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COUNCIL DIRECTIVE

of 28 June 1990

on the establishment of the internal market for telecommunications services through the implementation of open network provision

(90/387/EEC)

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**COUNCIL DIRECTIVE****of 28 June 1990****on the establishment of the internal market for telecommunications services through the implementation of open network provision**

(90/387/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission ⁽¹⁾,In cooperation with the European Parliament ⁽²⁾,Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas Article 8 a of the Treaty stipulates that the internal market shall comprise an area without internal frontiers in which the free movement of services is ensured, in accordance with the provisions of the Treaty;

Whereas the Commission submitted a Green Paper on the development of the common market for telecommunications services and equipment, dated 30 June 1987, and a communication on the implementation of that Green Paper up to 1992, dated 9 February 1988;

Whereas the Council adopted on 30 June 1988 a resolution on the development of the common market for telecommunications services and equipment up to 1992 ⁽⁴⁾;

Whereas the full establishment of a Community-wide market in telecommunications services will be promoted by the rapid introduction of harmonized principles and conditions for open network provision;

Whereas, since situations differ and technical and administrative constraints exist in the Member States, this objective should be realized in stages;

Whereas the conditions of open network provision must be consistent with certain principles and must not restrict access to networks and services except for reasons of general public interest, hereinafter referred to as 'essential requirements';

Whereas the definition and application of such principles and essential requirements must take full account of the fact that any restrictions of the right to provide services within and between Member States must be objectively justified, must follow the principle of proportionality and must not be excessive in relation to the aim pursued;

Whereas the conditions of open network provision must not allow for any additional restrictions on the use of the public telecommunications network and/or public telecommunications services except those restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law;

Whereas tariff principles should be clearly laid down to ensure fair and transparent conditions for all users;

Whereas this entire Directive must be read in the light of Annex III which lays down a work programme for the first three years;

Whereas the establishment of harmonized conditions of open network provision must be a progressive process and must be prepared with the assistance of a committee composed of representatives of the Member

⁽¹⁾ OJ No C 39, 16. 2. 1989, p. 8.

⁽²⁾ OJ No C 158, 26. 6. 1989, p. 300, OJ No C 149, 18. 6. 1990.

⁽³⁾ OJ No C 159, 26. 6. 1989, p. 37.

⁽⁴⁾ OJ No C 257, 4. 10. 1988, p. 1.

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States, which consults the representatives of the telecommunications organizations, the users, the consumers, the manufacturers and the service providers; whereas this process must also be open to all parties concerned and therefore sufficient time must be given for public comment;

Whereas the Community-wide definition of harmonized technical interfaces and access conditions must be based on the definition of common technical specifications based on international standards and specifications;

Whereas work to be undertaken in this area must take full account, *inter alia*, of the framework resulting from the provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations ⁽¹⁾, as last amended by Directive 88/182/EEC ⁽²⁾, Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment ⁽³⁾ and Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications ⁽⁴⁾;

Whereas the formal adoption on 12 February 1988 of the statutes of the European Telecommunications Standards Institute (ETSI) and of the associated internal rules has created a new mechanism for producing European telecommunications standards;

Whereas the Council in its resolution of 27 April 1989 on standardization in the field of information technology and telecommunications ⁽⁵⁾ supported the work of ETSI and invited the Commission to contribute to the coherent development of ETSI and lend it its support;

Whereas the Community-wide definition and implementation of harmonized network termination points establishing the physical interface between the network infrastructure and users' and other service providers' equipment will be an essential element of the overall concept of open network provision;

Whereas Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment ⁽⁶⁾ requires Member States to ensure that users who so request are given access to network termination points within a reasonable time period;

Whereas one of the principal aims of the establishment of an internal market in telecommunications services must be the creation of conditions to promote the development of Europe-wide services;

Whereas, in its abovementioned resolution of 30 June 1988, the Council considered the taking fully into account of the external aspects of Community measures on telecommunications to be a major policy goal;

Whereas the Community attaches very great importance to the continued growth of cross-border telecommunications services, to the contribution that telecommunications services provided by companies, firms or natural persons established in a Member State may make to the growth of the Community market, and to the increased participation of Community service providers in third country markets; whereas it will therefore be necessary, as specific Directives are drawn up, to ensure that these objectives are taken into account with a view to reaching a situation where the progressive realization of the internal market for telecommunications services will, where appropriate, be accompanied by reciprocal market opening in other countries;

⁽¹⁾ OJ No L 109, 26. 4. 1983, p. 8.

⁽²⁾ OJ No L 81, 26. 3. 1988, p. 75.

⁽³⁾ OJ No L 217, 5. 8. 1986, p. 21.

⁽⁴⁾ OJ No L 36, 7. 2. 1987, p. 31.

⁽⁵⁾ OJ No C 117, 11. 5. 1989, p. 1.

⁽⁶⁾ OJ No L 131, 27. 5. 1988, p. 73.

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Whereas this result should be achieved preferably through multilateral negotiations in the framework of GATT, it being understood that bilateral discussions between the Community and third countries may also contribute to this process;

Whereas this Directive should not address the problems of mass media, meaning problems linked to broadcasting and distribution of television programmes via telecommunications means, in particular cable television networks, which need special consideration;

Whereas neither should this Directive address the question of communication via satellite for which, according to the abovementioned Council resolution of 30 June 1988, a common position should be worked out;

Whereas the Council, on the basis of a report which the Commission is to submit to the European Parliament and the Council, and in accordance with Article 100b of the Treaty, will review, during 1992, any remaining conditions for access to telecommunications services which have not been harmonized, the effects of these conditions on the workings of the internal market for telecommunications services, and the extent to which this market needs to be further opened up,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive concerns the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services.

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2. The purpose of the conditions prescribed in paragraph 1 shall be to facilitate the provision of public telecommunications networks and/or public telecommunications services, within and between Member States, and in particular the provision of services by companies, firms or natural persons established in a Member State other than that of the company, firm or natural person for whom the services are intended.

3. Open network provision conditions shall aim at:

- ensuring the availability of a minimum set of services,
- securing access and interconnection to public telecommunications networks and public telecommunications services,
- encouraging the provision of harmonized telecommunications services to the benefit of users, in particular by identifying and promoting by voluntary means harmonized technical interfaces for open and efficient access and interconnection, and associated standards and/or specifications and
- guaranteeing the provision of universal service in telecommunications, taking account of any future evolution,

throughout the Community.

Article 2

For the purposes of this Directive:

1. 'users' shall mean individuals, including consumers, or organizations using or requesting publicly available telecommunications services;
2. 'telecommunications network' shall mean transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means;
'public telecommunications network' shall mean a telecommunications network used, wholly or in part, for the provision of publicly available telecommunications services;
3. 'telecommunications services' shall mean services the provision of which consists wholly or partly in the transmission and routing of

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signals on telecommunications networks, with the exception of radio and television broadcasting;

4. 'universal service' shall mean a defined minimum set of services of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;
5. 'network termination point' shall mean the physical point at which a user is provided with access to a public telecommunications network. The locations of network termination points shall be defined by the national regulatory authority and shall represent a boundary, for regulatory purposes, of the public telecommunications network;
6. 'essential requirements' shall mean the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems. Data protection may include protection of personal data, the confidentiality of information transmitted or stored and the protection of privacy;
7. 'interconnection' shall mean the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization or to access services provided by another organizations. Services may be provided by the parties involved or other parties who have access to the network;
8. 'open network provision conditions' shall mean the conditions, harmonized in accordance with this Directive, which govern open and efficient access to public telecommunications networks and, where applicable, public telecommunications services and the efficient use of those networks and services.

Without prejudice to their application on a case-by-case basis, open network provision conditions may include harmonized conditions with regard to:

- technical interfaces, including the definition and implementation of network termination points, where required,
- usage conditions,
- tariff principles and
- access to frequencies and numbers/addresses/names, where required in accordance with the reference framework of the Annex;

9. 'technical specifications', 'standards' and 'terminal equipment' shall have the same meanings as in Article 1 of Directive 91/263/EEC ⁽¹⁾.

▼ B*Article 3*

1. Open network provision conditions must comply with a number of basic principles set out hereafter, namely that:
 - they must be based on objective criteria,
 - they must be transparent and published in an appropriate manner,
 - they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.

⁽¹⁾ OJ L 128, 23. 5. 1991, p. 1.

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2. Open network provision conditions shall not restrict access to public telecommunications networks or public telecommunications services, except on grounds of essential requirements within the framework of Community law. In addition, the conditions generally applicable to the connection of terminal equipment to the network shall apply.

3. Open network provision conditions may not allow for any additional restrictions on the use of the public telecommunications networks and/or public telecommunications services, except those which are compatible with Community law.

5. Without prejudice to the specific Directives adopted in the field of open network provision and in so far as the application of the essential requirements referred to in paragraph 2 may cause Member States to limit access to public telecommunications networks or services, the rules for uniform application of the essential requirements, in particular concerning the interoperability of services and the protection of data, shall be determined, where appropriate, by the Commission, in accordance with the procedure laid down in Article 10.

Article 5

1. References to standards and/or specifications drawn up as a basis for harmonized technical interfaces and/or service features for open network provision shall be published in the *Official Journal of the European Communities* as suitable for the requirement of open and efficient access, interconnection and interoperability in order to encourage the provision of harmonized telecommunications services to the benefit of users throughout the Community.

Where necessary, the Commission may, in consultation with the committee referred to in Article 9, request standards to be drawn up by European standardization bodies.

2. Member States shall encourage the use of the standards and/or specifications to which reference is made in the *Official Journal of the European Communities*, in accordance with paragraph 1, for the provision of technical interfaces and/or network functions.

As long as such standards and/or specifications are not adopted, Member States shall encourage:

- standards and/or specifications adopted by European standardization bodies such as the European Telecommunications Standards Institute (ETSI) or the joint European standards institution, the European Committee for Standardization (CEN)/European Committee for Electrotechnical Standardization (Cenelec),
 - or, in the absence of such standards and/or specifications,
- international standards or recommendations adopted by the International Telecommunications Union (ITU), the International Organization for Standardization (ISO) or the International Electrotechnical Committee (IEC),
 - or, in the absence of such standards and/or specifications,
- national standards and/or specifications.

3. If the implementation of the standards and/or specifications referred to in paragraph 1 appears to be inadequate to ensure the interoperability of transfrontier services in one or more Member States, the implementation of such standards and/or specifications may be made compulsory under the procedure laid down in Article 10, to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users, subject to Articles 85 and 86 of the Treaty.

Before the implementation of the standards and/or specifications is made compulsory in accordance with the first subparagraph, the Commission shall, by publishing a notice to that effect in the *Official*

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Journal of the European Communities, invite public comment by all parties concerned.

4. Where a Member State or the Commission considers that the harmonized standards and/or specifications referred to in paragraph 1 do not correspond to the objective of open and efficient access, interconnection and interoperability, in particular the basic principles and the essential requirements referred to in Article 3, it shall be decided whether or not it is necessary to withdraw references to those standards and/or specifications from the *Official Journal of the European Communities* in accordance with the procedure laid down in Article 10.

5. The Commission shall inform the Member States of any such decision and publish information on the withdrawal of those standards and/or specifications in the *Official Journal of the European Communities*.

Article 5a

1. Where the tasks assigned to the national regulatory authority in Community legislation are undertaken by more than one body, Member States shall ensure that the tasks to be undertaken by each body are made public.

2. In order to guarantee the independence of national regulatory authorities:

- national regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommunications networks, equipment or services,
- Member States that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.

3. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved.

4. Member States may take steps to ensure that national regulatory authorities are able to obtain from organizations providing telecommunications networks and/or services all the information necessary for them to apply Community legislation.

Article 8

The Commission shall examine and report to the European Parliament and to the Council on the functioning of this Directive, on the first occasion no later than 31 December 1999. The report shall be based *inter alia* on the information supplied by the Member States to the Commission and to the committee referred to in Articles 9 and 10. Where necessary, the report shall examine what provisions of this Directive should be adapted in the light of the developments in the market. Further measures may be proposed in the report in pursuit of the aims of this Directive. The Commission shall also investigate in the report the added value of the setting up of a European Regulatory Authority to carry out those tasks which would prove to be better undertaken at Community level.

▼ B*Article 9*

1. The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

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The committee shall, in particular, consult the representatives of the ►**MI** organizations providing public telecommunications networks and/or publicly available telecommunications services ◀, the users, the consumers, the manufacturers and the service providers. It shall lay down its rules of procedure.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

Article 10

1. Notwithstanding the provisions of Article 9, the following procedure shall apply in respect of the matters covered by Article 3 (5) and Article 5 (3).

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 11

1. Member States shall bring into force the laws, regulations and administrative provisions necessary in order to comply with this Directive before 1 January 1991 at the latest. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 12

This Directive is addressed to the Member States.

 ANNEX

REFERENCE FRAMEWORK FOR THE APPLICATION OF ONP CONDITIONS

The application of open network provision conditions as defined in Article 2 (8) should be in accordance with the following reference framework, taking into account the relevant rules of the Treaty:

1. Harmonized technical interfaces and/or network functions

When open network provision conditions are drawn up the following scheme should be taken into account for the definition of specifications for technical interfaces and/or network functions:

- for existing services and networks, existing interface specifications should be adopted,
- for entirely new services or the improvement of existing services, existing interface specifications should also be adopted, as far as feasible. When existing interfaces are not suitable, enhancements and/or new interface specifications will have to be specified,
- for networks that are still to be introduced but for which the standardization programme has already commenced, open network provision requirements falling within the terms of Article 3 should be taken into account when new interface and network functions specifications are developed.

Open network provision proposals must, whenever possible, be in line with the ongoing work in the European standardization bodies, in particular the ETSI, and must also take into account work in international standardization organizations, such as the ITU-T.

2. Harmonized supply and usage conditions

Supply and usage conditions identify conditions of access and of provision of services, as far as required.

- (a) supply conditions concern conditions under which a service is offered to users. They may include:
- typical delivery period,
 - typical repair time,
 - quality of service, in particular availability and quality of transmission,
 - maintenance and network management;
- (b) usage conditions concern conditions which apply to users, such as:
- conditions for network access,
 - conditions for shared use,
 - conditions regarding protection of personal data and confidentiality of communications, where required.

3. Harmonized tariff principles

Tariff principles must be consistent with the principles stated in Article 3 (1).

Those principles imply, in particular, that:

- tariffs must be based on objective criteria and, until such time as competition becomes effective in keeping down prices for users, must in principle be cost oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provisions conditions. Where an organization no longer has significant market power in the relevant market, the requirement for cost orientation may be set aside by the competent national regulatory authority. One of the aims should be the definition of efficient tariff principles throughout the Community while ensuring a general service for all,
- tariffs must be transparent and must be properly published,
- in order to leave users a choice between the individual service elements and where technology so permits, tariffs must be sufficiently unbundled in accordance with the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must,

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as a general rule, be charged independently of the inclusive features and transportation as such,

- tariffs must be non-discriminatory and guarantee equality of treatment, except for restrictions which are compatible with Community law.

Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing in the global cost of the resources used, the need for a reasonable level of return on investment and, where appropriate, the financing of universal service in accordance with the interconnection Directive ⁽¹⁾.

There may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-peak periods, provided that the tariff differentials are commercially justifiable and do not conflict with the above principles.

4. Harmonized approach to numbering/addressing/naming

Numbering/addressing and in some instances naming provide for the selection of the destination or destinations, or for the selection of a service, of a service provider or a network operator.

Adherence to a harmonized approach for numbering/addressing and, where applicable, naming is therefore essential to guarantee Europe-wide end-to-end interconnection of users and the interoperability of services. Furthermore, the allocation of numbers/addresses/names should be fair, proportionate and consistent with the requirements for equal access.

To achieve that, it is necessary:

- to ensure the provision, according to harmonized principles, of adequate ranges of numbers and addresses, prefixes and short codes and, where applicable, of adequate naming, for all public telecommunications services,
- to ensure the coordination of national positions in international organizations and fora where decisions are taken on numbering/addressing/naming, taking into account possible future developments in numbering/addressing/naming at European level,
- to ensure that the relevant national telecommunications numbering/addressing/naming plans are under the supervision of the national regulatory authority, in order to guarantee independence from organizations providing public telecommunications networks or publicly available telecommunications services,
- to ensure the effective implementation of number portability in order to remove any obstacles for users in choosing their suppliers,
- to ensure that the procedures for allocating individual numbers/addresses/names, prefixes and short codes and/or addressing/numbering ranges are transparent, equitable and timely and that the allocation is carried out in an objective, transparent and non-discriminatory manner, taking into account the principle of proportionality,
- to give national regulatory authorities the possibility of laying down conditions for the use in numbering/addressing plans of certain prefixes or certain short codes, in particular where these are used for services of general public interest (e.g. directory services or emergency services), or to ensure equal access.

5. Access to frequencies

Member States must ensure that frequencies are made available for telecommunications services in accordance with Community law. Access to frequencies granted by means of licences or other authorizations must comply with the Council resolution of 19 November 1992 on the implementation in the Community of the European Radiocommunications Committee Decisions ⁽²⁾.

⁽¹⁾ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ L 199, 26. 7. 1997, p. 32).

⁽²⁾ OJ C 318, 4. 12. 1992, p. 1.