

COMMISSION DIRECTIVE 94/46/EC

of 13 October 1994

amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite 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. The Green Paper on a common approach in the field of satellite communications in the European Community, adopted by the Commission in November 1990, set out the major changes in the regulatory environment necessary to exploit the potential of this means of communications. This Satellite Green Paper called for, *inter alia*, full liberalization of the satellite services and equipment sectors, including the abolition of all exclusive or special rights in this area, subject to licensing procedures, as well as for the free (unrestricted access to space segment capacity.
2. The Council Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment⁽¹⁾, gave general support to the positions set out in the Commission's Satellite Green Paper, and considered as major goals: the harmonization and liberalization of the market for appropriate satellite earth stations, including where applicable the abolition of exclusive or special rights in this field, subject in particular to the conditions necessary for compliance with essential requirements.
3. The European Parliament, in its Resolution on the development of the common market for satellite communications services and equipment⁽²⁾ calls upon the Commission to enact the necessary legislation in order to create the environment to enable existing constraints to be removed and new activities developed in the field of satellite communications, while stressing the need to harmonize and liberalize the markets in satellite equipment and services.
4. Several Member States have already opened up certain satellite communications services to competition and have introduced licensing schemes. Nevertheless, the granting of licences in some Member States still does not follow objective, proportional and non-discriminatory criteria or, in the case of operators competing with the telecommunications organizations, is subject to technical restrictions such as a ban on connecting their equipment to be switched network operated by the telecommunications organization. Other Member States have maintained the exclusive rights granted to the national public undertakings.
5. Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment⁽³⁾, as amended by the Agreement on the European Economic Area, provides for the abolition of special or exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment. It does not cover all types of satellite earth station equipment.
6. In its judgment in Case C-202/88, *France v. Commission*⁽⁴⁾, the Court of Justice of the European Communities upheld Commission Directive 88/301/EEC. However, in so far as it relates to special rights, the Directive was declared void on the grounds that neither the provisions of the Directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty. As far as importation, marketing, connection, bringing into service and maintenance of telecommunications equipment are concerned, special rights are in practice 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,
 - limits to two or more the number of such undertaking, otherwise than according to objective, proportional and non-discriminatory criteria, or
 - designates, otherwise than according to such criteria, several competing undertakings, or
 - confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect

⁽¹⁾ OJ No C 8, 14. 1. 1992, p. 1.⁽²⁾ OJ No C 42, 15. 2. 1993, p. 30.⁽³⁾ OJ No L 131, 27. 5. 1988, p. 73.⁽⁴⁾ [1991] ECR I-1223.

the ability of any other undertaking to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.

This definition is without prejudice to the application of Article 92 of the EC Treaty.

7. The existence of exclusive rights has the effect of restricting the free movement of such equipment either as regards the importation and marketing of telecommunication equipment (including satellite equipment), because certain products are not marketed, or as regards the connection, bringing into service or maintenance because, taking into account the characteristics of the market and in particular the diversity and technical nature of the products, a monopoly has no incentive to provide these services in relation to products which it has not marketed or imported, nor to align its prices on costs, since there is no threat of competition from new entrants. Taking into account the fact that in most equipment markets there is typically a large range of telecommunication equipment markets there is typically a large range of telecommunication equipment, and the likely development of the markets in which there are as yet a limited number of manufacturers, any special right which directly or indirectly — for example by not providing for an open and non-discriminatory authorization procedure — limits the number of the undertakings authorized to import, market, connect, bring into service and maintain such equipment, is liable to have the same kind of effect as the grant of exclusive rights.

Such exclusive or special rights constitute measures having equivalent effect to quantitative restrictions incompatible with Article 30 of the EC Treaty. None of the specific features of satellite earth stations or of the market for their sale or maintenance is such as to justify their being treated differently in law from other telecommunications terminal equipment. Thus it is necessary to abolish all existing exclusive rights in the importation, marketing, connection, bringing into service and maintenance of satellite earth station equipment, as well as those rights having comparable effects — that is to say, all special rights except those consisting in legal or regulatory advantages conferred on one or more undertakings and affecting only the ability of other undertakings to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.

8. Satellite earth station equipment must satisfy the essential requirements harmonized by Council Directive 93/97/EEC⁽¹⁾ with special reference to the efficient use of frequencies. It will be possible to monitor the application of these essential requirements partly through the licences granted for the provision of the services concerned. Alignment on the essential requirements will be achieved mainly through the adoption of common technical rules and harmonization of the conditions attached to licences. Even where these conditions are not harmonized, Member States will nevertheless have to adapt their rules. In either case, Member States must in the meantime ensure that the application of such rules does not create barriers to trade.

9. The abolition of special or exclusive rights relating to the connection of satellite earth station equipment makes it necessary to recognize the right to connect this equipment to the switched networks operated by the telecommunications organizations so that licensed operators can offer their services to the public.

10. Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services⁽²⁾, as amended by the Agreement on the EEA, provides for the abolition of special or exclusive rights granted by Member States in respect of the provision of telecommunications services. However, the Directive excludes satellite services from its field of application.

11. In Joined Cases C-271/90, C-281/90 and C-289/90, *Spain v. Commission*⁽³⁾, the Court of Justice of the European Communities upheld this Commission Directive on 17 November 1992. However, in so far as it relates to special rights, the Directive was declared void by the Court of Justice on the grounds that neither the provisions of the Directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty. Consequently, these rights must be defined in this Directive. As far as telecommunications services are concerned, special rights are in practice 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,

⁽¹⁾ OJ No L 290, 24. 11. 1993, p. 1.

⁽²⁾ OJ No L 192, 24. 7. 1990, p. 10.

⁽³⁾ [1992] ECRI-5833.

- limits to two or more, otherwise than according to objective, proportional and non-discriminatory criteria, the number of undertakings which are authorized to provide any such service, of
- designates, otherwise than according to such criteria, several competing undertakings as those which are authorized to provide any such service, or
- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service in the same geographical area under substantially equivalent conditions.

This definition is without prejudice to the application of Article 92 of the EC Treaty.

In the field of telecommunications services, such special legal or regulatory advantages may consist, among other things, in a right to make compulsory purchases in the general interest, in derogations from law on town-and-country planning, or in the possibility of obtaining an authorization without having to go through the usual procedure.

12. Where the number of undertakings authorized to provide satellite telecommunications services is limited by a Member State through special rights, and *a fortiori* exclusive rights, these constitute restrictions that could be incompatible with Article 59 of the Treaty, whenever such limitation is not justified by essential requirements, since these rights prevent other undertakings from supplying (or obtaining) the services concerned to (or from) other Member States. In the case of satellite network services, such essential requirements could be the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunications systems and other space-based or terrestrial technical systems. Consequently, provided that equipment used to offer the services satisfies the essential requirement applicable to satellite communications, separate legal treatment of the latter is not justified. On the other hand, special rights consisting only in special legal or regulatory advantages, do not, in principle, preclude other undertakings from entering the market. The compatibility of these rights with the EC Treaty must

therefore be assessed on a case-by-case basis, regard being had to their impact on the effective freedom of other entities to provide the same telecommunications service and their possible justifications regarding the activity concerned.

13. The exclusive rights that currently exist in the satellite communications field were generally granted to organizations that already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. Such rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position. The exclusive rights granted in the satellite communications field are consequently incompatible with Article 90 of the EC Treaty, read in conjunction with Article 86.

14. These exclusive rights limiting access to the market also have the effect of restricting or preventing, to the detriment of users, the use of satellite communications that could be offered, thereby holding back technical progress in this area. Because their investment decisions are likely to be based on exclusive rights, the undertakings concerned are often in a position to decide to give priority to terrestrial technologies, whereas new entrants might exploit satellite technology. The telecommunications organizations have generally given preference to the development of optical-fibre terrestrial links, and satellite communications have been used chiefly as a technical solution of last resort in cases where the cost of the terrestrial alternatives has been prohibitive, or for the purpose of data broadcasting and/or television broadcasting, rather than being used as a fully complementary transmission technology in its own right. Thus the exclusive rights imply a restriction on the development of satellite communication, and this is incompatible with Article 90 of the Treaty, read in conjunction with Article 86.

15. However, where the provision of satellite services is concerned, licensing or declaration procedures are justified in order to ensure compliance with essential requirements, subject to the proportionality principle. Licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective. For example, in the case of provision of a satellite service which involves only the use of a dependent VSAT earth station in a Member State, the latter should impose no more than a declaration procedure.

16. Article 90 (2) of the Treaty provides for an exception to Article 86 in cases where the application of the latter would obstruct the performance, in law or in fact, of the particular tasks assigned to the telecommunications organizations. Pursuant to that provision, 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. In the case of direct transport and switching of speech via satellite earth station networks, such commercial provision for the public in general can take place only when the satellite earth station network is connected to the public switched network.

As regards all services other than voice telephony, no special treatment under Article 90 (2) is justified especially in view of the insignificant contribution of such services to the turnover of the telecommunications organizations.

17. The provision of satellite network services for the conveyance of radio and television programmes is a telecommunications service for the purpose of this Directive and thus subject to its provisions. Notwithstanding the abolition of certain special and exclusive rights in respect of receive-only satellite earth stations not connected to the public network of a Member State and the abolition of special and exclusive rights in respect of satellite services provided for public or private broadcasters, the content of satellite broadcasting services to the general public or private broadcasters, the content of satellite broadcasting services to the general public provided via frequency bands defined in the Radio Regulations for both Broadcasting Satellite Services (BSS) and Fixed-Satellite Services (FSS) will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.

18. This Directive does not prevent measure 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.

19. The offering by satellite operators of space segment capacity of national, private or international satellite systems to licensed satellite earth station network operators, is still, in some Member States, subject to regulatory restrictions other than those compatible with frequency and site coordination arrangements required under the international commitments of Member States. These additional restrictions are contrary to Article 59, which implies that such satellite operators should have full freedom to provide their services in the whole Community, once they are licensed in one Member State.

20. Tests to establish whether satellite earth stations of licensed operators other than national operators conform to specifications governing technical and operational access to intergovernmental satellite systems, are, in most of the Member States, carried out by the national Signatory of the nation upon whose territory the station is operating. These conformity assessments are therefore performed by service providers which are competitors.

This is not compatible with the Treaty provisions, notably Articles 3 (g) and 90, read in conjunction with Article 86. Member States therefore need to ensure that these conformity assessments can be carried out direct between the satellite earth station network operator concerned and the intergovernmental organization itself, under supervision of the regulatory authorities alone.

21. Most of the available space segment capacity is offered by the international satellite organizations. The charges for using such capacity are still high in many Member States because the capacity can be acquired only from the signatory for the Member State in question. Such exclusivity, permitted by some Member States, leads to a partitioning of the Common Market to the detriment of customers requiring capacity. In its resolution of 19 December 1991, the Council consequently called on the Member States to improve access to the space segment of the intergovernmental organizations. As regards the establishment and use of separate systems, restrictive measure taken under international conventions signed by Member States could also have effects incompatible with Community law, by limiting supply at the expense of the consumer within meaning of Article 86 (b). Within the international satellite organizations, reviews of the provisions of the relevant constituent instruments are under way, *inter alia*, in respect of improved access and in respect of the establishment and use of separate systems. In

order to enable the Commission to carry out the monitoring task assigned to it by the EC Treaty, instruments should be provided to help Member States to comply with the duty of cooperation enshrined in the first paragraph of Article 5, read in conjunction with Article 234 (2), of the Treaty.

22. In assessing the measures of this Directive, 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 130 (a), will also take into account the situation of those Member States in which the terrestrial network is not yet sufficiently developed and which could justify the deferment for these Member States, as regards satellite services and to the extent necessary, of the date of full application of the provisions of this Directive until 1 January 1996,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 88/301/EEC is hereby amended as follows:

- (a) The last sentence of the first indent is replaced by the following:

'Terminal equipment also means satellite earth station equipment.'

- (b) The following indents are added after the second indent:

— "special rights" means 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,

— limits to two or more the number of such undertakings, otherwise than according to objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to import, market, connect, bring into service and/or maintain telecommunication terminal equipment in the same geographical area under substantially equivalent conditions;

— "satellite earth station equipment" means equipment which is capable of being used for the transmission only, or for the transmission and reception ("transmit/receive"), or for the reception only ("receive-only") of radiocommu-

nication signals by means of satellites or other space-based systems'

2. The first paragraph of Article 2 is replaced by the following text.

'Member States which have granted special or exclusive rights to undertakings shall ensure that all exclusive rights are withdrawn, as well as those special rights which

(a) limit two or more the number of undertakings within the meaning of Article 1, otherwise than according to objective, proportional and non-discriminatory criteria, or

(b) designate, otherwise than according to such criteria, several competing undertakings within the meaning of Article 1.'

3. The first indent of Article 3 is replaced by the following text:

— in the case of satellite earth station equipment, refuse to allow such equipment to be connected to the public telecommunications network and/or to be brought into service where it does not satisfy the relevant common technical regulations adopted in pursuance of Council Directive 93/97/EEC (*) or, in the absence thereof, the essential requirements laid down in Article 4 of that Directive. In the absence of common technical rules of harmonized regulatory conditions, national rules shall be proportionate to those essential requirements and shall be notified to the Commission in pursuance of Directive 83/189/EEC where that Directive so requires.

— in the case of other terminal equipment, refuse to allow such equipment to be connected to the public telecommunications network where it does not satisfy the relevant common technical regulations adopted in pursuance of Council Directive 91/263/EEC (**) or, in the absence thereof, the essential requirements laid down in Article 4 of that Directive.

(*) OJ No L 290, 24. 11. 1993, p. 1.

(**) OJ No L 128, 23. 5. 1991, p. 1.'

Article 2

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

1. Article 1 is amended as follows:

- (a) Paragraph 1 is amended as follows:

- (i) the second indent is replaced by the following:

— "exclusive rights" means 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 a telecommunication service or undertake an activity within a given geographical area.'

(ii) The following is inserted as the third indent :

- “special rights” means 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,
- limits to two or more the number of such undertakings authorized to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
- designates, otherwise than according to such criteria, several competing undertakings as being authorized to provide a service or undertake an activity, or
- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.’

(iii) The fourth indent is replaced by the following :

- “telecommunications services” means services whose provision consists wholly or partly in the transmission and routing of signals on a public telecommunications network by means of telecommunications processes, with the exception of radio- and television-broadcasting to the public, and satellite services.’

(iv) the following indents are inserted after the fourth indent :

- “satellite earth station network” means a configuration of two or more earth stations which interwork by means of a satellite ;
- “satellite network services” means the establishment and operation of satellite earth station networks ; these services consist, as a minimum, in the establishment, by satellite earth stations, of radiocommunications to space segment (“uplinks”), and in the establishment of radiocommunications between space segment and satellite earth stations (“downlinks”) ;

- “satellite communications services” means service whose provision makes use, wholly or partly, of satellite network services ;

- “satellite services” means the provision of satellite communications services and/or the provision of satellite networks services ;’

(v) the second sentence of the sixth indent is replaced by the following text :

‘Those reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services, data protection and, in the case of satellite network services, the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunications systems and other space-based or terrestrial technical systems.’

(b) Paragraph 2 is replaced by the following :

‘2. This Directive shall not apply to the telex service or to terrestrial mobile radiocommunications.’

2. Article 2 is amended as follows :

(a) The first paragraph is replaced by the following :

‘Without prejudice to Article 1 (2), Member States shall withdraw all those measures which grant :

- (a) exclusive rights for the supply of telecommunications services otherwise than voice telephony and
- (b) special rights which limit to two or more the number of undertakings authorized to supply such telecommunication services, otherwise than according to objective, proportional and non-discriminatory criteria, or
- (c) special rights which designate, otherwise than according to such criteria, several competing undertakings to provide such telecommunication services.

They shall take the measures necessary to ensure that any operator is entitled to supply any such telecommunications services, otherwise than voice telephony’.

(b) The following paragraphs are added :

‘Member States shall communicate the criteria on which authorizations are granted, together with the conditions attached to such authorizations and to the declaration procedures for the operation of transmitting earth stations.

Member States shall continue to inform the Commission of any plans to introduce new licensing procedures or to change existing procedures’.

3. Article 6 is amended as follows :

- (a) The following paragraphs are added after the second paragraph :

'Member States shall ensure that any fees imposed on providers of services as part of authorization procedures, shall be based on objective, transparent and non-discriminatory criteria.

Fees, the criteria upon which they are based, and any changes thereto, shall be published in an appropriate and sufficiently detailed manner, so as to provide easy access to that information.

Member States shall notify to the Commission no later than nine months after publication of this Directive, and thereafter whenever changes occur, the manner in which the information is made available. The Commission shall regularly publish references to such notifications.'

- (b) The following paragraph is added :

'Member States shall ensure that any regulatory prohibition or restrictions on the offer of space-segment capacity to any authorized satellite earth station network operator are abolished, and shall authorize 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 his space segment capacity.'

Article 3

Member States which are party to the international conventions setting up the international organizations

Intelsat, Inmarsat, Eutelsat and Intersputnik for the purposes of satellite operations shall communicate to the Commission, at its request, the information they possess on any measure that could prejudice compliance with the competition rules of the EC Treaty or affect the aims of this Directive or of the Council Directives on telecommunications.

Article 4

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

Article 5

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

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 13 October 1994.

For the Commission

Karel VAN MIERT

Member of the Commission