II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 June 1997

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

(Only the Spanish text is authentic)

(Text with EEA relevance)

(97/603/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:

A. THE FACTUAL AND LEGAL BACKGROUND

I. The requests of Spain

(1) In a bilateral meeting on 9 October 1996 and further confirmed by letter of 26 November 1996, Spain requested the following additional implementation periods concerning Articles 3 and 3b of Directive 90/388/EEC as amended by Directive 96/19/EC:

(a) until 1 January 1998 for notification to the Commission before implementation of any licensing or declaration procedure for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of the Universal Service Obligation ('USO'). This provisions had to be implemented no later than 1 January 1997 under Article 3 of Directive 90/388/EEC;

(b) until 1 August 1998 for publication of any licensing or declaration procedure for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of the USO. This provision has to be implemented no later than 1 July 1997 under Article 3 of Directive 90/388/EEC;

and

(c) until 30 November 1998 for the requirement that adequate numbers are available for all telecommunications services. This requirement is

[1] OJ L 192, 24. 7. 1990, p. 10.
[2] OJ L 74, 22. 3. 1996, p. 13.
[3] OJ C 4, 8. 1. 1997, p. 5.

in order to give full effect to the liberalization to the telecommunications market. This provision has to be implemented before 1 July 1997 under Article 3b of Directive 90/388/EEC.

As a consequence of the additional implementation periods mentioned under (a), (b) and (c), and although by January 1998 there will be three nation-wide licences to operate voice telephony and public telecommunications networks in Spain, in addition to the licences granted to cable operators to provide voice telephony, the Spanish Government intends to delay the full implementation of the liberalization of the Spanish telecommunications market until 1 December 1998. As from that date, further licences will be granted for the provision of voice telephony and public telecommunications networks to all the undertakings which apply for them in compliance with the conditions set out in the relevant Spanish law and implementing regulations.

(2) Spain considers those additional implementation periods necessary for the following reasons:

(a) the introduction of competition on 1 January 1998 would oblige Telefónica de España SA ('Telefónica'), the Spanish telecommunications operator, to speed up the rebalancing of its tariffs which will affect significantly its profit margin up to the end of 1998;

(b) the introduction of competition also requires further capital investment in Telefónica's network, in particular for the implementation of the new numbering plan allowing the granting of adequate numbers to all new market entrants. For Telefónica to complete the necessary work in time, it is necessary to grant an additional implementation period of at least eleven months between the interconnection of the operator which will be licensed in early Janaury 1998 and the interconnection of all other new operators in the voice-telephony market. The conditions for interconnection between the first and second operators will be established during 1997.

(3) In response to the Commission's letter of 8 November 1996, the Spanish authorities confirmed in their letter received by the Commission on 15 November 1996 that they will:

(a) not seek any derogation for the lifting of restrictions on the provision of already liberalized telecommunications services on:

(i) networks established by the provider of telecommunications services;

(ii) infrastructures provided by third parties;

and

(iii) shared networks, other facilities and sites,

as from 1 July 1996 as provided in Article 2 (2) of Directive 90/388/EEC. Consequently, such networks can be provided without restrictions;

(b) allow in the course of 1997, as already decided, cable operators who apply in compliance with the conditions set out in the relevant law and implementing regulations to provide voice telephony, including the possibility to interconnect their networks for this purpose;

(c) ensure that the new General Telecommunications Law (Ley General de Telecomunicaciones) is adopted before the end of 1997, which will implement all outstanding provisions of Community law in the telecommunications sector;

(d) grant in early January 1998 a third nation-wide licence to operate voice telephony and public telecommunications networks, in addition to the licence already granted in 1996 to a second operator;

(e) ensure that all laws and regulations necessary for the complete opening of the telecommunications market to competition will be in place before the end of July 1998;

(f) ensure that on 1 December 1998, licences are granted effectively, without further conditions, for the provision of voice telephony and public telecommunications networks to all undertakings which applied in the course of August 1998, in compliance with the conditions set out in the relevant law and implementing regulations and in conformity with Directive 90/388/EEC; and

(g) abolish foreign ownership limitations in the conditions for licensing telecommunications operators in line with its obligations under the World Trade Organization.

(4) Further details were provided by the Spanish authorities by letter of 6 February 1997.

II. The comments received

(5) Four undertakings and associations provided comments following the notice published by the Commission on 8 January 1997, which amongst others:

(a) state that Spain has a developed and highly digitalized telephone network. According to those comments, the cost of tariff rebalancing has been overestimated by the Spanish authorities. It is also noted that Telefónica is strongly positioned and that this was reflected in the oversubscription for shares offered for sale by the Spanish Government at the beginning of 1997. Furthermore, reference is made to the investments of Telefónica in America;

(b) state that in order to give undertakings the time to submit licence applications, the licensing and USO financing schemes should be published as soon as possible following notification to the Commission; and

(c) state that the cost of renumbering has been overestimated by the Spanish authorities. Although there will be some expenditure by Telefónica, the largest share of the cost of the new numbering scheme will be borne by subscribers; and

(d) stress that licensed voice telephony operators should still have equal access to the numbers available from 1 January 1998;

(e) refer to late implementation of various Community provisions in Spain and state that the timetable for the other provisions set out above to which the Spanish authorities have agreed should be rigorously followed by the Spanish authorities; and

(f) state the licensing procedure for the third voice telephony operator should be published during September 1997 to allow undertakings to submit applications and a licence to be awarded early in January 1998.

By letter dated 28 February 1997, the Commission transmitted to Spain the comments of third parties received following the publication of the Commission's notice of 8 January 1997. The Commission invited the Spanish authorities to comment on the third party submissions. The Spanish authorities replied to those comments by letter dated 19 March 1997 and confirmed their original request.

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

(6) Detailed rules for the application of Article 90 (2) of the Treaty in the telecommunications sector were laid down 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, as amended by Directive 96/19/EC, the Commission will grant additional implementation periods, upon request, to a number of Member States giving the right to (a) derogate from the dates set out in Directive 90/388/EEC and (b) maintain during additional periods the special or exclusive rights granted to undertakings to which they entrust the provision of a public telecommunications network and telecommunications services.

(7) Unlike to the requests of Ireland (Commission Decision 97/114/EC [1]) and Portugal (Commission Decision 97/310/EC [2]), which pertained to the continuation of the exclusive rights granted to their respective telecommunications organizations, the Spanish request for additional implementation periods relates mainly to the time schedule for the implementation of full competition in Spain, in the context of a progressive opening to competition of the Spanish telecommunications market. On 7 June 1996, by Royal Decree Law 6/1996 on Liberalization of Telecommunications, the monopoly on voice telephony and the oligopoly on public telecommunications networks were formally abolished, and the public body Retevisión was granted a licence to provide voice telephony and the corresponding infrastructures. Moreover, during 1997 Spain will authorize the cable TV companies to provide the voice-telephony service and in early January 1998 it will grant a third nation-wide licence to operate voice telephony and public telecommunications networks; it is fully committed to

[1] OJ L 41, 12. 2. 1997, p. 8.
[2] OJ L 133, 24. 5. 1997, p. 19.

completing the introduction of competition by the end of November 1998. Telefónica remains, however, under obligation to provide the USO in Spain under the Telecommunications Law *(Ley de Ordenación de las Telecomunicaciones)* 31/1987 of 18 December 1987 [1] and Telefónica's concession contract of 26 December 1991 [2].

(8) The starting point of the examination of the Spanish request is the assessment whether Telefónica, which is entrusted with a task of general economic interest within the meaning of Article 90 (2) of the Treaty, could continue to perform its task in conditions of economic equilibrium during this transition towards full competition, if the timetable set out in Directive 90/388/EEC is strictly complied with.

B. LEGAL ASSESSMENT

Arguments adduced by Spain

(9) The Spanish authorities state that:

— in order to face the competition from Retevisión, Telefónica must significantly rebalance its tariffs,

— Telefónica must introduce cost accounting mechanisms,

— Telefónica must further develop and modernize its network.

Spain has moreover decided by Resolution of 16 October 1996 [3], to introduce a new national numbering plan to solve the current numbering shortage in Spain and to prepare the market for full competition under Article 3b of Directive 90/388/EEC. This new numbering scheme is also being used to implement the common European emergency number. The numbering shortage has been caused by increases in demand brought about by increases in telephone penetration and development of the market to date. It is expected that further growth in this market will be strong. Telefónica expects to rebuild or modernize its analogue telephone exchanges, to rebuild its small-capacity digital exchanges and to develop further exchanges to meet growing demand. In addition, a large public awareness campaign must be organized. This will require significant capital investment.

Assessment by the Commission

(10) Given the fact that Spain refrained from asking for an additional implementation period for the abolition of the former exclusive rights of Telefónica, the latter now needs to address in a period of a few months and in competition with the newly authorized operators, structural adjustments for which the public operators in other Member States with less developed networks were granted additional periods of up to three years whilst sheltered by continued monopoly rights. In the case of Spain, those structural adjustments encompass (a) the completion of the rebalancing of Telefónica's tariffs, (b) the introduction of cost accounting; and (c) the improvement in network penetration which appears to be too low.

(a) *Tariff rebalancing*

(11) The Spanish authorities state that most of Telefónica's tariffs are too high and out of alignment with the tariffs of other Community operators. Rebalancing by adjusting charges to bring prices closer to underlying costs is also still required to achieve this objective. Telefónica is proceeding with a gradual and flexible approach to tariff rebalancing, while maintaining safeguards for consumers in terms of price and quality of service. The Commission recognizes that every operator in the Community is or has been carrying out a programme of rebalancing.

(12) The following table, based on information in the Commission's possession [4], comparing certain telephone tariffs of Telefónica and the equivalent figures for an operator which has already rebalanced its tariffs [5], supports the arguments of the Spanish authorities:

[1] BOE No 303, 19. 12. 1987, p. 37409. Amended, *inter alia*, by Law 32/1992 of 3 December 1992 (BOE No 291, 4. 12. 1992, p. 41268).
[2] BOE No 20, 23. 1. 1992, p. 2132.
[3] BOE No 262, 30. 10. 1996, p. 32538.
[4] Tarifica study implemented for CEC — DG XIII.
[5] A direct comparison of the telephony tariffs of Telefónica with the Community average (which is not a weighted average) would not be appropriate, given that the tariff structures of the 15 Community telecommunications organizations 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 Decisions 97/114/EC with respect to Ireland, 97/310/EC with respect to Portugal and Decision 97/568/EC with respect to Luxembourg (OJ L 234, 26. 8. 1997, p. 7 — Decision not published at the time of notification).

Tariffs in ecus on 1 January 1996	Telefónica	British Telecom	Difference Telefónica/BT (BT = 100)
Charge for new connection	154,6	137,53	112
Bi-monthly rental	18,07	19,53	93
Local calls, resp. 3/10 minutes (cheap rate)	0,08-0,17	0,06-0,19	133-89
Local calls, resp. 3/10 minutes (peak rate)	0,08-0,21	0,14-0,47	57-45
Trunk calls, resp. 3/10 minutes (peak rate)	1,16-3,58	0,35-1,16	331-309
Intra EC, resp. 3/10 minutes (peak rate)	2,08-6,15	1,29-4,31	161-143

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

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

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

Consequently, telecommunications organizations should normally raise connection charges, bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long-distance calls. It appears, however, that some of Telefónica's cheap rate local charges are already high in comparison with British Telecom and Telefónica will therefore not be able to compensate decreases in trunk and international charges with increases in local cheap-rate charges. Consequently, it is difficult for Telefónica to align its tariffs which are excessive in comparison to cost before 1 January 1998, which it would have to do if, in addition to the limited number of voice-telephony operators already authorized or to be authorized, other new providers were authorized by that date to enter the market. Those new entrants would concentrate on those segments of the voice-telephony market where the difference between the tariffs of Telefónica and costs is substantial with a view to conquering a share of that lucrative market. The Spanish request to delay the granting of additional licences until the end of November 1998 therefore seems justified. On the other hand, as long as the voice-telephony market is not fully liberalized, Spain should not introduce a scheme to share the USO burden of Telefónica. The introduction of such a financing scheme should therefore also be delayed until that date.

(14) Given the need not to affect the resources required to develop further the telecommunications network and to satisfy the USO, the Commission would expect a gradual tariff rebalancing process to be implemented by Telefónica. The Commission accepts that the introduction of competition in voice telephony is obliging Telefónica to speed up the rebalancing of its tariffs which will affect significantly its profit margin up to the end of 1998. That effect would not be mitigated by the establishment of the national scheme envisaged to share the net cost of the provision of the USO, given that competitors will need time to acquire significant market share and that Telefónica would for this reason remain the main contributor to the cost of the USO in the course of 1998.

(b) *Cost accounting*

(15) The Spanish authorities have submitted that full tariff rebalancing will only be possible once Telefónica's new cost accounting system is fully operational. However, the Commission cannot accept that as a reason for granting an additional imple-

mentation period because Member States had to implement cost accounting systems by 31 December 1993 at the latest under Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1] and by 31 December 1996 at the latest under Directive 95/62/EC of the European Parliament and the Council of 13 December 1995 on the application of open network provision to voice telephony [2].

(c) *Development of the network and provision of universal service*

(16) In 1994 approximately 48 % of Telefónica's local exchanges were digitalized against a weighted Community average of 67 %. Moreover, Telefónica has not achieved particularly fast telephone penetration growth in the Community until recently (from 32 main lines per 100 inhabitants in 1990 to 37 lines against a Community average of 48 in 1994). Telefónica has the third lowest telephone penetration of the Community (after Ireland and Portugal), although in the last two years (1994-1996) Telefónica has intensified its efforts to modernize the network in Spain and has increased penetration to 40 main lines per 100 inhabitants and the rate of digitalization to 60 % [3]. It is also noted that due to the relatively low population density in Spain in comparison with most other Member States, combined with the relatively low digitalization rate of Telefónica's network, increasing telephone penetration and developing the network generally is likely to be more costly in Spain than in other Member States.

(17) The Commission therefore acknowledges that, combined with the need for further development of the network in Spain and for the more rapid rebalancing of Telefóncia's tariffs, the cost of implementing the new numbering scheme is likely to affect a significant proportion of Telefónica's revenues. The Commission considers that the fact that Spain intends to complete the implementation of the new national numbering plan by 1 December 1998, in order to allow Telefónica to spread the cost in time and avoid its financial stability being affected in the crucial year of transition to full competition, is not incompatible with the Spanish Government's obligation under Article 3 b of Directive 90/388/EEC, as amended by Directive 96/19/EC, to ensure by 1 July 1997 that adequate numbers are available for the liberalized telecommunications services. In any case, such numbers must be allocated in an objective, non-discriminatory, proportionate and transparent manner, in particular on the basis of individual application procedures.

(18) As regards comments by third parties referring to the investments by Telefónica outside Spain, the Commission notes that investments by Telefónica in Central and South America are profitable. Such investments have diversified Telefónica's activities so that it is better placed to fulfil the task of general economic interest and in due course to face competition in the Spanish telecommunications market. Those investments have thus helped to avoid the need for Spain to request for an additional implementation period in other market segments of up to five years as foreseen by Directive 90/388/EEC.

Development of trade

(19) The granting of the requested additional implementation periods to Spain would not foreclose the voice-telephony market in Spain. A second operator has already been authorized to provide voice telephony and public telecommunications networks. Cable TV operators are going to be granted the right to provide voice telephony and a third voice-telephony operator will be licensed by early January 1998. Further applicants will only be prevented from entering the Spanish market during a limited period (until 1 December 1998). Since the establishment of a new public telephony service requires a preparation of many months, the possible harm to potential investors by this additional implementation period of eleven months will be limited due to the following circumstances: (a) those investors can already plan their investments and (b) the formal licensing conditions will be published no later than 1 August 1998. That will mean that new entrants will be ready to be operational in advance of full liberalization. In addition, the effective liberalization of the market will be more rapidly achieved to the benefit of new market

[1] OJ L 165, 19. 6. 1992, p. 27.
[2] OJ L 321, 30. 12. 1995, p. 6.
[3] Internal data CEC DG XIII.

entrants given that the access conditions will in the meantime be settled between Telefónica and the initial competitors. Finally, no additional implementation period with regard to any other market segment has been requested by the Spanish authorities.

On the basis that the publication of licences will take place no later than 1 August 1998, and mindful of Article 9 (2) of Directive 97/13/EC of the European Parliament and the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services [1], the Spanish authorities have stated that they will grant licences for the provision of public fixed voice telephony within four months of publication, to those undertakings which submit licence applications in good time. This will coincide with the completion of the implementation of the new numbering plan and will achieve the full liberalization of the voice-telephony and public telecommunications networks market in Spain.

(20) The Commission moreover takes note that the new numbering plan has already been decided and that Spain will only spread over time the completion of its full implementation and will respect its obligations under Article 3b of Directive 90/388/EEC. Sufficient numbers will be granted already before that date to Retevisión, to the new operator to be licensed in early January, to the cable TV companies and to providers of services other than voice telephony.

Conclusion

(21) On the basis of the above assessment, the Commission considers that the development of trade which would result from the granting to Spain of the following additional implementation periods under Article 2 (2) of Directive 90/388/EEC will not be 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:

(a) until 1 January 1998 instead of 1 January 1997 as regards the notification to the Commission of licensing or declaration procedures for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of the USO;

and

(b) until 1 August 1998 instead of 1 July 1997 as regards the publication of licensing or declaration procedures for the provision of voice telephony and public telecommunications networks, including details of the national scheme envisaged to share the net cost of the provision of the USO;

(c) as a consequence of those two extensions, and in accordance with the deadlines set out in Article 9 (2) of Directive 97/13/EC, further licences for the provision of voice telephony and public telecommunications networks (in addition to those mentioned in paragraph 7 of this Decision) will only be granted as from 1 December 1998,

HAS ADOPTED THIS DECISION:

Article 1

Spain may postpone until:

(a) 1 January 1998 the notification to the Commission before implementation of any licensing or declaration procedure for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of the Universal Service Obligation;

(b) 1 August 1998 the publication of any licensing or declaration procedure for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme evisaged to share the net cost of the provision of the Universal Service Obligation; and

(c) 1 December 1998 the effective granting of further licences for the provision of voice telephony and public telecommunications networks, in compliance with the conditions set out in the relevant Spanish law and implementing regulations and in conformity with Directive 90/388/EEC.

[1] OJ L 117, 7. 5. 1997, p. 15.

Article 2

Spain shall inform the Commission of the implementation in national law of the following obligations in accordance with the following timetable:

(a) during 1997, cable operators who apply in compliance with the conditions set out in the relevant law and implementing regulations shall be allowed to provide voice telephony including the possibility of interconnecting their networks for this purpose;

(b) before the end of 1997, the new General Telecommunications Law (*Ley General de Telecomunicaciones*), which will implement the outstanding provisions of Community law in the telecommunications sector, shall be adopted;

(c) in early January 1998, a third nation-wide licence to operate voice telephony and public telecommunications networks shall be granted, in addition to the licence which was granted in 1996 to a second operator; and

(d) before the end of July 1998, all laws and regulations necessary for the complete opening of the telecommunications market to competition shall be in place.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 10 June 1997.

For the Commission

Karel VAN MIERT

Member of the Commission