

COMMISSION DIRECTIVE 95/51/EC

of 18 October 1995

amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Whereas :

- (1) Under Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services ⁽¹⁾, as amended by Directive 94/46/EC ⁽²⁾, certain telecommunications services were opened to competition, and the Member States were requested to take the measures necessary to ensure that any operator was entitled to supply such services ; as far as voice telephony services to the general public are concerned, the Council Resolution of 22 July 1993 ⁽³⁾ acknowledges that this exception can be terminated by 1 January 1998, with a transitional period for some Member States ; the telex service, mobile communications and radio and television broadcasting to the public were specifically excluded from the scope of the Directive ; satellite communications were included in the scope of the Directive through Directive 94/46/EC.

During the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector, following the Communication of the Commission of 21 October 1992, the effectiveness of the measures liberalizing the telecommunications sector and in particular the liberalization of data communications, value added services and the provision of data and voice services to corporate users and closed user groups, was questioned by many service providers and users of such services.

- (2) The regulatory restrictions preventing the use of alternative infrastructure for the provision of liberalized services, and in particular the restrictions on the use of cable TV networks, are the main cause of this continuing bottleneck situation. Potential service providers must now rely on transmission capacity — 'leased lines' — provided by the telecommunications organizations, which are often also

competitors in the area of liberalized services. To remedy this problem, the European Parliament, in its Resolution of 20 April 1993 ⁽⁴⁾, called upon the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services.

- (3) Following that resolution the Commission completed two studies on the use of cable TV networks and alternative infrastructures for the delivery of those telecommunications services which have already been opened to competition under Community law : 'The effects of liberalization of satellite infrastructure on the corporate and closed user group market', Analysis, 1994 and 'L'impact de l'autorisation de la fourniture de services de télécommunications libéralisés par les câblo-opérateurs' by Idate, 1994. The basic findings of those studies emphasize the potential role for, amongst other things, cable TV networks, in meeting the concerns raised about the relatively slow pace of innovation and delayed development of liberalized services in the European Community. Opening such networks would help to overcome the problems of high pricing levels and lack of suitable capacity, which are largely due to current exclusive provision of infrastructure in most Member States. The networks operated by authorized cable TV providers indeed offer opportunities for the supply of an increasing number of services, apart from TV broadcasts, if additional investment is forthcoming. The example of the US market shows that new services combining image and telecommunications emerge when certain regulatory barriers are removed.
- (4) Some Member States have therefore abolished previous restrictions on the provision of some data services and/or non-reserved telephone services on cable TV networks. One Member State permits voice telephony. Other Member States have, however, maintained severe restrictions on the provision of services other than the distribution of TV broadcasts on those networks.

⁽¹⁾ OJ No L 192, 24. 7. 1990, p. 10.

⁽²⁾ OJ No L 268, 19. 10. 1994, p. 15.

⁽³⁾ OJ No C 213, 6. 8. 1993, p. 1.

⁽⁴⁾ OJ No C 150, 31. 5. 1993, p. 39.

- (5) The current restrictions imposed by Member States on the use of cable TV networks for the provision of services other than the distribution of TV broadcasts aim to prevent the provision of public voice telephony by means of networks other than the public switched telephone network, to protect the main source of revenue of the telecommunications organizations.
- Exclusive rights to provide public voice telephony were granted to most of the telecommunications organizations of the Community, to guarantee them the financial resources necessary for the provision and exploitation of a universal network, that is to say, one having general geographical coverage and provided to any service provider or user upon request within a reasonable period of time.
- (6) Since those restrictions on the use of cable TV networks are brought about by State measures and seek, in each of the national markets where they exist, to favour telecommunications organizations, which the Member States own or to which they have granted special or exclusive rights, the restrictions must be assessed under Article 90 (1) of the EC Treaty. This Article requires Member States not to enact or maintain in force any measures regarding such undertakings which defeat the object of Treaty provisions, and in particular of the competition rules. It includes a prohibition on maintaining measures regarding telecommunications organizations which result in limiting the free provision of services within the Community or lead to abuses of a dominant position to the detriment of the users of a given service.
- (7) The granting of exclusive rights to the telecommunications organizations to provide transmission capacity for the provision of telecommunications services to the public and the consequent regulatory restrictions on the use of cable TV networks for purposes other than the distribution of radio and television broadcasting programmes, in particular, for new services such as interactive television and video on demand as well as multimedia-services in the Community, which otherwise cannot be provided, necessarily limits the freedom to provide such services to or from other Member States. Such regulatory restrictions cannot be justified for public policy reasons or in terms of essential requirements, since the latter, and in particular the essential requirement of interworking networks wherever cable TV networks and telecommunications networks are interconnected, can be guaranteed by less restrictive measures, such as objective, non-discriminatory and transparent declaration or licensing conditions.
- (8) The measures granting exclusive rights to the telecommunications organizations for the provision of transmission capacity and the consequent regulatory restrictions on the use of cable TV infrastructure for the provision of other telecommunications services already open to competition are therefore a breach of Article 90, read in conjunction with Article 59 of the Treaty. The fact that the restrictions apply without distinction to all companies other than the relevant telecommunications organizations is not sufficient to remove the preferential treatment of the latter from the scope of Article 59 of the Treaty. Indeed it is not necessary for all the companies of a Member State to be favoured in relation to the foreign companies. It is sufficient that the preferential treatment should benefit certain national operators.
- (9) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings holding dominant positions that constitutes an abuse of a dominant position within the common market or a substantial part of it.
- (10) In each relevant national market the telecommunications organizations hold a dominant position for the provision of transmission capacity for telecommunications services because they are the only ones with a public telecommunications network covering the whole territory of those States. Another factor in this dominant position concerns the peculiar characteristics of the market and in particular its highly capital-intensive nature. Taking account of the amount of investment needed to duplicate a network, there is a high reliance on use of existing networks. This enhances the structural dominance of the relevant telecommunications organizations and constitutes a potential barrier to entry. Thirdly, as a result of their market share, the telecommunications organizations further benefit from detailed information on telecommunications flows which is not available to new entrants. It includes information on subscribers' usage patterns,

necessary to target specific groups of users, and on price elasticities of demand in each market segment and region of the country. Finally, the fact that the relevant telecommunications organizations enjoy exclusive rights for the provision of voice telephony also contributes to their dominance in the neighbouring, but distinct, market for telecommunications capacity.

- (11) The mere creation of a dominant position within a given market through the grant of an exclusive right is not, as such, incompatible with Article 86. A Member State is, however, not allowed to maintain a legal monopoly where the relevant undertaking is compelled or induced to abuse its dominant position in a way that is liable to affect trade between Member States.
- (12) The prohibition of the use of other infrastructure, and in particular CATV networks, for the provision of telecommunications services has encouraged the telecommunications organizations to charge high prices in comparison with prices in other countries, whereas innovation in European corporate networking and competitive service provision as well as the implementation of applications proposed in the 'Report on Europe and the global information society', are critically dependent on the availability of infrastructure, in particular of leased circuits at decreasing costs. Tariffs for such high-capacity infrastructure are on average 10 times higher in the Community than equivalent capacity over equivalent distances in North America. In the absence of a justification, in the form of (for example) higher costs, these tariffs must be considered abusive within the meaning of point (a) of the second paragraph of Article 86.

Those high prices in the Community are a direct consequence of the restrictions imposed by Member States on the use of infrastructures other than those of the telecommunications organizations, and in particular of those of the cable TV operators, for the provision of telecommunications services. Such high prices cannot only be explained by the underlying costs, given the substantial differences in tariffs between Member States where similar cost structures could be expected.

- (13) Moreover, the State measures preventing the CATV operators from offering transmission capacity in competition with the telecommunications organizations for the provision of liberalized services restrict the overall supply of capacity in the market and eliminate incentives for telecommunications organizations to quickly increase the capacity of

their networks, to reduce average costs and to lower tariffs. The resulting high tariffs charged by the telecommunications organizations for, and the shortage of, the basic infrastructure provided by these organizations over which liberalized services might be offered by third parties have delayed widespread development of high-speed corporate networks, remote accessing of databases by both business and residential users and the deployment of innovative services such as telebanking, distance learning, computer-aided marketing, etc. (See communication to the European Parliament and the Council of 25 October 1994 'Green Paper on the liberalization of telecommunications infrastructure and cable television networks: Part One'). The networks of the telecommunications organizations currently fail to meet all potential market demand for transmission capacity for the provision of these telecommunications services, as emphasized by users and suppliers of such services ('Communication to the Council and the European Parliament on the consultation on the review of the situation in the telecommunications sector' of 28 April 1993, page 5, point 2; the findings made during the review thus showed that the mere obligation to provide leased lines on demand was not sufficient to avoid restrictions on access to the markets in telecommunications services and limits on user's freedom of choice).

The current restrictions on the use of CATV networks for the provision of such services therefore create a situation in which the mere exercise by the telecommunications organization of their exclusive right to provide transmission capacity for public telecommunications services limits, within the meaning of point (b) of the second paragraph of Article 86 of the Treaty, the emergence of, *inter alia*, new applications such as pay per view, interactive television and video on demand as well as multimedia-services in the Community, combining both audio-visual and telecommunications, which often cannot adequately be provided on the networks of the telecommunications organizations.

On the other hand, given the restrictions on the number of services which they may offer, cable TV operators often postpone investments in their networks and in particular the introduction of optical-fibre which could be profitable if they were to be spread over a larger number of services provided. Consequently, restrictions on the use of cable TV networks to provide services other than broadcasting also have the effect of delaying the development of new telecommunications and multimedia services, and thus holding back technical progress in this area.

(14) Lastly, as was recalled by the Court of Justice of the European Communities in its Judgment of 19 March 1991 in Case C-202/88, *France v. Commission*⁽¹⁾, a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material — transmission capacity — to all companies offering telecommunications services proved, however, tantamount to conferring upon it the power to determine at will which service could be offered by its competitors, at which costs and in which time periods, and to monitor their clients and the traffic generated by its competitors, thereby putting that undertaking at an obvious advantage over its competitors.

(15) The exclusive rights granted to the telecommunications organization to provide transmission capacity for telecommunications services to the public and the resulting restrictions on the use of cable TV networks for the provision of liberalized services are therefore incompatible with Article 90 (1) in conjunction with Article 86 of the Treaty. Article 90 (2) of the Treaty provides for an exception to Article 86 in cases where the application of the latter would obstruct the performance, in law or in fact, of the particular tasks assigned to the telecommunications organizations. Pursuant to that provision, the Commission investigated the impact of liberalizing the use of the cable networks for the provision of telecommunications and multimedia services.

Pursuant to Directive 90/388/EEC, Member States may until a certain date continue to reserve the provision of voice telephony to their national telecommunications organization so as to guarantee sufficient revenues for the establishment of a universal telephone network. Voice telephony is defined in Article 1 of Directive 90/388/EEC as the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point. Where cable TV networks are transformed into switched networks providing voice telephony to any subscriber, such networks should likewise be considered to be public switched networks and their termination points as termination points of such networks. The relevant voice service would

then become voice telephony, which according to Article 2 of Directive 90/388/EEC could further be prohibited on cable TV networks by the Member States.

It appears that such temporary prohibition of the provision of voice telephony on the cable TV network can be justified on the same grounds as for telecommunications networks. Conversely where switched voice services for closed user groups, and/or transparent transmission capacity in the form of leased lines, are provided on cable TV networks, those networks do not represent public switched networks and Member States should not restrict the relevant services, even when they involve the use of one connection point with the public switched telephone network.

Besides the case of voice telephony, no other restrictions for the provision of liberalized services is justified under Article 90 (2), particularly if regard is had to the small contribution made to the turnover of the telecommunications organizations by those services, currently provided on their own networks, which could be diverted towards the cable TV networks. It is recalled that the measures liberalizing the provision of voice telephony should take into account the need to finance a universal service including any development in the concept, see point V.2 in the Communication from the Commission to the Council and the European Parliament of 3 May 1995.

(16) Notwithstanding the abolition of the current restrictions on the use of cable TV networks, where the provision of services is concerned, the same licensing or declaration procedures could be laid down as for the provision of the same services on the public telecommunications networks.

(17) In addition, the distribution of audiovisual programmes intended for the general public via those networks, and the content of such programmes, will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.

(18) Where Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for

⁽¹⁾ [1991] ECR I-1271, paragraph 51.

overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. The introduction of fair competition will often require specific measures that take into account the specific circumstances of the relevant markets. Given the disparities between Member States, the national authorities are best able to assess which measures are the most appropriate, and in particular to judge whether a separation of the activities is indispensable. In early stages of liberalization, detailed control of cross-subsidies and accounting transparency are essential. To allow the monitoring of any improper behaviour, Member States should therefore at least impose a clear separation of financial records between the two activities, though full structural separation is preferable.

- (19) In order to allow the monitoring of any improper cross-subsidies between the broadcasting tasks of cable TV operators which are provided under exclusive rights in a given franchise area and their business as providers of capacity for telecommunications services, Member States should guarantee transparency as regards the use of resources from one activity which could be used to extend the dominant position to the other market. Given the complexity of the financial records of network providers, it is extremely difficult to detect cross-subsidies within it between the reserved activities and the services provided under competitive conditions. It is thus necessary to require those cable TV operators to keep separate financial records, and in particular to identify separately costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions once they achieve a significant turnover in telecommunications activities in the licensed area. For the time being, a turnover of more than ECU 50 million should be considered a significant turnover. Where such a requirement would constitute an excessive burden on the relevant undertaking, Member States may grant deferments for limited periods, subject to prior notification to the Commission of the underlying justifications.

The operators concerned should use an appropriate cost accounting system which can be verified by accounting experts and which ensures the production of recorded figures.

The above separation of accounts should, for this purpose at least, apply the principles set out in

Article 10 (2) of Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines⁽¹⁾, as amended by Commission Decision 94/439/EC⁽²⁾. Hybrid services, made up of elements falling variously within the reserved and the competitive services, should distinguish between the costs of each element.

- (20) In the event that, in the meantime, no competing home-delivery system is authorized by the relevant Member State, the Commission will reconsider whether separation of accounts is sufficient to avoid improper practices and will assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area, or whether further measures are warranted.
- (21) Member States should refrain from introducing new measures with the purpose or effect of jeopardizing the aim of this Directive,

HAS ADOPTED THIS DIRECTIVE :

Article 1

Directive 90/388/EEC is hereby amended as follows :

1. Article 1 (1) is amended as follows :

(a) the fifth indent is replaced by the following :

‘— “telecommunications services” means services whose provision consists wholly or partly in the transmission and/or routing of signals on a telecommunications network.’

(b) the following is added after the last indent :

‘— “cable TV network” means any wire-based infrastructure approved by a Member State for the delivery or distribution of radio or television signals to the public.’

This Directive shall be without prejudice to the specific rules adopted by the Member States in accordance with Community law, governing the distribution of audiovisual programmes intended for the general public, and the content of such programmes.’

⁽¹⁾ OJ No L 165, 19. 6. 1992, p. 27.

⁽²⁾ OJ No L 181, 15. 7. 1994, p. 40.

2. In Article 4, the following is inserted after the second paragraph :

'Member States shall :

- abolish all restrictions on the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony ;
- ensure that interconnection of cable TV networks with the public telecommunications network is authorized for such purpose, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished.'

Article 2

When abolishing restrictions on the use of cable TV networks, Member States shall take the necessary measures to ensure accounting transparency and to prevent discriminatory behaviour, where an operator having an exclusive right to provide public telecommunications network infrastructure also provides cable TV network infrastructure ; and in particular to ensure the separation of financial accounts as concerns the provision of each network and its activity as provider of telecommunication services.

Where an operator has an exclusive right to provide cable television network infrastructure in a given area Member States shall also ensure that the operator concerned keeps separate financial accounts regarding its activity as network capacity provider for telecommunications purposes as soon as it achieves a turnover of more than ECU 50 million in the market for telecommunications services other than the distribution of radio and broadcas-

ting services in the relevant geographic area. Where such requirement would constitute an excessive burden on the relevant undertaking, Member States may grant deferments for limited periods, subject to prior notification to the Commission of the underlying justification.

Where a single operator provides both networks or both services as referred to in the first paragraph, the Commission shall, before 1 January 1998, carry out an overall assessment of the impact of such joint provision in relation to the aims of this Directive.

Article 3

Member States shall supply to the Commission, not later than nine months after this Directive has entered into force, such information as will allow the Commission to confirm that Articles 1 and 2 have been complied with.

Article 4

This Directive shall enter into force on 1 January 1996.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 18 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission
