II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 1996

concerning the additional implementation periods requested by Ireland for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets

(Only the English text is authentic)

(Text with EEA relevance)

(97/114/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement establishing the European Economic Area,

Having regard 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], and in particular Article 2 (2) thereof,

Having regard to Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications [3], and in particular Article 4 thereof,

Having given notice [4] to interested parties to submit their comments in accordance with Article 2 (2) of Directive 90/388/EEC and Article 4 of Directive 96/2/EC,

Whereas:

A. THE FACTUAL BACKGROUND

I. The Irish request

(1) The Irish Government has, by letter of 15 May 1996, requested additional implementation periods:

— until 1 January 2000, regarding the abolition of the exclusive rights currently granted to Telecom Eireann as regards the provision of voice telephony and the underlying network infrastructure, instead of 1 January 1998 as provided in Article 2 (2) of Directive 90/388/EEC,

— until 1 July 1999, regarding the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service,

(b) infrastructures provided by third parties, and

(c) the sharing of networks, other facilities and sites,

instead of 1 July 1996 as provided in Article 2 (2) of Commission Directive 90/388/EEC,

— until 1 January 2000, regarding the direct interconnection of mobile telecommunications networks, instead of immediately as provided in Article 3d of Directive 90/388/EEC.

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 74, 22. 3. 1996, p. 13.
[3] OJ No L 20, 26. 1. 1996, p. 59.
[4] OJ No C 169, 13. 6. 1996, p. 5.

This request is in line with Council resolutions 93/C213/01 of 22 July 1993 [1] and 94/C379/03 of 22 December 1994 [2].

(2) The Irish Government considers these additional implementation periods necessary for the following reasons:

2.1. Ireland has been carrying out major development of the telecommunications networks; this has required significant capital investment, involving high levels of debt; Telecom Eireann has been constrained in its ability to achieve the necessary structural adjustments, particularly of tariffs, because of those high debt levels, the high cost of delivering telecommunications services in Ireland and Telecom Eireann's high cost-structure.

2.2. Further structural adjustments are required in order to enable Telecom Eireann to function effectively in a fully competitive market, but in a way that ensures the maintenance of universal service, an increase in telephone density and reductions in Telecom Eireann's debt and cost structure; these adjustments involve:

(1) further development of Ireland's telecommunications networks,

(2) further adjustment of Telecom Eireann's tariff structure,

(3) transformation of Telecom Eireann, in particular, further development of its products and services for the home and international sectors, restructuring its cost base and completion of the management of its change into a market-driven and customer-focused organization.

With the assistance of a strategic partner this transformation which would otherwise take more time could be achieved before 1 January 2000.

2.3. Liberalization of infrastructure significantly in advance of the liberalization of voice telephony would enable providers of liberalized services to erode Telecom Eireann's customer base.

2.4. In relation to mobile interconnection, freedom of interconnection by mobile operators would enable them to bypass the Public Switched Telephone Network (PSTN) for trunk and international traffic and furthermore enable them to capture a significant share of Telecom Eireann's international call traffic, as a result of which Telecom Eireann's revenues would be seriously reduced and the structural adjustment programme disrupted.

2.5. The derogation sought will not impede the development of competition in other areas of the telecommunications sector in Ireland.

(3) The Irish Government provided a detailed description regarding the capital investments required for the development of the network, the tariff rebalancing planned, as well as the restructuring of Telecom Eireann in the annex to its letter of 15 May 1996.

(4) The Irish Government announced that, if this derogation was granted, it would in any case implement the amendments made to Directive 90/388/EEC by Directive 96/19/EC in national law according to the following time table:

— fourth quarter 1996: establishment on a fully stand-alone basis of a telecommunications regulatory authority with appropriate arrangements for industry funding,

— first quarter 1998: publication of proposed legislative changes to implement full competition and remove all restrictions by 1 January 2000, including proposals for funding universal services,

— third quarter 1998: target for achievement of legislative changes,

— fourth quarter 1998: communication to the Commission of draft licences for voice telephony and/or underlying network providers,

— first quarter 1999: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant EU Directives,

— July-December 1999: award of licences and amendment of existing licences to enable competitive provision of voice telephony and unrestricted interconnection of mobile networks from 1 January 2000.

The request was delivered to the Commission services on Wednesday 15 May 1996.

II. The comments received

(5) Fourteen undertakings as well as the Irish Congress of Trade Unions provided comments following the notice published by the Commission on 13 June 1996.

[1] OJ No C 213, 6. 8. 1993, p. 1.
[2] OJ No C 379, 31. 12. 1994, p. 4.

(6) According to these comments:

— the Irish authorities have not established that the existing network is, in fact, so undeveloped that they require any derogation period before full liberalization. They have failed to satisfy the criteria established in Directive 90/388/EEC as amended, and in Article 2 (2) thereof in particular. A modern basic network is now in place and Telecom Eireann's real concern is not to shorten waiting lists but rather to 'encourage' demand,

— although Ireland's telecommunications networks have been less developed than those of some other EU Member States, much progress has been made in recent years. Some of this progress has been thanks to EU funding (in the order of ECU 65 to 70 million for the period 1989 to 1999). Telecom Eireann has been successfully increasing penetration: between 1 April 1994 and 31 March 1995 line connections increased by 6 % which represents a growth of new line connections of 22 %,

— Telecom Eireann's call tariffs have reduced by 34 % in real terms between 1986 to 1994; total traffic has increased by 7,4 % in 1994 to 1995,

— the commitments to tariff restructuring and to improving Telecom Eireann's cost structure are so vague and general that they lack credibility,

— the arguments put forward in the application relating to Telecom Eireann, particularly its indebtness, are greatly exaggerated and seriously misleading. The latest annual accounts for that company reveal that its financial position is in many respects surprisingly healthy,

— as regards the high cost of delivering services in Ireland, any competing operator would be affected by such costs,

— the projected investments of Telecom Eireann to complete universal telephone coverage (i.e. an increase of investment by approximately 43 %) are over estimated. These investments cannot be considered as necessary before liberalization, since Ireland concedes it already has a modern network, including Integrated Services Digital Network (ISDN) capabilities, which is as developed as the networks of other telecommunications organizations in Europe. These investments would aim at the establishment of nationwide fibre-optic Synchronous Digital Hierarchy (SDH) networks, implementation of non-hierarchical networks and establishment of low and high bandwidth copper access systems. To date none of the other EU countries have networks meeting such requirements. Moreover, some doubts were cast on the extent of the universal service obligation entrusted to Telecom Eireann. According to the Irish Telecommunications Act, Telecom Eireann is only obliged to satisfy user needs subject to its appreciation that such requests are 'reasonably practicable'. The fact that Telecom Eireann would want to improve the level of the telecommunications services it provides results from management decisions and not from a State measure,

— the introduction of a new partner, PTT Telecom/Telia, for Telecom Eireann, announced in June, should not be allowed to delay the introduction of competition,

— derogations would sanction Telecom Eireann's continuing dominance in the Irish telecommunications market, increasing the danger of abuse of such dominance. Telecom Eireann would actually discriminate against providers of liberalized services as regards for example volume discounts that are granted to other customers with a comparable volume of traffic; it would, moreover, underinvest in street payphones and delay the provision of competing companies,

— a market in which operators are able to construct alternative networks and provide value-added and data transmission services, will create a stable environment which will give incentive to Telecom Eireann to restructure its operations and complete its transition to a market-driven and customer-focused organization quickly and effectively. This environment will ensure that Telecom Eireann's voice telephony revenue streams are protected, and consequently that it can service its debt requirements fully. When full liberalization takes place, operators will be able to respond quickly to consumer needs as competing infrastructures will already have been developed,

— the derogation on the use of alternative infrastructure requested would in particular hurt cross-border traffic between Northern Ireland and Ireland. The derogation sought would prevent operators in Northern Ireland from being able to maintain margins on cross-border data services and closed user groups calls,

— the Irish Congress of Trade Unions fears that if Telecom Eireann is not ensured sufficient revenues to sustain the unavoidable increasing level of investments, the reducing of tariffs and remuneration of shareholders, the Irish Government will be faced with huge ongoing additional costs. This would damage the prospect of a new social partnership agreement coming up for negotiation in December and could, as a consequence, lead to the Union's withdrawal of cooperation with the liberalization process in this crucial strategic industry.

(7) By letter dated 29 July 1996, the Commission transmitted to the Irish authorities the 15 comments of these third parties, received on the occasion of the publication of the Commission's notice of 13 June 1996 opening the procedure.

In response to the abovementioned comments the Irish authorities by letter of 19 September 1996 stated *inter alia* that:

— Telecom Eireann is and will continue to be subject to all the normal European and Irish competition rules and any aggrieved party has available the normal remedies which apply. Any suggestion that a derogation would alter this is incorrect,

— Telecom Eireann's debt position, while it has improved, is still a serious constraint. The ratio of total debt to total equity (gearing) at the end of the fiscal year 1995/96 was 139,9 for Telecom Eireann compared to, for example 8,9 for British Telecom, 124,3 for Telefónica de España, 65,0 for Portugal Telecom, 39,4 for OTE, 59 for France Telecom, 242,5 for Belgacom, and 405,9 for Deutsche Telekom,

— ESAT Digifone would be at a particular advantage if it could run services other than GSM over its own infrastructure,

— telephone penetration rates are a simple measure of network development and universal service and these are clearly well behind EU averages. This gap cannot be completely eliminated before the year 2000. The gap is particularly evident outside the main urban areas where penetration rates remain low and the local access network, traditionally the most costly part of the network to develop, will require significant upgrading to enable connection and adequate quality of service,

— in the year ended 4 April 1996, total operating costs represented 55 % of total revenue. Staff costs in turn represented well over 50 % of operating costs. The main focus of cost reduction is on reducing the numbers of staff employed by the company. These staff severance schemes must be voluntary in nature and accordingly can only be implemented successfully over a period of years. The company is also actively examining the possibility of outsourcing in a number of areas but this must be managed carefully in conjunction with staff reduction programmes. For that reason a period of three years is required to make the necessary changes in the cost structure,

— connection and rental are loss-making for Telecom Eireann. This needs to be tackled on two fronts: revenue increase and cost reduction,

— apart from the average price levels for rentals and calls, the structure of prices needs to be revised. Two examples of possible change are:

(i) rental reductions for low-income or low-calling-rate users,

(ii) introduction of duration-based charges with no minimum fee, or low initial charge.

In both cases time is needed to alter structures to a more market-oriented system.

III. Application of the Article 90 (2) exception

(8) Article 90 (2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The application of this provision in the telecommunications sector has been specified in Directive 90/388/EEC. Under this Directive, as amended by Directives 96/2/EC and 96/19/EC, the Commission shall grant, on request, to a number of Member States the right to maintain during additional time periods the exclusive rights granted to undertakings to which they entrust the provision of a public telecommunications network and telecommunications services, as well as restrictions on competition, in so far as these measures are necessary to ensure the performance of the particular tasks assigned to the undertakings benefiting from exclusive rights.

(9) As regards the provision of public telecommunications services and networks, it appears that Telecom Eireann is a telecommunication organization within the meaning of Article 1 of Directive 90/388/EEC, since it is entrusted with a service of general economic interest pursuant to Section 14 (1) of the Irish Postal and Telecommunications Services Act of 1983, requiring it:

(a) to provide a national telecommunications service within the State and between the State and places outside the State,

(b) to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient telecommunications services and, so far as the company considers reasonably practicable, to satisfy all reasonable demands for such services throughout the State, and

(c) to provide such consultancy, advisory, training and contract service inside and outside the State as the company thinks fit.

(10) This provision in fact permits Telecom Eireann to refuse to provide telecommunications services where it is not reasonably practicable i.e. where it is not reasonably capable of being done or put into effect. According to the Irish Government, this exception to the general duty imposed by Section 14 (1) would have nevertheless been interpreted narrowly. Also relevant is Section 15 (1) (a) of the Act which imposes an obligation on the company to provide these services at minimal charges.

(11) Telecom Eireann operates on the basis that it shall meet all reasonable requests for telephone service within standard delivery terms, irrespective of location. In addition, the charges for connection to the telephone network, rental charges and call charges are levied on the same basis nationally. Telecom Eireann also provides and maintains uneconomic public pay phones and provides access to emergency services without charge to the caller. These tasks must be implemented irrespective of the specific situations or the degree of economic profitability of each individual operation.

(12) The question which falls to be considered is therefore the extent to which the requested temporary exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to continue performing its task of general interest and in particular to have the benefit of economically acceptable conditions.

(13) The main starting point for such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

(14) Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

(15) However, the restrictions on competition are not justified as regards specific services dissociable from the service of general interest — i.e. voice telephony — which meet special needs of economic operators in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

(16) Some comments mention that in practice new entrants could also contribute to the relevant tasks of general economic interest. In the short term, however, Telecom Eireann will continue to be the only undertaking able to deliver a universal telephone service to residential users in scarcely populated areas. For this reason, the Commission examined, regarding each of the additional implementation periods requested, whether their granting is necessary to allow Telecom Eireann to perform its task of general interest and to have the benefit of economically acceptable conditions.

B. LEGAL ASSESSMENT

I. Request for an additional implementation period regarding voice telephony and underlying network infrastructure

Assessment of the impact of the removal of the exclusive rights currently granted to Telecom Eireann

(17) Voice telephony is defined in Article 1 of Directive 90/388/EEC. The extent of this service has been specified in the Commission's communication 95/C275/02 to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the

markets for telecommunications services [1] and in correspondence between the Commission and the Member States. Since the reservation of voice telephony services is an exception to the general rule of competition, it must be interpreted narrowly.

(18) Pursuant to the general principle of proportionality, any additional implementation period granted must be strictly proportional to what is necessary to achieve the necessary structural adjustment, mentioned by the Irish Government, with a view to the introduction of full competition, i.e.:

(i) further development of Telecom Eireann's telecommunications networks;

(ii) further adjustment of Telecom Eireann's tariff structure;

(iii) transformation of Telecom Eireann, in particular, further development of its products, restructuring of its cost base and completion of the management of its change into a market-driven and customer-focused organization.

(19) The purpose of the exclusive rights granted to Telecom Eireann was to ensure the provision of universal voice telephony and the establishment of a public telecommunications network. It allowed the latter not only to finance more cheaply — it could borrow under State guarantee and 2 % of its fiscal assets were financed by grants from the European Regional Development Fund — important investment in the digitalization of its network, but also to maintain higher tariffs and a less efficient cost structure — in particular due to overstaffing — than it would in a competitive environment. As one of the comments [2] points out, 'the legacy of over-staffing specifically in the flagged age group 35 to 44 was created by Telecom Eireann in carrying out their modernization programme in the early 1980s employing in-house staff as against having the work done by private contractors'.

(20) This shows that exclusive rights are not an adequate means to further the development of the telecommunications network. In its resolution of 22 July 1993, the Council in this regard acknowledged that the maintenance of these exclusive rights should be terminated by 1 January 1998, with a transitional period for those Member States requiring additional time to implement structural adjustments.

(21) The required structural adjustments must be examined in the light of the following circumstances:

— the need to further rebalance tariffs,

— the low telephone density,

— the high debt and cost structure of Telecom Eireann.

(a) Rebalancing of tariffs

(22) Ireland states that since 1990 all charges (excluding VAT and discounts) including rentals and local calls have fallen significantly in real terms. Despite this achievement, Ireland claims that Telecom Eireann still has a relatively high level of telephone prices and that certain prices are still out of alignment with costs. Telecom Eireann has set an objective of achieving price levels in the lowest quartile of OECD countries by 2000. Rebalancing by adjusting charges to bring prices closer still to underlying costs is still required also to achieve this objective. Ireland is proceeding with a gradual and flexible approach to tariff rebalancing, while maintaining safeguards for consumers in terms of price and quality of service. Due to the limits of the proposed price-cap regime, Telecom Eireann needs about five years to implement the increases of reduced-rate local calls, i.e. from 1996 to 2000. On the basis of the most likely forecasts, Ireland believes that Telecom Eireann would be in a strong enough position to survive liberalization in 2000.

(23) The following table, based on information in the Commission's possession [3], comparing certain telephone tariffs of Telecom Eireann and the equivalent figures for an operator which has already rebalanced its tariffs [4], supports the arguments of the Irish Government:

[1] OJ No C 275, 20. 10. 1995, p. 2.
[2] Coin and card technology (CCT), p. 4.
[3] Tarifica study implemented for European Commission — DG XIII.
[4] A direct comparison of the telephony tariffs of Telecom Eireann with the Community average (which is not a weighted average) would not be appropriate, given that the tariff structures of the 15 Community TO's are still widely divergent and in addition, given that they are currently in the process of rebalancing tariffs.

Tariffs in ecu on 1 January 1996	Telecom Eireann	British Telecom	Difference TE/BT (BT = 100)
Bi-monthly rental	29,57 (*)	19,53	151,4
Local calls, resp. 3/10 minutes	0,14 – 0,14	0,06 – 0,19	233,3 – 73,7
(Peak hours)	0,14 – 0,56	0,14 – 0,47	100 – 119,1
Trunk calls, resp. 3/10 minutes	1,12 – 3,37	0,35 – 1,16	320 – 290,5
Intra EC, resp. 3/10 minutes	1,80 – 6,00	1,29 – 4,31	139,5 – 139,2

(*) Social payments are provided to low-income customers

(24) Given that due to technical progress in the network, cost is increasingly less dependent on distance, cost orientation of tariffs means as a general rule that prices are adjusted such that revenues are rebalanced with costs, i.e.:

— connection and rental revenues cover fixed costs (plus a standard margin),

— local call revenues cover local call costs (plus a standard margin),

— trunk call revenues cover trunk calls (plus a standard margin),

— international call revenues cover international call costs (plus a standard margin).

Consequently telecommunications organizations must raise bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long distance calls. Telecom Eireann has made some progress on rebalancing local charges, but needs additional time to decrease trunk and international charges.

(25) According to one comment [1], the overall level of the tariffs for the provision of telecommunications services is not relevant in assessing the extent to which tariff rebalancing has been achieved. But even using the methodology proposed in this comment, it still appears that in Denmark and the Netherlands, which decided to liberalize voice telephony in advance of 1 January 1998, imbalance between, on the one hand, rental and local call tariffs and, on the other hand, long distance and international calls is much further reduced than in Ireland.

(26) It is argued in the same comment that a high level of tariffs may indeed result from specific circumstances, such as a very low density of population which renders the provision of telecommunications services proportionately more expensive, when calculated *pro capita*. This might be the case. However, BT and MCL provide voice telephony from the UK to Ireland at prices which can be less than half those of Telecom Eireann [2]. It is therefore reasonable to expect that if voice telephony were liberalized immediately, amongst others these companies would — at least in certain areas of Ireland — provide voice telephony at tariffs which are significantly lower (at least as regards trunk and international calls) than those of Telecom Eireann and thus either force the latter to reduce dramatically its tariffs in the relevant market segments which are the most profitable, or lose subscribers to the new entrants.

(27) The continuation of the gradual approach envisaged by Ireland for further tariff rebalancing seems therefore justified, in view of the rebalancing (bi-monthly rental and local charges) already achieved in 1993 and the firm commitments to complete the process by reducing trunk and international tariffs by the year 2000. Moreover, to accelerate the process of rebalancing tariffs would pose related political problems since, in this case, an increase in local communication tariffs would be necessary.

(b) Telephone density

(28) Telecom Eireann has achieved one of the fastest telephone penetration growths in the EU over the last five years. Today, Ireland nevertheless still has a

[1] Esat Telecom, p. 34, No 49.

[2] ITL, p. 8.

relatively low telephone penetration in comparison with most of the EU Member States. Some comments are rightly emphasizing that telephone penetration would improve as a result of competition. It may nevertheless be assumed that in a first stage new entrants in the market will concentrate mainly on high users to acquire sufficient profitability before focusing on new users. The argument of the Irish Government that enabling Telecom Eireann to pursue its development programmes to further improve telephone density will benefit the public seems therefore acceptable, even if the additional time given to Telecom Eireann will enable it to strengthen its position by improving its efficiency. This improvement will to a certain extent also benefit future new entrants since the more users connected to the public telecommunications networks, the more calls will be generated both for the incumbent and for the new entrants.

(29) In fact, the figures provided by the Irish Government also show that although telephone penetration is still low in Ireland, remaining demand is also limited. It appears in particular that waiting lists have dramatically decreased and this, notwithstanding State social welfare payments involving financial support for telephone rental and call charges for qualifying pensioners. Currently one in eight of all customers is already on such a scheme.

(30) The development programmes with a view to increasing penetration can therefore justify a continuation of the current exclusive privilege of Telecom Eireann for a limited duration. Taking into account a continuation of the past yearly increase of Telecom Eireann's density of 2 % during the coming years in 1999, Telecom Eireann would reach the penetration currently achieved in Member States, such as Italy or Belgium, which do not qualify for additional implementation periods. A longer additional implementation period would not be justified, even if the increase of Telecom Eireann's density slows down during the coming years. As mentioned, it is indeed possible that, due to a combination of amongst others demographic (1) and economic factors specific to Ireland, there is actually no demand for further telephone lines by households. Further market growth would then depend on the offer of new services, and the growth of business customers, which can best be accelerated by the introduction of competition and therefore would not justify any additional implementation period.

(c) Debt and cost structure

(31) Ireland emphasizes two liabilities of Telecom Eireann in a future competitive environment: its low productivity (one employee for 99 lines) and its level of debt (£ Irl 862 million at end of March 1995 giving a debt/equity ratio of 1,9). Between 1985 and 1995, Telecom Eireann had already significantly improved productivity, which is reflected in the reduction of its staff costs from 42 % of its turnover to 30 %. Staff numbers have been reduced from 18 000 to under 12 000. A low number of lines per employee seems, nevertheless, a necessary result of the low population density in Ireland. International comparisons show that operators in countries with low population density retain a smaller number of lines per employee even after competition is introduced and where digitalization is very advanced. The planned increase of telephone density over the next years will increase productivity expressed in numbers of lines per employee before 1999 up to the level currently achieved in Finland. Overstaffing is nevertheless a common feature of telecommunications organizations at the eve of their privatization. The Commission, however, considers that it could not justify any additional implementation period extending after 1 January 1999.

(32) As regards the debt structure, the figures provided by the Irish Government show that, since 1993, the financial situation of Telecom Eireann has improved significantly. The submission states Telecom Eireann's debt at the end of the financial year 1995/1996 as £ Irl 700 million giving a debt/equity ratio of 1,4. Moreover, Telecom Eireann will receive a total of £ Irl 220 million of the proceeds of the sale. £ Irl 150 million will be injected on closing and the balance (£ Irl 70 million) in approximately three years' time on exercise of the option by the strategic partners or public offering. The balance of the funds over and above this £ Irl 220 million will be used by the State to reduce its liability to the pension fund. This will enable Telecom Eireann to use its own resources to further reduce its debt until the end of 1998. At this date the debt/equity ratio of Telecom Eireann will thus not be out of line with those of operators in coun-

(1) Household size in Ireland is, according to the Irish request, 3,2 people, e.g. larger than in most other EU Member States. This reduces the potential for additional residential penetration.

tries which will open their market to competition, for example the debt/equity ratios of Deutsche Telekom and Belgacom in 1995 were [1] respectively 2,5 and 1,4. Consequently, the debt of Telecom Eireann could not justify an additional implementation period extending over 1998.

Effect on trade

(33) The aim of the postponement of the liberalization of voice telephony is to delay the entry of competing carriers in the voice telephony market. Moreover, as pointed out by a comment [2], this will affect trade since large international players including AT&T, BT, C&W, Global One/Sprint and France Telecom are already present or interested in Ireland. The emergence of alternative Irish carriers will also be delayed, which will eventually reduce its possibilities to expand outside Ireland, given that in the mean time new entrants will enjoy a two-year head start in the other Member States which will liberalize their markets by 1 January 1998.

(34) Although the granting of a derogation to Ireland would foreclose the telecommunications market in Ireland for two years, the negative effect on trade in the Community will be reduced due to:

— the limited size of the Irish telecommunications market in comparison to the Community market. One could expect indeed that on 1 January 1998, massive investments will mainly occur in the more developed Member States, such as Germany, the Netherlands and France where a higher return on investment might be expected,

— the duration of the derogation requested: the establishment of new public telephony operators requires a preparation of many months. The harm done to potential investors by an additional implementation period of 24 months will be limited if, in the mean time, they can already plan investments, so as to be ready to be operational in advance of 1 January 2000.

(35) Such effect will further be reduced in the following circumstances:

— Telecom Eireann is not expanding its operation in Member States which have liberalized their markets. If this were the case, the derogation enabling Telecom Eireann to maintain higher prices on its domestic market could be used not only to achieve the necessary adjustments but also to cross-subsidize operations in foreign markets. This would obviously distort competition at the expense of the incumbents and of other new entrants in the relevant Member States and would be against the Community interest. In this regard, any involvement of Telecom Eireann alongside its strategic partners PTT Telecom and Telia, or Unisource, in investments outside Ireland should, during the additional time period, be achieved in a fully transparent way and at market conditions. This should be reviewed by an independent auditor,

— the Irish Government publishes the licensing conditions one year in advance of full liberalization and ensures that Telecom Eireann publishes in parallel the interconnection conditions to be applied to new entrants,

— the additional implementation period regarding the use of own/alternative infrastructures is reduced as mentioned below. This would allow potential new entrants to operate and provide already liberalized telecommunications services on such networks in preparation for full competition, and in particular to provide voice services to corporate networks and closed user groups via such networks,

— the Irish Government takes all measures necessary to ensure that Telecom Eireann does not make use of its additional statutory protection to extend its dominant position in neighbouring or ancillary markets such as the public payphone market or the cable TV industry,

— without prejudice to the impact assessment provided for in the third paragraph of Article 2 of Commission Directive 95/51/EC [3], the Irish Government ensures, in the short term, that Cablelink is managed at arm's length of Telecom Eireann as long as Telecom Eireann remains the controlling shareholder.

Conclusion

(36) On the basis of the above assessment, the Commission considers that the negative effects on trade which would result from the granting to Ireland of an additional implementation period until 1 January 2000 as regards the abolition of the exclusive rights currently granted to Telecom Eireann for the provision of voice telephony and public network infrastructure instead of 1 January 1998, pursuant to Article 2 (2) of Directive 90/388/EEC, are not incompatible with the interest of the Community, in so far as the circumstances set out above are fulfilled.

[1] Cable & Wireless, p. 4.
[2] Esat Telecom, p. 13.
[3] OJ No L 256, 26. 10. 1995, p. 49.

II. Request for an additional implementation period regarding the lifting of restrictions on the provision of already liberalized telecommunications services on own and alternative infrastructure

Assessment of the impact of the immediate lifting of restrictions

(37) Ireland states that the lifting of restrictions on the use of alternative infrastructure before 1 July 1999 would enable providers of liberalized services to offer customers speech calls and connect such calls with the public network in both directions. This practice would be indistinguishable from the provision of voice telephony, apart from minor differences such as numbering and interconnection charges. As a result Ireland fears that there would be effective competition for voice telephony, despite the voice telephony derogation.

(38) Ireland adds that such lifting of constraints may also cause Telecom Eireann losses of revenue contribution from leased lines. While not all such revenue would be lost, there would be a substantial impact in that those consumers remaining as Telecom Eireann's customers would expect lower prices. Ireland nevertheless acknowledges the need to advance the lifting of restrictions on alternative networks in order to ensure that future competitors can build and fund networks in sufficient time to allow for full competition by the time voice telephony is liberalized. Given the small size of Ireland and the concentrated nature of most profitable customers, Ireland considers that the liberalization of alternative infrastructures six months before voice telephony would not compromise the ability of new entrants to compete fully from 1 January 2000.

(39) Comments state that service-providers would be particularly affected if they were not allowed, as the second mobile operator is, to use alternative infrastructures to save significant leased-lines costs for the provision of their services. Conversely, the second GSM operator mentions that, given that it is not allowed to convey third-party traffic, the decision to establish a fully separate backbone network involves high sunk costs and substantial risks given that excess capacity cannot be leased to other providers of already liberalized services. If Ireland was granted the right to postpone the liberalization of alternative infrastructures, this would therefore also affect competition on the GSM markets.

(40) The argument that restrictions must be maintained on the provision of alternative network capacity for the provision of alternative infrastructures to prevent authorized providers of liberalized services to circumvent the voice telephony monopoly cannot be accepted. As a matter of fact, as the Commission stated in its Communication on the status and the implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, such 'unofficial' by pass will not occur to any significant extent without being noticed by the relevant Member State. A service which is offered to the public must be, *ipso facto,* public knowledge.

In particular, given that any commercial offer would normally involve advertising (of the services available) or, at the very least, issuing price lists, contracts and invoices, such by pass should be evident from an early stage.

New operators generally have shown that they will respect the voice telephony monopoly. Service-providers do not want to take the risk of having their authorization revoked and not being able to fulfil their obligations towards their clients. Many service-providers did therefore, before starting their services, investigate first the matter with the national regulatory authorities or with the Commission services.

(41) The use of alternative networks for the provision of already liberalized services will not alter this state of affairs. Alternative networks must indeed be considered to be public switched telecommunications networks within the meaning of Directive 90/388/EEC, where they are upgraded to switched networks providing voice to any interested subscriber and are interconnected with the public switched telephone network of the telecommunications organizations. The termination points of such alternative networks should likewise be considered as termination points of public switched networks and voice provided to the public from or to such points would then become voice telephony, which according to Article 2 of that Directive can further be reserved to the telecommunications organization, in this case Telecom Eireann.

(42) Moreover, Ireland itself recognizes that by pass would be distinguishable from legal voice telephony, due to differences as regards numbering and interconnection charges. Since the amendment of Ireland's regulatory framework, and in particular the new independent regulatory authority, will only

be operational early next year, one could, however, not exclude that in the mean time, Ireland could face certain difficulties in the effective enforcement of the voice telephony monopoly. For this reason, an additional implementation period until the entry into force of this new regulatory framework, provided it is clearly delimited in time, could be justified.

(43) The second argument put forward by Ireland, i.e. that such lifting of constraints may also cause Telecom Eireann losses of revenue contribution from leased lines can also not be accepted. It is true that, under its exclusive privilege to provide network infrastructure, Telecom Eireann is enjoying guaranteed revenues from the provision of leased lines to end-users and providers of liberalized telecommunications services (except GSM mobile telephony, where the second operator prefers to establish its own links). However, as the Commission stated in its Green Paper on the liberalization of telecommunications infrastructure and cable television networks — part one — principles and timetable (COM(94) 440 final, 25.10.1994), Directive 92/44/EEC [1] requires in particular that leased lines must be offered on a cost-oriented basis. Given this obligation and given that Member States must comply with it, the opening of alternative supply is not expected to alter the market position of TO's in this area substantially.

(44) Although allowed in Directive 92/44/EEC, Ireland did not request any deferment in favour of Telecom Eireann for the implementation of the obligation of cost-orientation of leased lines. On the contrary, on 8 March 1996, Ireland informed the Commission pursuant to Article 4 of Directive 90/388/EEC that it had authorized Telecom Eireann to increase its leased lines tariffs as from 1 February 1996 as regards new circuits and to existing circuits at the next billing date after 31 March 1996. The justification given for this increase was that leased lines charges had not been adjusted for many years and that Telecom Eireann had been recording significant losses on its leased lines service. International comparisons show that Telecom Eireann's tariffs are, even after the increases, still less than the EU average (e.g. on 1 January 1996 monthly rental 50 km circuit: ECU 265 (EU average: ECU 380) and connection charge: ECU 489 in comparison with EU average of ECU 596 [2]). One can for this reason hardly expect that alternative network providers could offer much better tariffs, at least to the vast majority of customers of Telecom Eireann and that the latter would be forced to lower its prices substantially.

(45) It is true that charges for leased lines in Ireland are not yet fully rebalanced. A cost-based tariff proposal is being implemented on a phased basis and this business is loss-making overall. If an alternative infrastructure is available, Telecom Eireann would lose revenue to that alternative as customers would wish to diversify suppliers, thus increasing the loss on the business.

(46) Finally Ireland, while acknowledging the need to advance the lifting of restrictions on alternative networks in order to ensure that future competitors can build and fund networks in sufficient time to allow for full competition by the time voice telephony is liberalized, states that six months would suffice for this purpose. This argument is based on the small size of Ireland and the concentrated nature of the most profitable customers. As a matter of fact, since the main cable TV network in Ireland is controlled by Telecom Eireann, the ability of new entrants to compete fully from 1 January 2000 would be compromised in the absence of sufficient time to extend their network also in the 'local loop'.

Effect on trade

(47) As a consequence of its monopoly on the provision of public telecommunications infrastructures, Telecom Eireann is the sole supplier of leased lines and interconnection to providers of liberalized services. It therefore determines to a large extent the costs of its competitors in the liberalized services sector. This was illustrated *inter alia* by the abovementioned increase in leased lines tariffs in early 1996, which rendered the provision of certain liberalized services uneconomic. This potential knowledge by Telecom Eireann of the costs of its competitors will increasingly affect trade, since the Irish public operator will develop even further its own offer of liberalized services with the technical support, expert and managerial assistance, software and systems improvements provided by its strategic partners PTT Telecom and Telia, backed by their Unisource global partnership, which are among the world leaders in terms of quality and efficiency. Whereas Telecom Eireann could use its own infrastructure to provide

[1] OJ No L 165, 19. 6. 1992, p. 27.
[2] Data computed by Tarifica for the Commission — DG XIII.

such services, competitors providing global liberalized services, such as VPN or voice services to closed user groups, would thus be obliged to rely only on circuits leased from the operator they want to compete with. This situation would be aggravated by the fact that according to comments [1], although Telecom Eireann complies fully with current regulations under both EU and Irish law on this matter, currently it does not produce accounts to a sufficient degree of transparency to allow for adequate separation of its activities in the monopoly sector from those in the liberalized sector and there is no structural separation to prevent staff in the infrastructure side of Telecom Eireann passing information to colleagues selling liberalized services.

Conclusion

(48) There are less restrictive regulatory means to prevent bypass of the voice telephony monopoly until 1 January 2000 and such means could be implemented by the telecommunications regulatory authority which Ireland will set up, with appropriate arrangements for industry funding, during the first quarter of 1997. The granting of an additional implementation period which would extend after that date does not therefore seem justified.

(49) Moreover, since Telecom Eireann will be able to provide on its own network worldwide interconnection to Irish industry and business, backed by the resources of its strategic partners and their global interconnection via Unisource and Uniworld, such additional implementation period would distort competition in global services from and to Ireland at the expense of the other global alliances.

(50) For these reasons, the Commission considers that the negative effects on trade which would result from the granting to Ireland of an additional implementation period regarding the liberalization of alternative infrastructure will be incompatible with the interest of the Community once the new regulatory framework is in force and at the latest on 1 July 1997.

III. Request for an additional implementation period regarding the lifting of restrictions on the direct interconnection of mobile telecommunications networks

Assessment of the impact of the immediate lifting of restrictions

(51) Ireland considers an additional implementation period as regards the direct international interconnection of mobile networks necessary to avoid undermining the provision of national and international voice telephony.

(52) Ireland states that if mobile networks were permitted to interconnect freely, it would be possible for a GSM operator in Ireland to connect to a fixed network or mobile network in another State and to obtain delivery prices for international calls close to the local interconnection rates applying in that country. Similarly, the Irish GSM operator could offer to deliver incoming international traffic at prices closely related to national interconnect rates in Ireland. The GSM operator could therefore offer very low tariffs to customers and could expect to obtain a substantial share of incoming international traffic. The public network would, as a result, lose a substantial part of the customer revenue and a large part of the incoming settlements, offset only partially by increased national interconnect income.

(53) Ireland acknowledges that to a certain extent, this situation already exists for medium and large companies, as resellers active in the Irish market already bypass the settlement regime. Ireland expects that the grant of full interconnection rights to mobile operators would immediately expose another large segment of international revenue to competition.

(54) Comments emphasize that the mobile telephone market is a new growing market and that the restrictions on international connection will therefore affect additional mobile traffic, generated by the mobile operators, from which Telecom Eireann already derives additional revenues from call-completion of calls originated from mobile phones. Moreover, the second GSM operator argued that in the absence of the right to interconnect directly with foreign networks, it is unrealistic to suggest that Telecom Eireann could offer acceptable international interconnect rates without recourse to the available judicial remedies.

(55) In practice, two issues must be considered: (i) the level of substitutability between mobile and fixed telephone services and (ii) the risk of bypass of the voice telephony monopoly via services consisting in calling a mobile number to be switched to a foreign fixed-voice telephony network.

[1] See in particular, Cable & Wireless, p. 2.

(56) As regards the latter risk, the argument cannot be taken into account, since there are other regulatory means to deal with such by pass of the legal privilege of Telecom Eireann (see Commission communication 95/C275/02).

(57) As regards the substitutability between fixed and mobile telephone services, the Commission has, in recent cases, discovered that such substitutability is not substantial, given that these services respond to different categories of demand, which are reflected *inter alia* in the higher tariffs of GSM-mobile telephony in comparison with voice telephony.

(58) In Ireland, the main market-segment for GSM-operators is the segment of domestic calls. Moreover it appears that at least half the costs of mobile operators in handling calls are traffic-insensitive costs. It can therefore not be excluded that a mobile operator, in order to increase overall turnover, usage of its network and market share would allot a higher share of these traffic-insensitive costs to domestic calls and offer international tariffs which are at the same level as the current international tariffs of Telecom Eireann. As stressed in one comment [1], BT and MCL provide voice telephony from the UK to Ireland at prices which can be less than half those of Telecom Eireann. By directly interconnecting with the networks of those British public telecommunications operators, Irish GSM operators could offer similar rates to Telecom Eireann without selling below cost. Moreover, the offer of international mobile calls at the fixed-network tariffs would be a powerful marketing tool to convince new subscribers to acquire and use GSM mobile telephony.

(59) On the basis of the current differences between tariffs for calls from Ireland to the UK and for calls from the UK to Ireland, the risk of substitution of fixed international telephone calls by GSM calls can thus not be ruled out. This would affect one of two voice-telephony market segments which are currently the most profitable for Telecom Eireann and could reduce its overall profitability to such an extent that it was no longer able to provide a universal service under economically acceptable conditions.

(60) This risk will however decrease as Telecom Eireann reduces its international tariffs. Although the argument of the Irish Government can thus be accepted, the additional implementation period requested is too long in view of the justifications provided. Taking into account the planned tariff rebalancing, the threat of substitution of fixed by GSM calls might only justify a derogation until at the latest the end of 1998, which is the date at which international tariffs of Telecom Eireann must be sufficiently reduced to rule out substitution by GSM-mobile calls. A liberalization of international interconnection of mobile networks at least one year in advance of the full liberalization of voice telephony will furthermore provide a strong incentive in favour of timely implementation of the gradual rebalancing envisaged.

Effect on trade

(61) The effects of the delayed liberalization of direct international interconnection of mobile operators will fall on the second GSM-operator and provided they are licensed in time, the future DCS-1800-operators. The possibility to interconnect directly with other operators would be a significant factor in facilitating their establishment and development in the Irish market. Moreover, the additional implementation period will also affect foreign carriers, since it will make more cumbersome and costly the handing-over of traffic for call termination by the Irish mobile operators.

(62) This negative effect on trade between Member States would nevertheless be reduced if the Irish Government were to ensure that Telecom Eireann provides specific and volume discounts, to be applied to mobile operators, which would, as in other Member States, take into account the fact that contrary to volume discounts granted to large users, mobile operators are generating new traffic.

Conclusion

(63) The immediate lifting of restrictions on the direct interconnection of mobile telecommunications networks pursuant to Article 3d of Directive 90/388/EEC as inserted by Directive 96/2/EC with regard to mobile and personal communications would put at risk the substantial international traffic revenues of Telecom Eireann and threaten its ability to further ensure the universal provision of voice telephony in Ireland in economically acceptable conditions. The effect on trade could, moreover be limited if tariff reductions, similar to those in other Member States, are provided in interconnect agreements entered into between Telecom Eireann and the mobile operators. The Commis-

[1] ITL, p. 8.

sion therefore considers that the limited negative effects on trade which would result from the granting to Ireland of an additional implementation period until 31 December 1998 at the latest as regards the lifting of restrictions on direct interconnection of mobile networks with foreign networks, is balanced by the certainty that universal service will not be affected and it is therefore for the time being not incompatible with the interest of the Community,

HAS ADOPTED THIS DECISION:

Article 1

Ireland may postpone until 1 January 2000 the abolition of the exclusive rights currently granted to Telecom Eireann as regards the provision of voice telephony and the establishment and provision of public telecommunications networks provided that the conditions set out in Article 4 are implemented according to the timetable laid down therein.

Article 2

Ireland may postpone until 1 January 1999 the lifting of restrictions on the direct interconnection of mobile telecommunications networks with foreign networks provided that the conditions set out in Article 4 are implemented according to the timetable laid down therein.

Article 3

Ireland may postpone until 1 July 1997 the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service,

(b) infrastructures provided by third parties, and

(c) the sharing of networks, other facilities and sites.

Article 4

By way of derogation from the deadlines set out for this purpose in Directive 90/388/EEC, as amended by Directive 96/19/EC, the Irish Government shall inform the Commission of the implementation in national law of the following obligations according to the following timetable:

— no later than 1 April 1997 instead of 1 July 1996: publication of all measures necessary to lift restrictions on the provision of already liberalized telecommunications services on:

  (a) networks established by the provider of the telecommunications service,

  (b) infrastructures provided by third parties, and

  (c) the sharing of networks, other facilities and sites,

— before 1 April 1998: publication of proposed legislative changes to implement full competition and remove all restrictions by 1 January 2000, including proposals for the funding of universal services,

— before 1 November 1998: adoption of those legislative changes,

— no later than 1 January 1999 instead of 1 January 1997: notification to the Commission of draft licences for voice telephony and/or underlying network providers,

— no later than 1 April 1999 instead of 1 July 1997: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant EU Directives,

— no later than 1 November 1999: award of licences and amendment of existing licences to enable competitive provision of voice telephony and unrestricted interconnection of mobile networks from 1 January 2000 instead of 1 January 1998.

The Irish Government shall moreover inform the Commission at the latest three months after notification of this Decision of the measures taken to:

— achieve transparency as regards any involvement of Telecom Eireann alongside its strategic partners PTT Telecom and Telia, or Unisource, in investments outside Ireland during the additional time period granted pursuant to Article 1,

— ensure that Telecom Eireann does not make use of its additional statutory protection to extend its dominant position in the public payphone market or the cable TV industry and in the short term ensure that Cablelink is managed at arm's length of Telecom Eireann as long as Telecom Eireann remains the controlling shareholder.

Article 5

This Decision is addressed to Ireland.

Done at Brussels, 27 November 1996.

For the Commission

Karel VAN MIERT

Member of the Commission