

**Commission Directive 2002/77/EC
of 16 September 2002
on competition in the markets for electronic communications networks and services
(Text with EEA relevance)**

Official Journal L 249 , 17/09/2002 P. 0021 - 0026

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

(1) Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services(1), as last amended by Directive 1999/64/EC(2), has been substantially amended several times. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) Article 86 of the Treaty entrusts the Commission with the task of ensuring that, in the case of public undertakings and undertakings enjoying special or exclusive rights, Member States comply with their obligations under Community law. Pursuant to Article 86(3), the Commission can specify and clarify the obligations arising from that Article and, in that framework, set out the conditions which are necessary to allow the Commission to perform effectively the duty of surveillance imposed upon it by that paragraph.

(3) Directive 90/388/EEC required Member States to abolish special and exclusive rights for the provision of telecommunications services, initially for other services than voice telephony, satellite services and mobile radiocommunications, and then it gradually established full competition in the telecommunications market.

(4) A number of other Directives in this field have also been adopted under Article 95 of the Treaty by the European Parliament and the Council aiming, principally, at the establishment of an internal market for telecommunications services through the implementation of open network provision and the provision of a universal service in an environment of open and competitive markets. Those Directives should be repealed with effect from 25 July 2003 when the new regulatory framework for electronic communications networks and services is applied.

(5) The new electronic communications regulatory framework consists of one general Directive, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)(3) and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)(4), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)(5), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)(6), and Directive 2002/58/EC of the European Parliament and of the Council

of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications (Directive on privacy and electronic communications) sector(7).

(6) In the light of the developments which have marked the liberalisation process and the gradual opening of the telecommunications markets in Europe since 1990, certain definitions used in Directive 90/388/EEC and its amending acts should be adjusted in order to reflect the latest technological developments in the telecommunications field, or replaced in order to take account of the convergence phenomenon which has shaped the information technology, media and telecommunications industries over recent years. The wording of certain provisions should, where possible, be clarified in order to facilitate their application, taking into account, where appropriate, the relevant Directives adopted under Article 95 of the Treaty, and the experience acquired through the implementation of Directive 90/388/EEC as amended.

(7) This Directive makes reference to "electronic communications services" and "electronic communications networks" rather than the previously used terms "telecommunications services" and "telecommunications networks". These new definitions are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service and networks used for such transmission and broadcasting should likewise be recognised as electronic communications networks. Furthermore, it should be made clear that the new definition of electronic communications networks also covers fibre networks which enable third parties, using their own switching or routing equipment, to convey signals.

(8) In this context, it should be made clear that Member States must remove (if they have not already done so) exclusive and special rights for the provision of all electronic communications networks, not just those for the provision of electronic communications services and should ensure that undertakings are entitled to provide such services without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC. The definition of electronic communications networks should also mean that Member States are not permitted to restrict the right of an operator to establish, extend and/or provide a cable network on the ground that such network could also be used for the transmission of radio and television programming. In particular, special or exclusive rights which amount to restricting the use of electronic communications networks for the transmission and distribution of television signals are contrary to Article 86(1), read in conjunction with Article 43 (right of establishment) and/or Article 82(b) of the EC Treaty insofar as they have the effect of permitting a dominant undertaking to limit "production, markets or technical development to the prejudice of consumers". This is, however, without prejudice to the specific rules adopted by the Member States in accordance with Community law, and, in particular, in accordance with Council Directive 89/552/EEC of 3 October 1989(8), on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European

Parliament and of the Council(9), governing the distribution of audiovisual programmes intended for the general public.

(9) Pursuant to the principle of proportionality, Member States should no longer make the provision of electronic communications services and the establishment and provision of electronic communications networks subject to a licensing regime but to a general authorisation regime. This is also required by Directive 2002/20/EC, according to which electronic communications services or networks should be provided on the basis of a general authorisation and not on the basis of a license. An aggrieved party should have the right to challenge a decision preventing him from providing electronic communications services or networks before an independent body and, ultimately, before a court or a tribunal. It is a fundamental principle of Community law that an individual is entitled to effective judicial protection whenever a State measure violates rights conferred upon him by the provisions of a Directive.

(10) Public authorities may exercise a dominant influence on the behaviour of public undertakings, as a result either of the rules governing the undertaking or of the manner in which the shareholdings are distributed. Therefore, where Member States control vertically integrated network operators which operate networks which have been established under special or exclusive rights, those Member States should ensure that, in order to avoid potential breaches of the Treaty competition rules, such operators, when they enjoy a dominant position in the relevant market, do not discriminate in favour of their own activities. It follows that Member States should take all measures necessary to prevent any discrimination between such vertically integrated operators and their competitors.

(11) This Directive should also clarify the principle derived from Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EC with regard to mobile and personal communications(10), by providing that Member States should not grant exclusive or special rights of use of radio frequencies and that the rights of use of those frequencies should be assigned according to objective, non-discriminatory and transparent procedures. This should be without prejudice to specific criteria and procedures adopted by Member States to grant such rights to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law.

(12) Any national scheme pursuant to Directive 2002/22/EC, serving to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria and shall be consistent with the principles of proportionality and of least market distortion. Least market distortion means that contributions should be recovered in a way that as far as possible minimises the impact of the financial burden falling on end-users, for example by spreading contributions as widely as possible.

(13) Where rights and obligations arising from international conventions setting up international satellite organisations are not compatible with the competition rules of the Treaty, Member States should take, in accordance with Article 307 of the EC Treaty, all appropriate steps to eliminate such incompatibilities. This Directive should clarify this obligation because Article 3 of Directive 94/46/EC(11), merely required Member States to "communicate to the Commission" the information they possessed on such incompatibilities. Article 11 of this Directive should clarify the obligation on Member

States to remove any restrictions which could still be in force because of those international conventions.

(14) This Directive should maintain the obligation imposed on Member States by Directive 1999/64/EC, so as to ensure that dominant providers of electronic communications networks and publicly available telephone services operate their public electronic communication network and cable television network as separate legal entities.

(15) This Directive should be without prejudice to obligations of the Member States concerning the time limits set out in Annex I, Part B, within which the Member States are to comply with the preceding Directives.

(16) Member States should supply to the Commission any information which is necessary to demonstrate that existing national implementing legislation reflects the clarifications provided for in this Directive as compared with Directives 90/388/EC, 94/46/EC, 95/51/EC(12), 96/2/EC, 96/19/EC(13) and 1999/64/EC.

(17) In the light of the above, Directive 90/388/EC should be repealed,

HAS ADOPTED THIS DIRECTIVE:

Article 1 **Definitions**

For the purposes of this Directive the following definitions shall apply:

1. "electronic communications network" shall mean transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit - and packet - switched, including Internet) and mobile terrestrial networks, and electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;
2. "public communications network" shall mean an electronic communications network used wholly or mainly for the provision of public electronic communications services;
3. "electronic communications services" shall mean a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting but exclude services providing or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services as defined in Article 1 of Directive 98/34/EC which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;
4. "publicly available electronic communications services" shall mean electronic communications services available to the public;
5. "exclusive rights" shall mean the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide an electronic communications service or to undertake an electronic communications activity within a given geographical area;

6. "special rights" shall mean the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

(a) designates or limits to two or more the number of such undertakings authorised to provide an electronic communications service or undertake an electronic communications activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

(b) confers on undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same electronic communications service or to undertake the same electronic communications activity in the same geographical area under substantially equivalent conditions;

7. "satellite earth station network" shall mean a configuration of two or more earth stations which interwork by means of a satellite;

8. "cable television networks" shall mean any mainly wire-based infrastructure established primarily for the delivery or distribution of radio or television broadcast to the public.

Article 2

Exclusive and special rights for electronic communications networks and electronic communications services

1. Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services.

2. Member States shall take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.

3. Member States shall ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks established by the providers of electronic communications services, over infrastructures provided by third parties, or by means of sharing networks, other facilities or sites without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC.

4. Member States shall ensure that a general authorisation granted to an undertaking to provide electronic communications services or to establish and/or provide electronic communications networks, as well as the conditions attached thereto, shall be based on objective, non-discriminatory, proportionate and transparent criteria.

5. Reasons shall be given for any decision taken on the grounds set out in Article 3(1) of Directive 2002/20/EC preventing an undertaking from providing electronic communications services or networks.

Any aggrieved party should have the possibility to challenge such a decision before a body that is independent of the parties involved and ultimately before a court or a tribunal.

Article 3

Vertically integrated public undertakings

In addition to the requirements set out in Article 2(2), and without prejudice to Article 14 of Directive 2002/21/EC, Member States, shall ensure that vertically integrated public undertakings which provide electronic communications networks and which are in a dominant position do not discriminate in favour of their own activities.

Article 4

Rights of use of frequencies

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:

1. Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.
2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.

Article 5

Directory services

Member States shall ensure that all exclusive and/or special rights with regard to the establishment and provision of directory services on their territory, including both the publication of directories and directory enquiry services, are abolished.

Article 6

Universal service obligations

1. Any national scheme pursuant to Directive 2002/22/EC, serving to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria and shall be consistent with the principle of proportionality and of least market distortion. In particular, where universal service obligations are imposed in whole or in part on public undertakings providing electronic communications services, this shall be taken into consideration in calculating any contribution to the net cost of universal service obligations.
2. Member States shall communicate any scheme of the kind referred to in paragraph 1 to the Commission.

Article 7

Satellites

1. Member States shall ensure that any regulatory prohibition or restriction on the offer of space segment capacity to any authorised satellite earth station network operator are abolished, and shall authorise within their territory any space-segment supplier to verify that the satellite earth station network for use in connection with the space segment of the

supplier in question is in conformity with the published conditions for access to such person's space segment capacity.

2. Member States which are party to international conventions setting up international satellite organisations shall, where such conventions are not compatible with the competition rules of the EC Treaty, take all appropriate steps to eliminate such incompatibilities.

Article 8

Cable television networks

1. Each Member State shall ensure that no undertaking providing public electronic communications networks operates its cable television network using the same legal entity as it uses for its other public electronic communications network, when such undertaking:

(a) is controlled by that Member State or benefits from special rights; and

(b) is dominant in a substantial part of the common market in the provision of public electronic communications networks and publicly available telephone services; and

(c) operates a cable television network which has been established under special or exclusive right in the same geographic area.

2. The term "publicly available telephone services" shall be considered synonymous with the term "public voice telephony services" referred to in Article 1 of Directive 1999/64/EC.

3. Member States which consider that there is sufficient competition in the provision of local loop infrastructure and services in their territory shall inform the Commission accordingly.

Such information shall include a detailed description of the market structure. The information provided shall be made available to any interested party on demand, regard being had to the legitimate interest of undertakings in the protection of their business secrets.

4. The Commission shall decide within a reasonable period, after having heard the comments of these parties, whether the obligation of legal separation may be ended in the Member State concerned.

5. The Commission shall review the application of this Article not later than 31 December 2004.

Article 9

Member States shall supply to the Commission not later than 24 July 2003 such information as will allow the Commission to confirm that the provisions of this Directive have been complied with.

Article 10

Repeal

Directive 90/388/EC, as amended by the Directives listed in Annex I, Part A, is repealed with effect from 25 July 2003, without prejudice to the obligations of the Member States in respect of the time limits for transposition laid down in Annex I, Part B.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

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

Article 12

This Directive is addressed to the Member States.

Done at Brussels, 16 September 2002.

For the Commission
Mario Monti
Member of the Commission

- (1) OJ L 192, 24.7.1990, p. 10.
- (2) OJ L 175, 10.7.1999, p. 39.
- (3) OJ L 108, 24.4.2002, p. 33.
- (4) OJ L 108, 24.4.2002, p. 21.
- (5) OJ L 108, 24.4.2002, p. 7.
- (6) OJ L 108, 24.4.2002, p. 51.
- (7) OJ L 201, 31.7.2002, p. 37.
- (8) OJ L 298, 17.10.1989, p. 23.
- (9) OJ L 202, 30.7.1997, p. 60.
- (10) OJ L 20, 26.1.1996, p. 59.
- (11) OJ L 268, 19.10.1994, p. 15.
- (12) OJ L 256, 26.10.1995, p. 49.
- (13) OJ L 74, 22.3.1996, p. 13.

ANNEX I

PART A

List of Directives to be repealed

Directive 90/388/EEC (OJ L 192, 24.7.1990, p. 10)
Articles 2 and 3 of Directive 94/46/EC (OJ L 268, 19.1.1994, p. 15)
Directive 95/51/EC (OJ L 256, 26.10.1995, p. 49)
Directive 96/2/EC (OJ L 20, 26.1.1996, p. 59)

Directive 96/19/EC (OJ L 74, 22.3.1996, p. 13)
Directive 1999/64/EC (OJ L 175, 10.7.1999, p. 39)

PART B
Transposition dates for the above Directives

Directive 90/388/EEC: transposition date: 31 December 1990
Directive 94/46/EC: transposition date: 8 August 1995
Directive 95/51/EC: transposition date: 1 October 1996
Directive 96/2/EC: transposition date: 15 November 1996
Directive 96/19/EC: transposition date: 11 January 1997
Directive 1999/64/EC: transposition date: 30 April 2000

ANNEX II
Correlation table

This Directive	Directive 90/388/EEC
Article 1 (Definitions)	Article 1
Article 2 (withdrawal of exclusive/special rights)	Article 2
Article 3 (vertically integrated public undertakings)	Article 3(a)(ii)
Article 4 (rights of use of radio frequencies)	Article 3(b)
Article 5 (directory services)	Article 4(b)
Article 6 (universal service obligations)	Article 4(c)
Article 7 (satellites)	Article 3 of Directive 94/46/EC
Article 8 (cable networks)	Article 9