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II

(Acts whose publication is not obligatory)

COUNCIL

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

⁽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.

representatives of the Member 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;

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.

2. The conditions referred to in paragraph 1 are designed to facilitate the provision of services using 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.

⁽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.

Article 2

For the purposes of this Directive:

1. 'telecommunications organizations' means public or private bodies, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, where applicable, public telecommunications services.

For the requirements of this Directive, Member States shall notify the Commission of the bodies to which they have granted special or exclusive rights;

2. 'special or exclusive rights' means the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity;

3. 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

4. — 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television;

— 'public telecommunications services' means telecommunications services whose supply Member States have specifically entrusted *inter alia* to one or more telecommunications organizations;

5. 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network;

6. 'essential requirements' means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. These reasons are security of network operations, maintenance of network integrity and, in justified cases, interoperability of services and data protection.

Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy;

7. 'voice telephony' means the commercial provision for the public or direct transport of real-time speech via the

public switches network or networks such that any user can use equipment connected to a network termination point to communicate with another user of equipment connected to another termination point;

8. 'telex service' means the commercial provision for the public of direct transport of telex messages in accordance with the relevant 'Comité consultatif international télégraphique et téléphonique' (CCITT) recommendation via the public switched network or networks, whereby any user can use equipment connected to a network termination point to communicate with another user using another termination point;

9. 'packet- and circuit-switched data services' means the commercial provision for the public of direct transport of data via the public switched network or networks such that any equipment connected to a network termination point can communicate with equipment connected to another termination point;

10. 'open network provision conditions' means the conditions, harmonized according to the provisions of this Directive, which concern the 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, the 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, including access to frequencies where required,
- tariff principles;

11. 'technical specifications', 'standards' and 'terminal equipment' are given the same meaning for those terms as in Article 2 of Directive 86/361/EEC.

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.

2. Open network provision conditions must not restrict access to public telecommunications networks or public telecommunications services, except for reasons based on essential requirements, within the framework of Community law, namely:

- security of network operations,
- maintenance of network integrity,
- interoperability of services, in justified cases,
- protection of data, as appropriate.

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 the restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law.

4. The Council, acting in accordance with Article 100a of the Treaty, may, if necessary, modify the points set out in paragraphs 1 and 2.

5. Without prejudice to the specific Directives provided for in Article 6 and in so far as the application of the essential requirements referred to in paragraph 2 of this Article may cause a Member State to limit access to one of its 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 4

1. Open network provision conditions shall be defined in stages under the procedure set out hereafter.

2. Open network provision conditions shall concern the areas selected in accordance with the list in Annex I.

The Council, acting in accordance with Article 100a of the Treaty, may, if necessary, modify this list.

3. Using the list referred to in paragraph 2, the Commission shall draw up a work programme each year, under the procedure laid down in Article 9.

4. For the work programme referred to in paragraph 3, the Commission shall:

- (a) initiate detailed analysis, in consultation with the committee referred to in Article 9, and draw up reports on the results of this analysis;
- (b) invite, by publication of a notice to that effect in the *Official Journal of the European Communities*, public

comment by all parties concerned on the reports on the detailed analysis provided for in subparagraph (a). The period for submitting such comment shall be not less than three months from the date of publication of the said notice;

(c) request, where appropriate, the European Telecommunications Standards Institute (ETSI) to draw up European standards, taking account of international standardization as a basis for setting up, where required, within specified time limits, harmonized technical interfaces and/or service features. In so doing, ETSI shall coordinate, in particular, with the Joint European Standards Institution CEN/Cenelec;

(d) draw up proposals for open network provision conditions in accordance with Article 3 and with the open network provision reference framework described in Annex II.

5. For 1990, 1991 and 1992 a work programme shall be drawn up in order to implement the guidelines in Annex III.

Article 5

1. Reference to European standards drawn up as a basis for harmonized technical interfaces and/or service features for open network provision according to Article 4 (4) (c) shall be published in the *Official Journal of the European Communities* as suitable for open network provision.

2. The standards mentioned under paragraph 1 shall carry with them the presumption:

- (a) that a service provider who complies with those standards fulfils the relevant essential requirements, and
- (b) that a telecommunications organization which complies with those standards fulfils the requirement of open and efficient access.

3. If the implementation of European standards within the meaning of Article 5 (2) appears inadequate to ensure the interoperability of transfrontier services in one or more Member States, reference to European standards 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. The procedure provided for in this paragraph may in no way affect the implementation of Articles 85 and 86 of the Treaty.

4. Where a Member State or the Commission considers that the harmonized standards mentioned under paragraph 1 do not correspond to the objective of open and efficient access, in particular the basic principles and the essential requirements referred to in Article 3, the Commission or the Member State concerned shall bring the matter before the committee referred to in Article 9, giving the reasons therefore. The committee shall deliver an opinion without delay.

5. In the light of the committee's opinion and after consultation of the standing committee set up by Directive 83/189/EEC, the Commission shall inform the Member States whether or not it is necessary to withdraw references to those standards from the *Official Journal of the European Communities*.

Article 6

Following the completion of the procedures set out in Articles 4 and 5, and acting in accordance with Article 100a of the Treaty, the Council shall adopt specific Directives establishing open network provision conditions including a time schedule for implementing them.

Article 7

The Council, acting in accordance with Article 100a of the Treaty, taking Article 8c of the Treaty into consideration, shall, where required, adopt measures for harmonizing declaration and/or licensing procedures for the provision of services via public telecommunications networks, with a view to establishing conditions in which there would be mutual recognition of declaration and/or licensing procedures.

Article 8

During 1992 the Council, on the basis of a report which the Commission shall submit to the European Parliament and the Council, shall review progress on harmonization and any restrictions on access to telecommunications networks and services still remaining, the effects of those restrictions on the operation of the internal telecommunications market, and measures which could be taken to remove those restrictions, in conformity with Community law, taking account of technological development and in accordance with the procedure provided for under Article 100b of the Treaty.

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.

The committee shall, in particular, consult the representatives of the telecommunications organizations, 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.

Done at Luxembourg, 28 June 1990.

For the Council

The President

M. GEOGHEGAN-QUINN

ANNEX I**Areas for which open network provision conditions may be drawn up in accordance with Article 4**

Areas shall be selected from the following list in accordance with the procedures laid down in Article 4:

1. leased lines;
2. packet- and circuit-switched data services;
3. Integrated Services Digital Network (ISDN);
4. voice telephony service;
5. telex service;
6. mobile services, as applicable;

subject to further study,

7. new types of access to the network, such as access, under certain conditions, to the circuits connecting subscriber premises to the public network exchange ('data over voice') and access to the network's new intelligent functions, according to progress on definition and technological development;
 8. access to the broadband network, according to progress on definition and technological development.
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ANNEX II

Reference framework for drawing up proposals on open network provision conditions in accordance with Article 4 (4) (d)

Proposals on open network provision conditions as defined in Article 2 (10) should be drawn up in accordance with the following reference framework:

1. Common principles

In drawing up the conditions described in this Annex, due account will be taken of the relevant rules of the Treaty.

Open network provision conditions shall be drawn up in such a way as to facilitate the service providers' and users' freedom of action without unduly limiting the telecommunications organizations' responsibility for the functioning of the network and the best possible condition of communications channels.

Member States may, in accordance with Community law, take any measure enabling the telecommunications organizations to develop the new opportunities deriving from open network provision.

2. Harmonized technical interfaces and/or service features

In drawing up open network provision conditions the following scheme should be taken into account for the definition of technical interfaces at appropriate open network termination points:

- for existing services and networks, existing interfaces should be adopted;
- for entirely new services or the improvement of existing services, existing interfaces should also be adopted, as far as feasible. When existing interfaces are not suitable, enhancements and/or new interfaces 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 specifying new interfaces.

Open network provision proposals must, wherever possible, be in line with the ongoing work in the European Conference of Postal and Telecommunications Administrations (CEPT), CCITT, ETSI and CENELEC.

Work undertaken in this area shall take full account 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⁾.

Additional features will be identified where required. They may be classified as:

- inclusive if they are provided in association with a specific interface and included in the standard offering,
- optional if they can be requested as an option with regard to a specific open network provision offering.

Work shall include the drawing up of proposals for time schedules for the introduction of interfaces and service features, taking account of the state of development of telecommunications networks and services in the Community.

3. Harmonized supply and usage conditions

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

They may include as applicable:

(a) supply conditions such as:

- maximum provision time (delivery period);
- quality of service, in particular the quality of transmission,
- maintenance,
- network malfunction reporting facilities;

⁽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.

- (b) usage conditions such as:
 - conditions for resale of capacity,
 - conditions for shared use,
 - conditions for interconnection with public and private networks.

Usage conditions may include conditions regarding access to frequencies, as applicable, and measures concerning protection of personal data and confidentiality of communications, where required.

Harmonized tariff principles

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

These principles imply, in particular, that:

- tariffs must be based on objective criteria and especially in the case of services and areas subject to special or exclusive rights 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 provision conditions. When these tariffs are determined, 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, 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.

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 and the need for a reasonable level of return on investment.

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

ANNEX III

Guidelines for implementation of the framework Directive up to 31 December 1992

In an initial phase, and without prejudice to the procedures laid down in Article 4 (2) and (3), work to be undertaken in 1990, 1991 and 1992 concerning Articles 4, 5 and 6 will implement the following priorities:

1. adoption of specific Directives pursuant to Article 6 covering leased lines and the voice telephony service;
 2. implementation by 1 January 1991 of harmonized technical interfaces and/or service features for packet-switched data services and ISDN (Integrated Services Digital Network); reference to such interfaces and features may be made compulsory before that date in accordance with the procedure set out in Article 5 (3);
 3. adoption by the Council by 1 July 1991, acting on a proposal from the Commission, of a recommendation on the supply of technical interfaces, conditions of usage and tariff principles applying to provision of packet-switched data services complying with open network principles; this recommendation would in particular call on Member States to ensure that at least one such service was provided on their territory;
 4. adoption by the Council by 1 January 1992, acting on a proposal from the Commission, of a similar recommendation on ISDN;
 5. examination in 1992, with a view to its adoption, on a proposal from the Commission, of a specific Directive on packet-switched data services. That proposal should take into account the initial results of the implementation of the recommendation referred to in point 3;
 6. subsequent examination of a proposal for a Directive on ISDN. That proposal should also take into account the initial results of the implementation of the recommendation referred to in point 4.
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COMMISSION

COMMISSION DIRECTIVE

of 28 June 1990

on competition in the markets for telecommunications services

(90/388/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

- (1) The improvement of telecommunications in the Community is an essential condition for the harmonious development of economic activities and a competitive market in the Community, from the point of view of both service providers and users. The Commission has therefore adopted a programme, set out in its Green Paper on the development of the common market for telecommunications services and equipment and in its communication on the implementation of the Green Paper by 1992, for progressively introducing competition into the telecommunications market. The programme does not concern mobile telephony and paging services, and mass communication services such as radio for television. The Council, in its resolution of 30 June 1988 ⁽¹⁾, expressed broad support for the objectives of this programme, and in particular the progressive creation of an open Community market for telecommunications services. The last decades have seen considerable technological advances in the telecommunications sector. These allow an increasingly varied range of services to be provided, notably data transmission services, and also make it technically and economically possible for competition to take place between different service providers.
- (2) In all the Member States the provision and operation of telecommunications networks and the provision of related services are generally vested in one or more telecommunications organizations holding exclusive or special rights. Such rights are characterized by the discretionary powers which the State exercises, in various degrees with regard to access to the market for telecommunications services.
- (3) The organizations entrusted with the provision and operation of the telecommunications network are undertakings within the meaning of Article 90 (1) of the Treaty because they carry on an organized business activity, namely the provision of telecommunications services. They are either public undertakings or private enterprises to which the State has granted exclusive or special rights.
- (4) Several Member States, while ensuring the performance of public service tasks, have already revised the system of exclusive or special rights that used to exist in the telecommunications sector in their country. In all cases, the system of exclusive or special rights has been maintained in respect of the provision and operation of the network. In some Member States, it has been maintained for all telecommunications services, while in others such rights cover only certain services. All Member States have either themselves imposed or allowed their telecommunications administrations to impose restrictions on the free provision of telecommunications services.
- (5) The granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State. The granting by a Member State of such rights inevitably restricts the provision of such services by other undertakings to or from other Member States.
- (6) In practice, restrictions on the provision of telecommunications services within the meaning of Article 59 to or from other Member States consist mainly in the prohibition on connecting leased lines by means of concentrators, multiplexers and other equipment to the switched telephone network, in imposing access charges for the connection that are out of proportion to the service provided, in prohibiting the routing of signals to or from third parties by means of leased lines or applying volume sensitive tariffs without economic justification or refusing to give service providers access to the

⁽¹⁾ OJ No C 257, 4. 10. 1988, p. 1.

network. The effect of the usage restrictions and the excessive charges in relation to net cost is to hinder the provision to or from other Member States of such telecommunications services as:

- services designed to improve telecommunications functions, e.g. conversion of the protocol, code, format or speed,
- information services providing access to data bases,
- remote data-processing services,
- message storing and forwarding services, e.g. electronic mail,
- transaction services, e.g. financial transactions, electronic commercial data transfer, teleshopping and telereservations,
- teleaction services, e.g. telemetry and remote monitoring.

(7) Articles 55, 56 and 66 of the Treaty allow exceptions on non-economic grounds to the freedom to provide services. The restrictions permitted are those connected, even occasionally, with the exercise of official authority, and those connected with public policy, public security or public health. Since these are exceptions, they must be interpreted restrictively. None of the telecommunications services is connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunication services cannot in itself threaten public policy and cannot affect public health.

(8) The Court of Justice caselaw also recognizes restrictions on the freedom to provide services if they fulfil essential requirements in the general interest and are applied without discrimination and in proportion to the objective. Consumer protection does not make it necessary to restrict freedom to provide telecommunications services since this objective can also be attained through free competition. Nor can the protection of intellectual property be invoked in this connection. The only essential requirements derogating from Article 59 which could justify restrictions on the use of the public network are the maintenance of the integrity of the network, security of network operations and in justified cases, interoperability and data protection. The restrictions imposed, however, must be adapted to the objectives pursued by these legitimate requirements. Member States will have to make such restrictions known to the

public and notify them to the Commission to enable it to assess their proportionality.

- (9) In this context, the security of network operations means ensuring the availability of the public network in case of emergency. The technical integrity of the public network means ensuring its normal operation and the interconnection of public networks in the Community on the basis of common technical specifications. The concept of interoperability of services means complying with such technical specifications introduced to increase the provision of services and the choice available to users. Data protection means measures taken to warrant the confidentiality of communications and the protection of personal data.
- (10) Apart from the essential requirements which can be included as conditions in the licensing or declaration procedures, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory and transparent trade regulations regarding the conditions of permanence, availability and quality of the service.
- (11) When a Member State has entrusted a telecommunications organization with the task of providing packet or circuit switched data services for the public in general and when this service may be obstructed because of competition by private providers, the Commission can allow the Member State to impose additional conditions for the provision of such a service, with respect also to geographical coverage. In assessing these measures, the Commission in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130a, will also take into account the situation of those Member States in which the network for the provision of the packet or circuit switched services is not yet sufficiently developed and which could justify the deferment for these Member States until 1 January 1996 of the date for prohibition on the simple resale of leased line capacity.
- (12) Article 59 of the Treaty requires the abolition of any other restriction on the freedom of nationals of Member States who are established in a Community country to provide services to persons in other Member States. The maintenance or introduction of any exclusive or special right which does not correspond to the abovementioned criteria is therefore a breach of Article 90 in conjunction with Article 59.
- (13) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial

part of it. Telecommunications organizations are also undertakings for the purposes of this Article because they carry out economic activities, in particular the service they provide by making telecommunications networks and services available to users. This provision of the network constitutes a separate services market as it is not interchangeable with other services. On each national market the competitive environment in which the network and the telecommunications services are provided is homogeneous enough for the Commission to be able to evaluate the power held by the organizations providing the services on these territories. The territories of the Member States constitute distinct geographical markets. This is essentially due to the existing difference between the rules governing conditions of access and technical operation, relating to the provision of the network and of such services. Furthermore, each Member State market forms a substantial part of the common market.

- (14) In each national market the telecommunications organizations hold individually or collectively a dominant position for the creation and the exploitation of the network because they are the only ones with networks in each Member State covering the whole territory of those States and because their governments granted them the exclusive right to provide this network either alone or in conjunction with other organizations.
- (15) Where a State grants special or exclusive rights to provide telecommunications services to organizations which already have a dominant position in creating and operating the network, the effect of such rights is to strengthen the dominant position by extending it to services.
- (16) Moreover, the special or exclusive rights granted to telecommunications organizations by the State to provide certain telecommunications services mean such organizations:
- (a) prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technological progress to the detriment of consumers;
 - (b) compel network users to use the services subject to exclusive rights, and thus make the conclusion of network utilization contracts dependent on acceptance of supplementary services having no connection with the subject of such contracts.

Each of these types of conduct represents a specific abuse of a dominant position which is likely to have an

appreciable effect on trade between Member States, as all the services in question could in principle be supplied by providers from other Member States. The structure of competition within the common market is substantially changed by them. At all events, the special or exclusive rights for these services give rise to a situation which is contrary to the objective in Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including that of Article 3 (f).

- (17) The exclusive rights to telecommunications services granted to public undertakings or undertakings to which Member States have granted special or exclusive rights for the provision of the network are incompatible with Article 90 (1) in conjunction with Article 86.
- (18) Article 90 (2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.
- (19) The provision of leased lines forms an essential part of the telecommunications organizations' tasks. There is at present, in almost all Member States, a substantial difference between charges for use of the data transmission service on the switched network and for use of leased lines. Balancing those tariffs without delay could jeopardize this task. Equilibrium in such charges must be achieved gradually between now and 31 December 1992. In the meantime it must be possible to require private operators not to offer to the public a service consisting merely of the resale of leased line capacity, i.e. including only such processing, switching of data, storing, or protocol conversion as is necessary for transmission in real time. The Member States may therefore establish a declaration system through which private operators would undertake not to engage in simple resale.

- However, no other requirement may be imposed on such operators to ensure compliance with this measure.
- (20) These restrictions do not affect the development of trade to such an extent as would be contrary to the interests of the Community. Under these circumstances, these restrictions are compatible with Article 90 (2) of the Treaty. This may also be the case as regards the measures adopted by Member States to ensure that the activities of private service providers do not obstruct the public switched-data service.
- (21) The rules of the Treaty, including those on competition, apply to telex services; however, the use of this service is gradually declining throughout the Community owing to the emergence of competing means of telecommunication such as telefax. The abolition of current restrictions on the use of the switched telephone network and leased lines will allow telex messages to be retransmitted. In view of this particular trend, an individual approach is necessary. Consequently, this Directive should not apply to telex services.
- (22) The Commission will in any event reconsider in the course of 1992 the remaining special or exclusive rights on the provision of services taking account of technological development and the evolution towards a digital infrastructure.
- (23) Member States may draw up fair procedures for ensuring compliance with the essential requirements without prejudice to the harmonization of the latter at Community level within the framework of the Council Directives on open network provision (ONP). As regards data-switching, Member States must be able, as part of such procedures, to require compliance with trade regulations from the standpoint of conditions of permanence, availability and quality of the service, and to include measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization. The procedures must be based on specific objective criteria and be applied without discrimination. The criteria should in particular be justified and proportional to the general interest objective, and be duly motivated and published. The Commission must be able to examine them in depth in the light of the rules on free competition and freedom to provide services. In any event, Member States that have not notified the Commission of their planned licensing criteria and procedures within a given time may no longer impose any restrictions on the freedom to provide data transmission services to the public.
- (24) Member States should be given more time to draw up general rules on the conditions governing the provision of packet- or circuit-switched data services for the public.
- (25) Telecommunications services should not be subject to any restriction, either as regards free access by users to the services, or as regards the processing of data which may be carried out before messages are transmitted through the network or after messages have been received, except where this is warranted by an essential requirement in proportion to the objective pursued.
- (26) The digitization of the network and the technological improvement of the terminal equipment connected to it have brought about an increase in the number of functions previously carried out within the network and which can now be carried out by users themselves with increasingly sophisticated terminal equipment. It is necessary to ensure that suppliers of telecommunication services, and notably suppliers of telephone and packet or circuit-switched data transmission services enable operators to use these functions.
- (27) Pending the establishing of Community standards with a view to an open network provision (ONP), the technical interfaces currently in use in the Member States should be made publicly available so that firms wishing to enter the markets for the services in question can take the necessary steps to adapt their services to the technical characteristics of the networks. If the Member States have not yet established such technical interfaces, they should do so as quickly as possible. All such draft measures should be communicated to the Commission in accordance with Council Directive 83/189/EEC ⁽¹⁾, as last amended by Directive 88/182/EEC ⁽²⁾.
- (28) Under national legislation, telecommunications organizations are generally given the function of regulating telecommunications services, particularly as regards licensing, control of type-approval and mandatory interface specifications, frequency allocation and monitoring of conditions of use. In some cases, the legislation lays down only general principles governing the operation of the licensed services and leaves it to the telecommunications organizations to determine the specific operating conditions.
- (29) This dual regulatory and commercial function of the telecommunications organizations has a direct impact
- ⁽¹⁾ OJ No L 109, 26. 4. 1983, p. 8.
⁽²⁾ OJ No L 81, 26. 3. 1988, p. 75.

on firms offering telecommunications services in competition with the organizations in question. By this bundling of activities, the organizations determine or, at the very least, substantially influence the supply of services offered by their competitors. The delegation to an undertaking which has a dominant position for the provision and exploitation of the network, of the power to regulate access to the market for telecommunication services constitutes a strengthening of that dominant position. Because of the conflict of interests, this is likely to restrict competitors' access to the markets in telecommunications services and to limit users' freedom of choice. Such arrangements may also limit the outlets for equipment for handling telecommunications messages and, consequently, technological progress in that field. This combination of activities therefore constitutes an abuse of the dominant position of telecommunications organizations within the meaning of Article 86. If it is the result of a State measure, the measure is also incompatible with Article 90 (1) in conjunction with Article 86.

- (30) To enable the Commission to carry out effectively the monitoring task assigned to it by Article 90 (3), it must have available certain essential information. That information must in particular give the Commission a clear view of the measures of Member States, so that it can ensure that access to the network and the various related services are provided by each telecommunications organization to all its customers on non-discriminatory tariff and other terms. Such information should cover:

- measures taken to withdraw exclusive rights pursuant to this Directive,
- the conditions on which licences to provide telecommunications services are granted.

The Commission must have such information to enable it to check, in particular, that all the users of the network and services, including telecommunications organizations where they are providers of services, are treated equally and fairly.

- (31) The holders of special or exclusive rights to provide telecommunications services that will in future be open to competition have been able in the past to impose long-term contracts on their customers. Such contracts would in practice limit the ability of any new competitors to offer their services to such customers

and of such customers to benefit from such services. Users must therefore be given the right to terminate their contracts within a reasonable length of time.

- (32) Each Member State at present regulates the supply of telecommunications services according to its own concepts. Even the definition of certain services differs from one Member State to another. Such differences cause distortions of competition likely to make the provision of cross-frontier telecommunications services more difficult for economic operators. This is why the Council, in its resolution of 30 June 1988, considered that one of the objectives of a telecommunications policy was the creation of an open Community market for telecommunications services, in particular through the rapid definition, in the form of Council Directives, of technical conditions, conditions of use and principles governing charges for an open network provision (ONP). The Commission has presented a proposal to this end to the Council. Harmonization of the conditions of access is not however the most appropriate means of removing the barriers to trade resulting from infringements of the Treaty. The Commission has a duty to ensure that the provisions of the Treaty are applied effectively and comprehensively.

- (33) Article 90 (3) assigns clearly-defined duties and powers to the Commission to monitor relations between Member States and their public undertakings and undertakings to which they have granted special or exclusive rights, particularly as regards the removal of obstacles to freedom to provide services, discrimination between nationals of the Member States and competition. A comprehensive approach is necessary in order to end the infringements that persist in certain Member States and to give clear guidelines to those Member States that are reviewing their legislation so as to avoid further infringements. A Directive within the meaning of Article 90 (3) of the Treaty is therefore the most appropriate means of achieving that end.

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive:

- 'telecommunication organizations' means public or private bodies, and the subsidiaries they control, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, when applicable, telecommunications services,
- 'special or exclusive rights' means the rights granted by a Member State or a public authority to one or more public

or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity,

- 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means,
 - 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television,
 - 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network,
 - 'essential requirements' means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. These reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services and data protection.
- Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy,
- 'voice telephony' means 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,
 - 'telex service' means the commercial provision for the public of direct transmission of telex messages in accordance with the relevant Comité consultatif international télégraphique et téléphonique (CCITT) recommendation 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,
 - 'packet- and circuit-switched data services' means the commercial provision for the public of direct transport of data 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,
 - 'simple resale of capacity' means the commercial provision on leased lines for the public of data

transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for transmission in real time to and from the public switched network.

2. This Directive shall not apply to telex, mobile radiotelephony, paging and satellite services.

Article 2

Without prejudice to Article 1 (2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any such refusal.

Without prejudice to Article 3, Member States shall inform the Commission no later than 31 December 1990 of the measures taken to comply with this Article and shall inform it of any existing regulations or of plans to introduce new licensing procedures or to change existing procedures.

Article 3

As regards packet- or circuit-switched data services, Member States may, until 31 December 1992, under the authorization procedures referred to in Article 2, prohibit economic operators from offering leased line capacity for simple resale to the public.

Member States shall, no later than 30 June 1992, notify to the Commission at the planning stage any licensing or declaration procedure for the provision of packet- or circuit-switched data services for the public which are aimed at compliance with:

- essential requirements, or
- trade regulations relating to conditions of permanence, availability and quality of the service, or
- measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization for the provision of switched data services, if the performance of that task is likely to be obstructed by the activities of private service providers.

The whole of these conditions shall form a set of public-service specifications and shall be objective, non-discriminatory and transparent.

Member States shall ensure, no later than 31 December 1992, that such licensing or declaration procedures for the provision of such services are published.

Before they are implemented, the Commission shall verify the compatibility of these projects with the Treaty.

Article 4

Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and publish them.

In particular, they shall ensure that operators who so request can obtain leased lines within a reasonable period, that there are no restrictions on their use other than those justified in accordance with Article 2.

Member States shall inform the Commission no later than 31 December 1990 of the steps they have taken to comply with this Article.

Each time the charges for leased lines are increased, Member States shall provide information to the Commission on the factors justifying such increases.

Article 5

Without prejudice to the relevant international agreements, Member States shall ensure that the characteristics of the technical interfaces necessary for the use of public networks are published by 31 December 1990 at the latest.

Member States shall communicate to the Commission, in accordance with Directive 83/189/EEC, any draft measure drawn up for this purpose.

Article 6

Member States shall, as regards the provision of telecommunications services, and existing restrictions on the processing of signals before their transmission via the public network or after their reception, unless the necessity of these restrictions for compliance with public policy or essential requirements is demonstrated.

Without prejudice to harmonized Community rules adopted by the Council on the provision of an open network, Member States shall ensure as regards services providers including the telecommunications organizations that there is no discrimination either in the conditions of use or in the charges payable.

Member States shall inform the Commission of the measures taken or draft measures introduced in order to comply with this Article by 31 December 1990 at the latest.

Article 7

Member States shall ensure that from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organizations.

They shall inform the Commission of the measures taken or draft measures introduced to that end no later than 31 December 1990.

Article 8

Member States shall ensure that as soon as the relevant special or exclusive rights have been withdrawn, telecommunications organizations make it possible for customers bound to them by a contract with more than one year to run for the supply of telecommunications services which was subject to such a right at the time it was concluded to terminate the contract at six months' notice.

Article 9

Member States shall communicate to the Commission the necessary information to allow it to draw up, for a period of three years, at the end of each year, an overall report on the application of this Directive. The Commission shall transmit this report to the Member States, the Council, the European Parliament and the Economic and Social Committee.

Article 10

In 1992, the Commission will carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive.

In 1994, the Commission shall assess the effects of the measures referred to in Article 3 in order to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 28 June 1990.

For the Commission

Leon BRITTAN

Vice-President