

Communication from the Commission

Status of voice on the Internet under Community law, and in particular, under Directive 90/388/EEC

Supplement to the Communication by the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services

(2000/C 369/03)

On 10 January 1998 the Commission published a notice⁽¹⁾ on the status of voice communications on Internet under Community law and, in particular, pursuant to Directive 90/388/EEC. This notice (hereafter the "1998 notice") was a supplement to the Commission communication of 20 October 1995 to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services⁽²⁾. This communication identified and clarified central issues raised by the implementation of Directive 90/388/EEC⁽³⁾ (hereafter the "Services Directive").

The Services Directive defines the concept of voice telephony. Pursuant to Article 1(1), seventh indent, of the Services Directive, "voice telephony" is the "commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point".

In this regard, the 1998 notice concluded that at that time Internet voice services could in principle not be considered as voice telephony, because they failed to meet simultaneously each of the four elements of the definition of voice telephony pursuant to the Services Directive, namely:

- voice telephony is offered commercially as such,
- it is provided for the public,
- it is provided to and from public switched network termination points, and
- it involves direct speech transport and switching of speech in real time, in particular the same level of reliability and speech quality as produced by the public switched telecommunications networks (PSTNs).

The new directives which are currently being discussed in the wake of the 1999 review of the regulatory framework for telecommunication services will put an end to the distinction between voice telephony and other telecommunications services. All

electronic communications services, whatever their commercial features, will be submitted to the same legal regime.

Until these directives will be implemented, the definition of voice telephony enshrined in the Services Directives nevertheless remains important, as it is necessary to establish which undertakings should be subject to the regulatory regime applicable to voice telephony operators, including the requirement of a licence(4) and the possible provision or contribution to universal service(5).

The 1998 notice announced that its content should be reviewed before 2000 in the light of technological and market changes. To this end, the Commission held a public consultation during summer 2000(6).

Overall assessment

In the light of the public consultation, the Commission concludes that under the current legal framework provided by the Services Directive, no substantial changes are needed to the 1998 notice.

The Commission considers that Internet telephony in general continues to fall outside the definition of voice telephony, except where Internet telephony meets each of the conditions established in the Directive as set out in the 1998 notice.

This means, except in very specific cases where the aforementioned conditions are satisfied, that Member States should normally continue to allow Internet access/service providers to offer voice on Internet under data transmission general authorisations, and that no mandatory requirement for a individual licence is justified. Conversely, voice communication services fulfilling the four conditions enshrined in the Directive and therefore appearing as substitutes for voice telephony services provided by traditional means should be regarded as voice telephony and be submitted to the relevant regulatory regime, in consideration of the principle of technological neutrality.

Necessary clarifications

The public consultation highlighted the need for a number of clarifications of the 1998 notice against the background of the most recent technological changes.

Voice on Internet protocol and voice over the Internet

A distinction must be drawn between "voice over the Internet protocol" (VoIP) and "voice over the Internet". The former encompasses all kinds of conveyance of voice using the Internet protocol as a routing and transmission technology. The latter is a subset of the former and covers only such voice services that are provided over the public Internet, defined as a network of networks.

Telecommunications operators increasingly use the Internet protocol (IP) as a transmission technology for voice services in the core of PSTNs, as an alternative or a substitute to other transmission technologies such as asynchronous transfer mode (ATM) or synchronous digital hierarchy (SDH). In such cases, the use of the Internet protocol on a privately owned or dedicated network is not perceptible for the end-user. Moreover, the service is marketed as voice telephony, and is clearly the subject of a commercial offer as interpreted in the 1998 notice.

The 1998 notice does not mean that all IP-based voice services fall outside of the field of voice telephony. Rather, the use of or the migration to IP technology within the core of public switched telephone networks does not affect the regulatory position of the companies concerned, nor require any change in the licences or authorisations under which they operate.

Categories of Internet telephony

The 1998 notice provided a description of three distinct categories of voice communications making use of the Internet, namely:

- computer-to-computer voice services,
- computer-to-phone voice services, and
- phone-to-phone voice services.

These categories were not presented by the 1998 notice as entailing direct legal consequences, but used for descriptive purposes. The assessment of the regulatory status of Internet voice services does not hinge on these categories, but on whether the four conditions set out in Article 1(1), seventh indent of the Services Directives are met.

These categories remain broadly applicable but they are increasingly blurred by the technical convergence of terminal equipments, while the creativity demonstrated by suppliers undermines any attempt to further categorise services mixing speech and data. Classifying the services at stake between the various categories identified in the 1998 notice should not be considered as decisive for ascertaining the regulatory regime applicable.

Quality and reliability

The 1998 notice explained the condition of "direct transport and switching of speech in real time". It drew the conclusion that for voice over the Internet (here understood as the public Internet), due to congestion risks, it was "difficult or impossible to guarantee the same level of reliability and speech quality as produced by the PSTNs". The 1998 notice further stated that these services could not for the time being be considered as voice telephony in the sense of the Services Directive.

Average latencies have reduced dramatically since 1998, in particular owing to improvements in underlying technologies. However, the way the public Internet is managed still makes it difficult to rule out any congestion risk affecting the transmission of the voice signal. The conclusion of the 1998 notice thus remains valid as regards voice services over the public Internet.

The condition of "direct transport and switching of speech in real time" could however be considered as satisfied when a voice service is generally regarded and used by consumer as a substitute for voice services over a circuit-switched PSTN, by virtue of its characteristics, in particular its level of quality and reliability. This condition should also be considered as satisfied where the provider of the service guarantees its customers PSTN-like quality and reliability.

Integrated Internet services

The 1998 notice pointed out that "in most cases, the facility for voice communications is only one part of an integrated Internet service offered to the customer, where the voice service is ancillary to other elements of the Internet service". In those cases, the service would not be the "subject of a commercial offer" as required by the legal definition of voice telephony.

In its paragraph about the future situation regarding the regulatory consequences, the 1998 notice indicated that in some cases voice communications services could be "a decisive driver for Internet subscription". However, it is not easy to determine which element is determinative in the subscription decision. It may vary to a very large extent from one user to another. Therefore, when analysing whether a voice service bundled with other services is the subject of a separate commercial activity, more objective criteria should apply.

In this regard, when the voice element is marketed as voice telephony or billed separately, or when similar bundled services are marketed by the same company without this voice element, the commercial offering condition could be considered as satisfied.

However, such indicators may be of little help in reverse situations, where voice communication and other service elements are marketed as a package or billed together.

In such cases, the notion "integrated Internet service" mentioned in the 1998 notice should provide good guidance. It refers to situations where the voice element is not separable of other components, as is the case, for instance, with video telephony. In such cases, the provision of voice services cannot be considered as the subject of a commercial offer. Conversely, when operators market a combination of a voice service and a data service which, although distinct and clearly separable, are bundled within the same commercial package, the Commission would consider this package as comprising two commercial offers. A voice service could be considered as separable from a data service, even though they are usually offered together under commercial usage.

(1) OJ C 6, 10.1.1998, p. 4.

(2) OJ C 275, 20.10.1995, p. 2.

(3) OJ L 192, 24.7.1990, p. 10, as last amended by Directive 1999/64/EC (OJ L 175, 10.7.1999, p. 39).

(4) Under Directive 90/388/EEC and Directive 97/13/EC (Article 7.2).

(5) Under Directive 97/33/EC (Article 5.1).

(6) OJ C 177, 27.6.2000, p. 4.