II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 May 1997

on the granting of additional implementation periods to Luxembourg for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets

(Only the French text is authentic)

(Text with EEA relevance)

(97/568/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 given notice [3] to interested parties to submit their comments in accordance with Article 2 (2) of Directive 90/388/EEC,

Whereas:

I. THE FACTUAL AND LEGAL BACKGROUND

A. The Luxembourg request

(1) Pursuant to Article 2 (2) of Directive 90/388/EEC, the Luxembourg authorities, by letter of 28 June 1996, have requested the following implementation periods:

— until 1 January 2000 in respect of the exclusive rights currently granted to the Luxembourg postal and telecommunications service provider known as Entreprise des Postes et Télécommunications (EPT), for the provision of voice telephony and the underlying network infrastructure. Under Article 2 (2) of Directive 90/388/EEC, this provision was to have been implemented by 1 January 1998,

— until 1 July 1998 in respect 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) shared networks, other facilities and sites.

Under Article 2 (2) of Directive 90/388/EEC, these provisions were to have been implemented before 1 July 1996. The provisions do not apply to cable TV infrastructures, governed by Article 4 of the same Directive.

(2) The Luxembourg authorities consider these additional implementation periods to be necessary for the following reasons:

— liberalization of the telecommunications market (consequent upon the immediate transposing of the Directive) before a suitable regulatory framework has been set up and the necessary structural changes made would expose Luxembourg to the risks of an unregulated market.

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 74, 22. 3. 1996, p. 13.
[3] OJ No C 257, 4. 9. 1996, p. 5.

The derogation requested will not impede the development of competition in other areas of the telecommunications sector in Luxembourg. Once the new Law on telecommunications ('the Law') enters into force the liberalization process can be implemented in an orderly fashion. For example, firms will be invited to bid for a licence to operate the second national GSM network. The selection procedure will be open and objective, and the licence will be granted to the firm that best meets the published qualitative criteria,

— EPT currently charges its customers a single, standard rate, but a reform of the tariff structure is planned. The considerable imbalance between currently estimated costs and current charges is a major factor hampering liberalization in Luxembourg. The new independent supervisory body now being set up (the ILT — Institut Luxembourgeois des Télécommunications) will oversee the ongoing process of adjusting charges in Luxembourg; the ILT will also be responsible for laying down the accounting rules and the rules for cost-based charging that will apply to EPT,

— in Luxembourg the liberalization process entails disproportionate commitments, particularly in terms of human resources, for the ministry responsible, the ILT and EPT,

— in 1995 international calls accounted for 71 % of the overall telephony turnover of Lfrs 6 346 million. Over 50 % of those calls were made by 960 business customers based in the City of Luxembourg. Outgoing calls accounted for 62 % of international calls. Opening up the Luxembourg market before a suitable regulatory framework has been put in place and the necessary structural changes made would leave telecommunications companies based in other countries free to offer international telephony services to Luxembourg firms and to divert business away from EPT's network. This could pose a serious threat to the viability of the national operator's infrastructure and to its ability to complete the necessary structural adjustments and future development in a competitive market. The regulatory framework needed to avert such a threat is currently being adopted, and the implementation period requested would enable it to be set up,

— Luxembourg recently placed its postal and telecommunications administration on a commercial footing. EPT devotes an annual budget of Lfrs 32 million to equipping its staff with the skills they need in order to work in a commercial environment. At the beginning of 1995, EPT commissioned an independent firm of consultants to undertake a thorough review of its organizational structure. The restructuring process, which entails introducing business accounting methods and adjusting the tariff structure, will not be completed in time for a full liberalization of the telecommunications market on 1 January 1998.

(3) The Luxembourg authorities have not given a definitive time for the adoption of the Law by the Luxembourg Parliament, but it would appear that it will be adopted in the first half of 1997. The Luxembourg authorities have stated that it is not able to influence the speed at which the Law is passing through the Parliament. The Law, once adopted, will transpose the Community open-network-provision (ONP) interconnection requirements into national law (in the meantime, the Luxembourg Government has informed the Commission that this law had been enacted on 19 March 1997 and entered into force on 1 April 1997). Other dates in the timetable proposed by the Luxembourg authorities have been estimated on the advice of independent consultants who are advising EPT and the Luxembourg authorities. The following timetable is anticipated:

— first half of 1997: adoption of the Law,

— March 1997: introduction of the new client billing and management system,

— five months after adoption of the Law: ILT established and operational,

— six months after adoption of the Law: principles of the financing of the Universal Service Obligations ('USO') settled,

— six months after adoption of the Law: grant of second GSM licence,

— second half of 1997: new system of regulation under ILT operational,

— 1 January 1998: new cost-based accounting system for EPT started,

— March 1998: new client-billing and management system fully implemented,

— July 1998: new client-billing and management system fully operational and necessary reform of internal procedures and staff retraining nearing completion,

— 1 January 2000: new cost-based accounting system for EPT fully implemented.

The request was delivered to the Commission on 28 June 1996.

B. The comments received

(4) Two undertakings provided comments following the notice published in the *Official Journal of the European Communities* (1).

(5) According to these comments:

— the telecoms market in Luxembourg is particularly healthy. The revenues per line and per employee of EPT are very high in comparison to the EU average. Telephone density in Luxembourg is considerably higher than the EU average,

— the international tariffs charged by EPT are already competitive and there is little need for tariff rebalancing,

— Luxembourg has failed to implement EU legislation and has thus impeded competition. A cost-based accounting system for EPT suitable for the implementation of Article 10 (1) of Council Directive 92/44/EEC (2) and Article 13 (1) of Directive 95/62/EC of the European Parliament and of the Council (3) have not been implemented as they should have been by 31 December 1993 and 31 December 1996 respectively. Furthermore, no second GSM licence, for example, has not yet been granted. Therefore, EPT retains a monopoly over public voice telephony, infrastructure and mobile telephony,

— the consistent case-law of the European Court of Justice has established that delays in the implementation of EU legislation cannot be justified on grounds of administrative or practical difficulties in a Member State. Therefore, limited governmental resources cannot be given as a justification for an additional implementation period. Under Directive 96/19/EC Luxembourg is requesting additional implementation periods as a Member State with a very small network. Adequate reasoning ought to be provided as to why the smallness of its network should justify an additional implementation period,

— any derogation would have a negative effect on trade. EPT is the sole supplier of leased lines and interconnection services in Luxembourg to any actual or potential providers of liberalized services. This is a determining factor on the costs of competitors and the knowledge of the costs involved will have an impact on trade. In addition, Luxembourg is an important financial centre in the EU, and both financial services and trading are largely based on telecoms. Any derogation will have an impact on the financial services market,

— Luxembourg has failed to give any particular reasons as to why there should be any derogation from the requirement to lift restrictions, by 1 July 1996, on the provision of already liberalized telecommunications services,

— it is generally accepted that the concentration of EPT's revenues on 960 business customers is a peculiarity within the EU. However, this is not necessarily a weakness. A close relationship with a fewer number of customers is a powerful marketing tool which is potentially conducive to good customer management. Further, since the coming into force of Directive 90/388/EEC on 28 July 1990, EPT's competitors have been allowed to provide non-public international telephony services to customers connected directly by leased lines. EPT has thus already *de facto* been exposed to competition for more than five years in its most lucrative market segment. Without unequivocal cost and revenue data related to the specific geographical and economic structure of Luxembourg (as well as the network configuration of EPT) showing that fundamental structural adjustments are required to preserve the viability of EPT in the face of the liberalization of the voice telephony service for residential customers, there is no justification for an extension of the voice telephony monopoly beyond 1 January 1998. The same analysis applies to the establishment and provision of underlying infrastructure.

(6) By fax of 18 October, later confirmed by letter dated 6 December 1996, the Commission sent on to the Luxembourg authorities the comments received.

C. The Luxembourg response

In response to the comments above the Luxembourg authorities by letter dated 19 December 1996 stated, *inter alia,* that:

— EPT was the only Telephone Operator ('TO') in Europe to experience falling revenues in 1995 and 1996. The profits of EPT (Lfrs 2 300 million in 1995) have fallen by 11,2 % against other European operators,

— as a result of the high penetration rate in Luxembourg, which has been achieved by EPT's concentrating on the supply of a technically high quality service, consumers would not suffer at a technological level from a late introduction of competition in the telecoms markets,

(1) OJ No C 257, 4. 9. 1996, p. 5.
(2) OJ No L 165, 19. 6. 1992, p. 27.
(3) OJ No L 321, 30. 12. 1995, p. 6.

— comparing EPT with British Telecom or any other large TO is unhelpful since such TOs enjoy, *inter alia*, economies of scale which are not available to EPT. The provision of Universal Service is more costly in Luxembourg than in most Member States because EPT cannot benefit from those economies of scale,

— although profits per employee are currently high in Luxembourg, this does not take into account EPT's current structure. EPT needs to restructure its personnel, for example by creating a maketing department. This will reduce the profits per employee,

— there are fewer than 100 analogue mobile radiotelephony subscribers, so that the high average revenues per user from this service are in fact insignificant in terms of total revenues. Revenues from the GSM mobile radiotelephony service will fall when a licence is granted to a second operator,

— EPT's market position is very vulnerable because of its reliance on only 960 business customers to generate the greater part of its revenues,

— the required rebalancing of tariffs will involve a substantial increase in subscription costs and yet international tariffs will probably decrease,

— Luxembourg is not late in implementing Directive 96/19/EC, because it has exercised its right to request a derogation,

— Luxembourg enjoys a very low unemployment rate and it will be very difficult to recruit new personnel to fulfil the requirements of EPT,

— it is highly likely that new market entrants will seek to compete on the Luxembourg market without having to invest in the fixed infrastructure market. It will be easy, relative to other Member States, for competitors to move quickly into the Luxembourg market.

In the same letter, the Luxembourg authorities stressed again the need for additional time to complete structural changes within EPT so that it can function on a commercial basis.

The Luxembourg authorities supplied further information to the Commission during a bilateral meeting held in Brussels on 18 February 1997 and in fax message sent on its behalf on 6 March 1997. The Luxembourg authorities confirmed that the new client-billing and management system is likely to be installed in March 1997 and thereafter a trial period of about twelve months is scheduled before the system becomes operational. By July 1998 the new client billing and management system should be operational and the necessary internal procedures and staff training will be nearing completion.

D. Article 2 (2) of Directive 90/388/EEC

(7) The application of Article 90 (2) of the EC Treaty in the telecommunications sector has been set out in Directive 90/388/EEC, which provides for the introduction of full competition in the telecommunications markets at the latest by 1 January 1998. However, under Article 2 (2) of Directive 90/388/EEC the Commission is to grant additional implementation periods, upon request, to a number of Member States with the right to (i) derogate from the dates set out in Directive 90/388/EEC and (ii) 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. This serves to allow for the implementation of measures which are necessary to carry out structural adjustments and strictly to the extent necessary for those adjustments.

(8) As regards the provision of public telecommunications services and networks, it appears that EPT is a telecommunication organization within the meaning of Article 1 of Directive 90/388/EEC, and is entrusted with a service of general economic interest pursuant to Luxembourg law.

(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.

(10) 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 the undertaking will be able to offset less profitable sectors against the profitable sectors. This justifies a restriction of competition from individual undertakings where economically profitable sectors are concerned. To authorize individual under-

takings to compete with the holder of the exclusive rights in the sectors of their choice would make it possible for them to concentrate on 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.

(11) 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 and the maintenance of the USO 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.

(12) In practice in the longer-term new entrants could also contribute to the relevant tasks of general economic interest: The exception aims to protect the fulfilment of a task of general economic interest and not to shelter specific undertakings. In the short term, however, EPT will continue to be the only undertaking providing a universal telephone service to residential users in sparsely populated areas. Moreover Luxembourg is a specific case because it has a very small telecommunications network located between two large telecommunications markets. The TOs operating in those markets would be able to compete in Luxembourg very easily. Many international calls to and from Luxembourg are made to and from these two markets. For this reason, the Commission examined both of the additional implementation periods requested to determine whether granting them is necessary to allow EPT to perform its task of general economic interest and to have the benefit of economically acceptable conditions whilst the necessary structural adjustments are being made.

II. LEGAL ASSESSMENT

A. 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 EPT

(13) In pursuance of the general principle of proportionality, any additional implementation period granted must be strictly proportional to what is necessary to achieve the necessary structural adjustments, mentioned by the Luxembourg authorities, on condition that such adjustments fall within Article 2 (2) of Directive 90/388/EEC, with a view to the introduction of full competition.

The required structural adjustments must examined in the light of these issues.

(a) Tariff rebalancing

(14) The Luxembourg authorities state that the connection costs in Luxembourg must increase substantially [1] if the network costs of EPT are to be recovered. The Luxembourg authorities state that international tariffs in Luxembourg are lower than the European average and will probably continue to fall.

(15) The following table, based on information in the Commission's possession [2], compares certain telephone tariffs of EPT and the equivalent figures for two operators which have already rebalanced their tariffs (British Telecom and TeleDanmark) and one operator which still has to rebalance its tariffs (Deutsche Telekom) [3]. The terms of comparison have been chosen on the following grounds. A comparison with British Telecom was also made in Commission Decision 97/114/EC [4] with respect to Ireland and in its Decision 97/310/EC [5] with respect to Portugal. The choice of TeleDanmark allows a comparison with a similarly relatively small TO providing services in relatively similar conditions in another Member State. A comparison has been made with Deutsche Telekom as a neighbouring TO. Deutsche Telekom is a neighbouring TO which could easily take advantage of the liberalization of the Luxembourg telecoms market. This table shows a certain need for rebalancing:

[1] Exact figures are omitted for reasons of commercial confidentiality.
[2] Tarifica study implemented for CEC — DG XIII.
[3] A direct comparison of the telephony tariffs of EPT 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.
[4] OJ No L 41, 12. 2. 1997, p. 8.
[5] OJ No L 133, 24. 5. 1997, p. 19.

Tariffs in ECU on 1 January 1996	EPT	British Telecom	Deutsche Telekom	TeleDanmark
initial connection charge	74,29	137,53	53,07	212,50
bi-monthly rental	13,08 (1)	19,53	26,11	27,33
local calls, resp. 3/10 minutes (cheap rate)	0,13-0,26	0,06-0,19	0,06-0,19	0,11-0,22
local calls, resp. 3/10 minutes (peak rate)	0,13-0,39	0,14-0,47	0,13-0,45	0,16-0,44
trunk calls, resp. 3/10 minutes (peak rate)	Not Applicable	0,35-1,16	1,02-3,38	0,33-0,99
intra EC, resp. 3/10 minutes (peak rate)	1,61-5,23	1,29-4,31	1,66-5,54	1,71-5,65

(1) Estimated for comparative purposes.

(16) Given that due to technical progress in the network, cost is increasingly less conditioned by distance, cost orientation of tariffs means as a general rule that prices are adjusted in such a way that revenues are rebalanced with costs. This means that connection and rental revenues must cover fixed costs (plus a standard margin) and call revenues must cover call costs (plus standard margin).

(17) Consequently telecommunications organizations have had to raise bi-monthly rental and local calls (or at least, not decrease these charges) and reduce tariffs for long-distance calls. There is clearly a need for further rebalancing and the Commission accepts that this will be more difficult for EPT than most TOs because of its reliance on 960 business customers generating a large proportion of its revenues from international calls and thus because EPT does not enjoy economies of scale. However, the figures for Deutsche Telekom show that other TOs have in some cases a greater need for rebalancing than EPT. Moreover, in the future flexible tariff structures will more and more be applied, as is currently the case for GSM telephony, whereby a user chooses the tariff package which best suits his needs. With such an approach, there would be little immediate need to reduce international tariffs, since large users could chose a tariff package with a higher monthly rental and lower usage tariff. However, the Commission accepts that because of its reliance on 960 business customers, EPT will have to concentrate particularly in assessing the specific needs of these customers in order to maintain revenues at a level sufficient to provide a Universal Service in the short term.

(18) Nevertheless, EPT is currently making profits annually with connection charges at current levels (19,2 % of its turnover in 1995 in comparison with only 12,5 % for British Telecom in the same year). Although there is a need to increase connection charges fairly significantly, there is no clear reason as to why connection charges would have to be increased as substantially as is suggested by the Luxembourg authorities because fixed costs are not apparently any higher in Luxembourg than in other Member States. The population density of Luxembourg is above the EU average and is higher than that in Denmark. The percentage of the population in urban areas in Luxembourg is comparable to that in both Denmark and the United Kingdom.

(19) The Luxembourg authorities have submitted that full tariff rebalancing will only be possible once EPT's new cost accounting system is fully operational. Whilst accepting this statement in principle, the Commission does not accept that the implementation of cost accounting is any more difficult for EPT as a result of the small size of the network in Luxembourg. On the contrary, allocating costs is easier for EPT, given that there are only two categories of calls, namely local and international calls, than for TOs in other Member States where the cost of regional and long-distance calls must be taken into account. Further, the timetable given by the Luxembourg authorities for the implementation of cost accounting is too long when set against the experience in other Member States. Finally, Luxembourg had to implement cost accounting systems by 31 December 1993 under Directive 92/44/EEC and by 31 December 1996 under Directive 95/62/EC. Even if the Commission was minded to grant an additional implementation period for this reason (which it is not), the Commission cannot adopt a Decision which effectively would amend a Council Directive.

(20) Given the high number of telephone lines per 100 inhabitants in Luxembourg and the high level of digitalization (amongst the highest in the EU), it is clear that there is already the infrastructure for an Universal Service in Luxembourg and that no extra financial means are required to develop the network. EPT may wish to provide new services but this can most effectively be done within a competitive market. The Commission cannot accept the submission of the Luxembourg authorities that as a result of the high penetration rate, consumers will not suffer from a late introduction of competition. It is clear that any delay in the introduction of competition will delay the introduction of price competition and tariff flexibility in Luxembourg, which will not benefit consumers.

(b) Adressing the specific problems of Luxembourg as a country with a very small network

(21) Specific to Luxembourg is that international calls account for approximately 70 % of the overall telephony turnover of EPT. Over 50 % of those calls are made by 960 business customers based in the City of Luxembourg. As soon as telecommunications companies based in other countries are free to offer international telephony services to these customers, they will be able to divert substantial business away from EPT, obliging it to raise substantially the rates for residential users. This might have negative short-term effects on the provision of universal service in Luxembourg and make difficult the necessary structural adjustments. This threat will only be averted when EPT has implemented and is operating a new client-relationship with its major customers. A close relationship with a client is a key to serving a client's needs and responding to the solutions sought by a client. Indeed, the basis for such a new approach is already being implemented.

(22) The Luxembourg authorities state that the new client billing and management system will be set up in January 1997 and that it should be fully implemented by March 1998. The Commission acknowledges that, given EPT's unique small client base and its current client orientation, this new billing system is a key measure in the current reorganization of working methods within EPT. For this reason a limited additional time period until the full implementation of this billing and management should be considered. The Commission also considers that a further additional implementation period to allow this billing and management system and related tariff rebalancing to be fully operational should also be granted. This will allow EPT to improve its knowledge and understanding of its clients' specific needs and to allow for the transition to a competitive environment, without major negative consequences on the affordability of the residential service.

As far as the other arguments are concerned, the Commission does not accept that the EPT's reliance on 960 business consumers to provide a large part of its revenues is necessarily a disadvantage in this area. If EPT can acquire the necessary marketing skills, a close relationship with a client is a key to serving a client's needs and responding to the arrangements sought by a client. Moreover, the limited size of EPT does not prevent it from enjoying the benefits of economies of scale: it may conclude agreements and alliances with other service providers to ensure that it is able to provide the global arrangements sought by its clients. In addition, the small size of EPT and its reliance on subcontractors allows it to enjoy a great degree of flexibility. It can more easily implement changes in the scope of its activities by taking on new contracts, than a fully integrated large organization which has to retrain personnel and change company organization to respond to the needs of its customers.

(23) The Commission can also not agree with the submission that it will be difficult to recruit new personnel for EPT in Luxembourg. EPT should be able to find staff from other Member States. In other industries, there is already a large work force in Luxembourg, as admitted by the Luxembourg authorities, which commutes daily from neighbouring Member States.

(24) Legislative amendments themselves and any potential delays in this process cannot be regarded as structural changes under Directive 90/388/EEC such as would justify a derogation. The Directive refers to the necessary structural changes of the operator wherever they are necessary to protect the provision of the service of general economic interest. According to the case-law of the Court of Justice [1], in the absence of the specific justification referred to in the Directive, Member States may not plead provisions, practices or circumstances existing in its legal system in order to justify an additional implementation period to comply with Community Directives.

(25) In any case, from the timetable provided by the Luxembourg authorities it would appear that all legislative changes and the consequent establishment of the ILT, the issuing of a second GSM licence, will be achieved by 1 January 1998. Therefore, the key regulatory and structural reforms will have been implemented by 1 January 1998.

[1] Case 1/86, Commission v. Belgium [1987] ECR 2797.

Development of trade

(26) 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 was pointed out by one commentator, this will affect trade since large international players are already present or interested in the Luxembourg market.

(27) Although the granting of a derogation to Luxembourg would foreclose the Luxembourg telecommunications market, the negative effect on the development of trade in the Community will be reduced owing, on the one hand, to the limited size of the Luxembourg telecommunications market in comparison with the Community market and, on the other, to the very limited duration of the derogation envisaged by the Commission.

(28) Such effect will be further reduced if the lifting of restrictions on the use of own and alternative infrastructures is effective from 1 July 1997, will be discussed below. This would allow potential new entrants to operate and provide already liberalized telecommunications services on such networks from that date onwards, in preparation for full competition, and in particular to provide voice services over corporate networks and/or to closed user groups via such infrastructures.

Conclusion

(29) The Commission accepts that, as in the case of other Member States which have requested an additional implementation period, telephone tariffs must be substantially rebalanced. Moreover, the Commission acknowledges that owing to the small size of the network, there are necessary structural adjustments which may be more difficult to implement in Luxembourg than in other Member States. In particular, the risk that EPT will lose significant revenues is real, as a result of its specific client-portfolio. This could harm in the short term the financial position of this operator and be a threat both to the structural adjustments which are still necessary and to the provision of a Universal Service. However, the Commission cannot accept fully the arguments of the Luxembourg Government.

On the basis of the above assessment, the Commission considers that the development of trade is not affected by the granting to Luxembourg of an additional implementation period until 1 July 1998 as regards the abolition of the exclusive rights currently granted to EPT for the provision of voice telephony and public network infrastructure instead of 1 January 1998, being the date envisaged under Article 2 (2) of Directive 90/388/EEC, to such an extent as to be contrary to the interests of the Community, provided that the conditions set out above are fulfilled.

B. 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

(30) The Luxembourg authorities state that the lifting of restrictions on the use of alternative infrastructure before 1 July 1998 would enable providers of liberalized services to offer customers speech calls and connect such calls with the public network in both directions. As a result of the peculiar circumstances of Luxembourg, where EPT relies heavily on the revenues of 960 clients, competitors — it is argued — could cream off these lucrative business clients in the City of Luxembourg without making any significant investments in infrastructure.

(31) The argument that the lifting of the current constraints may cause EPT revenue losses cannot be accepted. It is true that, under its exclusive privilege to provide network infrastructure, EPT 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 shall have been offered on a cost-oriented basis since 31 December 1993. Further, Directive 95/62/EC requires that fixed public telephone networks and voice telephony services shall have been offered on a cost-oriented basis since 31 December 1996. Given this obligation with which Member States must comply, the opening of the market to private operators is not expected to alter the position of TO's in this area substantially.

(32) The threat of a creaming-off of the leased-line market by other potential infrastructure providers can only become a reality in the absence of a clear regulatory framework and of possible monitoring by an independent regulatory authority. Article 8 of Directive 90/388/EEC acknowledges such a threat, inasmuch as it requires Member States to ensure, as regards undertakings enjoying special or exclusive rights in areas other than telecommunications, that such undertakings keep separate financial accounts as concerns activities as providers of networks.

This threat may be greater in Luxembourg than in other Member States having developed alternative telecommunications infrastructures, because of the location of a small number of highly lucrative clients in a small area which would allow a new entrant to supply them in a satisfactory way without depending on EPT for leasing lines or using EPT's network, and without very substantial

investments. However, according to the Luxembourg authorities, the necessary regulatory framework as well as the independent regulatory authority should be set up in the first half of 1997. For this reason no additional implementation period extending beyond 1 July 1997 could be justified. Possible delays in the calendar set out in the submission cannot be taken into account by the Commission when considering the request for an additional implementation period, since this calendar appears reasonable and indeed since Member States may not, according to the Court of Justice's judgment cited above, plead provisions, practices or circumstances existing in their legal systems in order to justify additional implementation periods to comply with Community Directives.

Development of trade

(33) The postponement of the lifting of restrictions on the use of own and alternative infrastructure will affect trade, since large international companies are already present or interested in the Luxembourg market.

(34) Although the granting of a derogation to Luxembourg would foreclose the Luxembourg telecommunications market, the negative effect on trade in the Community will be reduced, owing to the limited size of the Luxembourg telecommunications market in comparison with the Community market and with the very limited duration of the derogation envisaged by the Commission.

Conclusion

(35) Once the regulatory framework is in place there will be no threat of an abusive creaming-off of the market. According to the Luxembourg request this framework will be set up by 1 July 1997. Any grant of an additional implementation period which would extend beyond that date does not therefore seem justified.

(36) For these reasons, the Commission considers that the development of trade which would result from the granting to Luxembourg of an additional implementation period regarding the liberalization of alternative infrastructure is not affected to such an extent as to be contrary to the interests of the Community once the new regulatory framework is in force and at the latest from 1 July 1997 onwards,

HAS ADOPTED THIS DECISION:

Article 1

Luxembourg may postpone until 1 July 1998 the abolition of the exclusive rights currently granted to Entreprise des Postes et Télécommunications as regards the provision of voice telephony and the establishment and provision of public telecommunications networks, provided that the following conditions are implemented according to the time-table laid down hereinafter:

(a) No later than 11 July 1997 instead of 11 January 1997: notification to the Commission of legislative changes necessary to implement full competition by 1 July 1998, including proposals for the funding of universal services;

(b) No later than 1 July 1997 instead of 1 January 1997: notification to the Commission of draft licences for voice telephony and/or underlying network providers;

(c) No later than 1 January 1998 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 Community directives;

(d) No later than 1 July 1998 instead of 1 January 1998: award of licences and amendment of existing licences, to enable the competitive provision of voice telephony to commence.

Article 2

Luxembourg 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, facilities and sites.

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

Article 3

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 14 May 1997.

For the Commission

Karel VAN MIERT

Member of the Commission