

COMMISSION DIRECTIVE 1999/64/EC**of 23 June 1999****amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities****(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

- (1) Pursuant to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services ⁽¹⁾, as last amended by Directive 96/19/EC ⁽²⁾, Member States were required to lift special and exclusive rights for telecommunications services and infrastructures by 1 January 1998, subject to additional transition periods for some Member States. In particular, Article 4, as amended by Commission Directive 95/51/EC ⁽³⁾, required Member States to 'abolish all restrictions on the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony', and to 'ensure that interconnection of cable TV networks with the public telecommunications network is authorised for such purpose, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished'.
- (2) Directive 95/51/EC addressed two problems concerning undertakings to which Member States have granted the right to establish both cable TV and telecommunications networks. First, it stated that these undertakings are in a situation whereby they have no incentive to attract users to the network best suited to the provision of the relevant service. It was pointed out that the introduction of fair competition will often require specific measures that take into account the specific circumstances of the relevant markets. At the time of the adoption of Directive 95/51/EC, the Commission concluded that, given the disparities between Member States, the national authorities were best able to assess which measures were most appropriate, and in particular to judge whether a separation of these activities was indispensable. Secondly, the Commission concluded that detailed control of cross-subsidies and accounting transparency are essential in the early stages of liberalisation of the telecommunications sector. Article 2 of Directive 95/51/EC therefore required Member States to ensure in particular that telecommunications organisations providing cable TV infra-

structures kept separate financial accounts as regards the provision of public telecommunications networks and cable TV networks as well as their activities as telecommunications service providers. It was also stated that while Member States should at least impose a clear separation of financial records between those activities, full structural separation was preferable.

- (3) At the same time the Commission stated that in the absence of the emergence of competing home-delivery systems it would have to reconsider whether a separation of accounts was sufficient to avoid improper practices, and that it would assess whether such joint provision did not result in a limitation of the potential supply of transmission capacity at the expense of the service providers in the relevant area, or whether further measures were warranted. In this context the third paragraph of Article 2 of Directive 95/51/EC required the Commission to carry out, before 1 January 1998, an overall assessment of the impact, in relation to the aims of that Directive, of the joint provision of cable TV networks and public telecommunications networks through a single operator.
- (4) This Directive is based on the assessment carried out by the Commission pursuant to Article 2 to Directive 95/51/EC. In preparing that assessment, two studies were commissioned on the competition implications in telecommunications and multimedia markets of, on the one hand, joint provision of cable and telecommunications networks by a single dominant operator and, on the other, restrictions on the use of telecommunications networks for the provision of cable TV services. The studies concluded in particular that the joint ownership of telecommunications networks and cable TV networks by a single enterprise, without a high degree of competition in the local access markets, slows down the development towards a full multimedia infrastructure to the detriment of consumers, service providers and the European economy as a whole.
- (5) The Commission has adopted a communication on the assessment carried out as required by Directive 95/51/EC and 96/19/EC ⁽⁴⁾. In its review the Commission found that the optimal development of telecommunications and multimedia markets depends on four factors:

⁽¹⁾ OJ L 192, 24.7.1990, p. 10.

⁽²⁾ OJ L 74, 22.3.1996, p. 13.

⁽³⁾ OJ L 256, 26.10.1995, p. 49.

⁽⁴⁾ OJ C 71, 7.3.1998, p. 4.

service competition, infrastructure competition, infrastructure upgrade, and other types of innovation. It found that in the Community the joint provision of telecommunications and cable TV services by a single operator creates an asymmetric starting position for dominant telecommunications operators as compared with new entrants. This will act as a significant constraint on the optimal development of telecommunications markets. This analysis was also endorsed by the European Parliament in its resolution of 9 February 1999 ⁽¹⁾, concerning the draft of this Directive.

(6) The Treaty, and in particular Article 86 thereof, 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.

(7) Most European telecommunications organisations are still State-controlled companies and thus public undertakings as defined in Commission Directive 80/723/EEC ⁽²⁾, as last amended by Directive 93/84/EEC ⁽³⁾. In addition, whilst Community law provides for the withdrawal of exclusive rights for the provision of telecommunications networks and services, it does not prevent telecommunications organisations from continuing to benefit from certain special rights as defined by Directive 90/388/EEC, as amended by Directive 94/46/EC ⁽⁴⁾, beyond the date of full liberalisation. This is, for example, the case in the area of radio frequencies used for the provision of telecommunications networks and broadcasting transmission capacity. That is because telecommunications organisations continue to enjoy rights to use radio frequencies which they have historically been granted otherwise than according to objective, proportional and non-discriminatory criteria. Such regulatory advantages strengthen the position of those operators and continue to have a substantial effect on the ability of other undertakings to compete with the telecommunications organisations in the area of telecommunications infrastructure. Accordingly, those telecommunications operators remain undertakings covered by Article 86(1) of the Treaty. Moreover, certain Member States were granted additional implementation periods, which have not yet elapsed, for the abolition of exclusive rights for voice telephony and for the establishment and provision of public telecommunications networks.

(8) Most Member States have adopted measures granting to the telecommunications organisations special or exclusive rights for the provision of cable television networks. The rights can take the form either of an exclusive licence or of a non-exclusive licence where the number of licences is restricted otherwise than according to objective, proportional and non-discriminatory criteria.

(9) Article 82 of the Treaty prohibits one or more undertakings holding a dominant position from abusing that dominant position within the common market or a substantial part of it.

(10) Where Member States have granted a special or exclusive right to build and operate cable TV networks, to a telecommunications organisation in the same geographic area where it is dominant on the market for services using telecommunications infrastructure, that telecommunications organisation has no incentive to upgrade both its public narrowband telecommunications network and its broadband cable TV network to an integrated broadband communications network ('full-service network') capable of delivering voice, data and images at high bandwidth. In other words, such an organisation is placed in a situation whereby it has a conflict of interests, because any substantial improvement in either its telecommunications network or its cable TV network may lead to a loss of business for the other network. It would be desirable in those circumstances to separate the ownership of the two networks into two distinct companies since the joint ownership of the networks will lead those organisations to delay the emergence of new advanced communications services and will thus restrict technical progress at the expense of the users, contrary to Article 86(1) of the Treaty, read in conjunction with point (b) of the second paragraph of Article 82. As a minimum, all Member States should, however, ensure that telecommunications organisations which are dominant in the provision of public telecommunications networks and public voice telephony services and which have established their cable TV networks under special or exclusive rights operate cable TV networks in a separate legal entity.

(11) Moreover, where Member States grant to an undertaking the special or exclusive right to establish cable TV networks in the same geographical area as the one where it already provides public telecommunications networks, different forms of anti-competitive behaviour are likely to occur unless sufficient transparency of the operations of the undertakings is ensured. Notwithstanding the requirements of Community law with regard to accounting separation, some of which only entered into force with the implementation of the package of general measures opening up the Community's telecommunications markets in most Member States from 1 January 1998, in situations where serious conflicts of interest exist as a result of joint ownership,

⁽¹⁾ OJ C 150, 28.5.1999, p. 33.

⁽²⁾ OJ L 195, 29.7.1980, p. 35.

⁽³⁾ OJ L 254, 12.10.1993, p. 16.

⁽⁴⁾ OJ L 268, 19.10.1994, p. 15.

such separation has not provided the necessary safeguards against all forms of anti-competitive behaviour. In addition, the separation of accounts will only render financial flows more transparent, whereas a requirement for separate legal entities will lead to more transparency of assets and costs, and will facilitate monitoring of the profitability and the management of the cable network operations. The provision of telecommunications networks and cable TV networks are related activities. The position of an operator on either of those markets has an impact on its position on the other, and the supervision of its activities on those markets is more difficult. In addition, where a dominant telecommunications organisation has any cable TV interests, this has a discouraging effect on any other company because of the financial strength of the telecommunications operator. Also, the future financial prospects of a cable TV network which has not yet been built are uncertain for a company that is not yet established on the telecommunications or pay-TV services market. Consequently, it is essential that a dominant telecommunications organisation organises its cable TV network activities in such a way that it can be monitored in order to ensure that it does not use its resources so as to abuse its position. During the crucial phase of the full opening of the sector to competition, a legal separation between the operation of the public switched telecommunications network and the cable TV network, including backbone links, of the telecommunications organisations is the minimum requirement in order to ensure compliance with Article 86. In order to achieve this transparency, it is necessary that the networks be operated by separate legal entities which may, however, in principle be jointly owned. The requirement of legal separation would therefore be complied with if the cable TV operations of a telecommunications organisation were transferred to a fully-owned subsidiary of the telecommunications organisation.

accordance with Community law and should not, therefore, be governed by this Directive: this is, furthermore, in keeping with the principle of separating the provisions dealing with transmission from those dealing with content, which is an essential point of the Commission Communication of 9 March 1999 ⁽¹⁾ on the results of the public consultation on the Green Paper entitled 'The convergence of the telecommunications, media and information technology sectors'.

- (14) Taking into account current market evolution as well as the introduction of new technologies, competition in the local loop may emerge in certain Member States. In such an event, it would be necessary to review whether the maintenance of the legal obligation to separate legal entities for the telecoms and cable TV networks owned by a single company would still be necessary in view of the attainment of the objectives pursued. Given that the market situation is different in each Member State and is likely to evolve differently, such a review process should be carried out in a sufficiently flexible way to take into account the situation in each national market. National regulatory authorities should have the right to request the Commission to perform such a reassessment, in particular when asked to do so by the relevant operator. Such a request should include a detailed description of the development of the market structure in the Member State concerned. In such a case, given the legitimate interest of competitors in the relevant markets, the information provided should be made available to any interested party on demand, due regard being had to the legitimate interest of undertakings in the protection of their business secrets.
- (15) Directive 90/388/EEC should therefore be amended accordingly.
- (16) Member States should refrain from introducing new measures with the purpose or effect of jeopardising the aim of this Directive,

HAS ADOPTED THIS DECISION:

Article 1

- (12) The Commission will examine on a case-by-case basis whether it would be compatible with the principle of proportionality to require individual Member States to take further measures. The decisions to be taken in respect of specific cases could provide for measures including the opening of the cable operator to the participation of third parties, or the requirement to sell off that entity altogether.

- (13) The distribution of audiovisual programmes intended for the general public via telecommunications networks, and the content of such programmes, will continue to be subject to specific rules adopted by Member States in

Article 9 of Directive 90/388/EEC is hereby replaced by the following:

'Article 9

Each Member State shall ensure that no telecommunications organisation operates its cable TV network using the same legal entity as it uses for its public telecommunications network, when such organisation:

- (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 telecommunications networks and public voice telephony services; and
- (c) operates a cable TV network established under special or exclusive right in the same geographic area.'

⁽¹⁾ COM(1999) 108 final.

Article 2

The Commission shall review the application of this Directive when it considers that the requirements of this Directive have been complied with and the objectives pursued attained, and in any case not later than 31 December 2002.

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.

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.

Article 3

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

Article 4

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

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 23 June 1999.

For the Commission

Karel VAN MIERT

Member of the Commission
