

COMMISSION DIRECTIVE 2008/63/EC
of 20 June 2008
on competition in the markets in telecommunications terminal equipment
(Text with EEA relevance)
(Codified version)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

- (1) Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment⁽¹⁾ has been substantially amended⁽²⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) In all the Member States, telecommunications were, 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 used to go beyond the provision of network utilisation services and used to 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.
- (3) 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.
- (4) The existence of exclusive rights has the effect of restricting the free movement of telecommunications terminal equipment either as regards the importation and marketing of terminal equipment (including satellite equipment), because certain products are not marketed, or as regards the connection, bringing into service or maintenance because, taking into account the characteristics of the market and in particular the diversity and technical nature of the products, a monopoly has no incentive to provide these services in relation to products which it has not marketed or imported, nor to align its prices on costs, since there is no threat of competition from new entrants on the market. Taking into account the fact that in most equipment markets there is typically a large range of telecommunication equipment, any special right which directly or indirectly limits the number of the undertakings authorised to import, market, connect, bring into service and maintain such equipment, is liable to have the same kind of effect as the grant of exclusive rights. Such exclusive or special rights constitute measures having equivalent effect to quantitative restrictions incompatible with Article 28 of the Treaty. Thus it is necessary to abolish all existing exclusive rights in the importation, marketing, connection, bringing into service and maintenance of terminal and telecommunications equipment, as well as those rights having comparable effects — that is to say, all special rights except those consisting in legal or regulatory advantages conferred on one or more undertakings and affecting only the ability of other undertakings to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.
- (5) The special or exclusive rights relating to terminal equipment 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 31 of the Treaty in all the Member States.
- (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) The maintenance of terminal equipment is a service within the meaning of Article 50 of the Treaty. The service in question, which cannot from a commercial point of view be dissociated from the marketing of the equipment terminals, must be provided freely in accordance with Article 49 of the Treaty and in particular when provided by qualified operators.

⁽¹⁾ OJ L 131, 27.5.1988, p. 73. Directive as amended by Directive 94/46/EC (OJ L 268, 19.10.1994, p. 15).

⁽²⁾ See Annex II, Part A.

- (8) The situation in the market 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 which meet the essential requirements mentioned in Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity⁽¹⁾ and allow the free movement of terminal equipment. In turn, such transparency necessarily entails the publication of technical specifications.
- (9) Special or exclusive rights to import and market terminal equipment give rise to a situation which is contrary to the objective of Article 3(g) of the Treaty, which provides for the institution of a system ensuring that competition in the internal market is not distorted, and requires a fortiori that competition must not be eliminated. Member States have an obligation under Article 10 of the Treaty to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, including Article 3(g). The exclusive rights must therefore be regarded as incompatible with Article 82 of the Treaty in conjunction with Article 3 thereof, and the grant or maintenance of such rights by a Member State is prohibited under Article 86(1) of the Treaty.
- (10) 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 interface points of the public 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 interface points of the public network.
- (11) To be able to market their products, manufacturers of terminal equipment must know what technical specifications they must satisfy. Member States should therefore formalise and publish the specifications, which they must notify to the Commission in draft form, in accordance with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations⁽²⁾. The specifications may be extended to products imported from other Member States only in so far as they are necessary to ensure conformity with the essential requirements specified in Article 3 of Directive 1999/5/EC that can legitimately be required under Community law. Member States must, in any event, comply with Articles 28 and 30 of the Treaty,
- under which an importing Member State must allow terminal equipment legally manufactured and marketed in another Member State.
- (12) To ensure that type-approval specifications are applied transparently, objectively and without discrimination monitoring applications 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 monitoring is assigned to a body independent of the operator of the network and of any other competitor in the market in question.
- (13) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B,

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive, the following definitions shall apply:

1. 'terminal equipment' means:
 - (a) equipment directly or indirectly connected to the interface of a public telecommunications network to send, process or receive information; in either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically; a connection is indirect if equipment is placed between the terminal and the interface of the network;
 - (b) satellite earth station equipment;
2. 'satellite earth station equipment' means equipment which is capable of being used for the transmission only ('transmit-only'), or for the transmission and reception ('transmit/receive'), or for the reception only ('receive-only') of radio communication signals by means of satellites or other space-based systems;
3. '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 L 91, 7.4.1999, p. 10. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

⁽²⁾ OJ L 204, 21.7.1998, p. 37. Directive as last amended by Council Directive 2006/96/EC (OJ L 363, 20.12.2006, p. 81).

4. 'special rights' means 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:

- (a) limits to two or more the number of such undertakings, otherwise than according to objective, proportional and non-discriminatory criteria; or
- (b) designates, otherwise than according to the criteria referred to in point (a), several competing undertakings; or
- (c) confers on any undertaking or undertakings, otherwise than according to the criteria referred to in points (a) and (b), any legal or regulatory advantages which substantially affect the ability of any other undertaking to import, market, connect, bring into service and/or maintain telecommunication terminal equipment in the same geographical area under substantially equivalent conditions.

Article 2

Member States which have granted special or exclusive rights to undertakings shall ensure that all exclusive rights are withdrawn, as well as those special rights which:

- (a) limit to two or more the number of undertakings, otherwise than according to objective, proportional and non-discriminatory criteria; or
- (b) designate, otherwise than according to the criteria referred to in point (a), several competing undertakings.

They shall 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:

- (a) in the case of satellite earth station equipment, refuse to allow such equipment to be connected to the public telecommunications network or to be brought into service where it does not satisfy the relevant common technical regulations adopted in pursuance of Directive 1999/5/EC or, in the absence thereof, the essential requirements laid down in Article 3 of that Directive; in the absence of common technical rules of harmonised regulatory

conditions, national rules shall be proportionate to those essential requirements and shall be notified to the Commission in accordance with Directive 98/34/EC where that Directive so requires;

- (b) in the case of other terminal equipment, refuse to allow such equipment to be connected to the public telecommunications network where it does not satisfy the relevant common technical regulations adopted in pursuance of Directive 1999/5/EC or, in the absence thereof, the essential requirements laid down in Article 3 of that Directive;
- (c) 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 interface points and that the physical characteristics of these points are published by users of the telecommunications public network.

Article 5

Member States shall ensure that all specifications for terminal equipment are formalised and published.

Member States shall notify those technical specifications in draft form to the Commission in accordance with Directive 98/34/EC.

Article 6

Member States shall ensure that in monitoring the specifications referred to in Article 5, the application 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 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, and 6.

An outline of the report is set out in Annex I.

Article 8

Directive 88/301/EEC, as amended by the Directive listed in Annex II, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 9

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 10

This Directive is addressed to the Member States.

Done at Brussels, 20 June 2008.

For the Commission

The President

José Manuel BARROSO

ANNEX I

Outline of the report referred to in Article 7**Implementation of Article 2**

Terminal equipment 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.

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 public network interface points,
- number of public network interface points now accessible.

Implementation of Article 6

- independent body or bodies appointed.
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ANNEX II

PART A

Repealed Directive with its successive amendment

(referred to in Article 8)

Commission Directive 88/301/EEC

(OJ L 131, 27.5.1988, p. 73)

Commission Directive 94/46/EC

(OJ L 268, 19.10.1994, p. 15)

PART B

List of time limits for transposition into national law

(referred to in Article 8)

Directive	Time limit for transposition
88/301/EEC	—
94/46/EC	8 August 1995

ANNEX III

Correlation table

Directive 88/301/EEC	This Directive
Article 1, introductory words	Article 1, introductory words
Article 1, first indent, first and second sentences	Article 1, point (1)(a)
Article 1, first indent, last sentence	Article 1, point (1)(b)
Article 1, second indent	Article 1, point (3)
Article 1, third indent, introductory words	Article 1, point (4), introductory words
Article 1, third indent, first sub-indent	Article 1, point (4)(a)
Article 1, third indent, second sub-indent	Article 1, point (4)(b)
Article 1, third indent, third sub-indent	Article 1, point (4)(c)
Article 1, fourth indent	Article 1, point (2)
Article 2	Article 2
Article 3, first sentence	Article 3, first paragraph
Article 3, second sentence	Article 3, second paragraph, introductory sentence
Article 3, first indent	Article 3, second paragraph, point (a)
Article 3, second indent	Article 3, second paragraph, point (b)
Article 3, third indent	Article 3, second paragraph, point (c)
Article 4, first paragraph	Article 4
Article 4, second paragraph	—
Article 5(1)	—
Article 5(2), first sentence	Article 5, first paragraph
Article 5(2), second sentence	Article 5, second paragraph
Article 6	Article 6
Article 8	—
Article 9	Article 7
Article 10	—
—	Article 8
—	Article 9
Article 11	Article 10
Annex I	—
Annex II	Annex I
—	Annex II
—	Annexe III