II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DIRECTIVE
of 16 May 1988
on competition in the markets in telecommunications terminal equipment

(88/301/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90 (3) thereof,

Whereas :

1. In all the Member States, telecommunications are, either wholly or partly, a State monopoly generally granted in the form of special or exclusive rights to one or more bodies responsible for providing and operating the network infrastructure and related services. Those rights, however, often go beyond the provision of network utilization services and extend to the supply of user terminal equipment for connection to the network. The last decades have seen considerable technical developments in networks, and the pace of development has been especially striking in the area of terminal equipment.

2. Several Member States have, in response to technical and economic developments, reviewed their grant of special or exclusive rights in the telecommunications sector. The proliferation of types of terminal equipment and the possibility of the multiple use of terminals means that users must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector.

3. Article 30 of the Treaty prohibits quantitative restrictions on imports from other Member States and all measures having equivalent effect. The grant of special or exclusive rights to import and market goods to one organization can, and often does, lead to restrictions on imports from other Member States.

4. Article 37 of the Treaty states that 'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

   The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.' Paragraph 2 of Article 37 prohibits Member States from introducing any new measure contrary to the principles laid down in Article 37 (1).

5. The special or exclusive rights relating to terminal equipment enjoyed by national telecommunications monopolies are exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality, regardless of its origin. The exercise of these rights is therefore not compatible with Article 37 in all the Member States except Spain and Portugal, where the national monopolies are to be adjusted progressively before the end of the transitional period provided for by the Act of Accession.

6. The provision of installation and maintenance services is a key factor in the purchasing or rental of terminal equipment. The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights. Such rights must therefore also be abolished if the abolition of exclusive importing and marketing rights is to have any practical effect.

7. Article 59 of the Treaty provides that 'restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.' Maintenance of terminals is a service within the meaning of Article 60 of the Treaty. As the transitional period has ended, the service in question, which cannot from a commercial point of view be dissociated from the marketing of the terminals, must be provided freely and in particular when provided by qualified operators.

8. Article 90 (1) of the Treaty provides that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.'

9. The market in terminal equipment is still as a rule governed by a system which allows competition in the common market to be distorted; this situation continues to produce infringements of the competition rules laid down by the Treaty and to affect adversely the development of trade to such an extent as would be contrary to the interests of the Community. Stronger competition in the terminal equipment market requires the introduction of transparent technical specifications and type-approval procedures which meet the essential requirements mentioned in Council Directive 86/361/EEC [1] and allow the free movement of terminal equipment. In turn, such transparency necessarily entails the publication of technical specifications and type-approval procedures. To ensure that the latter are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question. It is essential that the specifications and type-approval procedures are published simultaneously and in an orderly fashion. Simultaneous publication will also ensure that behaviour contrary to the Treaty is avoided. Such simultaneous, orderly publication can be achieved only by means of a legal instrument that is binding on all the Member States. The most appropriate instrument to this end is a directive.

10. The Treaty entrusts the Commission with very clear tasks and gives it specific powers with regard to the monitoring of relations between the Member States and their public undertakings and enterprises to which they have delegated special or exclusive rights, in particular as regards the elimination of quantitative restrictions and measures having equivalent effect, discrimination between nationals of Member States, and competition. The only instrument, therefore, by which the Commission can efficiently carry out the tasks and powers assigned to it, is a Directive based on Article 90 (3).

11. Telecommunications bodies or enterprises are undertakings within the meaning of Article 90 (1) because they carry on an organized business activity involving the production of goods or services. They are either public undertakings or private enterprises to which the Member States have granted special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment. The grant and maintenance of special and exclusive rights for terminal equipment constitute measures within the meaning of that Article. The conditions for applying the exception of Article 90 (2) are not fulfilled. Even if the provision of a telecommunications network for the use of the general public is a service of general economic interest entrusted by the State to the telecommunications bodies, the abolition of their special or exclusive rights to import and market terminal equipment would not obstruct, in law or in fact, the performance of that service. This is all the more true given that Member States are entitled to subject terminal equipment to type-approval procedures to ensure that they conform to the essential requirements.

12. Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it.

13. The telecommunications bodies hold individually or jointly a monopoly on their national telecommunications network. The national networks are markets. Therefore, the bodies each individually or jointly hold a dominant position in a substantial part of the market in question within the meaning of Article 86.

The effect of the special or exclusive rights granted to such bodies by the State to import and market terminal equipment is to:

— restrict users to renting such equipment, when it would often be cheaper for them, at least in the long term, to purchase this equipment. This effectively makes contracts for the use of networks subject to acceptance by the user of additional services which have no connection with the subject of the contracts,

[1] OJ No L 217, 5. 8. 1986, p. 21.

— limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited and will not be the best available to meet the requirements of a significant proportion of users.

Such conduct is expressly prohibited by Article 86 (d) and (b), and is likely significantly to affect trade between Member States.

At all events, such special or exclusive rights in regard to the terminal equipment market give rise to a situation which is contrary to the objective of Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including Article 3 (f).

The exclusive rights to import and market terminal equipment must therefore be regarded as incompatible with Article 86 in conjunction with Article 3, and the grant or maintenance of such rights by a Member State is prohibited under Article 90 (1).

14. To enable users to have access to the terminal equipment of their choice, it is necessary to know and make transparent the characteristics of the termination points of the network to which the terminal equipment is to be connected. Member States must therefore ensure that the characteristics are published and that users have access to termination points.

15. To be able to market their products, manufacturers of terminal equipment must know what technical specifications they must satisfy. Member States should therefore formalize and publish the specifications and type-approval rules, which they must notify to the Commission in draft form, in accordance with Council Directive 83/189/EEC [1]. The specifications may be extended to products imported from other Member States only insofar as they are necessary to ensure conformity with the essential requirements specified in Article 2 (17) of Directive 86/361/EEC that can legitimately be required under Community law. Member States must, in any event, comply with Articles 30 and 36 of the Treaty, under which an importing Member State must allow terminal equipment legally manufactured and marketed in another Member State to be imported on to its territory, and may only subject it to such type-approval and possibly refuse approval for reasons concerning conformity with the abovementioned essential requirements.

16. The immediate publication of these specifications and procedures cannot be considered in view of their complexity. On the other hand, effective competition is not possible without such publication, since potential competitors of the bodies or enterprises with special or exclusive rights are unaware of the precise specifications with which their terminal equipment must comply and of the terms of the type-approval procedures and hence their cost and duration. A deadline should therefore be set for the publication of specifications and the type-approval procedures. A period of two-and-a-half years will also enable the telecommunications bodies with special or exclusive rights to adjust to the new market conditions and will enable economic operators, especially small and medium-sized enterprises, to adapt to the new competitive environment.

17. Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.

18. The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts,

HAS ADOPTED THIS DIRECTIVE :

Article 1

For the purposes of this Directive :

— 'terminal equipment' means equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically.

Terminal equipment also means receive-only satellite stations not reconnected to the public network of a Member State,

— 'undertaking' means a public or private body, to which a Member State grants special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

[1] OJ No L 109, 28. 3. 1983, p. 8.

Article 2

Member States which have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that those rights are withdrawn.

They shall, not later than three months following the notification of this Directive, inform the Commission of the measures taken or draft legislation introduced to that end.

Article 3

Member States shall ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may :

— in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2 (17) of Directive 86/361/EEC,

— require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

Article 4

Member States shall ensure that users have access to new public network termination points and that the physical characteristics of these points are published not later than 31 December 1988.

Access to public network termination points existing at 31 December 1988 shall be given within a reasonable period to any user who so requests.

Article 5

1. Member States shall, not later than the date mentioned in Article 2, communicate to the Commission a list of all technical specifications and type-approval procedures which are used for terminal equipment, and shall provide the publication references.

Where they have not as yet been published in a Member State, the latter shall ensure that they are published not later than the dates referred to in Article 8.

2. Member States shall ensure that all other specifications and type-approval procedures for terminal equipment are formalized and published. Member States shall communicate the technical specifications and type-approval procedures in draft form to the Commission in accordance with Directive 83/189/EEC and according to the timetable set out in Article 8.

Article 6

Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

Article 7

Member States shall take the necessary steps to ensure that undertakings within the meaning of Article 1 make it possible for their customers to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights at the time of the conclusion of the contracts.

For terminal equipment requiring type-approval, Member States shall ensure that this possibility of termination is afforded by the undertakings in question no later than the dates provided for in Article 8. For terminal equipment not requiring type-approval, Member States shall introduce this possibility no later than the date provided for in Article 2.

Article 8

Member States shall inform the Commission of the draft technical specifications and type-approval procedures referred to in Article 5 (2);

— not later than 31 December 1988 in respect of equipment in category A of the list in Annex I,

— not later than 30 September 1989 in respect of equipment in category B of the list in Annex I,

— not later than 30 June 1990 in respect of other terminal equipment in category C of the list in Annex I.

Member States shall bring these specifications and type-approval procedures into force after expiry of the procedure provided for by Directive 83/189/EEC.

Article 9

Member States shall provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

An outline of the report is attached as Annex II.

Article 10

The provisions of this Directive shall be without prejudice to the provisions of the instruments of accession of Spain and Portugal, and in particular Articles 48 and 208 of the Act of Accession.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 16 May 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission

ANNEX I

List of terminal equipment referred to in Article 8

	Category
Additional telephone set; private automatic branch exchanges (PABXs):	A
Modems:	A
Telex terminals:	B
Data-transmission terminals:	B
Mobile telephones:	B
Receive-only satellite stations not reconnected to the public network of a Member State:	B
First telephone set:	C
Other terminal equipment:	C

ANNEX II

Outline of the report provided for in Article 9

Implementation of Article 2

1. Terminal equipement for which legislation is being or has been modified.

   By category of terminal equipment:

   — date of adoption of the measure or,

   — date of introduction of the bill or,

   — date of entry into force of the measure.

2. Terminal equipment still subject to special or exclusive rights:

   — type of terminal equipment and rights concerned.

Implementation of Article 3

— terminal equipment, the connection and/or commissioning of which has been restricted,

— technical qualifications required, giving reference of their publication.

Implementation of Article 4

— references of publications in which the physical characteristics are specified,

— number of existing network termination points,

— number of network termination points now accessible.

Implementation of Article 6

— independent body or bodies appointed.

Implementation of Article 7

— measures put into force, and

— number of terminated contracts.