

COMMISSION DIRECTIVE 96/2/EC

of 16 January 1996

amending Directive 90/388/EEC with regard to mobile and personal communications

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas :

- (1) In its communication on the consultation on the Green Paper on mobile and personal communications of 23 November 1994, the Commission set out the major actions required for the future regulatory environment necessary to exploit the potential of this means of communication. It emphasized the need for the abolition, as soon as possible, of all remaining exclusive and special rights in the sector through full application of Community competition rules and with the amendment of Commission Directive 90/388/EEC of 28 June 1990 competition in the markets for telecommunications services⁽¹⁾, as last amended by Directive 95/51/EC⁽²⁾, where required. Moreover, the communication considered removing restrictions on the free choice of underlying facilities used by mobile network operators for the operation and development of their networks for those activities which are allowed by the licences or authorizations. Such a step was seen as essential in order to overcome current distortions of fair competition and, in particular, to allow such operators control over their cost base.
- (2) The Council Resolution of 29 June 1995 on the further development of mobile and personal communications in the European Union⁽³⁾ gave general support to the actions required, as set out in the Commission's communication of 23 November 1994, and considered as one of the major goals the abolition of exclusive or special rights in this area.
- (3) The European Parliament, in its Resolution of 14 December 1995 concerning the draft Commission Directive amending Directive 90/388/EEC with

regard to mobile and personal communications⁽⁴⁾, welcomed this Directive in both its principles and its objectives.

- (4) Several Member States have already opened up certain mobile communications services to competition and introduced licensing schemes for such services. Nevertheless, the number of licences granted is still restricted in many Member States on the basis of discretion or, in the case of operators competing with telecommunications organizations subject to technical restrictions such as a ban on using infrastructure other than those provided by the telecommunications organization. Many Member States, for example, have still not granted licences for DCS 1800 mobile telephony.

In addition, some Member States have maintained exclusive rights for the provision of certain mobile and personal communications services granted to the national telecommunications organization.

- (5) Directive 90/388/EEC provides for the abolition of special or exclusive rights granted by Member States in respect of the provision of telecommunications services. However, the Directive does not as yet apply to mobile services.
- (6) Where the number of undertakings authorized to provide mobile and personal communications services is limited by Member States through the existence of special rights and *a fortiori* exclusive rights, these constitute restrictions which would be incompatible with Article 90 in conjunction with Article 59 of the Treaty whenever such limitation is not justified under specific Treaty provisions or the essential requirements, since these rights prevent other undertakings from supplying the services concerned, to and from other Member States. In the case of mobile and personal communication networks and services, the applicable essential requirements encompass the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based, space-based or terrestrial technical systems. Consequently, provided that the equipment used to offer the services also satisfies these essential requirements, the current special rights and *a fortiori* exclusive

⁽¹⁾ OJ No L 192, 24. 7. 1990, p. 10.

⁽²⁾ OJ No L 256, 26. 10. 1995, p. 49.

⁽³⁾ OJ No C 188, 22. 7. 1995, p. 3.

⁽⁴⁾ Resolution A4-0306/95.

rights on the provision of mobile services are not justified and therefore should be treated in the same way as the other telecommunications services already covered by Directive 90/388/EEC. The scope of application of that Directive should accordingly be extended so as to include mobile and personal communications services.

- (7) When opening the markets for mobile and personal communications to competition Member States should give preference to the use of Pan-European standards in the area, such as GSM, DCS 1800, DECT and ERMES, in order to allow development and transborder provision of mobile and personal communications services.
- (8) Certain Member States have currently granted licences for digital mobile radio-based services making use of frequencies in the 1 700 to 1 900 Mhz band, according to the DCS 1800 standard. The Commission communication of 23 November 1994 established that DCS 1800 is to be seen as part of the GSM system family. The other Member States have not authorized such services even where frequencies are available in this band, thereby preventing the cross-border provision of such services. This is also incompatible with Article 90 in conjunction with Article 59. To remedy this situation, Member States which have not yet established a procedure for granting such licences should do so within a reasonable time-frame. In this context, due account should be taken of the requirement to promote investments by new entrants in these areas. Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences for existing GSM or DCS 1800 operators may take place only under conditions ensuring effective competition.
- (9) Digital European cordless telecommunications (DECT) services are also an essential element for the development towards personal communications. DECT provides an alternative to the current local loop access to the public switched telephone network. On 3 June 1991, the Council, by Directive 91/287/EEC, designated coordinated frequency bands for the introduction of DECT into the Community⁽¹⁾ to be implemented not later than 31 December 1991. Certain Member States are, however, preventing the use of these frequencies for such services by refusing to grant licences to companies which intend to start offering DECT services. Where telecommunications organizations were granted exclusive rights for the establishment of the public switched telephone network, the effect of such refusals is to strengthen their dominant position and also to delay the emergence of personal communications services and therefore restricts technical progress at the expense of the users contrary to Article 90 of the Treaty in conjunction with point (b) of Article 86. To remedy this situation Member States which have not yet established a procedure for granting such licences should also do so within a reasonable time-frame.
- (10) Even where licences were granted to competing mobile operators, Member States have in certain cases granted to one of them, in a discretionary manner, special legal advantages which were not granted to others. In such a situation, these advantages may be counterbalanced by special obligations and do not, necessarily, preclude the latter from entering and competing in the market. The compatibility of these advantages with the Treaty must therefore be assessed on a case-by-case basis taking into account their impact on the effective freedom of other entities to provide, in an efficient manner, the same telecommunications service and their possible justifications regarding the activity concerned.
- (11) The exclusive rights that currently exist in the mobile communications field were generally granted to organizations which already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice, constitutes an abuse of a dominant position contrary to Article 86 of the Treaty. The exclusive rights granted in the mobile and personal communications field are consequently incompatible with Article 90 read in conjunction with Article 86. These exclusive rights should consequently be abolished.
- (12) Moreover, as regards new mobile services, given the difficulty of ensuring that telecommunications organizations in those Member States with less developed networks which would qualify for a transitional time period for the abolition of the exclusive rights for the establishment and use of infrastructures required for a given mobile service, would

⁽¹⁾ OJ No L 144, 8. 6. 1991, p. 45.

not use this position to extend it to the market of the relevant mobile service, the Member States should, in order to prevent abuses of dominant positions contrary to the Treaty, abstain from granting such telecommunications organization, or any associated organization, a licence for this mobile service. Where telecommunications organization, do not or no longer enjoy exclusive rights for the establishment and the provision of the public network infrastructure, they should, however, not *a priori* be excluded from such licensing procedures.

mobile network. This framework is without prejudice to the harmonization of the framework for licensing in the Community.

The number of licences may be limited only in the case of scarcity of the frequency resources. Conversely, licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective.

- (13) Exclusive rights not only limit access to the market, but they also have the effect of restricting or preventing, to the disadvantage of users, the use of mobile and personal communications on offer, thereby holding back technical progress in this area. The telecommunications organizations have, in particular, maintained higher tariffs for mobile radiophony in comparison with fixed voice telephony which hinders competition at the expense of their main source of revenues.

As regards airtime resale and other mere provision of services by independent service providers or directly by mobile network operators on already authorized mobile systems, none of the applicable essential requirements would justify the introduction or maintenance of licensing procedures, given that such services do not consist of the provision of telecommunications services or the operation of a mobile communications network, but of the retail of authorized services, the provision of which is likely to be subject to conditions ensuring compliance with essential requirements or public service specifications in the form of trade regulations.

Where investment decisions are taken by undertakings in areas where they enjoy exclusive rights, these undertakings are in a position whereby they can decide to give priority to fixed network technologies, whereas new entrants may exploit mobile and personal technology even to compete with fixed services, in particular as regards the local loop. Thus, the exclusive rights imply that there is a restriction on the development of mobile and personal communications and this is incompatible with Article 90, read in conjunction with Article 86.

They could therefore, besides the application of national fair trade rules concerning all similar retail activities, only be subject to a requirement of a declaration of their activities to the National Regulatory Authority of the Member States where they choose to operate. Mobile network operators could on the other hand refuse to allow service providers to distribute their services, in particular where these service providers did not adhere to a code of conduct for service providers in conformity with the competition rules of the Treaty, as far as such code exists.

- (14) In order to establish the conditions under which mobile and personal communications systems are to be provided, Member States may introduce licensing or declaration procedures to ensure compliance with the applicable essential requirements and public service specifications in the form of trade regulations, subject to the proportionality principle. Public service specifications in the form of trade regulations relate to conditions of permanence, availability, and quality of the service. Such conditions may include the obligation to give service providers access to airtime on terms at least as favourable as those available to a service provision business owned by, or with ownership links to, a

- (15) In the context of mobile and personal communications systems radiofrequencies are a crucial bottleneck resource. The allocation of radiofrequencies for mobile and personal communications system by Member States according to criteria other than those which are objective, transparent and non-discriminatory constitutes a restriction incompatible with Article 90 in conjunction with Article 59 of the Treaty to the extent that operators from other Member States are disadvantaged in these allocation procedures. The development of effective competition in the telecommunications sector may be an objective justification to refuse the allocation of frequencies to operators already dominant in the geographical market.

Member States should ensure that the procedure for allocation of radiofrequencies is based on objective criteria and without discriminatory effects. In this context Member States should, with regard to future designation of frequencies for specific communications services, publish the frequency plans as well as the procedures to be followed by operators to obtain frequencies within the designated frequency bands. Current frequency allocation should be reviewed by the Member States at regular intervals. In cases where the number of licences was limited on the basis of spectrum scarcity, Member States should also review whether advances in technology would allow spectrum to be made available for additional licences. Possible fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.

- (16) Most Member States currently oblige mobile operators to use the leased line capacity of telecommunications organizations for both internal network connections and for the routing of long distance portions of calls. As the charges for leased line rental represent a substantial proportion of the mobile operator's cost base, this requirement gives the supplying telecommunications organization, i.e. in many cases its direct competitor, a considerable influence on the commercial viability and cost structure of mobile operators. In addition, restrictions on the self-provision of infrastructure and the use of third party infrastructure is slowing down the development of mobile services, in particular because effective pan-European roaming for GSM relies on the widespread availability of addressed signalling systems, a technology which is not yet universally offered by telecommunications organizations throughout the Community.

Such restrictions on the provision and use of infrastructures constrain the provision of mobile and personal communications services by operators from other Member States and are thus incompatible with Article 90 in conjunction with Article 59 of the Treaty. To the extent that the competitive provision of mobile voice services is prevented because the telecommunications organization is unable to meet the mobile operator's demand for infrastructures or will only do so on the basis of tariffs which are not oriented towards the costs of the leased line capacity concerned, these restrictions inevitably favour the telecommunications organization's offering of fixed telephony services, for which most Member States still maintain exclusive rights. The restriction on the provision and use of infrastructure thus infringes Article 90, in

conjunction with Article 86 of the Treaty. Accordingly, Member States must lift these restrictions and grant, if requested, the relevant mobile operators on a non-discriminatory basis access to the necessary scarce resources to set up their own infrastructure including radiofrequencies.

- (17) Currently, the direct interconnection between mobile communications systems as well as between mobile communications systems and fixed telecommunications networks within a single Member State or between systems located in different Member States is restricted in mobile licences granted by many Member States without any technical justification. Furthermore, restrictions exist for the interconnection of such networks via networks other than the public telecommunications networks. In the Member States concerned, mobile operators are required to interconnect with other mobile operators via the telecommunications organization's fixed network. Such requirements result in additional costs and thus impede, in particular, the development of transborder provision of mobile communication services in the Community and therefore infringe Article 90, in conjunction with Article 59.

As in most Member States exclusive rights for the provision of voice telephony and public fixed network infrastructure are maintained, potential abuses of the relevant telecommunications organization's dominant position can be prevented only if Member States ensure that interconnection of public mobile communications systems is made possible at defined interfaces with the public telecommunications network of those telecommunications organizations and that the interconnection conditions are based on objective criteria, justified by the cost of providing the interconnection service, are transparent, non-discriminatory, published in advance and allow the necessary tariff flexibility, including the application of off-peak rates. In particular, transparency is required in respect of cost-accounting of operators providing both fixed networks and mobile telecommunications networks. Special and exclusive rights in respect of the establishment of cross-border infrastructure for voice telephony are not affected by this Directive.

In order to be able to ensure the full application of this Directive as regards interconnection, information on interconnection agreements must be available to the Commission on request.

The drawing up of such national procedures for licensing and interconnection, is without prejudice to the harmonization of the latter at Community level by European Parliament and Council Directives, in particular within the framework of Directives on open network provision (ONP).

- (18) Article 90 (2) of the Treaty provides for an exception to the Treaty rules, and in particular 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, Directive 90/388/EEC allows exclusive rights to be maintained for a transitional period in respect of voice telephony.

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. The direct transport and switching of speech via mobile and personal communications networks is not implemented between two public switched termination points and is therefore not voice telephony within the meaning of Directive 90/388/EEC.

On the basis of Article 90 (2) of the Treaty, public service specifications in the form of trade regulations applicable to all authorized operators of mobile telecommunications services provided to the public, are, however, justified to ensure the fulfilment of objectives of general economic interest, such as ensuring geographical coverage or the implementation of Community-wide standards.

- (19) In its assessment of current restrictions imposed on mobile operators concerning the establishment and use of their own infrastructure and/or the use of third party infrastructures, the Commission will further consider the need for additional transition periods for Member States with less developed networks as called for in the Council's Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market⁽¹⁾ in addition to the Council's Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures⁽²⁾.

Although not covered by these resolutions there should be the possibility of requesting an additional transition period as regards the direct interconnection of mobile networks. The Member States which may request such an exception are Spain, Ireland, Greece and Portugal. However, only certain of these Member States do not allow GSM mobile operators to use own and/or third party infrastructures. A specific procedure should be provided in order to assess the possible justification for the maintenance of that regime for the provision of mobile and personal communications services for a transitional time period as set out in the said Council resolutions.

- (20) This Directive does not prevent measures being adopted in accordance with Community law and existing international obligations so as to ensure that nationals of Member States are afforded equivalent treatment in third countries,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/388/EEC is amended as follows:

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

- (a) the following indents are inserted after the ninth indent:

— "mobile and personal communications services" means services other than satellite services whose provision consists, wholly or partly, in the establishment of radiocommunications to a mobile user, and makes use wholly or partly of mobile and personal communications systems,

— "mobile and personal communications systems" means systems consisting of the establishment and operation of a mobile network infrastructure whether connected or not to public network termination points, to support the transmission and provision of radiocommunications services to mobile users;'

- (b) the thirteenth indent is replaced by the following:

— "essential requirements" means 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. These reasons are the security of network operations, maintenance of network integrity, and where justified,

⁽¹⁾ OJ No C 213, 6. 8. 1993, p. 2.

⁽²⁾ OJ No C 379, 31. 12. 1994, p. 4.

interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as the efficient 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 as well as the protection of privacy.'

2. Article 1 (2) is replaced by the following :

'2. This Directive shall not apply to telex.'

3. The following Articles 3a to 3d are inserted :

'Article 3a

In addition to the requirements set out in the second paragraph of Article 2 Member States shall, in attaching conditions to licences or general authorizations for mobile and personal communications systems, ensure the following :

- (i) licensing conditions must not contain conditions other than those justified on the grounds of the essential requirements and, in the case of systems for use by the general public, public service requirements in the form of trade regulation within the meaning of Article 3 ;
- (ii) licensing conditions for mobile network operators must ensure transparent and non-discriminatory behaviour between fixed and mobile network operators in common ownership ;
- (iii) licensing conditions should not include unjustified technical restrictions. Member States may not, in particular, prevent combination of licences or restrict the offer of different technologies making use of distinct frequencies, where multistandard equipment is available.

As far as frequencies are available, member States shall award licences according to open, non-discriminatory, and transparent procedures.

Member States may limit the number of licences for mobile and personal communications systems to be issued only on the basis of essential requirements and only where related to the lack of availability of frequency spectrum and justified under the principle of proportionality.

Licence award procedures may consider public service requirements in the form of trade regulation within the meaning of Article 3, provided the solution which least restricts competition is chosen. The relevant conditions related to trade regulations may be attached to the licences granted.

Member States which are granted an additional implementation period to abolish the restrictions with regard to infrastructure as provided for in Article 3c, shall not during that period grant any further mobile or personal communications licence to telecommunications organizations in such Member States do not or no longer enjoy exclusive or special rights, within the meaning of points (b) and (c) of the first paragraph of Article 2, for the establishment and the provision of the public network infrastructure, they shall not *a priori* be excluded from such licensing procedures.

Article 3b

The designation of radiofrequencies for specific communication services must be based on objective criteria. Procedures must be transparent and published in an appropriate manner.

Member States shall publish every year or make available on request, the allocation scheme of frequencies reserved for mobile and personal communications services, according to the scheme set out in the Annex, including the plans for future extension of such frequencies.

This designation must be reviewed by Member States at regular appropriate intervals.

Article 3c

Member States shall ensure that all restrictions on operators of mobile and personal communications systems with regard to the establishment of their own infrastructure, the use of infrastructures provided by third and the sharing of infrastructure, other facilities and sites, subject to limiting the use of such infrastructures to those activities provided for in their licence or authorization, are lifted.

Article 3d

Without prejudice to the future harmonization of national interconnection rules in the context of ONP, Member States shall ensure that direct interconnection between mobile communications systems, as well as between mobile communications systems and fixed telecommunications networks, is allowed. In order to achieve this, restrictions on interconnection shall be lifted.

Member States shall ensure that operators of mobile communications systems for the public have the right to interconnect their systems with the public telecommunications network. To this end, Member States shall guarantee access to the necessary number of points of interconnection to the public telecommunications network in the licences for mobile services. Member States shall ensure that the technical interfaces offered at such points of interconnection are the least restrictive interfaces available as regards the features of the mobile services.

Member States shall ensure that interconnection conditions with the public telecommunications network of the telecommunications organizations are set on the basis of objective criteria, are transparent and non-discriminatory, and compatible with the principle of proportionality. They shall ensure that, in case of appeal, full access to interconnection agreements is given to National Regulatory Authorities and that such information is made available to the Commission on request.

4. In the first sentence of Article 4 the word 'fixed' is inserted before the words 'public telecommunications networks'.

Article 2

1. Without prejudice to Article 2 of Directive 90/388/EEC, and subject to the provision set out in paragraph 4 of this Article, Member States shall not refuse to allocate licences for operating mobile systems according to the DCS 1800 standard at the latest after adoption of a decision of the European Radiocommunications Committee on the allocation of DCS 1800 frequencies and in any case by 1 January 1998.

2. Member States shall, subject to the provision set out in paragraph 4, not refuse to allocate licences for public access/Telepoint applications, including systems operation on the basis of the DECT standard as from the entry into force of this Directive.

3. Member States shall not restrict the combination of mobile technologies or systems, in particular where multistandard equipment is available. When extending existing licences to cover such combinations Member States shall ensure that such extension is justified in accordance with the provisions of paragraph 4.

4. Member States shall adopt, where required, measures to ensure the implementation of this Article taking

account of the requirement to ensure effective competition between operators competing in the relevant markets.

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 Article 1 as well as Article 2 (2) have been complied with.

Member States shall supply to the Commission, not later than 1 January 1998, such information as will allow the Commission to confirm that Article 2 (1) has been complied with.

Article 4

Member States with less developed networks may request at the latest three months from the entry into force of this Directive an additional implementation period of up to five years, in which to implement all or some of the conditions set out in Article 3c and in Article 3d (1) of Directive 90/388/EEC, to the extent justifiable by the need to achieve the necessary structural adjustments. Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation. The information provided shall be made available to any interested party on demand.

The Commission will assess such requests and take a reasoned decision within a time period of three months on the principle, implications and maximum duration of the additional period to be granted.

Article 5

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 16 January 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

1. Frequency bands allocated to mobile systems.
(specifying the number of channels, the service to which it is allocated and the review date of the allocation)
 2. Frequency bands which will be made available for mobile systems during the next year.
 3. Procedures envisaged to assign these frequencies to existing or new operators.
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