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COMMISSION DIRECTIVE
of 28 June 1990
on competition in the markets for telecommunications services

(90/388/EEC)

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COMMISSION DIRECTIVE

of 28 June 1990

on competition in the markets for telecommunications services

(90/388/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) The improvement of telecommunications in the Community is an essential condition for the harmonious development of economic activities and a competitive market in the Community, from the point of view of both service providers and users. The Commission has therefore adopted a programme, set out in its Green Paper on the development of the common market for telecommunications services and equipment and in its communication on the implementation of the Green Paper by 1992, for progressively introducing competition into the telecommunications market. The programme does not concern mobile telephony and paging services, and mass communication services such as radio for television. The Council, in its resolution of 30 June 1988 ([1]), expressed broad support for the objectives of this programme, and in particular the progressive creation of an open Community market for telecommunications services. The last decades have seen considerable technological advances in the telecommunications sector. These allow an increasingly varied range of services to be provided, notably data transmission services, and also make it technically and economically possible for competition to take place between different service providers.

(2) In all the Member States the provision and operation of telecommunications networks and the provision of related services are generally vested in one or more telecommunications organizations holding exclusive or special rights. Such rights are characterized by the discretionary powers which the State exercises, in various degrees with regard to access to the market for telecommunications services.

(3) The organizations entrusted with the provision and operation of the telecommunications network are undertakings within the meaning of Article 90 (1) of the Treaty because they carry on an organized business activity, namely the provision of telecommunications services. They are either public untertakings or private enterprises to which the State has granted exclusive or special rights.

(4) Several Member States, while ensuring the performance of public service tasks, have already revised the system of exclusive or special rights that used to exist in the telecommunications sector in their country. In all cases, the system of exclusive or special rights has been maintained in respect of the provision and operation of the network. In some Member States, it has been maintained for all telecommunications services, while in others such rights cover only certain services. All Member States have either themselves imposed or allowed their telecommunications administrations to impose restrictions on the free provision of telecommunications services.

(5) The granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State. The granting by a Member State of such

([1]) OJ No C 257, 4. 10. 1988, p. 1.

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rights inevitably restricts the provision of such services by other undertakings to or from other Member States.

(6) In practice, restrictions on the provision of telecommunications services within the meaning of Article 59 to or from other Member States consist mainly in the prohibition on connecting leased lines by means of concentrators, multiplexers and other equipment to the switched telephone network, in imposing access charges for the connection that are out of proportion to the service provided, in prohibiting the routing of signals to or from third parties by means of leased lines or applying volume sensitive tariffs without economic justification or refusing to give service providers access to the network. The effect of the usage restrictions and the excessive charges in relation to net cost is to hinder the provision to or from other Member States of such telecommunications services as:

— services designed to improve telecommunications functions, e.g. conversion of the protocol, code, format or speed,
— information services providing access to data bases,
— remote data-processing services,
— message storing and forwarding services, e.g. electronic mail,
— transaction services, e.g. financial transactions, electronic commercial data transfer, teleshopping and telereservations,
— teleaction services, e.g. telemetry and remote monitoring.

(7) Articles 55, 56 and 66 of the Treaty allow exceptions on non-economic grounds to the freedom to provide services. The restrictions permitted are those connected, even occasionally, with the exercise of official authority, and those connected with public policy, public security or public health. Since these are exceptions, they must be interpreted restrictively. None of the telecommunications services is connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunication services cannot in itself threaten public policy and cannot affect public health.

(8) The Court of Justice caselaw also recognizes restrictions on the freedom to provide services if they fulfil essential requirements in the general interest and are applied without discrimination and in proportion to the objective. Consumer protection does not make it necessary to restrict freedom to provide telecommunications services since this objective can also be attained through free competition. Nor can the protection of intellectual property be invoked in this connection. The only essential requirements derogating from Article 59 which could justify restrictions on the use of the public network are the maintenance of the integrity of the network, security of network operations and in justified cases, interoperability and data protection. The restrictions imposed, however, must be adapted to the objectives pursued by these legitimate requirements. Member States will have to make such restrictions known to the public and notify them to the Commission to enable it to assess their proportionality.

(9) In this context, the security of network operations means ensuring the availability of the public network in case of emergency. The technical integrity of the public network means ensuring its normal operation and the interconnection of public networks in the Community on the basis of common technical specifications. The concept of interoperability of services means complying with such technical specifications introduced to increase the provision of services and the choice available to users. Data protection means measures taken to warrant the confidentiality of communications and the protection of personal data.

(10) Apart from the essential requirements which can be included as conditions in the licensing or declaration procedures, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory and trans-

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parent trade regulations regarding the conditions of permanence, availability and quality of the service.

(11) When a Member State has entrusted a telecommunications organization with the task of providing packet or circuit switched data services for the public in general and when this service may be obstructed because of competition by private providers, the Commission can allow the Member State to impose additional conditions for the provision of such a service, with respect also to geographical coverage. In assessing these measures, the Commission in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130a, will also take into account the situation of those Member States in which the network for the provision of the packet or circuit switched services is not yet sufficiently developed and which could justify the deferment for these Member States until 1 January 1996 of the date for prohibition on the simple resale of leased line capacity.

(12) Article 59 of the Treaty requires the abolition of any other restriction on the freedom of nationals of Member States who are established in a Community country to provide services to persons in other Member States. The maintenance or introduction of any exclusive or special right which does not correspond to the abovementioned criteria is therefore a breach of Article 90 in conjunction with Article 59.

(13) 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. Telecommunications organizations are also undertakings for the purposes of this Article because they carry out economic activities, in particular the service they provide by making telecommunications networks and services available to users. This provision of the network constitutes a separate services market as it is not interchangeable with other services. On each national market the competitive environment in which the network and the telecommunications services are provided is homogeneous enough for the Commission to be able to evaluate the power held by the organizations providing the services on these territories. The territories of the Member States constitute distinct geographical markets. This is essentially due to the existing difference between the rules governing conditions of access and technical operation, relating to the provision of the network and of such services. Furthermore, each Member State market forms a substantial part of the common market.

(14) In each national market the telecommunications organizations hold individually or collectively a dominant position for the creation and the exploitation of the network because they are the only ones with networks in each Member State covering the whole territory of those States and because their governments granted them the exclusive right to provide this network either alone or in conjunction with other organizations.

(15) Where a State grants special or exclusive rights to provide telecommunications services to organizations which already have a dominant position in creating and operating the network, the effect of such rights is to strengthen the dominant position by extending it to services.

(16) Moreover, the special or exclusive rights granted to telecommunications organizations by the State to provide certain telecommunications services mean such organizations:

(a) prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technological progress to the detriment of consumers;

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(b) compel network users to use the services subject to exclusive rights, and thus make the conclusion of network utilization contracts dependent on acceptance of supplementary services having no connection with the subject of such contracts.

Each of these types of conduct represents a specific abuse of a dominant position which is likely to have an appreciable effect on trade between Member States, as all the services in question could in principle be supplied by providers from other Member States. The structure of competition within the common market is substantially changed by them. At all events, the special or exclusive rights for these services give rise to a situation which is contrary to the objective in 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 that of Article 3 (f).

17) The exclusive rights to telecommunications services granted to public undertakings or undertakings to which Member States have granted special or exclusive rights for the provision of the network are incompatible with Article 90 (1) in conjunction with Article 86.

(18) Article 90 (2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.

(19) The provision of leased lines forms an essential part of the telecommunications organizations' tasks. There is at present, in almost all Member States, a substantial difference between charges for use of the data transmission service on the switched network and for use of leased lines. Balancing those tariffs without delay could jeopardize this task. Equilibrium in such charges must be achieved gradually between now and 31 December 1992. In the meantime it must be possible to require private operators not to offer to the public a service consisting merely of the resale of leased line capacity, i.e. including only such processing, switching of data, storing, or protocol conversion as is necessary for transmission in real time. The Member States may therefore establish a declaration system through which private operators would undertake not to engage in simple resale. However, no other requirement may be imposed on such operators to ensure compliance with this measure.

(20) These restrictions do not affect the development of trade to such an extent as would be contrary to the interests of the Community. Under these circumstances, these restrictions are compatible with Article 90 (2) of the Treaty. This may also be the case as regards the measures adopted by Member States to ensure that the activities of private service providers do not obstruct the public switched-data service.

(21) The rules of the Treaty, including those on competition, apply to telex services; however, the use of this service is gradually declining throughout the Community owing to the emergence of competing means of telecommunication such as telefax. The

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abolition of current restrictions on the use of the switched telephone network and leased lines will allow telex messages to be retransmitted. In view of this particular trend, an individual approach is necessary. Consequently, this Directive should not apply to telex services.

(22) The Commission will in any event reconsider in the course of 1992 the remaining special or exclusive rights on the provision of services taking account of technological development and the evolution towards a digital infrastructure.

(23) Member States may draw up fair procedures for ensuring compliance with the essential requirements without prejudice to the harmonization of the latter at Community level within the framework of the Council Directives on open network provision (ONP). As regards data-switching, Member States must be able, as part of such procedures, to require compliance with trade regulations from the standpoint of conditions of permanence, availability and quality of the service, and to include measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization. The procedures must be based on specific objective criteria and be applied without discrimination. The criteria should in particular be justified and proportional to the general interest objective, and be duly motivated and published. The Commission must be able to examine them in depth in the light of the rules on free competition and freedom to provide services. In any event, Member States that have not notified the Commission of their planned licensing criteria and procedures within a given time may no longer impose any restrictions on the freedom to provide data transmission services to the public.

(24) Member States should be given more time to draw up general rules on the conditions governing the provision of packet- or circuit-switched data services for the public.

(25) Telecommunications services should not be subject to any restriction, either as regards free access by users to the services, or as regards the processing of data which may be carried out before messages are transmitted through the network or after messages have been received, except where this is warranted by an essential requirement in proportion to the objective pursued.

(26) The digitization of the network and the technological improvement of the terminal equipment connected to it have brought about an increase in the number of functions previously carried out within the network and which can now be carried out by users themselves with increasingly sophisticated terminal equipment. It is necessary to ensure that suppliers of telecommunication services, and notably suppliers of telephone and packet or circuit-switched data transmission services enable operators to use these functions.

(27) Pending the establishing of Community standards with a view to an open network provision (ONP), the technical interfaces currently in use in the Member States should be made publicly available so that firms wishing to enter the markets for the services in question can take the necessary steps to adapt their services to the technical characteristics of the networks. If the Member States have not yet established such technical interfaces, they should do so as quickly as possible. All such draft measures should be communicated to the Commission in accordance with Council Directive 83/189/EEC ([1]), as last amended by Directive 88/182/EEC ([2]).

([1]) OJ No L 109, 26. 4. 1983, p. 8.
([2]) OJ No L 81, 26. 3. 1988, p. 75.

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(28) Under national legislation, telecommunications organizations are generally given the function of regulating telecommunications services, particularly as regards licensing, control of type-approval and mandatory interface specifications, frequency allocation and monitoring of conditions of use. In some cases, the legislation lays down only general principles governing the operation of the licensed services and leaves it to the telecommunications organizations to determine the specific operating conditions.

(29) This dual regulatory and commercial function of the telecommunications organizations has a direct impact on firms offering telecommunications services in competition with the organizations in question. By this bundling of activities, the organizations determine or, at the very least, substantially influence the supply of services offered by their competitors. The delegation to an undertaking which has a dominant position for the provision and exploitation of the network, of the power to regulate access to the market for telecommunication services constitutes a strengthening of that dominant position. Because of the conflict of interests, this is likely to restrict competitors' access to the markets in telecommunications services and to limit users' freedom of choice. Such arrangements may also limit the outlets for equipment for handling telecommunications messages and, consequently, technological progress in that field. This combination of activities therefore constitutes an abuse of the dominant position of telecommunications organizations within the meaning of Article 86. If it is the result of a State measure, the measure is also incompatible with Article 90 (1) in conjunction with Article 86.

(30) To enable the Commission to carry out effectively the monitoring task assigned to it by Article 90 (3), it must have available certain essential information. That information must in particular give the Commission a clear view of the measures of Member States, so that it can ensure that access to the network and the various related services are provided by each telecommunications organization to all its customers on non-discriminatory tariff and other terms. Such information should cover:

— measures taken to withdraw exclusive rights pursuant to this Directive,

— the conditions on which licences to provide telecommunications services are granted.

The Commission must have such information to enable it to check, in particular, that all the users of the network and services, including telecommunications organizations where they are providers of services, are treated equally and fairly.

(31) The holders of special or exclusive rights to provide telecommunications services that will in future be open to competition have been able in the past to impose long-term contracts on their customers. Such contracts would in practice limit the ability of any new competitors to offer their services to such customers and of such customers to benefit from such services. Users must therefore be given the right to terminate their contracts within a reasonable length of time.

(32) Each Member State at present regulates the supply of telecommunications services according to its own concepts. Even the definition of certain services differs from one Member State to another. Such differences cause distortions of competition likely to make the provision of cross-frontier telecommunications services more difficult for economic operators. This is why the Council, in its resolution of 30 June 1988, considered that one of the objectives of a telecommunications policy was the creation of an open Community market for telecommunications services, in particular through the rapid definition, in the form of Council Directives, of technical conditions, conditions of use and principles governing charges for an open network provision (ONP). The Commission has presented a proposal to this end to the Council. Harmon-

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ization of the conditions of access is not however the most appropriate means of removing the barriers to trade resulting from infringements of the Treaty. The Commission has a duty to ensure that the provisions of the Treaty are applied effectively and comprehensively.

(33) Article 90 (3) assigns clearly-defined duties and powers to the Commission to monitor relations between Member States and their public undertakings and undertakings to which they have granted special or exclusive rights, particularly as regards the removal of obstacles to freedom to provide services, discrimination between nationals of the Member States and competition. A comprehensive approach is necessary in order to end the infringements that persist in certain Member States and to give clear guidelines to those Member States that are reviewing their legislation so as to avoid further infringements. A Directive within the meaning of Article 90 (3) of the Treaty is therefore the most appropriate means of achieving that end,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive:

— 'telecommunication organizations' means public or private bodies, and the subsidiaries they control, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, when applicable, telecommunications services,

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— 'exclusive rights' means the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunication service or undertake an activity within a given geographical area,

— 'special rights' means the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area,

  — limits to two or more the number of such undertakings authorized to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

  — designates, otherwise than according to such criteria, several competing undertakings as being authorized to provide a service or undertake an activity, or

  — confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions,

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— 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means,

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— 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signales on a public telecommunications network by means of telecommunications processes, with the exception of radio- and television-broadcasting to the public, and satellite services,

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— ‘satellite earth station network’ means a configuration of two or more earth stations which interwork by means by means of a satellite,

— ‘satellite network services’ means the establishment and operation of satellite earth station networks; these services consist, as a minimum, in the establishment, by satellite earth stations, of radiocommunications to space segment (‘uplinks’), and in the establishment of radiocommunications between space segment and satellite earth stations (‘downlinks’),

— ‘satellite communications services’ means service whose provision makes use, wholly or partly, of satellite network services,

— ‘satellite services’ means the provision of satellite communications services and/or the provision of satellite networks services,

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— ‘network termination point’ means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network,

— ‘essential requirements’ means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. ►M1 Those reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services, data protection and, in the case of satellite network services, the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunications systems and other space-based or terrestrial tecnical systems. ◄

Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy,

— ‘voice telephony’ means the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— ‘telex service’ means the commercial provision for the public of direct transmission of telex messages in accordance with the relevant Comité consultatif international télégraphique et téléphonique (CCITT) recommendation between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— ‘packet- and circuit-switched data services’ means the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— ‘simple resale of capacity’ means the commercial provision on leased lines for the public of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for transmission in real time to and from the public switched network.

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2. This Directive shall not apply to the telex service or to terrestrial mobile radiocommunications.

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Article 2

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Without prejudice to Article 1 (2), Member States shall withdraw all those measures which grant:

(a) exclusive rights for the supply of telecommunications services otherwise than voice telephony and

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(b) special rights which limit to two or more the number of undertakings authorized to supply such telecommunication services, otherwise than according to objective, proportional and non-discriminatory criteria, or

(c) special rights which designate, otherwise than according to such criteria, several competing undertakings to provide such telecommunication services.

They shall take the measures necessary to ensure that any operator is entitled to supply any such telecommunications services, otherwise than voice telephony.

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Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any such refusal.

Without prejudice to Article 3, Member States shall inform the Commission no later than 31 December 1990 of the measures taken to comply with this Article and shall inform it of any existing regulations or of plans to introduce new licensing procedures or to change existing procedures.

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Member States shall communicate the criteria on which authorizations are granted, together with the conditions attached to such authorizations and to the declaration procedures for the operation of transmitting earth stations.

Member States shall continue to inform the Commission of any plans to introduce new licensing procedures or to change existing procedures.

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Article 3

As regards packet- or circuit-switched data services, Member States may, until 31 December 1992, under the authorization procedures referred to in Article 2, prohibit economic operators from offering leased line capacity for simple resale to the public.

Member States shall, no later than 30 June 1992, notify to the Commission at the planning stage any licensing or declaration procedure for the provision of packet- or circuit-switched data services for the public which are aimed at compliance with:

— essential requirements, or

— trade regulations relating to conditions of permanence, availability and quality of the service, or

— measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization for the provision of switched data services, if the performance of that task is likely to be obstructed by the activities of private service providers.

The whole of these conditions shall form a set of public-service specifications and shall be objective, non-discriminatory and transparent.

Member States shall ensure, no later than 31 December 1992, that such licensing or declaration procedures for the provision of such services are published.

Before they are implemented, the Commission shall verify the compatibility of these projects with the Treaty.

Article 4

Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and publish them.

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In particular, they shall ensure that operators who so request can obtain leased lines within a reasonable period, that there are no restrictions on their use other than those justified in accordance with Article 2.

Member States shall inform the Commission no later than 31 December 1990 of the steps they have taken to comply with this Article.

Each time the charges for leased lines are increased, Member States shall provide information to the Commission on the factors justifying such increases.

Article 5

Without prejudice to the relevant international agreements, Member States shall ensure that the characteristics of the technical interfaces necessary for the use of public networks are published by 31 December 1990 at the latest.

Member States shall communicate to the Commission, in accordance with Directive 83/189/EEC, any draft measure drawn up for this purpose.

Article 6

Member States shall, as regards the provision of telecommunications services, and existing restrictions on the processing of signals before their transmission via the public network or after their reception, unless the necessity of these restrictions for compliance with public policy or essential requirements is demonstrated.

Without prejudice to harmonized Community rules adopted by the Council on the provision of an open network, Member States shall ensure as regards services providers including the telecommunications organizations that there is no discrimination either in the conditions of use or in the charges payable.

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Member States shall ensure that any fees imposed on providers of services as part of authorization procedures, shall be based on objective, transparent and non-discriminatory criteria.

Fees, the criteria upon which they are based, and any changes thereto, shall be published in an appropriate and sufficiently detailed manner, so as to provide easy access to that information.

Member States shall notify to the Commission no later than nine months after publication of this Directive, and thereafter whenever changes occur, the manner in which the information is made available. The Commission shall regularly publish references to such notifications.

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Member States shall inform the Commission of the measures taken or draft measures introduced in order to comply with this Article by 31 December 1990 at the latest.

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Member States shall ensure that any regulatory prohibition or restrictions on the offer of space-segment capacity to any authorized satellite earth station network operator are abolished, and shall autorize within their territory any space-segment supplier to verify that the satellite earth station network for use in connection with the space segment of the supplier in question is in conformity with the published conditions for access to his space segment capacity.

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Article 7

Member States shall ensure that from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organizations.

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They shall inform the Commission of the measures taken or draft measures introduced to that end no later than 31 December 1990.

Article 8

Member States shall ensure that as soon as the relevant special or exclusive rights have been withdrawn, telecommunications organizations make it possible for customers bound to them by a contract with more than one year to run for the supply of telecommunications services which was subject to such a right at the time it was concluded to terminate the contract at six months' notice.

Article 9

Member States shall communicate to the Commission the necessary information to allow it to draw up, for a period of three years, at the end of each year, an overall report on the application of this Directive. The Commission shall transmit this report to the Member States, the Council, the European Parliament and the Economic and Social Committee.

Article 10

In 1992, the Commission will carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive.

In 1994, the Commission shall assess the effects of the measures referred to in Article 3 in order to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

Article 11

This Directive is addressed to the Member States.