

COMMISSION OF THE EUROPEAN COMMUNITIES

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DRAFT COMMISSION DIRECTIVE

amending Directives 88/301/EEC and 90/388/EEC
with regard to satellite communications

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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 Green Paper on a common approach in the field of satellite communications in the European Community¹ adopted by the Commission in November 1990 set out the major changes of the regulatory environment necessary to exploit the potential of this means of communications. This Satellite Green Paper called for, inter alia, full liberalisation 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 equipment², gave general support to the positions set out in the Commission's Satellite Green Paper, and considered as major goals: the harmonisation and liberalisation for appropriate satellite earth stations, including where applicable the abolition of exclusive or special rights in this area, subject in particular to conditions necessary for compliance with essential requirements.

1 COM(90)490 final, 20.11.1990

2 OJ No C 8, 14.1.92, page 1

3. The European Parliament, in its Resolution on the development of the common market for satellite communications services and equipment³, 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 harmonise and liberalise the satellite equipment and services markets.
4. Several Member States have already opened up certain satellite communications services to competition and introduced licensing schemes. Nevertheless, licences are still granted in some Member States on a discretionary basis or, in the case of operators competing with the telecommunications organizations, subject to technical restrictions such as a ban on connecting their equipment to the 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 equipment⁴ provides for the abolition of special or exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment. This does not cover all types of satellite earth station equipment.
6. On 19 March 1991 the Court of Justice of the European Communities upheld the Commission Directive on competition in the markets in telecommunications terminal equipment. 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. The Court did not, however, annul Article 3 of the Directive which requires Member States to ensure that economic operators have the right to import, market, connect, bring into service and maintain, terminal equipment. Therefore no Member State could limit the number of undertakings authorized within a particular area to provide these activities. There is consequently no need to further specify the special rights which should be abolished.

3 EP Resolution ... of

4 OJ No L 131, 27.5.1988, p. 73.

7. The existence of exclusive rights to import, market, connect, bring into service or maintain telecommunications equipment has the effect of restricting the free movement of satellite equipment, either directly because certain products are not marketed or connected, or indirectly because a monopoly has no incentive to align its prices on costs since there is no threat of competition from new entrants. Such exclusive rights constitute measures having equivalent effect to quantitative restrictions incompatible with Article 30 of the EEC Treaty. None of the specific features of satellite earth stations or of the markets 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 satellite earth station equipment importation, marketing, connection, bringing into service and maintenance.
8. Satellite earth station equipment must satisfy the essential requirements harmonized by Directive .../.../EEC [supplementing Directive 91/263/EEC in respect of satellite earth station equipment] 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 providing 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. Where these conditions are not harmonized, Member States will nevertheless have to adapt their rules. In both cases, 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 organisations so that licensed operators can offer their services to the public. It is for the Member States to ensure that these operators are entitled to connect this equipment to the public networks at appropriate access points for the provision of their services, in accordance with Community Law. pending the adoption by the Council of harmonized arrangements, it is for the national regulatory authorities to assess, within a reasonable period, the justification for any refusal to grant non-standard access to these networks without

prejudice to the remedies available to operators which have suffered damage.

10. Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services⁵ provides for the abolition of special or exclusive rights granted by Member States in respect of the provision of telecommunications services. However, the Directive excluded satellite services from its field of application.

11. On 17 November 1992 the Court of Justice of the European Communities upheld this Commission Directive. However, in so far as it relates to special rights, the Directive was declared void by the Court of Justice of the European Communities 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. Therefore, 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 and reserve the provision of such services to several undertakings authorized on a discretionary basis or whose number is limited on such basis, or that confer to one or more undertakings a particular lasting advantage over other operators in carrying on the economic activity in question in the relevant market. In the field of telecommunications services, such an advantage may consist, among other things, in immunity from the enforcement of judicial decisions, in a right to make compulsory purchases in the general interest, in derogations from ordinary law in the town planning field, or in the possibility of obtaining an authorization without having to go through the usual procedure. An exclusive right exists, on the other hand, where the Member State reserves the activity for a single undertaking.

12. Where the number of undertakings authorised to provide satellite telecommunications services is limited by a Member State through the existence of special rights and a fortiori of exclusive rights these also 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 the services concerned to and from other Member States. In

5 OJ No L 192, 24.7.1990, p. 10.

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 requirements applicable to satellite communications, separate legal treatment of the latter is not justified;

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

14. These exclusive rights and special rights, limiting the access to the market, also have the effect of restricting or preventing, to the disadvantage of users, the use of satellite communications that could be offered, thereby holding back technical progress in this area. Because of their investments' decisions based on exclusive special rights, the undertakings concerned are often in a situation where they 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 was prohibitive or for the purpose of data broadcasting and/or television broadcasting applications rather than using it as a fully complementary transmission technology in its own right. Thus the special rights concerned and the exclusive rights imply a restriction on the development of satellite communications and this is incompatible with Article 90, read in conjunction with Article 86 of the Treaty.

15. However, where the provision of satellite services is concerned, licensing or declaration procedures are justified in order to ensure compliance with essential requirements.

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, in particular taking into account the insignificant contribution of such services to the turnover of the Telecommunications organizations.

17. Notwithstanding the abolition of certain special and exclusive rights in respect of receive-only satellite stations not connected to the public network of a Member State, the provision of satellite broadcasting services to the general public provided via frequency bands foreseen in the Radio Regulations for both Broadcasting Satellite Services and Fixed-Satellite Services - 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 measures being adopted in accordance with Community law and existing international obligations so as to ensure that nationals of Member States are afforded equivalent treatment in third countries.
19. The offering of space segment capacity of national, private or international satellite systems to licensed satellite earth station network operators, is currently, in some Member States, still 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 satellite operators have full freedom to provide their services in the whole Community, once licensed in one Member State.

20. 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 sanctioned 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 organisations. As regards the establishment and use of separate systems, restrictive measures taken under international conventions signed by Member States could also have effects incompatible with Community law, by limiting supply at the expense of the user in the sense of Article 86 b). Within the international satellite organisations, reviews of the provisions of the relevant constituent instruments are underway, inter alia, in respect of improved access and in respect of the establishment and use of separate systems. In this context, Member States shall take all appropriate steps to eliminate incompatibilities with the Treaty provisions, where appropriate on the basis of a common position. In order to enable the Commission to carry out the monitoring task assigned to it by the EEC Treaty, instruments should be provided to help the Member States to carry out the obligations to cooperate enshrined in the first paragraph of Article 5, in conjunction with Article 234(2), of the Treaty.

21. Tests for the conformance of satellite earth stations of licensed operators other than the national operators, to specifications governing technical and operational access to the capacity of intergovernmental satellite systems, is currently carried out by the national Signatory of the nation upon which territory the station is operating. These conformance assessments are therefore performed by service providers which are competitors.

This is not compatible with Treaty provisions notably Articles 3f and 90, in conjunction with Article 86. Member States shall therefore ensure that these conformance assessments can be carried out directly

between the satellite earth station network operator concerned and the intergovernmental organisation itself, under supervision of only regulatory authorities.

HAS ADOPTED THIS DIRECTIVE:

Article 1

So as to make it applicable to satellite earth station equipment, Commission Directive 88/301/EEC of 16 May 1988 is hereby amended as follows:

1. In Article 1:

The last sentence of the first indent is replaced by the following:

"Terminal equipment also means satellite earth station equipment,".

The following indent is added after the second indent:

"- 'satellite earth station equipment' means equipment which is capable of being used either for transmission ("transmit") or for transmission and reception ("transmit/receive"), or for reception only ("receive-only") of radiocommunication signals by means of satellites or other space-based systems."

2. In Article 3:

The first indent is replaced by the following:

"- for satellite earth station equipment, refuse to allow to be connected to the public telecommunications network and/or to be brought into service where its equipment does not satisfy the applicable common technical regulations adopted in pursuance of Council Directive .../.../EEC [Supplementing Council Directive 91/263/EEC as concerns satellite earth station equipment] or, in the absence thereof, the essential requirements laid down in Article 4 of that Directive. In the absence of common technical rules or 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."

"- for other terminal equipment, refuse to allow to be connected to the public telecommunications network where such equipment does not satisfy the applicable 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."

Article 2

So as to make it applicable to satellite communications, Commission Directive 90/388/EEC of 28 June 1990 is hereby amended as follows:

1. In Article 1:

The second indent is replaced by the following:

"- 'special or exclusive rights' means the rights that are granted by a Member State and reserve the provision of a telecommunications service to certain undertakings only or confer on them a particular advantage other than those referred to in Article 92 of the EEC Treaty, through any legislative, regulatory or administrative instrument. An exclusive right exists where the service is reserved by the Member State for a single public or private undertaking within a given area; a special right exists where, the Member State, within a given area, designates, other than according to objective, proportional, transparent and non-discriminatory criteria, several competing undertakings or limits their number other than according to such criteria or grants one or more of them a lasting particular advantage, other than those referred to in Article 92 of the EEC Treaty,".

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 the public telecommunications network by means of telecommunications processes and satellite services, with the exception of radio and television broadcasting services to the public,".

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 services whose provision makes use, wholly or partly, of the transmission and routing of signals from one or more transmitting earth stations to one or more receiving earth stations by means of satellites;
- "- 'satellite services' means the provision of satellite communications services and/or the provisions of satellite networks services;
- "- 'authorisations' means individual authorisations such as licences or declarations or general regulatory authorisations in the form of e.g. legislation or class licences, which allow the provision of satellite communications services and/or satellite network services in a Member State, in conformity with Community Law;

The following is inserted at the end of the second sentence of the sixth indent:

" (...) as well as, 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."

Paragraph 2 is replaced by the following:

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

2. In Article 2:

The first paragraph is replaced by the following:

"Without prejudice to Article 1(2), Member States shall withdraw all exclusive rights for the supply of telecommunications services other than voice telephony as well as those special rights which grant on a discretionary basis to a limited number of competing undertakings access to the relevant markets. They shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services."

The following paragraph is added after the last paragraph:

"Member States shall communicate the criteria on which authorisations are granted as well as the conditions attached to such authorisations and to the declaration procedures for the operation of transmitting earth stations. As from six months after the date of adoption of this Directive and until such time as the Council harmonizes those procedures, Member States shall continue to inform the Commission of any plans to introduce new licensing procedures or to change existing procedures."

3. In Article 6, the following paragraphs are added after the second paragraph:

"Member States shall ensure that fees, imposed on service providers as part of authorisation regimes, shall be based on objective, transparent and non-discriminatory criteria.

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

The Member States shall notify to the Commission at the latest six months after notification of this amending Directive, and thereafter in case of change, the manner in which the information is made available. The Commission will regularly publish references to such notifications."

The following paragraph is added after the last paragraph:

"Member States shall ensure that any regulatory restrictions on the offer of space segment capacity open to any licensed satellite earth station network operator are abolished, and shall authorize within their territory the chosen satellite operator to verify that the satellite earth station network 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 or affect the aims of this Directive or of the Council Directives on telecommunications.

Article 4

Member States shall communicate to the Commission, not later than nine months after the adoption of this Directive, the measures taken to comply with Articles 1 and 2.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The arrangements for making such reference shall be laid down by the Member States.

Article 5

This Directive is addressed to the Member States.