II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 February 1997

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

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(97/310/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 AND LEGAL BACKGROUND

I. *The requests of the Portuguese Government*

(1) Pursuant to Article 4 of Directive 96/2/EC, the Portuguese Government, by letter of 14 May 1996, has requested the following implementation periods:

— until 1 January 1998 as to the lifting of restrictions on operators of mobile and personal communications systems with regard to the establishment of own infrastructure. This de-restriction was supposed to be implemented without delay under Article 3 (c) of Directive 90/388/EEC,

— until 1 January 1999 as regards the direct interconnection of mobile telecommunications networks. This provision was supposed to be implemented without delay under Article 3 (d) of Directive 90/388/EEC.

The Portuguese Government considers these additional implementation periods necessary for the following reasons:

1.1 As regards the lifting of restrictions on operators of mobile and personal communications systems with regard to the establishment of own infrastructure and the use of third party

[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 189, 29. 6. 1996, p. 9 and OJ No C 260, 7. 9. 1996, p. 3.

infrastructure, Portugal states that interconnection circuits leased from Portugal Telecom generate about 2 % of the revenues of the latter. The loss of a part of those revenues (Esc 7,423 billion in 1997 on a turnover of more than Esc 375 billion) could have implications for the financing of the universal service, since at the same time Portugal Telecom will be affected by the liberalization of satellite communications and of the provision of services to closed user groups.

1.2 As regards the right of mobile operators to interconnect directly with foreign networks, Portugal claims that the international tariffs of the fixed voice-telephony service of Portugal Telecom are still out of line with costs. If this right was to be implemented without delay, Portugal Telecom would have either to lower sharply its international tariffs (impact estimated at Esc 9,652 billion in 1997) or lose — according to estimates — 15 % of its international fixed traffic to the benefit of the mobile operators (i.e. Esc 8,104 billion in 1997). Moreover, it would lose the revenues generated by the interconnection of the mobile networks with foreign networks (Esc 5,519 billion in 1997). This could also have negative repercussions on the financing of the universal service.

(2) The Portuguese authorities provided a description of the impact of the immediate implementation of Directive 96/2/EC. These elements are attached to the letter of the Portuguese authorities of 14 May 1996.

(3) By letter of 25 June 1996, the Portuguese authorities have furthermore requested the following implementation periods pursuant to Article 2 (2) of Directive 90/388/EEC:

— until 1 January 2000 as regards the abolition of the exclusive rights currently granted to Portugal Telecom as regards the provision of voice-telephony and the underlying network infrastructure. This provision is supposed to be implemented before 1 January 1998 under Article 2 (2) of Directive 90/388/EEC,

— until 1 July 1999 as regards 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.

Those provisions were to be implemented before 1 July 1996, according to Article 2 (2), third paragraph of Directive 90/388/EEC. They do not refer to the cable TV infrastructures, regulated by Article 4 of the same Directive.

The Portuguese Government considers these additional implementation periods necessary for the following reasons:

3.1 Portugal Telecom earns about 6 % of its revenues from the provision of leased circuits (in 1995 Esc 23 billion out of a turnover of Esc 393 billion). The immediate lifting of restrictions on the use of alternative infrastructures could lead to a loss of Esc 24 billion over a period of five years, resulting from a substitution effect (loss of customers to the providers of alternative networks) and a revenue effect (need to reduce tariffs to remain competitive). This loss could have implications on the level of the financing of the universal service, since at the same time Portugal Telecom will be affected by the liberalization of satellite communications and of the provision of services to closed user groups;

3.2 Telecom Portugal aims to rebalance completely the voice-telephony tariffs. This rebalancing is partly guaranteed by the present price convention, in force until 1998, via a real reduction of the global level of prices and increases at the rate of inflation of 6 % for the tariffs below costs. Further structural adjustments are required in order to enable Portugal Telecom to function effectively in a fully competitive market and there is a need to complete studies to assess whether it is necessary to adjust this approach for the period from 1998 to 2000 so that at that date the tariff rebalancing would be complete.

(4) Further details were provided during a bilateral meeting held in Brussels on 18 June 1996 and in a subsequent letter of the Portuguese authorities dated 30 July 1996. The issue was again discussed during bilateral meetings held in Strasbourg on 12 November and in Brussels on 18 November 1996 and in a subsequent facsimile transmission from the Portuguese authorities dated 22 November 1996.

II. *The comments received*

(5) Four undertakings and associations provided comments following the notice published by the Commission on 29 June 1996.

As regards the lifting of restrictions on operators of mobile and personal communications systems with regard to the establishment of own infrastructure, the majority of comments:

— state that there is no justification for granting a derogation in order to allow the Portuguese Government to safeguard itself against the effects of implementing Commission Directive 94/46/EC of 13 October 1994 [1] concerning satellite communications and of the liberalization of non-reserved services including voice services for Closed User Groups ('CUGs') under Directive 90/388/EEC that should have taken effect years ago. It is noted that neither satellite communications services nor non-reserved services, including CUG, would replace any sufficient amount of traffic originating or terminating on the GSM networks, as neither are suited for this purpose,

— state that it is not reasonable to assume that both GSM operators would cancel all their leased lines in 1997, given that it takes several years to build an alternative network or for new entrants truly to be able to compete with Portugal Telecom. The estimated losses are therefore unnecessarily high. A comment refers to a study showing that if Portugal Telecom were to match prices of competing networks (competition effect) rather than keep high prices (substitution effect), the negative financial impact on Portugal Telecom of the Directive would be only equivalent to 1,3 % of revenue instead of 15 % as stated by the Portuguese authorities. Furthermore, comments pointed out that GSM operators bring in new traffic rather than replace Portugal Telecom's traffic in the short term,

— claim that the majority of the statistics presented in the Portuguese submission do not take into account all relevant information. In particular it was mentioned that the calculations do not account for the companies within the Portugal Telecom Group who will benefit, rather than suffer, from the Directive. In light of this, the stated impact should be reduced greatly.

As regards the right of mobile operators to interconnect directly with foreign networks, comments:

— note that the analysis by the Portuguese authorities, which argues that direct interconnection will force Portugal Telecom to lower its tariffs sharply or also lose 15 % of its international fixed traffic to competitors, does not take into account the decrease in costs, as well as the increase in usage, both which would greatly lower the impact on Portugal Telecom,

— state, in reply to the Portuguese authorities' argument that mobile operators will reduce Portugal Telecom's international traffic, that it is highly unlikely that users (most of whom are business users) will use their GSM in place of the PSTN for international calls,

— claim that Portugal Telecom should be able to offer a reduction of at least 30 % on international tariffs. These discounts are supposedly already given to various large end-users. In addition, comments suggest that bulk discounts for mobile operators would create a fairer environment, allowing competing mobile operators companies to offer international tariffs which are more in line with the international fixed voice-telephony tariffs that Portugal Telecom offers. Currently, GSM operators are charged nearly 100 % of Portugal Telecom's retail international call rate [2]. One comment shows that this decrease in tariffs would not greatly affect Portugal Telecom's ability to operate, and would bring the benefits that come with lower prices,

— generally agree that the actual impact on Universal Service would be in fact, negligible. It is noted that the only figures included in the documentation offered by the Government were the level of investment needed to fulfil the Universal Service Obligation ('USO'). The evidence of a growing revenue that is generated from these investments (installation fees, monthly fees, incoming calls, inherent promotion of Portugal Telecom's services) was absent, as was the new technology used to implement the USO in a more cost-efficient manner. Comments suggest the EC concept of a

[1] OJ No L 268, 19. 10. 1994, p. 15.

[2] GSM operators get a discount of Esc 16,4 per minute (no matter where the call is placed).

Universal Service fund to pay for any discrepancy in providing the USO instead of imposing restrictions on the mobile operators could be used. It is also stressed that an accounting system should be set up in order to estimate the cost of provision of the USO. Current estimates are not, according to the comments, reliable,

— state that a derogation in this area will only delay the development of transborder mobile communications and restrict growth and development in the mobile market which has provided employment and other economic benefits in countries where early, unrestricted competition has been allowed.

By letter dated 20 August 1996, the Commission transmitted to the Portuguese authorities the four comments of these third parties, received following the publication of the Commission's notice in the *Official Journal of the European Communities* on 29 June 1996. The Commission invited the Portuguese authorities to comment on the third-party submissions.

(6) Seven undertakings and associations provided comments following the notice published by the Commission on 7 September 1996. One of those undertakings nevertheless informed the Commission by letter dated 18 November 1996 that some of its comments may not be in line with the current situation in Portugal, given that Portugal Telecom was intending to apply cost-oriented interconnection tariffs for international calls.

As regards the abolition of the exclusive rights currently granted to Portugal Telecom for the provision of voice-telephony and the underlying network infrastructure and, further, the lifting of restrictions on the provision of certain already liberalized telecommunications services, comments:

— stress that the dominant position of the incumbent public telephone operator should not be reinforced by allowing it alone to invest heavily in those infrastructures (such as cable) which should be the main alternative carriers of telecommunications services. Comments state that there is no need to protect an undertaking with more than a 90 % share of the telecommunications markets and which makes higher profits (a profit margin after tax and depreciation of Esc 50 billion in 1996 which is a 40 % increase on that in 1995) than British Telecom, France Telecom, TeleDanmark and AT&T. It is obvious that the increased efficiency brought about by opening the market will benefit consumers and the Portuguese economy as a whole. Comments state that the Portuguese authorities might be confusing the public interest with the interests of Portugal Telecom. Any significant negative effects on the revenue of Portugal Telecom brought about by the full implementation of the Directives can only mean that until now Portugal Telecom has been allowed to impose excessive prices for its services at the expense of other parties in the market and consumers. Comments question the basic assumption that losses will be inevitably suffered by Portugal Telecom and that these losses will inevitably lead to a deterioration of services. Further, it is argued that the Portuguese Government has assumed too high an elasticity of demand in tems of prices. The comments question whether it is sufficient to rely on historical figures in this fast growing market. Finally, any current price control exercised by the Portuguese authorities is not realistic or sufficient,

— state that the USO could be fulfilled by new entrants into the market and that the Portuguese authorities have always emphasised that this will be the case. Comments argue that competition will lead to lower costs and thus a lower cost for the USO. Comments point out that, as it stands, Portugal Telecom receives State subsidies for certain advanced services and ultimately enjoys the marketing advantage of being the universal supplier. Further it is stated that European Regional Development Funds have been used to assist in the fulfilment of the USO. Comments state that it is impossible to assess fully estimates given by the Portuguese authorities due to the lack of a transparent accounting procedure. Most comments stress that the likely losses quoted by the Portuguese authorities appear exaggerated. It is very unlikely that Portugal Telecom will lose all of its leased-line customers as many leased-line users are subsidiaries of Portugal Telecom. Comments state that any general decrease in revenues suffered by Portugal Telecom, if at all, will generate increased revenues in these subsidiaries. By way of example it is stated that Telepac has 75 % of the datacoms market, TMN has 50 % of the mobile market, Contactel and TLM have 67 % of the paging market, TV Cabo has 75 % of the cable TV

market and Radiomóvel has 70 % of the trunking market. Portugal Telecom clearly has a monopoly position in the public voice-telephony market where the bulk of its revenues are generated. This provides the bulk of the funds for the USO rather than any revenues generated from leased lines,

— stress that Portugal Telecom is profitable and succeeding well financially. Comments state that profits showed an increase of 70 % in 1995 whilst tariffs decreased. The share price of Portugal Telecom has outperformed that of the general index in Portugal and in the US, where Portugal Telecom is quoted on the New York Stock Exchange, its February 1996 price was US $ 22,375 as compared to its launch price of US $ 18,275. A strategic partner is being sought to position Portugal Telecom in the market following the next stage of privatization which is being prepared,

— state that the Portuguese authorities have misjudged the need to rebalance the tariffs of voice-telephony. It would appear that the average cost of a local call in Portugal is comparable to that in the UK, Belgium, Denmark and Austria but is higher than that in Germany and the Netherlands. On the other land, the cost of a long-distance call is 43 % higher than the European average. However, comments stress that this comparison is potentially flawed and cannot be verified. Local calls in Portugal are defined as calls within a 5-km radius (whereas in the UK for example it is a 30-km radius). Further, in Portugal the unit compared is three minutes, which is longer than in other Member States. Arguably, there is no need for rebalancing as tariffs simply need to be reduced in all sectors. If any rebalancing is required it was, in any case, an inevitable result of the liberalization process. The comments continue that without a transparent accounting process, it is impossible properly to evaluate the Portuguese authorities' submissions,

— state that for 2 Mbs circuits over 100 km, Portugal Telecom's prices are 2,6 times greater than those of British Telecom. Comments argue that this differential is clearly not based on cost. Further, it is stated that Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1] has not been properly adopted into Portuguese law as otherwise prices would clearly have come down. The comments argue that the inability of Portugal Telecom to match the services which would be provided by competitors on alternative infrastructure is no reason to prevent competitors from operating in the market. In addition, the comments point out that Portugal Telecom is dominant in the cable TV market which is one of the best alternative telecommunications infrastructures. Any derogation as requested by the Portuguese authorities would reinforce that position.

By letter dated 29 November 1996, the Commission transmitted to the Portuguese authorities the comments of these 7 third parties, received following the publication of the Commission's notice of 7 September 1996. The Commission invited the Portuguese authorities to comment on the third party submissions.

III. *Response of the Portuguese Government*

(7) By letter of 3 October 1996, the Portuguese authorities transmitted their first reply to the comments of the third parties, transmitted by letter of 20 August 1996.

Therein, they emphasized that no licence fee had been requested to the GSM operators in Portugal (except a compensation for the licensing process) and that therefore GSM operators could afford to continue to pay for the usage of the infrastructure of Portugal Telecom. Notwithstanding this additional cost, the GSM operators have, according to the Portuguese authorities, reached a market penetration placing Portugal in the sixth position in the EU.

Subsequently, in its facsimile transmission dated 22 November 1996, Portugal repeated that alternative infrastructure operators would be able to undercut Portugal Telecom's leased-line prices by 50 % for interconnection circuits and that providers of liberalized telecommunications services would only lease 10 % of the lines that they need from Portugal Telecom. Portugal adds that the decrease in demand would be immediate because capacity is already installed by public utilities, except at a local level. The Portuguese authorities estimated that increased competition would decrease Portugal Telecom's revenues by Esc 2 billion per annum as a result of competitors' decreased costs derived from the leasing of alternative infrastructure at lower prices.

[1] OJ No L 165, 19. 6. 1992, p. 27.

Portugal continued that, if in the alternative, Portugal Telecom reduced substantially the price of interconnection leased circuits to maintain its market share at an estimated 80 %, then Portugal Telecom would lose revenue of Esc 14 billion in this sector.

By letter dated 3 January 1997, the Portuguese authorities sent observations supporting their position on the second set of comments of the third parties. These observations were received by the Commission on 17 January 1997.

IV. *Article 4 of Directive 96/2/EC and Article 2 (2) of Directive 90/388/EEC*

(8) Under Article 4 of Directive 96/2/EC and Article 2 (2) of Directive 90/388/EEC the Commission shall grant, upon request, to a number of Member States the right to derogate from the dates set out in Directive 90/388/EEC and 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 in so far as these measures are necessary to carry out the structural adjustments and strictly to the extent necessary for those adjustments. The application of the exception in Article 90 (2) of the EC Treaty in the telecommunications sector has thus been specified in Directive 90/388/EEC modified by Directive 96/2/EC with regard to mobile and personal communications and Directive 96/19/EC with regard to full competition in the telecommunications markets.

As regards the provision of public telecommunications services and networks, it appears that Portugal Telecom is entrusted with a service of general economic interest pursuant to Section III of its Public Service Telecommunications Concession approved by Decree-Law No 40/95 of 15 February [1]. Under its concession contract, Portugal Telecom has a universal service obligation in respect of the provision of fixed telephone, telex, telegraphy and data transmission services. These tasks must be implemented in terms of 'equality and continuity' [2] irrespective of the specific situations or the degree of economic profitability of each individual operation. The Concession provides that, upon liberalization of the provision of public switched telephone services, Portugal Telecom may be compensated for its universal service obligations in a number of ways, including tariff mechanisms, EU funding programmes applicable to universal service obligations, deductions from the annual concession fee (1 % on turnover) payable to the Portuguese authorities and through the establishment of a Fund financed by Portugal Telecom and other telecommunications operators. Currently, the financing method used is by applying higher prices to most of the users in order to finance those tariffs which are below cost.

Owing to the absence of the implementation of an adequate cost accounting method, Portugal did not provide precise figures on the cost of universal service but only a gross estimate of Esc 81 billion for the investment as a whole (taking account of the depreciation rates [3] used by Portugal Telecom, the Commission will therefore assume in its assessment that this total investment corresponds to an annual burden around Esc 15 billion, i.e. one third of the net profits of Portugal Telecom in 1995). The cost of universal service provision in Portugal encompasses not only investment costs but also operating costs, including maintenance costs. Part of this burden was moreover subsidized by the EC in the framework of the grants received by Portugal Telecom for the development of its network under the Proter, STAR, Telematique and Thermie programs as well as loans from the European Investment Bank. The granting of this aid was, however, not directly linked to the cost of universal service.

(9) Under the Directive, 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 'warranted by the need to carry out the structural adjustments and strictly only to the extent necessary for those adjustments'.

The starting point of such examination is that the obligation on an undertaking entrusted with a task of general economic interest 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. Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice, would make it possible for them to concentrate on

[1] DR I Série A No 39/95 of 15 February 1995 as amended in DR I Série A No 50/95 of 28 February 1995.

[2] As stated in the definition of universal service in Article 1 (o) of Portugal Telecom's Public Telecommunications Service concession.

[3] Portugal Telecom Prospectus, May 1996, p. 76.

the economically profitable operations and to offer more advantageous tariffs than those charged by the holder 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.

Directive 90/388/EEC therefore granted a temporary exemption under Article 90 (2) in respect of special and exclusive rights for the provision of voice-telephony. This was because financial resources for the development of the public telecommunications network still derive mainly from the voice-telephony service. The opening of the voice-telephony market to competition could, at that time, obstruct the performance of the task of general economic interest and development of the network assigned to the telecommunications organizations. Restrictions on competition are only justified as regards services which, by their nature and the conditions in which they would be offered in a competitive market, would compromise the economic equilibrium of the provision of the service of general economic interest or affect it in some other way. For this reason the restrictions on the provision of such services can only be granted if substantive evidence is provided of such impact.

(10) Some comments mention that in practice new entrants could also contribute to the relevant tasks of general economic interest. The exception aims indeed to protect the fulfilment of a task of general economic interest and not to shelter specific undertakings. In the short term, however, Portugal Telecom will continue to be the only undertaking providing a universal public telephony network in Portugal. For this reason, the Commission examined the additional implementation periods requested to determine whether their granting is necessary to allow Portugal Telecom to perform this task of general economic interest and to have the benefit of economically acceptable conditions whilst the necessary structural adjustments are made.

B. LEGAL ASSESSMENT

I. *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

Arguments provided by the Portuguese Government

(11) Portugal considers an additional implementation period for the direct international interconnection of mobile networks to be necessary to avoid undermining the provision of national and international voice-telephony.

Portugal requests first that the effect of the different stages of liberalization be deferred to allow Portugal Telecom to assimilate all the consequences, without the disturbances which would put normal development at risk. Portugal announces that it has approved satellite communications under Directive 94/46/EC and voice services for closed user groups under Directive 90/388/EEC. It estimates the impact of these measures on the turnover of Portugal Telecom at around Esc 11 billion per annum, resulting from a sizable reduction in the Portugal Telecom leased-lines tariffs required to remain competitive with the new alternatives provided.

This impact must, according to Portugal, be added to the loss of revenue which would result from the immediate implementation of the Directive 96/2/EC as regards direct international interconnection: Esc 50 billion in accumulated terms.

Currently, Portugal allows direct interconnection neither between the two Portuguese GSM operators, nor between those operators and foreign fixed or mobile networks. This restriction is, according to Portugal, necessary because the tariffs for the fixed telephone network are not yet cost-oriented. The revenue related to the interconnection was around Esc 8,5 billion in 1995. If mobile networks were permitted to interconnect freely, it would be possible for a GSM operator in Portugal to connect to a fixed network or mobile network in another State and to obtain delivery prices for international calls close to the (lower) interconnection rates applying in that country. Mobile operators could thus offer lower tariffs to their GSM subscribers than Portugal Telecom. If Portugal Telecom did not follow the reduction in prices, Portugal assumes that it would not only lose all mobile-to-mobile and mobile-to-foreign network traffic but also 15 % of its fixed voice-telephony traffic to the mobile operators, which would correspond to a loss of Esc 27 billion in the period 1996 to 2000, or alternatively, if Portugal Telecom decreased its international tariffs, the loss of revenue would correspond to a loss of Esc 25 billion in the period.

However, Portugal confirms that the rebalancing of tariffs will continue independently from the implementation of Directive 90/388/EEC as amended.

(12) In addition, Portugal stresses a possible impact of the immediate implementation of direct international interconnection of the international fixed voice-telephony traffic, i.e. on a part of the revenues which the Commission considers necessary for the financing of the USO. It argues that the current intenational mobile tariffs of Esc 163 per minute could be lowered to Esc 100 (1) as regards calls to the rest of Europe. As regards calls to the rest of the world, prices would remain around 60 % higher, but could be lowered in comparison to the current charges amounting to Esc 260 up to Esc 490 per minute. In comparison the fixed international telephone tariffs (peak rates) of Portugal Telecom are (April 1996) Esc 112 per minute to the EU, Esc 149 to the rest of Europe, Esc 164 to the USA, Esc 183 to Canada and Esc 237 to Brazil.

According to the Portuguese request, Portugal Telecom would lose 15 % of its international fixed voice-telephony traffic to mobile operators from 1997 onwards, if it does not lower its prices to compete effectively with the potential international tariffs of the mobile operators. The resulting annual loss of revenue would amount to Esc 8,104 billion. Conversely Portugal Telecom could maintain its share of traffic by lowering its international fixed voice-telephony tariffs. The resulting loss would be Esc 9,652 billion in 1997.

Assessment by the Commission

(13) First, the Commission cannot consider the late implementation of previous EC Directives as reason for delaying the implementation of other Directives. The impact of the immediate implementation of Commission Directives on the performance of tasks of general economic interest must nevertheless be assessed, taking into account the economic conditions in which Portugal Telecom is providing this service. The impact of the implementation of Directive 90/388/EEC as amended *inter alia* by Directive 94/46/EC would, according to the Portuguese authorities, have brought about a reduction of Portugal Telecom's leased-lined tariffs and revenues and is therefore linked to the impact of the lifting of restrictions on operators of mobile and personal communications systems with regard to the establishment of own infrastructure. The effect of leased-lines tariff and revenue reductions by Portugal Telecom on its ability to provide universal service will be examined in the framework of the assessment of the additional implementation period requested relating to the implementation of Article 3 (c) of Directive 90/388/EEC.

(14) In its additional submission of 22 November 1996, Portugal stated that after the full implementation of Directive 96/2/EC, the Portuguese mobile operators will have the opportunity of interconnecting directly with public service telephone networks in other countries, thus by-passing Portugal Telecom's services and infrastructure. Under this scenario, mobile operators would pay a termination fee to the foreign fixed telephone operators instead of the amount they now pay to Portugal Telecom (Esc 106 per minute in the case of European calls, corresponding to the normal public service telephone network rate minus Esc 19,20 per minute).

Portugal submits that an average termination fee for European calls is Esc 35 per minute. Currently, mobile operators charge Esc 164 per minute for international calls. This is made up of an interconnection fee payable to Portugal Telecom of Esc 106 per minute leaving the sum of operating costs and profit margin at Esc 58 per minute. To reach an estimation of the price of European calls that mobile operators would charge after liberalization, Portugal added the operational costs of Esc 58 per minute, the costs of the determination fee of Esc 35 per minute, and the costs of half of the international transmission belonging to the originating country. According to the International Telecommunications Union's D.300R Recommendation (Teurem), this would amount to 10 % of the total price. The approximate total cost would therefore be Esc 100 per minute.

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

(1) This assumption is based on the average of the 'accounting rates shares' charged by British Telecom for handling international traffic, i.e. Esc 35 per minute. If the mobile operator were to transfer 75 % of the saving to the final consumer the end-user price would be Esc 115 per minute (letter of 30 July 1996, p. 9).

Nevertheless, in Portugal, the main market segment for GSM-operators is the segment of national calls. Moreover it appears that at least half the costs of mobile operators in handling calls are traffic-insensitive costs. It cannot therefore be ruled out 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 national calls and offer international tariffs which are at the same level as the current international tariffs of Portugal Telecom. The number of GSM customers in Portugal is currently estimated at approximately 600 000 and as this market grows, there is more scope for customers to be encouraged to substitute fixed voice international traffic for mobile international traffic.

(16) As regards the estimates provided by Portugal regarding losses which the immediate implementation of international direct interconnection would imply, the Commission notes, as various comments emphasize, that the mobile telephone market is a new and growing market, from which Portugal Telecom already derives additional revenues from completion of calls originated from mobile phones. The profitability of Portugal Telecom's fixed voice-telephony service does not depend on these additional revenues. The mobile operators generated an additional turnover of Esc 8,5 billion for Portugal Telecom, in excess of the Esc 301,5 billion earned on the fixed to fixed voice-telephony service.

(17) Nevertheless, the Commission agrees that it cannot be ruled out, in the short term, in the case of direct interconnection of mobile networks with foreign networks, that fixed international telephone calls could be replaced by international GSM calls. Furthermore, the losses resulting from such substitution would not necessarily be compensated by the additional revenues generated for Portugal Telecom by the growth of the GSM market. Indeed, this would affect one of the voice-telephony segments which is currently the most profitable for Portugal Telecom, i.e. international calls, and could, in addition to the impact of the lifting of restrictions on alternative networks for liberalized services from 1 of July 1997, reduce its overall profitability to such an extent that it would no longer be able to provide a universal service under economically acceptable conditions. This conclusion would be different if Portugal were not to lift the restictions on the use of own and alternative network infrastructure for the provision of liberalized telecommunications services.

This risk will, however, decrease as Portugal Telecom reduces its international tariffs. Therefore the argument of the Portuguese authorities can be accepted for the duration requested. Taking into account the planned tariff rebalancing, the threat of substitution of fixed by GSM calls only justifies a derogation until at the latest the end of 1998, which is the date by which international tariffs of Portugal Telecom should already have been 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.

Development of trade

(18) The effects of the delayed liberalization of direct international interconnection of mobile operators will be on the second GSM operator and, whenever they are licensed in the near future, the future DCS-1800 operators. The possibility of interconnecting direct with other operators would be a significant factor in facilitating their establishment and development in the Portuguese 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 Portuguese mobile operators.

(19) This adverse effect on the development of trade between Member States would nevertheless be reduced if in future the Portuguese authorities, in the framework of the concession of March 1995, effectively ensures that Portugal Telecom applies cost-oriented rates for interconnection between its own network and mobile telephony networks, and in particular as regards charges for handling international calls.

Conclusion

(20) The immediate lifting of restrictions on the direct interconnection of mobile telecommunications networks under Article 3 (d) of Directive 90/388/EEC as inserted by Directive 96/2/EC with regard to mobile and personal communications would expose the substantial international traffic

revenues of Portugal Telecom and could threaten its ability to further ensure the universal provision of voice-telephony in Portugal on economically acceptable conditions. The development of trade would be affected by an additional implementation period until 1 January 1999 in such a way as not to be contrary to the interests of Community.

II. *Request for an additional implementation period regarding the use of own/alternative networks for the provision of mobile and personal communications services*

Assessment of the impact of the immediate lifting of restrictions

Arguments set out by the Portuguese Government

(21) The lines leased by mobile operators (including paging and trunking operators) represent currently about 35 % of the total leased circuits and about 2 % of the total revenue of Portugal Telecom. Portugal states that in the case of the lifting of restrictions on operators of mobile and personal communications systems with regard to the establishment of own infrastructure before 1 January 1998, both GSM operators would set up their own infrastructure and Portugal Telecom would therefore forgo a turnover of Esc 7,4 billion in 1997. The Portuguese authorities calculate that the accumulated turnover forgone would be Esc 25,6 billion by the end of 2000. This is explained because although Portugal recognizes that in fact the duplication of Portugal Telecom's circuits currently used by mobile operators would take many years, on the other hand, given the fact that Portugal Telecom is in any case progressively reducing its leased-lines tariffs, it is implicitly acknowledged that the incentive for mobile operators to establish their own infrastructure will also decrease. The impact of the reduction in leased-lines turnover forgone by Portugal Telecom in the subsequent years will therefore progressively diminish.

Furthermore, according to the Portuguese authorities, the effect of the lifting of restrictions on mobile operators must be examined together with the effect of the liberalization of voice services for closed user groups under Directive 90/388/EEC. This effect would amount to Esc 11 billion turnover forgone by Portugal Telecom. Therefore, in 1997, the total turnover forgone would thus be Esc 18,4 billion.

Assessment by the Commission

(22) Neither the Commission nor the Council have ever considered that income from leased lines is indispensable for the financing of the USO. This is one reason why Article 10 of Council Directive 92/44/EEC on the application of open network provision to leased lines states that leased-lines tariffs must be cost-oriented, i.e. reflect only underlying costs and not the cost of providing fixed voice-telephony — which is a distinct service — in unprofitable areas and to unprofitable users in profitable areas. Although allowed by Article 13 of Directive 92/44/EEC, the Portuguese Government did not request any deferment in favour of Portugal Telecom for the implementation of the obligation of cost-orientation of leased lines. Since Directive 92/44/EEC requires in particular that leased lines must be offered on a cost-oriented basis and, 'given that Member States must comply with it, the opening of alternative supply [of infrastructure] is not expected to alter the market position of TOs in this area substantially' [1]. Therefore the Portuguese Government had an obligation to ensure that Portugal Telecom put in practice, by 31 December 1993, a cost accounting system for leased lines in conformity with Article 10 of Directive 92/44/EEC. As mentioned above, restrictions on competition are, however, not justified as regards specific services dissociable from voice-telephony, unless Member States provide substantive evidence that such specific services, by their nature and the conditions in which they are offered, compromise the economic equilibrium of the provision of voice-telephony. Such evidence has not been provided.

According to the Portuguese application, Portugal Telecom earned 6 % of its revenues (Esc 23 billion) from the provision of leased lines, against 79 % from the provision of fixed voice-telephony (Esc 310 billion). As assumed above, the annual burden of the USO would be around Esc 15 billion. No evidence has been provided showing that the revenues of fixed voice-telephony which is provided under exclusive rights do not suffice to cover the universal service burden, and that the monopoly area has to be extended to other, distinct, markets.

[1] Green Paper on the liberalization of Telecommunications Infrastructure and Cable Television Networks — Part One — Principles and Timetable (COM(94) 440 final, 25. 10. 1994).

Moreover, the Commission considers that the estimated impact of lifting restrictions on mobile operators on establishing own infrastructures is based on an unrealistic scenario, since:

— as noted by the second GSM operator, establishing a fully separated backbone network involves high irrecoverable costs, so that such a duplication would only be implemented progressively,

— a fully separated backbone network also involves substantial risks (as in the case of its failure). Therefore the GSM operators would in any case continue to use Portugal Telecom or third party lines, as 'back-up' capacity allowing them to maintain their service in the case of the failure of their own network. Furthermore, investing in own infrastructure is only justified in the case of sufficient traffic flows, which will probably not be the case for trunking and paging service operators. Moreover, as stated in the Portuguese application, whereas tariffs for long-distance leased lines are the least cost oriented, this is less the case for local circuits. On the other hand, if mobile operators were authorized to establish their own infrastructure, they could set up high capacity circuits (8, 34 and 140 Mbs), which Portugal Telecom does currently not provide for the mobile operators (according to one comment). Therefore, the assumption that there will be 100 % reduction in demand for leased lines in 1997 is not justified and will become even more unjustified in subsequent years given Portugal Telecom's planned tariff decreases. A more realistic approach would be to assume a decrease in demand for capacity over the next three years of up to 50 %. This would mean a maximum Esc 3,7 billion forgone per annum (less than 1 % of annual turnover). However, if Portugal Telecom adjusted its prices, the decrease would obviously be smaller and possibly could be fully compensated, if it induced the mobile operators to install additional base stations,

— a loss of turnover does not constitute a loss of profit, since Portugal Telecom would save the costs related to the provision of the leased lines involved. Only the profit margin would be forgone. Portugal has not provided evidence regarding the latter. We could assume a profit margin of a maximum of 50 %, which could — if proved correct — already constitute unfair pricing within the meaning of Article 86 (c) of the EC Treaty in addition to an infringement of the cost orientation requirements in Directive 92/44/EEC given that it would be more than twice the usual profit margins in the telecommunications sector. Even on this basis, the profit forgone would be less than Esc 1,8 billion,

— as already mentioned, one of the two GSM operators, TMN, is a 100 % subsidiary in the Portugal Telecom Group. Portugal considers [1] that, notwithstanding this link, TMN would also opt for own infrastructure in order to decrease its infrastucture costs by 50 %. But in this case the profit margin of TMN would increase accordingly, and compensate in the consolidated accounts of the Portugal Telecom Group half of the negative effect of lifting restrictions on mobile operators on using own infrastructure. Accordingly, the net effect would be only Esc 0,9 billion per year,

— the Portuguese argumentation start from a static perspective. In fact, with the liberalization of the mobile market achieved through Directive 96/2/EC, new operators should soon be authorized by the Portuguese authorities to operate in the DCS 1800 frenquency bands. The new operators will require Portugal Telecom leased lines to speed up the roll-out of their network in order to compete with the current two GSM operators. This new demand will more than offset the very limited impact of the GSM operators cancelling some of their leased lines. It must be emphasized in this context that the Portuguese authorities' delays in launching a call for tender for DCS 1800 and Ermes services are causing a larger loss in leased lines revenue for Portugal Telecom, than would the immediate implementation of Article 3 (c) of Directive 90/388/EEC as inserted by Directive 96/2/EC. The liberalization of voice services for closed user groups should also boost the demand for leased lines for fixed complementary telecommunications services and certainly constitute an alternative use for the transmission of capacity abandoned by GSM operators. Given this expected growth in the leased lines market, Portugal Telecom could maintain its total profits in this area even if it introduces further volume discounts. Such discounts could even further reduce the incentive for mobile operators to establish their own infrastructures.

[1] Letter of 30 July 1996, p. 5.

According to one comment received, Portugal Telecom already offers optical fibre leased lines to its associate company, TV Cabo Portugal, at prices which are in some cases 50 times lower than the price charged to the mobile operators.

Finally in assessing the impact of the immediate implementation of Article 3 (c) of Directive 90/388/EEC on the Portugal Telecom Group, the last paragraph of Article 3 (a) must also be taken into account. According to this provision, 'Member States which are granted an additional implementation period to abolish the restrictions with regard to infrastructure as provided for in Article 3 (c), shall not during that period grant any further mobile or personal communications licence to telecommunications organizations, or any associated organization. Where telecommunications organizations in such Member States do not or no longer enjoy exclusive or special rights, within the meaning of points (b) and (c) of the first paragraph of Article 2, for the establishment and the provision of the public network infrastructure, they shall not *a priori* be excluded from such licensing procedures.' Consequently, given that TMN would be excluded from participating in any call for tender for DCS 1800 during the whole duration of the possible additional time period requested by the Portuguese authorities for the lifting of restrictions on mobile operators to use own infrastructure, the possible profits forgone in this new market segment by TMN should also be deducted from the impact, calculated above, due to the cancellation of leased-lines contracts by GSM operators.

As regards the effect of the liberalization of voice services for closed user groups, the Commission notes that this liberalization had to be implemented at the latest on 31 December 1990, under Directive 90/388/EEC.

Development of trade

(23) Given that the above assessment shows that there are no reasons for justifying the derogation provided for under Article 4 of Directive 96/2/EC for the immediate lifting of the restrictions on mobile operators with regard to the establishment of own infrastructures and the use of third party infrastructures, there is no need to examine the effect on trade of the granting of such exception, and its possible compatibility with the interests of the Community.

Conclusion

(24) Given that it is not demonstrated that Portugal Telecom needs the profits realized by the provision of leased lines to mobile operators in order to bring about the necessary structural adjustments and that, moreover, it appears that the Portugal Telecom Group would globally increase its revenues if no exception were granted to the immediate application of Article 3 (c) of Directive 90/388/EEC, the granting of the requested additional implementation period is not justified.

III. *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 Portugal Telecom

Arguments provided by the Portuguese Government

(25) The Portuguese authorities has requested a derogation on the following grounds:

— Portugal Telecom must significantly rebalance its tariffs,

— telephone density is low.

Assessment by the Commission

(26) 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 Portuguese authorities with a view to the introduction of full competition, i.e. the further adjustment of Portugal Telecom's tariffs, which in most cases appear to be too high, the network penetration which appears to be too low (approximately 37 main lines per 100 inhabitants against a Community average of 48 in 1995) and low average spending for the usage of each single main line (in 1995, the average spending per 100 inhabitants was ECU 20 720 as opposed to ECU 33 275 in the UK).

(27) The Commission notes that Portugal Telecom has on the other hand already successfully implemented the modernization of its network. As of 1995, 70 % of Portugal Telecom's switching was digital with 100 % of the trunk network and 89 % of the international network also digital. The rate of digitalization of the local switches should, according to Portugal, reach 97 % in 1998, which is well ahead in comparison with other Community operators such as Deutsche Telekom or Telecom Italia. However, telephone penetration for voice-telephony is still very low in Portugal, by comparison with the rest of the Community.

(a) Tariff rebalancing

(28) Portugal states that from 1989 to 1996 all charges except those of local and regional calls have fallen in real terms. Despite this achievement, Portugal claims that most of its tariffs are still too high and out of alignment with tariffs of other Community operators. Rebalancing by adjusting charges to bring prices closer to underlying costs is still required also to achieve this objective. Portugal is proceeding with a gradual and flexible approach to tariff rebalancing, whilst maintaining safeguards for consumers in terms of price and quality of service. Every operator in the Community is or has been carrying out a programme of rebalancing. For Portugal the question is about the speed of rebalancing. Owing to the limits of the proposed price cap regime, Portugal claims that Portugal Telecom needs about five years to implement decreases in long-distance and international call charges and increases of installation and monthly rental charges, i.e. from 1996 to 2000.

(29) The following table, based on information in the Commission's possession [1], comparing certain telephone tariffs of Portugal Telecom and the equivalent figures for an operator which has already rebalanced its tariffs [2], supports the arguments of the Portuguese authorities.

Tariffs in ecus on 1 January 1996	Portugal Telecom	British Telecom	Difference PT/BT (BT = 100)
Charge for new connection	76,66	137,53	56
Bi-monthly rental	18,53	19,53	95
Local calls, resp. 3/10 minutes	0,06-0,12	0,06-0,19	100-63
(peak hours)	0,06-0,23	0,14-0,47	43-49
Trunk calls, resp. 3/10 minutes	1,17-3,91	0,35-1,16	334-337
Intra-EC, resp. 3/10 minutes	2,31-7,70	1,29-4,31	179-179

Caution is required in this comparison since local tariff areas are much smaller in Portugal (radius of 5 km) than in the UK (radius of more than 30 km). Many short distance calls are thus carged as regional calls in Portugal. For this reason 'local calls' in Portugal only represent 7 % of the revenues of Portugal Telecom.

(30) Given that owing to technical progress in the network, cost is increasingly less dependent on distance, cost orientation of trariffs 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 standard margin),

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

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

Consequently telecommunications organizations would normally raise bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long-distance calls. It appears, however, that Portugal Telelcom's local charges are as mentioned alredy high in comparison with other Member States and Portugal Telecom will therefore not bel able to compensate decreases in trunk and international charges with increases in local charges.

[1] Tarifica study implemented for CEC — DG XIII.

[2] A direct comparison of the telephony tariffs of Portugal Telecom with the Community average (which is not a weighted average) would not be appropriate, given that the tariff structures of the 15 Community TOs are still widely divergent and in addition, given that they are currently in the process of rebalancing tariffs. A comparison with British Telecom was also made in the Commission Decision with respect to Ireland of 27 November 1996.

(31) Given the need not to affect the resources required to extend further telephone penetration in the coming years, the continuation of the gradual approach envisaged by Portugal for further tariff decreases seems therefore justified, in view of the rebalancing already achieved to date and the firm commitments to complete the process by reducing trunk and international tariffs by the year 2000.

(b) Telephone density

(32) Portugal Telecom has achieved one of the fastest telephone penetration growths in the Community over the last five years (from 24 main lines per 100 inhabitants in 1991 to 37 in 1995). Today, Portugal Telecom nevertheless still has the second-lowest telephone penetration of the Community (after Ireland). Portugal states that 26 % of Portuguese households are still without a telephone and that this is due mainly to the need to expand the network further.

(33) 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 Portuguese authorities that enabling Portugal Telecom to pursue its development programmes to further improve telephone density will benefit the public seems therefore acceptable, even if the additional time given to Portugal Telecom 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.

(34) In fact, the figures provided by the Portuguese authorities also show that although telephone penetration is still low in Portugal, outstanding demand is also limited. It appears for example that the average waiting time for connection to the telephone network has dramatically decreased, i.e. from ten months in 1989 to only eight days in 1995.

(35) The need to increase penetration can therefore justify a continuation of the current exclusive privilege of Portugal Telecom for a limited duration. The slowing of the yearly increase in penetration (from 14,5 % in 1990 to 5 % in 1995) shows that, due to a combination of amongst others demographic [1] and economic factors (and in particular the lower Portuguese GDP reflected in a lower average spending per telephone line — ECU 560 per main line in 1995 compared with ECU 605 in the UK) specific to Portugal, there is actually no significant demand for further telephone lines by households. Further market growth would then depend on the reduction of tariffs as well as 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.

Development of trade

(36) Although the granting of a derogation to the Portuguese Government would foreclose the telecommunications market in Portugal during two years, the negative effect on the development of trade in the Community will be reduced due to:

— the limited size of the Portuguese telecommunications market in comparison to the Community market. One could expect indeed that as from 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 meantime they can already plan investments, so as to be ready to be operational in advance of 1 January 2000.

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

— Portugal Telecom is not expanding its operation in Member States which have liberalized their markets. If this were the case, the derogation enabling Portugal Telecom 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,

[1] Household size in Portugal is 2,9 people, i.e. larger than in all other EU member States except Ireland, and Spain (2,6 is the Community average). This reduces the potential for additional residential penetration.

— the lifting of restrictions on the use of own and alternative infrastructures is effective from 1 July 1997, as mentioned below. This would allow potential new entrants to operate and provide already liberalized telecommunications services on such networks from that date on, in preparation for full competition, and in particular to provide voice services over corporate networks and/or to closed user groups via such infrastructures,

— the full implementation of the provisions of Directive 90/388/EEC not subject to the current derogation, and in particular the abolition of the current complementary licences scheme in order to allow liberalized services providers, such as providers of voice services to closed user groups, to start operating their services on the basis of a mere declaration,

— without prejudice to the impact assessment provided for in the third paragraph of Article 2 of Commission Directive 95/51/EC [1] in the short term TV Cabo is managed at arm's length of Portugal Telecom as long as it remains within the Portugal Telecom Group.

Conclusion

(38) On the basis of the above assessment, the Commission considers that the development of trade which would result from the granting to Portugal of an additional implementation period until 1 January 2000 as regards the abolition of the exclusive rights currently granted to Portugal Telecom for the provision of voice-telephony and public network infrastructure instead of 1 January 1998, under Article 2 (2) of Directive 90/388/EEC, is not affected to such an extent as to be contrary to the interests of the Community, in so far as the circumstances set out above are fulfilled.

IV. *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

Arguments provided by the Portuguese Government

(39) The Portuguese Government has requested a derogation on the grounds that, due to a combination of, amongst others, demographic and economic factors (and in particular the lower Portuguese GDP reflected in a lower average spending per telephone line), there is little scope for an increase in the size of the liberalized services market.

(40) Currently, Portugal Telecom derives more than Esc 23 billion from the provision of leased circuits (approximately 6 % of its turnover). The Portuguese authorities state [2] that the lifting of restrictions on the use of alternative infrastructure before 1 July 1999 would cause Portugal Telecom a loss of about Esc 4 billion per annum up to 2000 (i.e. about 1 % of its turnover) due to the substitution by liberalized service providers of (mainly long-distance 'interconnection') leased circuits by alternative infrastructure. According to the Portuguese submission, if in the alternative Portugal Telecom reduced substantially the price of leased circuits to maintain its market share at an estimated 80 %, then Protugal Telecom would lose cumulated revenue of Esc 24 billion up to 2000.

Assessment by the Commission

(41) This argument cannot be fully accepted. It is true that, under its exclusive privilege to provide network infrastructure, Portugal Telecom is enjoying guaranteed revenues from the provision of leased lines to end-users and providers of liberalized telecommunications services. However, Directive 92/44/EEC requires 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 TOs in this area substantially.

(42) It is true that charges for leased lines in Portugal are not yet fully rebalanced. A cost-based tariff proposal could nevertheless be implemented rapidly to avoid Portugal Telecom losing revenue to potential alternative infrastructure providers, as customers would wish to diversify suppliers. Such tariffs reductions would not affect Portugal Telecom as significantly as stated by the Portuguese authorities for the following reasons:

[1] OJ No L 256, 26. 10. 1995, p. 49.

[2] Additional submission of 3 January 1997.

— the liberalized services market (voice services for closed user groups were just liberalized in 1996) is a growing market in the long term, although it is recognized that this growth in Portugal may be slower than in other Member States in the short term. Even with reduced tariffs, losses could be compensated in due course by the increase of demand of leased circuits,

— moreover a fully separated backbone network involves substantial risks (as in the case of its failure). Therefore, operators would in any case continue to use Portugal Telecom or third party lines, as 'back-up' capacity allowing them to maintain their service in the case of the failure of their own network,

— a loss of turnover does not constitue a loss of revenue, since Portugal Telecom would save the costs related to the provision of the leased lines involved,

— other companies within the Portugal Telecom Group, by providing their own infrastructure, would increase their profit margins accordingly and compensate in the consolidated accounts of the Portugal Telecom Group any negative effect of lifting the restrictions, with regard to them.

Finally, Portugal Telecom does not take account of the revenues that it will receive from competitors for the supply of interconnection services to them. Usually, interconnection charges are the single biggest cost to entrants of market participation. Consequently, the lifting of restrictions on the use of alternative infrastructure will in fact not reduce revenues, but in due course will be revenue generating.

Development of trade

(43) As a consequence of its monopoly on the provision of public telecommunications infrastructures, Portugal Telecom 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 is shown *inter alia* by the abovementioned current high leased-lines tariffs, which makes the supply of some liberalized services uneconomic. Furthermore, this potential knowledge by Portugal Telecom of the costs of its competitors will increasingly affect trade, since the Portuguese public operator is likely to develop even further its own offer of liberalized services, although this growth is likely to be slow in the short term. Whereas Portugal Telecom could use its own infrastructure to provide 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, Portugal Telecom currently does not produce accounts sufficiently transparently as to allow an adequate separation of its activities in the monopoly sector from those in the liberalized sector. Furthermore, there is no structural separation, to prevent staff in the infrastructure side of Portugal Telecom passing information to colleagues selling liberalized services.

Conclusion

(44) Given the existing obligation under Directive 92/44/EEC on the application of open network provision to leased lines, which requires leased line tariffs to be cost oriented, a lengthy additional implementation period would not be justfied. However, given the relatively low average spending power of the Portuguese user, it is likely that any growth in the market for already liberalized services will be relatively slow in the short term. An immediate lifting of restrictions on the provision of own or alternative infrastructure will have an impact on the revenues of Portugal Telecom in the short term which, together with the current rebalancing of voice-telephony tariffs, could have an adverse effect on development of the network and the provision of Universal Service.

(45) For this reason, the Commission considers that the development of trade will not be affected by the granting to Portugal of an additional implementation period regarding the liberalization of alternative infrastructure to such an extent as to be contrary to the interests of the Community if the abovementioned period will not go beyond 1 July 1997,

HAS ADOPTED THIS DECISION:

Article 1

Portugal may postpone until 1 January 1999 the lifting of restrictions on the direct interconnection of mobile telecommunications networks with foreign networks. It must notify to the Commission before that date the legislative measures adopted in order to implement Article 3 (d) of Directive 90/388/EEC.

Article 2

Portugal may not postpone the lifting of restrictions on operators of mobile and personal communications systems, pursuant to Article 3 (c) of Directive 90/388/EEC, with regard to:

(a) the establishment of their own infrastructure;

(b) the use of infrastructures provided by third parties; and

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

The Portuguese authorities shall inform the Commission of all authorizations granted and frequency allocated — upon request — to mobile operators wishing to establish their own infrastructure and to owners of other telecommunications infrastructure wanting to lease capacity to mobile operators.

Article 3

Portugal may postpone until 1 January 2000 the abolition of the exclusive rights currently granted to Portugal Telecom as regards the provision of voice-telephony and the establisment and provision of public telecommunications networks, provided that the following conditions are implemented according to the timetable laid down hereafter:

— no later than 1 July 1997 instead of 1 July 1996: notification to the Commission 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,

— no later than 12 November 1997 instead of 11 January 1997: notification to the Commission of legislative changes necessary to implement full competition by 1 January 2000, including proposals for the funding of universal services,

— 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 July 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 January 2000 instead of 1 January 1998: award of licences and amendment of existing licences to permit the competitive provision of voice-telephony.

Article 4

Portugal 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.

Portugal shall notify to the Commission, no later than 1 July 1997 instead of 1 July 1996, all measures adopted to lift such restrictions.

Article 5

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 12 February 1997.

For the Commission

Karel VAN MIERT

Member of the Commission