

# **CABLE REVIEW**

**COMMISSION COMMUNICATION**

**CONCERNING**

**THE REVIEW UNDER COMPETITION RULES**

**OF THE JOINT PROVISION OF**

**TELECOMMUNICATIONS AND CABLE TV NETWORKS**

**BY A SINGLE OPERATOR**

**AND THE ABOLITION OF RESTRICTIONS ON THE PROVISION**

**OF CABLE TV CAPACITY OVER TELECOMMUNICATIONS**

**NETWORKS**

# T A B L E O F C O N T E N T S

<b>Summary</b>	<b>2</b>
<b>1. History and reasons for Cable Review</b>	<b>5</b>
<b>2. Summary of the Reports' findings on current situation</b>	<b>7</b>
<b>2.1. Market and technology, overview</b>	<b>7</b>
<b>2.2. Key issues</b>	<b>8</b>
<b>2.3. Options assessed</b>	<b>9</b>
<b>3. More detailed analysis of joint provision and of restrictions for the provision of cable-TV capacity</b>	<b>11</b>
<b>3.1. Impact of joint provision of cable-TV capacity by telecommunications companies</b>	<b>11</b>
<b>3.2. Impact of restrictions to provide cable-TV transmission capacity</b>	<b>13</b>
<b>4. Member State Regulation</b>	<b>14</b>
<b>5. Assessment and action under Competition Rules</b>	<b>16</b>
<b>5.1. Horizontal action</b>	<b>16</b>
<b>5.2. Case specific action</b>	<b>20</b>
<b>6. Conclusions</b>	<b>22</b>
<b>Annex 1 : Cable-TV networks in the EU</b>	<b>24</b>
<b>Annex 2 :: Excerpt from "Cable Review - Study on the Competition Implications in Telecommunications and Multi-Media Markets" (Executive Summary) Assessment of options</b>	<b>25</b>

## S u m m a r y

1. The establishment of a framework of liberalisation of telecommunications and cable networks in the European Union is scheduled to take place on 1 January 1998 in most EU Member States.<sup>1</sup> Key principles underpinning this liberalisation process have been the introduction of competition into telecommunications markets, which increase the choice available for consumers of telecommunications services. This will result in lower costs of telecommunications services and a wider variety of services on offer.
2. This period of liberalisation has also been marked by an enormous leap forward in terms of technology in telecommunications and the associated digital technologies of broadcasting, interactive services, including the Internet, and new data communications such as electronic mail. These technologies increasingly overlap and merge, so that distinctions between previously different markets are disappearing.<sup>2</sup>
3. As well as the other benefits of lower costs and greater choice outlined above, the liberalisation will bring new and innovative telecommunications and multimedia companies into the market. They will come with many new ideas for services and will stimulate the existing operators to respond with their own ideas. This innovation will benefit consumers in Europe, by providing new interactive services, and it will help the European telecommunications and multimedia industry to compete more effectively on world markets, so creating more employment opportunities and increasing social welfare. This innovatory development, however, will not come about unless the appropriate conditions of competition exist with respect to telecommunications and cable networks in the EU, particularly in the transition period to full competition in the years following 1 January 1998.
4. As part of the process which is intended to ensure effective provision for the transition towards competitive market structures, the Commission was required by Directive 90/388/EEC as amended by Directive 95/51/EC (the Cable Directive) and

---

<sup>1</sup> The requirement to progressively open the telecommunications markets in the European Union until 1 January 1998 is set out in Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ 1990 No L 192, p. 10, as amended by Commission Directive 94/46/EC of 13 October 1994, satellite communications, OJ 1994 No L 268, p. 15, Commission Directive 95/51/EC of 18 October 1995, abolition of restrictions on the use of cable television networks for the provision of already liberalised telecommunications services, OJ 1995 No L 256, p. 49, Corrigendum OJ No L 308, 29. 11. 1996, p. 59, Commission Directive 96/2/EC of 16 January 1996, mobile and personal communications, OJ 1996 No L 20, p. 59 and Commission Directive 96/19/EC of 13 March 1996, full competition in telecommunications markets OJ 1996 No L 74, p. 13.

The Commission granted additional transition periods to five Member States (Ireland: 1 January 2000, Commission Decision 97/114/EC of 27 November 1996, OJ 1997 No L 41, p. 8; Portugal: 1 January 2000, Commission Decision 97/310/EC of 12 February 1997, OJ 1997 No L 133, p. 19; Luxembourg: 1 July 1998, Commission Decision 97/568/EC of 14 May 1997; OJ 1997 No L 234, p. 7 ; Spain: 30 November 1998, Commission Decision 97/603/EC of 10 June 1997, OJ 1997 No L. 243, p. 48; Greece: 31 December 2000, Commission Decision 97/607/EC of 18 June 1997, OJ 1997 No L.245, p. 6).

<sup>2</sup> These issues are considered in : Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation, COM(97)623 final, published on 3 December 1997 (“the Convergence Green Paper”).

also by Directive 96/19/EC (the Full Competition Directive) to review two particular aspects before the full liberalisation of the market in 1998. These were:

- the effects on competition of joint provision of telecommunications and cable TV networks by a single operator; and
  - the restrictions on the provision of cable TV capacity over telecommunications networks.
5. This communication fulfils the Commission's obligations under that Review. The communication is based on two reports established for the Commission which have involved substantial research and wide-ranging consultations with sector participants.
  6. This Communication addresses these competition and innovation issues only. In particular, it should be noted that with regard to broadcasting services, this communication only considers the transmission of signals, principally over cable and telecommunications networks, and does not address issues of the content which is transmitted over those networks. The Commission recently published the Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation<sup>3</sup> which covers this and other issues.
  7. The conclusions of the Review can be summarised as follows:
    - developments of telecommunications and multi-media markets depend on four factors: service competition, infrastructure competition and infrastructure upgrade as well as other types of innovation. The joint provision of telecommunications and cable-TV networks by former monopolies can stifle development of telecoms and multi-media applications ;
    - in the EU, the joint provision, inherited from monopoly provision in the past, of telecommunications and cable TV networks by a single operator could in certain Member States allow the former monopolies to delay emergence of effective competition. This could lead to an asymmetric starting position for dominant telecommunications operators compared with new entrants ;
    - the restrictions on the provision of cable TV capacity over telecommunications networks are also significant as they can create an asymmetric regulatory environment which again constrains market development over time. However, given that technology allowing such

---

<sup>3</sup> See Footnote 2. ("Convergence Green Paper")

Cf. also Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions on "Europe at the forefront of the Global Information Society: Rolling Action Plan", COM(96) 607 final, 28.11.1996, at para. 114. Media and Content issues are also addressed in the "Green Paper on Audio-visual and Information services: Cultural Matters" and in other Commission initiatives such as the Green Paper on the Protection of Minors and of Human Dignity in Audio-visual and Information Services", COM(96) 483 final, 16.10.1996, and the MEDIA II Programme, which aims at encouraging, among other things, the competitiveness of the European audio-visual industry.

provision is just emerging, the constraints are still not felt heavily in most Member States in practice ;

- the accounting separation in the case of the joint provision of competing networks by dominant telecommunications operators established by Commission Directive 95/51/EC (“the Cable Directive”) has been shown to be insufficient to facilitate pro-competitive development in the multi-media sector. Minimum steps should include the effective separation of these operators from their cable TV network companies, i.e. the operation of these activities in clearly separated legal entities. Further action by the Commission will be justified with regard to specific cases to reduce the anti-competitive effect of highly dominant positions through the joint provision inherited from previous legally protected monopoly positions.
8. Finally, the principle underlying this Review is the importance of competition for innovation. Telecommunications and multi-media can become vital drivers of growth and employment in the EU’s economies. The European Union must ensure that the starting positions into these new markets are right and pro-competitive in order to draw maximum benefit for growth and creation of new jobs from the new developments.

## 1. HISTORY AND REASONS FOR CABLE REVIEW

9. The programme to complete the internal market in telecoms services and equipment in Europe is designed to increase innovation and the range of services available to consumers in particular through the promotion of competition. The experience in countries where telecommunications liberalisation had been carried out indicated that both new and existing operators developed more innovative services as a result of the liberalisation, to the benefit of consumers.
10. On 18 October 1995, the Commission adopted the Cable Directive which required Member States to allow the use of cable TV networks for the provision of all liberalised telecommunications services.<sup>4</sup>

11. Specifically, in relation to the Cable Review, the Cable Directive stated:

*“Where a single operator provides both networks or both services..... (i.e. public telecommunications networks and cable-TV networks)....., the Commission shall, before 1 January 1998, carry out an overall assessment of the impact of such joint provision in relation to the aims of the Directive.”*

12. On 13 March 1996, the Commission adopted the Full Competition Directive which noted that :

*“While Directive 95/51/EC of 18 October 1995 lifted all restrictions with regard to the provision of liberalised telecommunications services over cable television networks, some Member States still maintain restrictions on the use of public telecommunications networks for the provision of cable television capacity. The Commission should assess the situation with regard to such restrictions in the light of the objectives of this directive once the telecommunications markets approach full liberalisation.”*

The Directive also stated that:

*“By 1 January 1998, the Commission will carry out an overall assessment of the situation with regard to remaining restrictions on the use of public telecommunications networks for the provision of cable television capacity.”*

13. The Review before 1 January 1998 was necessary because this is the date set for the introduction of full competition on the provision of telecommunications infrastructures and services. Effective liberalisation of telecommunications infrastructure is indispensable in this context as acknowledged by Directive 96/19/EC, to avoid new entrants being limited in their freedom to provide services and being reliant on their main competitor for the provision of transmission capacity.

---

<sup>4</sup> See footnote 1.

14. Given the capital intensive nature of investment in new networks, existing cable TV networks are a crucial element in the effective provision of alternative infrastructure, in the local loop, and also service provision for new telecommunications operators in the newly liberalised markets in the Member States. This Review is therefore important before the implementation of full competition to assess the effect of joint ownership of such networks and telecoms networks. This is because local loop competition is an essential ingredient for the creation of competitive markets and the reduction of market power of the dominant carrier.

15. In order to carry out the Review the Commission commissioned two reports, one focusing on market and technological developments, the other providing an analysis of the legal context.<sup>5</sup> The market report had the following overall objective:

*“To examine options for developing competition in local telephone markets, for example, via cable networks competing with existing local loop infrastructure.*

*To understand the barriers and drivers to the development of broadband networks in the European Union Member States, thus encouraging development of multimedia services over advanced networks.”*

16. The reports focused on :

*“The joint ownership of telecommunications and cable TV networks by dominant telecommunications operators (referred to as joint ownership) addressed in the Cable TV Directive, and*

*Existing restrictions on the provision of cable TV capacity on public telecommunications networks, addressed in the Full Competition Directive”*

---

<sup>5</sup> “Cable Review - Study on the competition implications in telecommunications and multimedia markets of (a) joint provision of cable and telecoms networks by a single dominant operator and (b) restrictions on the use of telecommunications networks for the provision of cable television services,” Arthur D. Little International, 1997, and “Study on the Scope of the Legal Instruments under EC Competition Law available to the European Commission to implement the Results of the ongoing review of certain situations in the telecommunications and cable television sectors,” Coudert, 1997. The views presented in the reports are those of the contractors and do not represent or commit the Commission in any way.

## 2. SUMMARY OF THE REPORTS' FINDINGS ON THE CURRENT SITUATION

17. According to the reports undertaken for the Commission, Member States' telecommunications and multimedia markets are not developing in an optimal manner at present. This is clear from evidence gathered on the four drivers of optimal development identified in the market report. On each of these drivers - innovation, service provision, network competition and service competition - according to the reports it is clear that nearly all of the markets for telecommunications and multimedia are developing in a suboptimal manner.

### 2.1. Market and technology overview

18. According to the reports, the telecommunications and multimedia service offerings in most Member States are still limited compared with the optimal development path. Most fundamentally, telephone density in Europe is generally still low compared with that in the US. Only Sweden has a greater telephone density than the US, the other Member States are below with the EU average being 49 lines per 100 inhabitants, compared with 62 for the US. This lower penetration in telecommunications lines is also reflected in other areas, such as the number of Internet hosts per inhabitant, where only Finland exceeds the US figure. ISDN<sup>6</sup> penetration remains also limited.

Fewer than half (43%) of European homes are connected to either cable or satellite television (for the European cable-TV networks in particular see overview in Annex 1).

19. Cable competition is developing in the US, Canada and Australia. Incumbent cable companies in America have been forced to respond to competition by cutting prices by 50% and in one case over 90%, offer free pay per view events and upgrading their systems. Other companies have added more programmes to their basic cable package. In Australia, new competing cable operators are planning to widen the services they will offer in comparison with the incumbent operators to generate additional revenue.
20. In the European Union, by contrast, the reports suggest that as many as 59% of cable customers are served by a cable operator which is wholly or partly owned by the main telecommunications provider. Far from there being competition in the local loop in these circumstances, therefore, one company controls two points of entry into these homes. Effective local loop competition currently only takes place in three Member States: the UK, Finland and Sweden. In the UK, BT's market position has been retained at a high level partly because of its continuing strength in the local loop. In Finland by contrast, a large market share was obtained by the new entrants in a very short space of time because many of the companies already had a presence in local telephone markets.

---

<sup>6</sup> Integrated Services Digital Network.



21. Exploitation of technological advances is essential for the development of increased telecommunications and multimedia services. Currently such technological advances include: digital terrestrial television, digital satellite DTH<sup>7</sup> television, cable telephony services and multichannel television over broadband cable television networks, and, in the future, broadband Internet provision over fixed, wireless and satellite networks.

## 2.2. Key issues

22. The four key issues identified in the reports for the optimal development of the new telecommunications and multi-media technologies are :

- the range of services: Upgraded cable-TV and PSTN<sup>8</sup> access technologies have the potential to offer the widest range of telecommunications and multi-media services, including multichannel TV, voice telephony, and high-speed Internet access. While telephony services will be available from a range of alternative wireline and wireless networks, such as power lines and WLL<sup>9</sup>, these technologies are unlikely in the short to medium term to have the capacity to deliver the full range of audio-visual services. The lack of an inherent return path will prevent other technologies that are well suited to the delivery of broadcasting multichannel TV and multimedia services from providing a full range of interactive and two-way services.
- the level of service innovation : Both cable-TV and telecommunications networks have the technical capabilities to foster the conception, development, and realisation of the widest range of innovative telecommunications and multimedia services : for example, switched video services, broadcast services, pointcast services, and high speed data services. In contrast the development of innovative services over alternative access technologies will be limited, owing to, for example, lack of upstream capacity or bandwidth per user.
- infrastructure limitations : Every telecommunications infrastructure has technological limitations on the range of services that can be offered. Both cable-TV and PSTN access technologies can be upgraded to overcome most of these limitations and provide a suitable platform for the development of the telecommunications and multi-media sector. The bandwidth can be upgraded by replacing with broadband fibre optics. Bi-directional amplifiers and switching fabrics can be installed to provide switching capabilities. Digitalisation will greatly enhance the quality and variety of services of both wireline and wireless technologies. By contrast, the upgrading of many wireless technologies, such as wireless local loop and DTH satellite, will be limited by technical or environmental restraints.

---

<sup>7</sup> Direct-to-Home

<sup>8</sup> Public Switched Telephone Network

<sup>9</sup> Wireless local loop

- infrastructure competition: Cable-TV and PSTN systems can be equal competitors in the local loop for the provision of all telecommunications and multi-media services. In the medium term, there will be competition from digital satellite and wireless local loop operators for the provision of television and telephony services respectively. However, cable-TV and PSTN systems are in place today and will accelerate competition in the local loop substantially.
23. In summary, the two wireline technologies - telecommunications and cable-TV networks - are at this stage the only ones which can promote optimal development according to all four criteria: choice of services, service innovation, removal of infrastructure limitations and the encouragement of infrastructure competition. The other wireless technologies currently available still have limitations of one or more of the criteria which makes them less suitable for the optimal development of multimedia services. Nevertheless, in most Member States, dominant telecommunications operators own or control cable TV networks.

### 2.3. Options assessed

24. Given this situation, the reports assessed a broad range of actions. As regards joint ownership of cable TV and telecommunications network, the market report examined the following main options.
- maintain joint ownership without other changes
  - legal separation (creation of 100% cable subsidiary)
  - no joint ownership
25. As regards the restrictions on the provision by telecommunications operators of cable TV capacity over telecommunications networks the following options were examined:
- maintain status quo
  - lift restrictions on specific PTOs and/or give dominant PTOs rights to provide cable TV capacity via telecommunications infrastructure
  - lift restrictions on licences for cable TV infrastructure.
26. In a graduated approach, the report also assessed a number of intermediate and transitional options<sup>10</sup>. The details are set out in Annex 2. The reports are available on request.

---

<sup>10</sup> The Report also assessed the following options :

- maintain joint ownership / accelerate DTH development towards digital multichannel services
- maintain joint ownership but establish ONP on joint owner's cable network
- maintain joint ownership but open up spectrum for wireless local loop (narrowband)
- legal separation and management separation
- partial joint ownership
- independent trustee

27. The reports found that an optimal result would be achieved only by a full-scale divestiture, in cases where the dominant Telecommunications Operator also has a determining ownership interest in the cable-TV infrastructure, as joint ownership acts as a severe deterrent to the emergence of new and innovative services and to potential new entrants into the market, and could undermine the effective implementation of full liberalisation by 1 January 1998. The reports concluded that a divestiture could be required under competition rules in certain circumstances.

As regards the restrictions on telecommunications operators to provide cable TV capacity over telecommunications networks the reports conclude that such restrictions should be lifted, depending on the overall impact of such a measure as regards the competitive situation in the local loop.

### **3. MORE DETAILED ANALYSIS OF JOINT PROVISION AND OF RESTRICTIONS FOR THE PROVISION OF CABLE-TV CAPACITY**

28. In this section, more details are given, drawing on parts of the reports, on the focus of the Review : the impact of joint provision and the restrictions on providing cable-TV capacity.

#### **3.1. Impact of allowing continued joint provision of cable-TV capacity by telecommunications organisations, when abolishing their exclusive rights**

29. It seems clear from the analysis that the current position with regard to the innovation in the European Union is not optimal in the telecommunications and multi-media sectors<sup>11</sup>.

30. Joint ownership of both telecommunications networks and cable TV networks limits the development of the telecommunications and multimedia markets in the Member States in four main ways. These are:

- delaying the upgrading of cable networks to have bi-directional capability;
- blocking the development of competing infrastructures;
- limiting service competition; and
- constraining innovation

31. Joint operators have no incentive to upgrade their cable TV networks to full bi-directional capacity. This is because there is no intrinsic financial benefit in upgrading a cable TV network which will then compete for customers with the core telecommunications business of the telecommunications network operator. This competition will take place not only for telephony services, but also for more advanced multimedia services such as Internet access and in the future services such as video on demand. The investment in the cable television network is seen as unlikely to generate a net additional revenue for the joint owner.

32. In addition, in many circumstances, the joint owner is unlikely to focus on the development of the cable television business as it represents a small proportion of the total revenue of the telecommunications and cable businesses combined. On average across the EU, less than 10% of revenue comes from cable. Therefore a jointly owned cable television company may not receive the management attention necessary to invest in the development of the system.

---

<sup>11</sup> It should be noted that problems related to audio-visual and content provision and the position of public service broadcasters are not dealt with in this communication. More general regulatory and audio-visual matters are addressed by the Commission in the Convergence Green Paper (see footnote 2). This communication addresses innovation and market structure issues relating to infrastructure provision.

33. Independent cable network operators, by contrast, do not face the investment disadvantage which the joint owner has. Upgrading an existing cable network to provide bi-directional capacity costs less than building a new telecommunications network from scratch. However, the revenue benefits for the independent cable television provider are pure benefits and do not take revenue from other activities as is the case with the joint owner. Indeed, the development of telecommunications services is likely to attract entirely new customers to the independent cable television provider, and not customers transferring from another business.
34. Joint ownership also has a profound effect on both infrastructure and service competition. This effect takes place in several ways. First, the joint ownership does not give competitors to the dominant operator an alternative access to the local loop. This has proved vital in the development of competition in telecommunications in the UK, where the arrival of the cable companies led to the reduction in the dominant operator's market share far quicker than the previous (primarily the service competitor Mercury) challenger to BT had done. To maintain joint ownership will deny consumers in other markets the access to alternative service providers for broadband multimedia services. Second, the absence of local loop competition means that long distance competition is also curtailed. Long distance operators can operate by taking traffic from the incumbent directly through the incumbent's local loop. However, long distance competition has been far stronger when customers can be found from other challengers to the dominant operator at a local level. Again, experience in the UK demonstrates that this is the case. Thirdly, joint ownership can prevent or delay the introduction of broadband interactive services. According to the analysis undertaken, joint owners appear to be reluctant to link the broadband cable network with the PSTN network in order to provide true interactivity for the development of interactive services, such as high speed Internet access. Finally, service providers face problems if there is not a choice of infrastructure providers over which to offer their services because of the reliance on a single provider.
35. Service innovation is also hindered by joint ownership. Experience of cable operators from several Member States indicates that when those operators wish to develop innovative services the dominant telecommunications operator often restricts the development of the innovative services. This restriction arises because of the cable operators' dependence for many elements on the dominant telecommunications operator. Even if they are willing to develop the services, the costs which it wishes to impose on the other cable operators will often make the venture non-viable for those companies. Where the dominant telecommunications operator is a joint owner of the cable operator, its role in the development of new services is even more important for the success of the venture. Without the involvement of the joint owner, the critical mass is not available to kick start the new services.

36. The result is that joint ownership of telecommunications and cable networks in a situation of dominance is likely to be the single most important factor holding back market development and the pro-competitive effects of liberalisation, as Europe moves into the multi-media age<sup>12</sup>.
- 3.2. **Impact of restrictions to provide cable-TV transmission capacity**
37. Restrictions on telecoms companies to provide cable TV transmission capacity may discourage the building of broadband networks in other ways. The Cable Directive ensures that all cable TV networks are free to provide all liberalised telecommunications services. However, there is no corresponding provision to ensure that telecommunications operators are allowed to offer cable TV capacity over their public telecommunications networks. The ability of telecommunications operators to develop further their public telecommunications networks in this respect may depend on national regulations. Even in cases of joint ownership where telecommunications companies do make available cable TV capacity, this can lead to restrictions on technical progress, given that new technologies for upgrading telecommunications networks exist and also given the far higher penetration of telecommunications networks compared with cable TV networks in most Member States.
38. The technology underpinning the different types of telecommunications networks is steadily converging. For telecommunications networks, technologies such as ADSL<sup>13</sup> are providing an opportunity for telecommunications networks to carry broadcast signals. Combined with compression techniques, telecommunications operators will be able to transmit high bandwidth signals down the existing copper pair telephone line. This could amount to between one and six television channels. This will enable telecommunications companies to contemplate competing with cable companies, for the provision of television channels and, more likely by offering Video on Demand services which would compete with cable television companies Pay per View services, as well as high-speed Internet access.
39. The removal of such restrictions in the context of the liberalisation of the European telecommunications sector was therefore called for by the European Parliament.<sup>14</sup>

---

<sup>12</sup> Currently the public Telecommunications Organisations have a strong cable presence in ten Member States; they plan such presence in two Member States; they are not present at this stage in three Member States.

<sup>13</sup> Asymmetrical Digital Subscriber Line. For details see Arthur D. Little study (footnote 4).

<sup>14</sup> EP Resolution of 15 June 1995, OJ No C 166, 3. 7. 1995, p. 109, and EP Resolution of 19 May 1995 OJ C 151 of 19.6..1995 page 479.

#### 4. MEMBER STATE REGULATION

40. Member States are now in the process of completing the implementation of the Directive 96/19/EC with a view to introducing full competition by 1 January 1998<sup>15</sup>. Except in one member state, national legislation aiming at the abolition of special and exclusive rights adopted in this framework contains no measures to address the issue of joint ownership.
41. Different levels of regulation continue to be applied to cable network operators. Most Member States give licences to cable TV operators at a local level, often under exclusive or special rights. The possibility for owning infrastructure also varies from country to country as do the restrictions on the ability for the dominant operators to provide cable TV services over telecommunications networks
42. Although one member state imposes limitations which affect the size of the shareholding which the telecommunications operator can hold in cable TV company authorised as a telecoms network operator, the joint provision of telecommunications and cable TV networks by a single operator remains permitted in all Member States<sup>16</sup>. A number of Member States rely on general competition law to regulate the actions of the joint provider.
43. As regards the provision of cable TV capacity over telecommunications networks, two Member States have imposed explicit restrictions on their telecommunications organisations. Other Member States have no national restrictions, but the telecommunications operator still does not carry cable TV capacity for a variety of reasons connected with the local regulatory environment. In the longer term, the restrictions, mentioned in the first sentence, prevent telecommunications companies from offering cable TV capacity, which is likely to restrict infrastructure competition and multimedia and therefore means that the development of telecommunications and multimedia markets in the EU will proceed in a sub-optimal manner<sup>17</sup>. These restrictions therefore should not be regarded as a permanent fixture and should be lifted according to a given and transparent timescale across the EU as effective competition develops in the local loop. That timescale should be capable of some flexibility, to take account of national circumstances.
44. The finding therefore is that, as market development is still in its infancy as regards the carriage of television capacity via public telecommunications networks, the regulatory situation is largely undefined.

---

<sup>15</sup> Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the telecommunications regulatory package : first update (COM(97)504).

<sup>16</sup> In Spain the dominant operator Telefónica is required to wait before beginning as a cable TV network provider in a new franchise area. This restriction lasts between 16 months and two years. In the UK, BT, the dominant operator, Mercury and Kingston Communications can operate cable TV networks if they obtain a franchise. However, they have to be run separately from the main telecommunications business.

In a number of other Member States no explicit restrictions are foreseen but the situation is undefined. It can be expected that problems will arise as the new technologies are applied. According to the reports, the Commission considers that the situation in ten Member States falls into this category.

<sup>17</sup> This is reflected in the UK, where the restrictions on BT and the other PTOs are time limited.

45. The restraints on further development of cable-TV capacity through the deployment of new technologies, either by further development of the public telecommunications networks (e.g. via ADSL) or the allocation of new licences for new broadband wireless technologies could become a major brake on market development towards multi-media in the near future.



## 5. ASSESSMENT AND ACTION UNDER COMPETITION RULES

46. The Treaty, and in particular its Article 90, entrusts the Commission with the task of ensuring that Member States, in the case of public undertakings and undertakings enjoying special or exclusive rights, comply with their obligations under Community law. Under Article 90 (3) the Commission can, on the one hand, specify and clarify the obligations arising from this Article, and, on the other hand, set out obligations for the Member States—which are necessary to allow the Commission to perform effectively the duty of surveillance imposed upon it by that paragraph.
47. The Commission must in particular ensure that, even while abolishing these rights, Member States shall not enforce measures which would not allow the dominant position of telecommunications organisations being challenged by competition once the liberalisation of voice telephony takes place, making it thus possible for these telecommunications organisations to maintain their dominant position in voice telephony and public telecommunications network markets and thereby strengthening the dominant position of the incumbent operator.

### 5.1. Horizontal action

#### 5.1.1. Joint Ownership

48. As regards joint ownership, Directive 95/51/EC (“the Cable Directive”) has established the principle of accounting separation and has indicated a preference for structural separation, i.e. operation of telecommunications and cable-TV networks by those operators in clearly distinct legal entities<sup>18</sup> .
49. Article 2 of the Directive requires that Member States :
- ensure accounting transparency and prevent discriminatory behaviour, where a telecommunications operator with an exclusive right to provide public telecommunications network infrastructure also provides cable-TV network infrastructure ;
  - ensure the separation of financial accounts as concerns the provision of each network and the telecommunications operator’s activity as provider of telecommunications services ; and
  - ensure that an operator with an exclusive right to provide cable-TV network infrastructure in a given area in a Member State keeps separate financial accounts regarding its activity as a telecommunications network capacity provider when its turnover exceeds a certain level.

---

<sup>18</sup> The Cable Directive stipulates in its Recital 18 in particular : “Where Member States grant to the same undertaking the right to establish both cable-TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for overcharging for use of the Cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. ....To allow the monitoring of any improper behaviour, Member States should therefore at least impose a clear separation of financial records between the two activities, though full structural separation is preferable. (emphasis added)

50. While the Cable Directive left the decision on accounting separation versus a full-scale structural separation to the Member States, it also stated that the current Review of the impact of such joint provision in relation to the aims of the Directive would be made. The Directive stated that the Commission would re-consider “whether the separation of accounts is sufficient to avoid improper practices” and would “assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area, or whether further measures are warranted”(Recital 20), where in the meantime no competing home delivery systems were authorised by the relevant Member States.
51. Even though under Directive 96/19/EC, the majority of the Member States have the legal obligation to abolish exclusive or special rights by 1 January 1998 on telecommunications networks, in none of them will effective competition in the local loop be established at a national level before a substantial transition period. As regards the joint ownership of telecommunications and cable networks, only a few Member States have established structural separation<sup>19</sup> .
52. While accounting separation and implementation of appropriate cost allocation methods can help in verifying and avoiding a number of possibly abusive practices by the dominant undertaking, the beneficial effects of such rules remain largely limited to pricing practices. However, as was anticipated in the Cable Directive the position of the dominant undertaking may also give rise to more fundamental concerns which go back to the essential “conflict of interest” which is inherent in that position due to the control over both the telecommunications and cable-TV infrastructure.
53. The mere separation of accounts will only render financial flows more transparent, whereas legal separation will lead to more transparency of assets and costs and will facilitate monitoring of the profitability and the management of the cable network operations. The provision of telecommunications networks and cable-TV networks are related activities. Therefore the position of an operator on one of these markets has an impact on its position on the other, and the supervision of its activities on these markets is more difficult.
54. Also, the future financial prospects of a cable-TV network which has not yet been built are uncertain for a company that is not yet already established on the telecommunications or pay-TV services markets. Therefore, it is essential that a dominant telecommunications organisation organises its own cable-TV network activities in a way that can be monitored in order to exclude that it uses its resources

---

<sup>19</sup> .e.g. the Netherlands have taken a number of steps to ensure a limitation of cross-ownership by the incumbent telecommunications organisation over both telecommunications and cable-TV infrastructure as well as to introduce a form of structural separation between those two activities; inter alia, specific obligations were developed to ensure that there would be no influence by the incumbent telecommunications organisation on the commercial behaviour of the cable-TV operator and specific Chinese Walls needed to be put in place in order to ensure that there would be no direct or indirect exchange of commercially sensitive information between the incumbent telecommunications organisation and the cable-TV operator. In Germany, Deutsche Telekom have recently announced that their cable TV networks will be put into a separate company from the core telecommunications business

to abuse its position, for example so that it does not discriminate against new entrant cable TV networks for interconnection rates for telephony as opposed to the rates for its own cable TV network.

55. In applying the competition rules to specific facts it is essential to take due account of the legal and economic context. This implies that changes in market circumstances, such as technological or other developments have a direct impact on the analysis under competition law. At the eve of convergence and the emergence of new multi-media markets, cross-ownership between telecommunications and cable networks has a much higher potential impact as regards market power and potential of abuse. The commercial conduct of the enterprises concerned will therefore require an increased scrutiny since a large potential for abusive conduct and foreclosure effects exists. Accounting separation is an insufficient measure in this context.
56. The Review of the Commission therefore considers it necessary, as a minimum measure, that legal separation is implemented. In order to be able to ensure rapid technological progress and to monitor effectively behaviour which could be abusive, it therefore will submit an amendment to Directive 90/388/EC which will establish this requirement to enable fully competitive structures in the telecommunications and cable-TV network markets.
57. In addition, Member States might have to take specific action to avoid that in the local telephony markets the operator of both networks is the only infrastructure provider for its competitors<sup>20</sup> taking into account the specific circumstances of the relevant local telephony markets where duplication of infrastructure is slow and expensive.

#### 5.1.2. Restrictions on the provision of cable TV capacity

58. The restrictions on telecommunications operators to provide cable-TV capacity over their public telecommunications networks can lead to a situation where providers of cable-TV services are prevented from using the public telecommunications network capacity of the telecommunications organisation for cable-TV services. The exclusion of the use of the public telecommunications network increases the scarcity of cable-TV transmission capacity available. The restrictions on the available capacity have particularly severe effects on providers of cable-TV from other Member States as the allocation of capacity available on cable networks is based on the media laws of the Member States which usually give or have given preference to national providers.
59. The measures restricting the use of telecommunications networks for the provision of cable television capacity could therefore be in breach of Article 90, in conjunction

---

<sup>20</sup> The measures to be taken in respect of specific cases could include the splitting-up of the entity operating cable-TV networks into several regional entities, the opening of the cable operator to a participation of third parties, or the requirement to fully sell-off this entity.

For example, a requirement to sell-off wholly or partly its ownership in the entity or entities operating cable-TV networks could be implemented through the appointment of a trustee with an irrevocable mandate to sell the entity and to set up a management structure for the time period required to implement a divestiture.

with Article 59 of the Treaty. Even in cases where restrictions apply without distinction to all companies other than the relevant cable TV network operators, Article 59 might be applicable. It is not necessary for all the companies of a Member State to be favoured in relation to the foreign companies. It is sufficient that the preferential treatment should benefit certain national operators<sup>21</sup> if these measures prevent telecommunications organisations from upgrading their telecommunications networks to full multimedia capabilities they could also be in breach of Article 90, in conjunction with Article 86 b) of the Treaty.

60. Even though these measures limit the technological development of the networks and impede cross-frontier provision of services, temporary restrictions in this area may be justifiable by the requirement to ensure effective competition between operators competing in the relevant markets, as long as there is no effective competition in the local loop. This could be particularly important in geographic areas where cable networks have not yet been fully rolled out.
61. In conclusion, as only two Member States currently maintain explicit restrictions, the adoption of a horizontal measure at this stage may not be justified. However, the situation in at least ten Member States seems undefined and barriers to the future development of the convergent multi-media markets may emerge very rapidly. For example, in Belgium, the telecommunications operator is planning to invest heavily in ADSL technology to offer high speed Internet connections to customers in response to the introduction of cable modems by the cable TV networks. Accordingly, the Commission will keep the situation under review, in particular in respect of possible impediments of the development of the EU multi-media markets (such as introduction of broadband Internet services).

### 5.1.3 Allocation of frequencies for broadband wireless local loop

62. In the light of the effect of the restrictions in the allocation of radio frequencies on the overall availability of cable-TV capacity, in particular for new market developments and technologies, the commercial provision of new broadband transmission capacity is of utmost importance. In the future, wireless broadband applications will become technically feasible and commercially viable.
63. According to the Full Competition Directive (96/19/EC) Member States have an obligation not to refuse to grant licences for such wireless broadband applications where the necessary frequencies are available. Given the importance of this issue, the Commission will monitor closely the granting of radio frequency licences by Member States and will take action if necessary.

If Member States were to delay the grant of licences for such applications for reasons other than the non-availability of radio frequencies these delays could therefore be incompatible with the Treaty.

---

<sup>21</sup> ECJ judgement *Mediawet I*, 25.7.1991, OJ C 353 page 89, Vol I - 4069 paragraph 14 onwards especially paragraph 25.

64. The current restrictions on the allocation of radio frequencies can act as a measure equivalent to the restriction of the provision of cable-TV capacity particularly for new innovative services. Therefore, it is of paramount importance that Member States fulfil their obligations with regard to the allocation of new licences, particularly where new technological opportunities allow this. In the near future, wireless broadband cable-TV networks could become such an alternative.

#### 5.1.4 - Summary

65. The Commission will bring forward a measure to structurally separate jointly owned dominant telecommunications operators and cable TV companies. In addition, it will keep under review the restrictions on the provision of cable TV capacity over telecommunications networks and the allocation of licences of radio frequencies for the broadband local loop with a view to taking action should it be justified.

#### **5.2. Case specific actions**

66. The horizontal approach outlined above will only suffice as a minimum application of the competition rules of the EU to the issues raised by the joint ownership of telecommunications and cable television. Individual action, addressed to the Member States<sup>22</sup> or to undertakings concerned<sup>23</sup> will be necessary to ensure that the optimum conditions for the development of telecommunications and multimedia take place.

The Commission will need to examine individual cases on their own merits as they arise.

67. Article 86 applies to individual undertakings which hold a dominant position. In this sector it should be applied a fortiori to an undertaking which is the owner of both a telecommunications and a cable network, in particular when it is dominant on both markets. Where companies enjoy a dominant position on two markets, they must take particular care not to allow their conduct to impair genuine undistorted competition. In particular, that dominance cannot be leveraged into neighbouring markets, impede the emergence of new services or strengthen their dominance through acquisitions or co-operative ventures either horizontally or vertically.

Within the framework set out in this communication, certain common approaches can be identified, within the context of the existing case law under Articles 86 and 90.

68. In certain circumstances it might be that the only means which would allow the creation of a competitive environment consist in the divestment of the cable television network by the telecommunications operator. Other solutions may also be explored depending on the precise circumstances of the case<sup>24</sup>.

---

<sup>22</sup> Through further action deriving from Article 90.

<sup>23</sup> Through further action under Article 86 or Article 85 or the merger regulation.

<sup>24</sup> See in particular, section I of the Coudert study.

69. Under Article 90 in conjunction with Article 86, the Commission may, if any abuse of dominance occurs as a direct consequence of a state measure, in addition to the horizontal approach set out above (5.1), take individual action to prevent abuses such as the unlawful extension of a dominant position by taking into account existing case law and the evolution of market circumstances and regulatory frameworks.
70. The Commission's options for action under Article 86 include the opening of own initiative cases or action upon the receipt of a complaint. In addition, under Article 85, and more specifically Regulation 17/62, and the Merger Regulation, there is the possibility of the Commission receiving a notification of an operation. The Commission will assess such a notification in the light of the facts underlying the case. It can be expected that an extension of an operator dominant in both telecommunications and cable television networks into related fields could raise serious competition concerns.
71. In summary, as regards case-specific action :

The Commission will have to examine, either at its own initiative or in the light of a notification or complaint, the individual situations pertaining in Member States and take action under the relevant instruments of competition law.

## 6. CONCLUSION

72. This Communication has not addressed media and content issues. The Commission has published on these more general issues a “Green Paper on the implications of the regulatory framework for telecommunications, audio-visual and publishing” (“Convergence Green Paper”)<sup>25</sup>. From a competition policy point of view, convergence must build on the development of a broad base of pro-competitive infrastructures of telecommunications and cable-TV networks. Therefore this Review is central to the success of convergence in building pro-competitive structures, and complementary to the “Convergence Green Paper”.
73. The Commission recognises that there is a diversity of market structures across the EU and that tailored solutions must be produced which are appropriate to individual circumstances.
74. One minimal general principle, however, can - and should - now be applied across the EU. This is that investments in multimedia by dominant operators have to be assessed against the background of the market structures in place. The assessment of any attempts by dominant telecommunications operators to expand into new multimedia areas will depend on the introduction of the necessary structural changes or other adequate safeguards.
75. The starting positions for moving into the convergent markets must be in conformity with the competition rules. Convergence must not lead to new multi-media super-monopolies, but to the creation of growth-oriented, job-rich new economic structures.
76. The joint provision of telecommunications and cable TV networks by a single operator, which has been inherited from monopoly provisions in the past, creates an asymmetric starting position for dominant telecommunications operators as compared to new entrants as the various different multi-media markets converge. First, it will act as a significant constraint on the optimal development of these markets. It will clearly have the effect of reducing competition in telecommunications markets as new entrants will be unable to access the local loop independently of the dominant operator. Second, it creates at least an incentive and a strong likelihood that the dual dominant operator will act in a manner which will stifle innovation and delay the development of multimedia markets in the European Union.

---

<sup>25</sup> Cf. para. 9 above.

77. The Commission therefore will act in two ways. First, it will submit an Article 90 Directive amending Directives 90/388/EEC and 95/51/EC requiring legal separation of the cable television companies from telecommunications companies, i.e. operating cable-TV networks and telecommunications networks in separate legal entities, in particular where special or exclusive rights have been allocated for cable operations. This will increase transparency of assets and costs and create a “walling off” effect between the two operations. Most importantly, it will allow regulators and the competition authorities to supervise the operations of cable-TV networks in their own right. This separation will be the minimum step that the Commission intends to take, given that the Review has shown that the current accounting separation is clearly insufficient in those cases.
78. Further, the Commission intends to act within the scope of Article 86, or of Article 85 and the Merger Regulation on a case by case basis, where appropriate, for reducing further the anti-competitive effects of joint provision inherited from previous market positions. Action could be at the Commission’s own initiative, or as the result of a complaint based on Article 86 by an affected third party. In addition, the Commission will act as a result of notifications by a dominant telecommunications and cable television company of an expansion into new multimedia areas, by imposing further structural changes or other effective safeguards where necessary. This will be in the application of either Articles 85 and 86 or the Merger Regulation, as cases require.
79. As regards restrictions on telecommunications operators to provide cable-TV capacity over their public telecommunications networks, the Commission will keep the situation under review, in particular in respect of possible impediments to the development of EU multi-media markets.
80. As far as the allocation of radio frequencies is concerned, the Commission will also keep under review the obligations on Member States contained in the Full Competition Directive (96/19/EC) to grant licences for radio frequencies on a non-discriminatory basis. The Commission will monitor this process closely in the Member States and will take action if necessary.
81. Where the Commission intends to adopt horizontal measures based on Article 90 (Amendment to the existing Article 90 Directives), in accordance with the conclusions drawn in Chapter 5, it will follow transparent procedures of consultation. It will, in particular, submit such amendments to the European Parliament, the Council of Ministers, the Social and Economic Committee, and the Committee of Regions, as well as publish them in the Official Journal for a two month consultation period.



## ANNEX 1

### OVERVIEW OF CABLE-TV NETWORKS IN THE EU

TOTAL TV HOUSEHOLDS (in million)	145.8
TOTAL CABLE SUBCRIBERS (in million)	40.5
CABLE PENETRATION (homes connected / TV homes) EU AVERAGE	28%

Estimations for 1997 based on projections. Please note that cable penetration varies from 0 to near 100% across Member States.

**Excerpt from  
“Cable Review - Study on the Competition Implications in  
Telecommunications and Multi-Media Markets” (Executive Summary), Arthur D.  
Little**

**Assessment of options**

---

According to the scope of the study, the following options were considered.

**Options for joint ownership**

Broadly, the options concerning joint ownership fall into four categories :

- ⇒ Maintaining joint ownership ;
- ⇒ Partial joint ownership ;
- ⇒ Divestiture of the cable-TV operation ;
- ⇒ Transition from joint ownership to divestiture.

In the *first category*, six options were examined. They impose different degrees of restrictions on the joint owner ; the impact on the development of infrastructure and services increases with transparency of and separation within the joint owner’s group of companies.

The *second category*, partial joint ownership, covers increasing separation of the cable-TV company from the joint owner, as additional shareholders take bigger shares. The higher their share, the higher the impact on accelerated development of infrastructure and services in the Member States.

Divestiture of the joint owner’s cable-TV network, the *third category*, has a high impact on infrastructure and service development, leading to greater capacity increase, greater accessibility of residential customers and availability of services, high innovation and the ability of other service providers to offer their services over different infrastructures. Implementing this option will offer a sound basis for development of telecommunication and multimedia markets in line with the European Union’s objectives.

In the *fourth category*, two options mentioned by many interviewees for the period between joint ownership and partial and/or full divestiture : introducing an independent trustee and structural separation were looked at. These options can be combined. In The Netherlands, for example, KPN has not only to separate its cable operations legally from the telecommunications operations but also to set up separate management and an independent trustee. The regulator enforced these steps to initiate a partial divestiture of KPN’s cable operations, moving it towards an eventual minority share of less than 25 per cent.

The other options described above can also be part of an overall transition from joint ownership.

The figure below summarises the results of the examination of ten main options within the four categories described.

Options for ownership	Impact on infrastructure			Impact on services			Comments
	Capacity upgrade	Accessibility to residential customers	Cost performance improvement	Availability of products and services	Increasing choice of service providers	Innovation rate for new services and applications	
1. Maintain joint ownership without other change	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	⇒ No cable upgrade ⇒ Less innovation in service provision ⇒ Slow down of content service development ⇒ No short or medium-term infrastructure competition ⇒ Strong regulator needed
2. Maintain joint ownership/DTH development towards digital multichannel services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	⇒ Influence on cable upgrade to remain competitive ⇒ Increasing availability of products and services because of rising competition ⇒ Rising number of service providers in the market ⇒ No impact on upgrade to bi-directional services
3. Maintain joint ownership but establish ONP on joint owner's cable network	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	⇒ Extended content service competition ⇒ Strong regulator required ⇒ Cable upgrade investment requirements vary strongly between countries
4. Maintain joint ownership but open up spectrum for	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	⇒ Potentially medium-term infrastructure competition ⇒ Potential devaluation of cable

Options for ownership	Impact on infrastructure			Impact on services			Comments
	Capacity upgrade	Accessibility to residential customers	Cost performance improvement	Availability of products and services	Increasing choice of service providers	Innovation rate for new services and applications	
wireless local loop (narrowband)			□	□			⇒ Joint owner forced to upgrade cable to remain competitive ⇒ Increase of content-service development ⇒ Digital, two-way broadband technology not yet available at competitive price, widespread rollout not realistic in near future.
5. Legal separation (creation of 100% subsidiary)	□	□	■	■	■	□	⇒ Minimum condition for effective surveillance of competitive behaviour ⇒ Transparency of assets and costs ⇒ Clear allocation of profit /loss ⇒ Allows shareholders and regulators to see profitability of CATV

□ No Impact   ■ Low impact   ■■ Medium impact   ■■■ High Impact

6. Legal separation and management separation	□	■	■■	■■	■	□	⇒ As point 5  ⇒ Separate management needs to present achievements to shareholders and public  ⇒ Motivation for management to increase number of services and network performance  ⇒ Financial and management details still have to be revealed to parent company
7. Partial joint ownership							
7.1 Incumbent owns > 50%	■	■■	■■	■■	■■	■	⇒ All of points 5 and 6  . Majority of shares allows joint owner to make management decisions and therefore avoid competition between the two infrastructures  . Specific contract with other shareholders may impact development of infrastructure and services
7.2 Incumbent owns < 50%	■■	■■	■■■	■■■	■■■	■■	⇒ Cable upgrade achievable according to business case  ⇒ Higher possibility for additional service providers next to joint owner  ⇒ Financial and management decisions have to be revealed to parent company  ⇒ Blocking vote of joint owner against major competitive action, i.e. in POTS
7.3 Incumbent owns < 25%							⇒ Since joint owner does not have "blocking" minority vote, a full service competitor can be established by management according to

	■■■	■■■	■■■	■■■	■■■	■■	<p>business case.</p> <p>⇒ Joint owner can keep link to CATV network for the provision of cable-TV services</p>
8. No joint ownership	■■■	■■■	■■■	■■■	■■■	■■■	<p>⇒ Service and infrastructure competition</p> <p>⇒ Increased accessibility of residential customers</p> <p>⇒ Full upgrade of CATV network</p> <p>⇒ Technology improvement usable as competitive advantage-continuous network operator</p> <p>⇒ Increasing choice of service providers, even of similar services, because of additional capacity and competing infrastructures</p>

No Impact   
 Low impact   
 Medium impact   
 High Impact

<b>Additional options for transitional periods</b>							
9. Independent trustee	□	■ ■	■	■ ■	■ ■	□	⇒ Independent trustee is able to optimise cost/performance of networks ⇒ Independent trustee is likely to receive funds for network upgrade ⇒ In The Netherlands the trustee option is used during the transition to partial divestiture
10. Separation of network and services (creation of separate subsidiaries for joint owner)	■	■ ■	■	■	■	■	⇒ Very limited network upgrade owing to risk aversion of network owner (cannot participate in upside) ⇒ Price increase since network operation has to be profitable stand alone ⇒ Strong regulator needed to control increasing prices ⇒ If service providers are allowed to invest in network upgrade, "shared ownership is created".

□ No Impact   ■ Low impact   ■ ■ Medium impact   ■ ■ ■ High Impact



## **Restrictions on the Provision of Cable-TV Capacity**

Three policy options for the provision of Cable-TV capacity can be considered :

- ⇒ Maintaining the status quo
- ⇒ Lifting restrictions on specific PTOs and/or giving dominant PTOs rights to provide cable-TV capacity over telecommunications infrastructure
- ⇒ Lifting restrictions on licences for cable-TV infrastructure.

As shown in the figure, lifting restrictions that apply specifically to PTOs and giving them rights to provide cable TV capacity over their existing networks would have limited impact on the market, but lifting the general restrictions on licence availability for cable-TV infrastructure would have a major impact on the long term development of broadband multi-media markets.

Options for lifting Restrictions on the Provision of Cable-TV capacity	Impact on Infrastructure				Impact on Services		
	Capacity Upgrade	Accessibility to Residential Customers	Cost / Performance Improvement	Availability of Products and Services	Increasing Choice of Service Providers	Innovation Rate for New Services and Applications	
1. Maintain status quo	■	■	□	■	□	□	⇒ In 7 Member States infrastructure re ⇒ Reduced opp for multi-media ser
2. Lift restrictions on specific PTOs and/or give dominant PTOs rights to provide cable-TV capacity via telecommunications infrastructure	■■	■■	■	■■	■	■	⇒ Potentially le and explicit rest ⇒ Potential com dominant PTOs ⇒ Lifts specific (and Spain)
3. Lift restrictions on licences for cable-TV infrastructure	■■■	■■■	■■	■■■	■■■	■■■	⇒ Removes a regulation ⇒ Potentially hig networks and m

□ No Impact ■ Low impact ■■ Medium impact ■■■ High Impact

**DRAFT COMMISSION DIRECTIVE AMENDING DIRECTIVE 90/388/EEC WITH  
REGARD TO ITS EFFECTIVE APPLICATION IN A MULTIMEDIA  
ENVIRONMENT, BY LEGALLY SEPARATING  
THE PROVISION OF TELECOMMUNICATIONS AND CABLE TV NETWORKS OWNED  
BY A SINGLE OPERATOR**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

- (1) Under Commission Directive 90/388/EC of 28 June 1990 on competition in the markets for telecommunications services<sup>26</sup> as amended by Directives 94/46/EC,<sup>27</sup> 95/51/EC,<sup>28</sup> 96/2/EC<sup>29</sup> and 96/19/EC<sup>30</sup> the Member States are required to progressively lift all special and exclusive rights for telecommunications services and infrastructures by 1 January 1998, subject to additional transition periods for some Member States. In particular, Directive 95/51/EC required Member States “to abolish all restrictions on the supply of transmission capacity by cable tv networks

---

<sup>26</sup> OJ No L 192, 24. 7. 1990, p. 10.

<sup>27</sup> OJ No L 268, 19. 10. 1994, p. 15.

<sup>28</sup> OJ No L 256, 26. 10. 1995, p. 49; Corrigendum OJ No L 308, 29. 11. 1996, p. 59.

<sup>29</sup> OJ No L 20, 26. 1. 1996, P. 59.

<sup>30</sup> OJ No L 74, 22. 3. 1996, p. 13.

and allow the use of cable networks for the provision of telecommunications services other than voice telephony”, and “to ensure that interconnection of cable tv networks with the public telecommunications network is authorised for such purposes, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable tv networks by cable tv operators are abolished.”

- (2) Commission Directive 95/51/EC addressed two problems concerning undertakings to which Member States have granted the right to establish both cable tv and telecommunications networks. Firstly, the Directive stated that these undertakings are in a situation whereby they have no incentive to attract users to the network best suited to the provision of the relevant service. It was pointed out that the introduction of fair competition will often require specific measures that take into account the specific circumstances of the relevant markets. At the time of the adoption of the Directive the Commission concluded that given the disparities between Member States the national authorities were best able to assess which measures are most appropriate, and in particular to judge whether a separation of these activities was indispensable. Secondly, the Commission concluded that a detailed control of cross-subsidies and accounting transparency are essential in the early stages of liberalisation of the telecommunications sector. Article 2 of Directive 95/51/EC therefore required Member States to ensure in particular that telecommunications organisations providing cable tv infrastructures keep separate financial accounts as concerns the provision of public telecommunications network and cable tv network as well as their activities as telecommunications service providers. Recital 18 of Directive 95/51/EC stated that while Member States should at least impose a clear separation of financial records between two activities, full structural separation was preferable.
- (3) At the same time the Commission stated that in the absence of the emergence of competing home-delivery systems it would have to reconsider whether a separation of accounts is sufficient to avoid improper practices and will assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the service providers in the relevant area, or whether further measures are warranted. In this context Article 2 (3) of Directive 95/51/EC required the Commission to carry out, before 1 January 1998, an overall assessment of the impact in relation to the aims of the Directive of the joint provision of cable tv networks and public telecommunications networks through a single operator.
- (4) This Directive is based on the assessment carried out by the Commission as required by Article 2 of Directive 95/51/EC. In preparation of this assessment two studies on the competition implications in telecommunications and multimedia markets of (a) joint provision of cable and telecommunications networks by a single dominant operator and (b) restrictions on the use of telecommunications networks for the provision of cable tv services were commissioned. The studies concluded in particular that the joint ownership of telecommunications networks and cable tv networks by a single enterprise, without a high degree of competition

in the local access markets, slows down the development towards a full multimedia infrastructure to the detriment of consumers, service providers and the European economy as a whole.

- (5) The Commission has adopted a Communication on the assessment carried out as required by Directives 95/51/EC and 96/19/EC (COM (97) ... final, ...1997). In its review the Commission found that the optimal development of telecommunications and multimedia markets depends on four factors: service competition, infrastructure competition, infrastructure upgrade, as well as other types of innovation. It found that in the EU, the joint provision of telecommunications and cable television services by a single operator creates an asymmetric starting position for dominant telecommunications operators compared with new entrants. This will act as a significant constraint on the optimal development of telecommunications markets.
- (6) The Treaty, and in particular its Article 90, entrusts the Commission with the task of ensuring that Member States, in the case of public undertakings and undertakings enjoying special or exclusive rights, comply with their obligations under Community law. Under Article 90 (3) the Commission can specify and clarify the obligations arising from this Article, and in this framework, set out the conditions which are necessary to allow the Commission to perform effectively the duty of surveillance imposed upon it by that paragraph.
- (7) Most European telecommunications organisations are still state-controlled companies. In addition, whilst Community law provides for the withdrawal of special and exclusive rights for the provision of telecommunications networks and services telecommunications organisations will continue to enjoy special rights as defined by Directive 90/388/EEC as amended by Directive 94/46/EC beyond the date of full liberalisation, in the area of radiofrequencies used for the provision of telecommunications networks and broadcasting transmission capacity. This results from the fact that telecommunications organisations continue to enjoy rights to use radiofrequencies which they have historically been granted otherwise than according to objective, proportional and non-discriminatory criteria. These authorisations are regulatory advantages that strengthen the position of these operators and continue to have a substantial effect on the ability of other undertakings to compete with the telecommunications organisations in the area of telecommunications infrastructure. Therefore these telecommunications operators are undertakings covered by Article 90 (1) of the Treaty.
- (8) Most Member States have adopted measures granting to the telecommunications organisations special or exclusive rights for the provision of cable television networks. These rights can take the form either of an exclusive licence or of a non-

exclusive licence. where the number of licences is restricted otherwise than according to objective, proportional and non-discriminatory criteria.

- (9) Article 86 of the Treaty prohibits one or more undertakings holding a dominant position from abusing this dominant position within the common market or a substantial part of it.
- (10) Where Member States have granted a special or exclusive right to build and operate cable tv networks to a telecommunications organisation which is dominant on the market for services using telecommunications infrastructure, this telecommunications organisation has no incentive to upgrade both its public narrowband telecommunications network or its broadband cable tv network to an integrated broadband communications network (“full-service network”) capable of delivering voice, data and images at high bandwidth.

In other words, such an organisation is placed into a situation where it has a conflict of interests because any substantial improvement in either its telecommunications network or its cable tv network may lead to a loss of business for the other network. It would be necessary in these circumstances to separate the ownership of the two networks in two distinct companies as the joint ownership of these networks leads these organisations to delay the emergence of new advanced communications services and thus restricts technical progress at the expense of the users contrary to Article 90 (1) of the Treaty, in conjunction with point (b) of the second paragraph of Article 86.

As a minimum, all Member States should, however, ensure that telecommunications organisations which have special or exclusive rights for the provision of cable tv networks operate cable tv networks in a separate legal entity.

- (11) Such a conclusion is reinforced by the following considerations. Where Member States grant to an undertaking the special or exclusive right to establish cable tv networks in the same geographic area where it already provides public telecommunications networks different forms of anti-competitive behaviour are likely to occur unless sufficient transparency of the operations of these undertakings is ensured.

Notwithstanding the requirements in Community law with regard to accounting separation, some of which only enter into force with the implementation of the package of general measures opening up the Community’s telecommunications

markets in most Member States from 1 January 1998, in situations where where serious conflicts of interest exist resulting from joint ownership such separation has not provided the necessary safeguards against all forms of anti-competitive behaviour. In addition, the separation of accounts will only render financial flows more transparent, whereas legal separation will lead to more transparency of assets and costs and will facilitate to monitor the profitability and the management of the cable network operations. The provision of telecommunications networks and cable tv networks are related activities. The position of an operator on one of these markets has an impact on its position on the other, and the supervision of its activities on these markets is more difficult. In addition, where a dominant telecommunications organisation has any cable tv interests, this has a discouraging effect on any other company because of the financial strength of the telecommunications operator. Also, the future financial prospects of a cable tv network which has not yet been built are uncertain for a company that is not yet already established on the telecommunications or pay tv services markets.

Therefore, it is essential that a dominant telecommunications organisation organises its cable tv network activities in a way that it can be monitored in order to exclude that it uses its resources abusing its position. During the crucial phase of the full opening of the sector to competition a legal separation between the operation of the public switched telecommunications network and the cable tv network of the telecommunications organisations is the minimum necessary in order to ensure compliance with Article 90. In order to achieve this transparency it is necessary that the networks are operated by separate legal entities which may, however in principle be jointly owned. The requirement of legal separation would therefore be complied with if the cable tv operations of a telecommunications organisation are transferred to a fully-owned subsidiary of the telecommunications organisation.

- (12) The Commission will examine on a case-by-case basis whether it would be compatible with the principle of proportionality to require individual Member States to take further measures.

The decisions to be taken in respect of specific cases could provide for measures including the opening of the cable operator to a participation of third parties, or the requirement to fully sell-off this entity.

- (13) The Commission has carried out its assessment required under Article 2 (3) of Directive 95/51/EC. This provision can therefore be deleted.

- (14) The distribution of audio-visual programmes intended for the general public via telecommunications networks and the content of such programmes, will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.
  
- (15) Member States should refrain from introducing new measures with the purpose or effect of jeopardising the aim of this Directive,

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

Directive 90/388/EEC is amended as follows:

Article 9 is replaced by the following:

#### Article 9

##### Legal Separation

Member States shall ensure that any telecommunications organisation to which they grant special or exclusive rights in the areas of relevant radiofrequencies or which they control, which, in a substantial part of the common market, is dominant and operates a cable tv network under special or exclusive rights does not do so using the same legal entity as it uses for its public telecommunications network.



## Article 2

Article 2 (3) of Directive 95/51/EC is deleted.

## Article 3

Member States shall supply to the Commission, not later than nine months after this directive has entered into force, such information as will allow the Commission to confirm that Article 1 of this Directive has been complied with.

## Article 4

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

## Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the Commission