

# Guide to the Case Law

of the Court of Justice  
of the European Union  
in the field of  
Telecommunications



... DG INFSO  
January 2010



European Commission  
Information Society and Media

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# **Guide to the Case Law** of the Court of Justice of the European Union in the field of Telecommunications

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**January 2010**



**European Commission**  
Information Society and Media



## **Preface**

*Following the entry into force of the Lisbon Treaty on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon.*

*The EU regulatory framework for electronic communications networks and services, in force since 2002 and recently revised, consists of five different directives: the Framework Directive, the Authorisation Directive, the Access and Interconnection Directive and the Universal Service Directive as well as the Directive on privacy and electronic communications. Together they aim at developing and reinforcing the single market, promoting competition, and safeguarding public and user interests in the sector.*

*The European Commission is a major driving force for the correct implementation of these rules. It is only their full and coherent application that can guarantee an efficient single digital market. The Commission, as guardian of EU legislation, plays a central role here. Its timely and constant monitoring of the market ensures that if a Member State fails to comply with the rules or to implement them consistently, infringement proceedings will be opened.*

*Experience to date has shown that there can only be an internal market for e-communications if there is overall cooperation – between the European Commission, the national regulatory authorities and ultimately the courts at both national and European levels. The national courts are crucial for enforcing the regulatory framework. They are the first port of call for companies or individuals seeking clarification of the regulatory rules. Their intervention has resulted in the referral of a number of important legal issues to the Court of Justice of the European Union, in the form of requests for preliminary rulings.*

*These have contributed and continue to contribute to improving legal certainty for stakeholders in the market. This is crucial for investment and economic development in such a dynamic sector. At the same time, national judges are acquiring an increasing knowledge of the legal and regulatory landscape in the e-communications sector. This cooperation can serve as a useful building-block, and can contribute to ensuring uniformity as far as the application of EU law is concerned.*

*To assist this process the present Guide to electronic communications case law lists 126 specific cases which are relevant for regulating this sector. This publication constitutes another step towards increased transparency by ensuring easier access to the case law for all interested parties. It thus aims at increasing legal certainty and a more uniform application of the EU rules as we move towards the implementation of the revised regulatory framework, adopted in November 2009 and to be applied by the Member States as from May 2011.*

*Brussels, February 2010*

*Bernd Langeheine  
Director for Electronic Communications Policy*



## INTRODUCTION

*Following liberalisation in 1998, competition in European telecommunications markets has driven growth and innovation and has led to the widespread availability of services to the public.*

*The European Parliament and Council adopted in March 2002 a new package of sector-specific regulation designed for more competitive markets and converging electronic communications technologies. The new framework linked the imposition of regulatory obligations to the absence of effective competition on a given market, and became applicable for the EU 15 from July/October 2003, for the EU 10 from May 2004 and for Bulgaria and Romania from 1 January 2007.*

*In November 2009, the European Parliament and Council adopted a substantial revision of the 2002 regulatory framework, which builds on its principles and further develops these in order to better achieve its objectives, i.e. a true single digital market for the benefit of European citizens. This will need to be implemented and applied by the Member States from 26 May 2011.*

*The European Commission and in particular the Directorate-General for Information Society and Media has continuously monitored and enforced the implementation of all rules for the electronic communications sector.*

*This guide to the case law of the Court of Justice of the European Union presents extracts of relevant cases, without seeking to interpret them. It is intended to facilitate understanding and analysis of issues concerning the existing regulatory package for electronic communications and related issues. It is structured so as to provide an overview of the basic concepts laid down in the Treaty provisions, including terminal equipment (part 1), the case law on the 1998 telecommunications regulatory package, which is essential for an understanding of the current regulatory framework (part 2), the case law on the 2002 regulatory package (part 3) and other related issues such as television broadcasting services, specific copyright issues and public procurement in the telecommunications sector (part 4). Where reference is made to previous Treaty provisions, a reference to the corresponding provisions following the entry into force of the Lisbon Treaty on 1 December 2009 has been added for information. A list of all cases referred to in the guide can be found at the end of the document, both in chronological and in order of case numbers. A list of cases pending at the end of 2009 and references to the relevant case law of the General Court have also been added.*

*The guide aims to present the case law of the Court of Justice of the European Union in the field of electronic communications in a practical way by gathering together the key passages of the cases, and thus making it possible to find all the relevant parts of the judgment without having to consult the complete text of the case. It should be noted, however, that whilst some passages of the judgments speak for themselves, in the majority of cases it will inevitably be necessary to read other parts of the*

*judgment, if not the whole, to understand the context in which it was given and to avoid any misinterpretation.*

*Reference may also be made to other relevant judgments not set out in this guide, including for example those on general principles of EU law or on competition law, which may be of importance in the legal assessment of issues arising in the electronic communications sector.*

*The guide has been produced by the European Commission, Information Society and Media Directorate-General (INFSG), Unit B3 (Implementation of the regulatory framework) in co-operation with the other services concerned. It is a further update of the first guide produced in 2001 and revised in 2003 and 2007, and reflects the situation as of end of 2009. The guide is made available in English, French and German. Unfortunately translations of some – even important – judgments are made officially available in French only by the Court; in such cases an unofficial translation into the other languages has been included in italics, and a reference can be found to the publication, in the Official Journal of the European Union, of at least the operative part in those languages. Further regular updating is envisaged.*

*The present document is intended purely for information purposes, and the presentations made therein cannot be construed as implying any authoritative legal interpretation. Although it is intended to be updated regularly, the European Commission will accept no liability for incompleteness or inaccuracies in its content. Readers of this guide are referred to the official collection of judgments as published by the Court of Justice of the European Union for complete official information (the judgments are also available electronically at <http://eur-lex.europa.eu/en/index.htm>).*

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## 1. BASIC CONCEPTS

### 1.1. Provision of services

In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60 [now Article 57 TFEU], only insofar as they are governed by such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.

On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods. [...]

**Case 155/73 *Sacchi* [1974] ECR 409, paras. 6 and 7**

By virtue of Article 59 of the Treaty [now Article 56 TFEU], restrictions on the freedom to provide services within the Community were to be withdrawn by the end of the transitional period as regards nationals of Member States established in a Community country other than that of the person for whom the services are intended. The requirements of that provision include, in particular, the elimination of any discrimination against the provider of a service established in a Member State other than that where the service is provided.

The Court has consistently held (see in particular the judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 13) that Article 59 [now Article 56 TFEU] imposes an obligation to achieve a precise result, the fulfilment of which had to be made easier by, but not dependent upon, the implementation of a programme of progressive measures. It follows that the provisions of Article 59 of the Treaty [now Article 56 TFEU] became unconditional on the expiry of the transitional period (judgment in Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 24).

**Joined cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v. Commission* [1992] ECR I-5833, paras. 19-20**

[...] on a proper construction, Article 59 of the EEC Treaty [now Article 56 TFEU] covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established.

[...] rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty [now Article 56 TFEU].

[...] Article 59 [now Article 56 TFEU] does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures.

**Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paras. 22, 39, 56**

The requirement imposed on an undertaking wishing to market apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite to register as an operator of conditional-access services and to state in that register the products which it proposes to market restricts the free movement of goods and the freedom to provide services guaranteed by Articles 30 and 59 of the Treaty [now Articles 34 and 56 TFEU] respectively (see, as regards crafts businesses, *Corsten* [C-58/98 [2000] ECR I-7919], paragraph 34).

Moreover, the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the above-mentioned requirements from being treated as selling arrangements within the meaning of paragraph 16 of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

Where a national measure restricts both the free movement of goods and the freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, in relation to lottery activities, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22).

In the field of telecommunications, however, it is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. As the case in the main proceedings shows, the two aspects are often intimately linked. The supply of telecommunication equipment is sometimes more important than the installation or other services connected therewith. In other circumstances, by contrast, it is the economic activities of providing know-how or other services of the operators concerned which are dominant, whilst delivery of the apparatus, equipment or conditional-access telecommunication systems which they supply or market is only accessory.

Accordingly, the question whether the restrictions referred to in paragraph 29 of this judgment are justified must be examined simultaneously in the light of both Article 30 and Article 59 of the Treaty [now Articles 34 and 56 TFEU], in order to determine whether the national measure at issue in the main proceedings pursues an objective of public interest and whether it complies with the principle of proportionality, that is to say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35; and *Corsten*, paragraph 39).

It is undisputed that informing and protecting consumers, as users of products or services, constitute legitimate grounds of public interest which are in principle capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty. However, in order to determine whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account considerations which include the following.

First, it is settled case-law that a system of prior administrative authorisation cannot legitimise discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, particularly those relating to the fundamental freedoms at issue in the main proceedings (Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 90). Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir*, paragraph 38).

Second, a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State.

First, it is well established in case-law that a product which is lawfully marketed in one Member State must in principle be able to be marketed in any other Member State without being subject to additional controls, save in the case of exceptions provided for or allowed by Community law (see, in particular, Case 120/78 *Rewe-Zentral* ('Cassis de Dijon') [1979] ECR 649, paragraph 14, and Case C-123/00 *Bellamy and English Shop Wholesale* [2001] ECR I-2795, paragraph 18).

Second, it is incompatible in principle with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; *Arblade*, paragraph 34).

Third, a prior authorisation procedure will be necessary only where a subsequent control is to be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.

In order to determine whether that is the case, it is necessary to consider, on the one hand, whether it is possible to discover defects in the products and services concerned at the time when the statements made by the operators of conditional-access services are checked, and, on the other hand, the risks and dangers that would result from not discovering those defects until after the products have been marketed or the services supplied to end-users.

Finally, it should be noted that, for as long as it lasts, a prior authorisation procedure completely prevents traders from marketing the products and services concerned. It follows that, in order to comply with the fundamental principles of the free movement of goods and the freedom to provide services, such a procedure must not, on account of its duration, the amount of costs to which it gives rise, or any ambiguity as to the conditions to be fulfilled, be such as to deter the operators concerned from pursuing their business plan.

In that regard, once examination of the conditions for obtaining registration has been carried out and it has been established that those conditions have been satisfied, the requirement to obtain certification for the apparatus, equipment or conditional-access telecommunication systems after that registration procedure must neither delay nor complicate exercise of the right of the undertaking concerned to market those products and related services. Moreover, the requirements of entry on a register and the obtaining of certification, assuming they are justified, must not give rise to disproportionate administrative expenses (*Corsten*, paragraphs 47 and 48).

**Case C-390/99 *Canal Satellite Digital* [2002] ECR I-607, paras. 29-42**

In the context of freedom to provide services the Court has also recognised that a national tax measure restricting that freedom may constitute a prohibited measure (see, in particular, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 9, and Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraphs 20 to 22).

Since the duty to abide by the rules relating to the freedom to provide services applies to the actions of public authorities (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17), it is, in that respect, irrelevant that the tax measure in question was adopted, as in the main proceedings, by a local authority and not by the State itself.

Furthermore, it is settled case-law that the transmission, and broadcasting, of television signals comes within the rules of the Treaty relating to the provision of services (see, in particular, Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 8; Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 20 to 25; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraph 38; Case C-211/91 *Commission v Belgium* [1992] ECR I-6757, paragraph 5, and Case C-23/93 *TV10* [1994] ECR I-4795, paragraphs 13 and 16).

It must also be noted that, according to the case-law of the Court, Article 59 of the Treaty [now Article 56 TFEU] requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14).

Furthermore, the Court has already held that Article 59 of the Treaty [now Article 56 TFEU] precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*Commission v France*, cited above, paragraph 17, and *Safir*, cited above, paragraph 23; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33; Case C-157/99 *Smits and Peerbooms*, [2001] ECR I-5473, paragraph 61).

In that regard it must be noted that the introduction of a tax on satellite dishes has the effect of a charge on the reception of television programmes transmitted by satellite which does not apply to the reception of programmes transmitted by cable, since the recipient does not have to pay a similar tax on that method of reception.

As stated in paragraph 7 of this judgment, the municipality of Watermael-Boitsfort nevertheless justifies the tax regulation by stating its concern to prevent the uncontrolled proliferation of satellite dishes in the municipality and thereby preserve the quality of the environment.

In that regard, it suffices to state that even if the need for protection relied on by the municipality of Watermael-Boitsfort is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.

As the Commission observed, there are methods other than the tax in question in the main proceedings, less restrictive of the freedom to provide services, which could achieve an objective such as the protection of the urban environment, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerials adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (*Moniteur belge* of 31 May 1997, p. 14520).

**Case C-17/00 *De Coster* [2001] ECR I-9445, paras. 26-31 and 36-38**

By its first question the referring court is seeking to ascertain whether Article 59 of the Treaty [now Article 56 TFEU] must be interpreted as precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations.

Although, as Community law stands at present, direct taxation does not as such fall within the scope of the Community's competence, Member States must nevertheless exercise their retained powers consistently with Community law (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-436/00 *X and Y* [2002] ECR I-

10829, paragraph 32, and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 44).

In the field of freedom to provide services the Court has already recognised that a national tax measure restricting that freedom may constitute a prohibited measure, whether it was adopted by the State itself or by a local authority (see, to that effect, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 26 and 27).

According to the Court's case-law, Article 59 of the Treaty [now Article 56 TFEU] requires not only the elimination of all discrimination on grounds of nationality, against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14, and *De Coster*, cited above, paragraph 29).

Furthermore, the Court has already held that Article 59 [now Article 56 TFEU] precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*De Coster*, cited above, paragraph 30 and the case-law cited, and paragraph 39).

By contrast, measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 59 of the Treaty [now Article 56 TFEU].

As regards the question whether the levy by municipal authorities of taxes such as those in question in the main proceedings amounts to a restriction incompatible with Article 59 [now Article 56 TFEU], it is necessary to point out that such taxes apply without distinction to all owners of mobile telephone installations within the commune in question, and that foreign operators are not, either in fact or in law, more adversely affected by those measures than national operators.

Nor do the tax measures in question make cross-border service provision more difficult than national service provision. Admittedly, introducing a tax on pylons, masts and antennae can make tariffs for mobile telephone communications to Belgium from abroad and vice versa more expensive. However, national telephone service provision is, to the same extent, subject to the risk that the tax will have an impact on tariffs.

It is appropriate to add that there is nothing in the file to suggest that the cumulative effect of the local taxes compromises freedom to provide mobile telephony services between other Member States and the Kingdom of Belgium.

The answer to the first question must therefore be that Article 59 of the Treaty [now Article 56 TFEU] must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and

authorisations, which applies without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.

**Joined cases C-544/03 *Mobistar* and C-545/03 *Belgacom* [2005] ECR I-7723, paras. 26-35**

The national court has doubts as to the compatibility of Law No 249/1997 [Law No 249 of 31 July 1997 (Ordinary Supplement to GURI No 177 of 31 July 1997) ('Law No 249/1997')] with Community law only in so far as Article 3(7) of that Law set up transitional arrangements in favour of the incumbent networks, which had the effect of preventing operators without radio frequencies, such as Centro Europa 7, from accessing the market in question.

The national court is also questioning the Court on the criteria applied, pursuant to Law No 112/2004 [Law No 112 of 3 May 2004 (Ordinary Supplement to GURI No 82 of 5 May 2004) ('Law No 112/2004')], for granting rights to operate on the digital and analogue television broadcasting market, only in so far as those criteria consolidated the transitional arrangements structured in favour of the existing networks in Article 1 of Decree-Law No 352/2003 [Decree-Law No 352 of 24 December 2003 (GURI No 300 of 29 December 2003, p. 4; 'Decree-Law No 352/2003')], which had the effect of precluding the grant to operators of radio frequencies for the purpose of operating on the analogue television broadcasting market, even though they had been granted rights under Law No 249/1997.

In that regard, the successive application of the transitional arrangements structured in favour of the incumbent networks in Article 3(7) of Law No 249/1997 and Article 1 of Decree-Law No 352/2003 had the effect of preventing operators without broadcasting radio frequencies from accessing the market in question.

The view must also be taken that, by issuing a general authorisation to operate on the broadcasting services market only to the incumbent networks, Article 23(5) of Law No 112/2004 consolidated the restrictive effect confirmed in the preceding paragraph.

First, by limiting *de facto* the number of operators able to broadcast on the market in question, those measures are and/or were likely to hinder the provision of services in the area of television broadcasting.

Secondly, those measures have and/or have had the effect of freezing the structures on the national market and protecting the position of the operators already active on that market.

Consequently, Article 49 EC [now Article 56 TFEU] and, from the date on which they became applicable, Article 9(1) of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; "the Framework Directive")], Article 5(1) of the Authorisation Directive [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('Authorisation Directive') (OJ 2002 L 108,

p. 21)] and point 1 of Article 4 of the Competition Directive [Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) ('the Competition Directive')] preclude such measures unless they are justified.

In that respect, it is clear from the case-law of the Court that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives (see, to that effect, *Placanica and Others*, paragraph 53), on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.

However, as the Advocate General stated in points 34 and 37 of his Opinion, in order for such arrangements, which generally adversely affect Article 49 EC [now Article 56 TFEU] and the NCRF [The new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services], to be justified they must not only comply with general-interest objectives but also be structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (see, to that effect, *Placanica and Others*, paragraph 49 and the case-law cited).

In the main proceedings, according to the information supplied by the national court, under Law No 249/1997 the allocation of radio frequencies to a limited number of operators was not carried out in accordance with such criteria.

First, those radio frequencies were allocated de facto to the incumbent networks under the transitional arrangements adjusted in Article 3(7) of Law No 249/1997, even though some of those networks had not been granted rights under that Law.

Secondly, operators such as *Centro Europa 7* were not allocated radio frequencies even though they had been granted rights under that Law.

Consequently, irrespective of the objectives pursued by Law No 249/1997 with regard to the system for the grant of radio frequencies to a limited number of operators, the view must be taken that Article 49 EC [now Article 56 TFEU] precluded such a system.

**Case C-380/05 *Centro Europa 7 Srl*, [2008] ECR I-349, paras. 93-100, 103, 108-111**

By these questions, which should be considered together, the national court asks, in essence, whether Article 49 EC [now Article 56 TFEU] is to be interpreted as precluding national legislation of a Member State, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by the private broadcasters falling under the public powers of that State and designated by them.

The national legislation at issue in the main proceedings thus directly determines the conditions for access to the market for services in the bilingual region of Brussels-Capital, by imposing on the providers of services established in Member States other

than the Kingdom of Belgium which are not designated under that legislation a burden which is not imposed on the providers of services designated by it. Such legislation is accordingly liable to hinder the provision of services between Member States (see, to that effect, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 38, and *De Coster*, paragraph 33).

It follows that the national legislation at issue in the main proceedings therefore has the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

In those circumstances, it must be held that the national legislation at issue in the main proceedings constitutes a restriction on freedom to provide services within the meaning of Article 49 EC [now Article 56 TFEU].

The Court has consistently held that such a restriction on a fundamental freedom guaranteed by the Treaty may be justified only where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-6/98 *ARD* [1999] ECR I-7599, paragraphs 50 and 51; and *Cipolla and Others*, paragraph 61).

As regards, first, the objective pursued by the national legislation at issue in the main proceedings, the Belgian Government submits that its aim is to preserve the pluralist and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to pluralism and to a wide range of programmes, particularly by guaranteeing to Belgian citizens of the bilingual region of Brussels-Capital that they will not be deprived of access to local and national news and to their culture. That legislation thus seeks to harmonise the audiovisual landscape in Belgium.

In that regard, it should be noted that according to the well-established case-law of the Court, a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which freedom is one of the fundamental rights guaranteed by the Community legal order (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23; *Commission v Netherlands*, paragraph 30; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 10; and *TV10*, paragraph 19).

Consequently, it must be accepted that the national legislation at issue in the main proceedings pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region.

As regards, secondly, the question whether that legislation is suitable for securing the attainment of the aim pursued, it must be acknowledged, as the Advocate General rightly observed at point 13 of his Opinion, that having regard to the bilingual nature of the Brussels-Capital region national legislation, such as that at issue in the main proceedings constitutes an appropriate means of achieving the cultural objective pursued, since it is capable of permitting, in that region, Dutch-speaking television viewers to have access, via the network of cable operators broadcasting in that area, to television programmes having a cultural and linguistic connection with the Flemish Community and French-speaking television viewers to have similar access to television programmes having a cultural and linguistic connection with the French Community. Such legislation thus guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture.

As regards, thirdly, the question whether the legislation at issue in the main proceedings is necessary in order to attain the aim pursued, it must be noted that, while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, that the national authorities have a wide margin of discretion in that regard, the requirements imposed under measures designed to implement such a policy must in no case be disproportionate in relation to that aim and the manner in which they are applied must not bring about discrimination against nationals of other Member States (see, to that effect, Case C-379/87 *Groener* [1989] ECR 3967, paragraph 19, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 82).

In particular, such legislation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law relating to a fundamental freedom (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 35).

Therefore, as the Commission points out, the award of must-carry status must first of all be subject to a transparent procedure based on criteria known by broadcasters in advance, so as to ensure that the discretion vested in the Member States is not exercised arbitrarily. In particular, each broadcaster must be able to determine in advance the nature and scope of the precise conditions to be satisfied and, where relevant, the public service obligations it is required to observe if it is to apply for that status. In that regard, the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient.

Next, the award of must-carry status must be based on objective criteria which are suitable for securing pluralism by allowing, where appropriate, by way of public service obligations, access inter alia to national and local news on the territory in question. Thus, such status should not automatically be awarded to all television channels transmitted by a private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective.

Lastly, the criteria on the basis of which must-carry status is awarded must be non-discriminatory. In particular, the award of that status must not, either in law or in fact, be subject to a requirement of establishment on the national territory (see, to that effect, Case C-211/91 *Commission v Belgium* [1992] ECR I-6757, paragraph 12).

Furthermore, even where the requirements laid down for the award of must-carry status apply without discrimination, in so far as those requirements are capable of being more easily satisfied by broadcasters established on the national territory by reason, in particular, of the content of the programmes to be transmitted, they must be essential for the attainment of the legitimate objective in the general interest which is being pursued.

It is for the national court, in the light of the information before it, to examine whether the national legislation at issue in the main proceedings satisfies those conditions.

**Case C-250/06 *United Pan-Europe Communications Belgium SA*, [2007]  
ECR I-11135, paras. 24, 33, 36, 38-50**

The question referred by the national court must therefore be construed as asking in essence whether Article 49 EC [now Article 56 TFEU] precludes legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators, such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that first Member State.

It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC [now Article 56 TFEU] (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 54).

Such legislation also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.

It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC [now Articles 51 and 52 TFEU], applicable in this area by virtue of Article 55 EC [now Article 62 TFEU], or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

Article 46(1) EC [now Article 52(1) TFEU] allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited).

The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).

In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, *Placanica and Others*, paragraph 49).

In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.

It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.

**Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd*,  
8 September 2009, paras. 50, 52, 53, 55, 56, 59, 60, 67, 69-72 (not yet reported)**

## 1.2. Terminal equipment

### 1.2.1. Free movement of goods

Article 28 EC [now Article 34 TFEU] precludes legislation and national administrative practice which - in the context of a system where matters concerning conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided at their discretion - prevents economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorised under national law.

**Joined cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, para. 47**

With regard to the fourth paragraph of the question referred, the national court has held that the apparatus in question was seized solely because it did not bear the national type-approval mark provided for by the Italian legislation.

The judgment in *Radiosistemi*, cited above (particularly paragraphs 47 and 66), states that such a requirement of national law is incompatible with Community law which has direct effect, whether it be Article 28 EC [now Article 34 TFEU] or the provisions of the Directive which acquire direct effect after the expiry of the time-limit for its implementation.

Furthermore, it follows from the judgment in *Radiosistemi* (particularly paragraphs 79 and 80), that a system of penalties which provides for fines or other coercive measures to ensure compliance with national rules that are recognised as being contrary to Community law must be held, from that fact alone, to be contrary to Community law, without there being any need to examine whether it meets the tests of non-discrimination or proportionality.

It follows therefrom that a seizure of goods such as that in issue in the main proceedings is contrary to Community law. [...]

**Case C-13/01 *Safalero Srl* [2003] ECR I-8679, paras. 43-46**

Questions 6 to 9, which it is appropriate to deal with together, concern possible justifications which may be relied on by a Member State in support of obstacles to the free movement of radio equipment bearing the 'CE' conformity marking, and the interpretation of Article 30 EC [now Article 36 TFEU].

In that regard, it should be borne in mind, as the Commission in particular submits, that, where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that

harmonising measure and not of Articles 28 EC and 30 EC [now Articles 34 and 36 TFEU] (see Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32 and the case-law cited).

Furthermore, as the Commission observes, where, in support of a restriction, a Member State invokes grounds external to the field harmonised by Directive 1999/5 [Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ 1999 L 91, p. 10)], it may refer to Article 30 EC [now Article 36 TFEU]. In such a case, the Member State may invoke only one of the public-interest reasons laid down in Article 30 EC [now Article 36 TFEU] or one of the overriding requirements referred to in the judgments of the Court (see, in particular, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8). In either case, the national provision must be appropriate for securing the attainment of that objective and must not go beyond what is necessary in order to attain it (see *Radiosistemi*, paragraph 42, and *ATRAL*, paragraph 64).

**Case C-132/08 *Lidl Magyarország Kereskedelmi bt*, 30 April 2009, paras. 41, 42, 45 (not yet reported)**

#### 1.2.2. Import from third countries

The national court is in essence asking whether Regulations Nos 519/94 [Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83 (OJ 1994 L 67, p. 89)] and 3285/94 [Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94 (OJ 1994 L 349, p. 53)] affect a Member State's rules as regards the placing on the market of products imported from third countries [here: cordless telephones].

Those regulations were adopted in the context of the common commercial policy, as is apparent from their legal basis, that is Article 113 of the EC Treaty (now, after amendment, Article 133 EC) [now Article 207 TFEU]. Whereas Regulation No 519/94 covers imports from State-trading countries, Regulation No 3285/94 concerns imports from countries which are members of the WTO.

Regulations Nos 519/94 and 3285/94 contain no provisions relating to the placing on the market of the products to which they refer. In contrast to Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ 1999 L 91, p. 10), which was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC) [now Article 114 TFEU] after the date material to the facts in the main proceedings, they do not provide for any harmonisation of the applicable national provisions on the matter.

In view of all the preceding considerations, the reply to the national court must be that Regulations Nos 519/94 and 3285/94 do not affect a Member State's rules as regards the placing on the market of products imported from third countries.

**Case C-296/00 *Carbone* [2002] ECR I-04657, paras. 28, 29, 33 and 35**

### 1.2.3. Scope of secondary legislation

The first sentence of Article 3 of Directive 88/301 [Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73)] confers on traders the right to import and market terminal equipment. In accordance with the second sentence of that provision, however, Member States may check terminal equipment in order to establish whether it satisfies certain essential requirements such as those listed in Article 2(17) of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ 1986 L 217, p. 21), that is to say in particular user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and inter-working of terminal equipment in justified cases.

It should be borne in mind that Directive 88/301 was adopted by the Commission in the exercise of the legislative power conferred on it by Article 90(3) of the Treaty [now Article 106(3) TFEU] to lay down general rules specifying the obligations arising from the Treaty, which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2) [now Article 106(1) and (2) TFEU] (judgment in Case C-202/88 *France v Commission* ('Terminals') [1991] ECR I-1223, paragraph 14). Article 3 of the directive forms part of the provisions implementing Article 30 of the Treaty [now Article 34 TFEU] (see to that effect the same judgment, paragraphs 37 to 39).

The power so conferred on the Member States would be rendered ineffective if it were possible to import equipment which has not been approved for release for consumption, to possess it with a view to sale, to sell or distribute it or to advertise it without any guarantee that it will actually be re-exported.

In those circumstances, the answer to the question from the national court must be that neither Article 30 of the Treaty [now Article 34 TFEU] nor Directive 88/301 precludes national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported and is therefore not suitable for connection to the public network.

#### **Case C-314/93 *Rouffeteau* [1994] ECR I-3274, paras. 6-8 and 11**

It follows that, for equipment covered by Directive 88/301 [Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73)], and for the period after 1 July 1989, Article 6 of that directive precludes national rules which prohibit and lay down penalties for the offering for sale or hire of equipment without a model having been granted type-approval by a public undertaking offering goods and/or services in the telecommunications sector. It is for the national court to draw the conclusions from that finding.

As regards the period prior to 1 July 1989 and equipment not covered by the directive either prior to or subsequent to that date, the problem must be considered in the light of Article 90(1) [now Article 106(1) TFEU], read in conjunction with Article 86 [now Article 102 TFEU], of the Treaty.

**Joined cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267, paras. 40-41**

The provisions of the second sentence of Article 6(1), Article 7(1) and Article 8(1) of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity [OJ 1999 L 91, p. 10] confer on individuals rights which may be relied upon before national courts even though the Directive itself has not been formally implemented in national law within the period prescribed. Article 7(2) of the Directive does not allow for the maintenance in force of legislation or administrative practice which, after 8 April 2000, prohibits the marketing or the putting into service of radio equipment which does not bear the national type-approval stamp, where it has been confirmed that such equipment makes efficient and proper use of the radio frequencies authorised under national law, or where it is easy to verify that this is the case.

The term 'measure' within the meaning of Article 1 of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community [OJ 1995 L 321, p. 1] includes any measures, other than judicial decisions, taken by a Member State having the effect of restricting the free movement of goods lawfully produced or marketed in another Member State. Where the administrative authorities, having seized a particular model or a particular type of product which is lawfully marketed in another Member State, continue to withhold that model or product after a check has been carried out by the public authorities responsible for technical checks to ascertain that the product in question is in conformity with both national and Community legislation, that is a 'measure' which must be notified to the Commission within the meaning of that provision.

Where national provisions have been recognised as being contrary to Community law, the imposition of fines or other coercive measures for infringements of those provisions is also incompatible with Community law.

**Joined cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paras. 66, 73, 80**

By its first question, the referring court seeks, essentially, to ascertain whether a Member State may, pursuant to Directive 1999/5 [Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ 1999 L 91, p. 10)], require an operator placing radio equipment on the national market to provide a declaration of conformity even though the manufacturer of that equipment, whose head office is situated in another Member State, has affixed the 'CE' marking on it and has issued a declaration of conformity for that product.

The Member States are therefore obliged, without prejudice to the provisions of Articles 6(4), 7(2) and 9(5) of Directive 1999/5, to recognise the ‘CE’ marking affixed by one of the persons listed in Article 12(1) of that directive. To require one of those persons to provide a declaration of conformity for radio equipment on which the ‘CE’ marking has already been affixed by one of the other persons identified in Article 12(1) of Directive 1999/5 would be tantamount to impeding the placing of that product on the market by making it subject to requirements other than those laid down by Directive 1999/5.

It follows that Directive 1999/5 precludes national rules which, in the field harmonised by that directive, require the persons responsible for the placing on the market of a product bearing the ‘CE’ marking and accompanied by a declaration of conformity issued by the producer also to provide a declaration of conformity.

The fact that the producer who affixed the ‘CE’ marking is based in a Member State other than that in which the product is placed on the market has no bearing on that assessment. Indeed, the contrary is the case: since it concerns the free movement of radio equipment and the mutual recognition of the conformity of such equipment, Directive 1999/5 precisely covers that situation.

Furthermore, the fact that the apparatus concerned in the main proceedings uses a frequency which has not been harmonised also cannot, in the light of Article 6(4) of Directive 1999/5, alter that assessment. The procedural rule laid down in that provision merely imposes on the manufacturer, his authorised representative within the Community or the person responsible for placing the apparatus on the market the obligation to notify the national authority responsible for spectrum management of the intention to place such equipment on its national market. Although it is intended to complement the implementation of the mechanisms of Directive 1999/5 in national law, that procedural rule does not in any way confer on the Member States the power to impose additional conditions or limit the scope of the prohibition contained in the second sentence of Article 6(1) of Directive 1999/5 (see Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 53).

As regards the obligation to provide a declaration of conformity for radio equipment, Directive 1999/5 contains specific rules. It is clear from the wording and the objective of that directive that it pursues complete harmonisation in its field of application. It follows that, in the fields covered by that directive, the Member States must conform to them in their entirety and cannot maintain national provisions to the contrary (see *ATRAL*, paragraph 44).

The free movement of the apparatus covered by the scope of Directive 1999/5, which is presumed to conform to the essential requirements and therefore with the safety standards to which it refers, may be impeded only under the conditions laid down by that directive itself. Where a Member State takes the view that the conformity with a harmonised standard does not guarantee compliance with the essential requirements laid down by that directive which that standard is supposed to cover, that Member State may, pursuant to Article 5 thereof, refer the matter to the committee. In the case of shortcomings of harmonised standards with respect to the essential requirements, those standards may be withdrawn only in accordance with the procedure set out in Article 5 of Directive 1999/5. In those circumstances, it must be held that the scheme

put in place by Directive 1999/5 ensures compliance with the essential requirements laid down by that directive.

**Case C-132/08 *Lidl Magyarország Kereskedelmi bt*, 30 April 2009, paras. 22, 29-32, 43, 44 (not yet reported)**

#### 1.2.4. Independence of bodies responsible for drawing up technical specifications

It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

Consequently, the Commission was justified in seeking to entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

**Case C-202/88 *France v. Commission* [1991] ECR I-1223, paras. 51-52**

[...] To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors (judgment in Case C-202/88 [*France v Commission "Telecommunications terminals"*], [1991] ECR I-1223], paragraph 51).

In those circumstances, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector (judgment in Case C-202/88, paragraph 52).

**Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paras. 25-26**

In Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941, the Court ruled that Article 30 of the Treaty [now Article 34 TFEU] precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

That interpretation must be extended to situations where a public undertaking approves radio transmitters or receivers, whether or not they are intended to operate over the public network.

Article 6 of the directive [Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73)] draws a distinction between activities or functions connected with drawing up the specifications of terminal equipment, monitoring their application and granting type-approval of such equipment, and those connected with the offering of goods and/or services in the telecommunications sector by public or private undertakings.

Article 6 requires the Member States to ensure that, from 1 July 1989, activities in the first category are entrusted to a body independent of undertakings engaging in activities in the second category.

**Joined cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267, paras. 25-26 and 37-38**

So far as concerns the requirement that the body responsible for drawing up the specifications, monitoring their application and granting type-approval must be independent, suffice it to note that the different directorates of a single authority cannot be regarded as independent of each other for the purposes of Article 6 of the directive [Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73)].

**Case C-92/91 *Criminal Proceedings against Neny* [1993] ECR I-5383, para. 15**  
**Case C-69/91 *Criminal Proceedings against Gillon* [1993] ECR I-5335, para. 16**

#### 1.2.5. Effective judicial review

It is apparent from the judgment in Case 178/84 *Commission v Germany* [1987] ECR 1227, paragraph 46, that it must be open to traders to challenge before the courts an unjustified failure to grant authorization for imports. The same possibility must exist with regard to decisions refusing to grant type-approval since they can lead in practice to denial of access to the market of a Member State to telephone equipment imported from another Member State and hence to a barrier to the free movement of goods.

If there were no possibility of any challenge before the courts, the authority granting type-approval could adopt an attitude which was arbitrary or systematically unfavourable to imported equipment. Moreover, the likelihood of the authority granting type-approval adopting such an attitude is increased by the fact that the procedures for obtaining type-approval and for laying down the technical specifications do not involve the hearing of any interested parties.

The second answer to be given to the national court is, therefore, that Article 30 of the Treaty [now Article 34 TFEU] precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

**Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paras. 34-36**

It follows that Article 30 of the Treaty [now Article 34 TFEU] does not preclude a public undertaking from being given the power to grant type-approval for radio transmitters or receivers which it has not supplied, provided that the decisions of that undertaking can be challenged before the courts.

**Joined cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267, para. 29**

As a preliminary point, it should be recalled that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, among others, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29).

Moreover, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24).

Since, in a situation such as that in the main proceedings, an importer such as *Safalero* can claim in court proceedings against the public authorities that the fine imposed on it because the apparatus sold did not bear the type-approval stamp required by Article 398 of the Postal Regulations is illegal under Community law, it is necessary to consider whether there is available to it a legal remedy which ensures effective judicial protection of the rights which it derives from Community law.

In the present case it is clear that such an importer's interest in not having his trade impeded because of a national provision which is contrary to Community law is sufficiently protected where he can obtain a court decision establishing the incompatibility of that provision with Community law.

In the light of all the foregoing, the answer to the question referred is that the principle of effective judicial protection of the rights which the Community legal order confers on individuals is to be construed, in circumstances such as those in the main proceedings, as not precluding national legislation under which an importer cannot bring court proceedings to challenge a measure adopted by the public authorities under which goods sold to a retailer are seized, where there is available to that importer a legal remedy which ensures respect for the rights conferred on him by Community law.

**Case C-13/01 *Safalero Srl* [2003] ECR I-8679, paras. 49-50 and 54-56**

### 1.3. Competition law concepts

#### 1.3.1. Abuse of dominant position

The answer to the question submitted by the national court must therefore be that contractual practices, even if abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in Article 86 of the EEC Treaty [now Article 102 TFEU] where that undertaking does not occupy a dominant position on the relevant market, in this case the domestic market in telephone installations.

**Case 247/86 *Alsatel v. Novasam* [1988] ECR 5987, para. 23**

[...] Article 86 of the EEC Treaty [now Article 102 TFEU] must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

[...] An abuse within the meaning of Article 86 [now Article 102 TFEU] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

**Case 311/84 *CBEM v. Compagnie luxembourgeoise de télédiffusion SA et al.* [1985] ECR 3261, paras. 18 and 27**

It should be noted in the first place that the applicant does not dispute that, despite BT's status as a nationalized industry, its management of public telecommunications equipment and its placing of such equipment at the disposal of users on payment of a fee do indeed amount to a business activity which as such is subject to the obligations imposed by Article 86 of the Treaty [now Article 102 TFEU].

The applicant argues that, by virtue of Article 222 of the Treaty [now Article 345 TFEU], which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership', Member States are free to determine, in their internal systems, the activities which are reserved to the public sector and to create national monopolies. Thus BT is entitled to preserve its monopoly by preventing the operation of private agencies wishing to provide services covered by that monopoly. By condemning the schemes adopted by BT in that regard as being incompatible with Article 86 [now Article 102 TFEU], the Commission therefore infringed Article 222 of the Treaty [now Article 345 TFEU].

It is apparent from the documents before the Court that, whilst BT has a statutory monopoly, subject to certain exceptions with regard to the management of

telecommunication networks and to making them available to users, it holds no monopoly over the provision of ancillary services such as the retransmission of messages on behalf of third parties. At all events, it must be observed that the schemes adopted by BT are not designed to suppress any private agencies which may be created in contravention of its monopoly but seek solely to alter the conditions in which such agencies operate. Accordingly, Article 222 of the Treaty [now Article 345 TFEU] did not prevent the Commission from appraising the schemes in question for their compatibility with Articles 86 [now Article 102 TFEU] thereof.

**Case 41/83 *Italy v. Commission* [1985] ECR 873, paras. 18, 21 and 22**

It is appropriate to recall that, under Article 86(1) EC [now Article 106(1) TFEU], in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary to the rules contained in the EC Treaty, including those provided for in Article 82 EC [now Article 102 TFEU].

Article 82 EC [now Article 102 TFEU] prohibits, in so far as it may affect trade between Member States, any abuse of a dominant position within the common market or in a substantial part thereof.

In that regard, it should first be observed that the order for reference makes clear that Mobilkom is a public undertaking which has a dominant position on the digital mobile telecommunications services market according to the GSM 900 standard.

In that context, although it is for the national court to define the market for the services at issue, it should nevertheless be recalled that, according to the Court's case-law, in order for a market to be held to be sufficiently homogeneous and distinct from others, the service must be able to be distinguished from other services by virtue of specific characteristics as a result of which it is scarcely interchangeable with those alternatives as far as the consumer is concerned and is affected only to an insignificant degree by competition from them (see, to that effect, Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraphs 11 and 12, and Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 40). In that regard, the examination cannot be limited to the objective characteristics of the relevant services but must include the competitive conditions and the structure of supply and demand on the market (Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37).

Therefore, it falls to the national court to determine, in the present case:

- whether there are three distinct markets, one for analogue mobile telecommunications services, one for digital mobile telecommunications services according to the GSM 900 standard and one for digital mobile telecommunications services according to the DCS 1800 standard, or
- whether there are two distinct markets, one for analogue mobile telecommunications services and one for digital mobile telecommunications services according to the GSM 900 and DCS 1800 standards, or

- whether there is only one market, that for mobile telecommunications services including both analogue mobile telecommunications services and digital mobile telecommunications services according to the GSM 900 and DCS 1800 standards.

To that end, the national court must consider inter alia whether digital mobile telecommunications services according to the GSM 900 standard and digital mobile telecommunications services according to the DCS 1800 standard are regarded by consumers as interchangeable and, in the context of that examination, determine the availability of dual-band mobile telephones able to function on both frequency bands. It must also consider the size of the analogue mobile telecommunications services market and whether there is competition among the three systems, in particular at the local level in large cities.

If the national court holds that the services market at issue is that for mobile telecommunications services as a whole, it is clear from the file that Mobilkom holds a dominant position on that market as well.

Since Mobilkom's dominant position extends over the territory of a Member State, it is capable of constituting a dominant position in a substantial part of the common market, in breach of Article 82 EC [now Article 102 TFEU] (see, to that effect, Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 43).

Secondly, it must be observed that the Court has consistently held that a Member State breaches the prohibitions laid down by Article 86(1) EC [now Article 106(1) TFEU] in conjunction with Article 82 EC [now Article 102 TFEU] if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights cannot avoid abusing its dominant position (see to that effect, in particular, Case C-18/88 *GB-Inmo-BM* [1991] ECR I-5941, paragraph 20; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraphs 33 and 34; and Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 61).

Practices by an undertaking in a dominant position which tend to strengthen that position by distorting competition amount to abuse of a dominant position within the meaning of Article 82 EC [now Article 102 TFEU] (see to that effect *Hoffmann-La Roche v Commission* [Case 85/76 [1979] ECR 461], paragraph 90, and *Michelin v Commission*, paragraph 73).

The same is true when the conduct of an undertaking with a dominant position in a given market tends to extend that position to a neighbouring but separate market by distorting competition.

The Court has consistently ruled that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 51, and *GB-Inmo-BM*, cited above, paragraph 25).

If inequality of opportunity between economic operators, and therefore distorted competition, results from a State measure, such a measure constitutes an infringement

of Article 86(1) EC [now Article 106(1) TFEU] in conjunction with Article 82 EC [now Article 102 TFEU].

In that regard, the fact that, in the main case, a new entrant on the market at issue, namely the third national operator in the mobile telecommunications services sector, must pay a fee for its DCS 1800 licence whereas the first national operator, a public undertaking which has a dominant position, is allocated additional frequencies in the DCS 1800 band without having to pay a separate fee is liable to amount to a competitive advantage, allowing the latter either to extend its dominant position in the digital mobile telecommunications services market according to the DCS 1800 standard or to reinforce its dominant position in the digital mobile telecommunications services market or in the mobile telecommunications services market, depending on how the market at issue is defined, by distorting competition, and therefore to infringe Article 82 EC [now Article 102 TFEU].

As a result of the financial charge imposed on its competitor which obtained a DCS 1800 licence (Connect Austria), Mobilkom, a public undertaking in a dominant position and, as Connect Austria rightly points out, a former monopoly which already enjoys a number of advantages such as a presence on the markets for analogue mobile telecommunications services and digital mobile telecommunications services according to the GSM 900 standard and a sizeable number of existing clients, could find itself in a situation which would lead it, inter alia, to offer reduced rates, in particular to potential subscribers to the DCS 1800 system, and to carry out intensive publicity campaigns in conditions with which Connect Austria would find it difficult to compete.

Therefore, national legislation such as that at issue in the main proceedings, under which additional frequencies in the DCS 1800 band may be allocated to a public undertaking in a dominant position without the imposition of a separate fee whereas the new entrant to the market at issue has had to pay a fee for its DCS 1800 licence, is likely to lead the public undertaking in a dominant position to breach Article 82 EC [now Article 102 TFEU] by extending or strengthening its dominant position, depending on how the market at issue is defined, by distorting competition. Given that the distorted competition would therefore result from a State measure which creates a situation where equality of opportunity for the various economic operators concerned cannot be ensured, it may amount to a breach of Article 86(1) EC [now Article 106(1) TFEU] in conjunction with Article 82 EC [now Article 102 TFEU].

Nevertheless, the order of reference makes clear that in the main case Mobilkom and max.mobil each paid ATS 4 billion for licences allocating each of them a frequency cluster of 2 x 8 MHz in the band reserved for GSM 900, while Connect Austria paid a fee of ATS 2.3 billion for a licence allocating it a frequency cluster of 2 x 16.8 MHz, which could be increased to 2 x 22.5 MHz if it reached a user volume of 300 000, in the band reserved for DCS 1800.

In that regard, it is important to recall that national legislation such as that at issue in the main proceedings is not contrary to Articles 82 EC and 86(1) EC [now Articles 102 and 106(1) TFEU] if, taking into account the fees imposed on the different operators involved for their respective licences, the allocation of additional frequencies in the DCS 1800 band, without the imposition of a separate fee, to a

public undertaking in a dominant position must be considered to comply with the requirement to ensure equality of opportunity for different economic operators and therefore to guarantee undistorted competition.

If the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including subsequent allocation of additional frequencies in the DCS 1800 band without additional payment, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence, national legislation such as that at issue in the main proceedings must be deemed to ensure equality of opportunity for different economic operators and therefore guarantee undistorted competition.

It falls to the national court to determine if that is the situation in the case in the main proceedings.

In that regard, it should be pointed out that, since the setting of fee amounts involves complex economic assessments, the national authorities cannot be required to comply with rigid criteria in that regard, provided that they remain within the limits resulting from Community law.

In the course of its examination, the national court must also determine the economic value of the licences concerned, taking account inter alia of the size of the different frequency clusters allocated, the time when each of the operators concerned entered the market and the importance of being able to present a full range of mobile telecommunications systems.

As regards the argument put forward by Connect Austria that Mobilkom did not pay a fee for its licence to provide analogue mobile telecommunications services, it is for the national court to determine whether that licence must be taken into account when it considers whether the Austrian authorities complied with the obligation to ensure equality of opportunity between different economic operators, particularly in the light of the date when that licence was granted, the law in force at the time, a possible operating requirement and, where relevant, the economic value of that licence, in particular as from the opening of the mobile telecommunications sector to competition.

It follows that Articles 82 EC and 86(1) EC [now Articles 102 and 106(1) TFEU] in principle preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a GSM 900 licence without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee for its DCS 1800 licence. However, those provisions do not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

**Case C-462/99 *Connect Austria* [2003] ECR I-5197, paras. 72-95**

[...] Article 82 EC [now Article 102 TFEU] is to be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.

[...] Article 82 EC [now Article 102 TFEU] is to be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

**Case C-52/07 *Kanal 5 Ltd and TV 4 AB*, 11 December 2008, paras. 41, 48 (not yet reported)**

In support of the first part of the first ground of its appeal, the appellant claims that the Court of Justice held in *Tetra Pak v Commission* that it was not necessary to demonstrate the possibility of recouping the losses which the undertaking in a dominant position suffered as a result of the application of the pricing policy in the circumstances of that case. As the Court of First Instance followed the approach adopted in *Tetra Pak v Commission*, it should have stated the reasons why the circumstances of the present case were similar or not to those in *Tetra Pak* or justified the same solution as that adopted in that judgment.

Contrary to the appellant's argument, it must be stated in the present case that the Court of First Instance gave sufficient reasons why the Commission was not required to prove that WIN had the possibility of recouping its losses.

It is by applying precisely the reasoning followed by the Court of Justice in *Tetra Pak v Commission*, as summarised in the preceding paragraphs, to the present case that the Court of First Instance held, in paragraph 227 of the judgment under appeal, that the Commission had good grounds for finding that the pricing practice concerned was eliminatory inasmuch as the prices charged by WIN were, as in *Tetra Pak v Commission*, below average variable costs and that, concerning total costs, the Commission had also to provide evidence that the pricing practice adopted by WIN formed part of a plan to 'pre-empt' the market.

In those circumstances, it must be held that the judgment under appeal sets out sufficiently clearly the reasons which led the Court of First Instance to find that the circumstances giving rise to the present case, in particular the relationship between the level of prices applied by WIN and the average variable costs and average total costs borne by WIN, were analogous to those in *Tetra Pak v Commission*, and to find, accordingly, that proof of recoupment of losses does not constitute a necessary precondition to a finding of predatory pricing.

By the second part of this ground of appeal, the appellant claims that the Court of First Instance failed to state adequate reasons for rejecting the appellant's arguments based on a right to align its prices on those of its competitors. In particular, it objects that the Court confined itself to stating, in paragraph 187 of the judgment under appeal, that, even if alignment of prices on those of competitors is not in itself abusive, it might become so where it is aimed at strengthening and abusing a dominant position, without specifying in any way whether WIN had, in the present case, the intention of strengthening its dominant position or abusing it.

To that end, the Court refers in paragraphs 185 and 186 of the judgment under appeal to the Community case-law according to which Article 82 EC [now Article 102 TFEU] imposes specific obligations on undertakings in a dominant position. In particular, the Court recalled that, although the fact that an undertaking is in a dominant position cannot deprive it of the right to protect its own commercial interests if they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, it is not possible, however, to countenance such behaviour if its actual purpose is to strengthen that dominant position and abuse it.

It was on the basis of that case-law that the Court of First Instance thus found, in paragraph 187 of the judgment under appeal, that WIN cannot rely on any absolute right to align its prices on those of its competitors in order to justify its conduct where that conduct constitutes an abuse of its dominant position.

Nor can the appellant object that the Court merely made such a finding without ascertaining whether, in the present case, WIN's conduct was abusive. The Court specifically rejected, inter alia in paragraphs 195 to 218 and 224 to 230 of the judgment under appeal, all the appellant's arguments seeking to question whether that abusive conduct existed, as found in the contested decision.

With regard to the fourth ground of appeal, the appellant alleges that the Court of First Instance wrongly approved the Commission's analysis which excluded from the method for evaluating the rate of recovery of costs revenues and costs subsequent to the alleged infringement, that is, later than 15 October 2002. In that regard, it claims, in particular, that the Court of First Instance could not, without contradicting itself and infringing Article 82 EC [now Article 102 TFEU], uphold the approach adopted by the Commission consisting in excluding from the calculation of that rate of recovery revenues and costs subsequent to the alleged infringement but included in the 48-month lifetime of a subscription and, at the same time, recognising that, as regards subscriptions, it was legitimate to spread the costs and revenues over a period of 48 months.

In paragraphs 136 and 137 of the judgment under appeal, the Court of First Instance explained that the method followed by the Commission consisted in spreading over the average lifetime of a subscription, equal to 48 months, only non-recurrent variable costs, that is, the customer acquisition costs. According to the approach adopted by the Commission in the contested decision, the undertaking's objective is not to produce an instantaneous profit but, as results from recital 76 of the decision, cited by the Court in paragraph 136 of the judgment under appeal, 'to achieve a level of recovery of recurrent costs (network costs and production costs) which is sufficient to ensure that the margin between revenue and recurrent costs will, within a reasonable time, also cover the non-recurrent variable costs invested in the commercial development of the particular product'.

In application of that method, the Commission analysed WIN's pricing policy between January 2001 and October 2002 and concluded that, during that period, WIN had applied prices lower than a certain level of its adjusted costs.

It follows that the failure to take into account the revenues and costs subsequent to the period during which the infringement lasted, but included in the period of 48 months in question, flows directly from the application to the present case of the method of calculating the rate of recovery of costs chosen by the Commission, the unlawfulness of which the appellant has not succeeded in establishing either at first instance, as is apparent from paragraph 154 of the judgment under appeal, or in the context of this appeal, as is clear from paragraphs 69 to 73 of this judgment.

The Court of First Instance thus did not err in law when it held, in paragraph 152 of the judgment under appeal, that 'the Commission was entitled to consider that the revenue and costs applicable after the infringement cannot be relevant for the purposes of assessing the rate of recovery of costs during the period investigated'.

The seventh ground of appeal is also divided into two parts.

The first part of seventh ground of appeal, alleging the necessity of proving the possibility of recoupment of losses

In considering the merits of the first part of this ground of appeal, it is necessary to note at the outset that, according to settled case-law, Article 82 EC [now Article 102 TFEU] is an application of the general objective of European Community action laid

down by Article 3(1)(g) EC [see now the Protocol on the internal market and competition annexed to the TEU and the TFEU and see Article 3(1)(b) TFEU], namely, the institution of a system ensuring that competition in the common market is not distorted. Thus, the dominant position referred to in Article 82 EC [now Article 102 TFEU] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers (*Case 85/76 Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38).

In that context, in prohibiting the abuse of a dominant market position in so far as trade between Member States is capable of being affected, Article 82 EC [now Article 102 TFEU] refers to conduct which is such as to influence the structure of a market where the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffman-La Roche v Commission*, paragraph 91; *Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 70; *AKZO v Commission*, paragraph 69; and *Case C-95/04 P British Airways v Commission* [2007] ECR I-2331, paragraph 66).

Therefore, since Article 82 EC [now Article 102 TFEU] refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure (*Case 6/72 Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 26), an undertaking which holds a dominant position has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the common market (*Nederlandsche Banden-Industrie-Michelin v Commission*, paragraph 57).

As the Court has already stated, it follows that Article 82 EC [now Article 102 TFEU] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, not all competition by means of price can be regarded as legitimate (*AKZO v Commission*, paragraph 70).

In particular, it must be found that an undertaking abuses its dominant position where, in a market the competition structure of which is already weakened by reason precisely of the presence of that undertaking, it operates a pricing policy the sole economic objective of which is to eliminate its competitors with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market.

In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, the Court, in paragraph 74 of *AKZO v Commission*, relied on pricing criteria based on the costs incurred by the dominant undertaking and on its strategy.

Thus, the Court of Justice has held, first, that prices below average variable costs must be considered *prima facie* abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors. Secondly, prices below average total costs but above average variable costs are to be considered abusive only where they are fixed in the context of a plan having the purpose of eliminating a competitor (see *AKZO v Commission*, paragraphs 70 and 71, and *Tetra Pak v Commission*, paragraph 41).

Accordingly, contrary to what the appellant claims, it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive. In particular, the Court has taken the opportunity to dispense with such proof in circumstances where the eliminatory intent of the undertaking at issue could be presumed in view of that undertaking's application of prices lower than average variable costs (see, to that effect, *Tetra Pak v Commission*, paragraph 44).

That interpretation does not, of course, preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists.

Moreover, the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them.

**Case C-202/07 P *France Télécom SA v. Commission*, 2 April 2009, paras. 27, 32, 36, 37, 39, 46-48, 74, 78-81, 100, 103-112 (not yet reported)**

### 1.3.2. Collusive behaviour

As a preliminary point, the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, *Commission v Anic Partecipazioni*, paragraph 131).

It follows, as the Advocate General stated in essence at point 38 of her Opinion, that the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice.

In that regard, it should be noted that the Court has already provided a number of criteria on the basis of which it is possible to ascertain whether an agreement, decision or concerted practice is anti-competitive.

With regard to the definition of a concerted practice, the Court has held that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 63).

With regard to the assessment as to whether a concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraph 25, and Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-0000, paragraphs 16 and 21). Moreover, while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the Commission of the European Communities or the competent Community judicature from taking it into account (see, to that effect, *IAZ International Belgium and Others v Commission*, paragraphs 23 to 25).

As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC [now Article 101(1) TFEU]. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the conjunction ‘or’, means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent (see, to that effect, *Beef Industry Development Society and Barry Brothers*, paragraph 15).

Moreover, in deciding whether a concerted practice is prohibited by Article 81(1) EC [now Article 101(1) TFEU], there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraph 125; and *Beef Industry Development Society and Barry Brothers*, paragraph 16). The distinction between ‘infringements by

object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (*Beef Industry Development Society and Barry Brothers*, paragraph 17).

Accordingly, contrary to what the referring court claims, there is no need to consider the effects of a concerted practice where its anti-competitive object is established.

With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.

Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see *Suiker Unie and Others v Commission*, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others v Commission*, paragraph 63; and Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, paragraph 86).

While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, *Suiker Unie and Others v Commission*, paragraph 174; *Züchner*, paragraph 14; and *Deere v Commission*, paragraph 87).

At paragraphs 88 et seq. of *Deere v Commission*, the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of

uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see *Deere v Commission*, paragraph 90, and Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 81).

Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC [now Article 101(1) TFEU] to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.

On the contrary, it is apparent from Article 81(1)(a) EC [now Article 101(1)(a) TFEU] that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. In the present case, as the Netherlands Government submitted in its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.

In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC [now Article 101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.

Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

By its second question, the referring court asks essentially whether, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is a concerted practice within the meaning of Article 81(1) EC [now Article 101 TFEU] – the national court is required to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on the market, such undertakings are presumed to take account of the information exchanged with their competitors, or whether that court can apply the rules of national law pertaining to the burden of proof.

As the Advocate General pointed out at point 76 of her Opinion, that question seeks to clarify whether national authorities and courts are also obliged to base their application of Article 81(1) EC [now Article 101(1) TFEU] on the presumption which operates at Community level.

It should be borne in mind at the outset that Article 81 EC [now Article 101 TFEU], first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 36 and 39, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 31 and 39).

In applying Article 81 EC [now Article 101 TFEU], any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States.

As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article 81(1) EC [now Article 101(1) TFEU], it should be pointed out, first, that the Court has held that the concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. However, the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period. Lastly, the Court concluded that such a concerted practice is caught by Article 81(1) EC [now Article 101(1) TFEU], even in the absence of anti-competitive effects on the market (see *Hüls*, paragraphs 161 to 163).

In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC [now Article 101(1) TFEU], as interpreted by the Court, and it consequently forms an integral part of applicable Community law.

By its third question, the referring court asks essentially whether, when applying the concept of concerted practices in Article 81(1) EC [now Article 101(1) TFEU], there is in all cases a presumption of a causal connection between the concerted practice and the market conduct of the undertakings concerned, even if the concerted action is the result of a single meeting.

It is evident from paragraph 162 of *Hüls* and paragraph 121 of *Commission v Anic Partecipazioni* that the Court found that that presumption applied only where there was concerted action and where the undertaking concerned remained active on the market. The addition of the words ‘particularly when they concert together on a regular basis over a long period’, far from supporting the argument that there is a presumption of a causal connection only if the undertakings meet regularly, must necessarily be interpreted as meaning that that presumption is more compelling where undertakings have concerted their actions on a regular basis over a long period.

Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.

As the Netherlands Government correctly pointed out, together with the Advocate General at points 104 and 105 of her Opinion, the number, frequency, and form of

meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

In the light of the foregoing, the answer to the third question must be that, in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

**Case C-8/08 *T-Mobile Netherlands and others*, 4 June 2009, paras. 23-39, 44, 45, 49-52, 54, 58-62 (not yet reported)**

### 1.3.3. State aid

By their first ground of appeal, the appellants complain that the Court of First Instance failed to provide a sufficient statement of reasons as regards the application to the present case of the exception based on the nature and general scheme of the system, as a rule derogating from the principle that differential treatment in favour of one or more undertakings necessarily constitutes a selective advantage. More specifically, the judgment under appeal does not contain a sufficiently clear statement of reasons either as regards the content of that exception or as regards the causal link between the exception and the waiver of a significant part of State resources.

It should be noted first of all that the duty incumbent upon the Court of First Instance under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons for its judgments does not require the Court of First Instance to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its powers of review (*Case C-397/03 P Archer Daniels Midland and Archer Daniels*

*Midland Ingredients v Commission* [2006] ECR I-4429, paragraph 60, and Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraph 46).

It should be noted in the present case, however, that the Court of First Instance indicated the reasons why it considered that, by reason of the general scheme of the system of Community telecommunications law, the waiver of the claims at issue was not covered by the concept of State aid incompatible with Community law.

In paragraphs 108 to 110 of the judgment under appeal, in particular, the Court of First Instance explained at length the Community framework for telecommunications services as set up by Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] and Decision No 128/1999 [Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community (OJ 1999 L 17, p. 1)]. In particular, it held that although the Member States are free to choose the procedure for the award of UMTS licences, they are required to comply with equality of treatment between operators, account being taken of the time when each of the operators concerned entered the market.

In addition, according to paragraph 109 of the judgment under appeal, Article 11(2) of Directive 97/13 has been interpreted in Community case-law as requiring that the fees charged to different operators be equivalent in economic terms.

It follows, according to the Court of First Instance, that the French authorities had no choice in the circumstances of the present case but to reduce the fees due from Orange and SFR and, therefore, to waive the claims at issue, so as to make the amount equivalent to that charged to Bouygues Télécom.

Accordingly, it is apparent from paragraphs 108 to 110 that the circumstances justifying the application in the present case of the exception based on the general scheme of the system – that is to say, the obligation on the national authorities to comply with the requirements of equal treatment specifically laid down in Community telecommunications law – were clearly identified by the Court of First Instance.

Furthermore, the other circumstances referred to by the appellants are based on an erroneous reading of the judgment under appeal.

First, contrary to the appellants' argument, the Court of First Instance in no way examined the need to meet the deadline of 1 January 2002, fixed by Article 3(1) of Decision No 128/1999 as the date on which UMTS had to be introduced in the territory of the Member States, as a characteristic of the system. In reality, it took account of that factor in paragraph 141 of the judgment under appeal only to assess the reasons why the French authorities decided not to recommence the entire award procedure *ab initio*.

Secondly, it is made expressly clear in paragraphs 11 and 138 of the judgment under appeal that the need to 'select a sufficient number of operators to guarantee effective

competition in the sector' was taken into account by the Court of First Instance not as a characteristic of the system, but solely in order to conclude that the first call for applications had not produced a satisfactory result, given the need to ensure competition in the sector, and that, consequently, other operators had to be sought.

Lastly, with regard to the allegedly insufficient nature of the grounds stated for the judgment under appeal as regards the causal link between the nature of the system and the waiver of the claims at issue against Orange and SFR, it is sufficient to point out that the Court of First Instance, in paragraph 123 of its judgment, set out the reasons why it concluded that such a link existed by holding that since the characteristics of the three UMTS licences were identical, maintaining the initial amount of the fees due from Orange and SFR would inevitably have involved a breach, to their detriment, of the obligations specifically laid down with regard to equal treatment by Community telecommunications law.

In the light of the foregoing considerations, it must be held that the grounds stated for the judgment under appeal make it possible, to the requisite legal standard, to understand the reasons for which the Court of First Instance held that, by reason of the general scheme of the system, the reduction in the fees due from Orange and SFR and, accordingly, the waiver of the claims against them could not be regarded as State aid.

By their second ground of appeal, the appellants claim that the Court of First Instance confused the assessment of the existence of serious difficulties with that of the merits of the contested decision. In particular, in order to establish that the Commission was not under an obligation to initiate the investigation procedure, the Court of First Instance merely added formally, after weighing the merits of each of the pleas in law relied upon by the parties, that such an investigation did not constitute a serious difficulty.

[...] the Court cannot accept the appellants' argument that the Court of First Instance substituted its own assessment for that of the Commission when it held, in paragraphs 131 and 132 of the judgment under appeal, that Orange and SFR, on the one hand, and Bouygues Télécom, on the other, were not in a comparable situation because the latter undertaking risked being unable to introduce its UMTS services or being able to do so only after a delay.

It should be noted in that regard that the contested decision had ruled out any discrimination, not because the three operators were in a comparable situation, but because of the application of the Community framework for telecommunications services, which made necessary the solution adopted by the French authorities. Consequently, whether those operators were or were not in a comparable situation with regard to the risks which they undertook was not something which influenced the Commission's position.

In the light of the foregoing considerations, it must be held that, even if, when it examined some of the arguments raised at first instance by Bouygues and Bouygues Télécom, the Court of First Instance reached different conclusions from those reached by the Commission in the contested decision, none of the assessments made by the

Court suggest that the Commission's conclusions are not well founded or that serious difficulties exist.

By the first branch of this ground, the appellants claim that the Court of First Instance erred in law by concluding that the exception based on the general scheme of the system made it impossible for the French State, in the present case, not to waive the claims against Orange and SFR. In reality, since the general scheme of the system requires that the maximum number of operators be sought, the French authorities could either have re-commenced the entire procedure ab initio or, as in the present case, made a new call for applications.

By the second branch of the fourth ground of appeal, the appellants argue that the Court of First Instance committed several errors of law when it concluded that Orange and SFR had obtained no selective advantage.

With regard to whether those arguments are well founded, it should be recalled that the Court of First Instance held, in paragraph 108 of the judgment under appeal, that Directive 97/13 and Decision No 128/1999 leave the Member States a discretion as to the choice of procedure for the award of licences provided that the principles of free competition and equal treatment are respected.

The Court deduced from that finding, and has not been challenged on this point by the appellants, that Member States could opt for a comparative selection procedure, the essential being that the operators received the same treatment, in particular with regard to fees.

In the present case, the French authorities, in the exercise of that discretion, decided to award the UMTS licences by way, precisely, of a comparative selection procedure. As the Court of First Instance points out in paragraph 12 of the judgment under appeal, it is only because of the partial failure of the first call for applications, which did not enable enough licences to be awarded to ensure genuine competition in the market for telecommunications services, that the French authorities considered it necessary to seek further applications.

In such a situation, as the appellants themselves admit, the French authorities had three options open to them: to re-commence the procedure ab initio; to launch a new call for additional applications without retroactively amending the amount due from Orange and SFR by way of UMTS licence fees; or to launch a new call but with a retroactive amendment of those fees.

As the Court of First Instance noted in paragraph 141 of the judgment under appeal, in the circumstances of the present case, the option of re-commencing the procedure ab initio would have made it impossible to meet the 1 January 2002 deadline fixed by Article 3(1) of Decision No 128/1999 as the date on which Directive 97/13 had to be implemented by the Member States with regard to the coordinated and progressive introduction of UMTS services in their territory. Similarly, as the Court of First Instance correctly pointed out in paragraphs 144 and 145 of its judgment, the option of requiring Orange and SFR to pay fees substantially higher than those charged to Bouygues Télécom, even though none of the three operators, for reasons not entirely of their own making, had yet entered the market and even though the characteristics

of the licences were identical, would have constituted discrimination against Orange and SFR.

In other words, the application of one of those two options would not have enabled the French authorities to comply with the requirements of Community law.

In those circumstances, in the context of the option ultimately chosen by the French authorities, waiver of the claims at issue as a result of the retroactive alignment of the UMTS licence fees due from Orange and SFR with those charged to Bouygues Télécom was inevitable.

Only that option could, at the material time, reduce the risks, on the one hand, of a late launch of UMTS services, since it ensured that at least two of the licences had been awarded by the date fixed in Article 3(1) of Decision No 128/1999. On the other hand, that option also excluded the possibility that the three operators might suffer discrimination, since the very purpose of the alignment of the fees was to take account of the fact that, at the time that the licence was awarded to Bouygues Télécom, none of the three operators had entered the market – for reasons not of their own choosing – with the result that their situation was, for that reason, comparable.

By the third branch of their fourth ground of appeal, the appellants claim that the Court of First Instance erred in law in the application of the principle of non-discrimination.

In the present case, the fact that UMTS licences were awarded to Orange and SFR at an earlier date can justify, or even require, that the related fees be set higher than the fees charged to Bouygues Télécom only if the economic value of those licences could be regarded, by dint merely of having been awarded earlier, as being of greater value than the licence awarded to the latter undertaking.

It is clear that that is not so in the present case.

The Court of First Instance found, in paragraph 116 of the judgment under appeal, that Orange and SFR were not able to make use of the licences which had been awarded to them.

As the Court of First Instance rightly pointed out in paragraphs 100 and 110 of the judgment under appeal, although it is true that a licence has an economic value, that value depends on the time when each of the operators concerned entered the market (see also Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 93).

In other words, the economic value of a licence derives, in particular, from the possibility for the licence holder to make use of the rights attached to the licence which, in the present case, means the possibility of occupying public wireless space in order to use UMTS technology.

Accordingly, the fact that the licences were awarded to the three operators concerned at different dates does not lead to the conclusion that, at the date on which the licence was awarded to Bouygues Télécom, the operators were in a different situation in

relation to the objective of Directive 97/13, namely that of ensuring that operators obtain access to the UMTS market under the same conditions.

With regard, next, to the alleged existence of a principle of inviolability of the criteria for the award of licences, it should be borne in mind that – contrary to the assertions of the appellants – in paragraph 60 of its judgment in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, the Court of Justice merely confirmed that contracting authorities are required to comply with the principle of non-discrimination even where they conclude contracts which are outside the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), without in any way establishing the existence of a principle of inviolability.

On the other hand, as the Advocate General remarked in point 192 of her Opinion, it is apparent from Article 11(2) of Directive 97/13 that the amount of the charges must reflect the need to foster the development of innovative services and competition. It is common ground in the present case that if the French authorities had not aligned the UMTS fees, they would have run the serious risk of Orange and SFR withdrawing their applications. Thus, it was precisely in order to ensure the development of competition that the fees due from the first two licence holders were amended to bring them into line with those charged to Bouygues Télécom.

Lastly, there is no foundation to the argument that the Court of First Instance erred in law by holding that Directive 97/13 introduced an exception to Article 87(1) EC [now Article 107(1) TFEU] additional to those exhaustively listed in Article 87(2) EC [now Article 107(2) TFEU].

As the Advocate General remarked in point 196 of her Opinion, it should be borne in mind that Article 87(2) EC [now Article 107(2) TFEU] lays down exceptions to the rule that State aid is incompatible with the Treaty.

By concluding – in the light, in particular, of Directive 97/13 – that the alignment of the fees due from Orange and SFR with those charged to Bouygues Télécom did not constitute State aid, the Court of First Instance could not have been supplementing the content of Article 87(2) EC [now Article 107(2) TFEU] since that provision applies only to measures which constitute State aid.

**Case C-431/07 P *Boygues SA and Boygues Télécom SA v. Commission*, 2 April 2009, paras. 38, 42-52, 54, 73, 74, 77, 80, 84, 90-97, 106, 115-119, 122, 124-128 (not yet reported)**

It must be noted, as a preliminary point, that the only defence available to a Member State in opposing an infringement action by the Commission under Article 88(2) EC [now Article 108(2) TFEU] is to plead that it was absolutely impossible for it to implement the decision in question (see, in particular, Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 16; Case C-261/99 *Commission v France* [2001] ECR I-2537, paragraph 23, and Case C-499/99 *Commission v Spain* [2002] ECR I-6031, paragraph 21).

It is also apparent from the case-law of the Court that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties, whether of a political, legal or practical kind, or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions of the EC Treaty and in particular those on aid (see *Commission v France*, paragraph 24; Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 31; and *Commission v Spain*, paragraphs 24 and 25).

In addition, the Court has held that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount (see, in particular, Case C-480/98 *Spain v Commission* [2000] ECR I-8717, paragraph 25, and Case C-415/03 *Commission v Greece* [2005] ECR I-3875, paragraph 39).

[...] as regards the argument of that Member State that it is impossible to determine with certainty the amount of aid to be recovered, it must be recalled that, in situations involving the recovery of amounts of aid from a large number of undertakings in conjunction with numerous individual calculation parameters, the Court has held that such difficulties in implementing the relevant decisions did not constitute an absolute impossibility, within the meaning of the case-law cited (see, in particular, Case C-280/95 *Commission v Italy* [1998] ECR I-259, paragraphs 18 and 23, and *Commission v Belgium*, paragraphs 41 and 42). The documents before the Court do not show that the problems arising, in the present case, in calculating the amount of aid to be recovered are greater than those encountered in the situations that gave rise to the judgments cited above.

It must also be pointed out that apprehension of internal difficulties in the course of implementing a decision on State aid cannot justify a failure by a Member State to comply with its obligations under Community law (see, to that effect, Case C-52/95 *Commission v France* [1995] ECR I-4443, paragraph 38; Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 55, and Case C-280/95 *Commission v Italy*, paragraph 16).

It should be borne in mind, first of all, that Article 10 EC [see now Article 4(3) TEU] requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (see Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 63).

As regards the complaint that the Commission has raised in this regard in the present case, it must be noted that, in its exchanges with the French authorities following the adoption of the decision in question, the Commission requested in numerous letters a certain amount of information to enable it, in agreement with those authorities, to determine the final amount of aid to be repaid.

In addition, in the context of its discussions with the French authorities aimed at implementing the decision in question, the Commission, in a letter of 23 December 2005, fixed the amount of aid to be repaid at EUR 928 million net of interest.

However, the French authorities did not consider it necessary to take a clear position on that point or to submit to the Commission a counter-proposal backed up by concrete figures.

Moreover, even if the French Republic, throughout the exchanges it had with the Commission following the adoption of the decision in question, believed it necessary to contest the merits of that decision, and in particular the categorisation as State aid of the tax arrangements applicable to FT [France Télécom] between 1994 and 2002, this did not in any way exempt it from implementing the said decision.

The French Republic also raised numerous questions concerning the parameters of the calculation necessary to determine the amount of aid to be recovered. In addition, it repeatedly stated that it was technically impossible to identify a reliable and precise methodology and, consequently, to reconstruct exactly and without leaving any room for dispute the amount of business tax that FT would have had to pay if it had been subject to the ordinary business tax system. That Member State reached the conclusion, repeated in several letters drafted between 2005 and 2006, that there was no sufficiently sound legal basis on which to initiate a recovery procedure without a major risk of litigation.

Taking into account those assertions and in the light of the foregoing considerations, it must be held that the French Republic displayed a lack of cooperation towards the Commission as regards providing the assistance needed to implement the decision in question.

Consequently, the conduct of the said authorities must be regarded as constituting an infringement of Article 10 EC [see now Article 4(3) TEU].

**Case C-441/06 *Commission v. France* [2007] ECR I-2887, paras. 27-29, 42, 43, 45-52**

#### **1.4. Legal basis for harmonisation measures**

##### **1.4.1. ENISA**

As regards the scope of the legislative powers laid down in Article 95 EC [now Article 114 TFEU] it must be observed that, as the Court held in paragraph 44 of the judgment in Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR [I-10553], that provision is used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market.

The Court also pointed out in paragraph 45 of that judgment that by using the expression ‘measures for the approximation’ in Article 95 EC [now Article 114 TFEU] the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.

It must be added in that regard that nothing in the wording of Article 95 EC [now Article 114 TFEU] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate.

It must be emphasised, however, that the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application.

In those circumstances, it must be examined whether the objectives laid down for the Agency in Article 2 of the regulation [Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (OJ 2004 L 77, p. 1)] and the tasks which are conferred on it pursuant to Article 3 thereof are in line with the requirements set out in paragraphs 44 and 45 of the present judgment.

To that end, it needs to be determined, first, whether those objectives and tasks are closely linked to the subject-matter of the instruments which are described in Article 1(2) of the regulation as ‘present Community legislation’, and secondly, if the answer is yes, whether those objectives and tasks may be regarded as supporting and providing a framework for the implementation of that legislation.

As regards the tasks conferred on the Agency, those tasks concern the collection of appropriate information with a view to carrying out an analysis of current and emerging risks, in particular those which are likely to have an impact on the resilience of electronic communications networks and on the authenticity, integrity and confidentiality of those communications. The Agency is also called upon to develop ‘common methodologies’ to prevent security issues, contribute to raising awareness, promote exchanges of ‘current best practices’ and ‘methods of alert’ and risk assessment and management activities.

The Agency is also entrusted with enhancing cooperation between those involved in the area of network and information security, providing assistance to the Commission and the Member States in their dialogue with industry to address security-related problems in hardware and software products and contributing to Community efforts to cooperate with third States and, where appropriate, with international organisations to promote a common global approach to network and information security issues, thereby contributing to the development of a culture of network and information security.

Consequently, the tasks conferred on the Agency under Article 3 of the regulation are closely linked to the objectives pursued by the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a

common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33)] and the specific directives in the area of network and information security.

Accordingly, [...] it needs to be determined whether the tasks of the Agency may be regarded as supporting and providing a framework for the implementation of the Community legislation in the area, that is to say, whether the establishment of the Agency and the objectives and tasks which are assigned to it by the regulation may be regarded as ‘measures for approximation’ within the meaning of Article 95 EC [now Article 114 TFEU].

In the light of the characteristics of the subject-matter, the regulation does not constitute an isolated measure but forms part of a normative context circumscribed by the Framework Directive and the specific directives and directed at completing the internal market in the area of electronic communications.

All the elements in the case-file also tend to show that the Community legislature was confronted with an area in which technology is being implemented which is not only complex but also developing rapidly. It concluded from this that it was foreseeable that the transposition and application of the Framework Directive and the specific directives would lead to differences as between the Member States.

Accordingly, the Community legislature considered that the establishment of a Community body such as the Agency was an appropriate means of preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market in the area.

It is stated in recitals 3 and 10 in the preamble to the regulation that the Community legislature considers that, as a result of the technical complexity of networks and information systems, the variety of products and services that are interconnected, and ‘the huge number of private and public actors that bear their own responsibility’, the smooth functioning of the internal market risks being undermined by a heterogeneous application of the technical requirements laid down in the Framework Directive and the specific directives.

In that context, the Community legislature was entitled to consider that the opinion of an independent authority providing technical advice at the request of the Commission and the Member States might facilitate the transposition of the directives at issue into the laws of the Member States and the implementation of those directives at national level.

Finally, in accordance with Article 27 of the regulation, the Agency is to be established from 14 March 2004 for a period of five years, and under Article 25(1) and (2) of the same regulation the Commission is bound to carry out by 17 March 2007 at the latest an evaluation to assess the impact of the Agency in the light of the objectives and tasks assigned to it, as well as its working practices.

It is thus apparent from those two provisions, read together, that the Community legislature considered that before making a decision as to the fate of the Agency it was appropriate to carry out an evaluation of the effectiveness of that Agency and the

contribution which it makes to the implementation of the Framework Directive and specific directives.

In those circumstances and in the light of all the elements in the case-file, it must be found that the regulation is rightly based on Article 95 EC [now Article 114 TFEU] and the action must, therefore, be dismissed.

*Case C-217/04 United Kingdom v European Parliament and Council* [2006] ECR I-3771, paras. 42-47 and 56-67

#### 1.4.2. Data retention

Ireland submits that the choice of Article 95 EC [now Article 114 TFEU] as the legal basis for Directive 2006/24 [Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)] is a fundamental error. Neither Article 95 EC [now Article 114 TFEU] nor any other provision of the EC Treaty is, in its view, capable of providing an appropriate legal basis for that directive. Ireland argues principally that the sole objective or, at least, the main or predominant objective of that directive is to facilitate the investigation, detection and prosecution of crime, including terrorism. Therefore, the only legal basis on which the measures contained in Directive 2006/24 may be validly based is Title VI of the EU Treaty [see now Chapters 1, 4 and 5 of Title IV Part Three of the TFEU], in particular Articles 30 EU [see now Articles 87 and 88 TFEU], 31(1)(c) EU [see now Articles 82, 83, 85 TFEU] and 34(2)(b) EU [repealed by the Lisbon Treaty].

That argument cannot be accepted.

According to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C-440/05 *Commission v Council* [2007] ECR I-9097, paragraph 61 and the case-law cited).

The Community legislature may have recourse to Article 95 EC [now Article 114 TFEU] in particular where disparities exist between national rules which are such as to obstruct the fundamental freedoms or to create distortions of competition and thus have a direct effect on the functioning of the internal market (see, to that effect, Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 37 and the case-law cited).

Furthermore, although recourse to Article 95 EC [now Article 114 TFEU] as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from the divergent development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (*Germany v Parliament and Council*, paragraph 38 and the case-law cited).

It is necessary to ascertain whether the situation which led to the adoption of Directive 2006/24 satisfies the conditions set out in the preceding two paragraphs.

In the light of that evidence, it is apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time.

Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.

Furthermore, it must also be noted that, by laying down a harmonised level of retention of data relating to electronic communications, Directive 2006/24 amended the provisions of Directive 2002/58 [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)].

Directive 2002/58 is based on Article 95 EC [now Article 114 TFEU].

Under Article 47 EU [now Article 40 TEU], none of the provisions of the EC Treaty may be affected by a provision of the EU Treaty. That requirement appears in the first paragraph of Article 29 EU [see now Article 67 TFEU], which introduces Title VI of the EU Treaty, entitled 'Provisions on police and judicial cooperation in criminal matters' [see now Chapters 1, 4 and 5 of Title IV Part Three of the TFEU] (Case C-440/05 *Commission v Council*, paragraph 52).

In order to determine whether the legislature has chosen a suitable legal basis for the adoption of Directive 2006/24, it is also appropriate, as follows from paragraph 60 of this judgment, to examine the substantive content of its provisions.

In that connection, the provisions of Directive 2006/24 are essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States.

By contrast, the measures provided for by Directive 2006/24 do not, in themselves, involve intervention by the police or law-enforcement authorities of the Member States. Thus, as is clear in particular from Article 3 of the directive, it is provided that service providers are to retain only data that are generated or processed in the course of the provision of the relevant communication services. Those data are solely those which are closely linked to the exercise of the commercial activity of the service providers.

Directive 2006/24 thus regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty [see now Chapters 1, 4 and 5 of Title IV Part Three of the TFEU], have been excluded from the provisions of that directive, as is stated, in particular, in recital 25 in the preamble to, and Article 4 of, Directive 2006/24.

It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty [see now Chapters 1, 4 and 5 of Title IV Part Three of the TFEU].

**Case C-301/06 *Ireland v. European Parliament and Council*, 10 February 2009, paras. 28, 59, 60, 63-65, 71-75, 79, 80, 82-84 (not yet reported)**

### 1.5. Direct effect

The provisions of the second sentence of Article 6(1), Article 7(1) and Article 8(1) of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity [OJ 1999 L 91, p. 10] confer on individuals rights which may be relied upon before national courts even though the Directive itself has not been formally implemented in national law within the period prescribed.

**Joined cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, para. 66**

It is clear from settled case-law that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where it has failed to implement the directive correctly (see Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103 and case-law cited).

First, the third paragraph of Article 4c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) ('Directive 90/388')] satisfies those criteria, given that it is clear that tariff rebalancing must, as a general rule, be completed before 1 January 1998 or at the latest by 1 January 2000, and that that obligation is unconditional.

Secondly, the same is true of Article 12(7) of Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ 1997 L 199, p. 32), as amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 (OJ 1998 L 268, p. 37) ('Directive 97/33')], since that provision defines the restrictions to which charges such as those at issue in the main proceedings are subject.

Consequently, the provisions of Article 4c of Directive 90/388 and Article 12(7) of Directive 97/33 fulfil all the conditions necessary to produce direct effect.

**Joined Cases C-152/07 *Arcor AG & Co. KG*, C-153/07 *Communication Services TELE2 GmbH* and C-154/07 *Firma 01051 Telekom GmbH* [2008] ECR I-5959, paras. 40-43.**



## 2. THE 1998 REGULATORY PACKAGE

### 2.1. Liberalisation

#### 2.1.1. Powers of the Commission

[...] it must be held in the first place that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3) [now Article 106(3) TFEU], obligations arising under the Treaty. The extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.

[...] As for Article 90 [now Article 106 TFEU], it is concerned with measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such measures that Article 90 [now Article 106 TFEU] imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States.

**Case C-202/88 *France v. Commission* [1991] ECR I-1223, paras. 21 and 24**

[...] As the Court held in its judgment in Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 14, inasmuch as it makes it possible for the Commission to adopt directives, Article 90(3) of the Treaty [now Article 106(3) TFEU] empowers it to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2) [now Article 106(1) and (2) TFEU]. The Commission's power is not, therefore, limited to mere surveillance to ensure application of the existing Commission rules.

It must be borne in mind that, in its judgment in *France v Commission*, cited above, paragraph 21, the Court held that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3) [now Article 106(3) TFEU], obligations arising under the Treaty and that the extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.

Since Article 59 [now Article 56 TFEU] is thus, like Article 30 [now Article 34 TFEU], a directly applicable provision, the Commission was empowered, with a view to promoting the effective exercise of the freedom to provide services, to specify the obligations arising from that article without the need for any prior legislative action on the part of the Council. In those circumstances, a restriction on the Commission's power of the kind envisaged by the Belgian Government would deprive Article 90(3) [now Article 106(3) TFEU] of its effectiveness. [...]

**Joined cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v. Commission* [1992] ECR I-5833, paras. 12, 18, and 21**

Article 90(3) of the Treaty [now Article 106(3) TFEU] requires the Commission to ensure that the Member States comply with the obligations imposed on them, in regard to the undertakings covered by Article 90(1) of that Treaty [now Article 106(1) TFEU], and expressly confers on it the power to take action for that purpose by way of directives and decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (*Bundesverband der Bilanzbuchhalter v Commission* [C-107/95 P [1997] ECR I-947], paragraph 23).

In the present case, max.mobil, the applicant at first instance, had requested the Commission to find that the Republic of Austria had infringed the combined provisions of Articles 86 and 90(1) of the Treaty [now Articles 102 and 106(1) TFEU]. It alleged in its complaint that, by not drawing a distinction between the fee charged to max.mobil and that charged to its competitor, Mobilkom, even though the latter company, in its capacity as a subsidiary, received the support of the PTA for the establishment and operation of its GSM network, the Austrian authorities had unlawfully conferred advantages on Mobilkom in the allocation of frequencies.

It follows from paragraph 24 of the judgment in *Bundesverband der Bilanzbuchhalter v Commission* that individuals may, in certain circumstances, be entitled to bring an action for annulment against a decision which the Commission addresses to a Member State on the basis of Article 90(3) of the Treaty [now Article 106(3) TFEU] if the conditions laid down in the fourth paragraph of Article 173 of the EC Treaty (now, following amendment, the fourth paragraph of Article 230 EC) [now Article 263, fourth paragraph TFEU] are satisfied.

It follows, however, from the wording of Article 90(3) of the Treaty [now Article 106(3) TFEU] and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense.

The fact that max.mobil has a direct and individual interest in annulment of the Commission's decision to refuse to act on its complaint is not such as to confer on it a right to challenge that decision. The letter by which the Commission informed max.mobil that it was not intending to bring proceedings against the Republic of Austria cannot be regarded as producing binding legal effects, with the result that it is not a challengeable measure that is capable of being the subject of an action for annulment.

Nor can max.mobil claim a right to bring an action pursuant to Regulation No 17, which is not applicable to Article 90 of the Treaty [now Article 106 TFEU].

That finding is not at variance with the principle of sound administration or with any other general principle of Community law. No general principle of Community law requires that an undertaking be recognised as having standing before the Community judicature to challenge a refusal by the Commission to bring proceedings against a Member State on the basis of Article 90(3) of the Treaty [now Article 106(3) TFEU].

The max.mobil company did not therefore have standing to bring an action before the Court of First Instance challenging the Commission's decision to refuse to pursue and sanction an alleged infringement of the rules on competition resulting from the decision by the Austrian Government not to draw a distinction between the amount of the fee charged to max.mobil and that charged to its competitor, Mobilkom, for the operation of their mobile telephony networks.

**Case C-141/02 P *Commission v max.mobil* [2005] ECR I-1283, paras. 66-73**

### 2.1.2. Special and exclusive rights

The Court has held that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty [now Article 106(1) TFEU] is not as such incompatible with Article 86 [now Article 102 TFEU] (see, in particular, the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 16).

However, the Court has also held that the extension of the monopoly on the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, was prohibited as such by Article 86 [now Article 102 TFEU], or by Article 90(1) [now Article 106(1) TFEU] in conjunction with Article 86 [now Article 102 TFEU], where that extension resulted from a State measure, thus leading to the elimination of competition (judgment in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 24). The same conclusion necessarily follows where the monopoly on establishment and operation extends to the market in telecommunications services.

In that regard, it may be seen from the 16th recital in the preamble to the contested directive [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10)], the terms of which have not been in any way challenged by the Italian Government, that the grant of exclusive rights to telecommunications organizations has been conducive to the latter's excluding competitors from the market for telecommunications services or, at least, restricting their access to that market. According to the same recital, all the services in question could in principle be supplied by providers established in other Member States.

The Commission was therefore justified in requiring the withdrawal of such exclusive rights as regards the supply of certain telecommunications services. [...]

**Joined cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v. Commission* [1992] ECR I-5833, paras. 35-38**

It is clear, first, from Article 2 of Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (OJ 1994 L 268, p. 15) - which amends the definitions set out in Article 1(1) of the 'services' directive and is repeated verbatim in Article 2(1) and (2) of the 'open networks' directive - second, from the factual context in which the 'services', 'open networks' and 'leased lines' directives were adopted and, third, from

their intended objectives, that the exclusive or special rights in question must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings otherwise than according to objective, proportional and non-discriminatory criteria, and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions.

The mere fact that the name of an undertaking is notified to the Commission does not mean that the rights enjoyed by that undertaking must be regarded as exclusive or special rights, although such notification may raise a strong presumption that they are. Whether directives apply to particular bodies cannot turn on statements made by the Member State concerned. [...]

The national court observes, second, that, in the case of the United Kingdom system, the operation of telecommunications networks on the national market requires a licence from the competent authority. The licence is granted, unless there are specific reasons to the contrary, on the merits of the application and without applying any limit to the number of such licences. The national court states, moreover, that the applications which have not been granted to date 'have been refused on objective grounds'.

The grant of a licence in those circumstances cannot be described as the grant of exclusive or special rights. The rights which such a licence confers are granted according to criteria which the national court presents as objective, proportional and non-discriminatory, and do not have the effect of limiting the number of undertakings which operate public telecommunications networks or services.

The national court points out, third, that 'all PTOs may be empowered to acquire land compulsorily, to enter land for exploratory purposes and to acquire land by agreement' and that 'most PTOs ... are authorized ... to place network equipment in, over or under the public highway and are able to place apparatus on private land with the consent of the persons having an interest in that land (which consent can be dispensed with by the court ...)'.

Such powers cannot be regarded as being exclusive or special rights either. Prerogatives of that kind, which are merely intended to facilitate the provision of networks by the operators concerned and which are or may be conferred upon all those operators, do not give their holders any substantial advantage over their potential competitors.

**Case C-302/94 *British Telecommunications II* [1996] ECR I-6417, paras. 34 and 37-41**

### 2.1.3. Mobile and personal communications

It is appropriate to bear in mind that Directive 96/2 [Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59)] is intended to establish a legislative framework enabling the potential of mobile and personal communications to be

exploited by abolishing, as early as possible, exclusive and special rights by removing, for operators of mobile networks, (i) restrictions on the freedom to operate and develop their networks for the purpose of carrying out the activities authorised by their licences or authorisations and (ii) distortions of competition and by allowing those operators control over their cost base.

In accordance with that objective, Article 2(1) of Directive 96/2 requires Member States, from 1 January 1998, to refrain from refusing to allocate licences for operating mobile systems according to the DCS 1800 standard and Article 2(2) imposes the same requirement in relation to DECT licences from 15 February 1996.

For there to be free competition in the mobile and personal communications market, access to that market may be limited only on the basis of essential requirements and only where related to the lack of availability of frequency spectrum. Where access is made conditional upon obtaining authorisation, there is a presumption that the persons concerned will know the procedure that must be followed and the criteria governing the grant of that authorisation. That is why the second paragraph of Article 2, and Article 3a, of Directive 90/388 require Member States to ensure that procedures for the grant of licences are transparent and public, are conducted in accordance with objective criteria and are non-discriminatory.

**Joined cases C-396/99 and C-397/99 *Commission v. Greece* [2001] ECR I-7577, paras. 25-27**

It is appropriate to bear in mind that Directive 96/2 [Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59)] is intended to establish a legislative framework enabling the potential of mobile and personal communications to be exploited by abolishing, as soon as possible, all exclusive and special rights, by removing, for operators of mobile networks, both restrictions on the freedom to operate and develop those networks for the purpose of carrying out the activities authorised by their licences or authorisations and distortions of competition and by allowing those operators control over their costs (Joined Cases C-396/99 and C-397/99 *Commission v Greece* [2001] ECR I-7577, paragraph 25).

In accordance with that objective, Article 2(1) of Directive 96/2 requires Member States, from 1 January 1998, to refrain from refusing to allocate licences for operating mobile systems according to the DCS 1800 standard (see *Commission v Greece*, cited above, paragraph 26).

According to Article 2(3) and (4) of Directive 96/2, Member States are to extend existing licences to provide digital mobile telecommunications services to combined digital mobile telecommunications systems complying with the GSM 900 standard and the DCS 1800 standard respectively only where that extension is justified by the need to ensure effective competition between operators competing in the relevant markets.

In accordance with the eighth recital in the preamble to Directive 96/2, when a procedure for granting DCS 1800 licences is initiated, Member States should take due account of the requirement to promote investments by new entrants. They should be

able to refrain from granting a licence to existing operators, for example to operators of GSM 900 systems already present on their territory, if it can be shown that the grant would eliminate effective competition, in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences to existing GSM 900 or DCS 1800 operators may take place only under conditions ensuring effective competition.

In that regard, it must be held that if, by extending an existing GSM 900 licence granted to a public undertaking in a dominant position to include additional frequencies in the band reserved for DCS 1800, without imposing a separate fee, whereas a new entrant to the market at issue has had to pay a fee to obtain a DCS 1800 licence, equality of opportunity between different economic operators is no longer ensured and competition is thereby distorted, that extension cannot be considered to be justified under Article 2(4) of Directive 96/2.

Therefore, a national provision such as Paragraph 125(3) of the TKG [Austrian Federal Law on telecommunications], which allows such an extension, is liable to be in breach of Article 2(3) and (4) of Directive 96/2.

However, as observed in paragraph 90 of the present judgment, if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the DCS 1800 band, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence, national legislation such as that at issue in the main proceedings must be deemed to ensure equality of opportunity between different economic operators and thereby guarantee undistorted competition, and therefore, by ensuring effective competition between the operators of systems which compete in the market concerned, it appears to comply with Article 2(3) and (4) of Directive 96/2.

It is for the national court, on the basis of the guidance provided by the Court in paragraphs 92 to 94 of the present judgment, to determine whether such is the situation in the case in the main proceedings.

In that context, it should be pointed out that the 15th recital in the preamble to Directive 96/2 states that any fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.

It follows that Article 2(3) and (4) of Directive 96/2 in principle precludes national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a GSM 900 licence without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee to acquire a DCS 1800 licence. However, that provision does not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

However, Connect Austria also maintains that in the main case effective competition within the meaning of Directive 96/2 can be ensured only by completely excluding Mobilkom from the allocation of frequencies in the DCS 1800 band.

Pursuant to the first sentence of Paragraph 125(3) of the TKG, the authority may not allocate additional frequencies from the DCS 1800 band to existing holders of a GSM 900 licence unless at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence, and only up to an additional 5 MHz for each of them. That provision takes due account of the requirement to promote investments by new entrants, as provided in the eighth recital in the preamble to Directive 96/2, and the concern expressed in the first subparagraph of the 15th recital of that same directive, according to which, since radiofrequencies are a crucial bottleneck resource, the development of effective competition in the telecommunications sector may be an objective justification for refusing the allocation of frequencies to operators already dominant in the geographical market.

None the less, it follows from the second sentence of Paragraph 125(3) of the TKG that additional frequencies in the DCS 1800 band may be allocated to existing holders of a GSM 900 licence if it is established that they have exhausted their user capacity although they have employed all commercially viable technical possibilities.

In that regard, it should be observed that DCS 1800 is a digital mobile telecommunications system which is based on the GSM international standard but uses a frequency band around 1800 MHz instead of 900 MHz. In principle, there are more frequencies available in the DCS 1800 band than in the GSM 900 band, which allows that system to take on more subscribers and to support more traffic simultaneously. Since higher frequencies have a more limited coverage, the cells of each DCS 1800 base station are smaller than those for the GSM 900 system, which implies a greater density of base stations and hence a network with greater capacity.

However, at the time Paragraph 20a(3b) of the Fernmeldegesetz 1993, which takes over Paragraph 125(3) of the TKG verbatim, was adopted, digital mobile telecommunications networks according to the GSM 900 standard were in danger of soon reaching saturation point during peak hours in the large cities of several Member States, as the result of very rapid growth in the number of subscribers. Before the arrival of dual-use telephones, able to move from one system to the other, the installation of DCS 1800 base stations in large cities, in addition to GSM 900 base stations, made it possible for GSM 900 network operators to reduce saturation problems due to the growth in the number of subscribers.

In that situation, it appears that national legislation such as that at issue in the main proceedings, which allows a limited number of additional frequencies in the DCS 1800 band to be allocated to existing holders of a GSM 900 licence, including a public undertaking in a dominant position, after at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence, and allows such an allocation before that period has elapsed if it is established that their user capacity has been exhausted despite the use of all commercially viable technical possibilities, must be held to be justified by the need to ensure effective competition between operators competing in the relevant markets, within the meaning of Article 2(3) and (4) of Directive 96/2.

It follows that Article 2(3) and (4) of Directive 96/2 does not preclude national legislation such as that at issue in the main proceedings, under which a limited number of additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a GSM 900 licence, including a public undertaking in a dominant position, after at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence. Nor does that provision preclude national legislation such as that at issue in the main proceedings, which allows such an allocation before that period has elapsed if it is established that the user capacity of those operators has been exhausted despite the use of all commercially viable technical possibilities.

**Case C-462/99 *Connect Austria* [2003] ECR I-5197, paras. 96-112**

#### 2.1.4. Voice telephony/call-back services

[...] although the Commission and the Portuguese Republic agree that 'call-back' is not a voice telephony service within the meaning of Article 1 of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13)], the Portuguese Government argues that the retention of the exclusive rights granted to Portugal Telecom is incompatible with a 'call-back' system subjected to competition, as such liberalisation would prejudice the financial stability of the public operator and hinder tariff adjustments.

However, the derogation which the Portuguese Republic enjoys under Article 3 of Decision 97/310 [Commission Decision 97/310/EC of 12 February 1997 concerning the granting of additional implementation periods to Portugal for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets (OJ 1997 L 133, p. 19)] is expressly limited to the field of voice telephony alone. In those circumstances and taking account of the fact that any derogation from the rules intended to guarantee the effectiveness of rights granted by the EC Treaty must be strictly interpreted, it must be held that the said Member State has infringed its obligation, under Article 2(2) of Directive 90/388, to abolish the exclusive rights relating to voice telephony before 1 January 1998.

Accordingly it must be held that by the postponing until 1 January 2000 the abolition of Portugal Telecom's exclusive rights in respect of the 'call-back' system, the Portuguese Republic has failed to fulfil its obligations under the fourth subparagraph of Article 2(2) of Directive 90/388.

**Case C-429/99 *Commission v. Portugal* [2001] ECR I-7605, paras. 19-21**

### 2.1.5. Tariff re-balancing

Since it is established that the re-balancing of charging rates contemplated by the third paragraph of Article 4c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13)] was not completed by 1 January 1998 and that the French Government has not sent the Commission a report on its plans for the gradual phasing out of the remaining imbalances, or a detailed timetable for so doing, it must be held that the French Republic has failed to fulfil the express obligations laid down in Article 4c. The requirement of a detailed timetable cannot be satisfied by simply mentioning a completion date, such as that given in paragraph II(3) of Article L. 35-3 of the Code, as amended by Law 96-659.

#### **Case C-146/00 *Commission v. France* [2001] ECR I-9767, para. 35**

Although Article 4(c) of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13)] does not lay down a period within which the obligation to rebalance tariffs must be fulfilled, the fact remains that several elements of Directive 96/19 state that the rebalancing of tariffs must be carried out at a sustained rate in order to facilitate the opening of the telecommunications market to competition. Thus, as the Advocate General stated in paragraphs 58 to 60 of his Opinion, it is clear from reading the 20th and 5th recitals in the preamble to Directive 96/19 together with Article 4(c) of Directive 90/388 that the Member States were bound to phase out the restrictions on tariff rebalancing as soon as possible after the entry into force of Directive 96/19 and at the latest by 1 January 1998. The Member States with less developed networks or with very small networks were to adopt a detailed timetable for the implementation of their obligation.

However, the Spanish Government has not shown that it had adopted, in accordance with Article 4(c) of Directive 90/388, such a timetable within the prescribed period and that it had been approved by the Commission.

As for Decision 97/603 [Commission Decision 97/603/EC concerning the granting of additional implementation periods to Spain for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets (OJ 1997 L 243, p. 48)], it does not authorise the Kingdom of Spain to postpone the implementation of its obligation to phase out the restrictions on tariff rebalancing before 1 January 1998. It only permits the Kingdom of Spain to postpone until 1 December 1998 the effective grant of new licences for the supply of vocal telephony and public telecommunications networks, the notification to the Commission, the publication of all the licensing and declaration procedures for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of the universal service obligation.

In its defence, the Spanish Government expressly acknowledged that Telefónica had experienced an access deficit of ESP 173 449 billion in 1999, and that that access deficit was absorbed, according to the most optimistic estimates of the annual gains in productivity, only during 2002. It also acknowledged the existence of a difference between the monthly subscription charge and the charge for access to the local loop.

As regards the question whether the Spanish authorities can be held responsible for the deficit, it must be recalled that until the entry into force of the price cap system in 2001 they themselves carried out the various increases and reductions in the charges for the components of the voice telephony services, so that the traditional operator had no discretion in setting the charges. As the Advocate General stated in paragraphs 88 and 89 of his Opinion, the absence of tariff rebalancing for 1999 and 2000 is exclusively attributable to the Spanish authorities.

It is true that after the introduction of the price cap system in 2001 Telefónica was authorised to increase or reduce its prices each year. However, the tariff imbalances recorded for 2001 and 2002 cannot be entirely attributed to it; a part of those tariff imbalances must be attributed to the Spanish authorities. Telefónica's freedom to set charges was limited by the existence of a ceiling or maximum price imposed by the Spanish authorities. That restriction was detrimental to the development of competition with regard to the traditional operator and is contrary to the aim of Directive 90/388.

Since the tariff rebalancing required by Article 4(c) of Directive 90/388 can be carried out by the traditional Spanish operator only for the beginning of 2003, that is with a five year delay with respect to the requirement of Directive 90/388, both the tariff imbalance and the situation detrimental to the development of competition arising from it are attributable to the Spanish authorities.

It must therefore be held that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 4(c) of Directive 90/388, the Kingdom of Spain has failed to fulfil its obligations under that directive.

**Case C-500/01 *Commission v. Spain* [2004] ECR I-583, paras. 32-39**

Moreover, although Article 4c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) ('Directive 90/388')] does not lay down a period within which the obligation to rebalance tariffs must be fulfilled, the fact remains that several elements of Directive 96/19 indicate that the rebalancing was to be carried out at a sustained rate in order to facilitate the opening of the telecommunications market to competition. Indeed, it is clear from recital 5 in the preamble to Directive 96/19 in conjunction with recital 20 therein, and from Article 4c of Directive 90/388, that the Member States were bound to bring an end to restrictions on rebalancing as soon as possible after the entry into force of Directive 96/19, and at the latest by 1 January 1998 (see Case C-500/01 *Commission v Spain* [2004] ECR I-583, paragraph 32). Failing completion of that rebalancing before 1 January 1998, the Member States were bound to send a report to the Commission on

their plans for the phasing-out of the remaining tariff imbalances, that report to contain a detailed timetable for implementation of those plans. That phase was to be completed before 1 January 2000.

However, it is clear that Paragraph 43(6) of the TKG 1996 [Law on telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl. 1996 I, p. 1120; the ‘TKG 1996’)], in the version taking effect on 1 December 2002, comes after 1 January 2000, the final date for completion of that tariff rebalancing, while the Federal Republic of Germany has not submitted any rebalancing plan to the Commission. In any event, a provision such as that in the fourth sentence of Paragraph 43(6) does not encourage the subscriber network operator in receipt of the connection charge to take steps to eliminate the deficit incurred by adjusting its rates.

It follows that Directive 90/388 does not allow a national regulatory authority to approve the levy, by the market-dominant subscriber network operator, of a connection charge which is additional to the interconnection charge for the year 2003.

**Joined Cases C-152/07 *Arcor AG&Co. KG*, C-153/07 *Communication Services TELE2 GmbH* and C-154/07 *Firma 01051 Telekom GmbH*, [2008] ECR I-5959, paras. 30-32**

#### 2.1.6. Rights of way/transparency of procedures

[...] according to settled case-law, in relation to the transposition of a directive into the legal order of a Member State, it is essential that the national legislation in question effectively ensures that the directive is fully applied, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights (Case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9, and Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, paragraph 17).

In view of the foregoing considerations, it is necessary to assess whether the Luxembourg law in force at the time when the period laid down in the reasoned opinion expired met the requirements of Article 4d of the Directive [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13)].

According to the first subparagraph of that provision Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks.

Under the first subparagraph of Article 34(1) of the Law on telecommunications, a right of way subject to the laws, regulations and administrative provisions governing the use of the public land of the State and municipalities forms part of the licence granted for the provision of a telecommunications network.

However, such a measure does not suffice to meet the requirements of Article 4d of the Directive, which seeks to ensure the effective exercise of rights of way with the aim of liberalising the provision of telecommunications infrastructures. Effective

transposition of that provision requires that the competent authority for the grant of such rights be clearly designated and that transparent administrative procedures be established to implement them. It is not thus in this case.

In relation to the designation of the competent authority, even if the Member States are free to delegate powers to their domestic authorities as they consider fit and to implement directives by means of measures adopted by various authorities (see Joined Cases 227/85 to 230/85 *Commission v Belgium* [1988] ECR I, paragraph 9), the fact remains that individuals must be made fully aware of their rights.

The system of licensing in issue in respect of the granting of rights of way over public land lacks transparency. In respect of public railway land, it is clear from the contents of the file that the Luxembourg authorities themselves disagree on the question whether the authority competent to deal with an application to lay cables along the rail network is CFL, as the Luxembourg Minister for Transport contended, or the State, as maintained by the Luxembourg Institute of Telecommunications.

In relation to the procedures for the granting of rights of way, the use of public land of the State and municipalities is, according to Article 35(1) of the Law on telecommunications, subject to the prior approval of the location plan and system details by the authority responsible for the relevant land. In addition, holders of a telecommunications network provider's licence which envisage using the rights of way that the latter includes must obtain highway permits from the State authorities and all the local authorities concerned according to the locations of the networks. The Luxembourg Government does not maintain that it has established and published implementing provisions in that regard. Even if the procedures applied by the various competent authorities may be obtained on request by interested parties or, in certain cases, through the internet, the fact remains that all the administrative procedures as a whole are far from transparent and that, therefore, such situation is capable of discouraging interested parties from making applications for rights of way.

In the light of all the foregoing considerations, it must be held that, by failing to ensure the effective transposition of Article 4d of the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations.

**Case C-97/01 *Commission v. Luxembourg* [2003] ECR I-5797, paras. 32-40**

#### 2.1.7. Municipal taxes

By its second question the referring court essentially seeks to ascertain whether tax measures applying to mobile communications infrastructures are covered by Article 3c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended, with regard to the implementation of full competition in telecommunications markets, by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13)].

It is necessary to point out at the outset that the event which gives rise to the taxes on communications infrastructures is not the issue of a licence. Therefore, Directive

97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], which was relied on by Mobistar at the hearing, is not applicable to the facts of the case.

As regards Directive 90/388 it is first of all appropriate to note that the wording of Article 3c thereof, in that it requires the lifting of ‘all restrictions’ on operators of mobile and personal communications systems with regard to infrastructure, does not prevent the aforementioned restrictions from also referring to tax measures applying to mobile communications infrastructures.

According to the Court’s settled case-law, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St.Nikolaus Brennerrei* [1984] ECR 1051, paragraph 10, and Case C-17/03 *Vereinigung voor Energie, Milieu en Water and Others* [2005] ECR [I-4983], paragraph 41).

In its original version Directive 90/388 provided for the withdrawal of exclusive or special rights granted by Member States to supply telecommunications services but did not include mobile communications services in its field of application. In order to extend its scope to mobile and personal communications it was amended by Directive 96/2 [Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388 with regard to mobile and personal communications (OJ 1996 L 20, p. 59)].

Directive 96/2 is intended to establish a legislative framework enabling the potential of mobile and personal communications to be exploited by abolishing, as soon as possible, all exclusive and special rights, by removing, for operators of mobile networks, both restrictions on the freedom to operate and develop those networks for the purpose of carrying out the activities authorised by their licences or authorisations and distortions of competition and by allowing those operators control over their costs (see Joined Cases C-396/99 and C-397/99 *Commission v Greece* [2001] ECR I-7577, paragraph 25, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 96).

Directive 96/2 is based on Article 90(3) of the EC Treaty [now Article 106(3) TFEU]. It follows that Article 3c of Directive 90/388 is applicable only to restrictions which are incompatible with Article 90 of the Treaty [now Article 106 TFEU].

According to the 16th recital in the preamble to Directive 96/2, that directive was adopted for the purpose of a situation where the competitive provision of mobile voice services was prevented because the telecommunications organisations were unable to meet the mobile operator’s demand for infrastructures and most Member States maintained exclusive rights in favour of those organisations. On the basis of the finding that the restriction on the provision and use of infrastructure infringes Article 90 of the Treaty [now Article 106 TFEU] in conjunction with Article 86 of the Treaty [now Article 102 TFEU], the Commission concluded that the Member States must lift those restrictions and grant the relevant mobile operators, if requested, access on a non-discriminatory basis to the necessary scarce resources to set up their own infrastructure.

It follows from this that the restrictions referred to in Article 3c of Directive 90/388 are characterised, first, by their link with the exclusive and special rights of the traditional operators and, second, by the fact that the situation can be remedied by access on a non-discriminatory basis to the necessary scarce resources.

Thus, restrictions such as those mentioned by way of example in the fourth recital in the preamble to Directive 96/2 are covered, namely the restriction of the number of licences granted on the basis of discretion or, in the case of operators competing with telecommunications organisations, making the grant of licences subject to technical restrictions such as a ban on using infrastructure other than those provided by those organisations.

In addition, only measures which appreciably affect the competitive situation fall within the notion of restriction within the precise meaning of Article 3c of Directive 90/388.

By contrast, national measures which are applicable to all mobile telephony operators without distinction and do not favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators placed in competition with them do not fall within the scope of Article 3c of Directive 90/388.

It is for the national court to make sure that those conditions are met in the main proceedings.

In the context of its examination the national court will have to assess the effects of the taxes bearing in mind, in particular, the point at which each of the operators concerned entered the market. It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators.

It follows from all the foregoing that the answer to the second question must be that tax measures applying to mobile communications infrastructures are not covered by Article 3c of Directive 90/388, except where those measures favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators and appreciably affect the competitive situation.

**Joined cases C-544/03 *Mobistar* and C-545/03 *Belgacom* [2005] ECR I-7723, paras. 36-50**

Article 4d of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13)] which requires that Member States do not discriminate between the providers of public telecommunications networks in the grant of rights of way for the provision of those networks, is a specific application of the general principle of equality (see, by analogy, in regard to Article

7(5) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20), Case C-17/03 *VEMW and Others* [2005] ECR I-[4983], paragraph 47).

The prohibition of discrimination, which is one of the fundamental principles of Community law, requires that comparable situations should not be treated in a different manner unless such a distinction can be objectively justified (see, *inter alia*, Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 67).

In this case, it is common ground that PT Comunicações is exempted from payment of the taxes and charges connected with the installation of the telecommunications infrastructure, the access to the various parts of the installation and the apparatus necessary for the operation of the transferred network.

The position of PT Comunicações, as the provider of a public network, must be compared with that of its competitors, which also carry out their activities in the telecommunications market and intend to put in place alternative networks. Failing this, the objective of the Community legislation, namely the establishment of a competitive market in the telecommunications sector, would be seriously jeopardised. As is apparent from recital 23 in the preamble to Directive 96/19, if Member States do not grant new licensed operators the same legal rights and privileges to install their networks on public and private land as were granted to existing telecommunications organisations, the rolling-out of the new operators' networks would be delayed, which would, in certain sectors, be tantamount to maintaining exclusive rights for the existing organisations.

It is necessary, therefore, to determine whether the disparate treatment established here, consisting of exemption from the payment of tax and charges under the national provisions at issue, is justified in the light of Directive 90/388.

Firstly, under Article 9, read in conjunction with Article 8(1)(a), of the basic rules of the public telecommunications service concession, the Portuguese State made PT Comunicações responsible for maintaining the infrastructure concerned in good condition with regard to its functioning, its security and its maintenance, as well as for expanding the network, both qualitatively and quantitatively, so as to ensure the provision of telecommunications services for general use, as a universal service, throughout the national territory.

However, compensation for the costs resulting from that obligation is not, in this case, capable of justifying discrimination between operators as regards the grant of rights of way.

The net cost of implementing a universal service should have been assessed in accordance with Article 5(3) of Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32)], read in conjunction with Annex III thereto. No such assessment of net costs was carried out in this case. Consequently, there is no need to determine whether

the exemption from municipal taxes constitutes a means of financing the provision of the universal service or whether, as the Portuguese Government maintains, this exemption does not go beyond what is necessary to cover the cost of the service in accordance with the decision in Case C-280/00 (*Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747).

Secondly, the fact that PT Comunicações is required to give competing operators access to the basic telecommunications network in a transparent and non-discriminatory manner also cannot provide justification for the different treatment at issue. It is true that sharing or coordination arrangements and the establishment of rules apportioning the costs of facility- or property-sharing are encouraged in Article 12(2) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33). However, the fact that other operators have access to the network does not justify disparate treatment in regard to the costs arising from the implementation of a new network.

**Case C-334/03 *Commission v. Portugal*, [2005] ECR I-8911, paras. 23-25 and 29-34**

#### 2.1.8. Lack of transposition

It follows from the foregoing that, as the Advocate General states in point 29 of his Opinion, although the Law of 21 March 1997 laid down the outline provisions and general rules governing the establishment and operation of satellite communications, from the making of the declaration up to the allocation of frequencies and the grant of licences, no provisions governing the implementation of those procedures have been adopted in the present case. In particular, the Law of 21 March 1997 does not lay down the detailed procedures whereunder operators can obtain licences, or the level of fees and duties payable by operators.

Consequently, it must be held that, by not adopting, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with the Directive [Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (OJ 1994 L 268, p. 15)], the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

**Case C-59/98 *Commission v. Luxembourg* [1999] ECR I-1181, paras. 23 and 24**

## 2.2. Harmonisation of national rules

### 2.2.1. Scope of the ONP directives

According to the second recital in the preamble to the 'services' directive [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10)], at the time when that directive and the 'open networks' directive [Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1)] were adopted, the provision and operation of telecommunications networks and the provision of related services were generally delegated, in all Member States, to one or more undertakings which enjoyed, to that end, 'exclusive or special' rights, that is to say, rights 'characterized by the discretionary powers which the State exercises in various degrees with regard to access to the market for telecommunications services'.

The 'services' directive required Member States to withdraw all special or exclusive rights granted to those undertakings for the supply of most telecommunications services so as to ensure that those services may be freely offered throughout the Community (see in particular the first paragraph of Article 2 of the directive).

In contrast, exclusive or special rights granted to those undertakings for the provision and operation of networks have not been called in question.

In order to prevent retention of those exclusive or special rights in respect of telecommunications networks from impeding freedom to provide telecommunications services within and between the Member States, the 'open networks' directive provided for the creation of a Community-wide, open telecommunications network accessible to all operators on the same terms. Accordingly, the directive harmonizes certain of the conditions governing access to telecommunications networks and the use thereof.

Under that directive, however, harmonization is to be carried out in stages so as to take account of the situations and technical or administrative constraints existing in the various Member States (see the fifth recital in the preamble to the directive and Article 4).

**Case C-302/94 *British Telecommunications II* [1996] ECR I-6417, paras. 27-31**

### 2.2.2. Right of appeal against decisions of the NRA/primacy of EC law

It must be recalled first that, according to settled case-law, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see,

in particular, Case 179/84 *Bozzetti v Invernizzi* [1985] ECR 2301, paragraph 17, and Case C-258/97 *HI* [1999] ECR I-1405, paragraph 22).

In addition, whilst Article 5a(3) of Directive 90/387 [Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23)] requires Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to an independent body, it does not specify the national body in each Member State which is competent to hear and decide on such appeals.

It is clear that on 3 March 1999, when the *Verfassungsgerichtshof* referred the appeal by Connect Austria to the *Verwaltungsgerichtshof*, Article 5a(3) of Directive 90/387 had not been implemented in Austrian law. As the *Verfassungsgerichtshof* rightly observed, and contrary to what the Austrian Government claims, a right of appeal such as that available before the *Verfassungsgerichtshof*, limited to cases where the applicant claims to have been injured by the infringement of a constitutionally guaranteed right or by the application of an unlawful regulation, an unconstitutional statute or an unlawful international treaty, cannot be said to constitute a suitable mechanism within the meaning of Article 5a(3) of Directive 90/387 and therefore does not comply with the requirements of that article.

In those circumstances, it is appropriate to recall that the Court has consistently held that the obligation arising from a directive for the Member States to achieve the result envisaged therein and their duty under Article 10 EC [see now Article 4(3) TEU] to take all appropriate measures, whether general or particular, to ensure compliance with that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third subparagraph of Article 249 EC [now Article 288 TFEU] (Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 26; *EvoBus Austria* [Case C-111/97 [1998] ECR I-5411], paragraph 18; *HI*, cited above, paragraph 25; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraphs 38 and 39).

That obligation requires the national court to determine whether domestic law establishes suitable mechanisms to recognise the right of individuals to appeal against decisions of the national regulatory authority. In circumstances such as those in the main proceedings, the national court is required in particular to determine whether that right of appeal may be exercised before the court or tribunal competent to review the lawfulness of actions taken by the public authorities (see, to that effect, *EvoBus Austria*, paragraph 19).

Where application of national law in accordance with the requirements of Article 5a(3) of Directive 90/387 is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would, in

the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied (see, to that effect, *Engelbrecht*, paragraph 40).

It follows that a national court or tribunal which satisfies the requirements of Article 5a(3) of Directive 90/387 and which would be competent to hear appeals against the decisions of the national regulating authorities if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as Article 133(4) of the B-VG [i.e. the Austrian Federal Constitutional Act], has the obligation to disapply that provision.

Therefore, the answer to the first question referred for a preliminary ruling must be that in order to ensure that national law is interpreted in compliance with Directive 90/387 and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387. If national law cannot be applied so as to comply with the requirements of Article 5a(3) of Directive 90/387, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision.

**Case C-462/99 *Connect Austria* [2003] ECR I-5197, paras. 35-42**

The context in which the question referred arises should be made clear. Contrary to Arcor's claims, the second question does not relate to a conflict between two sets of rules of substantive law on the repayment of fees levied unlawfully. Neither the provisions of Article 11(1) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] nor those of the TKG [German Federal Law on telecommunications] and the TKLGebV [Regulation on Telecommunications Licence Fees], as that Law and that Regulation were presented in the file submitted to the Court, deal with such reimbursement.

The question relates rather to the relationship between Article 11(1) of Directive 97/13 and Paragraph 48 of the Law on Administrative Procedure, as interpreted by the Bundesverwaltungsgericht. Pursuant to the latter paragraph, upon expiry of a given period, the fee assessments become final and the addressees of those assessments no longer have a legal remedy enabling them to assert a right which they derive from Article 11(1) of the directive, subject to the proviso that the competent administrative authority should withdraw an unlawful administrative act if it would be 'outright intolerable' to uphold it.

In accordance with the principle of legal certainty, Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of the reasonable time-

limits for legal remedies or by exhaustion of those remedies (see *Kühne & Heitz* [Case C-453/00 [2004] ECR I-837], paragraph 24). Compliance with that principle prevents administrative acts which produce legal effects from being called into question indefinitely (see, by analogy, Case C-310/97 *Commission v AssiDomän Kraft Products AB and Others* [1999] ECR I-5363, paragraph 61).

The Court has, however, acknowledged that there could be a limit to this principle in certain cases. Thus it held in paragraph 27 of the judgment in *Kühne & Heitz* that the administrative body responsible for the adoption of an administrative decision is, in accordance with the principle of cooperation arising from Article 10 EC [see now Article 4(3) TEU], under an obligation to review and possibly to reopen that decision if four conditions are fulfilled. First, the administrative body must, under national law, have the power to reopen that decision. Secondly, the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance. Thirdly, that judgment must, in the light of a decision given by the Court subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling in the circumstances set out in the third paragraph of Article 234 EC [now Article 267 TFEU]. Fourthly, the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court.

The case giving rise to the judgment in *Kühne & Heitz*, however, was entirely different from those at issue in the main proceedings. Whilst the undertaking *Kühne & Heitz NV* had exhausted all legal remedies available to it, i-21 and Arcor did not avail themselves of their right to appeal against the fee assessments issued to them.

Accordingly, contrary to the argument advanced by i-21, the judgment in *Kühne & Heitz* is not relevant for the purposes of determining whether, in a situation such as that in the main proceedings, an administrative body is under an obligation to review decisions which have become final.

The actions pending before the national court seek reimbursement of the fees paid pursuant to fee assessments which have become final, on the ground that the administrative authority responsible is required to withdraw those assessments pursuant to Paragraph 48 of the Law on Administrative Procedure, as interpreted by the Bundesverwaltungsgericht.

The issue is therefore whether, in order to safeguard the rights which individuals derive from Community law, the national court before which such actions are brought should consider it necessary to acknowledge the existence of such an obligation on the part of the administrative authority.

It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, *inter alia*, C-78/98

*Preston and Others* [2000] ECR I-3201, paragraph 31, and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67).

In relation first of all to the principle of effectiveness, this requires that the rules applicable to the issuing of fee assessments based on legislation incompatible with Article 11(1) of Directive 97/13 do not make the exercise of the rights conferred by that directive impossible or excessively difficult.

The undertakings concerned must therefore be able to appeal against such assessments within a reasonable time-limit from the date of notification of those assessments and to assert the rights which they derive from Community law, in particular Article 11(1) of Directive 97/13.

In the disputes at issue in the main proceedings, it was not argued that the rules governing appeals, in particular the one month time-limit allowed for this purpose, were unreasonable.

Furthermore, it should be pointed out that under Paragraph 48(1) of the Law on Administrative Procedure, an unlawful administrative act can be withdrawn even if it has become final.

Next, in relation to the principle of effectiveness, this requires that all the rules applicable to appeals, including the prescribed time-limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law.

It follows that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'outright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act which does not comply with Community law.

It is clear from the information provided by the national court that, for the purposes of construing the term 'outright intolerable', the national court examined whether upholding the fee assessments at issue in the main proceedings ran counter to the national legal principles of equal treatment, fairness, public policy or good faith, and whether the incompatibility of the fee assessments with rules of higher-ranking law was manifest.

As regards the principle of equal treatment, the Bundesverwaltungsgericht considers that there is no breach of that principle in so far as undertakings such as i-21 and Arcor, whose fee assessments have been upheld, had not exercised their right to challenge those assessments. They are therefore not in a situation comparable to that of undertakings which, having exercised that right, succeeded in having the fee assessments which had been addressed to them withdrawn.

Such an application of the principle of equal treatment provided for in the legislation at issue in the main proceedings does not differ according to whether the dispute relates to a situation arising under national law or to a situation arising under Community law and therefore does not appear to breach the principle of equivalence.

Moreover, it was not alleged that the principles of public policy, good faith or fairness were applied differently according to the nature of the dispute.

However, the question has been raised as to whether the concept of manifest unlawfulness was applied in an equivalent manner. According to the Commission, the national court examined whether the fee assessments were based on legislation that was manifestly unlawful with regard to rules of higher-ranking law, namely the TKG and German constitutional law, but did not or did not correctly conduct that examination with regard to Community law. The Commission maintains that the legislation is manifestly unlawful with regard to the provisions of Article 11(1) of Directive 97/13 and that the principle of equivalence has therefore not been complied with.

Where, pursuant to rules of national law, the administration is required to withdraw an administrative decision which has become final if that decision is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law.

In order to assess the degree of clarity of Article 11(1) of Directive 97/13 and to determine whether or not the incompatibility of the national law with that article is manifest, the objectives of that directive, which is among the measures adopted for the complete liberalisation of telecommunications services and infrastructures and is intended to encourage the entry of new operators onto the market, must be taken into account (see, to that effect, *Albacom and Infostrada* [Joined Cases C-292/01 and C-293/01, [2001] ECR I-9449], in paragraph 35). In that regard, the imposition of a very high fee to cover an estimation of the general costs over a period of 30 years is such as to seriously impair competition, as the national court points out in its references for a preliminary ruling, and constitutes a relevant factor in that assessment.

It is for the national court, in the light of the foregoing, to ascertain whether legislation which is clearly incompatible with Community law, such as that on which the fee assessments at issue in the main proceedings is based, constitutes manifest unlawfulness within the meaning of the national law concerned.

The reply to the second question must therefore be that Article 10 EC [see now Article 4(3) TEU], read in conjunction with Article 11(1) of Directive 97/13, requires the national court to ascertain whether legislation which is clearly incompatible with Community law, such as that on which the fee assessments at issue in the main proceedings are based, constitutes manifest unlawfulness within the meaning of the national law concerned. If that is the case, it is for the national court to draw the necessary conclusions under its national law with regard to the withdrawal of those assessments.

**Joined cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG*, [2006] ECR I-8559, paras. 49-72**

### 2.2.3. Leased lines/special and exclusive rights

The 'leased lines' directive [Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)] is a specific directive which sets out, pursuant to Article 6 of the 'open networks' directive [Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1)], the conditions for access to leased lines provided by operators of telecommunications networks in the Member States. It harmonizes some of the conditions governing access to leased lines, notably with regard to tariffs (Articles 3 to 10), and provides for a minimum set of leased lines with harmonized characteristics to be made available to users in each of the Member States (Article 7).

According to the preamble to and the provisions of the 'open networks' directive and the 'leased lines' directive (see, in particular, Articles 6(4), 7(1), 8(2) and 10(2) of the latter directive), those various obligations are intended to be applied to 'telecommunications organizations'. Thus, according to the definitions given in Article 2(1) of the 'open networks' directive, to which Article 2(1) of the 'leased lines' directive refers, public or private bodies to which Member States have granted exclusive or special rights for the provision of public telecommunications networks and, where applicable, of public telecommunications services.

The fact that the operation of international links, in particular intra-Community links, is reserved to two undertakings, such as BT and Mercury, is sufficient to constitute the grant for their benefit of exclusive or special rights in respect of public telecommunications networks or public telecommunications services.

Accordingly, those two undertakings have been granted, according to criteria which appear to be neither objective nor proportional nor free from discrimination, a substantial competitive advantage over other network operators and other providers of telecommunications services. First, they alone may operate international lines, which are essential to the provision of telecommunications services between Member States. Second, they may easily interconnect their own domestic lines, which cover virtually the entire country, with those international lines and thus offer a wider range of telecommunications services on those lines.

Whilst it is true that the undertakings in question are obliged to accept, in return, other operators' being connected to their networks at tariffs fixed by the public authority, it does not appear that those constraints are such as to deprive them of the advantages available to them. First, as the United Kingdom Government and the Commission rightly point out, only those undertakings have direct access to foreign networks and may therefore negotiate tariffs for access to those networks. Second, the tariffs which the public authority imposes on them are intended in particular, as the United Kingdom Government confirms, to prevent those undertakings from abusing their position vis-à-vis other operators.

It follows that such undertakings must be regarded as 'telecommunications organizations' within the meaning of the 'open networks' and 'leased lines' directives.

**Case C-302/94 *British Telecommunications II* [1996] ECR I-6417, paras. 32, 33 and 44-47**

#### 2.2.4. Leased lines/asymmetric regulation

In order to ensure the development throughout the Community of telecommunications services using leased lines, the Community legislature considered that it was necessary to make available to users throughout the Community a minimum set of leased lines complying with harmonized technical specifications (see the 12th recital in the preamble to the directive [Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)]).

Article 7 of the directive provides that that minimum set of leased lines, whose technical characteristics are defined in Annex II to the directive, must be provided by one or more telecommunications organizations in each of the Member States.

It is therefore for the authorities in the Member States to determine which telecommunications organizations must be required to provide leased lines complying with the technical characteristics defined in Annex II to the directive so as to ensure that a minimum set of lines of that type is available throughout their territory.

Consequently, a Member State is entitled to impose the obligations laid down in Article 7 of the directive on only some telecommunications organizations, since the imposition of those obligations is sufficient to make available to users throughout the national territory a minimum number of leased lines complying with the specifications laid down by the directive. In particular, it is entitled to impose those obligations on only those telecommunications organizations which are the principal operators of telecommunications lines in each of the geographical areas comprising its territory.

**Case C-302/94 *British Telecommunications II* [1996] ECR I-6417, paras. 53-56**

#### 2.2.5. Leased lines/proportionality

As far as this point is concerned, it should be recalled that Article 7 of the directive [Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)] is intended to guarantee a harmonized offering throughout the Community of a minimum set of leased lines in accordance with the specifications laid down in Annex II to that directive.

As is stated in the 12th recital in the preamble to the directive, the provision of that harmonized minimum set of leased lines is to be guaranteed for communications both within a given Member State and between Member States.

It follows from the foregoing that the aim of the directive is both to harmonize the conditions of offer in the various Member States and to remove technical barriers to cross-border telecommunications services.

In those circumstances, the directive cannot be considered to be in breach of the principle of proportionality on the ground that, at the time when it was adopted or transposed into national law, there was no demand on the national market of a Member State for the type of services which the directive requires to be offered.

**Case C-302/94 *British Telecommunications II* [1996] ECR I-6417, paras. 62-65**

### 2.2.6. Licensing/objectives

*The third recital of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] states that "a common framework should be established for general authorisations and individual licences granted by the Member States in the field of telecommunication services..."*

*According to the ninth recital of this Directive, "Member States may attach conditions to authorisations in order to ensure compliance with essential requirements; [they] may, in addition, attach other conditions in accordance with the Annex to this Directive";*

*The 11th recital of the Directive states that "the harmonisation of the procedures associated with the granting of authorisations and the conditions attached to such authorisations should significantly facilitate the free provision of telecommunications services in the Community".*

*It follows from these recitals that Directive 97/13 is intended to facilitate the free provision of telecommunications services in the Community by harmonising the procedures for granting authorisations and the conditions attached to such authorisations.*

**Case C-104/04 *Commission v. France*, 16 June 2005, paras 33-36 (not reported), OJ C 193, 6.8.2005, p. 6**

### 2.2.7. Licensing/scope

The Court finds in that respect that, according to Article 1(1) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], the latter concerns the procedures for granting authorisations for the purposes of providing telecommunication services, without making any distinction between networks open to the public and private networks.

In addition, Article 7(2) of that directive authorises Member States to enact a system of individual licences for the establishment and provision of public telecommunication networks as well as other networks involving the use of radio frequencies

It follows that that directive applies, in principle, not only to public telecommunication networks and services but also to private telecommunication networks which have not been opened to the public and are reserved to a closed group of users, and to services provided on those private networks.

According to the referring court, the network at issue in the main proceedings has been opened to the public by virtue of the individual licence authorising NST to

provide a public telecommunication network, in accordance with Article 7(2) of Directive 97/13.

In that respect, it should be noted that, in accordance with the fifth recital of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32), the word ‘public’ refers to any network or service that is made publicly available for use by third parties.

Moreover, it follows from the second subparagraph of Article 2(2) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23), that ‘public telecommunications network’ is to be interpreted as a telecommunications network ‘used, wholly or in part, for the provision of publicly available telecommunications services’.

It follows that a network such as that at issue in the main proceedings, which has been made available to the public after having been used solely for private purposes, must be regarded as a public telecommunications network within the meaning of Directive 97/13.

Therefore, such a telecommunications network, and all services supplied under it, fall in their entirety within the scope of that directive.

**Case C-339/04 *Nuova società di telecomunicazioni SpA*, [2006] ECR I-6917, paras.26-33**

#### 2.2.8. Licensing/prohibition of discrimination

The national court asks whether the prohibition on discrimination laid down in Articles 9(2) and 11(2) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] precludes national legislation such as that at issue in the main proceedings, under which additional frequencies in the DCS 1800 band may be allocated to existing holders of a GSM 900 licence without the imposition of a separate fee, whereas the holder of a DCS 1800 licence must pay a fee to obtain it.

In that regard, it should be observed that, contrary to what the TCK [i.e. the NRA] contends, Articles 9(2) and 11(2) of Directive 97/13 are, as regards their content, unconditional and sufficiently precise and may therefore, in accordance with settled case-law (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51), in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

It should also be recalled that it is settled case-law that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences (see, inter alia, Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch v High Authority* [1962] ECR 325, at 345, and Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 57).

Without it being necessary to rule on whether Article 9(2) of Directive 97/13 applies only to the granting of licences, or also to the allocation of additional frequencies, it must be observed that if the fee imposed on existing operators for their GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the DCS 1800 band, appears to be equivalent in economic terms to the fee imposed on the operator which was granted the DCS 1800 licence, that allocation does not amount to like cases being treated differently.

It is for the national court, on the basis of the guidance provided by the Court in paragraphs 92 to 94 of the present judgment, to determine whether such is the situation in the case in the main proceedings.

It follows that the prohibition on discrimination laid down in Articles 9(2) and 11(2) of Directive 97/13 does not preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a GSM 900 licence without the imposition of a separate fee, whereas the operator which was granted a DCS 1800 licence has had to pay a fee, if the fee charged to existing operators for their GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the operator which holds the DCS 1800 licence.

**Case C-462/99 *Connect Austria* [2003] ECR I-5197, paras. 113-118**

#### 2.2.9. Licensing/procedures

It should be noted in this regard that, in specifying that the Member State must set reasonable time limits, Article 9(2), second indent, of the directive [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] confirms in clear terms the Community legislature's desire to limit the time which Member States may spend in examining individual licence applications.

It follows from Article 9(2) that the Member State is required to inform an applicant of its decision within a period no longer than six weeks. The requirements that decisions be taken quickly by the competent authorities, as demanded by the directive, and the absence of any reference to the decision as being interim in nature show that the second indent of Article 9(2) is to be interpreted as meaning that the decisions which must be taken within the period which it lays down are to be definitive. [...]

**Case C-448/99 *Commission v. Luxembourg* [2001] ECR I-607, paras. 17 and 19**

## 2.2.10. Licensing/conditions (R&D)

*Initially, it should be verified whether the obligation to make a contribution [to research, development and training missions in the field of telecommunications, of a minimum 5% of the amount (excluding taxes) of its investments in telecommunications infrastructure, equipment and software for the preceding year covered by the authorisation] as laid down in French legislation can be justified under the provision contained in the second indent of the final paragraph of the Annex to Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], by determining whether or not the provision is exhaustive.*

*First, it should be noted that this provision does not refer expressly to the concept of research and development.*

*Consequently, an analysis of the wording of this provision needs to be carried out to determine whether the Community legislature intended to allow Member States to adopt measures in accordance with public interest requirements for fields other than those referred to expressly by the provision.*

*It should be noted in this respect that the term "in particular", in connection with the concept of public interest requirements recognised by the Treaty, refers to an illustrative list of requirements likely to justify a measure taken by a Member State and consisting in a condition that is not expressly laid down in the Annex to Directive 97/13. Consequently, this list, which contains the concepts of public morality, public security (including the investigation of criminal activities), and the concept of public order, is not exhaustive and allows for other public interest requirements.*

*However, the relevant provision of the Annex in question should be considered as having been drafted in order to define the scope of the derogation it lays down, so that the derogation applies only to requirements that are expressly listed therein or which can be classified in the same category (see the judgment in Case C-101/01 Lindqvist [2003] ECR I-12971, paragraph 44).*

*In this respect, the scheme of Directive 97/13 itself corroborates this reading of the final paragraph of the Annex to this Directive.*

*Directive 97/13 aims to harmonise the conditions that can be attached to authorisations in the telecommunications sector within the Community. Its Annex thus contains a complete list of the different conditions which may accompany the said authorisations. However, the final paragraph of this Annex constitutes a derogation from the express nature of the Annex as a whole. Consequently, the second indent of the final paragraph of the said Annex cannot have a general application since that would call in question the system put in place by Directive 97/13.*

*Moreover, this interpretation is confirmed by the purpose of that Directive.*

*In this respect, if the provision in the second indent of the final paragraph of the Annex to this Directive were to be given too broad an interpretation, the purpose of Directive 97/13 would be called in question, enabling the Member States to take measures under public interest requirements as recognised by the Treaty, subjecting the said authorisations to conditions not provided for by this Annex (in connection with the provisions of Directive 97/13 on taxes and charges, see the judgments in Joined Cases C-292/01 and C-293/01 Albacom and Infostrada [2003] ECR I-9449, paragraph 38).*

*The French Government pointed out that the public interest that research and technological development presents is included in the Community activities listed in Article 3(1)(n) of the EC Treaty [see now Article 3(4) TFEU]. In addition, Title XVIII of the Treaty [now Title XIX TFEU] is dedicated in its entirety to these fields.*

*However, it should be noted that the requirement relied upon by the French Government to justify the compulsory contribution in question cannot be classified among those mentioned in the second indent of the final paragraph of the Annex to Directive 97/13.*

*The reference to both Articles 36 and 56 of the Treaty [now Articles 42 and 63 TFEU] and to the concepts of public morality, public security and public order relates to a specific category of public interest requirements, in which research and technological development cannot be included. In this respect, the concept of the investigation of criminal activities relates to the category of public security and constitutes an implicit reference to certain connected measures, such as those relating to telephone intercepts.*

*Accordingly, it follows from the foregoing that the national provision in question cannot be justified in terms of the second indent of the final paragraph of the Annex to Directive 97/13.*

*It is also appropriate to ascertain whether there is another provision of Directive 97/13 that could serve to justify the obligation to make a contribution as provided for in the French legislation.*

*It should be noted in this respect that, according to the 10th recital of this Directive, "any conditions attached to authorisations should be objectively justified in relation to the service concerned and should be non-discriminatory, proportionate and transparent".*

*Among the relevant provisions in the Annex to Directive 97/13 that are likely to justify the compulsory contribution provided for in French legislation, the French Government cites point 4, entitled "Specific conditions that may be attached to individual licences in justified cases and in compliance with the principle of proportionality". Point 4 contains sub-point 4.8 concerning "requirements relating to the quality, availability and permanence of a service or network, including the financial, managerial and technical competence of the applicant and conditions setting a minimum period of operation and including, where appropriate and in accordance with Community law, the mandatory provision of publicly available telecommunications services and public telecommunications networks".*

*However, it must be stated that requiring an operator to contribute to telecommunications research and training a minimum 5% per annum of the amount (excluding taxes) of its investments in telecommunications infrastructure, equipment and software cannot be considered as proportionate to the objective referred to in point 4.8 of Directive 97/13.*

*A contribution in kind or a financial contribution to research, development and training activities promoting the development of telecommunications within the Community will not have a genuine and practical effect on the ability of operators to guarantee the quality, availability and permanence of the service or network.*

*In this respect, measures that are less general and less restrictive but more direct and targeted in their effects, such as those ensuring minimum standards as regards the level of advancement of the technologies used, would be better suited to the objective referred to in point 4.8 of the Annex to Directive 97/13.*

*The obligation to make a contribution as laid down in the contested provision of national legislation cannot therefore be justified with reference to point 4.8 of the Annex to Directive 97/13.*

**Case C-104/04 *Commission v. France*, 16 June 2005, paras 25-32 and 37-48  
(not reported), OJ C 193, 06.08.2005, p. 6**

#### 2.2.11. Licensing/fees and charges

First of all, it must be noted that the main proceedings concern two undertakings which hold individual licences within the meaning of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] and that the observations presented to the Court concentrated on Article 11 of that directive, concerning the fees and charges which apply to undertakings holding individual licences. The Consiglio di Stato is therefore essentially asking whether the provisions of that directive and, in particular, of Article 11 prohibit Member States from imposing financial charges such as the contested charge on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences.

In that respect, it is first necessary to ascertain whether Article 11 of Directive 97/13, or any other of its provisions, expressly authorises Member States to impose financial charges such as the contested charge on such undertakings.

Article 11(1) of Directive 97/13 provides that Member States are to ensure that any fees imposed on undertakings which hold individual licences seek only to cover the administration costs generated by the work involved in implementing those licences. Article 11(2) nevertheless allows the national regulatory authorities to impose charges where scarce resources are to be used.

Aside from the fees and charges mentioned in Article 11 and the fees intended to cover administrative costs related to the general authorisation procedure laid down in Article 6, Directive 97/13 expressly provides for only one type of financial charge,

namely financial contributions to the provision of universal service, referred to in Article 6 and in paragraph 3(2) of the annex to the directive.

There is no dispute that the contested charge does not seek to cover the administrative costs relating to an authorisation procedure or to ensure optimal use of a scarce resource. Decree No 318 and the decree of 5 February 1998 establish other charges for those purposes. Moreover, no claim has been made to the effect that the purpose of the contested charge is to finance the provision of universal service.

The inevitable conclusion is that a charge such as the contested charge does not come under one of the cases expressly mentioned in Articles 6 and 11 of Directive 97/13.

It therefore needs to be examined, secondly, whether such a charge is prohibited.

In that regard, it is necessary to consider the objective of Directive 97/13 and the legal context in which it was adopted.

The Italian Government maintains that a charge such as the contested charge is not contrary to the objective of Directive 97/13 and that it should even be considered permissible, in the light of Article 11(2) of that directive. The government states that, since that provision allows Member States to impose additional charges in the case of scarce resources such as the limited availability of numbers or radiofrequencies in order to ensure the optimal use of such resources, it must also be possible for Member States to impose additional charges intended to contribute to investments made for the purpose of ensuring the general liberalisation of the telecommunications sector.

In the present case, the contested charge constitutes a contribution to the investment made by the State in order to liberalise telecommunications and to allow innovative services to develop. Moreover, it applies only for a limited period and complies with the criteria of objectivity, non-discrimination and transparency referred to in the 12th recital in the preamble to the directive.

It should be noted, however, that Article 11(1) of Directive 97/13 expressly provides that Member States are to ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred by the licensing system. In relation to that general provision set out in Article 11(1), Article 11(2) inserts a reservation limited to the case of scarce resources.

The wording of Article 11(2) therefore calls for a restrictive interpretation and, in any event, cannot in itself be extrapolated as advocated by the Italian Government.

Directive 97/13, as is clear from the first, third and fifth recitals in its preamble, is among the measures adopted for the complete liberalisation of telecommunications services and infrastructures as from 1 January 1998, which also include Directive 96/19 [Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets] with regard to the implementation of full competition in telecommunications markets. To that end, Directive 97/13 establishes a common framework for general authorisations intended to make a significant contribution to the entry of new operators into the market.

In addition to laying down rules for authorisation procedures and the content of authorisations, that framework sets out the nature and scope of financial payments related to those procedures which Member States may impose on undertakings in the field of telecommunications services.

As stated in the 12th recital in the preamble to Directive 97/13, those charges must be based on objective, non-discriminatory and transparent criteria. Moreover, they must not conflict with the objective of the complete liberalisation of the market, which implies opening it completely to competition.

In that regard, as the Advocate General argues in point 52 of his Opinion, the common framework of general authorisations and individual licences for telecommunications services which the directive seeks to establish would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in the sector.

In addition, it is significant that, in the first phase of the implementation of Community directives intended to liberalise the national telecommunications market, the Italian Republic discontinued the charge on turnover which telecommunications service franchisees were previously required to pay. Even if that former charge and the contested charge are not identical, the contested charge, like the former charge, is calculated on the basis of the turnover of undertakings which hold individual licences and thereby reintroduces a financial obstacle to the liberalisation process.

Such a charge considerably increases the fees and charges which Member States are expressly authorised to impose under Directive 97/13 and creates a significant obstacle to the freedom to provide telecommunications services.

It follows that such a charge is contrary to the objectives sought by the Community legislature and goes beyond the common framework established by Directive 97/13.

In the light of the foregoing, the answer to the question referred must be that Directive 97/13 and, in particular, Article 11 thereof prohibit Member States from imposing financial charges other than and in addition to those allowed by the directive, such as the contested charge in the main proceedings, on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences.

**Joined cases C-292/01 *Albacom SpA* and C-393/01 *Infostrada SpA*  
[2003] ECR I-9449, paras. 23-42**

The provisions of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [(OJ 1997 L 117, p. 15)], and in particular Article 11 thereof, prohibit Member States from requiring undertakings which hold individual licences in the area of telecommunications services, solely on the ground that they hold such licences, to pay charges such as those at issue in the main proceedings which are different from, and additional to, those authorised by that directive.

**Joined cases C-250/02 *Telecom Italia Mobile SpA*, C-251/02 *Blu SpA*, C-252/02 *Telecom Italia SpA*, C-253/02 *Vodafone Omnitel SpA*, formerly *Omnitel Pronto Italia SpA* C-256/02 *WIND Telecomunicazioni SpA*, 8 June 2004, para. 5 (not reported), OJ C 228, 11.09.2004, p. 17**

The Court has already had an opportunity to examine the scope of Article 11(1) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)].

In Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2001] ECR I-9449, paragraph 25, the Court pointed out that Article 11(1) of Directive 97/13 provides that Member States are to ensure that any fees imposed on undertakings which hold individual licences seek only to cover the administration costs generated by the work involved in implementing those licences.

It is clear from the wording of that provision, as interpreted by the Court in paragraph 25 of *Albacom and Infostrada*, cited above, that that work must relate only to four activities, namely the issue, management, control and enforcement of individual licences. Furthermore, the fee must be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to render the information readily accessible.

These requirements meet the objectives of proportionality, transparency and non-discrimination of the individual licensing regimes referred to in the second recital in the preamble to Directive 97/13.

It is thus necessary to establish whether the method of calculating the fee at issue in the main proceedings, consisting of taking into account the general costs over a period of 30 years generated by implementing the individual licences, is in line with the provisions of Article 11(1) of Directive 97/13 read in the light of those objectives.

In this respect, it should be pointed out, first of all, that the concept of administrative costs is sufficiently wide to cover so-called 'general' administrative costs.

Those general administrative costs must, however, relate only to the four activities expressly referred to in Article 11(1) of Directive 97/13 and recalled in paragraph 29 of the present judgment.

According to the information submitted to the Court, the calculation of the fee at issue in the main proceedings includes expenditure relating to other tasks such as the regulatory authority's general supervisory activities and, in particular, monitoring possible abuses of a dominant position.

Since this form of monitoring goes beyond the work strictly generated by the implementation of individual licences, it follows that taking into account expenditure linked to this monitoring is contrary to Article 11(1) of Directive 97/13.

Secondly, it is necessary to check whether the general administrative costs relating to the four activities referred to in Article 11(1) can be estimated over a period of 30 years and included in the calculation of the fee.

It is clear from the observations submitted to the Court by i-21, Arcor and the Commission that an estimation covering such a long period raises problems of reliability, having regard to the particularities of the telecommunications sector. Given that this sector is expanding and developing constantly, it would indeed appear difficult to predict the market situation and the number of telecommunications undertakings in several years' time, all the more so over a period of 30 years. Thus, the number of individual licences to be managed in the future and, therefore, the level of general costs arising from such management are unclear. Furthermore, the applicable legislation has been subject to significant changes, as shown by the new directives adopted in 2002, including Directive 2002/21 [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33)] which repeals Directive 97/13. Those legislative amendments are also likely to affect the scope of the administrative costs generated by the individual licensing regimes.

The lack of reliability of the estimation and its effects on the fee calculation affect the latter's compatibility with the requirements of proportionality, transparency and non-discrimination.

First, the calculation of the general costs over a period of 30 years entails an extrapolation of the expenditure that may be incurred in the future which, by definition, does not represent the expenditure actually incurred. In the absence of a mechanism to revise the amount of fee claimed, that amount cannot be strictly proportionate to the work involved, as Article 11(1) of Directive 97/13 expressly requires.

Next, since it is not based on expenditure actually incurred, such a system of calculation risks falling foul of the requirement to publish details of the fee as provided for in Article 11(1) of Directive 97/13, and, thereby, the objective of transparency.

Finally, the obligation imposed on all telecommunications undertakings to pay a sum representing general costs over a period of 30 years fails to take account of the fact that certain undertakings might only operate on the market for a few years and may thus lead to discrimination.

It follows from the foregoing that Article 11(1) of Directive 97/13 precludes the application of a fee for individual licences calculated by taking into account the regulatory body's general administrative costs linked to implementing those licences over a period of 30 years.

**Joined cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG* [2006]  
ECR I-8559, paras. 27-42**

By its two questions, the Consiglio di Stato asks, in essence, whether Article 11 of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] precludes a national provision, such as that at issue in the main proceedings, which requires a

company holding an individual licence for the provision of a public telecommunications network, for which it has paid a fee as provided for in that article, to pay an additional fee in respect of the private use of that network.

In that respect, it should be noted that Member States may not levy any fees or charges in relation to authorisation procedures other than those provided for by Directive 97/13 (see, to that effect, *Albacom and Infostrada* [C-292/01 and C-293/01, [2003] ECR I-9449], paragraph 41).

Article 11 of that directive expressly provides that Member States are to ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred by the licensing system (*Albacom and Infostrada*, paragraph 33).

It is apparent from the order for reference and from the observations submitted to the Court that the second fee has been calculated in accordance with the criteria laid down by the Code before the liberalisation of the telecommunications market, which do not correspond to those laid down in Article 11 of Directive 97/13.

In the light of the above, the answer to the questions referred must be that Article 11 of Directive 97/13 precludes a national provision, such as that at issue in the main proceedings, which requires the holder of an individual licence for the provision of a public telecommunications network, for which it has paid a fee as provided for in that article, to pay an additional fee in respect of the private use of that network calculated in accordance with criteria which do not correspond to those laid down in that article.

**Case C-339/04 *Nuova società di telecomunicazioni SpA* [2006] ECR I-6917, paras. 24 and 35-38**

It is necessary to point out at the outset that the event which gives rise to the taxes on communications infrastructures is not the issue of a licence. Therefore, Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], which was relied on by Mobistar at the hearing, is not applicable to the facts of the case.

**Joined cases C-544/03 *Mobistar* and C-545/03 *Belgacom* [2005] ECR I-7723, para. 37**

According to the order for reference, in the main proceedings the activity carried out by the [national regulatory authority] consisted of allocating, by auction, rights to use certain frequencies in the electromagnetic spectrum to economic operators for a specified period. At the end of the awards procedure, those operators were issued with the authorisation to exploit the rights thus acquired to set up telecommunications equipment operating in defined parts of the electromagnetic spectrum.

In that regard, it must be noted that the activity at issue in the main proceedings consists of the issuing of authorisations which allow the economic operators who receive them to exploit the resulting frequency use rights by offering their services to the public on the mobile telecommunications market in return for remuneration.

Such an activity constitutes the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems, as is apparent from Article 2(1)(d) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] read in conjunction with Articles 4(1) and 8(1) thereof.

Furthermore, it should also be pointed out that, under both Directive 97/13 [and the national law], the issuing of such authorisations falls exclusively within the competence of the Member State concerned.

Thus, an activity such as that at issue in the main proceedings constitutes a necessary precondition for the access of economic operators such as the applicants in the main proceedings to the mobile telecommunications market. It cannot constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis.

In those circumstances, an activity such as that at issue in the main proceedings cannot, by its very nature, be carried out by economic operators. In that regard, it must be pointed out that it is irrelevant that those operators thereafter have the right to transfer their rights to use radio frequencies. Such a transfer, apart from remaining subject to the control of the national regulatory authority responsible for spectrum assignment, in accordance with Article 9(4) of Directive 2002/21 [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], cannot be compared to the issuing of an authorisation by the State.

Therefore, in granting such an authorisation, the competent national authority is not participating in the exploitation of property, consisting in rights to use the radio-frequency spectrum for the purpose of obtaining income therefrom on a continuing basis. By means of that allocation procedure, that authority exclusively carries out the activity of controlling and regulating the use of the electromagnetic spectrum which has been expressly delegated to it.

Furthermore, the fact that the grant of rights such as the frequency use rights at issue in the main proceedings gives rise to a payment cannot affect the legal status of that activity (see, to that effect, Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraph 24 and the case-law cited).

In the light of the foregoing, the answer to the sixth question must be that Article 4(2) of the Sixth Directive [Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1)] is to be interpreted as meaning that the allocation, by auction by the national regulatory

authority responsible for spectrum assignment, of rights such as the frequency use rights at issue in the main proceedings does not constitute an economic activity within the meaning of that provision and, consequently, does not fall within the scope of that directive.

**Case C-284/04 *T-Mobile Austria*, [2007] ECR I-5189, paras. 36, 39-45, 49**  
**Case C-369/04 *Hutchison 3G UK*, [2007] ECR I-5247, paras. 30, 33-39, 43**

Under Article 11(2) of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], the charge must satisfy three conditions. First, it must serve to ensure the optimal use of a scarce resource. Next, it must be non-discriminatory. Finally, it must take into account the need to foster the development of innovative services and competition.

In that respect, it must be stated that, although Article 11(2) of Directive 97/13 allows the application of a charge to manage a 'scarce resource' in an optimal manner, it does not define that concept.

It is therefore necessary to refer to the provisions which precede that article, in particular Article 10(1) of the same directive. Under that provision, the Member States may limit the number of individual licences for any category of telecommunications services only to the extent necessary to make available sufficient numbers. It follows that the Community legislature has therefore acknowledged that there may be a limited quantity of telephone numbers and, consequently, they constitute a scarce resource.

Article 11(2) of Directive 97/13 must therefore be understood as meaning that the Member States may impose a charge on telecommunications undertakings in order to manage the allocation of telephone numbers in an optimal manner.

On the other hand, if an application for the allocation of telephone numbers is refused, which, by definition, does not entail any use of numbers or, consequently, any reduction in the number of numbers available, the provisions of Article 11(2) of Directive 97/13 do not apply. In that case, it is necessary to apply the general rule set out in Article 11(1), according to which the fees imposed on undertakings as part of authorisation procedures must be restricted to the administrative costs related to the processing of an application for numbers. The requirement to pay a charge of more than three times the amount of the administrative costs incurred is therefore contrary to that rule.

As regards the condition of non-discrimination, it should be recalled that the latter requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified (see, in particular, Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 91).

In that regard, ISIS Multimedia and Firma O2, like Deutsche Telekom, are telecommunications companies operating in the local network sector. In order to offer their services, they must necessarily have telephone numbers available to allocate to

their customers. Those companies are therefore in a comparable position from the point of view of offering services. It is not disputed that ISIS Multimedia, Firma O2 and all new operators have to pay the charge referred to in Paragraph 1 of the TNGebV [Regulation on fees in connection with telecommunications numbers], read in conjunction with point B 1 of the Annex to that paragraph, in order to obtain telephone numbers and gain entry into the local network voice telephony services market, whereas Deutsche Telekom has a large stock of numbers available to it which enables it to operate on that market and for which it did not pay any charge.

Deutsche Telekom and its competitors are therefore clearly not treated in the same manner in terms of access to that market.

The fact that Deutsche Telekom has to pay the charge to obtain new numbers does not in any way change that finding which relates to the access of operators to the market.

The German Government submits that the fact that Deutsche Telekom did not pay a charge for the stock of telephone numbers at its disposal is justified by the fact that that undertaking must take on universal service tasks and must also ensure that the pensions of the staff it has taken over are paid.

In that regard, it must be noted that the German Government has not submitted any figures in support of its contention that the free allocation of that stock constitutes compensation for the charges borne by Deutsche Telekom in respect of its universal service obligations or because of the payment of the pensions of the staff it has taken over. As the Court has held previously, to the extent that Article 11(2) of Directive 97/13 introduces a derogation to the general rule set out in Article 11(1), it must be interpreted restrictively (see Joined Cases C-292/01 and C-293/01 *Albacorn and Infostrada* [2003] ECR I-9449, paragraphs 33 and 34). Consequently, justifications based on Article 11(2) cannot be put forward in a purely general manner.

Subject to an explanation which would justify the difference in treatment between operators, it must be held that the requirement to pay a charge for the allocation of telephone numbers, such as that imposed on new operators by the legislation at issue in the main proceedings, which is the precondition of entry of those operators into the local network voice telephony services market, even though the undertaking which succeeded the former monopoly may operate on that market by having a large stock of numbers available to it free of charge, constitutes discrimination against those new operators contrary to Article 11(2) of Directive 97/13.

Even if the German Government managed to show the allegedly non-discriminatory nature of the stock of telephone numbers available to Deutsche Telekom, there would remain to determine whether, in accordance with the third condition set out in Article 11(2), the payment of the charge for the allocation of numbers takes into account the need to foster the development of innovative services and competition.

In that regard, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 83).

Clearly, in that regard the undertaking in a dominant position, namely Deutsche Telekom, did not pay any charge for the allocation of a very large quantity of telephone numbers and that undertaking is required to pay a charge only for the allocation of new numbers, whereas its competitors, the new operators, have to pay a charge upon allocation of the first number.

It is common ground that that charge, which is calculated on the basis of the economic value of the numbers allocated, constitutes a considerable burden on telecommunications undertakings. In the case of new operators, that burden is imposed on their budget right from the initial stage of setting up in the local network sector.

It follows that new operators are not placed on an equal footing with the undertaking in a dominant position in respect of obtaining telephone numbers and that competition on the local network voice telephony services market is therefore distorted

Instead of making a significant contribution to the entry of new operators into the market, as stated in recital 5 in the preamble to Directive 97/13 (see *Albacom and Infostrada*, cited above, paragraph 35), by lessening disparities in relation to competition between the undertaking in a dominant position and new operators on the telecommunications market, legislation such as that in the main proceedings has the effect of maintaining those disparities. It constitutes a barrier to entry of new operators into that market and therefore acts as a brake on the development of competition and the fostering of innovative services, contrary to the third condition in Article 11(2) of Directive 97/13.

The answer to the first question must therefore be that Article 11(2) of Directive 97/13 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that a new operator on the telecommunications market is required to pay a charge in respect of the allocation of telephone numbers taking account of their economic value, even though a telecommunications undertaking having a dominant position on the same market took over free of charge the very large stock of numbers which were available to its predecessor, the former monopoly, and national law precludes retrospective payment of such a charge in respect of that stock.

**Joined cases C-327/03 *Bundesrepublik Deutschland v ISIS Multimedia Net* and C-328/03 *Bundesrepublik Deutschland v Firma O2 (Germany)* [2005] ECR I-8877, paras. 21, 23-25, 27, 29-32, 35-39 and 42-46**

Consequently, the question referred must be understood as seeking to ascertain whether Articles 6 and 11 of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)], read in conjunction with Articles 22 and 25 thereof, preclude a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services and then the holder of a general authorisation, to pay a pecuniary charge such as the charge in the main proceedings, corresponding to the amount previously demanded for the exclusive right, for one

year from the final date laid down for transposition of that directive into national law, namely 31 December 1998.

Pursuant to Article 25 of Directive 97/13, Articles 6 and 11 had to be implemented, like all provisions of that directive, not later than 31 December 1997.

Article 22 of Directive 97/13 contains, however, the derogating provisions applicable to the authorisations existing on the date of entry into force of that directive, under which those authorisations had to be brought into line with the latter before 1 January 1999, in other words not later than one year after the date laid down in Article 25.

The question therefore arises whether Article 22 of Directive 97/13 allows, by way of derogation and for one year only, the continuation of a charge such as the charge in the main proceedings as regards the operator to which an exclusive right had been granted before the entry into force of that directive.

Article 22 allows not only, in subparagraph 1, an additional period of one year, expiring on 31 December 1998, to bring authorisations existing on the date of entry into force of Directive 97/13 into line with its provisions, but in addition provides in subparagraph 2 thereof, that the validity of terms linked to existing authorisations may be extended, without prejudice, however, to those giving special or exclusive rights and provided that that extension of validity does not affect the rights of other undertakings under Community law. Article 22(3) concerns obligations in the authorisations existing on the date of entry into force of that directive. That provision, which applies without prejudice to the provisions in Article 22(2), provides that the obligations referred to must be brought into line with that directive by 1 January 1999, unless the Member State concerned has, upon request, been granted a deferment of that date by the Commission.

Article 22 of Directive 97/13 does not therefore deal explicitly with the charges applicable to telecommunications undertakings which are holders of authorisations, be they general authorisations or individual licences. Only Articles 6 and 11 of that directive expressly address that issue.

Before determining whether Article 22 may none the less be applied to charges such as the charge at issue in the main proceedings, it is necessary to interpret that article by reference not only to its wording but also to its objective and scheme in the context of Directive 97/13 taken as a whole.

In that regard, recital 26 in the preamble to that directive serves to clarify the objective of Article 22. The Community legislature stated in that recital that certain telecommunications licences have been granted by the Member States for periods which go beyond 1 January 1999. In order to avoid claims for compensation, it was considered necessary to allow the Member States to extend the validity of certain conditions of those licences, in so far as they do not confer special or exclusive rights. As regards those rights, without prejudice to authorisations granted by the Commission, they must be withdrawn in particular pursuant to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10).

The objective of Article 22 of Directive 97/13 is therefore to avoid litigation, by making it possible for contractual relationships entered into between those States and telecommunications undertakings before the entry into force of that directive to continue beyond 1 January 1999, while granting the Member States a period only until that date in order to adapt the content of the contracts in question to the provisions of that directive.

The purpose of Article 22 of Directive 97/13, thus clarified in the light of recital 26, therefore appears to have nothing to do with the continuation of a charge connected with a former exclusive right.

Analysis of the precise wording of that article supports that finding.

First, so far as concerns a Member State which has not obtained an authorisation from the Commission to maintain special or exclusive telecommunications rights, Article 22(2) of Directive 97/13 precludes the continuation of conditions giving such rights beyond 31 December 1997. As the Advocate General has pointed out in paragraph 37 of his Opinion, if an exclusive right is withdrawn, that withdrawal must generally affect the application of the pecuniary charge which is the consideration for it.

Secondly, the actual wording of Article 22(3) of Directive 97/13 makes it clear that that paragraph applies without prejudice to the provisions of Article 22(2). Since that subparagraph excludes the terms giving special or exclusive rights, Article 22(3) cannot refer to obligations laid down in such terms, so that it cannot be understood as allowing them to continue until 31 December 1998.

Consequently, it must be considered that an obligation taking the form of a charge linked to a former exclusive right does not come within the scope of the obligations referred to in Article 22(3) of Directive 97/13 and such a charge cannot be continued beyond 31 December 1997 pursuant to Article 25 of that directive.

In that respect, it should be pointed out that it is for the national court to determine whether the charge at issue in the main proceedings, which it is not denied is based on Article 188 of the Codice Postale, is linked to the exclusive right relating to the public telecommunications service granted to Telecom Italia before the entry into force of Directive 97/13.

Assuming that a charge such as the charge at issue in the main proceedings is not linked to an exclusive right granted before the entry into force of Directive 97/13, it must be examined whether such a charge constitutes an obligation within the meaning of Article 22(3) of that directive, eligible for the derogation laid down in that provision.

That analysis cannot, however, be accepted. First, according to the scheme of Article 22(2) and (3), and the use of the word 'terms', in particular in Articles 3, 4 and 8 of Directive 97/13 read in conjunction with the annex thereto, in order to describe the conditions which may be attached to authorisations, that word covers the notion of 'obligations' within the meaning of Article 22(3) of that directive. The conditions which may be attached to authorisations as set out in the annex to that directive cover

many obligations, including the condition in point 4.3 of that annex, relating to environmental and town and country planning requirements.

Secondly, only Articles 6 and 11 of Directive 97/13 deal with the charges applicable to undertakings which hold authorisations in the telecommunications services sector (see, to that effect, *Albacom and Infostrada*, cited above, paragraph 26). As to individual licences, Article 11(1) of that directive provides that the fees imposed by the Member States on undertakings which hold those licences seek only to cover the administration costs generated by the work involved in implementing those licences (*Albacom and Infostrada*, paragraph 25, and Joined Cases C-392/04 and C-422/04 *i-21 Germany* [2006] ECR I-8559, paragraph 28). The same consideration applies to the fees imposed by the Member States for general authorisations pursuant to Article 6 of Directive 97/13, which provides in addition for only one other form of financial contribution, namely contributions to the provision of universal service.

Accordingly, the notion of ‘conditions attached to authorisations’ within the meaning of Directive 97/13 covers different rights and obligations without, however, covering charges imposed on telecommunications undertakings which hold authorisations.

It follows that the word ‘obligations’ within the meaning of Article 22(3) of Directive 97/13 does not cover a pecuniary charge, such as the charge at issue in the main proceedings, which is imposed on a telecommunications undertaking without any link to the conditions of exercise of the authorisation granted to it, for the sole purpose of assisting financially the Member State concerned.

**Case C-296/06 *Telecom Italia SpA* [2008] ECR I-801, paras. 20, 24-36, 38, 39, 41-44**

#### 2.2.12. Interconnection/ex-ante regulation for SMP operators

The first paragraph of Article 1 of the directive [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)] indicates that the aim of the directive is, inter alia, to ensure interconnection of telecommunications networks, the interoperability of services and provision of a universal service in an environment of open and competitive markets.

As stated in recital 5, the directive relies for the attainment of its objectives primarily on commercial negotiations between the operators providing telecommunications services.

None the less, it is also clear from that recital, as it is from recital 12, that the directive permits Member States to limit the freedom of those operators to decide whether to enter into interconnection agreements in order to ensure the adequacy of those agreements.

On the other hand, as stated in recital 2, the directive merely puts in place the general framework within which its objective must be pursued, without seeking to achieve complete harmonisation.

It is in light of those considerations that Articles 4(2) and 9(2) of the directive must be interpreted.

As regards Article 4(2), it is clear from its wording that it merely imposes obligations on operators having significant market power.

However, the fact that such operators are required under Article 4(2) of the directive to satisfy only reasonable requests for interconnection does not mean that Member States are precluded under that provision from permitting their national regulatory authorities to impose ex ante on those operators conditions or obligations with regard to access.

Article 4(2) of the directive cannot therefore be construed as precluding a Member State from adopting provisions authorising a national regulatory authority to require an operator having significant power on the market to provide access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.

Article 9(2) permits the national regulatory authorities to lay down ex ante conditions in the areas set out in Part 1 of Annex VII to the directive and to encourage inclusion in the interconnection agreements of the matters mentioned in Part 2 of that annex.

It cannot be inferred from the wording of that provision that it is only in the areas set out in Part 1 of Annex VII to the directive that the Member States may authorise their national regulatory authorities to lay down ex ante conditions or obligations.

Moreover, it would not be compatible with the subject-matter and structure of the directive, as described in paragraphs 26 to 29 of this judgment, to preclude the Member States from authorising their national regulatory authorities to lay down ex ante conditions or obligations relating to matters referred to in Part 2 of Annex VII to the directive, even when such authorisation appears necessary in order to facilitate the introduction of competition and to further the interests of users.

In light of all those considerations it should be stated in reply to the question referred for a preliminary ruling that Articles 4(2) and 9(2) of the directive must be interpreted as not precluding the Member States from authorising national regulatory authorities to impose on an operator having significant power on the market the ex ante obligation to provide access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.

*Case C-79/00 Telefónica de España v. Administración General del Estado* [2001]  
ECR I-10075, paras. 26 -37

#### 2.2.13. Interconnection/powers of the NRA to intervene on its own initiative

[...] as stated by the Advocate General in paragraphs 35 to 37 of his Opinion, it is clear from Article 9(3) of the Directive [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability

through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)], as well as the fifth recital in its preamble, that the national regulatory authorities must be empowered to intervene at any moment of the negotiations leading up to an interconnection agreement. The Community legislature clearly envisaged that the power to intervene must be distinct from the power to require changes to interconnection agreements already concluded.

The national legislation invoked by the Belgian Government, however, confers on the Institute either very general supervisory powers, which cannot be regarded as adequate implementation of a specific power to intervene in commercial negotiations, or specific powers to intervene in contexts which do not fully reflect those envisaged by Article 9(3) of the Directive.

**Case C-221/01 *Commission v. Belgium* [2002] ECR I-7835, paras. 33 and 34**

#### 2.2.14. Interconnection/cost accounting

The Commission, in its first complaint, states that, contrary to the Belgian authorities' contention during the pre-litigation procedure, the national legislation does not correctly implement the second subparagraph of Article 7(5) of the Directive [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)], since that law does not contain any mechanism for monitoring compliance. According to the Commission, under the last two sentences of that provision, compliance with the cost accounting system must be verified and a statement concerning compliance must be published annually. Those obligations do not, however, appear in the Belgian legislation.

In its rejoinder, the Belgian Government admits that, in the national legislation, there is no system for statements concerning compliance which meet the requirements of Article 7(5) of the Directive.

In those circumstances, the Commission's first complaint must be held to be well founded.

**Case C-221/01 *Commission v. Belgium* [2002] ECR I-7835, paras. 26-28**

Lastly, the Luxembourg Government contends that the Commission has not established that the Grand Duchy of Luxembourg disregarded its obligations of verification of the compliance of the cost accounting system and the publication of statements of compliance, as provided for by Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32)] and Directive 98/10 [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)]. In fact, the ILT [a

télécommunications regulatory authority called the ‘Institut luxembourgeois des télécommunications’) and the ILR [ILT subsequently became the ‘Institut luxembourgeois de régulation’] have approved the EPT’s [the Entreprise des Postes et Télécommunications] reference interconnection offers for each year since 1998. That approval comprises, inter alia, verification by the ILR and the ILT of the EPT’s compliance with its obligation of cost orientation for tariffs. Accordingly, it follows that since the EPT’s reference interconnection offers have always been the subject of regular approvals and publications, including in 1998 and 1999, the Commission cannot criticise the Luxembourg authorities for having failed to fulfil their obligations under Article 7(5) of Directive 97/33 and Article 18(1) and (2) of Directive 98/10.

That argument must also be rejected. The Court notes that compliance with the principles of transparency and cost orientation for tariffs does not automatically entail compliance with the cost accounting system and accounting separation in relation to interconnection. Accordingly, the Luxembourg Government’s assertion, even if it were well founded, cannot lead to the conclusion that the obligations of verification and publication as required by the abovementioned provisions of those directives have been complied with in this case.

The Court accordingly finds that, by failing to comply with the obligations to verify the compliance of cost accounting systems by a competent independent body and to publish a statement of compliance for the years 1998 and 1999, in accordance with Article 7(5) of Directive 97/33/EC [...] the Grand Duchy of Luxembourg has failed to fulfil its obligations under those provisions.

**Case C-33/04 *Commission v. Luxembourg* [2005] ECR I-10629 , paras 87-88 and 92**

According to the referring court, the obligation to contribute to the costs of the local loop falls on the interconnected network operator (carrier) chosen by the subscriber by direct selection or by preselection. That obligation can be seen however as compensation for the deficit arising from the costs of provision of the local loop on the part of Deutsche Telekom, the market-dominant subscriber network operator, and not as consideration for a service provided by Deutsche Telekom to the interconnected network operator.

The purpose therefore of the connection charge at issue in the main proceedings is to provide additional remuneration in the form of a contribution to the costs of providing the local loop which are not covered by ‘customer’ charges. The charge is payable solely by the operators of networks which have concluded an interconnection agreement with Deutsche Telekom concerning carrier direct selection or preselection services on the local networks.

It is clear from Article 12(7) of Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ 1997 L 199, p. 32), as amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 (OJ 1998 L 268, p. 37) (‘Directive 97/33’)] that national regulatory authorities are to ensure that pricing for interconnection related to the provision of voice telephony services, which allow the subscriber to choose those

services by means of preselection, with a facility to override any preselected choice on a call-by-call basis by dialling a short prefix, is cost-oriented and that direct charges do not act as a disincentive to the consumer for the use of this facility.

It follows that the charge is within the scope of Article 12(7) of Directive 97/33 and must therefore be subject to the same pricing conditions as the interconnection charge *stricto sensu*, namely with due regard to the principle of the cost orientation of tariffs.

That principle, laid down in Article 7(2) of Directive 97/33, requires that charges be derived from actual costs.

Consequently, it is clear that Article 12(7) of Directive 97/33 does not allow a national regulatory authority to approve a connection charge the rate of which is not cost-oriented, when it has the same characteristics as an interconnection charge and is levied as a supplement to such a charge.

It is evident, first, that the existence of a connection charge such as that at issue in the main proceedings makes it possible in fact for the deficit of the market-dominant subscriber network operator to be funded by the subscribers of the other operators of interconnected networks and, secondly, that such funding, which is separate from any funding of universal service obligations, is contrary to the principle of free competition.

Contrary to what is contended by Deutsche Telekom, it is not obvious that the charge serves to prevent distortions of competition between operators which have invested in a telecommunications network and other operators which are new entrants to the local market. It is not disputed that the effect of the connection charge at issue in the main proceedings is only to protect the market-dominant subscriber network operator by enabling it to maintain a cost for the calls of its own subscribers which is below the actual cost and, accordingly, to fund its own deficit.

Moreover, although Article 4c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) ('Directive 90/388')] does not lay down a period within which the obligation to rebalance tariffs must be fulfilled, the fact remains that several elements of Directive 96/19 indicate that the rebalancing was to be carried out at a sustained rate in order to facilitate the opening of the telecommunications market to competition. Indeed, it is clear from recital 5 in the preamble to Directive 96/19 in conjunction with recital 20 therein, and from Article 4c of Directive 90/388, that the Member States were bound to bring an end to restrictions on rebalancing as soon as possible after the entry into force of Directive 96/19, and at the latest by 1 January 1998 (see Case C-500/01 *Commission v Spain* [2004] ECR I-583, paragraph 32). Failing completion of that rebalancing before 1 January 1998, the Member States were bound to send a report to the Commission on their plans for the phasing-out of the remaining tariff imbalances, that report to contain a detailed timetable for implementation of those plans. That phase was to be completed before 1 January 2000.

However, it is clear that Paragraph 43(6) of the TKG 1996 [Law on telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl. 1996 I, p. 1120; the 'TKG 1996')], in the version taking effect on 1 December 2002, comes after 1 January 2000, the final date for completion of that tariff rebalancing, while the Federal Republic of Germany has not submitted any rebalancing plan to the Commission. In any event, a provision such as that in the fourth sentence of Paragraph 43(6) does not encourage the subscriber network operator in receipt of the connection charge to take steps to eliminate the deficit incurred by adjusting its rates.

It follows that Directive 90/388 does not allow a national regulatory authority to approve the levy, by the market-dominant subscriber network operator, of a connection charge which is additional to the interconnection charge for the year 2003.

**Joined Cases C-152/07 *Arcor AG&Co. KG*, C-153/07 *Communication Services TELE2 GmbH* and C-154/07 *Firma 01051 Telekom GmbH*, [2008] ECR I-5959, paras. 18-20, 22-24, 28-32**

#### 2.2.15. Interconnection/number portability

*The Commission points out that in France there are no services enabling users to keep non-geographical numbers, irrespective of the organisation providing the services, contrary to Article 12(5) of Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32) as amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection (OJ 1998 L 268 p. 37)].*

*As regards the portability of non-geographical numbers providing access to shared cost and shared revenue services, the French Government notes that standard amendments to the interconnection agreements relating to portability between these two groups of numbers were finalised in January 2002 and December 2002 respectively. According to the French Government, the legal, technical and operating conditions for implementing portability of these non-geographical numbers have therefore been met since December 2002.*

*It should be pointed out in this respect that, according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-446/01 *Commission v Spain* [2003] ECR I-6053, paragraph 15, and Case C-255/03 *Commission v Belgium*, paragraph 12, not reported).*

*However, in its argument, the French Government acknowledges that portability of non-geographical numbers enabling access to shared cost and shared revenue services was not available at the end of the period laid down in the reasoned opinion, namely 30 June 2001.*

*As regards the portability of non-geographical numbers enabling access to free call services, the French Government notes that an initial standard amendment to the interconnection agreements on the portability of such numbers was completed in April 2001, and that negotiations between France Télécom and the alternative operators began in May 2001, with an initial agreement being reached on 1 July 2001.*

*It is important to note in this respect that, as the Commission rightly points out, under Article 12(5) of Directive 97/33, the number portability facility must allow end-users to request the retention of their number(s), independent of the organisation providing service.*

*However, without it being necessary to determine whether the fact that an agreement with an operator had been finalised within the period laid down in the reasoned opinion also implies that the necessary technical preparations for number portability had been completed, it must be acknowledged that upon expiry of the period, the opportunity to benefit from number portability enabling access to free call services was not available to all end-users, irrespective of the organisation providing service.*

*The Commission's action must therefore be upheld.*

*Accordingly it must be held that, by failing to ensure that portability of non-geographical numbers was available on 1 January 2000 at the latest, as required by Article 12(5) of Directive 97/33, the French Republic has failed to fulfil its obligations under this Directive.*

**Case C-113/03 *Commission v. France*, 9 September 2004, paras 11-19  
(not reported), OJ C 262, 23.10.2004, p. 10**

#### 2.2.16. Interconnection/publication of information

[...] as stated by the Advocate General in paragraphs 49 to 53 of his Opinion, if the information in question - namely, in the context of this complaint [Articles 9(2) and 10], the general conditions and essential requirements set down in advance by the national regulatory authority - is itself published in the national Official Gazette of the Member State concerned, that procedure constitutes publication for the purposes of Article 14(1) of the Directive [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)].

In that regard, it should be pointed out that Article 14(1) of the Directive gives no guidance as to the mode of publication envisaged for the information defined in Article 12(4) [i.e. the main elements of the national numbering plans]. In those circumstances, in the modern telecommunications sector, publication via the internet can be considered as appropriate for the purposes of Article 14(1).

Nevertheless, that provision requires that the manner in which the information is published be referred to in the national Official Gazette of the Member State

concerned. It is not clear from the Belgian Government's statements, according to which 'reference' to that information is published in the *Moniteur belge*, that the manner of publishing that information is clearly specified in the Official Gazette of the Kingdom of Belgium.

**Case C-221/01 *Commission v. Belgium*, [2002] ECR I-7835, paras. 39, 44 and 45**

#### 2.2.17. Universal Service funding schemes

The first head of complaint thus concerns the question whether, in 1997, it was 'necessary' to put in place a mechanism for sharing out the net cost of universal service provision, that necessity being the condition for cost sharing laid down by Article 4c of Directive 90/388 [Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13)].

In this connection it should be emphasised, first of all, that, as is clear from the fifth recital in the preamble to Directive 96/19 [Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13)], the purpose of extending until 1 January 1998 the monopoly of the established service providers in fixed voice telephone services was to protect their financial stability and to enable them to provide a universal service over the fixed telephone network.

Lastly, it should be observed that the Commission submits that competition in the French telecommunications market in 1997 following the creation of the mobile telephone market was not such as to make it necessary for France Télécom to implement a system for sharing out the financing of the net cost of its universal service. In making that submission the Commission refers to the very fact that France Télécom enjoyed at the time an almost complete monopoly in fixed voice telephony.

That being so, it must be held that the first head of complaint formulated by the Commission and developed in its reply is well founded.

**Case C-146/00 *Commission v. France* [2001] ECR I-9767, paras. 25-26, 28 and 31**

In its application, the Commission claims that Belgian law fails to comply with the Directive [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)] and makes the following three complaints:

-First, preferential tariffs are granted to some daily newspapers and certain weekly publications as well as to the press agency Belga. That goes beyond what is allowed under Annex I to the Directive, which limits the special measures financed as part of the universal service to 'customers with disabilities or with special social needs'.

-Second, the method for calculating the contributions of operators to the financing of the net cost of the universal service is incomplete and does not fulfil the obligations of transparency defined in Article 5(1) of the Directive. More precisely, the Kingdom of Belgium has not adopted or published, or in any event notified to the Commission, the measure specifying that method of calculation.

-Third, the method for calculating the cost of the universal service, which is currently described in general terms by the Law of 21 March 1991, as amended, is incorrect in so far as it fails to take into account the 'non-material' benefits connected with the provision of the universal service and therefore does not comply with Article 5(4) of the Directive. Furthermore, it fails to take into account the principles for calculation set out in Annex III to the Directive as regards the concept of avoidable net cost, the taking into account of forward-looking, not historical, costs and revenues and the taking into account of the direct and indirect revenues inherent in the provision of each of the services financed as part of the universal service.

In this respect, it should be pointed out that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-316/96 *Commission v Italy* [1997] ECR I-7231, paragraph 14).

In the present case, the Royal Decree adapting Articles 1 and 4 of Annex 2 to the Law of 21 March 1991, which is relied on by the Belgian Government, was adopted on 23 December 1999 and the administrative circular clarifying the concept of turnover to be used to calculate the contribution of operators to the net cost of the universal service, which is also relied on, was adopted on 31 January 2000, whereas the period laid down by the Commission in the reasoned opinion expired on 9 May 1999. Accordingly, even if those measures correctly implemented the Directive, they could not be taken into account in the context of the present action.

It must therefore be declared that, by failing to bring into force within the prescribed period the laws, regulations and administrative measures necessary to comply with Article 5 of the Directive, in conjunction with Annexes I and III thereto, the Kingdom of Belgium has failed to fulfil its obligations under the Directive.

**Case C-384/99 *Commission v. Belgium* [2000] ECR I-10633, paras. 11 and 16-18**

It is common ground that the French Republic included in the formula for calculating component C1 the cost of all residential customers, including, therefore, profitable accounts. On this point the French Government merely makes the general argument that it was impossible for it to distinguish between customers in accordance with the criteria set out in Annex III of Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199 p. 32)]. It must be concluded, therefore, that the French Republic included in the cost of universal service provision costs which did not satisfy the criteria set out in the annex.

[...] it must be observed that Article 5(1) of Directive 97/33 provides that, when establishing a mechanism for sharing out the net cost of the universal service obligations, Member States must take due account of the principles of transparency in setting the contributions to be made.

Since the reference values chosen will have an impact on the amount of any contribution demanded of new market entrants, it is important that those values are set in accordance with objective criteria and that like is compared with like so as to ensure transparency; this will enable new entrants to calculate their probable costs and income. Any factor that makes that calculation more difficult is likely to discourage them from entering the market.

Whilst international comparison may, as the Commission acknowledges, provide an adequate method of calculating the net cost of the various components of universal service, given the differences between the Member States, the results of any such comparison must be considered with caution, particularly where services which are optional in some of the countries used for reference are not optional services in the Member State for which the comparison is being made. The method cannot, therefore, be used to calculate the net cost of universal service provision unless it is first refined by specifying the range of services included in the basic line rental charge used for reference and attempting to recalculate, on the basis of that list of services, the cost of a matching line rental in the various countries concerned so as to arrive at a range of comparable charges.

Article 5(3) of Directive 97/33 provides that the net cost of universal service provision is to be calculated in accordance with Annex III of that directive and thus only those costs that are a direct consequence of the provision of universal service may be taken into account. Establishing a level playing field for telecommunications providers requires an objective and transparent costs structure. It is therefore not permissible under Directive 97/33 to ascribe flat-rate or imprecise values to the components of the net cost of universal service provision, rather than carrying out specific calculations. [...]

[...] it may be remembered, first, that Annex III to Directive 97/33 states that revenue must be taken into account in calculating the net cost of universal service provision.

Secondly, Article 6(2) and (3) of Directive 98/10 [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)] provides that every service provider must assist in the creation of telephone directories by providing the relevant information, that is to say, information about those of its customers who do not object to being listed.

As the Commission has pointed out, that implies a principle that every service provider must maintain a list of its own customers who do not wish to be listed in the general directory and not disclose the names of those customers to the body which prepares the general telephone directory. Every service provider will, therefore, have its own ex-directory list, the maintenance of which falls within the scope of the

management of its own customer accounts, rather than within the scope of the universal service. The fact that customers of a new market entrant must pay to be included in the ex-directory list maintained by the new entrant has no bearing on the costs of or revenue derived from the creation of telephone directories by the established service providers themselves.

Accordingly, the French Government ought to have taken into account revenue derived from 'comfort' services and from ex-directory listing in calculating the net cost of universal service provision in order to identify unprofitable areas.

[...] it may be remembered, first, that Annex III to Directive 97/33 states that the costs and revenue items that are to be taken into account in calculating the net cost of universal service provision should be forward-looking.

It may be recalled [...] that Article 5(4) of Directive 97/33 requires the Member States, in calculating the net cost of universal service provision, to take into account the market benefit, if any, which accrues to an organisation that offers universal service.

Given that the report for 1997 does not fully satisfy the obligations imposed by the second subparagraph of Article 5(5) of Directive 97/33, it must be held that the sixth head of complaint formulated by the Commission is well founded.

**Case C-146/00 *Commission v. France* [2001] ECR I-9767, paras. 40, 48-50, 60, 66-69, 72, 76 and 81**

#### 2.2.18. Voice telephony/objectives

The aims of the directive [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)], as set out in the second subparagraph of Article 1(1) thereof, are to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price.

**Case C-411/02 *Commission v. Austria* [2004] ECR I-8155, para. 2**

#### 2.2.19. Voice telephony/cost accounting

Lastly, the Luxembourg Government contends that the Commission has not established that the Grand Duchy of Luxembourg disregarded its obligations of verification of the compliance of the cost accounting system and the publication of statements of compliance, as provided for by Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32)] and Directive 98/10 [Directive 98/10/EC of the European Parliament and

of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)]. In fact, the ILT [a télécommunications regulatory authority called the ‘Institut luxembourgeois des télécommunications’] and the ILR [ILT subsequently became the ‘Institut luxembourgeois de régulation’] have approved the EPT’s [the Entreprise des Postes et Télécommunications] reference interconnection offers for each year since 1998. That approval comprises, inter alia, verification by the ILR and the ILT of the EPT’s compliance with its obligation of cost orientation for tariffs. Accordingly, it follows that since the EPT’s reference interconnection offers have always been the subject of regular approvals and publications, including in 1998 and 1999, the Commission cannot criticise the Luxembourg authorities for having failed to fulfil their obligations under Article 7(5) of Directive 97/33 and Article 18(1) and (2) of Directive 98/10.

That argument must also be rejected. The Court notes that compliance with the principles of transparency and cost orientation for tariffs does not automatically entail compliance with the cost accounting system and accounting separation in relation to interconnection. Accordingly, the Luxembourg Government’s assertion, even if it were well founded, cannot lead to the conclusion that the obligations of verification and publication as required by the abovementioned provisions of those directives have been complied with in this case.

The Court accordingly finds that [...] by failing to apply correctly in practice the measures relating to verification of the compliance of the cost accounting system by the national regulatory authority or another competent body, independent of the telecommunications organisation and approved by that regulatory authority, for the year 2000, in accordance with the provisions of Article 18(1) and (2) of Directive 98/10, as maintained by Article 27 of Directive 2002/21 [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], read in conjunction with Article 16 of Directive 2002/22 [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51)], the Grand Duchy of Luxembourg has failed to fulfil its obligations under those provisions.

**Case C-33/04 *Commission v. Luxembourg*, [2005] ECR I-10629, paras 87-88 and 92**

#### 2.2.20. Voice telephony/directory services

By its first question the national court is essentially asking what are the data referred to in the words ‘relevant information’ in Article 6(3) of the Directive [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)].

It must first of all be noted that Article 6(3) of the Directive does not define the concept of ‘relevant information’ in regard to subscribers which entities allocating

telephone numbers are expected to provide to third parties. That concept must therefore be interpreted in light of its context and of the purpose of the Directive.

Thus, under the second paragraph of Article 1(1) of the Directive, the aims of the Directive are to ensure the availability throughout the Community of good quality fixed public telephone services and to define the set of services to which all users, including consumers, should have access in the context of universal service in the light of specific national conditions, at an affordable price and, pursuant to the title of the Directive, 'in a competitive environment'.

The Directive thus aims to ensure a balance between the specific interests of the supplier of the universal service and those of undertakings within the competitive sector, as well as those of users, including consumers.

With regard first of all to the universal service, it is important to recall that that service is defined in Article 2(2)(f) of the Directive as a defined minimum set of services of specified quality available to all users irrespective of their geographical location and, in the light of specific national conditions, at an affordable price.

As the Commission correctly submits, it is clear from the words '[i]n order to ensure provision of the services referred to in paragraph 2(b) and 2(c)', at the beginning of Article 6(3) of the Directive, that the Member States' obligation to ensure that entities allocating telephone numbers to subscribers respond to all reasonable enquiries about the provision of relevant information comes within the context of the supply of a universal service.

It is therefore necessary to consider the data necessary for securing the supply of such a service.

In that connection Article 6(2)(b) of the Directive provides only that directories must contain, in order to be available to users, all subscribers who have not expressed opposition to being listed, including fixed, mobile and personal numbers. As KPN has rightly pointed out, it follows that data other than those mentioned in that provision are not necessary in order to produce a telephone directory in the context of a universal service.

The question none the less arises whether such a limitation on the data in the context of the supply of information to the competitors of the supplier of the universal service meets the requirements of liberalisation of the telecommunications market which forms the backdrop to the Directive. OPTA and Denda express serious doubts as to that and argue that only a broad interpretation of the concept of the data to be provided is such as to ensure fair competition.

According to KPN, the Directive is not however intended to enable third parties to benefit from the endeavours of the supplier of the universal service, such as the costly compilation of the additional data, as those endeavours do not form part of its obligations in regard to the supply of the service in the strict sense. Any other interpretation of the Directive would lead to a distortion of competition between companies producing directories since one of them would be obliged to help its competitors yet they would not be under any obligation to reciprocate.

In that regard it is common ground that the Directive repeatedly mentions its purpose, which is to encourage the opening up of a competitive market in the telecommunications field. With regard more particularly to directories, the seventh recital to the Directive states that the 'provision of directory services is a competitive activity'. In addition, in so far as it provides for the making available to competing companies of certain subscriber-related information, Article 6(3) of the Directive corroborates that purpose.

In the Member State concerned the fact that there are companies compiling directories other than the supplier of the universal service, such as Denda and Topware, demonstrates that a competitive market in directories has in fact developed.

However it is not impossible that the refusal to provide the information in question in the main proceedings may influence the circumstances in which such a competitive market involving companies offering directories can develop. As to those circumstances, Article 6(3) of the Directive provides that they must be 'fair, cost oriented and non-discriminatory'. Therefore, if the supplier of the universal service complies with the requirements of that provision he is not bound also to provide all the additional information sought by competitors.

It follows that the refusal to make available to third parties data other than that listed in Article 6(2)(b) of the Directive is compatible with the liberalisation of the telecommunications market, which is one of the objectives of the Directive.

Finally, with regard to the specific interests of users, including those of consumers, it is primarily those persons who are supposed under the second paragraph of Article 1(1) of the Directive to benefit from the competitive conditions on the market in question. The seventh recital of the Directive states that users and consumers 'desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed, mobile and personal telephone numbers)', and Article 6(2)(b) of the Directive is worded analogously.

The counterpart of that need for information on the part of users is the right under Article 6(2)(a) of the Directive not only to appear in a directory but also to request the total or partial withholding of certain information appearing therein. Similarly as the Commission rightly pointed out, Article 6(1) of the Directive expressly refers to certain Community provisions on the protection of personal data and privacy.

Moreover, as the Court has held, albeit in another context, but which relates none the less to the application of Article 6(2) of the Directive, that provision embraces the principle that every service provider must maintain a list of its own customers who do not wish to be listed in the general directory and not disclose the names of those customers to the publisher of the general telephone directory (Case C-146/00 *Commission v France* [2001] ECR I-9767 paragraph 68).

Plainly, therefore, the protection of personal data and privacy is a factor of the first importance to be taken into account in determining the data that an operator is required to make available to a third-party competitor. In fact a broad approach requiring the indiscriminate provision of all the data at an operator's disposal, with the

exception, however, of those concerning subscribers who in no way wish to appear on a published list, is not reconcilable either with the protection of those data or with the privacy of the persons concerned.

Nor, consequently, does the account taken of the specific interests of the users of the services at issue, including consumers, militate in favour of a broad construction of the concept of 'relevant information'.

In light of all the foregoing considerations concerning the various interests at stake the words 'relevant information' in Article 6(3) of the Directive must be strictly interpreted. The entities allocating telephone numbers must therefore communicate to third parties only data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including post code, of subscribers, together with any telephone numbers allocated to them by the entity concerned.

In light of that, and as the Commission argues and the Advocate General notes at point 28 of his Opinion, there may be differences at national level in the demand among users of voice telephony services. Inasmuch as, by using the words 'relevant information', the directive does not seek complete harmonisation of all the criteria which may appear necessary to identify subscribers, the Member States retain competence for determining whether in a specific national context certain additional data ought to be made available to third parties.

The reply to the first question must therefore be that Article 6(3) of the Directive must be interpreted as meaning that the words 'relevant information' refer only to data relating to subscribers who have not expressly objected to being listed in a published directory and which are sufficient to enable users of a directory to identify the subscribers they are looking for. Those data include in principle the name and address, including postcode, of subscribers, together with any telephone numbers allocated to them by the entity concerned. However, it is open to the Member States to provide that other data are to be made available to users where, in light of specific national circumstances, they appear to be necessary in order to identify subscribers.

By its second question the national court is essentially asking which elements of the costs of compiling, updating and providing relevant information on subscribers may be included in the price of the supply of the data in the context of Article 6(3) of the Directive.

In that regard it is sufficient to state, as OPTA and Denda rightly point out, that the compilation of the basic data relating to subscribers, that is to say their names, addresses and telephone numbers, is inextricably linked to the telephony service and does not demand any particular effort on the part of the provider of the universal service.

As the Advocate General stated at point 49 of his Opinion, the costs relating to the compilation, or allocation, of those data, unlike the costs incurred in making them available to third parties, must in any event be borne by the supplier of a voice telephony service and are already included in the costs and revenue of such a service.

In those circumstances, passing the costs associated with compiling or allocating data on to persons requesting access to them would result in an excessive and unwarranted offset of the costs in question.

It follows that, when communicating those data to competing companies on the market for the provision of directories, only the additional costs associated with that communication may be invoiced by the supplier of the universal service but not the costs relating to the compilation of those data.

However, it would be otherwise in the case of additional data in respect of which the supplier of the universal service has himself had to bear the additional costs of compilation. In such a case, if the supplier of the universal service decides to make such data available to third parties, even though not bound by the directive to do so, there is no provision in the Directive to prevent those additional costs from being invoiced to the third parties, provided that those third parties are treated in a non-discriminatory manner.

The reply to the second question must therefore be that Article 6(3) of the Directive, in so far as it provides that the relevant information must be provided to third parties on terms which are fair, cost oriented and non-discriminatory, must be interpreted as meaning that:

- with regard to data such as the name and address of the persons and the telephone number allocated to them, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service;
- with regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data, provided that those third parties are treated in a non-discriminatory manner.

**Case C-109/03 *KPN Telecom BV* [2004] ECR I-11273, paras. 15-36 and 37-42**

#### 2.2.21. Voice telephony/itemised billing

Although Article 14(2) of the directive [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)] does not specifically indicate what information is required to appear on standard itemised bills, the directive lays down a minimum level of information which is dictated by the need to allow subscribers to verify and control the charges incurred in using the fixed public telephone network.

Yet, as the Commission has observed, the form of billing required by Paragraph 94(1) of the TKG [Austrian Federal Law on telecommunications], which only allows subscribers to deduce that they have made a certain number of calls costing a certain total amount within the different tariff bands during the period covered by the bill, does not allow subscribers to use the bill to verify and control their charges.

Without its being necessary to determine whether a standard itemised bill should take account of each of the factors determining the cost of each call, clearly, it cannot but be noted that, on the basis of the Austrian standard itemised bills, it is not possible to identify, within the different tariff bands, each call viewed individually and, consequently, to check that it was in fact made.

A billing system which shows only the number of calls, the total number of tariff units used and the corresponding total price does not therefore allow verification and control of the charges incurred in using the fixed public telephone network as required by Article 14(2) of the directive.

Nor is that finding contradicted either by the Austrian Government's argument that fixing, for the standard itemised bills, a higher level of detail than that required under Paragraph 94 of the TKG is to be ruled out since it would negate the option expressly provided for in Article 14(2) of the directive under which bills showing a higher level of detail may be issued, or by its argument that bills showing the level of detail required by the Commission would of necessity include information which would be in breach of legislation governing the protection of privacy and personal data.

Firstly, it must be pointed out that incorporating in standard itemised bills a higher level of detail than that required under Paragraph 94(1) of the TKG, in order to comply with Article 14(2) of the directive, would not have the effect of negating the option, expressly permitted by that article, of issuing bills showing a higher level of detail.

In fact, it is also possible to provide other levels of detail on the basis of which subscribers can obtain, as shown by the examples given by the Advocate General in paragraphs 50 and 51 of his Opinion, a higher level of additional detail in order to facilitate a yet greater control of their expenditure or to provide them with other information on the use of the telephone services. Furthermore, it cannot be excluded that free calls which, under the third subparagraph of Article 14(2) of the directive, are not shown on the itemised bill of the calling subscriber may be shown in a more detailed layout.

With regard to the assertion that bills showing the level of detail required by the Commission would of necessity include information which would be in breach of legislation governing the protection of privacy and personal data, it should be noted that the Austrian Government has failed entirely to support that assertion with detailed arguments which would allow the Court to assess whether it is well founded.

In those circumstances, it must be held that, by opting for billing which lists charges only according to the type of charge and is not sufficiently detailed to ensure effective verification and control by the consumer, the Republic of Austria has failed to fulfil its obligations under Article 14(2) of the directive.

**Case C-411/02 *Commission v. Austria* [2004] ECR I-8155, paras. 16-24**

### 2.2.22. TV signals

Forming as it does a part of the overall Community strategy of establishing the internal market for advanced television technologies, Directive 95/47 [Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51)] is designed to promote rapid development of large-format television services (16:9) and the introduction of high definition television (HDTV) in Europe. To that end, it contains provisions relating to the new market in conditional-access digital television services ('pay TV'), including provisions relating both to the obligations of conditional-access service operators and to the features of the equipment which they rent out or sell.

On the other hand, Directive 95/47 does not contain any provisions concerning detailed administrative rules for implementing the obligations incumbent on Member States under that directive. That finding does not, however, justify the conclusion that the Member States may not establish a prior authorisation procedure consisting of compulsory entry in a register together with the requirement of a prior technical report drawn up by the national authorities.

However, where they establish such an administrative procedure, Member States must at all times comply with the fundamental freedoms guaranteed by the Treaty.

**Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paras. 26-28**

### 2.2.23. Lack of transposition

In the first place, the Commission maintains that Article 11(5)(1) of the Telecommunicatiewet derogates from the general principle set out in Article 6(1) of Directive 97/66 [Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1)]. It stresses that for that national provision to be in conformity with that directive the general administrative measure envisaged should include an exhaustive list of information. Since no measure containing such a list was communicated to it, the Commission considers that Article 6 of Directive 97/66 was not completely transposed.

Since the Netherlands Government acknowledges that not all the provisions necessary for the transposition of Article 6(1) of Directive 97/66 have been adopted, the ground of complaint raised by the Commission must be regarded as well founded.

Secondly, the Commission submits that, although Article 11(5)(3) of the Telecommunicatiewet refers to implementing provisions, none of them have been communicated to it. Consequently, it is of the view that Article 6 of Directive 97/66 was not fully transposed.

The Netherlands authorities retort that, since those implementing provisions have not been adopted, they could not be communicated to the Commission.

None the less, it should be pointed out that the Netherlands Government does not dispute that, in light of the wording in force at that time of Article 11(5) of the Telecommunicatiewet, the adoption of the implementing provisions mentioned in paragraph 3 of that article was necessary in order to support a finding that Article 6 of Directive 97/66 had been fully transposed.

Given that, first, the Netherlands Government has acknowledged that, as at the expiry of the period laid down in the reasoned opinion, the implementing provisions at issue had not been communicated to the Commission and that, second, failure to adopt those provisions by that date cannot reasonably be relied on to justify that infringement, it must be concluded that the ground of complaint raised by the Commission is well founded.

It follows from the foregoing that the Commission is legally entitled to take the view that Article 6 of Directive 97/66 has not been fully transposed into Netherlands law on the ground that, on the one hand, Article 11(5)(1) of the Telecommunicatiewet refers to a list of information to be determined by a general administrative measure which was not communicated to it and that, second, the implementing provisions mentioned in paragraph 3 of Article 11(5) aforesaid were not communicated to it.

The Commission alleges that Article 9(a) of Directive 97/66 has not been transposed into Netherlands law with the result that that article has not been fully transposed.

Since there have in fact been no Netherlands provisions transposing Article 9(a) of Directive 97/66, as the Netherlands Government has moreover acknowledged, the Commission's ground of complaint alleging incomplete transposition of Article 9 aforesaid must be regarded as well founded.

It must therefore be held that, by incompletely transposing Article 6 of Directive 97/66, in that, first, Article 11(5)(1) of the Telecommunicatiewet refers to a general administrative measure which was not communicated to the Commission and in that, second, the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were not communicated to the Commission, and by incompletely transposing Article 9 of that directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

**Case C-350/02 *Commission v. Netherlands* [2004] ECR I-6213, paras. 33-42**

The Luxembourg Government does not deny that it failed to transpose the provisions of the Directive [Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1)] within the periods prescribed therein. It points out that transposition is at present under way and sets out the reasons for that delay.

Suffice it in this regard to note that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any

subsequent changes (see, *inter alia*, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7).

Likewise, it follows from settled case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal order in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, *inter alia*, Case C-286/01 *Commission v France* [2002] ECR I-5463, paragraph 13).

It must accordingly be held that, by failing, within the prescribed periods, to adopt the laws, regulations and administrative provisions necessary to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations thereunder.

**Case C-211/02 *Commission v. Luxembourg* [2003] ECR I-2429, paras. 5-8**

The French Government does not dispute that not all of the provisions of the Directive [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)] had been implemented by the expiry of the period laid down by the reasoned opinion. However, it submits that the implementation process is nearing completion.

It also claims that Articles 6(3) and 10(2) of the Directive were implemented by Articles 17 to 19 of Order No 2001-670 of 25 July 2001 on the adaptation to Community law of the Intellectual Property Code and of the Post and Telecommunications Code (JORF of 28 July 2001, p. 12132, corrigendum in JORF of 20 October 2001, p. 16564). The text of that order was notified to the Commission by letters of 1 August and 3 October 2001.

The French Government submits further that Articles 10(1) and 21 of the Directive have now been implemented by virtue of the adoption of Decree No 2002-36 of 8 January 2002 relating to certain standard clauses in contract documents attached to authorisations issued under Article L 33-1 of the Post and Telecommunications Code (JORF of 10 January 2002, p. 585) which was notified to the Commission on 31 January 2002.

With respect to Article 6(4) of the Directive, the French Government claims that that provision has not yet been implemented in French law because of the need to comply with consultation procedures. As regards Article 26 of the Directive, the French Government submits that it has decided to create a 'telephone mediation' organisational structure in order to settle disputes with customers. The process of establishing such a structure is still at the stage of consultation between all interested parties.

It must be pointed out that, in accordance with consistent case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid

down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-279/00 *Commission v Italy* [2002] ECR I-1425, paragraph 10).

In the present case, it is established that the Directive was not transposed within the period prescribed for that purpose by the reasoned opinion.

Furthermore, the Court has repeatedly held that a Member State may not plead provisions, practices or situations in its internal legal order in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-423/00 *Commission v Belgium* [2002] ECR I-593, paragraph 16).

It must therefore be held that, by failing to bring into force, within the prescribed period, all the laws, regulations and administrative provisions necessary to implement the Directive and, in particular, Articles 6(3) and (4), 10, 21 and 26 thereof, the French Republic has failed to fulfil its obligations under Article 32 of that directive.

**Case C-286/01 *Commission v. France* [2002] ECR I-5463, paras. 7-14**

The Netherlands Government accepts that its implementation of Directive 95/47 [Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51)] has been tardy and adds that it will be fully implemented in Netherlands law once the bill amending the Telecommunicatiewet (Telecommunications Law) has been passed by the Netherlands Parliament, which should happen in the near future.

However, it points out that, in practice, Directive 95/47 is already observed in the Netherlands and that existing national legislation, inter alia on patents and competition, applies a number of the provisions of that directive, with the result that its delayed implementation prejudices neither consumers nor operators of telecommunications networks and services.

It is, therefore, common ground that the Kingdom of the Netherlands has not fully implemented Directive 95/47 in its national legal order.

As regards the argument of the Netherlands Government that Directive 95/47 is already observed in the Netherlands in practice although it has not yet been fully implemented in Netherlands law, suffice it to observe that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty (see, in particular, Case C-159/99 *Commission v Italy* [2001] ECR I-4007, paragraph 32). This is all the more true of mere practices of economic operators.

As regards the argument of the Netherlands Government that the Netherlands legal order was already consistent with Directive 95/47, it is sufficient to note, without there being any need to rule on the question whether the national legislation in question actually implements Directive 95/47, that it is not disputed that that national

legislation was not communicated to the Commission, in breach of the requirements of Article 8 of Directive 95/47.

Accordingly, it must be held that by failing to bring into force and to communicate all of the laws, regulations and administrative provisions necessary to comply with Directive 95/47 the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

**Case C-254/00 *Commission v. Netherlands* [2001] ECR I-7567, paras. 4-9**

The French Government does not dispute its obligation to transpose the provisions of Directive 97/66 [Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1)] into national law and acknowledges its delay in transposing that directive. It points out that the transposition of Directive 97/66 requires a revision of the Code des postes et télécommunications, that the transposition process has been started and that it will reach its completion very shortly.

Since the directive was not transposed within the period laid down therein, the Commission's application must be considered to be well founded.

It must therefore be held that, by failing to bring into force within the prescribed period the national measures transposing Articles 4(2), 6(1), (3) and (4), 7, 8(2), (3), (4) and (6), 11(2) and 12 of Directive 97/66, the French Republic has failed to fulfil its obligations under Article 15 of that directive.

**Case C-151/00 *Commission v. France* [2001] ECR I-625, paras. 7-9**

In its defence the Italian Government does not deny that it has failed to adopt the implementing measures needed to comply with the Directive [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)].

It states, however, that a draft regulation was submitted to the Commission for information and to the Consiglio di Stato (Council of State) for an opinion. The Consiglio di Stato considered it expedient, before giving its opinion, to obtain the views of the Autorità per le Garanzie nelle Comunicazioni (Communications Authority) and the Autorità Garante della Concorrenza e del Mercato (Competition Authority).

In that regard, it must be pointed out that, in accordance with settled case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, *inter alia*, Case C-470/98 *Commission v Greece* [2000] ECR I-4657, paragraph 11).

Since the Directive was not transposed within the time-limit laid down therein, the Commission's action must be considered well founded.

It must therefore be held that, by not adopting, within the time-limit laid down, the laws, regulations and administrative provisions necessary to comply with the Directive, the Italian Republic has failed to fulfil its obligations under the Directive.

**Case C-423/99 *Commission v. Italy* [2000] ECR I-11167, paras. 8-12**

In its defence, the Italian Government does not deny having failed to adopt the implementing measures necessary to comply with the Directive [Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (OJ 1997 L 295, p. 23)].

It points out, however, that a draft regulation has been sent to the Commission, for information, and that the opinion of the Italian Council of State has been sought. Before taking a view, the Council of State deemed it necessary to seek opinions from the *Autorità per le Garanzie nelle Comunicazioni* (Communications Authority) and the *Autorità Garante della Concorrenza e del Mercato* (Competition Authority).

In that regard, it must be pointed out that, according to settled case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-470/98 *Commission v Greece* [2000] ECR I-4657, paragraph 11).

Since the Directive has not been implemented within the prescribed period, the action brought by the Commission must be held to be well founded.

Consequently, it must be held that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with the Directive, the Italian Republic has failed to fulfil its obligations under that directive.

**Case C-422/99 *Commission v. Italy* [2000] ECR I-10651, paras. 8-12**

In its defence, the French Government does not deny that the domestic provisions necessary for the implementation of Directive 95/47 [Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51)] have not been adopted. It confines itself to confirming that the implementing procedures are in progress and that they should result in the definitive adoption of the legislative provisions described in its letter of 8 June 1999 in reply to the reasoned opinion, and also in the adoption of a series of measures of a regulatory nature. In any event, the French Government gives its assurance that it has made a very great effort to ensure that Directive 95/47 is transposed as soon as possible.

The French Government observes that the period of nine months prescribed in Article 8 of Directive 95/47 for its transposition by Member States was particularly short,

especially in the light of the fact that, pursuant to Article 7, that directive was to replace, by repealing it, Council Directive 92/38/EEC of 11 May 1992 on the adoption of standards for satellite broadcasting of television signals (OJ 1992 L 137, p. 17). That situation is not at all simple in terms of legal certainty and it makes the transposition of the directive into domestic law particularly complex. The Government recognises, however, that the brevity of the period within which Member States were to transpose the directive cannot validly justify its delay in adopting the national measures necessary for its transposition.

In that regard, the Court would point out, first, that, according to settled case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-470/98 *Commission v Greece* [2000] ECR I-4657, paragraph 11) and, second, that the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare within the period prescribed by the legislative provisions necessary for their implementation (see Case 301/81 *Commission v Belgium* [1983] ECR 467, paragraph 11).

Since, in the present case, Directive 95/47 was not transposed within the period laid down in that directive, the action brought by the Commission must be considered well founded.

Accordingly, it must be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Directive 95/47, the French Republic has failed to fulfil its obligations under that directive.

**Case C-319/99 *Commission v. France* [2000] ECR I-10439, paras. 8-12**

The Greek Government does not dispute the fact that the directive [Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)] has not been transposed into national law within the prescribed period. It explains that the principal cause of the delay was that, in its view, transposition of the directive was not feasible before the statutory framework relating to the telecommunications sector was enacted and that the measures necessary for transposition are in the process of being adopted.

According to the settled case-law of the Court (see, for example, the judgment in Case C-147/94 *Commission v Spain* [1995] ECR I-1015, at paragraph 5), a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive.

It must therefore be held that, by omitting to bring into force within the period prescribed the laws, regulations or administrative provisions necessary to comply in full with the directive, the Hellenic Republic has failed to fulfil its obligations under the Treaty.

**Case C-259/94 *Commission v. Greece* [1995] ECR I-1947, paras. 4-6**

The Court has consistently held that in order to ensure that directives are fully applied in fact as well as in law, Member States must provide a precise legal framework in the field in question, by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know their rights and rely on them before the national courts (see, inter alia, Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 24).

Even supposing that the general conditions adopted and published by the postal and telecommunications undertaking have a content which complies with the Directive [Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)], which the Commission doubts, it is apparent that the Grand Duchy of Luxembourg has not adopted within the prescribed period the provisions needed to oblige that undertaking to comply with the requirements of the Directive and to put individuals in a position to know the full extent of their rights under the Directive and rely on them, if necessary, before the national courts.

In those circumstances, it must be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 15 of the Directive.

**Case C-220/94 *Commission v. Luxembourg* [1995] ECR I-1589, paras. 10-12**

#### 2.2.24. Unbundling regulation/objectives

Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) should, according to its second recital, complement the existing provisions of Community law guaranteeing universal service and affordable access for all citizens of the European Union by enhancing competition, ensuring economic efficiency and bringing maximum benefit to users.

According to the seventh recital in the preamble to that regulation, unbundled access to the local loop allows new entrants to compete with notified operators in offering high bit-rate data transmission services for continuous internet access and for multimedia applications based on digital subscriber line (DSL) technology as well as voice telephony services.

**Case C-500/01 *Commission v. Spain* [2004] ECR I-583, paras. 6-7**

#### 2.2.25. Unbundling regulation/Cost orientation

Without expressly seeking a definition of the principle that rates for unbundled access to the local loop and related facilities are to be set on the basis of cost-orientation, as laid down in Article 3(3) of Regulation No 2887/2000 [Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on

unbundled access to the local loop (OJ 2000 L 336, p. 4)], the national court invites the Court of Justice to adopt a position on the costs which have to be taken into consideration in order to orientate the rates for unbundled access to the local loop (Question 2), on the calculation basis for those costs (Question 3(a)), and on the proof of those costs (Question 3(b) and (c)).

Before answering those questions, it should be noted that Regulation No 2887/2000 does not define the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

It follows that the pricing principle laid down in Article 3(3) of Regulation No 2887/2000 does not follow the rules of an open competitive market driven by the rules of supply and demand. On the contrary, that principle imposes the obligation on notified operators to set their rates for access to the local loop on the basis of cost-orientation for a given period and with the aim of enabling the market concerned to be opened up to competition gradually.

Second, it is apparent from recital 11 in the preamble to Regulation No 2887/2000, read in conjunction with Article 3(3) thereof, that, for unbundled access to the local loop, rates must be set on the basis of cost-orientation, in the sense that the rules on rates must enable the provider of the local loop, in this case the notified operator, such as Deutsche Telekom, to be able to cover the costs already incurred in relation to the provision of that loop.

It thus follows from those provisions that the pricing rule laid down in Article 3(3) of Regulation No 2887/2000 requires that, when setting rates for unbundled access to the local loop on the basis of cost-orientation, the notified operator must take account of quantitative elements which are in line with the costs which he incurred in putting that loop in place.

Third, and as is also apparent from recital 11 in the preamble to Regulation No 2887/2000, the notified operator must derive a reasonable return from the setting of rates for unbundled access to its local loop in order to ensure the long-term development and upgrade of local access infrastructure.

Therefore, in the context of unbundled access to the local loop, the pricing principle laid down in Article 3(3) of Regulation No 2887/2000 allows the notified operator to charge other telecommunications operators suitable fees to enable it, at least, to ensure the proper functioning of the local infrastructures in the case of unbundled access to them.

It follows from the above findings that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000, is to be understood as the obligation on notified operators, in the course of the gradual opening of the telecommunications market to competition, to set those rates in accordance with the costs incurred in putting in place the local loop, while deriving a reasonable return from the setting of those rates in order to ensure the long-term development and upgrade of existing telecommunications infrastructures.

It follows from those provisions that, in providing unbundled access to its local loop to other telecommunications operators, the notified operator reflects in particular in the proposed tariffs the costs relating to the investments made. Therefore, in fixing the tariffs for unbundled access to the local loop, account must be taken of the costs which the notified operator had to incur for the investments made in putting its local infrastructures in place.

The interest on the capital invested are costs to be taken into account to set rates for unbundled access to the local loop in accordance with the principle laid down in Article 3(3) of Regulation No 2887/2000. Those costs represent the revenue which would have been earned on that capital had it not been invested in the local loop.

The same is true of interest on loans, which represents, in reality, the cost of the debt incurred in connection with investments made in the initial implementation of the local loop.

As regards the depreciation of the fixed assets deployed for the construction of the local network, it should be noted that the taking into account of that depreciation makes it possible to catch the loss in real value of those assets and constitutes a cost for the notified operator.

In that regard, that depreciation relates to the investments made by the notified operator in the initial implementation of the local loop and, consequently, it falls within the operating costs which need to be taken into account in accordance with the pricing principle laid down in Article 3(3) of Regulation No 2887/2000.

It follows from all of the above considerations that the answer to Question 2 must be that the interest on the capital invested and the depreciation of the fixed assets deployed for the initial implementation of the local loop are among the costs to be taken into account in accordance with the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000.

The national court requests the Court to answer the question whether the calculation basis of costs which must be taken into account when setting rates for unbundled access to the local loop is the replacement value of the assets after the deduction for depreciation made prior to the time of valuation, or exclusively the current replacement value, expressed in terms of current prices at the time of valuation.

In response to that line of argument, the Court finds that it is necessary to rely on Recommendation 2000/417 [Recommendation 2000/417/EC of 25 May 2000 on unbundled access to the local loop enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet (OJ 2000 L 156, p.44)] which, as opposed to the other recommendations cited above, concerns specifically unbundled access to the local loop and also refers to Directives 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32)] and 98/10 [Directive 98/10/EC of the European Parliament and of the

Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)]. Even if recommendations are not intended to produce binding effects, the national courts are bound to take the recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions (see Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 18, and Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraph 41). Article 1(6) of Recommendation 2000/417 lays down the principle of a forward-looking approach based on current costs. As is apparent from that provision, that approach will foster fair and sustainable competition and provide alternative investment incentives.

However, it is clear from that provision that a different approach, in particular one based on historic costs to avoid distortions of competition, cannot be ruled out. Thus, the NRA is in a position to take account of each individual competitive situation.

In that regard, it must be held that, in view of the technological evolution in the telecommunications sector, it is possible that the current cost of certain investments, related in particular to the material used for the network put in place, may, in certain cases, be lower than the historic cost.

It follows that the possibility for the notified operator to base the calculation basis of costs exclusively on the current costs of its investments enables it, in reality, to choose those which could enable it to set rates for unbundled access to the local loop as high as possible and to not take account of pricing elements which would favour beneficiaries. In that respect, the notified operator could effectively circumvent the rules concerning the setting of rates for unbundled access to the local loop on the basis of cost-orientation.

It must thus be held that a method of calculation based exclusively on current costs is also not the most appropriate method of applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

Consequently, if, as claimed by Arcor, for the application of the pricing rule laid down in Article 3(3) of Regulation No 2887/2000, the cost calculation basis were based exclusively on historic costs, which, depending of the age of the network, could potentially lead to account being taken of an almost entirely depreciated network and thus result in a very low tariff, the notified operator would be faced with unjustified disadvantages.

It should be added in that regard that the costs related to maintaining and upgrading the local infrastructure are calculated in any case on the basis of the actual value of the notified operator's fixed assets.

It follows that the cost calculation basis which must be taken into account when setting rates for unbundled access to the local loop cannot be based exclusively on historic costs, otherwise the notified operator would suffer, compared with the beneficiary, unjustified disadvantages, which is precisely what Regulation No 2887/2000 seeks to prevent. The aim of that regulation is to enable both

beneficiaries and the notified operator to operate on the market so as to establish normal competition in the medium term.

It results from all of the above that there is no indication in Regulation No 2887/2000 and Directives 97/33 and 98/10 of the FRF [The former regulatory framework for telecommunications] in favour of a method of calculation based exclusively on current costs or historic costs and that the taking into account of only one or other of those bases is likely to call into question the aim of that regulation, namely to intensify competition through the setting of harmonised conditions for unbundled access to the local loop, in order to foster the competitive provision of a wide range of electronic communications services.

It results from the abovementioned provisions that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation requires account to be taken of actual costs, namely costs already paid by the notified operator and forward-looking costs based on an estimation of the costs of replacing the network or certain parts thereof.

In the absence of specific Community legislation, it is the task of the NRAs to define the detailed rules for determining the calculation basis on which depreciation must be taken into account.

Thus, pursuant to the provisions of Directive 97/33, which also apply to the local loop under Regulation No 2887/2000, the method of cost calculation may be based both on costs already paid by the notified operator – which presupposes the taking into account, as the basis of reference, of costs at their historic value – and on forward-looking costs, which does not exclude the taking into account, as the basis of reference, of costs at their current value.

It is under those conditions that the NRAs have to calculate the actual costs which have to be taken into account for the application of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

By Question 3(b) the national court asks the Court of Justice to determine whether the costs which have to be taken into account in the application of the pricing principle laid down in Article 3(3) of Regulation No 2887/2000 have to be proven by complete and comprehensible accounting documents.

It follows from the above that the answer to Question 3(b) must be that, pursuant to Article 4(2)(b) of Regulation No 2887/2000, the NRA may request notified operators to supply relevant information on the documents justifying the costs taken into account when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation. Since Community law does not contain any provision concerning the accounting documents to be checked, it is the task of the NRAs alone, in accordance with the law applicable, to examine whether, for the purposes of cost-accounting, the documents produced are the most appropriate ones.

As regards analytical cost models, it should be noted, as a preliminary point, that, in the analytical model for bottom-up costs, it is necessary to take account of the current value of the investments in the construction of a new network. That model is based on

the costs which an operator would incur to acquire and exploit its own network. By contrast, the top-down model is based on the costs actually incurred by the notified operator.

Therefore, it is apparent from Regulation No 2887/2000 and the legislation of the FRF applicable in the case in the main proceedings that there is no evidence to establish to the required legal standard that the Community legislature opted for either a bottom-up or a top-down accounting model.

In the absence of further clarification, it must be found that Community law leaves to the NRAs, on the basis of the applicable law, the choice of cost-accounting method which they deem most appropriate in a specific case.

In those circumstances it is not necessary to answer the subsequent question concerning the methodological requirements of the valuation based on an analytical model of bottom-up or top-down costs.

By its first question the national court asks whether Article 1(4) of Regulation No 2887/2000 must be understood as meaning that the principle that rates for access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of that regulation, constitutes a minimum requirement from which national law of the Member States may not deviate to the prejudice of beneficiaries.

In that regard, the Court notes, first, that Article 1(4) of Regulation No 2887/2000 does grant the Member States the possibility to maintain in force or to introduce measures which contain more detailed provisions than those laid down in that regulation and, in particular, those concerning the principle that rates for access to the local loop are to be set on the basis of cost-orientation.

However, such a provision cannot be interpreted as granting the Member States the right to derogate from that principle by maintaining in force or adopting national measures.

It is apparent from the wording of Article 1(4) of Regulation No 2887/2000 that that provision permits the Member State concerned to supplement, by means of detailed national provisions, the relevant provisions of that regulation, in this case those concerning the principle that rates for access to the local loop are to be set on the basis of cost-orientation, but not to derogate from it.

It should be pointed out that Article 4(1) of Regulation No 2887/2000, entitled ‘Supervision by the [NRA]’, provides that the NRA is to ensure that charging for unbundled access to the local loop fosters fair and sustainable competition.

In that regard, Article 4(2) of that regulation states that the NRA is to have the power, first, to impose changes on the reference offer for unbundled access to the local loop and related facilities, including prices, where such changes are justified, and, second, to require notified operators to supply information relevant for the implementation of that regulation.

It is apparent from those provisions that the NRAs have broad discretion to intervene in the various pricing aspects for the provision of unbundled access to the local loop, including the discretion to change prices, and thus the proposed tariffs.

In those circumstances, it follows that the broad discretion granted by Regulation No 2887/2000 to the NRAs as regards the assessment of pricing aspects of unbundled access to the local loop also concerns the evaluation of the costs incurred by the notified operator.

Therefore, it must be held that the broad discretion enjoyed by the NRAs under Article 4(2) of Regulation No 2887/2000 also relates to the costs taken into account, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost-accounting models used to prove them.

In addition, it is also apparent from Article 4(2) of that regulation that, in the context of the broad discretion granted to them by those provisions, the NRAs are also entrusted with the power to conduct proceedings to control the pricing for unbundled access to the local loop in that they may request information concerning, inter alia, costs incurred in applying the principle that rates for access to the local loop are to be set on the basis of cost-orientation.

It follows that Regulation No 2887/2000 grants the NRAs not only broad discretion, but also the appropriate means to enable them to examine, in the most effective way, the correct application of the principle laid down in Article 3(3) of that regulation.

**Case C-55/06 *Arcor AG & Co. KG* [2008] ECR I-2931, paras. 47, 48, 64-69, 72, 77-80, 84, 85, 94, 95, 97-99, 104, 107-109, 115-118, 120, 127, 128, 131-133, 135, 139-141, 151-153, 155-158**

#### 2.2.26. Unbundling regulation/judicial review

It should be pointed out at the outset that neither Regulation No 2887/2000 [Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4)] nor the directives of the FRF [The former regulatory framework for telecommunications] envisage harmonisation of the national rules concerning the applicable court proceedings or, in that regard, the scope of any review by the courts.

In that regard, according to the case-law, in the absence of relevant Community rules it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-30/02 *Recheio – Cash & Carry* [2004] ECR I-6051, paragraph 17, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited).

In that regard, it needs to be pointed out that, as rightly submitted by Arcor and, more generally, the Lithuanian Government, it is apparent from recital 11 in the preamble to Regulation No 2887/2000 as well as Articles 3(2) and (3) and 4(3) of that regulation that the NRAs must ensure the application of rates for access to the local loop in transparent, fair and non-discriminatory conditions.

It is thus the task of the national courts to ensure compliance with the obligations resulting from Regulation No 2887/2000 regarding unbundled access to the local loop by means of procedures consistent with the pricing principle laid down in Article 3(3) of that regulation, and in accordance with the conditions referred to above

By Question 3(f) the Court of Justice is essentially invited to consider whether beneficiaries within the meaning of Regulation No 2887/2000 may challenge the decisions of the NRAs authorising the rates of notified operators for unbundled access to their local loop by virtue of the requirements regarding the cost-orientation of rates.

In order to answer that question it is necessary to examine the regulatory framework to which Article 3(3) of Regulation No 2887/2000 belongs.

In that regard, according to the wording of Article 5a(3) of Directive 90/387 [Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23; ‘Directive 90/387’)], Member States are to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the NRA has a right of appeal to a body independent of the parties involved.

Given that a decision of the NRA taken in relation to Article 4 of Regulation No 2887/2000 falls within the scope of Directive 90/387, Article 5a(3) of that directive requires that national law provides for suitable mechanisms under which the ‘party affected’ by that decision has a right of appeal to an independent body. That guarantee applies to both the addressee of that decision and the beneficiaries within the meaning of Regulation No 2887/2000.

As regards the right of appeal of third parties, it must be held that, since a beneficiary is not the addressee of a decision of the NRA, he acquires the status of ‘party affected’ when his rights are potentially affected by such a decision by reason of its content and the activity exercised or envisaged by that party (see, by way of analogy, *Tele2 Telecommunication*, paragraph 39).

By Question 3(g) and (h) the national court asks the Court of Justice to determine who is to bear the burden of proving that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation has been respected, in the context of the supervisory procedure laid down in Article 4 of Regulation No 2887/2000 or during judicial proceedings brought against the decision of the NRA authorising the rates of a notified operator.

It results from the above that the answer to Question 3(g) and (h) is that Regulation No 2887/2000 must be interpreted as meaning that, during the procedure supervising

the pricing for unbundled access to the local loop conducted by an NRA pursuant to Article 4 of that regulation, it is for the notified operator to provide the evidence that its rates respect the principle that rates are to be set on the basis of cost-orientation. On the other hand, it is for the Member States to allocate the burden of proof between the NRA which made the decision to authorise the rates of the notified operator and the beneficiary challenging that decision. It is also for the Member States to establish, in accordance with their rules of procedure and the Community principles of effectiveness and equivalence of judicial protection, the rules on the allocation of that burden of proof when a decision of the NRA authorising the rates of a notified operator for unbundled access to its local loop is challenged before the courts.

**Case C-55/06 *Arcor AG & Co. KG*, [2008] ECR I-2931, paras. 163, 166-168, 171-173, 175, 176, 178, 179, 192**

### 3. THE 2002 REGULATORY PACKAGE

#### 3.1. Liberalisation

##### 3.1.1. Lack of transposition

*The Luxembourg Government acknowledges that this Directive [Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21)] was not transposed within the prescribed period and that, accordingly, it was not in a position to provide the Commission with this information. However, it points out that the measures needed to transpose that Directive are in the process of being adopted and that the vote on the relevant draft law was delayed, particularly on account of the need for it to be first referred to the State Council.*

*It suffices to point out that, according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see in particular the judgments in Case C-143/02 Commission v Italy [2003] ECR I-2877, paragraph 11, and Case C-446/01 Commission v Spain [2003] ECR I-6053, paragraph 15).*

*In the present case, it is undisputed that the Grand Duchy of Luxembourg did not provide the Commission with all the necessary information that would have enabled it to confirm compliance with the provisions of Directive 2002/77 within the time limit laid down in the reasoned opinion.*

*Moreover, the Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to implement a directive within the time limit (see in particular the judgments in Case C-352/01 Commission v Spain [2002] ECR I-10263, paragraph 8, and Case C-85/02 Commission v France [2003] ECR I-1693, paragraph 13).*

*It follows therefore that the Commission's action must be upheld.*

*Accordingly, it must be held that by failing to supply the Commission with all the necessary information to enable it to confirm that the provisions of Directive 2002/77 have been complied with, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 9 of that Directive.*

**Case C-349/04 Commission v. Luxembourg, 16 June 2005, paras. 5-10  
(not reported), OJ C 193, 06.08.2005, p. 8**

*The Greek Government acknowledged in its defence that the procedure for transposing Directive 2002/77 [Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21)] had not yet been completed. It pointed out that the vote on the relevant draft law had been delayed on account of the parliamentary elections.*

*It suffices to point out that, according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see in particular the judgments of 20 March 2003, Case C-143/02 Commission v Italy [2003] ECR I-2877, paragraph 11, and 12 June, Case C-446/01 Commission v Spain [2003] ECR I-6053, paragraph 15).*

*In the present case, it is not disputed that the Hellenic Republic has not adopted the necessary measures to comply with Directive 2002/77 by the end of the period laid down in the reasoned opinion.*

*Moreover, the Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to implement a directive within the time limit (see in particular the judgments in Case C-352/01 Commission v Spain [2002] ECR I-10263, paragraph 8, and Case C-85/02 Commission v France [2003] ECR I-1693, paragraph 13).*

*The Commission's action must therefore be upheld.*

*Accordingly, by failing to adopt the necessary laws, regulations and administrative provisions to comply with Directive 2002/77, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-299/04 Commission v. Greece, 14 April 2005, paras. 5-10  
(not reported), OJ C 143, 11.06.2005, p. 13**

## 3.2. Harmonisation of national rules

### 3.2.1. Repeal of the 1998 framework

It is first of all appropriate to examine the argument of the German Government that Article 11 of Directive 97/13 [Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15)] does not apply to the disputes at issue in the main proceedings on the ground Directive 97/13 was repealed by a later directive.

It should be noted in that regard that Directive 97/13 was repealed by Article 26 of Directive 2002/21 [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33)] with effect from 25 July 2003 in accordance with the second subparagraph of Article 28(1) of the latter directive.

It follows, however, from reading Article 26 and the second subparagraph of 28(1) of Directive 2002/21 that the legislature did not intend to prejudice the rights and obligations arising under Directive 97/13 and that Directive 2002/21 applies only to legal situations arising from 25 July 2003.

Consequently, despite the fact that Directive 97/13 was repealed by Directive 2002/21, the validity of a charge such as that imposed on i-21 and Arcor by the fee assessments of 14 June 2000 and 18 May 2001 respectively, at a time when Directive 2002/21 was not yet applicable, has to be examined in the light of Article 11(1) of Directive 97/13.

**Joined cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG*,  
[2006] ECR I-8559, paras. 22-25**

[...] it should be recalled at the outset that, as the Court has repeatedly held, the question whether a Member State has failed to fulfil its obligations must be determined as at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paragraph 35, and Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 21).

Accordingly, the matters relied on by the Netherlands in its pleadings concerning, on the one hand, repeal of Directive 97/66 [Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1)] by Article 19 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) with effect from 31 October 2003 and, on the other, the existence of a bill to transpose the latter directive into Netherlands law, cannot affect the assessment to be made of the obligations of the

Kingdom of the Netherlands as at expiry of the period of two months laid down in the reasoned opinion.

Case C-350/02 *Commission v. Netherlands* [2004] ECR I-6213, paras. 31-32

### 3.2.2. Transitional regime

It should be borne in mind that, under Article 26 and the second subparagraph of Article 28(1) of Directive 2002/21 [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], Directive 98/10 [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)] is repealed with effect from 25 July 2003. However, under Article 27 of Directive 2002/21, Member States are required to maintain all obligations under national law referred to in Article 7 of Directive 2002/19 [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7)] and Article 16 of Directive 2002/22 [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51)] until such time as a determination is made in respect of those obligations by a national regulatory authority.

Article 7(1) of Directive 2002/19 provides that the Member States are to maintain in force all obligations that were previously applicable, *inter alia*, under Article 16 of Directive 98/10 concerning special network access.

Article 16(1) of Directive 2002/22 provides that Member States are to maintain all obligations relating to, *inter alia*, retail tariffs for the provision of access to and use of the public telephone network, referred to in Article 17 of Directive 98/10. The latter article concerns the principle of cost orientation for tariffs.

It follows that Article 18(1) and (2) of Directive 98/10, relating to the principles of cost accounting, the subject-matter of the second head of claim in the present action, is not explicitly referred to by the aforementioned provisions of the NRF ['New Regulatory Framework'].

The fact remains, however, that the lack of reference in the present case to Article 18 of Directive 98/10 in Article 16 of Directive 2002/22 is not such as to exempt the Member States from their obligations under Article 18.

The Court notes that it is not apparent from Directive 2002/22 that the Community legislature wished, by way of transitional measures, to maintain in force only those obligations under Article 17 of Directive 98/10 relating to cost orientation for tariffs and not those relating to the cost accounting system.

On the contrary, as evidenced by the explicit references to Article 17 of Directive 98/10 contained in Article 18 thereof, the obligations under those two articles must be taken into account together, as the principle of cost orientation for tariffs is closely linked to the accounting system for those same costs.

It follows that the Member States' obligations under Article 18(1) and (2) of Directive 98/10 must be regarded as having been maintained in force by the relevant provisions of the NRF.

The Grand Duchy of Luxembourg stated in this regard at the hearing that the transitional scheme provided for by the NRF concerns the obligations resulting from national legislation and not the disputed provisions of Directive 98/10. In those circumstances, the Grand Duchy of Luxembourg takes the view that, if there are no national measures transposing the obligations under Article 18(1) and (2) of Directive 98/10 for the year in question, that is, the year 2000, the transitional measures provided for by the NRF are not relevant for assessing the admissibility of the second head of claim in the present action.

That argument cannot be accepted. In acknowledging essentially that it has not transposed Article 18(1) and (2) of Directive 98/10 for the year 2000, the Grand Duchy of Luxembourg cannot rely on its own failure to fulfil its obligations under the former regulatory framework governing telecommunications in order to evade those same obligations under the transitional measures provided for by the NRF.

**Case C-33/04 *Commission v. Luxembourg*, [2005] ECR I-10629, paras. 51-60**

The first, second and third questions, in which the referring court asks in essence whether the regulatory authority was entitled, taking account of the provisions of Community law which were applicable after 1 May 2004 [the date of accession of the Czech Republic], to impose on a telecommunications company with significant market power in the telecommunications market the obligation to conclude a contract for the interconnection of its network with that of another operator, must be examined together.

On that point, it must be stated, taking into consideration the provisions of Article 27 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)] and Article 7(1) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7)] relating to transitional provisions which can be implemented independently of transposition of those directives, that Directive 97/33 [Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (OJ 1997 L 199, p. 32) as amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 (OJ 1998 L 268, p. 37)], which it is accepted has

been transposed into Czech law by the Law No 151/2000, remains effective so far as necessary.

Accordingly, and as the Commission rightly submits, the regulatory authority had the power to act within the framework of Directive 97/33.

It follows from the foregoing that the answer to be given to the first, second and third questions is that, in accordance with the transitional provisions of the Framework and Access Directives, the regulatory authority was entitled to consider the obligation, on the part of a telecommunications company with significant market power within the meaning of Directive 97/33, to conclude a contract for the interconnection of its networks with that of another operator, subsequent to 1 May 2004, within the framework of the provisions of Directive 97/33.

**Case C-64/06 *Český Telecom*, [2007] ECR I-4887, paras. 25-28**

By its first question, the national court is essentially asking whether the aim of Article 27 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; ‘the Framework Directive’)] and Article 16(1)(a) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51; ‘the Universal Service Directive’)] is to maintain temporarily in force a statutory requirement for authorisation in respect of certain telephony tariffs charged by an undertaking with a dominant position in the market in question, provided for under earlier national law, and an administrative measure confirming that requirement.

As regards a literal interpretation of Article 27 of the Framework Directive, it must be pointed out that ‘all obligations’ under Member States’ legislation and referred to in Article 7 of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7; ‘the Access Directive’)] and Article 16 of the Universal Service Directive are to be maintained. Article 7 concerns obligations on undertakings providing public communications networks and/or services concerning access and interconnection that were in force prior to the date of entry into force of the Framework Directive. Article 16(1)(a) of the Universal Service Directive provides for all obligations relating to retail tariffs for the provision of access to and use of the public telephone network to be maintained.

It follows, as the Advocate General noted in point 30 of his Opinion, that all obligations thus referred to and imposed under Member States’ legislation which preceded the regulatory framework stemming from the Framework Directive, Access Directive, Universal Service Directive and Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (‘the new regulatory framework’) are to be temporarily maintained, regardless of their nature.

The fact that it is for the regulatory authority to decide when to bring the temporary situation to an end, as a result of carrying out the market analysis referred to in Article 16 of the Framework Directive, does not alter this interpretation as the authority does no more than implement the obligations imposed by the legislation in force, which stems from the new regulatory framework. Indeed, the amendment, maintenance or withdrawal of the obligations is determined in accordance with this framework.

Such an interpretation also accords with the origin and scheme of the new regulatory framework.

It clearly follows that the Community legislature did not intend to limit the categories of obligations referred to in the first paragraph of Article 27 of the Framework Directive.

It follows from the foregoing that the obligations set out above concern both individual acts and regulatory measures applied by an authority whose appointment depends on the constitutional arrangements of each Member State.

Accordingly, by referring expressly to Article 7 of the Access Directive and Article 16 of the Universal Service Directive, Article 27 of the Framework Directive was necessarily meant to achieve the same purpose, namely to ensure continuity, irrespective of the nature and basis of the obligations imposed on operators, between the former and new regulatory frameworks.

*Case C-262/06 Deutsche Telekom AG [2007] ECR I-10057, paras. 18, 20-23, 33, 36, 43*

### 3.2.3. NRA independence

Article 3(2) of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; ‘the Framework Directive’)] specifies the means by which it should be possible to guarantee the independence of the regulatory authorities, providing that they must be legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Where Member States retain ownership or control of undertakings providing electronic communications networks and/or services, they are to take care, specifically, to ensure effective structural separation of the regulatory function, on the one hand, from activities associated with ownership or control of those undertakings, on the other.

As regards the assigning of the national numbering resources and the management of the national numbering plans, it should be pointed out at the outset that such functions form no part of the functions exercised by entities which ensure services and/or networks provision, as defined in Article 2(m) of the Framework Directive. They must therefore be regarded, not as ‘operational functions’ within the meaning of Recital (11) of that directive, but as ‘regulatory functions’.

Moreover, the referring court seems to be unsure whether the Framework Directive allows Member States to allocate, on the one hand, the regulatory functions, and on the other, the management functions involved in assigning national numbering resources and national numbering plans, to separate regulatory authorities.

In that regard, it is clear from Article 10(1) of the Framework Directive, read in conjunction with Article 3(2) thereof, that (i) Member States must allocate to one or more regulatory authorities control of the assignment of all national numbering resources, as well as the management of the national numbering plans; (ii) those regulatory authorities must be legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services; and (iii) Member States which retain ownership or control of undertakings providing electronic communications networks and/or services must ensure effective structural separation of activities associated with ownership or control of those undertakings, on the one hand, and regulatory functions (including the assignment of national numbering resources and the management of the national numbering plans), on the other.

That finding is substantiated both by Recital (11) of the Framework Directive, in accordance with which Member States should guarantee the independence of the national regulatory authority or authorities, and by Article 3(4) of that directive, which provides that Member States must publish the tasks to be undertaken by those regulatory authorities, in particular where those tasks are assigned to more than one body.

Moreover, the potentially pluralist nature of regulatory authorities is clear from the very definition of ‘national regulatory authority’ set out in Article 2(g) of the Framework Directive.

In contrast, it must be noted that there is no provision in the Framework Directive, under which the regulatory authority to which the tasks of assigning national numbering resources and management of national numbering plans have been assigned is required to be distinct from or independent of the other regulatory authorities and, in particular, from the authority with responsibility for adopting the national numbering plan or the control and management procedures of that plan.

By its second question, the referring court wishes to know whether a Member State may allocate the regulatory functions referred to in Article 10(1) of the Framework Directive to a number of regulatory authorities.

It is clear from the wording of Articles 2(g) and 10(1) of the Framework Directive that it is possible for more than one regulatory authority to have control over the assignment of national numbering resources and the management of national numbering plans.

Although the Member States enjoy institutional autonomy as regards the organisation and the structuring of their regulatory authorities within the meaning of Article 2(g) of the Framework Directive, that autonomy may be exercised only in accordance with the objectives and obligations laid down in that directive.

Thus, in accordance with Article 3(2), (4) and (6) of the Framework Directive, the Member States must not only guarantee the functional independence of regulatory authorities in relation to the organisations providing electronic communications networks, equipment or services, but must also publish, in an easily accessible form, the tasks to be undertaken by the national regulatory authorities, and notify to the Commission the names of the regulatory authorities entrusted with carrying out those tasks, and their respective responsibilities.

As a consequence, where those functions are to be discharged, even partially, by ministerial authorities, each Member State must ensure that those authorities are neither directly nor indirectly involved in 'operational functions' within the meaning of the Framework Directive.

It follows from all of the foregoing that the reply to the second question referred must be that Article 10(1) and Article 3(2), (4) and (6) of the Framework Directive must be interpreted as not precluding the functions of assigning national numbering resources or of managing national numbering plans from being shared by a number of independent regulatory authorities, provided that the allocation of the tasks is made public and easily accessible, and notified to the Commission.

**Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2008]  
ECR I-1265, paras. 14-20, 22-27**

#### 3.2.4. Appeal mechanism/Confidentiality

By its second question, the referring court is seeking to ascertain whether under Article 4 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33)] an independent body covered by that provision, such as the referring court, must have at its disposal all the information necessary to examine the merits of an appeal before it, including information which is confidential under the applicable legislation on business confidentiality.

According to the decision for reference, the IBPT [Institut belge des services postaux et des télécommunications] is relying on the duty of confidentiality imposed on it by its statute as defined by the Law of 17 January 2003.

In that regard, it is appropriate to note that the body responsible for hearing an appeal against a decision of the national regulatory authority in accordance with Article 4 of the Framework Directive must be able to have at its disposal all the information necessary in order to decide in full knowledge of the facts on the merits of the appeal, including information that is subject to confidentiality. However, the protection of such information and business confidentiality must be guaranteed and must be adjusted to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute.

Article 4(1) of the Framework Directive provides expressly that the right of appeal against the decision of a national regulatory authority which may be exercised by any

user or service provider affected by it must be based on an effective appeal mechanism which permits the merits of the case duly to be taken into account.

Furthermore, Article 5(3) of that directive provides that, in the context of exchanges of information between the national regulatory authorities and the Commission, information considered confidential by those authorities may be communicated to the Commission which is, however, to guarantee such confidentiality.

Accordingly, the answer to the second question must be that Article 4 of the Framework Directive must be interpreted as meaning that the body responsible for hearing an appeal against a decision of the national regulatory authority must have at its disposal all the information necessary in order to decide on the merits of the appeal, including, if necessary, confidential information which that authority has taken into account in reaching the decision which is the subject of the appeal. However, that body must guarantee the confidentiality of the information in question whilst complying with the requirements of effective legal protection and ensuring protection of the rights of defence of the parties to the dispute.

**Case C-438/04 *Mobistar*, [2006] ECR I-6675, paras. 38-43**

### 3.2.5. Appeal mechanism/affected entities

By its first question the national court asks, in essence, whether the terms user ‘affected’ or undertaking ‘affected’ (betroffen) for the purposes of Article 4(1) of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; ‘the Framework Directive’)] and the term party ‘affected’ (betroffene) within the meaning of Article 16(3) of that directive must be interpreted as covering not only an undertaking (formerly) having significant power on the relevant market which is the subject of a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive, and which is the addressee of that decision, but also users and undertakings in competition with such an undertaking (formerly) having significant power which are not themselves addressees of that decision but the rights of which are adversely affected by it.

It should be noted, at the outset, that, as is apparent from the decision making the reference, at issue in the case in the main proceedings is the right to be a party in non-adversarial administrative proceedings, in this case market analysis proceedings conducted by the TCK [the Telekom-Control-Kommission (Telecommunications Control Commission; ‘the TCK’)] pursuant to Paragraph 37 of the TKG [the 2003 Law on Telecommunications (Telekommunikationsgesetz 2003, BGBl. I No 70/2003; ‘the TKG’)], which implements Article 16 of the Framework Directive. However, Article 4 of that directive, also raised by the referring court, regulates an issue of adversarial administrative-law proceedings. That article states that Member States are to ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services which is affected by a decision of a national regulatory authority has the right of appeal against that decision to an appeal body which is independent of the parties involved, and

which may be a court. Where the appeal body is not judicial in character, written reasons for its decision must always be given and, furthermore, in such a case, its decision is to be subject to review by a court or tribunal within the meaning of Article 234 EC [now Article 267 TFEU].

First, it must be pointed out that the Framework Directive does not define that term.

It is also settled case-law that the need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, *inter alia*, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-0000, paragraph 24).

Accordingly, the scope which the Community legislature intended to confer on the terms user ‘affected’ or undertaking ‘affected’ by a decision of a national regulatory authority for the purposes of Article 4(1) of the Framework Directive must be assessed in the light of the purpose of that article within the context of that directive.

It must, however, be noted that, even if one assumes that an undertaking in a situation similar to that of the applicant in the main proceedings falls within Article 16(3) of the Framework Directive, it does not automatically follow that that undertaking may fall within the scope of Article 4(1) thereof. As pointed out by the Advocate General in point 19 of his Opinion, Article 4(1) of the Framework Directive pursues objectives which are very distinct from those pursued by Article 16(3) thereof.

The consequence of the applicability of Article 4(1) to an undertaking is that that undertaking is granted a right to appeal against a decision taken by a national regulatory authority by which it is affected, whereas Article 16(3) grants it the right, in the case of a decision to withdraw obligations placed on the undertaking (formerly) having significant power on the relevant market, to be given an appropriate period of notice of that withdrawal.

In the case covered by Article 4 of the Framework Directive, the Member States are required to provide for a right of appeal before an appellate body in order to protect the rights which users and undertakings derive from the Community legal order.

It follows that the requirement to provide effective judicial protection, which is at the origin of Article 4 of the Framework Directive, must apply to both users and undertakings which may derive rights from the Community legal order, in particular from telecommunications directives, and whose rights are affected by a decision taken by a national regulatory authority.

It is thus necessary to determine whether the users and undertakings operating in competition with an undertaking (formerly) having significant power on the relevant market may derive rights from the Community legal order, in particular from telecommunications directives, and whether their rights may be affected by a decision

taken by a national regulatory authority which is not addressed to them. If that is the case, they should be entitled to a right of appeal in order to make that decision amenable to judicial review.

As pointed out by the Advocate General in point 29 of his Opinion, and as submitted by the applicant in the main proceedings and the Commission, certain specific obligations imposed on the undertaking with significant power on the relevant market in accordance with Article 16(3) and (4) of the Framework Directive and the provisions of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [OJ 2002 L 108, p. 7]] which are cited therein are protective measures adopted in the interest of users and undertakings in competition with that undertaking with significant market power and are therefore capable of conferring rights on them. Those protective measures include, for example, those which may be adopted by national regulatory authorities under Article 8 of the Access Directive and the obligations of non-discrimination between competitors and the obligations to give competitors access to specific network facilities and the use of such facilities, laid down respectively in Articles 10 and 12 of the latter directive.

As regards, *inter alia*, those obligations to provide access to network facilities and the use of those facilities, Article 12(1) of the Access Directive provides that ‘a national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user’s interest’. As in the case of the obligation of non-discrimination laid down in Article 10 of that directive, those obligations concerning the access of competitors to specific network facilities and the use thereof seek to enable interested competitors to benefit from such access.

It follows that users or undertakings competing with an undertaking with significant power on the relevant market must be considered to be potential beneficiaries of the rights corresponding to the specific regulatory obligations imposed by a national regulatory authority on that undertaking with significant market power pursuant to Article 16 of the Framework Directive and the telecommunications directives cited therein. Consequently, those users and undertakings may be regarded as being ‘affected’, within the meaning of Article 4(1) of the Framework Directive, by decisions of that authority which amend or withdraw those obligations.

As noted by the Advocate General in point 24 of his Opinion, and as submitted by the Danish Government, a strict interpretation of Article 4(1) of the Framework Directive to the effect that that provision confers a right of appeal only on persons to whom the decisions of the national regulatory authorities are addressed would be difficult to reconcile with the general objectives and regulatory principles resulting, for those authorities, from Article 8 of that directive, particularly with the objective of promoting competition.

It follows that Article 4(1) of the Framework Directive must be interpreted as granting a right of appeal also to persons other than the addressees of a decision taken by a national regulatory authority in the context of a market analysis. Thus, users and undertakings competing with an undertaking (formerly) having significant power on the market concerned must be regarded as being ‘affected’ for the purposes of that provision when their rights are potentially affected by such a decision.

As regards, next, the third sentence of Article 16(3) of the Framework Directive, that provision provides that the parties ‘affected’ by the withdrawal of sector-specific regulatory obligations are to be given an appropriate period of notice. An undertaking (formerly) having significant power on the market concerned is an addressee of the decision withdrawing such obligations, with the result that it is self-evident that that undertaking must be notified of the decision. The same applies with regard to decisions imposing such obligations on such an undertaking, irrespective of the fact that Article 16(4) of that directive does not state so expressly. By contrast, the period of notice laid down in Article 16(3) of that directive acquires its full significance in relation to competing undertakings which, for their part, benefit from the obligations the withdrawal of which has been decided. It follows that, in providing that a period of notice must be given, the Community legislature sought to protect, above all, competitors of the undertaking (formerly) having significant power on the market in their capacity as ‘affected’ parties. Furthermore, in that provision the Community legislature would otherwise have used the term ‘undertaking’, as in the second sentence of that provision, and not the term parties ‘affected’.

Consequently, the rights of the competitors of an undertaking (formerly) having significant power on the relevant market are covered by Article 16(3) of the Framework Directive and those rights must therefore be regarded as stemming from both that provision and Article 4(1) of that directive.

It must also be pointed out that, pursuant to Article 16(6) of the Framework Directive, measures taken under that provision are subject to the procedures laid down in, *inter alia*, Article 6 of that directive and that that latter provision contains, among other things, a right for the interested parties to comment on the draft measure within a reasonable period.

It follows from all of the foregoing that the terms user ‘affected’ or undertaking ‘affected’ for the purposes of Article 4(1) of the Framework Directive and the term party ‘affected’ within the meaning of Article 16(3) of that directive must be interpreted as being applicable not only to an undertaking (formerly) having significant power on the relevant market which is subject to a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive and to which that decision is addressed, but also users and undertakings in competition with such an undertaking which are not themselves addressees of that decision but the rights of which are adversely affected by it.

By its second question the national court asks, essentially, whether it follows from Article 4 of the Framework Directive that, when it has a right to appeal against decisions taken by a national regulatory authority following administrative market analysis proceedings, an undertaking such as the applicant in the main proceedings

must for that reason also be granted the status of a party to the non-adversarial market analysis proceedings.

In that regard, Article 4 of the Framework Directive does not state which are the parties to the non-adversarial administrative proceedings referred to in Article 16 of that directive. The wording of that provision also does not provide any indication to the effect that an undertaking such as the applicant in the main proceedings must have a right to participate, as a party, in those market analysis proceedings. The third sentence of Article 16(3) of the Framework Directive merely affirms that the parties affected by the withdrawal of specific regulatory obligations must be given an appropriate period of notice.

Thus, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions before the courts for safeguarding rights which individuals derive from the direct effect of Community law (see, *inter alia*, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12 and the case-law cited, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33 and the case-law cited).

It follows that Community law does not, *a priori*, require the Member States to permit all users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market to participate in a market analysis procedure referred to in Article 16 of the Framework Directive as a party for the purposes of the applicable Austrian procedural law with the rights described in paragraph 18 of the present judgment. It is thus for the national legislature to specify whether an undertaking such as the applicant in the main proceedings has the status of a party to those non-adversarial administrative proceedings and, if so, to decide whether that undertaking may be granted procedural rights other than those laid down expressly in Article 16 of the Framework Directive and rights inherent in the consultation procedure laid down expressly in Article 6 of that directive.

Consequently, a provision of national law which, in the context of such proceedings, grants party status only to undertakings (formerly) having significant power on the relevant market in respect of which specific regulatory obligations are imposed, amended or withdrawn is not, in principle, contrary to Article 4 of the Framework Directive.

However, the detailed national procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law must not be less favourable than those governing similar domestic actions (principle of equivalence) or render virtually impossible or excessively difficult the exercise of the rights conferred by Community law (principle of effectiveness) (see, to that effect, *inter alia*, *Peterbroeck*, paragraph 12 and the case-law cited, and *Grundig Italiana*, paragraph 33 and the case-law cited).

As regards the principle of effectiveness, on which the applicant in the main proceedings relies for the purpose of claiming entitlement to participate in the administrative market analysis proceedings in question, it is clear from the Court's case-law that each case which raises the question whether a national procedural

provision renders the exercise of rights conferred on individuals by the Community legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see, to that effect, *Peterbroeck*, paragraph 14, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 33).

It is thus for the national court to ensure that national procedural law guarantees the safeguarding of the rights which users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market derive from the Community legal order in a manner which is not less favourable than that in which comparable domestic rights are safeguarded and which does not prejudice the effectiveness of the legal protection of those users and undertakings guaranteed in Article 4 of the Framework Directive.

**Case C-426/05 *Tele2 Telecommunication GmbH* [2008] ECR I-685, paras. 16, 17, 20, 26-29, 31-36, 38-43, 49-56**

### 3.2.6. Objectives

As regards the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33)], referred to in recital 9 in the preamble to the regulation [Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency (OJ 2004 L 77, p. 1)], Article 1(1) thereof states that it seeks to establish a harmonised framework for the regulation of electronic communications services, electronic communications networks and associated facilities and services. It lays down the tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

Recital 16 in the preamble to the Framework Directive indicates in that regard that those authorities are to base their actions on a harmonised set of objectives and principles. The latter are stated in Article 8 of that directive, and include, inter alia, a high level of protection of personal data and privacy and the integrity and security of public communications networks (see Article 8(4)(c) and (f) of the Framework Directive).

Numerous concerns of the specific directives express the concerns of the Community legislature in relation to network and information security.

First, as is apparent from recital 6 in the preamble to the regulation, the Authorisation Directive [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ 2002 L 108, p. 21)] mentions, in points 7 and 16 of part A of the annex thereto,

personal data and privacy protection in the electronic communications sector and security of public networks against unauthorised access.

Second, as is apparent from recital 7 in the preamble to the regulation, the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51)] aims to ensure the integrity and availability of public telephone networks. In that regard, Article 23 of that directive provides that the Member States are to take all necessary steps to ensure those functionalities, in particular in the event of catastrophic network breakdown or in cases of force majeure.

Third, as is specified in recital 8 in the preamble to the regulation, the Directive on privacy and electronic communications [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37)] requires providers of publicly available electronic communications services to take appropriate technical and organisational measures to safeguard security of the services concerned and the confidentiality of the communications and related traffic data. Those requirements are reflected in particular in Articles 4 and 5 of that directive, which concern network security and the confidentiality of communications respectively.

Fourth, Article 17 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) provides that the Member States are to ensure that the controller implements appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Fifth, Article 3(4) of the Electronic Signatures Directive [Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ 2000 L 13, p. 12)] provides that appropriate bodies designated by Member States are to determine the conditions relating to the conformity of secure signature creation devices.

**Case C-217/04 *United Kingdom v European Parliament and Council* [2006]  
ECR I-3771, paras. 48-55**

[...] the Commission submits that Paragraph 9a(2) of the TKG [Law on Telecommunications, of 22 June 2004, (Telekommunikationsgesetz, BGBl. 2004 I, p. 1190) ('the TKG')] establishes a hierarchy of the objectives laid down in Article 8 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], contrary to that provision.

According to Paragraph 9a(2) of the TKG, in order to assess the need for regulation and in order to impose measures, the NRA is to take account, in particular, of the objective of promoting effective investment in infrastructure and supporting innovation. The other objectives which are to be taken into consideration by the NRA are listed in Paragraph 2 of the TKG.

The Federal Republic of Germany claims that the new amendments to the TKG carry out a pre-structuring of the NRA's intervention on new markets. That Member State takes the view that, having regard to its freedom of action in transposing the common regulatory framework for electronic communications, it may give priority to one of the objectives recognised by the Framework Directive where there is a clear link between that objective and a certain type of market, as is apparent from the reasoning in the Commission recommendation [Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 (OJ 2003 L 114, p. 45) ('the Commission recommendation')].

It must be recalled [...] that, under Article 8(2) of the Framework Directive, the NRAs are to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, inter alia, by ensuring that users derive maximum benefit in terms of choice, price, and quality, ensuring that there is no distortion or restriction of competition in the electronic communications sector, encouraging efficient investment in infrastructure, promoting innovation, and encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

In accordance with Article 8(1) of the Framework Directive, the Member States must ensure that in carrying out the regulatory tasks specified in the Framework Directive and the Specific Directives, the NRAs take all reasonable measures which are aimed at achieving the objectives set out in Article 8.

In addition, it is clear from Article 8(4) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7)] and Article 17(2) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51)] that the obligations imposed under those articles are to be based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of the Framework Directive.

It is clear from those provisions that the NRAs are required to promote the regulatory objectives referred to in Article 8 of the Framework Directive when carrying out the regulatory tasks specified in the common regulatory framework. Consequently, as noted by the Advocate General, in paragraph 64 of his Opinion, it is also for the NRAs, and not the national legislatures, to balance those objectives when defining and analysing a relevant market which may be susceptible to regulation.

In that context, the Court has interpreted Article 8 of the Framework Directive as placing on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (see, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 81, and Case C-227/07 *Commission v Poland* [2008] ECR I-8403, paragraph 63).

A national provision such as Paragraph 9a(2) of the TKG, which gives priority to only one of the objectives recognised by the Framework Directive during the analysis by the NRA of the need to regulate a new market, gives a weighting to those objectives, even though such a weighting exercise is a matter for the NRA when carrying out the regulatory tasks assigned to it.

**Case C-424/07 *Commission v Germany*, 3 December 2009,  
paras. 85-93 (not yet reported)**

### 3.2.7. Market review/Article 7 procedure

*According to settled case law, it follows from Article 234 of the Treaty [now Article 267 TFEU] that national courts or tribunals are only permitted to refer matters to the Court if litigation is pending before them or if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see in this respect the order in Case 138/80 *Borker* ECR 1975, paragraph 3; the judgment of 19 October 1995, *Job Centre*, "Job Centre I", C-111/94, ECR I-3361, paragraph 9, and the order of 22 January 2002, *Holto*, C-447/00, ECR I-735, paragraph 17).*

*In this case, it follows both from Article 7 of the "framework" Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, p.33)] and from the Commission Decision of 20 October 2004 that there is no litigation pending before the Telekom-Control-Kommission. Telekom Austria AG did not apply to the Telekom-Control-Kommission, the regulating authority in Austria, for a ruling on the state of competition on the market in question. Of its own motion, the latter proposed to the Commission a draft measure relating to competition on the relevant market. In any event, the Commission did no more than answer the national authority. The mere fact that Telekom Austria AG could have known the consequences of the contested decision does not make it a party to the dispute. It therefore follows that Telekom-Control-Kommission cannot make a reference to the Court for a preliminary ruling on the act's validity.*

*Article 92(1) of the Rules of Procedure should therefore be applied and the Court found to have no jurisdiction to rule in connection with the question posed by Telekom-Control-Kommission.*

**Case C-256/05 *Telekom Austria*, 6 October 2005, paras. 10-12  
(not reported), OJ C 10, 14.1.2006, p. 7**

[...] as regards the argument that the Commission should have used the procedure provided for in Article 7 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)] in order to establish an infringement of the provisions of the directives concerned, it must be recalled that special procedures in a directive can neither derogate from nor replace the powers of the Commission under Article 226 EC [now Article 258 TFEU] (see, in particular, Case C-359/93 *Commission v Netherlands* [1995] ECR I-157, paragraph 13).

**Case C-424/07 *Commission v Germany*, 3 December 2009, para. 36 (not yet reported)**

### 3.2.8. Market review/effective competition

[...] as regards the Commission's criticism that Paragraph 9a(2) of the TKG [Law on Telecommunications, of 22 June 2004, (Telekommunikationsgesetz, BGBl. 2004 I, p. 1190) ('the TKG')] imposes conditions which are more restrictive than those laid down by the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)] for analysing the markets, it must be recalled that that provision states that where certain facts suggest that in the absence of regulation the development of a sustainable competitive market for telecommunications services or networks would be hindered in the long term, the NRA may, by way of derogation from Paragraph 9a(1), subject a new market to 'regulation' within the meaning of Part 2 of the TKG, in accordance with the provisions of Paragraphs 9 to 12 thereof.

Thus, it is clear from Paragraph 9a(2) of the TKG that the NRA is required to analyse the need for regulation of new markets where there is a risk that the development of sustainable competition on that market will be hindered in the long term.

It must be recalled that, in accordance with Article 16 of the Framework Directive, the NRAs are required to determine whether the relevant markets are effectively competitive. If a market is not effectively competitive, the NRA concerned is to impose ex ante regulatory obligations on undertakings having significant market power.

The criteria laid down by Paragraph 9a(2) of the TKG for a new market, by way of exception, to be subject to ex ante regulation, that is the risk of a long-term impediment to the development of sustainable competition, are more restrictive than those in Article 16 of the Framework Directive, according to which ex ante regulation is justified merely if it is established that the relevant market is not effectively competitive.

**Case C-424/07 *Commission v Germany*, 3 December 2009, paras. 95-98 (not yet reported)**

In support of its action, the Commission relies essentially on two complaints. The first alleges that the Federal Republic of Germany, in violation of Articles 8(1) and (2), 15 and 16 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], Article 8(4) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7)] and Article 17(2) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51)], limited the discretion of the NRAs by defining the concept of 'new markets' in the new provisions of the TKG [Law on Telecommunications, of 22 June 2004, (Telekommunikationsgesetz, BGBl. 2004 I, p. 1190) ('the TKG')], by laying down in them the principle of non-regulation of those markets, by imposing more restrictive conditions in them than those provided for by the common regulatory framework when, exceptionally, those markets may be subject to regulation, and by giving priority to a specific regulatory objective in the analysis of those markets. The second complaint alleges failure to comply with the consultation and consolidation procedures laid down in Articles 6 and 7 of the Framework Directive.

First, the Court considers it appropriate to examine whether, as the Commission claims, the Federal Republic of Germany has failed to fulfil its obligations under Article 16 of the Framework Directive, by imposing, in Paragraph 9a of the TKG, a principle of non-regulation of new markets.

In that connection, it must be observed that, under Article 16 of the Framework Directive, the NRAs are to carry out an analysis of the relevant markets in accordance with Article 15 thereof, in order to determine whether those markets must be subject to ex ante regulation. Those articles relate to the electronic communications sector in general and do not exclude new markets or any other markets from their scope.

Next, it must be recalled that Paragraph 9a(1) of the TKG states that, subject to subparagraph 2 thereof, new markets are not to be subject to regulation within the meaning of Part 2 of the TKG. In accordance with Paragraph 9a(2), where certain facts suggest that, in the absence of regulation, the development of a sustainable competitive market in the area of services or telecommunications networks would be hindered in the long term, the NRA may, by way of derogation from subparagraph 1, submit a new market to regulation within the meaning of Part 2 of the TKG.

The wording of Paragraph 9a(1) and (2) of the TKG expressly provides that new markets should not be regulated unless certain factors, such as the absence of sustainable competition on the market, show the need to regulate them. Thus, this general legal provision imposes, first of all in subparagraph 1, a principle of non-regulation of new markets, then provides, in subparagraph 2 thereof, for exceptions to that principle.

The Federal Republic of Germany contends that the principle of non-regulation of new markets forms part of the common regulatory framework for electronic communications. That Member State relies, in that respect, on recital 27 in the preamble to the Framework Directive, point 32 of the guidelines [Commission's guidelines for market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ 2002 C 165, p. 6) ('the guidelines')] and recital 15 in the preamble to the Commission recommendation [Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 (OJ 2003 L 114, p. 45) ('the Commission recommendation')], according to which, as a general rule, new markets should not be subject to ex ante regulation.

However, such an argument cannot be accepted.

First of all, recital 27 in the preamble to the Framework Directive states that the guidelines will address the issue of new markets where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. That recital envisages that the regulation of new markets is to take account of the specific characteristics of those markets. Consequently, such a provision cannot be understood as laying down a general principle of non-regulation of those markets.

Next, according to point 32 of the guidelines, recital 27 in the preamble to the Framework Directive notes that emerging markets, where de facto the market leader is likely to have a substantial market share, should not be subject to inappropriate ex-ante regulation. According to that provision of the guidelines, premature imposition of ex-ante regulation may unduly influence the competitive conditions taking shape within a new and emerging market.

Thus, that provision merely repeats the contents of recital 27 in the preamble to the Framework Directive by prohibiting the imposition of inappropriate ex ante obligations. Therefore, the guidelines do not lay down a general rule of non-regulation of new markets either. That finding is also confirmed by the wording of the last two sentences of point 32 of the guidelines, which state that foreclosure of emerging markets by the leading undertaking should be prevented and that NRAs should ensure that they can fully justify any form of early ex-ante intervention.

Finally, recital 15 in the preamble to the Commission recommendation notes that new and emerging markets, in which market power may be found to exist because of 'first-mover' advantages, should not in principle be subject to ex-ante regulation. Such a provision envisages the non-regulation of new markets where, having regard to first mover advantages, there are undertakings with significant market power. Therefore, that provision calls, where necessary, for the verification by the NRA on a case-by-case basis of the necessary conditions for a finding that a new market does not require regulation.

It is clear from all the foregoing that, although recital 27 in the preamble to the Framework Directive, point 32 of the guidelines and recital 15 in the preamble to the Commission recommendation propose that, as regards the new markets, the NRAs

should proceed cautiously, the fact remains that those provisions do not lay down any general principle of non-regulation with respect to those markets.

It should be added that, in any event, as it is clear from paragraphs 53 to 57 of this judgment, the Framework Directive confers on the NRA, and not on the national legislature, the task of determining the need for regulation of the markets.

In that connection, it must be observed that Articles 15 and 16 of the Framework Directive, which are expressly addressed to the NRAs, constitute the legal basis on which the guidelines and the Commission recommendation are founded, and that those two legal instruments serve as a guide for the NRAs when defining and analysing the relevant markets in order to determine whether they must be subject to *ex ante* regulation.

According to point 1 of the guidelines, they set out the principles for use by NRAs in the analysis of markets and effective competition under the regulatory framework for electronic communications. Point 6 of the guidelines also states that they are intended to guide NRAs in the exercise of their new responsibilities for defining markets and assessing significant market power.

In accordance with point 1 of the Commission recommendation, NRAs are advised to analyse the product and service markets identified in the annex thereto before defining the relevant markets in accordance with Article 15(3) of the Framework Directive.

Therefore, by laying down a legal provision, according to which, as a general rule, the regulation of new markets by the NRA is excluded, Paragraph 9a of the TKG encroaches on the wide powers conferred on the NRA under the Community regulatory framework, preventing it from adopting regulatory measures appropriate to each particular case. As it is clear from point 54 in the Advocate General's Opinion, the German legislature cannot alter a decision of the Community legislature and cannot, as a general rule, exempt new markets from regulation.

Second, the Commission takes the view that, by defining the concept of 'new market' in Paragraph 3(12b) of the TKG, the Federal Republic of Germany has limited the discretion of the NRA and failed to fulfil its obligations under Article 15(3) of the Framework Directive.

In that connection, it must be observed that the procedure for defining markets laid down in Article 15 of the Framework Directive is intended to enable NRAs to carry out an analysis of the relevant market in accordance with Article 16 of that directive and, in particular, to verify whether certain undertakings present on the market concerned have significant market power. The definition of the market therefore constitutes the starting point for the competition analysis carried out pursuant to Article 16 of the Framework Directive.

In that connection, it must be held that the definition of 'new market' in Paragraph 3(12b) of the TKG, which refers to 'a market for services and goods' does not constitute a definition of a relevant market within the meaning of Article 15(3) of the Framework Directive which might be the subject of a competition analysis under Article 16 of that directive. It follows that Paragraph 3(12b) of the TKG cannot be

regarded as limiting the power to define the market, which is the responsibility of the NRA under Article 15(3) of the Framework Directive.

However, it must be held that the limitation of the German NRA's discretion as a result of Paragraph 9a(1) of the TKG necessarily affects the NRA's ability to define the market. In that connection, it must be recalled that the Commission recommendation identifies, in an annex, the markets which must be the subject of an examination under Article 15(3) of the Framework Directive. Having regard to the principle of non-regulation of new markets in Paragraph 9a(1) of the TKG, the NRA will no longer find it necessary to define the relevant markets in accordance with Article 15(3) of the Framework Directive, since the markets identified in the annex to the Commission recommendation fall within the definition in Paragraph 3(12b) of the TKG.

It must be observed that both Article 15(3) of the Framework Directive and Article 16(6) thereof refer, with respect to the definition and analysis of the market, to the procedures laid down in Articles 6 and 7 of that directive.

In that connection, it has already been held that the principle of non-regulation of new markets provided for in Paragraph 9a(1) of the TKG limits the discretion of the NRA under Articles 15(3) and 16 of the Framework Directive. The limitation of the NRA's discretion to submit 'new markets' to a definition and to a market analysis necessarily involves a failure to comply in certain circumstances with the procedures provided for in Articles 6 and 7 of the Framework Directive.

Accordingly, the Commission's second complaint must also be upheld.

**Case C-424/07 *Commission v Germany*, 3 December 2009,  
paras. 38, 63-78, 80-83, 105-107 (not yet reported)**

### 3.2.10. Authorisation/assignment of frequency

The second, fourth and fifth questions all relate, essentially, to whether the provisions of Article 49 EC [now Article 56 TFEU] or the NCRF [The new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services] preclude, in television broadcasting matters, national legislation the application of which means that it is impossible for an operator holding rights to broadcast without the allocation of broadcasting radio frequencies.

It is true that, in respect of the second question, the Court can answer from the point of view of Article 49 EC [now Article 56 TFEU] only in so far as that question relates to Italian legislation, namely Article 3(7) of Law No 249/1997 [Law No 249 of 31 July 1997 (Ordinary Supplement to GURI No 177 of 31 July 1997) ('Law No 249/1997')], which pre-dates the application of the NCRF, as is clear from Article 28(1) of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; "the Framework Directive")], Article 18(1) of the Authorisation

Directive [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('Authorisation Directive') (OJ 2002 L 108, p. 21)] and Article 9 of the Competition Directive [Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) ('the Competition Directive')].

Likewise, the fourth and fifth questions refer only to the NCRF, since they concern national legislation subsequent to the date of application of the NCRF, namely the provisions of Law No 112/2004 [Law No 112 of 3 May 2004 (Ordinary Supplement to GURI No 82 of 5 May 2004) ('Law No 112/2004')].

First, however, the second question also relates to Italian legislation subsequent to the applicability of the NCRF, namely Article 1 of Decree-Law No 352/2003 [Decree-Law No 352 of 24 December 2003 (GURI No 300 of 29 December 2003, p. 4; 'Decree-Law No 352/2003')].

Secondly, as pointed out by the Commission in its observations to the Court, the NCRF implemented provisions of the Treaty, in particular those on freedom to provide services, in the area of electronic communications networks and services, as defined in Articles 2(a) and (c) of the Framework Directive, Article 2(1) of the Authorisation Directive and points 1 and 3 of Article 1 of the Competition Directive. The second, fourth and fifth questions must therefore be dealt with together, since the answers relating to the NCRF are relevant only from its date of application, as set out in Article 28(1) of the Framework Directive, Article 18(1) of the Authorisation Directive and Article 9 of the Competition Directive.

However, Article 49 EC [now Article 56 TFEU] precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 30).

In the area of electronic communications networks and services, those principles were implemented by the NCRF.

On that point, it must be stated that, in the area of television broadcasting, freedom to provide services, as enshrined in Article 49 EC [now Article 56 TFEU] and implemented in this area by the NCRF, requires not only the grant of broadcasting authorisations, but also the grant of broadcasting radio frequencies.

An operator cannot exercise effectively the rights which it derives from Community law in terms of access to the television broadcasting market without broadcasting radio frequencies.

The national court has doubts as to the compatibility of Law No 249/1997 with Community law only in so far as Article 3(7) of that Law set up transitional arrangements in favour of the incumbent networks, which had the effect of preventing operators without radio frequencies, such as *Centro Europa 7*, from accessing the market in question.

The national court is also questioning the Court on the criteria applied, pursuant to Law No 112/2004, for granting rights to operate on the digital and analogue television broadcasting market, only in so far as those criteria consolidated the transitional arrangements structured in favour of the existing networks in Article 1 of Decree-Law No 352/2003, which had the effect of precluding the grant to operators of radio frequencies for the purpose of operating on the analogue television broadcasting market, even though they had been granted rights under Law No 249/1997.

In that regard, the successive application of the transitional arrangements structured in favour of the incumbent networks in Article 3(7) of Law No 249/1997 and Article 1 of Decree-Law No 352/2003 had the effect of preventing operators without broadcasting radio frequencies from accessing the market in question.

The view must also be taken that, by issuing a general authorisation to operate on the broadcasting services market only to the incumbent networks, Article 23(5) of Law No 112/2004 consolidated the restrictive effect confirmed in the preceding paragraph.

First, by limiting *de facto* the number of operators able to broadcast on the market in question, those measures are and/or were likely to hinder the provision of services in the area of television broadcasting.

Secondly, those measures have and/or have had the effect of freezing the structures on the national market and protecting the position of the operators already active on that market.

Consequently, Article 49 EC [now Article 56 TFEU] and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1) of the Authorisation Directive and point 1 of Article 4 of the Competition Directive preclude such measures unless they are justified.

In that respect, it is clear from the case-law of the Court that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives (see, to that effect, *Placanica and Others*, paragraph 53), on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.

Thus, the NCRF expressly allows the Member States, under Article 1(3) of the Framework Directive, to adopt or maintain, in compliance with Community law, provisions pursuing general-interest objectives, in particular relating to audio-visual policy.

Likewise, the first subparagraph of Article 5(2) of the Authorisation Directive allows the Member States to grant rights to the use of radio frequencies on an individual basis with a view to complying with the objective of the efficient use of radio frequencies, as referred to by the Framework Directive.

However, as the Advocate General stated in points 34 and 37 of his Opinion, in order for such arrangements, which generally adversely affect Article 49 EC [now Article 56 TFEU] and the NCRF, to be justified they must not only comply with general-

interest objectives but also be structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (see, to that effect, *Placanica and Others*, paragraph 49 and the case-law cited).

Accordingly, Article 9(1) of the Framework Directive provides that the Member States are to ensure that the allocation and assignment of radio frequencies by the national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

Furthermore, where it is necessary to grant individual rights to the use of radio frequencies, those rights must be granted, under the second subparagraph of Article 5(2) of the Authorisation Directive, ‘through open, transparent and non-discriminatory procedures’.

Likewise, pursuant to Article 7(3) of the Authorisation Directive, ‘[w]here the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate’.

That requirement is backed up by point 2 of Article 4 of the Competition Directive, under which ‘the assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria’.

In the main proceedings, according to the information supplied by the national court, under Law No 249/1997 the allocation of radio frequencies to a limited number of operators was not carried out in accordance with such criteria.

First, those radio frequencies were allocated de facto to the incumbent networks under the transitional arrangements adjusted in Article 3(7) of Law No 249/1997, even though some of those networks had not been granted rights under that Law.

Secondly, operators such as Centro Europa 7 were not allocated radio frequencies even though they had been granted rights under that Law.

Consequently, irrespective of the objectives pursued by Law No 249/1997 with regard to the system for the grant of radio frequencies to a limited number of operators, the view must be taken that Article 49 EC [now Article 56 TFEU] precluded such a system.

The same conclusion must be drawn as regards the system for the grant of radio frequencies to a limited number of operators under Law No 112/2004, in the sense that that scheme was not implemented on the basis of objective, transparent, non-discriminatory and proportionate criteria, in breach of Article 49 EC [now Article 56 TFEU] and, from the date on which they became applicable, Article 9(1) of the Framework Directive, the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and point 2 of Article 4 of the Competition Directive.

Under Law No 112/2004, radio frequencies were granted to the incumbent operators and the latter were authorised to broadcast under the transitional arrangements

adjusted in Article 1 of Decree-Law No 352/2003, which merely extended the transitional arrangements set up by Law No 249/1997.

In any event, the restrictions established above cannot be justified by the need to ensure a swift transformation to digital television broadcasting.

Irrespective of whether such an objective may constitute a general-interest objective capable of justifying such restrictions, it is clear, as the Commission rightly pointed out in the observations which it submitted to the Court, that the Italian legislation, in particular Law No 112/2004, does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting.

**Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349,  
paras. 72-76, 79, 80, 85, 86, 93-115**

### 3.2.11. Obligation to negotiate interconnection

In its first plea, the Commission contends that the obligation to negotiate interconnection laid down in Article 4(1) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') (OJ 2002 L 108, p. 7)] applies to all operators of public telecommunications networks and concerns the interconnection of networks. The latter is a particular type of access which is implemented between the various operators of public networks and does not involve any other form of access. The national regulatory authority only intervenes in exceptional circumstances.

It should be noted at the outset that the Republic of Poland accepts that Article 26(1) of the Law on telecommunications [Polish Law on telecommunications (Prawo Telekomunikacyjne), of 16 July 2004 (Dz. U. 2004, No 171, position 1800; 'the Law on telecommunications')] is a general statutory provision requiring any operator of a public telecommunications network to negotiate in good faith the conclusion of an agreement on access to that network at the request of any undertaking wishing to obtain such access, since such negotiations relate not only to agreements on interconnection but also to agreements governing access to the network.

It must be borne in mind that the obligation on all operators of public telecommunications networks to negotiate when requested by other undertakings so authorised, as is apparent from Article 4(1) of the Access directive, concerns interconnection which, in accordance with the definition provided in Article 2(b) of that directive, 'is a specific type of access implemented between public network operators'. Contrary to Article 26 of the Law on telecommunications, this obligation therefore does not concern other forms of access to networks, such as those defined in Article 2(a) of the directive and those provided for in the Law on telecommunications.

It must also be pointed out that the second sentence of Article 4(1) of the Access Directive allows operators to offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority. Those obligations include the obligations which that authority may impose under Article 8(2) of the Access Directive on an operator designated as having significant market power on a specific market following a market analysis.

In that regard, it is apparent from reading together Articles 8 and 12(1)(b) of the Access Directive that an obligation to negotiate an agreement with undertakings in good faith may be imposed by national regulatory authorities on operators with significant market power, following an analysis of that market.

As the Advocate General has pointed out in point 62 of his Opinion, Article 26 of the Law on telecommunications is not based on two sets of rules depending on the market power of the undertakings; rather, it leads to equal treatment of all operators, without allowing the national regulatory authority to take account of the specific context before intervening or in the course of its examination of the request by the undertaking seeking access to a telecommunications network.

The consequence of the obligation provided in the Law on telecommunications to negotiate access agreements in good faith is to impose such an obligation without prior evaluation of the degree of effective competition on the market concerned. The Law also does not allow the obligation to be withdrawn or amended where competition in the market intensifies.

Moreover, according to recital 19 of the Access Directive, whilst increasing competition, intervention by national regulatory authorities must balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit and the rights of other service providers to access facilities that are essential for the provision of competing services.

Furthermore, under Article 12(2) of the Access Directive, intervention by national regulatory authorities is circumscribed by the need take account of the factors set out in that provision, including the need to safeguard competition in the long-term and to assess the proportionality of obligations which that authority intends to impose as regards access to specific network elements and their use in relation to the objectives set out in Article 8 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)].

By not providing for intervention by the national regulatory authority prior to imposition of an obligation to negotiate access agreements, the Law on telecommunications does not allow for any assessment of the circumstances in accordance with the factors set out in Article 12(2).

It follows that, by imposing on operators of public communications networks a general obligation to negotiate agreements for access to the telecommunications network, the Republic of Poland has not correctly transposed Article 4(1) of the Access Directive.

This finding is not undermined by the Member State's argument to the effect that a more dynamic and purposive approach to interpreting the directive would enable a more rapid development of technologies to take place.

Indeed, the national regulatory authority should intervene only to ensure efficient functioning of the market. To that end, the first subparagraph of Article 5(1) of the Access Directive provides that the authority is under a duty to promote efficiency and sustainable competition and to give the maximum benefit to end-users.

As regard the Member State's argument that the Law on telecommunications strengthens observance of the principle of legal certainty, it suffices to state that this principle does not permit any derogation from the rules laid down by the Access Directive.

Accordingly, it must be held that by not transposing Article 4(1) of the Access Directive correctly, the Republic of Poland has failed to fulfil its obligations under that directive.

**Case C-227/07 *Commission v. Poland* [2008] ECR I-8403, paras. 23, 35-47, 49**

By the first part of the first question, the national court asks essentially whether Article 4(1) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') (OJ 2002 L 108, p. 7)], read in conjunction with recitals 5, 6 and 8 in its preamble and with Articles 5 and 8 thereof, preclude national legislation, such as that at issue in the main proceedings, which does not limit the possibility of relying on the obligation to negotiate with respect to interconnection solely to operators of public communications networks. By its second question, which it is appropriate to examine at the same time, the national court also asks whether, as a consequence, the status and nature of the network of an undertaking relying on the obligation to negotiate has an effect on the relations with the other undertaking concerned.

As a preliminary point, it should be stated that, in view of the definitions given in Paragraph 2 of the Communications Market Law [Communications Market Law (Viestintämarkkinalaki 393/2003) of 23 May 2003], as set out in paragraph 18 of this judgment, the first question referred asks in fact whether the obligation to negotiate provided for in Article 4(1) of the Access Directive may be relied on by service providers in order to ensure the interoperability of communications services.

It is clear from the wording of Article 4(1) that the obligation to negotiate an interconnection applies to all operators of public communications networks when requested to do so by another authorised undertaking.

As regards the authorisation, it should be noted that Article 2(2)(a) of the Authorisation Directive [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ('Authorisation Directive') (OJ 2002 L 108, p. 21)] defines 'general

authorisation' issued to operators pursuant to Article 3(2) of that directive as 'a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services'.

That authorisation thus also concerns service operators.

However, Article 4(2)(a) of the Authorisation Directive states that undertakings authorised to provide electronic communications networks or services to the public have the right to negotiate interconnection with other providers of communications networks or services in accordance with the Access Directive.

Article 2(b) of the Access Directive defines 'interconnection' as 'the physical and logical linking of public communications networks', and points out that it 'is a specific type of access implemented between public network operators'.

Furthermore, the reciprocity of the interconnection, provided for in Article 4(1) of the Access Directive, implies that the two parties to the negotiations are public network operators.

Therefore, the obligation to negotiate laid down in Article 4(1) concerns only the interconnection of networks, to the exclusion of other forms of network access (see, to that effect, Case C-227/07 *Commission v Poland* [2008] ECR I-8403, paragraph 36), and applies only to operators of public communications networks with respect to other operators of public communications networks.

Consequently, as electronic communications services providers do not fall within the category of 'operators of public communications networks', they cannot rely on the obligation to negotiate laid down in Article 4(1) of the Access Directive.

In any event, it must be held that that obligation to negotiate is independent of whether the undertaking concerned has significant market power, and does not entail the obligation to conclude an interconnection agreement, but merely an obligation to negotiate such an agreement.

It follows that, as the Romanian Government submits, an obligation to negotiate such as that provided for in Article 4(1) of the Access Directive is an exception and must therefore be interpreted strictly.

[...] as the Advocate General notes, in paragraphs 64 et seq. of his Opinion, and contrary to the Netherlands Government's submissions, Article 6(1) of the Authorisation Directive cannot provide the basis for national legislation such as that at issue in the main proceedings.

Article 6(1) of the Authorisation Directive provides only for a general authorisation subject to the conditions set out in Part A of the Annex to that directive, which refers in point 3 to the Access Directive.

It follows that the Access Directive establishes the framework in which negotiations take place or obligations to be imposed on communications undertakings are determined.

Having regard to the foregoing, it must be held that the nature of the network of an undertaking relying on the obligation to negotiate, laid down in Article 4(1) of the Access Directive, and the question whether that undertaking is an operator of public communications networks, affect the relationship with the other undertaking concerned in so far as the Member States may not impose that obligation on operators other than operators of public communications networks.

It is for the national court, taking into account the definitions given in Article 2 of the Access Directive and the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”) (OJ 2002 L 108, p. 33)], to determine whether, having regard to the status and the nature of the operators concerned in the main proceedings, they may be classified as operators of public communications networks.

It follows from the foregoing that the answer to the first part of the first question and to the second question is that Article 4(1) of the Access Directive, read in conjunction with recitals 5, 6, 8 and 19 in its preamble and with Articles 5 and 8 thereof, preclude national legislation such as the Communications Market Law, in so far as it does not restrict the possibility of relying on the obligation to negotiate on the interconnection of networks solely to operators of public communications networks. It is for the national court to determine whether, having regard to the status and the nature of the operators concerned in the main proceedings, they may be classified as operators of public communications networks.

**Case C-192/08 *TeliaSonera Finland Oyj*, 12 November 2009,  
paras. 26-36, 40, 43-48 (not yet reported)**

### 3.2.12. Access/power of NRA

By its second complaint, the Commission requests that the Court declare that the first subparagraph of Article 5(1) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”) (OJ 2002 L 108, p. 7)], requiring national regulatory authorities to be given the power to intervene specifically in order to ensure compliance with the objectives of Article 8 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)] has not been correctly transposed by the Law on telecommunications [Polish Law on telecommunications (Prawo Telekomunikacyjne), of 16 July 2004 (Dz. U. 2004, No 171, position 1800; “the Law on telecommunications”)].

It must be pointed out, first, that the regulatory tasks of the national regulatory authority are set out in Articles 8 to 13 of the Framework Directive. Article 8(1) thereof provides that Member States are to ensure that, in carrying out those tasks, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2 to 4 of that article.

Furthermore, the Court has interpreted Article 8 as placing on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 81).

Secondly, the first subparagraph of Article 5(1) of the Access Directive refers to the powers and responsibilities of the national regulatory authorities in respect of access and interconnection. It provides that, acting in pursuit of the objectives set out in Article 8 of the Framework Directive, those authorities are to encourage and where appropriate ensure adequate access and interconnection, and interoperability of services, while promoting efficiency, sustainable competition, and giving the maximum benefit to end-users.

It follows that the first subparagraph of Article 5(1) of the Access Directive is limited to providing for a general power for the national regulatory authorities for the purpose of achieving the objectives of Article 8 of the Framework Directive in the specific context of access and interconnection.

Thirdly, as the Advocate General has observed in point 83 of his Opinion, Articles 26 to 30 of the Polish Law on telecommunications afford the national regulatory authority wide powers of intervention.

Fourthly, it is to be remembered that, according to settled case-law, in proceedings for failure to fulfil obligations it is incumbent upon the Commission to prove the alleged failure. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, (Case C-387/06 *Commission v Finland* [2008] ECR I-1, paragraph 25 and the case-law cited).

It must be held that by doing no more than submitting that the first subparagraph of Article 5(1) of the Access Directive cannot be implemented by a general statutory provision, but only by wording which sets out decisions which the national regulatory authority is empowered to take, without showing that the relevant provisions of the Law on telecommunications do not achieve the objectives of the Framework Directive, the Commission has not sufficiently established that those provisions do not ensure the correct transposition of the first subparagraph of Article 5(1) of the Access Directive.

**Case C-227/07 *Commission v. Poland* [2008] ECR I-8403, paras. 61-68**

By the second part of the first question, the national court asks whether a national regulatory authority may take the view that the obligation to negotiate an interconnection, provided for under Article 4(1) of the Access Directive [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') (OJ 2002 L 108, p. 7)], has been breached where an undertaking which does not have significant market power offers another undertaking

interconnection under unilateral conditions which are likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the other undertaking from benefiting from its services.

It should be observed, first of all, that the Court has held that the regulatory tasks of a national regulatory authority are set out in Articles 8 to 13 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)]. Furthermore, the Court has interpreted Article 8 as placing on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (*Commission v Poland*, paragraphs 62 and 63, and the case-law cited).

Second, recital 5 in the preamble to the Access Directive states that undertakings which receive requests for access or interconnection should, in principle, conclude such agreements on a commercial basis and negotiate in good faith.

In that connection, Article 5(4) of that directive enables the national regulatory authorities to intervene in the absence of agreement in order to secure the objectives laid down in Article 8 of the Framework Directive.

Third, as the Advocate General observed in point 103 of his Opinion, in order to give practical effect to Article 4(1) of the Access Directive, which provides for an obligation to negotiate under the conditions set out in paragraphs 28 to 36 of this judgment, it must be accepted that the negotiations are to be carried out in good faith.

Fourth, contrary to the Finnish Government’s submission, Article 12(1) of the Access Directive cannot serve as a basis for an appraisal such as that referred to by the national court unless the operator to which the interconnection request is addressed has not been designated as having significant power on the market concerned in accordance with Article 8(2) of that directive.

It is clear from the foregoing that the answer to the second part of the first question referred is that a national regulatory authority may take the view that the obligation to negotiate an interconnection has been breached where an undertaking which does not have significant market power proposes interconnection to another undertaking under unilateral conditions likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services.

By the third part of its first question, the national court asks essentially whether a national regulatory authority may require an undertaking which does not have significant market power to negotiate in good faith with another undertaking on the interconnection of SMS and MMS message services between the systems of those two undertakings.

As a preliminary point, it must be stated that the necessary premiss for the answer to that part of the first question is either that Article 4(1) of the Access Directive applies to the case in the main proceedings since the two operators concerned are operators of public communications networks but the obligations imposed by that article have not been complied with by the operator requested to negotiate an interconnection, or that the situation at issue in the main proceedings falls outside the scope of that article since one of the operators concerned cannot be classified as an operator of public communications networks.

It must be observed, first, that it follows from the wording of the first subparagraph of Article 5(1) of the Access Directive that the national regulatory authorities are responsible for ensuring adequate access and interconnection and also interoperability of services by means which are not exhaustively listed there.

In that context, in accordance with point (a) of the second subparagraph of Article 5(1), those authorities must be able to impose 'obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks' solely in order to ensure end-to-end connectivity.

Second, Article 5(4) of the Access Directive also concerns access and interconnection and requires that national regulatory authorities be empowered to intervene, since it provides that those authorities may intervene at their own initiative in order to secure the objectives of Article 8 of the Framework Directive, but without defining or limiting the detailed rules for that intervention.

Thus it is apparent that the relevant provisions of the Framework Directive and the Access Directive enable a national regulatory authority to take a decision ordering an undertaking which does not have significant market power but which controls access to end-users to negotiate either an interconnection of the two networks concerned if the undertaking requesting such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if the undertaking which makes the request is not covered by that classification.

It follows from the foregoing that the answer to the third part of the first question referred is that a national regulatory authority may require an undertaking which does not have significant market power but which controls access to end-users to negotiate in good faith with another undertaking for either interconnection of the two networks concerned if the undertaking which requests such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if that undertaking is not covered by that classification.

**Case C-192/08 *TeliaSonera Finland Oyj*, 12 November 2009,  
paras. 49-62 (not yet reported)**

### 3.2.13. Call termination/power of NRA

*It should first be pointed out that the usage fee for telephone networks is dealt with in Article 43 of the Communications Market Law [Communications Market Law (Viestintämarkkinalaki 393/2003) of 23 May 2003], within Chapter 5 thereof, which concerns the interconnection obligations of telecommunications operators. This Article does not therefore cover the remit of the regulatory authority.*

*By its action for failure to fulfil obligations, the Commission seeks a declaration that the powers of the regulatory authority are limited solely because the fourth subparagraph of Article 43 of the law lays down, in respect of incoming traffic, an exception to the obligation to fix a separate price for call termination when the connection is established from a fixed to a mobile network, except where the connection is established using a carrier access code or preselection. Restricting the powers of this authority in this way is contrary to the Framework [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)] and Access Directives [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”) (OJ 2002 L 108, p. 7)].*

*In order to verify whether the regulatory authority's powers are effectively restricted on account of the provisions of the fourth subparagraph of Article 43 of the Communications Market Law, the provisions in this law defining the powers of this authority need to be examined in full.*

*It appears in this case, however, that, although the Commission has explained the existence of an exception to the obligation to fix a separate price for the termination of calls from a fixed network to a mobile network, it has nevertheless not examined the regulatory authority's powers in detail. It follows that the Commission has neither identified nor demonstrated sufficiently in law the extent to which the provisions of the fourth subparagraph of Article 43 of the Communications Market Law affect the powers of this authority.*

*In this regard, it should be noted that it is settled case-law that, in an action for failure to fulfil obligations, it is incumbent on the Commission to prove the allegation that the obligation has not been fulfilled. It is for the Commission to put before the Court the evidence or arguments necessary in order for it to determine that there has been such a failure to fulfil obligations (cf. the judgment in case C-6/04 Commission v United Kingdom [2005] ECR I-9017, paragraph 75 and the case law cited there).*

*However, in view of the reasons given in paragraphs 23 and 24 of the present judgment, it must be concluded that the Commission has not shown how the fourth subparagraph of Article 43 of the Communications Market Law limits the regulatory authority's powers in such a way that the regulator could not, in accordance with Article 8(1) of the Framework Directive, take any reasonable measure to meet the objectives defined, in particular, in the second subparagraph of Article 8(1), Article 8(2)(b) and 8(3)(c).*

*The same point applies to the Commission's arguments regarding, first, that the regulatory authority is not empowered, in accordance with Article 8(1) of the Access Directive to enforce the obligations referred to in Articles 9 to 13 of the Directive and, second, that the authority is unable to impose upon operators enjoying significant market power obligations based on the nature of the problem noted, in accordance with Article 8(4).*

*It follows from the foregoing that the Court has insufficient evidence to determine whether the allegation that Finland has infringed Community law is well-founded.*

**Case C-387/06 *Commission v. Finland* [2008] ECR I-1\*, paras. 21-28**

#### 3.2.14. Voice telephony/cost accounting

Paragraph 25(1) of the TKG 1996 [Law on telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl. 1996 I, p. 1120; the ‘TKG 1996’)] subjected tariffs for voice telephony services charged by undertakings having a dominant position in the relevant market to end-users to prior approval in accordance with Paragraphs 24 and 27 to 31 of that Law.

Article 17(1) of Directive 98/10 [Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24)], expressly maintained in force by Article 16(1)(a) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51; ‘the Universal Service Directive’)], referred to in Article 27 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; ‘the Framework Directive’)], sets out the role of the national regulatory authorities and the obligation on licensees having a dominant position in the market to comply with the provisions of Article 17. Article 17(2) provides that tariffs for use of the fixed public telephone network and fixed public telephone services are to follow the basic principles of cost orientation.

According to Paragraph 24 of the TKG 1996, tariffs are to be based on the costs of efficient service provision and are to satisfy the requirements laid down in Paragraph 24(2), which provides, *inter alia*, that tariffs may not contain any surcharges which can be imposed solely as a result of the operator’s dominant position in the relevant telecommunications market.

It follows that a provision such as Paragraph 25 of the TKG 1996, containing a general requirement for approval and at the same time referring to the principle of cost orientation laid down in a provision such as Paragraph 24 of that law, may be regarded as implementing Article 17 of Directive 98/10.

It follows from the foregoing that an obligation such as that laid down in Paragraph 25 of the TKG 1996 constitutes an obligation within the meaning of Article 16(1)(a) of the Universal Service Directive, and must therefore be maintained temporarily.

**Case C-262/06 *Deutsche Telekom AG*, [2007] ECR I-10057, paras. 37-41**

### 3.2.15. Number portability/pricing

By the first part of the first question, the referring court essentially asks whether pricing for interconnection related to the provision of number portability, as referred to in Article 30(2) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51)], concerns the set-up costs in addition to the traffic costs.

Mobistar and Belgacom Mobile, together with the IBPT, the Commission of the European Communities and the Cypriot and Lithuanian Governments, submit that the provisions of Article 30(2) relate only to the costs connected with traffic to the number ported and not to the costs incurred in implementing a request for porting of numbers between mobile operators.

However, Base and the Italian and United Kingdom Governments take the view that the pricing for interconnection referred to in that article includes all services linked to the implementation of number portability for which the operators are entitled to seek payment.

Firstly, it must be stated that the concept of number portability covers the facility available to a mobile telephone subscriber to retain the same number when changing operator.

The implementation of that facility requires the platforms between operators to be compatible, the subscriber's number to be ported from one operator to another and technical operations to allow the forwarding of telephone calls to the ported number.

Number portability is intended to remove the obstacles to consumers' freedom of choice particularly between mobile telephone operators and thus to ensure development of effective competition on the telephone services market.

With a view to achieving those aims, the Community legislature provided, in Article 30(2) of the Universal Service Directive, that national regulatory authorities are to ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities.

The interpretation according to which the set-up costs are not covered by that provision would be contrary to the aim and purpose of the Universal Service Directive and might limit its effectiveness from the point of view of the provision of portability.

The set-up costs represent a large part of the costs which may be passed on directly or indirectly by the recipient operator to the subscriber who wishes to make use of the portability facility for his mobile number.

Although such costs do not fall within the scope of the checks laid down in Article 30(2) of the Universal Service Directive, their fixing at excessive levels by donor operators, in particular those already established on the market which have a large client base, might dissuade consumers from making use of that facility, or even make it in fact largely illusory.

The answer to the first part of the first question must therefore be that pricing for interconnection related to the provision of number portability, as referred to in Article 30(2) of the Universal Service Directive, concerns the traffic costs of numbers ported and the set-up costs incurred by mobile telephone operators to implement requests for number porting.

By [the third] part of the first question, the referring court asks essentially whether the national regulatory authorities are permitted to fix *ex ante* maximum prices in respect of all mobile telephone operators on the basis of an abstract model of the costs.

At the outset, it should be noted that Article 30(2) of the Universal Service Directive requires the national regulatory authorities to ensure that the operators set the prices on the basis of their costs and, furthermore, that the prices do not dissuade consumers.

Once it is established that prices are fixed on the basis of costs, that provision confers a certain discretion on the national authorities to assess the situation and define the method which appears to them to be the most suitable to make portability fully effective, in a manner which ensures that consumers are not dissuaded from making use of that facility.

Clearly, the limits of that discretion have not been exceeded in the present case by the national regulatory authorities. A method consisting in defining a maximum price, such as that chosen by the Belgian authorities, may be considered compatible with Article 30(2) of the Universal Service Directive, provided that it is genuinely possible for new operators to contest the application of maximum prices by operators already present in the market by showing that those prices are too high in relation to their cost structure.

Thus, it follows from the foregoing that, in principle, the Universal Service Directive does not preclude the competent national authorities from fixing *ex ante* maximum prices in respect of all mobile telephone operators on the basis of an abstract model of the costs.

In the light of all those considerations, the answer to the third part of the first question must be that Article 30(2) of the Universal Service Directive does not preclude the adoption of a national measure such as that at issue in the main proceedings which fixes in advance and on the basis of an abstract model of the costs maximum prices which may be charged by the donor operator to the recipient operator as set-up costs, provided that the prices are fixed on the basis of the costs in such a way that consumers are not dissuaded from making use of the facility of portability.

**Case C-438/04 *Mobistar*, [2006] ECR I-6675, paras. 20-30 and 32-37**

### 3.2.16. Subscriber

*In this case, it should be noted that the Commission has not confined itself to alleging that the definition of the concept of 'subscriber' used by Poland in its Law regarding telecommunications [Polish Law on telecommunications (Prawo Telekomunikacyjne), of 16 July 2004 (Dz. U. 2004, No 171, position 1800; 'the Law on*

*telecommunications’)] is not entirely identical to that contained in Article 2(k) of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)] but has clearly identified a number of rights which ‘subscribers’ would be denied on account of the incorrect transposition of this provision.*

*Nevertheless, under this provision of Polish law, the concept of ‘subscriber’ is limited to persons who have entered into a ‘written’ contract with a provider of publicly accessible telecommunications services. In this respect, it should be noted that, had the Community legislature wished to limit the concept of ‘contract’ in this way, it could have easily done so by using the specific term ‘written contract’ in Article 2(k) of the Framework Directive. However, this is not the case.*

*With regard to Poland’s argument that, despite differences in terms of the scope of the definitions adopted by the Community and Poland, fulfilment of the objectives pursued by the ‘electronic communications’ directives [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”) (OJ 2002 L 108, p. 7), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (“the Authorisation Directive”) (OJ 2002 L 108, p. 21), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (“the Universal Service Directive”) (OJ 2002 L 108, p. 51) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Directive on privacy and electronic communications”) (OJ 2002 L 201, p. 37)] is not compromised in this case, the conclusion must be that Poland has not sufficiently justified its position.*

*In support of the teleological interpretation of the Framework Directive that Poland is proposing, Poland has, in substance, merely asserted that it is technically impossible to allow users of prepaid cards in every case all the same rights that subscribers are allowed. However, in the context of the present action, Poland is not being accused of failing to grant subscribers’ rights to users of pre-paid cards but of denying them, with no valid technical reason, the only reason being the absence of a written contract, in particular to persons who, having concluded a contract for the purchase of a prepaid mobile telephone card with their provider of electronic communications services, have been provided with a specific number and who, in order to enjoy the same benefits as other subscribers, are willing to give up the anonymity under which they may have purchased the card.*

*In these circumstances, the Commission’s action must be upheld.*

*Accordingly, by failing to transpose correctly the Framework Directive, in particular Article 2(k) thereof regarding the definition of the concept of ‘subscriber’, Poland has failed to fulfil its obligations under the Directive.*

**Case C-492/07 Commission v. Poland, 22 January 2009, paras. 22, 26-30 (not yet reported)**

### 3.2.17. Designation of universal service provider

*Under these circumstances, it should be noted that even though Member States are free to determine the most suitable approach for ensuring the provision of a universal service, they are nonetheless bound to ensure that such service is provided in a profitable and efficient way, while adhering, in particular, to the principles of objectivity, non-discrimination and minimal distortion of competition. In this regard, the mechanism used to appoint undertakings entrusted with providing universal services may not exclude a priori any other undertakings.*

*Indeed, Article L. 35-2 of the code [Postal and Electronic Communications Code] specifies that any operator who agrees and is able to provide the service throughout the country's territory may be appointed to provide elements of the universal service. This provision therefore excludes from any appointment procedure the undertakings that are unable to cover the national territory in its entirety and, in this respect, the resulting appointment mechanism does not comply with Article 8(2) of the 'Universal Service' Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ("the Universal Service Directive") (OJ 2002 L 108, p. 51)] and, specifically, the principle of non-discrimination.*

*It should also be pointed out that this appointment mechanism, firstly, does not guarantee that the universal service provision meets the criteria of profitability and efficiency and, secondly, is likely to distort competition in the telecommunications market. What follows from the provisions of Article L. 35-2 of the code is that this measure sets a preliminary legal condition which predetermines the result of the appointment procedure. This condition hinders genuine and effective competition in this market and does not enable the universal service to be provided profitably or efficiently, since the national regulatory authorities are necessarily obliged to appoint, from amongst the companies capable of providing the service, only those which are capable of ensuring coverage of the entire national territory.*

*It follows that a provision of this kind stipulates an appointment mechanism that is not likely to ensure adherence to the principles set out in Article 8(2) of the 'Universal Service' Directive referred to in point 31 of this judgment and, consequently, that Article 8(2) has been transposed incorrectly.*

*It is important to add that, under established case law, the reduced existence in a specific Member State of a specific activity covered by the Directive does not release the Member State from its obligation to transpose correctly all of the Directive's provisions (cf. judgments in Case C-214/98 Commission v. Greece [2000] ECR I-9601, paragraph 22, Case C-441/00 Commission v. United Kingdom [2002] ECR I-4699, paragraph 15).*

*Such an obligation is incumbent upon the Member State concerned, not merely to anticipate any change in the actual circumstances existing at a given moment, as cited by the Member State in its defence, but above all to establish a legislative or regulatory framework which is sufficiently precise, clear and transparent to*

*guarantee in law, irrespective of circumstance, the full application of the 'Universal Service' Directive and enabling individuals to know their rights and obligations (cf. in this respect the judgment in Commission v. Greece, cited above, paragraph 27).*

**Case C-220/07 Commission v. France [2008] ECR I-95\*, paras. 31-36**

### 3.2.18. Telephone directory and telephone directory enquiry services

*Portugal maintains, in substance, that it had taken every necessary measure to ensure that all the relevant data for a directory and a complete information service could be made available. However, it would not be able to close the procedure since the decisions by the national judicial authorities were not final.*

*In this respect, it is worth noting that the obligation upon Member States stemming from a Directive to achieve the result provided for under the Directive and also the duty under Article 10 of the EC Treaty [see now Article 4(3) TEU] to take all general or specific measures needed in order to ensure fulfilment of these obligations are incumbent upon all the authorities of a Member State, including judicial authorities (cf. judgment of 27 November 2008, Juuri, C-396/07, not published in the ECR, paragraph 27 and case-law cited).*

*Action against an infringement by a Member State may thus in principle be founded on Article 226 of the EC Treaty [now Article 258 TFEU] irrespective of the body of that State whose action or failure to act lay behind the infringement, even in the case of a constitutionally independent institution (Judgments in Case 77/69 Commission v. Belgium [1970] ECR 237, paragraph 15, and Case C-129/00 Commission v. Italy [2003] ECR I-14637, paragraph 29).*

*In fact, the Court has repeatedly held that a Member State may not cite internal circumstances, such as difficulties in application arising when implementing a Community act, as a justification of non-compliance with obligations and deadlines stemming from Community law (cf. judgments in Case C-387/97 Commission v. Greece [2000] ECR I-5047, paragraph 70, and Joined Cases C-418/00 and C-419/00 Commission v. France [2002] ECR I-3969, paragraph 59).*

*Regarding such deadlines, established case law states that the existence of non-compliance must be determined with reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes may not be taken into account by the Court (cf. in particular, the judgments in Case C-392/99 Commission v. Portugal [2003] ECR I-3373, paragraph 87, Case C-433/03 Commission v. Germany [2005] ECR I-6985, paragraph 32, and, Case C-319/06 Commission v. Luxembourg [2008] not yet reported, paragraph 72).*

*At the time of the hearing, Portugal reported that an agreement on making mobile telephone numbers available had been reached between the telephone operators concerned. This agreement was to result in an Anacom decision granting operators and the universal service provider a 30-day deadline, by which time a directory and a complete enquiry service were to be made available.*

However, in the light of the case law cited in paragraph 22 of this judgment, the Court is not able to take this decision into account because, at the time when the period laid down in the reasoned opinion expired, neither the telephone directory nor the telephone enquiry service including all telephone service subscribers who wished to appear in it were accessible to the public. Portugal has not contested this statement.

*In these circumstances, the Commission's action must be upheld.*

**Case C-458/07 *Commission v. Portugal*, 12 March 2009, paras. 18-25 (not yet reported)**

### 3.2.19. Single European emergency call number

*Italy does not dispute non-compliance relating to its obligations under Article 26(3) of the Directive in question. However, it does assert that it has made every effort to find a solution to the problem at the origin of the Commission's complaints. On this subject, it refers to the Decree of 22 January 2008 (ordinary supplement to the Official Gazette of the Italian Republic No 59 of 10 March 2008) and indicates that the single European emergency number ('112') would be available by 10 July 2008 in the province of Salerno and then gradually extended to all other Italian provinces.*

*In this respect, it should be noted that, under established case law, determination of an infringement should be based on the situation of the Member State at the end of the deadline stipulated in the reasoned opinion, and changes occurring subsequently should not be taken into account by the Court (cf. in particular, the judgments of 30 January 2002, Case C-103/00 *Commission v Greece* [2002] ECR I1147, paragraph 23, and of 30 May 2002, Case C-323/01 *Commission v Italy* [2002] ECR I4711, paragraph 8).*

*Furthermore, according to established case law, a Member State may not cite provisions, practices or situations specific to its domestic legal system to justify non-compliance with the obligations and deadlines stipulated by a Directive (cf. in particular, the judgments in Case C-352/01 *Commission v. Spain* [2002] ECR I-10263, paragraph 8, Case C-22/02 *Commission v. Italy* [2003] ECR I-9011, paragraph 9, and, Case C-40/07 *Commission v. Italy* [2007] not yet reported, paragraph 12).*

*The fact that Italy encountered organisational problems when endeavouring to comply with the obligations fixed in the Directive may not in itself have any bearing on the validity of the Commission's case.*

*In these circumstances, the Commission's action must be upheld.*

**Case C-539/07 *Commission v. Italy*, 15 January 2009, paras. 8, 9, 11-13 (not yet reported)**

*In its application, the Commission indicates that the provision of caller location information to authorities in charge of emergency services is technically feasible in the case of calls made to the single European emergency number '112'.*

*In its defence, the Slovak Republic acknowledges that it has not met its obligations under Article 26(3) of the Directive. It indicates that it expects to comply at the earliest possible opportunity, if possible before the Court ruling on this case.*

*It should be noted that upon expiry of the deadline stipulated in the reasoned opinion, the date in respect of which it must be determined whether a Member State has failed to fulfil its obligations (cf. in particular, the judgments in Case C-168/03 Commission v. Spain [2004] ECR I-8227, paragraph 24, and Case C-23/05 Commission v. Luxembourg [2005 ECR I-9535, paragraph 9), the necessary measures to ensure the transposition of Article 26(3) of the Directive into the Slovakian legal order had not been adopted.*

*In these circumstances, the Commission's action must be upheld.*

**Case C-493/07 Commission v. Slovakia, 25 July 2008, paras. 9-12 (not yet reported)**

It must be recalled that, under Article 26(3) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51; 'the Universal Service Directive')], Member States are to ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls to the single European emergency call number '112'.

It follows from the wording and the aim of the provision that it imposes on Member States, subject to technical feasibility, an obligation to achieve a result which is not limited to putting in place an appropriate regulatory framework, but which requires that the location information for all callers to the '112' be actually transmitted to the emergency services.

In this case, the Republic of Lithuania does not deny that when the period prescribed in the reasoned opinion expired, that information was not transmitted in cases where the call came from a mobile telephone.

First, the Republic of Lithuania's argument that the Commission's complaint is not formulated in an appropriate manner since it has adopted all the legal, technical and organisational measures necessary to transpose Article 26(3) of the Universal Service Directive, cannot be accepted. It is clear from the formulation and the reasoning of that complaint that the Commission does not criticise the Republic of Lithuania for having incorrectly or insufficiently transposed that provision, but for not being able to ensure in practice that the information at issue is actually made available to the emergency services.

Second, as regards the requirement of technical feasibility which accompanies the obligation imposed on the Member States by Article 26(3) of the Universal Service Directive, it must be held that, according to the information provided by the Republic of Lithuania, the failure to transmit information on the location of calls from the public mobile telephone networks is due to the fact that the operators of those

networks do not have the necessary technical equipment, which would require substantial investment.

It has been explained in that regard that after an initial disagreement between the operators and the Lithuanian authorities concerning the financing of the costs of such investment the legislature amended Article 65(4) of the Law on electronic communications [Law No IX-2135 on electronic communications (Elektroninių ryšių įstatymas Nr. IX-2135), of 15 April 2004 (Žin., 2004, Nr. 69-2382) ('Law on electronic communications')] with effect from 1 September 2007, so as to provide that from now on operators are to provide the information at issue free of charge to the Joint Emergency Services Centre and that the costs of acquiring, installing, adapting, refurbishing and operating the equipment necessary for that purpose are to be reimbursed from public funds.

It follows from that evidence, without there being any need to examine the agreement concluded on 4 December 2006 between the Joint Emergency Services Centre and the providers of public mobile telephony network services, the interpretation of which is a matter of dispute between the parties, that the reason for the failure to transmit information on the location of calls from those networks does not arise from technical characteristics of those networks, which would prevent the transmission of that information, but from the lack of the investment required in order to acquire or adapt the equipment so as to allow that transmission.

As the Commission rightly stated, the failure to acquire or adapt the equipment necessary cannot be regarded as a lack of technical feasibility within the meaning of Article 26(3) of the Universal Service Directive.

Lastly, as regards the arguments put forward by the Republic of Lithuania regarding the method to be employed in order to transmit location information on callers to the '112' number, it must be held, first of all, that Article 26(3) of the Universal Service Directive does not contain any information in that regard and therefore leaves the Member States to decide the manner in which they wish to actually ensure that that information is transmitted.

In point 4, Recommendation 2003/558 [Commission Recommendation 2003/558/EC of 25 July 2003 on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services (OJ 2003 L 189, p. 49)] mentions two methods. The first method, called the 'push' method consists in the automatic transmission of that information by the operators of telephone networks, while according to the second method, the 'pull' method, that information is provided solely at the request of public safety answering points.

Although it follows from the wording of point 4 and the 10th recital in the preamble to Recommendation 2003/558 that the Commission regards the application of the first method to be the most effective and recommends that the Member States impose it, at least after an intermediate period, on public telephone networks operating on their territory, it is equally clear that that recommendation, in the light of its non-binding nature, cannot require the Member States to use a specific method in order to implement Article 26(3) of the Universal Service Directive.

Not only is the non-binding nature of Recommendation 2003/558 clear from the fifth paragraph of Article 249 EC [now Article 288 TFEU], but it is also explicitly confirmed by Article 19 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)] on the basis of which the recommendation was adopted. It is clear from Article 19(1) that the national regulatory authorities may choose not to follow a recommendation adopted by the Commission on the basis of the latter provision, on condition that they inform the Commission thereof and communicate to the Commission the reasoning for their position.

Although the Member States are therefore free to choose the method to be used by the operators of public telephone networks in order to transmit the location information of callers to the ‘112’ number, they are however bound by the clear and precise obligation to achieve a result laid down in Article 26(3) of the Universal Service Directive, which requires them to ensure that that information is made available to the emergency services.

In particular, a Member State cannot justify any delay in the implementation of that obligation by the fact that it has decided to put in place the ‘push’ method based on the automatic transmission of location information.

In that connection it must be held that, contrary to the Republic of Lithuania’s assertions, Recommendation 2003/558 does not give extra time to Member States which have opted for the ‘push’ method. Not only does the Commission lack powers to legitimately extend the binding time-limit allowed to Member States for compliance with Article 26(3) of the Universal Service Directive, but it also follows from the wording of point 4 of that recommendation that it by no means intends to provide for exemption from compliance with that time-limit. Although point 4 mentions the possibility of implementing the ‘push’ method only after an intermediate period, it explains at the same time that during that period the information on location must at least be provided at the request of the emergency services, that is according to the ‘pull’ method.

Lastly, as to the alleged uncertainties concerning the method and the period in which to implement the obligation laid down in Article 26(3) of the Universal Service Directive, it must be held that that provision and Recommendation 2003/558 do not give rise to any objective doubt in that respect. In those circumstances, and taking account of the fact in particular that the Republic of Lithuania itself explained in its defence that Recommendation 2003/558 is not binding on the Member States, it cannot reasonably argue that its delay in effectively implementing Article 26(3) of the Universal Service Directive is justified by a misunderstanding as to its obligations.

**Case C-274/07 *Commission v. Lithuania* [2008] ECR I-7117, paras. 38, 40-54**

*Although the Member State cites technical problems, it does not call into question the technical feasibility of mobile operators’ making location information available, something which can be achieved by means of the ‘pull’ method.*

*With regard to mere technical difficulties, the Court has already ruled that it is irrelevant whether the infringement by a Member State is the result of technical difficulties with which it has been faced (cf. in particular, the judgments in Case C-71/97 Commission v. Spain [1998] ECR I-5991, paragraph 15, Case C-333/99 Commission v. France [2001] ECR I-1025, paragraph 36, and case C-152/98 Commission v. Netherlands [2001] ECR I-3463, paragraph 41).*

*It should also be noted that neither does seeking greater profitability constitute grounds for non-compliance with the obligations and time limits stemming from a Directive. A Member State may not cite internal situations, such as difficulties in application arising when implementing a European legal instrument, to justify its failure to comply with obligations and time limits stipulated under Community law (cf. judgment in Case C-45/91 Commission v. Greece [1992] ECR I-2509, paragraph 21).*

*Moreover, the Court has recently ruled that a Member State is not justified in failing to meet obligations under Article 26(3) of the Directive belatedly solely because it decided to employ the 'push' method (cf. judgment in Case C-274/07 Commission v. Lithuania, paragraph 52, not yet reported).*

**Case C-230/07 Commission v. Netherlands [2008] ECR I-144\*, paras. 15-18**

### 3.2.20. "Must carry" obligations

By these questions, which should be considered together, the national court asks, in essence, whether Article 49 EC [now Article 56 TFEU] is to be interpreted as precluding national legislation of a Member State, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by the private broadcasters falling under the public powers of that State and designated by them.

As a preliminary point, it should be noted that, contrary to what a number of interested parties have submitted in their written observations, that question cannot be examined in the light of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), Article 31 of which authorises the Member States, subject to certain conditions, to impose a must-carry obligation, inter alia as regards the transmission of television programmes.

As is clear from the order for reference, that directive, which is not the subject of any questions put by the Conseil d'État, has no bearing on the resolution of the main proceedings since, as UPC also pointed out at the hearing, it was not in force on the date of the adoption of the Orders of 17 January 2001 [Ministerial Order of 17 January 2001 concerning the designation of the broadcasters referred to in the second indent of Article 13 of the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual

region of Brussels-Capital (*Moniteur belge* of 2 February 2001, p. 2781) ('the Order of 17 January 2001') and of 24 January 2002 [Ministerial Order of 24 January 2002 amending the Ministerial Order of 17 January 2001 designating the broadcasters referred to in the second indent of Article 13 of the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital (*Moniteur belge* of 16 February 2002, p. 6066) ('the Order of 24 January 2002')], the validity which that court is required to review in those proceedings.

It follows that the third and fourth questions fall to be examined only in the light of Article 49 EC [now Article 56 TFEU].

*Case C-250/06 United Pan-Europe Communications Belgium SA* [2007]  
ECR I-11135, paras. 24-27

By its first, second and fourth questions, which should be examined together, the referring court is essentially asking whether Article 31(1) of the Universal Service Directive [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51; 'the Universal Service Directive')] is to be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which, first, requires a cable operator to provide access to its analogue cable network to television channels and services which are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and, secondly, in the event of a shortage of channels, establishes an order of priority of applicants which results in full utilisation of the channels available on that network.

Under Article 31(1) of the Universal Service Directive, Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive such broadcasts. That provision goes on to state that those obligations can be imposed only where they are necessary to meet clearly defined general interest objectives and must be proportionate and transparent.

In order for Member States to be able to impose 'must carry' obligations, the first sentence of that provision requires that the television channels must be specified and a significant number of end-users must use the electronic communications networks as their principal means to receive television broadcasts.

As regards the specified nature of the channels which may be covered by 'must carry' status, it is apparent from the wording of Article 31(1) of the Universal Service Directive that Member States must specify which channels are to be granted 'must carry' status.

In this connection, Paragraph 37(1) of the NMedienG [Lower Saxony Law on the Media (Niedersächsisches Mediengesetz) of 1 November 2001] states that the cable

network which is intended to receive television programmes on an analogue basis must enable reception of at least those programmes which are allowed to be transmitted via the terrestrial network. According to Paragraph 37(2), the decision which the competent authority is required to take must specify, by establishing an order of priority of applicants, which channels the cable operator is required to broadcast. Therefore, those provisions specify which channels are to be granted ‘must carry’ status.

The mere fact that the result of applying the national legislation is that the cable operator is required, first, to provide access, on more than half of the available channels, to programmes broadcast terrestrially and, secondly, to set aside all channels still available on its network for transmission of the selected programmes, in accordance with an order of priority established by the competent authority, does not prevent those obligations from being regarded as relating to the transmission of ‘specified’ television channels within the meaning of Article 31(1) of the Universal Service Directive. By requiring that the television channels to be broadcast be ‘specified’, the directive does not seek to lay down a quantitative condition.

In those circumstances, it must be held that Paragraph 37 of the NMedienG accords with the conditions laid down in the first sentence of Article 31(1) of the Universal Service Directive, as set out in paragraph 22 of this judgment.

As regards the proportionality of the obligations imposed, raised by the referring court, it must be borne in mind that Article 31(1) of the Universal Service Directive requires that the obligations be reasonable, proportionate, transparent and necessary to meet clearly defined general interest objectives.

Since Article 31(1) of the Universal Service Directive does not define the general interest objectives of the obligation to transmit television channels, they must be defined by the Member States in conformity with Community law.

As is apparent from recital 5 of the Framework Directive [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; “the Framework Directive”)], a distinction should be made between the regulation of transmission and the regulation of content. That recital provides that the Community regulatory framework does not cover broadcasting content. As a consequence, Article 1(3) of that directive provides that that directive as well as the Universal Service Directive are to be without prejudice to measures taken at national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy. Recital 6 of the Framework Directive states that audiovisual policy and content regulation are to be undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural diversity, social inclusion, consumer protection and the protection of minors.

In particular, it is appropriate to stress the importance of the fundamental freedom to receive information of which the recipients are end-users and which the Member States must guarantee, in accordance with Article 10 of the European Convention for

the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

It follows that Article 31(1) of the Universal Service Directive cannot be interpreted so as to undermine national legislation which, in compliance with Community law, pursues general interest objectives, in particular those relating to regulation of content and audiovisual policy. In accordance with that division of powers, Article 31(1) of the Universal Service Directive, which falls under Chapter IV thereof, entitled 'End-user interests and rights', does not establish a right for a cable operator to choose which channels to broadcast, but limits that right in so far as it may exist under applicable national law.

In that regard, it should be noted that the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal order (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 10; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 19; and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 41).

Consequently, it must be accepted that such national legislation pursues a general interest objective, since it seeks to preserve the pluralist nature of the television channel service in the *Land* of Lower Saxony and thus forms part of a cultural policy the aim of which is to guarantee, in the audiovisual sector, the freedom of expression of the different social, cultural and linguistic components which exist in that *Land* (see, to that effect, *United Pan-Europe Communications Belgium and Others*, paragraph 42).

In that context, the national court asks whether the obligation imposed on Kabel Deutschland, laid down in Paragraph 37(1) of the NMedienG, to provide access to the channels already broadcast under the DVB-T, resulting in the utilisation of more than half of the channels available on its analogue cable network, is proportionate within the meaning of the second sentence of Article 31(1) of the Universal Service Directive. The national court is therefore enquiring as to whether such a provision is capable of ensuring the achievement of the objective thereof, and does not go beyond what is necessary in order to attain it.

The very objective of ensuring that end-users are offered an identical service which is broadcast by the various means of transmission available militates against allowing the obligation to broadcast channels to be limited, having regard to the fact that, in certain regions of the *Land* of Lower Saxony, end-users are able to receive the same television channels terrestrially. Furthermore, this objective requires that the number of channels on the analogue cable network concerned by the obligation to broadcast should correspond to the number of channels which are broadcast terrestrially. Therefore, in the main proceedings, the obligation at issue, which results in more than half of the available channels being utilised, may be shown to be proportionate, in the absence of alternative measures enabling the objective to be achieved as effectively

and in the light of the number of channels broadcast terrestrially as well as the availability of channels on the analogue cable network.

However, in order to protect a cable operator from unreasonable and arbitrary obligations, it is necessary to consider, first, the operation of the mechanism established by the legislation at issue in the main proceedings – in terms of which of the channels broadcast terrestrially serve as the reference point in the specification of the obligation to broadcast – functions, and, secondly, the resulting economic consequences for the cable operator.

As regards the reference system applied by that legislation, it must be noted that, in interpreting Article 49 EC [now Article 56 TFEU], the Court has held that ‘must carry’ status should not automatically be awarded to all television channels transmitted by the same private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective (see *United Pan-Europe Communications Belgium and Others*, paragraph 47).

It must therefore be ascertained whether the reference system applied by the legislation at issue in the main proceedings entails such an automatic award of ‘must carry’ status.

In respect of the analogue cable network, Paragraph 37(1) of the NMedienG awards ‘must carry’ status to television channels which are already being broadcast under the DVB-T. It is apparent from the documents provided to the Court by the referring court that the decision on which of the television channels that are broadcast under the DVB-T this status is to be awarded is based on the criteria of pluralism and diversity of opinion, in accordance with the provisions of the NMedienG, and is adopted on the basis of those criteria by the general meeting of the NLM [Niedersächsische Landesmedienanstalt für privaten Rundfunk (media authority for private radio of the *Land* of Lower Saxony; ‘the NLM’)], which is independent of the public authorities and which comprises, for the most part, representatives of the civil community.

The reference system thus does not entail an automatic award of ‘must carry’ status, as mentioned in paragraph 42 of this judgment, but is simply a technical means of ensuring that the channels broadcast terrestrially – which, by virtue of their contribution to pluralism and diversity of opinion, have been allowed to be broadcast by this means of transmission – are also broadcast over the analogue cable network.

As regards the resulting economic consequences of the obligations imposed on the cable operator, it must be determined whether those obligations are unreasonable because they are likely to prevent the cable operator from performing them in conditions which are economically acceptable, in the light, where appropriate, of all its activities.

According to settled case-law, since this assessment is a matter for the national court, it is for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the

case pending before it, whether or not that court has specifically referred to them in its questions (see, *inter alia*, Case C-17/06 *Céline* [2007] ECR I-7041, paragraph 29).

Therefore, in determining whether the obligations imposed on the cable operator under the legislation at issue are unreasonable, it will be for the national court to have regard to the fact that, first, the cable operator is free to decide whether the channels are to be broadcast on its analogue or digital network, with the latter not being subject to similar rules, and that, secondly, Article 31(2) of the Universal Service Directive allows Member States to determine appropriate remuneration. In this regard, it is for the national court to ascertain whether the obligations imposed are such as to make the payment of such remuneration necessary.

The national court also seeks to know whether Paragraph 37(2) of the NMedienG runs counter to Article 31(1) of the Universal Service Directive, on the ground that this provision of national law requires the competent national authority, in respect of the remaining channels and in the event of a shortage of channels, to establish an order of priority of applicants which will result in the channels available on the analogue cable network being fully utilised.

It is apparent from Paragraph 37(2) of the NMedienG that, in the absence of a sufficient number of channels on the cable network for other television programmes, the NLM is to establish an order of priority for the purposes of allocating a cable channel to television programmes which have not been taken into account under Paragraph 37(1). The decisive factor for establishing that order of priority, according to that provision, is the contribution of the various programmes or services to the diversity of the cable service.

It must be accepted, in this regard, that the drawing-up of an order of priority for the allocation of the remaining channels available on the analogue cable network, on the basis of the applicants' contribution to the diversity of the service on that network, is an appropriate method for ensuring the attainment of the general interest objectives referred to by that provision. A provision of national law, such as Paragraph 37(2) of the NMedienG, constitutes an appropriate means of achieving the cultural objective referred to, since, in such a situation, it enables television viewers to receive a pluralist and diverse range of programmes on the analogue cable network.

As regards the question whether the legislation at issue in the main proceedings achieves these objectives in a reasonable and proportionate manner, it must be noted that Article 31(1) of the Universal Service Directive does not establish a right for a cable operator to choose which channels to broadcast, but limits that right to the extent that it exists under applicable national law.

In the context of audiovisual policy, that legislation entrusts the competent authority, in the event of a shortage of available channels in relation to the demand for transmission channels, with the task of selecting the channels for broadcast over analogue cable from among the applicants, having regard to the contribution of their programmes to the diversity of the service and to the public's need for information, instead of allowing the cable operator itself to make its own selection on the basis of purely economic considerations. Therefore, this objective may make it necessary for all the available channels to be utilised for transmission of the channels, in the context of a transparent procedure which safeguards the rights of the cable operator, in order,

as far as possible, that access is granted to the analogue cable network to the highest number of applicants who merit such access on the basis of the channels broadcast.

Consequently, since the obligations imposed are, in the context of national audiovisual policy, necessary in order to achieve the objectives of pluralism and media diversity, such legislation cannot, in principle, be regarded as disproportionate.

However, as regards the question whether the economic consequences resulting from the obligations imposed by the national legislation on the cable operator are unreasonable, it is for the national court to examine whether those consequences are such as to prevent the cable operator from fulfilling those obligations in acceptable economic conditions, in the light, where appropriate, of its activities.

By this question, the national court is asking whether telemedia services, for example teleshopping, are included in the concept of 'television services' within the meaning of Article 31(1) of the Universal Service Directive.

It must be pointed out, first of all, that this provision contains no definition of the concept of 'television services'. In order to interpret this concept, it is therefore necessary to examine both the wording and objective of the provision in the light of the purpose of the Universal Service Directive.

In fact, that provision does not concern the content of television channels and services, but refers rather to regulating their transmission by way of telecommunications networks.

Accordingly, it is clear from Article 31(1) of that directive, and the objective referred to by that provision, that the Community legislature refrained from imposing any limit on 'must carry' obligations as regards the content of television services.

Secondly, it must be borne in mind that the Court has already had the opportunity to examine the concept of 'television broadcasting services' within the meaning of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552').

In Case C-89/04 *Mediakabel* [2005] ECR I-4891, the Court held that a service comes within the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552 if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. In that regard, the determinative criterion for that concept is the broadcast of television programmes 'intended for reception by the public', since priority is to be given in the analysis to the standpoint of the service provider. Thus, the Court also held that the manner in which the images are transmitted is not a determining element in that assessment.

Telemedia services, such as teleshopping, broadcast by the various electronic communications networks, irrespective of the manner in which they are transmitted by those networks, are 'intended for reception by the public'. It follows that those

services are ‘television broadcasting services’ within the meaning of Directive 89/552.

Such an analysis can be applied to the concept of ‘television services’ within the meaning of Article 31(1) of the Universal Service Directive. As was stated in paragraphs 52 and 53 of this judgment, the aim of that provision is not to define those services, but to regulate the way in which they are transmitted by the imposition of ‘must carry’ obligations. As a result, telemedia services, such as teleshopping, are television services for the purposes of that provision and fall within its scope.

However, telemedia services, as television services, can fall within the ‘must carry’ obligation imposed by Member States only if they satisfy the conditions laid down in Article 31(1) of the Universal Service Directive, as set out in paragraphs 22 and 26 of this judgment.

It is for the national court to establish whether such conditions are met in the light of all the facts of the case in the main proceedings.

The answer to the third question must be that the concept of ‘television services’ within the meaning of Article 31(1) of the Universal Service Directive includes telemedia services, such as teleshopping, provided that the conditions laid down in that provision are met, which is a matter for the national court to establish.

**Case C-336/07 *Kabel Deutschland Vertrieb und Service GmbH & Co. KG*,  
22 December 2008, paras. 19, 21, 22, 24-28, 30, 32-34, 37-57, 60, 62-69  
(not yet reported)**

### 3.2.21. Data protection

It is not disputed that the communication sought by Promusicæ of the names and addresses of certain users of KaZaA involves the making available of personal data, that is, information relating to identified or identifiable natural persons, in accordance with the definition in Article 2(a) of Directive 95/46 [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)] (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 24). That communication of information which, as Promusicæ submits and Telefónica does not contest, is stored by Telefónica constitutes the processing of personal data within the meaning of the first paragraph of Article 2 of Directive 2002/58 [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)], read in conjunction with Article 2(b) of Directive 95/46. It must therefore be accepted that that communication falls within the scope of Directive 2002/58, although the compliance of the data storage itself with the requirements of that directive is not at issue in the main proceedings.

In those circumstances, it should first be ascertained whether Directive 2002/58 precludes the Member States from laying down, with a view to ensuring effective

protection of copyright, an obligation to communicate personal data which will enable the copyright holder to bring civil proceedings based on the existence of that right. If that is not the case, it will then have to be ascertained whether it follows directly from the three directives expressly mentioned by the national court that the Member States are required to lay down such an obligation. Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter [Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter')], whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

Article 5(1) of Directive 2002/58 provides that Member States must ensure the confidentiality of communications by means of a public communications network and publicly available electronic communications services, and of the related traffic data, and must *inter alia* prohibit, in principle, the storage of that data by persons other than users, without the consent of the users concerned. The only exceptions relate to persons lawfully authorised in accordance with Article 15(1) of that directive and the technical storage necessary for conveyance of a communication. In addition, as regards traffic data, Article 6(1) of Directive 2002/58 provides that stored traffic data must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of that article and Article 15(1) of the directive.

With respect, first, to paragraphs 2, 3 and 5 of Article 6, which relate to the processing of traffic data in accordance with the requirements of billing and marketing services and the provision of value added services, those provisions do not concern the communication of that data to persons other than those acting under the authority of the providers of public communications networks and publicly available electronic communications services. As to the provisions of Article 6(6) of Directive 2002/58, they do not relate to disputes other than those between suppliers and users concerning the grounds for storing data in connection with the activities referred to in the other provisions of that article. Since Article 6(6) thus clearly does not concern a situation such as that of *Promusicae* in the main proceedings, it cannot be taken into account in assessing that situation.

With respect, second, to Article 15(1) of Directive 2002/58, it should be recalled that under that provision the Member States may adopt legislative measures to restrict the scope *inter alia* of the obligation to ensure the confidentiality of traffic data, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, as referred to in Article 13(1) of Directive 95/46.

Article 15(1) of Directive 2002/58 thus gives Member States the possibility of providing for exceptions to the obligation of principle, imposed on them by Article 5 of that directive, to ensure the confidentiality of personal data.

However, none of these exceptions appears to relate to situations that call for the bringing of civil proceedings. They concern, first, national security, defence and public security, which constitute activities of the State or of State authorities unrelated to the fields of activity of individuals (see, to that effect, *Lindqvist*, paragraph 43), and, second, the prosecution of criminal offences.

As regards the exception relating to unauthorised use of the electronic communications system, this appears to concern use which calls into question the actual integrity or security of the system, such as the cases referred to in Article 5(1) of Directive 2002/58 of the interception or surveillance of communications without the consent of the users concerned. Such use, which, under that article, makes it necessary for the Member States to intervene, also does not relate to situations that may give rise to civil proceedings.

It is clear, however, that Article 15(1) of Directive 2002/58 ends the list of the above exceptions with an express reference to Article 13(1) of Directive 95/46. That provision also authorises the Member States to adopt legislative measures to restrict the obligation of confidentiality of personal data where that restriction is necessary *inter alia* for the protection of the rights and freedoms of others. As they do not specify the rights and freedoms concerned, those provisions of Article 15(1) of Directive 2002/58 must be interpreted as expressing the Community legislature's intention not to exclude from their scope the protection of the right to property or situations in which authors seek to obtain that protection in civil proceedings.

The conclusion must therefore be that Directive 2002/58 does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings.

However, the wording of Article 15(1) of that directive cannot be interpreted as compelling the Member States, in the situations it sets out, to lay down such an obligation.

The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection.

However, the situation in respect of which the national court puts that question involves, in addition to those two rights, a further fundamental right, namely the right that guarantees protection of personal data and hence of private life.

According to recital 2 in the preamble to Directive 2002/58, the directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. Article 7 substantially reproduces Article 8 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, which guarantees the right to respect for private life, and Article 8 of the Charter expressly proclaims the right to protection of personal data.

The present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.

That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, *Lindqvist*, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-0000, paragraph 28).

In the light of all the foregoing, the answer to the national court's question must be that Directives 2000/31 [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1)], 2001/29 [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)], 2004/48 [Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16)] and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

**Case C-275/06 *Productores de Música España (Promusicae)* [2008]  
ECR I-271, paras. 45-55, 61, 63-65, 68, 70**

By its second question, which it is appropriate to consider first, the national court essentially asks whether Community law, in particular Article 8(3) of Directive 2004/48 [Directive 2004/48/EC of the European Parliament and of the

Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16)], read in conjunction with Articles 6 and 15 of Directive 2002/58 [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)], precludes Member States from imposing an obligation to disclose to private third parties personal data relating to Internet traffic in order to enable them to bring civil proceedings for copyright infringements.

The reply to that question can be clearly inferred from the case-law of the Court.

In paragraph 53 of *Promusicae*, the Court stated that the exceptions provided for in Article 15(1) of Directive 2002/58, which refers expressly to Article 13(1) of Directive 95/46 [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)], include measures which are necessary for the protection of the rights and freedoms of others. As it does not specify the rights and freedoms covered by that exception, Directive 2002/58 must be interpreted as reflecting the intention of the Community legislature not to exclude from its scope the protection of the right to property or situations in which authors seek to obtain that protection through civil proceedings.

The Court inferred from this, in paragraphs 54 and 55 of *Promusicae*, that Directive 2002/58 – in particular, Article 15(1) thereof – does not preclude the Member States from imposing an obligation to disclose personal data in the context of civil proceedings, nor does it oblige them to impose such an obligation.

Moreover, the Court pointed out that the freedom which Member States retain to give priority to the right to privacy or to the right to property is qualified by a number of requirements. Accordingly, when transposing Directives 2000/31 [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1)], 2001/29 [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)], 2002/58 and 2004/48 into national law, it is for the Member States to ensure that they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Furthermore, when applying the measures transposing those directives, the authorities and courts of Member States must not only interpret their national law in a manner consistent with those directives, but must also make sure that they do not rely on an interpretation of those directives which would conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (*Promusicae*, paragraph 70).

By its first question, the national court asks, essentially, whether access providers which merely provide users with Internet access, without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users

make use of, are ‘intermediaries’ within the meaning of Articles 5(1)(a) and 8(3) of Directive 2001/29.

It follows clearly both from the order for reference and from the wording of the questions referred that, by its first question, the national court wishes to know whether Internet access providers who merely enable the user to access the Internet may be required to provide the information referred to in the second question.

First, it should be pointed out that Article 5(1)(a) of Directive 2001/29 requires Member States to provide for exemptions from reproduction rights.

The point at issue in the dispute before the referring court is whether LSG can rely on a right to information as against Tele2, not whether Tele2 has infringed reproduction rights.

It follows that an interpretation of Article 5(1)(a) of Directive 2001/29 serves no purpose in relation to the outcome of the dispute before the referring court.

It should be noted at the outset that *Promusicae* concerned the communication by Telefónica de España SAU – a commercial undertaking engaged, inter alia, in the provision of Internet access services – of the identities and physical addresses of certain persons to whom it provided such services and whose IP addresses and dates and times of connection were known (*Promusicae*, paragraphs 29 and 30).

It is common ground, as is apparent from the question referred and from the facts in *Promusicae*, that Telefónica de España SAU was an Internet access provider (*Promusicae*, paragraphs 30 and 34).

Accordingly, in holding – in paragraph 70 of *Promusicae* – that Directives 2000/31, 2001/29, 2002/58 and 2004/48 do not require the Member States to impose, in a situation such as that in *Promusicae*, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings, the Court did not immediately rule out the possibility that Member States may, pursuant to Article 8(1) of Directive 2004/48, place Internet access providers under a duty of disclosure.

It should also be pointed out that, under Article 8(3) of Directive 2001/29, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.

Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who ‘carries a third party’s infringement of a protected work or other subject-matter in a

network'. It is common ground that access providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.

That interpretation is borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished if 'intermediaries', within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights.

**Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH, 19 February 2009, paras. 24-28, 30, 34-37, 39-45 (not yet reported)**

### 3.2.22. Lack of transposition

*In its defence, the Greek Government does not dispute that the Directive [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, p. 37)] had not been transposed by the time limit. It does however maintain that the committee supposed to complete the drafting of the relevant draft law has completed its work and the draft law in question is now awaiting submission to the Greek parliament.*

*In this respect, it should be recalled that, according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-63/02 Commission v United Kingdom [2003] ECR I-821, paragraph 11, and of Case C-388/02 Commission v Ireland [2003] ECR I-12173, paragraph 6).*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and Commission v Ireland, cited above, paragraph 8).*

*In the present case, it is not disputed that the Hellenic Republic has not adopted the necessary measures to ensure transposition of the directive into Greek law by the end of the period laid down in the reasoned opinion.*

*In these circumstances, the Commission's application must be upheld.*

*Accordingly, it must be held that, by failing to adopt, within the prescribed period, the necessary laws, regulations and administrative provisions to comply with the Directive, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-475/04 Commission v. Greece, paras. 8-13 [2006] ECR I-69\***

*The Greek Government does not dispute this complaint and in its defence states that, due to the parliamentary elections of March 2004, the draft law transposing the Directive in question [Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21)] has still not been voted on by the national parliament.*

*In this respect, it should be recalled that according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-103/00 Commission v Greece [2002] ECR I-1147, paragraph 23, and of Case C-323/01 Commission v Italy [2002] ECR I-4711, paragraph 8).*

*In the present case, it is not disputed that, by the end of the period laid down in the reasoned opinion, no measure intended to transpose the "authorisation" Directive into domestic law had been adopted.*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 11).*

*In the present case, the internal difficulties experienced by the Hellenic Republic cannot be relied upon to justify a failure.*

*In these circumstances, the Commission's application must be upheld.*

*In view of the foregoing considerations, it must be held that, by failing to adopt the necessary laws, regulations and administrative provisions to comply with the "authorisation" Directive, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-254/04 Commission v. Greece, 15 December 2005, paras. 4-10  
(not reported), OJ C 36, 11.02.2006, p. 13**

*The Greek Government does not dispute this complaint and in its defence states that, due to the parliamentary elections of March 2004, the draft law transposing the Directive in question [Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic*

*communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)] has still not been voted on by the national parliament.*

*In this respect, it should be recalled that according to settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-103/00 Commission v Greece [2002] ECR I-1147, paragraph 23, and of Case C-323/01 Commission v Italy [2002] ECR I-4711, paragraph 8).*

*In the present case, it is not disputed that no measure intended to transpose the "framework" Directive into domestic law had been adopted by the end of the period laid down in the reasoned opinion.*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and of Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 11).*

*In the present case, the internal difficulties experienced by the Hellenic Republic cannot be relied upon to justify a failure.*

*In these circumstances, the Commission's application must be upheld.*

*In view of the foregoing considerations, it must be held that, by failing to adopt the necessary laws, regulations and administrative provisions to comply with the "framework" Directive, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-253/04 Commission v. Greece, 15 December 2005, paras. 4-10  
(not reported), OJ C 36, 11.02.2006, p. 13**

*The Greek Government does not dispute this complaint and in its defence states that, due to the parliamentary elections of March 2004, the draft law transposing the Directive in question [Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51)] has still not been voted on by the national parliament.*

*In this respect, it should be recalled that under settled case law, evidence of failure must be assessed according to the situation of the Member State as it was at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-103/00 Commission v Greece [2002] ECR I-1147, paragraph 23, and of Case C-323/01 Commission v Italy [2002] ECR I-4711, paragraph 8).*

*In the present case, it is not disputed that, by the end of the period laid down in the reasoned opinion, no measure intended to transpose the "universal service" Directive into domestic law had been adopted.*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and of Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 11).*

*In the present case, the internal difficulties experienced by the Hellenic Republic cannot be relied upon to justify a failure.*

*In these circumstances, the Commission's application must be upheld.*

*In view of the foregoing considerations, it must be held that, by failing to adopt the necessary laws, regulations and administrative provisions to comply with the "universal service" Directive, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-252/04 Commission v. Greece, 15 December 2005, paras. 4-10 (not reported), OJ C 48, 25.02.2006, p. 7**

*The Greek Government does not dispute this complaint and in its defence states that, due to the parliamentary elections of March 2004, the draft law transposing the Directive in question [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and services (Access Directive) (OJ 2002 L 108, p. 7)] has still not been voted on by the national parliament.*

*In this respect, it should be recalled that under settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-103/00 Commission v Greece [2002] ECR I-1147, paragraph 23, and of Case C-323/01 Commission v Italy [2002] ECR I-4711, paragraph 8).*

*In the present case, it is not disputed that no measure intended to transpose the "access" Directive into domestic law had been adopted by the end of the period laid down in the reasoned opinion.*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and of Case C-114/02 Commission v France [2003] ECR I-3783, paragraph 11).*

*In the present case, the internal difficulties experienced by the Hellenic Republic cannot be relied upon to justify a failure.*

*In these circumstances, the Commission's application must be upheld.*

*In view of the foregoing considerations, it must be held that, by failing to adopt the necessary laws, regulations and administrative provisions to comply with the "access" Directive, the Hellenic Republic has failed to fulfil its obligations under that Directive.*

**Case C-250/04 Commission v. Greece, 15 December 2005, paras. 4-10 (not reported), OJ C 36, 11.02.2006, p. 12**

*The French Government acknowledges that that it has not taken the necessary steps to comply with the directives in question [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p.7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)].*

*In its defence, the French Government pointed out that the decrees necessary for the complete transposition of the three directives were in the process of being adopted.*

*It should be recalled that under settled case law, evidence of failure must be assessed according to the situation of the Member State as it was at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-103/00 Commission v Greece [2002] ECR I-1147, paragraph 23, and of Case C-323/01 Commission v Italy [2002] ECR I-4711, paragraph 8).*

*In the present case, it is not disputed that the necessary measures to fully transpose Directives 2002/19, 2002/20 and 2002/21 had not been adopted by the end of the period laid down in the reasoned opinion.*

*In these circumstances, the Commission's application must be upheld.*

*In view of the foregoing considerations, it must be held that, by failing to adopt within the time limit the necessary laws, regulations and administrative provisions to comply with the Directives 2002/19, 2002/20 and 2002/21, the French Republic has failed to fulfil its obligations under those Directives.*

**Case C-31/05 Commission v. France, 14 July 2005, paras. 4-9 (not reported), OJ C 271 , 29.10.2005, p. 11**

*In its defence, the Belgian Government does not dispute that the Directive [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the*

*electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, p. 31)] was not fully transposed within the time limit. It nonetheless maintains that the Directive was already partly transposed in the legislation in force and that a preliminary draft bill for the complete transposition of this Directive would shortly be discussed by the competent committee of the House of Representatives.*

*In this respect, it should be recalled that under settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see the judgments in Case C-63/02 Commission v United Kingdom [2003] ECR I-821, paragraph 11, and of Case C-388/02 Commission v Ireland [2003] ECR I-12173, paragraph 6).*

*In the present case, it is not disputed that the Kingdom of Belgium has not adopted all the necessary measures to ensure complete transposition of the Directive into Belgian law by the end of the period laid down in the reasoned opinion.*

*In these circumstances, the Commission's application must be upheld.*

*Accordingly, it must be held that, by failing to adopt within the prescribed time limit all the necessary laws, regulations and administrative provisions to comply with the Directive, the Kingdom of Belgium has failed to fulfil its obligations under that Directive.*

**Case C-376/04 Commission v. Belgium, 28 April 2005, paras. 9-13  
(not reported), OJ C 143, 11.06.2005, p. 14**

*In its reply of 6 July 2004, the Grand Duchy of Luxembourg stated that the draft law transposing the Directive [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 31)] was in the process of being adopted. It stated that the State Council had issued its opinion on 4 May 2004 and that a number of amendments to the draft law would be submitted to the Government at the beginning of July 2004. However, following the dissolution of the Chamber of Deputies, the draft law would be voted on by the new parliament in the following October at the earliest.*

*In its defence, the Luxembourg Government acknowledges that the Directive had not been transposed within the period laid down in the reasoned opinion. It does however point out that the necessary measures are in the process of being drawn up and that the legislative procedure transposing the Directive into Luxembourg law should be finalised before the end of 2004.*

*In this respect, it should be recalled that under settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by*

*the Court (see the judgments in Case C-63/02 Commission v United Kingdom [2003] ECR I-821, paragraph 11, and of Case C-388/02 Commission v Ireland [2003] ECR I-12173, paragraph 6).*

*According to equally settled case law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits resulting from a directive (see the judgments in Case C-450/00 Commission v Luxembourg [2001] ECR I-7069, paragraph 8, and Commission v Ireland, cited above, paragraph 8).*

*In the present case, it is not disputed that, by the end of the period laid down in the reasoned opinion, the Grand Duchy of Luxembourg had not adopted the necessary measures to ensure transposition of the directive into Luxembourg law .*

*In these circumstances, the Commission's application must be upheld.*

*Accordingly, it must be held that, by failing to adopt within the prescribed time limit the necessary laws, regulations and administrative provisions to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive.*

**Case C-375/04 Commission v. Luxembourg, 28 April 2005, paras. 6 and 9-14 (not reported), OJ C 143, 11.06.2005, p. 14**

*In its defence, the Kingdom of Belgium does not dispute that it has not yet taken the necessary steps to transpose in full the four directives in question [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p.7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p.51)]. It nonetheless points out that the Flemish and French Communities have already transposed these Directives, whilst transposition by the German Community is being finalised. It also acknowledges that at the federal level, the authorities have so far only drawn up a draft law that has not yet been definitively adopted.*

*It is settled case law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see in particular the judgment of Case C-310/03 Commission v Luxembourg, not reported, paragraph 7).*

*In the present case, it is not disputed that, by the end of the period laid down in the reasoned opinions, not all the necessary measures to transpose Directives 2002/19, 2002/20, 2002/21 and 2002/22 into Belgian law had been adopted .*

*In these circumstances, the Commission's application must be upheld.*

*Accordingly, it must be held that, by failing to adopt all the necessary laws, regulations and administrative provisions to comply with Directives 2002/19, 2002/20, 2002/21 and 2002/22, the Kingdom of Belgium has failed to fulfil its obligations under those Directives.*

**Case C-240/04 Commission v. Belgium, 10 March 2005, paras. 6-10  
(not reported), OJ C 115, 14.05.2005, p. 8**

*In its defence, the Luxembourg Government acknowledges that that it has not taken the necessary steps to comply with the four directives in question [Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p.7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p.51)] within the prescribed time limit. It points out that there had been a delay in the transposition of these Directives into domestic law on account of the complexity of the matter itself and of the legislative procedure in force in Luxembourg.*

*It should be recalled that under settled case law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that subsequent changes should not be taken into account by the Court (see in particular the judgment of Case C-312/03 Commission v Belgium, [[2004] ECR I-1975], paragraph 7).*

*In the present case, it is not disputed that, by the end of the period laid down in the reasoned opinions, not all the necessary measures to transpose Directives 2002/19, 2002/20, 2002/21 and 2002/22 into Luxembourg law had been adopted .*

*In these circumstances, the Commission's application must be upheld.*

*Accordingly, it must be held that, by failing to adopt all the necessary laws, regulations and administrative provisions to comply with Directives 2002/19, 2002/20, 2002/21 and 2002/22, the Grand Duchy of Luxembourg has failed to fulfil its obligations under those Directives.*

**Case C-236/04 Commission v. Luxembourg, 10 March 2005, paras. 6-10  
(not reported), OJ C 115, 14.05.2005, p. 7-8**

In the defence, Ireland acknowledges that it has not yet fulfilled its obligation to transpose Directive 2006/24 [Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)]. It claims, however, that the legislative provisions for that transposition were published on 9 July 2009 and should be adopted during the autumn parliamentary session. Furthermore, Ireland requests the Court to suspend, for a period of 8 months from the date that defence was lodged, the infringement proceedings brought against it.

In that respect, it should be noted that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-194/05 *Commission v Italy* [2007] ECR I-11661, paragraph 19 and case-law cited).

Furthermore, in accordance with settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations and time-limits laid down by a directive (see, *inter alia*, Case C-450/00 *Commission v Luxembourg* [2001] ECR I-7069, paragraph 8, and judgment of 28 April 2005 in Case C-375/04 *Commission v Luxembourg*, paragraph 11).

Therefore, the Commission's action must be regarded as well founded.

Accordingly, it must be held that by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2006/24, Ireland has failed to fulfil its obligations under that directive.

**Case C-202/09 *Commission v. Ireland*, 26 November 2009,  
paras. 9-11,13,14 (not yet reported)**

*In its defence, Greece does not dispute the infringement. It merely informs the Court of developments regarding transposition of the Directive [Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)].*

*According to established case law, the question whether a Member State has failed to fulfil its obligations must be determined with reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and subsequent changes should not be taken into account by the Court (cf. in particular the judgment of 14 September 2004 in Case C-168/03 *Commission v Spain* [2004] ECR I-8227, paragraph 24, and that of 24 September 2009 in Case C-477/08 *Commission v Austria* [2009], paragraph 8).*

*In the present case, it is not disputed that Greece had not adopted all the necessary measures to ensure complete transposition of the Directive into Greek law by the end of the period laid down in the reasoned opinion.*

*The Commission's action must therefore be upheld.*

*In view of the foregoing, it must be upheld that, by failing to adopt the laws, regulations and administrative provisions necessary to ensure compliance with the Directive by the deadline, Greece has failed to fulfil its obligations under the Directive.*

**Case C-211/09 *Commission v. Greece*, 26 November 2009, paras. 6-10 (not yet reported)**

## 4. RELATED ISSUES

### 4.1. Privatisation of public undertakings/golden share

Accordingly, by adopting Articles 1(5) and 2 of the consolidated legislation and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52, 59 and 73b of the Treaty [now Articles 49, 56 and 63 TFEU].

Case C-58/99 *Commission v. Italy* [2000] ECR I-3811, para. 20

As is also apparent from the 1997 Communication [Communication from the Commission of 19 July 1997 on certain legal aspects concerning intra-EU investment (OJ 1997 C 220, p. 15)], it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (see today's judgements in Case C-483/99 *Commission v France* [[2002], ECR I-4781], paragraph 43, and Case C-503/99 *Commission v Belgium* [[2002], ECR I-4809], paragraph 43).

However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty [now Article 345 TFEU], by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (*Konle*, [C-302/97, [1999] ECR I-3099], paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.

The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty [now Article 65(1) TFEU] or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, *Sanz de Lera*, [C-163/94, C-165/94 and C-250/94, [1995] ECR I-4821], paragraph 23, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18).

As regards a scheme of prior administrative authorisation of the kind at issue in the present case, the Court has previously held that such a scheme must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto* (see, to that effect, *Sanz de Lera*, paragraphs 23 to 28; *Konle*, paragraph 44; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35). Such a scheme must be based on objective, non-discriminatory criteria which are known in advance to the

undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (*Analir*, cited above, paragraph 38).

As regards the need to safeguard the financial interest of the Portuguese Republic, it must be recalled that, save in so far as they may fall within the ambit of the reasons set out in Article 73d(1) of the Treaty [now Article 65(1) TFEU], which relate in particular to tax law, the general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty (see, as regards the free movement of goods, Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 62, and, in relation to freedom to provide services, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23). That reasoning is equally applicable to the economic policy objectives reflected in Article 3 of Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production. Such interests cannot constitute a valid justification for restrictions on the fundamental freedom concerned.

**Case C-367/98 *Commission v. Portugal* [2002] ECR I-4731, paras. 47-50 and 52**

[...] by maintaining in force Article 2(1) and (3) of Decree No 93-1298 of 13 December 1993 vesting in the State a 'golden share' in Société Nationale Elf-Aquitaine, according to which the following rights attach to the 'golden share' held by the French Republic in that company:

(a) any direct or indirect shareholding by a natural or legal person, acting alone or in conjunction with others, which exceeds the ceiling of one tenth, one fifth or one third of the capital of, or voting rights in, the company must first be approved by the Minister for Economic Affairs;

(b) the right to oppose any decision to transfer or use as security the assets listed in the annex to the Decree - the assets in question being the majority of the capital of four subsidiaries of that company, namely Elf-Aquitaine Production, Elf-Antar France, Elf-Gabon SA and Elf-Congo SA,

the French Republic has failed to comply with its obligations under Article 73b of the EC Treaty [now Article 63 TFEU].

**Case C-483/99 *Commission v. France* [2002] ECR I-4781, para. 1**

In the present case, the objective pursued by the legislation at issue, namely the safeguarding of energy supplies in the event of a crisis, falls undeniably within the ambit of a legitimate public interest. Indeed, the Court has previously recognised that the public-security considerations which may justify an obstacle to the free movement of goods include the objective of ensuring a minimum supply of petroleum products at all times (*Campus Oil*, [72/83 [1984] ECR 2727], paragraphs 34 and 35). The same reasoning applies to obstacles to the free movement of capital, inasmuch as public security is also one of the grounds of justification referred to in Article 73d(1)(b) of the Treaty [now Article 65(1)(b) TFEU].

First of all, it should be noted that the regime in issue is one of opposition. It is predicated on the principle of respect for the decision-making autonomy of the undertaking concerned, inasmuch as, in each individual case, the exercise of control by the minister responsible requires an initiative on the part of the Government authorities. No prior approval is required. Moreover, in order for that power of opposition to be exercised, the public authorities are obliged to adhere to strict time-limits.

Next, the regime is limited to certain decisions concerning the strategic assets of the companies in question, including in particular the energy supply networks, and to such specific management decisions relating to those assets as may be called in question in any given case.

Lastly, the Minister may intervene pursuant to Articles 3 and 4 of the Royal Decrees of 10 and 16 June 1994 only where there is a threat that the objectives of the energy policy may be compromised. Furthermore, as the Belgian Government has expressly stated in its written pleadings and at the hearing, without being contradicted on the point by the Commission, any such intervention must be supported by a formal statement of reasons and may be the subject of an effective review by the courts.

The scheme therefore makes it possible to guarantee, on the basis of objective criteria which are subject to judicial review, the effective availability of the lines and conduits providing the main infrastructures for the domestic conveyance of energy products, as well as other infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. Thus, it enables the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of legal certainty.

The legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis.

**Case C-503/99 *Commission v. Belgium* [2002] ECR I-4809, paras. 46, 49-52 and 55**

[...] by maintaining in force the provisions limiting the possibility of acquiring voting shares in BAA plc as well as the procedure requiring consent to the disposal of the company's assets, to control of its subsidiaries and to winding-up, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 56 EC [now Article 63 TFEU].

**Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641, para. 50**

[...] the rules deriving from Law 5/1995 and Royal Decrees Nos 3/1996, 8/1997 [Royal Decree No 8/1997 of 10 January 1997 concerning Telefónica de España SA and Telefónica Servicios Móviles SA (BOE No 10 of 11 January 1997, p. 907)], 40/1998, 552/1998 and 929/1998 [...] submit to the prior approval of the national authorities decisions of commercial undertakings relating to:

- the undertaking's winding-up, demerger or merger;

- the disposal or charging of the assets or shareholdings necessary for the attainment of the undertaking's object;
- a change in the undertaking's object;
- dealings in the share capital which result in the State's shareholding being reduced by a percentage equal to or greater than 10%;
- a share purchase resulting in a holding of at least 10% of the share capital, where the State's shareholding in the undertaking has been reduced by at least 10% and has fallen below 50% or where the holding has been reduced to less than 15% of the share capital.

As the Court has held (see the judgments [...] in *Commission v Portugal*, [C-367/98 [2002] ECR I-4731] paragraph 47, *Commission v France*, [C-483/99 [2002] ECR I-4781] paragraph 43, and *Commission v Belgium*, [C-503/99 [2002] ECR I-4809] paragraph 43), it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services.

However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC [now Article 345 TFEU], by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. That article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see *Commission v France*, paragraph 44, and *Commission v Belgium*, paragraph 44).

As regards a system of prior administrative approval of the kind at issue in the present case, the Court has previously held that such a system must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto* (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35; *Commission v Portugal*, paragraph 50; and *Commission v France*, paragraph 46). Such a system must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (*Analir*, paragraph 38; *Commission v Portugal*, paragraph 50; and *Commission v France*, paragraph 46).

As regards the three other undertakings concerned, which are active in the petroleum, telecommunications and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason (see, for similar situations, *Commission v France*, paragraph 47, and *Commission v Belgium*, paragraph 46) and therefore may justify an obstacle to the free movement of capital.

However, the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be

interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, in particular, *Église de Scientologie* [C-54/99 [2000] ECR I-1335], paragraph 17; *Commission v France*, paragraph 48; and *Commission v Belgium*, paragraph 47).

It is therefore appropriate to ascertain whether the rules at issue relating to those three entities provide assurance within the Member State concerned, in the event of a genuine and serious threat, that there would be a minimum supply of petroleum products and electricity and a minimum level of telecommunications services and do not go beyond what is necessary for that purpose.

In that regard, so far as the Commission's complaint relating to Article 3(2) of Law 5/1995 is concerned, it must be borne in mind that the rules introduced by that provision provide, first, that dealings in the share capital which result in the State's shareholding being reduced by a percentage equal to, or greater than, 10%, provided that the holding has fallen below 50% or that the holding has been reduced to less than 15% of the share capital, and, second, that share purchases resulting in a stake of at least 10% of the share capital, must be approved by a public authority. Exercise of the State's right is not subject, under the relevant provisions, to any conditions. The investors concerned are given no indication of the specific, objective circumstances in which prior approval will be granted or withheld.

Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 56 EC [now Article 63 TFEU], with the result that such rules must be regarded as contrary to the principle of legal certainty (*Commission v France*, paragraph 50).

The administrative authorities have in this sphere a particularly broad discretion which represents a serious threat to the free movement of capital and may end by negating it completely. The rules concerned therefore go beyond what is necessary to attain the objective relied on by the Spanish Government, namely preventing any impairment of supplies of petroleum products or electricity or of telecommunication services.

As regards the Commission's complaint relating to Article 3(1) of Law 5/1995, which concerns prior administrative approval of decisions on the winding-up, demerger or merger of the undertaking, on the disposal or charging of the assets or shareholdings necessary for the attainment of the undertakings' objects and on any change in the undertakings' objects, the Spanish Government submitted at the hearing that the rules thus introduced must be upheld because they are similar to those examined in *Commission v Belgium*, which were approved by the Court since they concerned solely certain assets of the companies at issue and certain management decisions rather than restrictions as to the persons who may invest or their shareholdings as such.

In that regard, it is clear from paragraphs 49 to 52 of *Commission v Belgium*, first, that the system examined in that judgment was one of *ex post facto* opposition, which is less restrictive than a system of prior approval such as that in the present case (see, to

that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 37). Furthermore, a feature of the Belgian system was that it listed specifically the strategic assets concerned and the management decisions which could be challenged in any given case. Finally, any intervention by the administrative authorities was strictly limited to cases in which the objectives of the energy policy were jeopardised. Any decision taken in that context had to be supported by a formal statement of reasons and was subject to an effective review by the courts.

The rules deriving from the combined application of Article 3(1) of Law 5/1995 and the royal decrees relating to the relevant undertakings in the petroleum, telecommunications and electricity sectors do not satisfy those criteria. The assets or shareholdings necessary for the attainment of the undertaking's object and which are defined as such, to which Article 3(1)(b) of Law 5/1995 refers, are precisely defined only in certain of the decrees. The voluntary winding-up, demerger or merger of the undertaking or a change in its object, to which subparagraphs (a) and (c) of Article 3(1) refer, are not, unlike the decisions at issue in *Commission v Belgium* (paragraph 50), decisions concerning specific management matters but decisions fundamental to the life of an undertaking. Similarly, the administrative authority's power to intervene is not in this case, as it was in the case relating to the Kingdom of Belgium, subject to any condition fettering the authority's discretion. The fact that it appears to be possible to bring legal proceedings against such decisions makes no difference to that finding, since neither the law nor the decrees at issue provide the national courts with sufficiently precise criteria to enable them to review the way in which the administrative authority exercises its discretion.

Given the lack of any objective, precise criteria deriving from the rules at issue, it must be held that the latter go beyond what is necessary to attain the objective relied on by the Spanish Government.

That finding cannot be called in question by the fact that the three royal decrees concerned introduced regimes which will last only 10 years. An infringement of Treaty obligations does not cease to be an infringement merely because it is limited in time.

Nor can that finding be called in question by the argument which the Spanish Government bases on Article 86(2) EC [now Article 106(2) TFEU]. In that regard, although it is true that paragraph (2) of Article 86 EC [now Article 106 TFEU], read with paragraph (1) thereof, seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market (Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12; and Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 39), it is none the less the case that the Member State must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised (*Commission v Netherlands*, paragraph 58).

The Spanish Government has given no explanation of why that would be the case here. Consequently, the argument based on Article 86(2) EC [now Article 106(2) TFEU] must also be rejected.

It must therefore be held that, by maintaining in force the provisions of Article 2 and Article 3(1) and (2) of Law 5/1995 as well as Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998, in so far as they implement a system of prior administrative approval, the Kingdom of Spain has failed to fulfil its obligations under Article 56 EC [now Article 63 TFEU].

**Case C-463/00 *Commission v. Spain* [2003] ECR I-4581, paras. 54, 66-67, 69 and 71-84**

In 1989, the Netherlands State undertaking for post, telegraph and telephone was transformed into a limited liability company called Koninklijke PTT Nederland NV ('PTT').

On the occasion of the partial privatisation of PTT, by the sale in 1994 of a first tranche of shares representing 30% of its capital and in 1995 of a second tranche representing a further 20%, the company statutes were amended in order to introduce a special share, called a 'golden share', for the benefit of the Netherlands State.

In 1998, PTT was divided into two limited liability companies, namely Koninklijke KPN NV ('KPN') for telecommunications services and TNT Post Groep NV, which subsequently became TPG NV ('TPG'), for postal services.

In the present case, the Court finds that the special shares at issue constitute restrictions on the free movement of capital provided for in Article 56(1) EC [now Article 63(1) TFEU].

First of all, the introduction of the special shares at issue into the statutes of KPN and TPG is the result of decisions taken by the Netherlands State in the course of the privatisation of those two companies with a view to reserving a certain number of special rights under the companies' statutes. In those circumstances, contrary to what the Netherlands Government argues, those shares must be regarded as State measures falling within the scope of Article 56(1) EC [now Article 63(1) TFEU].

The Court further finds that the special shares at issue are likely to deter investors of other Member States from investing in KPN and TPG.

By virtue of those special shares, a series of very important management decisions of the organs of KPN and TPG, concerning both the activities of those two companies and their very structure (in particular questions of merger, demerger and dissolution), depend on prior approval by the Netherlands State. Thus, in the first place, as the Commission has rightly pointed out, those special shares confer on the Netherlands State an influence over the management of KPN and TPG which is not justified by the size of its investment and is significantly greater than that which its ordinary shareholding in those companies would normally allow it to obtain. Moreover, those shares limit the influence of other shareholders in relation to the size of their holding in KPN and TPG.

Furthermore, those special shares can be withdrawn only with the consent of the Netherlands State.

By making decisions of such importance subject to the prior approval of the Netherlands State and thereby limiting the possibility of other shareholders effectively participating in the management of the company concerned, the existence of those shares may have a negative influence on direct investments.

Similarly, the special shares at issue may have a deterrent effect on portfolio investments in KPN and TPG. A possible refusal by the Netherlands State to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, would be capable of depressing the (stock market) value of the shares of that company and thus reduces the attractiveness of an investment in such shares.

Thus, the risk that the Netherlands State might exercise its special rights in order to pursue interests which do not coincide with the economic interests of the company concerned might discourage direct or portfolio investments in that company.

Finally, contrary to what the Netherlands Government argues, the Court does not find those restrictive effects to be either too uncertain or too indirect to constitute an obstacle to the free movement of capital.

The possibility cannot be excluded that, in certain particular circumstances, the Netherlands State might exercise its special rights in order to defend general interests, which might be contrary to the economic interests of the company concerned. The special shares at issue thus entail the real risk that decisions recommended by the organs of those companies as being in the economic interests of the latter may be blocked by that State.

The free movement of capital may, however, be restricted by national measures justified on the grounds set out in Article 58 EC [now Article 65 TFEU] or by overriding reasons in the general interest (see, to that effect, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29), to the extent that there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests (see, to that effect, in the context of the freedom to provide services, Case C-255/04 *Commission v France* [2006] ECR [I-5251], paragraph 43, and case-law cited).

In the absence of such Community harmonisation, it is in principle for the Member States to decide on the degree of protection which they wish to afford to such legitimate interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, to that effect, Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 45).

In this case, therefore, in order to assess whether the Commission's complaints are well founded, the Court needs to examine whether the special shares at issue, implying special rights of prior approval of certain management decisions of the organs of KPN and TPG, may be justified having regard to one of the reasons referred to in paragraph 32 of this judgment and whether those measures are proportionate to the objectives pursued.

With regard to the special share held in KPN, the Netherlands Government does not adduce any objective in the general interest capable of providing justification.

In those circumstances, the first complaint raised in Case C-282/04, claiming infringement of Article 56(1) EC [now Article 63(1) TFEU], must be upheld.

Concerning the special share held in TPG, the Netherlands Government argues that it is necessary in order to guarantee universal postal service and, more particularly, in order to protect the solvency and continuity of TPG, which is the only undertaking currently capable in the Netherlands of providing that universal service at the level required by statute.

In that regard, the Court acknowledges that the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital (see, by analogy, Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 44).

However, the special share at issue goes beyond what is necessary in order to safeguard the solvency and continuity of the provider of the universal postal service.

As the Advocate General has rightly pointed out in paragraphs 38 and 39 of his Opinion, it should be noted, first, that the special rights of the Netherlands State in TPG are not limited to that company's activities as provider of a universal postal service. Moreover, the exercise of those special rights is not based on any precise criterion and does not have to be backed by any statement of reasons, which makes any effective judicial review impossible.

Having regard to the whole of the above, the first complaint in Case C-283/04, claiming infringement of Article 56(1) EC [now Article 63(1) TFEU], must be upheld.

**Joined cases C-282/04 and C-283/04 *Commission v. Netherlands*, [2006] ECR I-9141, paras. 4-6, 21-30 and 32-41**

The Commission takes the view that the infringement of which it complains must be examined in the light of Article 43 EC [now Article 49 TFEU], relating to freedom of establishment, and of Article 56 EC [now Article 63 TFEU], relating to free movement of capital.

In this case, a distinction must be drawn, depending on whether the criteria are applied to the State's powers to oppose the acquisition of shareholdings and the conclusion of contracts by shareholders representing a certain proportion of voting rights or are applied to the power to veto certain company resolutions.

With regard, first, to the powers of opposition contained in Article 2(1)(a) and (b) of Decree-Law No 332/1994 [Decree-Law No 332 of 31 May 1994 providing for acceleration of the procedures for the disposal of the State's and public bodies' shareholdings in joint stock companies (Decreto-legge n. 332, norme per l'accelerazione delle procedure di dismissione di partecipazioni dello Stato e degli enti pubblici in società per azioni), (GURI No 126 of 1 June 1994, p. 38)], it is clear from the documents before the Court that the proportion of at least 5% of voting rights or, as the case may be, a lesser percentage fixed by the competent minister has to enable the persons concerned to participate effectively in the management of the company in question, which is covered by Article 56 EC [now Article 63 TFEU]. It is conceivable, in respect of companies having in general large numbers of smaller shareholdings, that the holders of shareholdings corresponding to those percentages might have the power to influence in a definite manner the management of such a company and to determine its activities, which is covered by Article 43 EC [now Article 49 TFEU], as the Italian Republic maintains. Furthermore, because Decree-Law No 332/1994 fixes a minimum percentage, that legislation is also designed to apply to holdings greater than that percentage which give an obvious power of control. It is therefore necessary to examine the criteria relating to the exercise of those powers of opposition in the light of those two Treaty provisions.

With regard, second, to the power of veto contained in Article 2(1)(c) of Decree-Law No 332/1994, that power clearly relates to decisions within the scope of the management of the company and therefore concerns only those shareholders capable of exerting a definite influence on the companies concerned, with the result that the criteria applying to the exercise of that power must be examined in the light of Article 43 EC [now Article 49 TFEU]. Moreover, even if the effects of those criteria are restrictive of the free movement of capital, those effects would be the unavoidable consequence of any restriction on freedom of establishment and would not warrant independent examination in the light of Article 56 EC [now Article 63 TFEU] (*Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 33). Consequently, the criteria applying to the exercise of the power of veto must be examined solely from the point of view of Article 43 EC [now Article 49 TFEU].

A preliminary point to note is that the criteria examined here determine the circumstances in which the powers of the State to oppose the acquisition of certain shareholdings or the conclusion of certain agreements of shareholders in the companies concerned may be exercised. It is apparent from the Court's case-law that the use of such powers may be contrary to the free movement of capital guaranteed by Article 56 EC [now Article 63 TFEU] (see, inter alia, Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, paragraph 50, and *Commission v Spain*, paragraph 58). The point at issue in this case is whether those criteria fix conditions that make it possible to vindicate the exercise of such powers.

It is to be borne in mind, in this regard, that the free movement of capital may be restricted by national measures justified by the reasons set out in Article 58 EC [now Article 65 TFEU] or by overriding reasons in the public interest, in so far as there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests (see *Commission v Germany*, paragraph 72, and case-law cited).

In the absence of such Community harmonisation, it is in principle for the Member States to decide on the degree of protection they intend to afford to such legitimate interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted should be appropriate to secure the attainment of the objective which they pursue and should not go beyond what is necessary in order to attain it (see *Commission v Germany*, paragraph 73, and case-law cited).

Furthermore, even in the spheres that have been harmonised, the principle of proportionality applies to those cases in which the Community legislature has left the Member States some discretion.

It may be noted that the criteria at issue apply to common interests concerning, in particular, the minimum supply of energy resources and goods essential to the public as a whole, the continuity of public service, national defence, the protection of public policy and public security and health emergencies. The pursuit of such interests may, subject to observance of the principle of proportionality, warrant certain restrictions of the exercise of fundamental freedoms (see, inter alia, judgment of 14 February 2008 in Case C-274/06 *Commission v Spain*, paragraph 38).

However, as noted in paragraphs 42 and 43 above, the first requirement of observance of the principle of proportionality is that the measures taken should be appropriate for the purpose of attaining the objectives pursued.

Application of the criteria at issue as they relate to the exercise of the powers of opposition is not appropriate for the purpose of attaining the objectives pursued in the case in point, because there is no link between the criteria and the power.

The Court has earlier held that the mere acquisition of a holding of more than 10% of the capital of a company operating in the energy sector or any other acquisition conferring significant influence on such a company cannot, as a general rule, be regarded as a real and serious enough threat to security of supply (*Commission v Spain*, paragraphs 38 and 51).

In its written pleadings, the Italian Republic has provided no proof or even anything at all to show that the application of the criteria for the exercise of the powers of opposition makes it possible to attain the objectives pursued.[...]

The Court has previously held that a State's powers of intervention such as the powers of opposition in respect of which the criteria at issue determine the conditions for their exercise, which are not qualified by any condition, save for a reference to the protection of national interests, formulated in general terms and without any indication of the specific objective circumstances in which those powers are to be exercised, constitute serious interference with the free movement of capital (see, to that effect, Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraphs 50 and 51).

Those considerations are applicable to the present case. Even if the criteria at issue concern different kinds of public interests, they are formulated in a general and imprecise manner. What is more, the lack of any connection between the criteria and the special powers to which they relate increases the uncertainty surrounding the circumstances in which those powers may be exercised and gives them a discretionary nature, having regard to the latitude enjoyed by the national authorities in making use of them. Such latitude is disproportionate in relation to the objectives pursued.

Furthermore, the mere statement in Article 1(1) of the Decree of 2004 [Decree of the President of the Council of Ministers of 10 June 2004 defining the criteria for the exercise of the special powers referred to in Article 2 of Decree-Law No 332 of 31 May 1994, converted into law with amendments by Law No 474 of 30 July 1994 (decreto del Presidente del Consiglio dei Ministri, definizione dei criteri di esercizio dei poteri speciali, di cui all'art. 2 del decreto-legge 31 maggio 1994, n. 332, convertito, con modificazioni, dalla legge 30 luglio 1994, n. 474), (GURI No 139, of 16 June 2004, p. 26, 'the Decree of 2004')] that the special powers must be used only in accordance with Community law cannot make the use of those criteria consistent with Community law. The general and abstract nature of those criteria is incapable of ensuring that the special powers will be exercised in accordance with the requirements of Community law (see, to that effect, Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 63 and 64).

Last, while the fact that the exercise of the special powers may be submitted to review by the national court, pursuant to Article 2(1)(a) to (c) of Decree-Law No 332/1994, is essential to the protection of persons having regard to the application of the rules on freedom of establishment, it cannot, on its own, suffice to make good the incompatibility with those rules of the criteria for the application of the special powers.

In so far as the exercise of the powers of opposition also concern holdings conferring on their holders the power to influence in a definite manner the managements of the companies concerned and to determine their activities and may therefore restrict freedom of establishment, it must be considered that, for the same reasons as those set out above in the examination of the compatibility of the criteria in Article 1(2) of the Decree of 2004 with Article 56 EC [now Article 63 TFEU], those criteria give the Italian authorities disproportionate discretion in the exercise of their powers of opposition.

As mentioned in paragraph 39 above, the application of the criteria in Article 1(2) of the Decree of 2004 to the power to veto certain decisions has to be examined from the viewpoint of Article 43 EC [now Article 49 TFEU] alone.

It must be held that, with regard to the companies concerned, resolutions for the dissolution of the company, transfer of the undertaking, merger, demerger, transfer abroad of the company headquarters, alteration of the company's objects and amendment of the articles of association removing or modifying the special powers relate to important aspects of the management of those companies.

It is possible that such decisions, which may affect the very existence of those companies, may impinge on the continuity of the public service or on the maintenance

of a minimum national supply of goods essential to the public as a whole, which constitute public interests covered by the Decree of 2004.

There exists, therefore, a connection between the special power of veto and the criteria fixed in the Decree of 2004.

However, the circumstances in which that power may be exercised are not clear.

The Decree of 2004 contains no details of the circumstances in which the criteria for the exercise of the power of veto provided by Article 2(1)(c) of Decree-Law No 332/1994 may be applicable. [...]

As pointed out in paragraph 43 above, even though those directives leave the Member States some leeway, especially in order to adopt measures in an emergency, the provisions they adopt must observe the limits drawn by the Treaty, in particular the principle of proportionality.

In the circumstances of this case, however, as found in paragraph 66 above, the Decree of 2004 contains no details of the actual circumstances in which the power of veto may be exercised and the criteria it lays down are not, therefore, based on objective verifiable conditions.

As noted in paragraphs 53 and 54 above, the statement that the power of veto must be used only in accordance with Community law and the fact that its exercise may be subject to national judicial review cannot make the Decree of 2004 compatible with Community law.

**Case C-326/07 *Commission v. Italy*, 26 March 2009, paras. 32, 37-43, 45-49, 51-54, 56, 58, 60-63, 66, 68, 72, 73 (not yet reported)**

## **4.2. Unfair terms in consumer contracts**

This reference for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) [the Directive].

The reference was made in proceedings for enforcement of an arbitration award which had become final between Asturcom Telecomunicaciones SL ('Asturcom') and Mrs Rodríguez Nogueira concerning the payment of sums due under a subscription contract for a mobile telephone concluded by that company with Mrs Rodríguez Nogueira.

By its question, the Juzgado de Primera Instancia No 4 de Bilbao asks, in essence, whether the Directive must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has acquired the force of *res judicata* and was made in the absence of the consumer is required to determine of its own motion whether an arbitration clause in a contract concluded between a consumer and a seller or supplier is unfair and to annul the award.

In order to guarantee the protection intended by the Directive, the Court has also stated on a number of occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27, and *Mostaza Claro*, paragraph 26).

It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair (*Mostaza Claro*, paragraph 38).

However, the present case can be distinguished from that which gave rise to the judgment in *Mostaza Claro* in that Mrs Rodríguez Nogueira did not in any way become involved in the various proceedings relating to the dispute between her and Asturcom and, in particular, did not bring an action for annulment of the arbitration award made by the AEADE in order to challenge the arbitration clause on the ground that it was unfair, so that that award now has the force of *res judicata*.

Accordingly, it is necessary to determine whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of *res judicata*.

It is necessary at the outset to draw attention to the importance, both for the Community legal order and for the national legal systems, of the principle of *res judicata*.

In the absence of Community legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness) (see, inter alia, *Kapferer*, paragraph 22, and *Fallimento Olimpiclub*, paragraph 24).

As regards, first, the principle of effectiveness, the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and *Fallimento Olimpiclub*, paragraph 27).

In the present case, the arbitration award at issue in the main proceedings became final because the consumer in question did not bring an action for annulment of the award within the time-limit prescribed for that purpose.

According to established case-law, it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty (see, to this effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28; and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 58). Such time-limits are not liable to make it virtually impossible or excessively difficult to exercise rights conferred by Community law (see, to that effect, Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34).

It is therefore necessary to ascertain whether it is reasonable to impose a two-month time-limit, such as that laid down in Article 41(4) of Law 60/2003 [Ley 60/2003 de Arbitraje (Law 60/2003 on Arbitration) of 23 December 2003 (BOE No 309 of 26 December 2003) ('Law 60/2003')], upon the expiry of which, in the absence of any action for annulment, an arbitration award becomes final and thus acquires the authority of *res judicata*.

In the present case, it should be noted first that, as the Court has already held, a period of 60 days is not objectionable per se (see, to that effect, *Peterbroeck*, paragraph 16).

In such circumstances, such a time-limit is consistent with the principle of effectiveness, since it is not in itself likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from the Directive (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55).

In any event, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final.

Next, in accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking (see, to that effect, inter alia, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraphs 13 and 17 and the case-law cited).

In order to determine whether that principle is complied with in the case before the national court, it is for that court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law, to consider both the purpose and the essential characteristics of domestic actions which are claimed to be

similar (see, inter alia, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraphs 49 and 56). However, with a view to the appraisal to be carried out by the national court, the Court may provide guidance for the interpretation of Community law (see *Preston and Others*, paragraph 50).

As pointed out at paragraph 30 above, Article 6(1) of the Directive is a mandatory provision. It should also be noted that, according to the Court's case-law, that directive as a whole constitutes, in accordance with Article 3(1)(t) EC [see now Article 4(2)(f) TFEU], a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community (*Mostaza Claro*, paragraph 37).

Accordingly, in view of the nature and importance of the public interest underlying the protection which the Directive confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.

It follows from this that, inasmuch as the national court or tribunal seised of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task (see, to that effect, *Pannon GSM*, paragraph 32).

The national court or tribunal is also under such an obligation where, under the domestic legal system, it has a discretion whether to consider of its own motion whether such a clause is in conflict with national rules of public policy (see, to that effect, *van Schijndel and van Veen*, paragraphs 13, 14 and 22, and *Kempter*, paragraph 45).

Lastly, as regards the consequences of a finding by the court responsible for enforcement that the arbitration clause in a contract concluded by a seller or supplier with a consumer is unfair, it should be recalled that Article 6(1) of the requires the Member States to lay down that unfair terms are not to be binding on the consumer, 'as provided for under their national law'.

**Case C-40/08 *Asturcom Telecomunicaciones*, 6 October 2009, paras. 1, 2, 28, 31-35, 38-43, 46, 47, 49-54, 57 (not yet reported)**

By this question, the referring court wishes to know whether Article 6(1) of the Directive [Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29; 'the Directive')], pursuant to which unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer, must be interpreted as meaning that it is only where the consumer has successfully challenged such a term that he is not bound by it.

[...] the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his

bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25).

The Court also held, in paragraph 26 of that judgment, that the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms, and that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

It must be pointed out, in that regard, that, if that power is to be granted to the national court, Article 6(1) of the Directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer. Such an interpretation would rule out the possibility of the national court assessing, of its own motion, in the context of examining the admissibility of the action which is before it, and without a specific application from the consumer to that effect, the unfairness of a contractual term.

As regards the legal effects of an unfair term, the Court stated, in Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 36, that the importance of consumer protection has led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier ‘shall ... not be binding on the consumer’. It emphasised that it is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

The Court added further, in paragraph 37 of that judgment, that as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC [see now Article 4(2)(f) TFEU], a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life in its territory.

Consequently, the expression ‘as provided for under their national law’, set out in Article 6(1) of the Directive, cannot be understood as enabling Member States to subject the non-binding status of an unfair term to a condition such as that mentioned in the first question referred.

[...] the referring court asks the Court about the obligations on the national court, by reason of the provisions of the directive, in order to determine whether the national court, in the context of assessing its jurisdiction and irrespective of the type of action, must rule, if necessary of its own motion, on the unfairness of a contractual term.

In order to reply to that question, it should be recalled that, in Case C-473/00 *Cofidis* [2002] ECR-I-10875, paragraph 34, the Court has held that the protection which the Directive confers on consumers extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise

the unfairness of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.

It should also be pointed out that the Court has held, in *Mostaza Claro*, paragraph 38, that the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.

The court seized of the action is therefore required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction.

In carrying out that obligation, the national court is not, however, required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.

In those circumstances, the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive.

[...] the national court seeks guidance on the factors which it must consider in assessing the possible unfairness of a contractual term.

In order to reply to that question, it should be noted that in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19).

In that context, the Annex to which Article 3(3) of the Directive refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair (*Freiburger Kommunalbauten*, paragraph 20).

Furthermore, Article 4 of the Directive provides that the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it.

However, as regards the term which is the subject-matter of the dispute in the main proceedings, it should be borne in mind that, in *Océano Grupo Editorial and Salvat Editores*, paragraphs 21 to 24, the Court has held that, in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive, a

term, drafted in advance by the seller or supplier – which was not subject to individual negotiation – the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller has his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of the Directive.

As the Court stated in *Océano Grupo Editorial and Salvat Editores*, paragraph 22, a term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. The Court therefore concluded that such a term falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

While it is true that the Court, in exercising the jurisdiction conferred on it by Article 234 EC [now Article 267 EC], in *Océano Grupo Editorial and Salvat Editores*, paragraph 22, interpreted the general criteria used by the Community legislature in order to define the concept of unfair terms, it cannot however rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question (see *Freiburger Kommunalbauten*, paragraph 22).

It is for the national court, in the light of the foregoing, to assess whether a contractual term may be categorised as unfair within the meaning of Article 3(1) of the Directive.

Case C-243/08 *Pannon GSM Zrt*, 4 June 2009, paras. 20, 22-27, 29-34, 36-43 (not yet reported)

#### 4.3. Per-minute tariffs for telephone calls and introduction of the Euro

Regulation No 1103/97 [Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1)] does not define the notion of 'monetary amounts to be paid or accounted for', which is contained in the first sentence of Article 5.

Although the wording of that provision clearly suggests that the term encompasses, on the one hand, amounts which give rise to a payment on the consumer's part, namely all monetary debts, and, on the other hand, amounts entered in accounting documents or statements, it does not make it immediately apparent whether the term also covers monetary amounts, such as the per-minute prices applied by O2, which serve as a basis for calculating the price to be paid by the consumer.

As regards a tariff, such as the per-minute price at issue in the main proceedings, no practical reason requires the amount to be rounded in every case to two decimal places. It is actually possible to display a per-unit tariff for goods or services with a higher degree of accuracy, as is shown by the practices of a good many economic operators. Above all, such an amount is not actually invoiced to, or paid by, the consumer and it is not entered as such in any accounting document or statement of

account. In those circumstances, it does not constitute a monetary amount to be paid or accounted for within the meaning of the first sentence of Article 5 of Regulation No 1103/97. Therefore it is not to be rounded, in every case, to the nearest cent.

The fact that that tariff represents the decisive factor as regards the price of the goods or services offered to the consumer does not affect that conclusion. Quoting a tariff with a degree of accuracy restricted to 2 decimal places is not necessarily the best way of ensuring that the consumer is fully informed.

Nor does the fact that the tariff relates to a particular multiple (six) of the unit (a ten-second unit) on the basis of which the final amount of the invoice is calculated have any effect on the reply to the question referred to the Court. Since the tariff is not the amount actually paid by the consumer, it is not a monetary amount to be paid or accounted for within the meaning of Regulation No 1103/97, irrespective of the way in which it is structured or calculated.

[..] [A]lthough Regulation No 1103/97 does not generally preclude monetary amounts other than those referred to in the first sentence of Article 5 being rounded to the nearest cent, that rounding method must none the less not affect contractual obligations entered into by economic agents, including consumers, and must not have a real impact on the prices actually to be paid.

Thus, where the price to be paid is obtained by taking into account a large number of intermediate calculations, rounding to the nearest cent the per-unit tariff for the goods and services, or each of the intermediate amounts involved in the invoicing process, is liable to have a real impact on the price actually borne by consumers. So, if it has not been previously agreed between the parties to the contract concerned, such a variation of the price is contrary to the principle of continuity of contracts and to the objective which Regulation No 1103/97 seeks to secure that the transition to the euro should be neutral.

It is for the national court to ascertain, in the proceedings before it, whether application of the rule of rounding to the nearest cent has had a real impact on the amount which must be paid by consumers and whether application of that rule has compromised the contractual obligations entered into by the parties.

It thus falls to the referring court to ascertain whether O2's decision to round all its per-minute tariffs to the nearest cent has had a real impact on prices and whether it entails a breach of the contractual obligations which O2 has entered into vis-à-vis its customers.

*Case C-19/03 Verbraucher-Zentrale Hamburg [2004] ECR I-8183, paras. 28-29, 40-42 and 53-56*

#### **4.4. Television broadcasting services**

The concept of 'television broadcasting' referred to in Article 1(a) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [(OJ 1989 L 298, p. 23)], as amended

by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 [(OJ 1997 L 202, p. 60)], is defined independently by that provision. It is not defined by opposition to the concept of ‘information society service’ within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [(OJ 1998 L 204, p. 37)], as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 [(OJ 1998 L 217, p. 18)], and therefore does not necessarily cover services which are not covered by the latter concept.

A service comes within the concept of ‘television broadcasting’ referred to in Article 1(a) of Directive 89/552, as amended by Directive 97/36, if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.

A service such as Filmtime, which consists of broadcasting television programmes intended for reception by the public and which is not provided at the individual request of a recipient of services, is a television broadcasting service within the meaning of Article 1(a) of Directive 89/552, as amended by Directive 97/36. Priority is to be given to the standpoint of the service provider in the analysis of the concept of ‘television broadcasting service’. However, the situation of services which compete with the service in question is not relevant for that assessment.

The conditions in which the provider of a service such as Filmtime complies with the obligation referred to in Article 4(1) of Directive 89/552, as amended by Directive 97/36, to reserve for European works a majority proportion of his transmission time are irrelevant for the classification of that service as a television broadcasting service.

**Case C-89/04 *Mediakabel BV* [2005] ECR I-4891**

By its questions, which must be examined together, the national court essentially asks whether Article 1 of Directive 89/552 [Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) (‘Directive 89/552’)] is to be interpreted as meaning that the definition which it gives of teleshopping or, as the case may be, that which it gives of television advertising covers a broadcast or part of a broadcast in the course of which the television broadcaster itself offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment.

As regards, first, the application of the criteria used in Article 1(f) of Directive 89/552 to define teleshopping, it must be stated that, in the programme at issue, described in paragraph 15 of this judgment, the television broadcaster transmits directly to the

public an offer which makes it possible for that public to participate in a type of prize game in return for payment of a telephone call.

[...] an activity which enables users, in return for payment, to participate in a prize game may constitute a supply of services (see, to that effect, in respect of the organisation of lotteries, Case 275/92 *Schindler* [1994] ECR I-1039, paragraph 25; in respect of the making available of slot machines, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 27; and in respect of the operation of games of chance or gambling, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 56).

In the present case, a direct offer to participate in a game of chance is made to television viewers during the broadcast by providing them with the necessary information to contact the programme's presenter and be on air, or, if they are unsuccessful in that regard, to enter the weekly draw. Invited by the presenter to participate in the programme's competition, the television viewer accepts the invitation by dialling the premium rate telephone number displayed on the screen. From the moment that ORF's [Österreichischer Rundfunk (ORF) ('ORF')] staff answers him, the payment process is initiated and the increased cost of the call is added to the telephone bill of the viewer who, at that moment, chooses to play the game on air or, as the case may be, qualifies to take part in the draw with the other unsuccessful callers.

The viewer concerned thus accepts an offer to participate in a game in the hope of winning. In those circumstances, the television broadcaster may appear, in return for payment, to be making a service available to the viewer by allowing him to participate in a prize game.

That having been said, the categorisation of the game at issue as 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 nevertheless still calls for an investigation as to whether, in view of its particular characteristics, that broadcast or part of the broadcast constitutes a real offer of services. In that regard, it is for the national court to carry out an assessment of all the factual circumstances of the case in the main proceedings.

Therefore, it is for the national court, in the context of that assessment, to take account of the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast as a whole in terms of time and of anticipated economic effects in relation to the economic benefits which are expected in respect of that broadcast, and also the type of questions which the candidates are asked.

It is important to add that a game, such as that at issue in the main proceedings, can constitute 'teleshopping' within the meaning of Article 1(f) of Directive 89/552 only if that game constituted an actual economic activity in its own right involving the supply of services and was not restricted to a mere offer of entertainment within the broadcast (see, by analogy, in respect of a prize game inserted in a publication, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 23).

It is not inconceivable that the television broadcaster simply had the intention, taking into account the purpose of the broadcast of which the game forms part, of making that broadcast interactive without thereby making an actual offer of services in the

gambling sector, particularly if that game represents only a minimal part of the content and the time of the entertainment broadcast and, therefore, does not change the nature of that broadcast, and if the questions which the candidates are asked are unconnected with the promotion of goods or of services in connection with a trade, business, craft or profession. The same is true if the economic interest expected from that game proves to be quite incidental in relation to that of the broadcast as a whole.

As regards, secondly, the application of the criteria used in Article 1(c) of Directive 89/552 to define television advertising, it must be considered whether, in a broadcast such as that at issue in the main proceedings, the invitation to viewers to dial a premium rate telephone number in order to participate, in return for payment, in a prize game constitutes a form of announcement broadcast or a broadcast for self-promotional purposes by an undertaking in connection with a trade in order to promote the supply of goods or services.

The national court raises the question whether the announcement contained in the broadcast or part of the broadcast at issue in the main proceedings may be categorised as ‘television advertising’ only in the event that it is not teleshopping. Having regard to the views expounded in paragraphs 35 to 38 of this judgment, from which it is apparent that there can be no teleshopping in the absence of an actual offer of services, it must be accepted that the announcement which has to be examined is part of an entertainment broadcast.

Article 1(c) of Directive 89/552 covering any form of announcement broadcast, it must also be accepted that the answer to the question referred by the national court requires that all the aspects of the broadcast or of the part of the broadcast must be taken into account in order to establish whether they show that there is an intention of broadcasting television advertising to viewers. There is thus no need to restrict that assessment solely to the form of announcement which is constituted by the appearance on the screen of a premium rate telephone number which allows him to participate in the game.

In that regard, it cannot be denied that the television broadcaster seeks, through that announcement, to promote that broadcast by encouraging viewers to watch it, making it more attractive due to the prospect of participating in a game which it is possible to win. However, generally, each broadcaster seeks to make attractive any television broadcast which it has the freedom to broadcast. It cannot be deduced from this that any form of announcement seeking to make the broadcast more attractive constitutes television advertising.

It is therefore important to know whether that particular form of announcement constituted by an invitation to participate in a prize game has any inherent characteristic capable of giving it the nature of television advertising.

It must be stated that the announcement and the game to which it may give access seek to make the viewer participate directly in the content of the broadcast. The announcement is an integral part of the broadcast and does not, a priori, in itself have the purpose of extolling the interest thereof.

However, by its content, the game may consist in indirectly promoting the merits of the broadcaster's programmes, in particular if the questions given to the candidate relate to his knowledge of other broadcasts by that body and are thus capable of encouraging potential candidates to watch them. The same would be true if the prizes to be won consisted of derivative goods serving to promote those programmes, such as video recordings. In such circumstances, the announcement made by that broadcast or part of a broadcast could be regarded as television advertising in the form of self-promotion. The announcement could also be regarded as television advertising if the goods and services offered as prizes to be won were the subject of representations or promotions intended to encourage viewers to buy those goods and services.

It must be stated that the pieces of information which the Court has at its disposal do not make it possible for it to assess whether that is true of a broadcast or part of a broadcast, such as that at issue in the main proceedings. It is for the national court to make that assessment.

**Case C-195/06 *Kommunikationsbehörde Austria (KommAustria)*,  
[2007] ECR I-8817, paras. 23, 30, 32-46**

Under Article 3a(1) of Directive 89/552 [Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552')], each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following them via live coverage or deferred coverage on free television. To that end, the Member State concerned is to draw up a list of such events.

Article 3a(2) of Directive 89/552 requires the Commission to verify that those measures are compatible with Community law and to publish them in the Official Journal. Article 3a(3) puts in place a mutual recognition mechanism by which the other Member States must ensure that broadcasters under their jurisdiction do not circumvent measures adopted pursuant to Article 3a(1) by another Member State, approved by the Commission and published in the Official Journal.

That is also stated in the 19th recital in the preamble to Directive 97/36, from the terms of which it is evident that Article 3a of Directive 89/552 is intended to prevent the possibility of circumvention of national measures protecting a legitimate general interest.

Pursuant to that legislation, the Commission informed the United Kingdom, by the contested decision, of the approval of the measures it had adopted and of their subsequent publication in the Official Journal. As the Court of First Instance held, that decision thus closed the verification procedure which the Commission was required to carry out under Article 3a(2) of Directive 89/552. The publication in the Official Journal of those measures informed the other Member States of their existence and

enabled them to comply with their obligations under Article 3a(3) of Directive 89/552.

The contested decision therefore triggered the mutual recognition mechanism under Article 3a(3) of Directive 89/552 and, consequently, activated the other Member States' obligation to ensure that broadcasters under their jurisdiction did not circumvent the measures adopted by the United Kingdom pursuant to Article 3a(1).

**Case C-125/06 P *Commission v. Infront WM AG* [2008] ECR I-1451, paras. 35-39**

#### **4.5. Copyright issues**

Therefore, the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an 'act of communication to the public' or 'reception by the public' is not governed by the Directive [Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15)], and must consequently be decided in accordance with national law.

**Case C-293/98 *Egeda* [2000] ECR I-629, para. 29**

While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society [(OJ 2001 L 167, p. 10)], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

**Case C-306/05 *SGAE*, Case C-306/05 *SGAE*, [2006] ECR I-11519, paras. 47, 54**

Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [(OJ 1993 L 248, p. 15)] is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights.

**Case C-169/05 *Uradex SCRL*, [2006] ECR I-4973, para. 25**

In those circumstances, it should first be ascertained whether Directive 2002/58 [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)] precludes the Member States from laying down, with a view to ensuring effective protection of copyright, an obligation to communicate personal data which will enable the copyright holder to bring civil proceedings based on the existence of that right. If that is not the case, it will then have to be ascertained whether it follows directly from the three directives expressly mentioned by the national court that the Member States are required to lay down such an obligation. Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter [Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter')], whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

It must therefore be ascertained whether the three directives mentioned by the national court require those States to lay down that obligation in order to ensure the effective protection of copyright.

It should first be noted that, as pointed out in paragraph 43 above, the purpose of the directives mentioned by the national court is that the Member States should ensure, especially in the information society, effective protection of industrial property, in particular copyright. However, it follows from Article 1(5)(b) of Directive 2000/31 [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1)], Article 9 of Directive 2001/29 [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)] and Article 8(3)(e) of Directive 2004/48 [Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16)] that such protection cannot affect the requirements of the protection of personal data.

Article 8(1) of Directive 2004/48 admittedly requires Member States to ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided. However, it does not follow from those provisions, which must be read in conjunction with those of paragraph 3(e) of that article, that they require the Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

Nor does the wording of Articles 15(2) and 18 of Directive 2000/31 or that of Article 8(1) and (2) of Directive 2001/29 require the Member States to lay down such an obligation.

As to Articles 41, 42 and 47 of the TRIPs Agreement [Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement')], relied on by Promusicae, in the light of which Community law must as far as possible be interpreted where – as in the case of the provisions relied on in the context of the present reference for a preliminary ruling – it regulates a field to which that agreement applies (see, to that effect, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 47, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-0000, paragraph 35), while they require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement, they do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings.

The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection.

However, the situation in respect of which the national court puts that question involves, in addition to those two rights, a further fundamental right, namely the right that guarantees protection of personal data and hence of private life.

According to recital 2 in the preamble to Directive 2002/58, the directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. Article 7 substantially reproduces Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, which guarantees the right to respect for private life, and Article 8 of the Charter expressly proclaims the right to protection of personal data.

The present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.

That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, *Lindqvist*, paragraph 87, and Case

C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-0000, paragraph 28).

In the light of all the foregoing, the answer to the national court's question must be that Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

**Case C-275/06 *Productores de Música España (Promusicae)*, [2008] ECR I-271, paras. 46, 56-61, 63-65, 68, 70**

By its first question, the national court asks, essentially, whether access providers which merely provide users with Internet access, without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, are 'intermediaries' within the meaning of Articles 5(1)(a) and 8(3) of Directive 2001/29 [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)].

It follows clearly both from the order for reference and from the wording of the questions referred that, by its first question, the national court wishes to know whether Internet access providers who merely enable the user to access the Internet may be required to provide the information referred to in the second question.

First, it should be pointed out that Article 5(1)(a) of Directive 2001/29 requires Member States to provide for exemptions from reproduction rights.

The point at issue in the dispute before the referring court is whether LSG can rely on a right to information as against Tele2, not whether Tele2 has infringed reproduction rights.

It follows that an interpretation of Article 5(1)(a) of Directive 2001/29 serves no purpose in relation to the outcome of the dispute before the referring court.

It should be noted at the outset that *Promusicae* concerned the communication by Telefónica de España SAU – a commercial undertaking engaged, inter alia, in the provision of Internet access services – of the identities and physical addresses of certain persons to whom it provided such services and whose IP addresses and dates and times of connection were known (*Promusicae*, paragraphs 29 and 30).

It is common ground, as is apparent from the question referred and from the facts in *Promusicae*, that Telefónica de España SAU was an Internet access provider (*Promusicae*, paragraphs 30 and 34).

Accordingly, in holding – in paragraph 70 of *Promusicae* – that Directives 2000/31 [Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1)], 2001/29, 2002/58 [Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37)] and 2004/48 [Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum, OJ 2004 L 195, p. 16)] do not require the Member States to impose, in a situation such as that in *Promusicae*, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings, the Court did not immediately rule out the possibility that Member States may, pursuant to Article 8(1) of Directive 2004/48, place Internet access providers under a duty of disclosure.

It should also be pointed out that, under Article 8(3) of Directive 2001/29, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Access providers who merely enable clients to access the Internet, even without offering other services or exercising any control, whether *de iure* or *de facto*, over the services which users make use of, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.

Moreover, according to Recital 59 in the preamble to Directive 2001/29, rightholders should have the possibility of applying for an injunction against an intermediary who ‘carries a third party’s infringement of a protected work or other subject-matter in a network’. It is common ground that access providers, in granting access to the Internet, make it possible for such unauthorised material to be transmitted between a subscriber to that service and a third party.

That interpretation is borne out by the aim of Directive 2001/29 which, as is apparent in particular from Article 1(1) thereof, seeks to ensure the legal protection of copyright and related rights in the framework of the internal market. The protection sought by Directive 2001/29 would be substantially diminished if ‘intermediaries’, within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights.

In view of the foregoing, the answer to the first question is that access providers which merely provide users with Internet access, without offering other services such as email, FTP or file-sharing services or exercising any control, whether *de iure* or *de*

*facto*, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29.

*Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH*,  
19 February 2009, paras. 30, 34-37, 39-46 (not yet reported)

#### 4.6. Research & Development

Consequently, the answer to be given to the first question must be that Articles 52 of the Treaty [now Article 49 TFEU] and 58 EC [now Article 54 TFEU] preclude a Member State's legislation under which undertakings established in that State and exploiting proprietary medicinal products there are charged a special levy on their pre-tax turnover in certain of those proprietary medicinal products during the last tax year before the enactment of that legislation and are allowed to deduct from the amount payable only expenditure incurred during the same tax year on research carried out in the levying State, when it applies to Community undertakings operating in that State through a secondary place of business.

*Case C-254/97 Baxter* [1999] ECR I-4809, para. 21

#### 4.7. Information in the field of technical standards and regulations

[...] National legislation [...], which prohibits commercial advertising for transmitting equipment of a non-approved type, does not constitute, for the purposes of Directive 83/189 [Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8)], a technical regulation which should have been notified to the Commission prior to its adoption.

*Case C-278/99 Georgius van der Burg* [2001] ECR I-2015, para. 22

By its third question, the referring court is asking, first, essentially, whether national legislation which requires operators of conditional-access services to have their name entered in a register and indicate therein the products which they propose to market, and to obtain prior certification for those products, constitutes a 'technical regulation' within the meaning of Article 1, point 9, of Directive 83/189 [Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 (OJ 1994 L 100, p. 30)], and, second, whether such national legislation must be notified to the Commission in accordance with that directive.

As regards the first part of that question, the Court has already held that national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of Article 1, point 9, of Directive 83/189. Technical regulations within the meaning of that

provision are specifications defining the characteristics of products and not specifications concerning economic operators (Case C-194/94 *CIA Security* [1996] ECR I-2201, paragraph 25; Case C-278/99 *Van der Burg* [2001] ECR I-2015, paragraph 20).

However, a national provision must be classified as a technical regulation within the meaning of Article 1, point 9, Directive 83/189 if it requires the undertakings concerned to apply for prior approval of their equipment (*CIA Security*, paragraph 30).

It follows that a national rule which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a 'technical regulation' within the meaning of Article 1, point 9, of Directive 83/189.

As regards the second part of the third question, which relates to the obligation under Article 8 of Directive 83/189 to communicate any draft technical regulation to the Commission, Article 10 of that directive shows that Articles 8 and 9 do not apply to laws, regulations or administrative provisions of Member States, or to voluntary agreements entered into by them, whereby Member States comply with binding Community measures which result in the adoption of technical specifications. So, to the extent that the national legislation at issue in the main proceedings transposes Directive 95/47 [Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51)], and to that extent only, there will be no duty of notification under Directive 83/189.

However, having regard to the content of Directive 95/47 referred to in paragraphs 26 and 27 of this judgment, the national legislation in question, in so far as it establishes a system of prior administrative authorisation, cannot qualify as legislation whereby the Member State complies with a binding Community measure resulting in the adoption of technical specifications.

**Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paras. 44-49**

## **4.8. Public procurement in the telecommunications sector**

### **4.8.1. Exclusion of telecommunications operators**

By its second question, the Divisional Court asks whether the criterion laid down by Article 8(1) [of the Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1)], namely that 'other entities are free to offer the same services in the same geographical area and under substantially the same conditions', is to be verified only as a matter of law or also as a matter of fact. In the latter case, the national court wishes to know which matters are to be taken into

account for the purposes of assessing whether, as regards a particular service, real competition exists in the telecommunications market.

BT maintains that the criterion laid down in Article 8(1) is fulfilled where there are legal or regulatory provisions guaranteeing, in law, freedom of competition in the sector concerned, so obviating any need to examine whether such competition exists in practice.

That interpretation runs counter to the wording and purpose of Article 8(1). The criterion that other contracting entities must be able to offer the same services under substantially the same conditions is couched in general terms in Article 8(1). Moreover, the 13th recital in the preamble states that, to fall outside the scope of the directive, activities of contracting entities must be 'directly exposed to competitive forces in markets to which entry is unrestricted'.

Consequently, the criterion laid down by Article 8(1) is to be interpreted as meaning that other contracting entities must not only be authorized to operate in the market for the services in question, without any legal barrier to entry thereto, but must also be in a position actually to provide the services in question under the same conditions as the contracting entity.

In those circumstances, a decision to exclude certain services from the scope of the directive must be taken on an individual basis, having regard in particular to all their characteristics, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity's position on the market and the existence of any legal constraints.

The answer to Question 2 must therefore be that the criterion laid down by Article 8(1) of the directive, namely that 'other entities are free to offer the same services in the same geographical area and under substantially the same conditions', is to be verified as a matter of law and of fact, having regard in particular to all the characteristics of the services concerned, the existence of alternative services, price factors, the dominance or otherwise of the contracting entity's position on the market and any legal constraints.

**Case C-392/93 *British Telecommunications I* [1996] ECR I-1631, paras. 30-35**

#### 4.8.2. Public service concessions in the telecommunications sector

[...] Directive 93/38 [Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84)] covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories); -although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of

the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

[...] It should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on grounds of nationality, in particular.

As the Court held in Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

**Case C-324/98 *Telaustria*, [2000] ECR I-10745, paras. 58, 60-62**

It is apparent from the referral decision that, by becoming a member of Brutélé, the Municipality of Uccle entrusted it with the management of its cable television network. It is also apparent that Brutélé's remuneration comes not from the municipality but from payments made by the users of that network. That method of remuneration is characteristic of a public service concession (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40).

Public service concession contracts do not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable at the material time. Notwithstanding the fact that such contracts fall outside the scope of that directive, the authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the concomitant obligation of transparency (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19). Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraph 62, and *Coname*, paragraph 21).

The application of the rules set out in Articles 12 EC [now Article 18 TFEU], 43 EC [now Article 49 TFEU] and 49 EC [now Article 56 TFEU], as well as of the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling

authority or authorities (see, to that effect, *Teckal*, paragraph 50, and *Parking Brixen*, paragraph 62).

As regards the second of those conditions, the national court stated in the order for reference that Brutélé carries out the essential part of its activities with its members. Accordingly, the scope of the first condition – that the control exercised over the concessionaire by the concession-granting public authority or authorities must be similar to that which the authority exercises over its own departments – remains to be examined.

In order to determine whether a concession-granting public authority exercises a control similar to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the concessionaire in question is subject to a control which enables the concession-granting public authority to influence that entity's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity (see, to that effect, *Parking Brixen*, paragraph 65, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 36).

By Question 3, the national court is essentially asking whether, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is necessary, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for that control to be exercised individually by each of those public authorities or whether it can be exercised jointly by them, decisions being taken by a majority, as the case may be.

According to the case-law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect (see, to that effect, *Parking Brixen*, paragraph 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.

Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.

Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle and RPL Lochau*, paragraph 48).

**Case C-324/07 *Coditel Brabant SA* [2008] ECR I-8457, paras. 24-28, 43, 46-48**

#### 4.9. Tax issues

Article 59 of the EC Treaty [now Article 56 TFEU] and Articles 60 and 66 of the EC Treaty [now Articles 57 and 62 TFEU] must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation adopted on 24 June 1997 by the municipal council of Watermael-Boitsfort.

**Case C-17/00 *De Coster* [2001] ECR I-9445, para. 39**

This reference for a preliminary ruling relates to the interpretation of Article 7(1) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) ('Directive 69/335').

The reference was made in proceedings between Optimus – Telecomunicações SA ('Optimus') and the Portuguese tax authorities on the subject of payment of 'stamp duty' demanded in respect of an increase in share capital paid in cash.

[...] the referring court is asking, in essence, whether Article 7(1) of Directive 69/335 must be interpreted to mean that the mandatory exemption stipulated there relates only to transactions which fall within Article 4(2) and Article 8 of that directive, and to the extent that those transactions were exempted or taxed at a reduced rate less than or equal to 0.50% at the date of 1 July 1984.

[...] in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, in the absence of derogating provisions in the Act of Accession of that State or in another Community document, Article 7(1) of Directive 69/335 must be interpreted to mean that the mandatory exemption for which it provides applies to all the transactions falling within the scope of that directive which, on 1 July 1984, were exempted, in that State, from capital duty or which were subject to that duty at a reduced rate of 0.50% or less.

By its second question, the referring court asks, in essence, whether, in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, Articles 7(1) and 10 of Directive 69/335 must be interpreted as prohibiting the introduction, after 1 January 1986 of a stamp duty on a transaction increasing share capital falling within the scope of that directive which, on 1 July 1984, was exempt from that duty under national law.

[...] in the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1 January 1986, Articles 7(1) and 10 of Directive 69/335 prohibit the introduction, after 1 January 1986, of stamp duty on a transaction increasing share capital falling within the scope of that directive which, on 1 July 1984, was exempted from that duty under national law.

**Case C-366/05 *Optimus – Telecomunicações SA* [2007] ECR I-4985,  
Paras. 1, 2, 22, 33, 34 et 46**

#### 4.10. Promotion of linguistic diversity

It is clear from the foregoing examination that the object of the programme [Council Decision 96/664/EC of 21 November 1996 on the adoption of a multi-annual programme to promote the linguistic diversity of the Community in the information society (OJ 1996 L 306, p. 40)], namely the promotion of linguistic diversity, is seen as an element of an essentially economic nature and incidentally as a vehicle for or element of culture as such.

In conclusion, it is clear from the contested decision as a whole, and particularly from the aims mentioned in its preamble and in Article 1, and from the actions envisaged in Article 2 and Annex I, that it was properly based only on Article 130 of the Treaty [now Article 173 TFEU].

**Case C-42/97 *European Parliament v. Council* [1999] ECR I-869, paras. 61, 64**

### **List of cases quoted (in chronological order)**

- ECJ, Case C-424/07 *Commission v Germany*, 3 December 2009 (not yet reported);
- ECJ, Case C-211/09 *Commission v. Greece*, 26 November 2009 (not yet reported);
- ECJ, Case C-202/09 *Commission v. Ireland*, 26 November 2009 (not yet reported);
- ECJ, Case C-192/08 *TeliaSonera Finland Oyj*, 12 November 2009 (not yet reported);
- ECJ, Case C-40/08 *Asturcom Telecomunicaciones*, 6 October 2009 (not yet reported);
- ECJ, Case C-243/08 *Pannon GSM Zrt*, 4 June 2009 (not yet reported);
- ECJ, Case C-8/08 *T-Mobile Netherlands and others*, 4 June 2009 (not yet reported);
- ECJ, Case C-132/08 *Lidl Magyarország Kereskedelmi bt*, 30 April 2009 (not yet reported);
- ECJ, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd*, 8 September 2009 (not yet reported);
- ECJ, Case C-431/07 P *Boygues SA and Boygues Télécom SA v. Commission*, 2 April 2009 (not yet reported);
- ECJ, Case C-202/07 P *France Télécom SA v. Commission*, 2 April 2009 (not yet reported);
- ECJ, Case C-326/07 *Commission v. Italy*, 26 March 2009 (not yet reported);
- ECJ, Case C-458/07 *Commission v. Portugal*, 12 March 2009 (not yet reported);
- ECJ, Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH*, 19 February 2009 (not yet reported);
- ECJ, Case C-492/07 *Commission v. Poland*, 22 January 2009 (not yet reported);
- ECJ, Case C-539/07 *Commission v. Italy*, 15 January 2009 (not yet reported);
- ECJ, Case C-336/07 *Kabel Deutschland Vertrieb und Service GmbH & Co. KG*, 22 December 2008 (not yet reported);
- ECJ, Case C-52/07 *Kanal 5 Ltd and TV 4 AB*, 11 December 2008 (not yet reported);
- ECJ, Case C-324/07 *Coditel Brabant SA* [2008] ECR I-8457;
- ECJ, Case C-227/07 *Commission v. Poland* [2008] ECR I-8403;
- ECJ, Case C-230/07 *Commission v. Netherlands* [2008] ECR I-144\*;

ECJ, Case C-274/07 *Commission v. Lithuania* [2008] ECR I-7117 ;

ECJ, Case C-493/07 *Commission v. Slovakia*, 25 July 2008 (not yet reported);

ECJ, Joined Cases C-152/07 *Arcor AG&Co. KG*, C-153/07 *Communication Services TELE2 GmbH* and C-154/07 *Firma 01051 Telekom GmbH* [2008] ECR I-5959;

ECJ, Case C-220/07 *Commission v. France* [2008] ECR I-95\*;

ECJ, Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2008] ECR I-1265;

ECJ, Case C-301/06 *Ireland v. Parliament and Council*, 10 February 2009 (not yet reported);

ECJ, Case C-55/06 *Arcor AG & Co. KG* [2008] ECR I-2931;

ECJ, Case C-125/06P *Commission v. Infront WM AG* [2008] ECR I-1451;

ECJ, Case C-296/06 *Telecom Italia SpA* [2008] ECR I-801;

ECJ, Case C-426/05 *Tele2 Telecommunication GmbH* [2008] ECR I-685;

ECJ, Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349;

ECJ, Case C-275/06 *Productores de Música Española (Promusicae)* [2008] ECR I-271;

ECJ, Case C-387/06 *Commission v. Finland* [2008] ECR I-1\*;

ECJ, Case C-250/06 *United Pan-Europe Communications Belgium SA* [2007] ECR I-11135;

ECJ, Case C-262/06 *Deutsche Telekom AG* [2007] ECR I-10057;

ECJ, Case C-441/06 *Commission v. France* [2007] ECR I-2887;

ECJ, Case C-195/06 *Kommunikationsbehörde Austria (KommAustria)* [2007] ECR I-8817;

ECJ, Case C-369/04 *Hutchison 3G UK* [2007] ECR I-5247;

ECJ, Case C-284/04 *T-Mobile Austria* [2007] ECR I-5189;

ECJ, Case C-366/05 *Optimus – Telecomunicações SA* [2007] ECR I-4985;

ECJ, Case C-64/06 *Český Telecom*, [2007] ECR I-4887;

ECJ, Case C-306/05 *SGAE* [2006] ECR I-11519;

ECJ, Joined cases C-282/04 and C-283/04 *Commission v. Netherlands* [2006] ECR I-9141;

ECJ, Joined cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG* [2006] ECR I-8559;

ECJ, Case C-339/04 *Nuova società di telecomunicazioni SpA* [2006] ECR I-6917;

ECJ, Case C-438/04 *Mobistar* [2006] ECR I-6675;

ECJ, Case C-169/05 *Uradex SCRL* [2006] ECR I-4973;

ECJ, Case C-475/04 *Commission v. Greece* [2006] ECR I-69\*;

ECJ, Case C-217/04 *United Kingdom v European Parliament and Council* [2006] ECR I-3771;

ECJ, Case C-254/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 13;

ECJ, Case C-253/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 13;

ECJ, Case C-252/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 48, 25.02.2006, p. 7;

ECJ, Case C-250/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 12;

ECJ, Case C-33/04 *Commission v. Luxembourg* [2005] ECR I-10629;

ECJ, Case C-334/03 *Commission v. Portugal* [2005] ECR I-8911;

ECJ, Joined cases C-327/03 *Bundesrepublik Deutschland v ISIS Multimedia Net* and C-328/03 *Bundesrepublik Deutschland v Firma O2 (Germany)* [2005] ECR I-8877;

ECJ, Case C-256/05 *Telekom Austria*, 6 October 2005, (not reported), OJ C 10, 14.01.2006, p. 7;

ECJ, Joined cases C-544/03 *Mobistar* and C-545/03 *Belgacom* [2005] ECR I-7723;

ECJ, Case C-31/05 *Commission v. France*, 14 July 2005 (not reported), OJ C 271, 29.10.2005, p. 11;

ECJ, Case C-349/04 *Commission v. Luxembourg*, 16 June 2005 (not reported), OJ C 193, 06.08.2005, p. 8;

ECJ, Case C-104/04 *Commission v. France*, 16 June 2005 (not reported), OJ C 193, 06.08.2005, p. 6;

ECJ, Case C-89/04 *Mediakabel BV* [2005] ECR I-4891;

ECJ, Case C-376/04 *Commission v. Belgium*, 28 April 2005 (not reported), OJ C 143, 11.06.2005, p. 14;

ECJ, Case C-375/04 *Commission v. Luxembourg*, 28 April 2005 (not reported), OJ C 143, 11.06.2005, p. 14;

ECJ, Case C-299/04 *Commission v. Greece*, 14 April 2005 (not reported), OJ C 143, 11.06.2005, p. 13;

ECJ, Case C-240/04 *Commission v. Belgium*, 10 March 2005 (not reported), OJ C 115, 14.05.2005, p. 8;

ECJ, Case C-236/04 *Commission v. Luxembourg*, 10 March 2005 (not reported), OJ C 115, 14.05.2005, p. 7-8;

ECJ, Case C-141/02 P *Commission v max.mobil* [2005] ECR I-1283;

ECJ, Case C-113/03 *Commission v. France*, 9 September 2004 (not reported), OJ C 262, 23.10.2004, p. 10;

ECJ, Case C-109/03 *KPN Telecom BV* [2004] ECR I-11273;

ECJ, Case C-19/03 *Verbraucher-Zentrale Hamburg* [2004] ECR I-8183;

ECJ, Case C-411/02 *Commission v. Austria* [2004] ECR I-8155;

ECJ, Case C-350/02 *Commission v. Netherlands* [2004] ECR I-6213;

ECJ, Joined cases C-250/02 *Telecom Italia Mobile SpA*, C-251/02 *Blu SpA*, C-252/02 *Telecom Italia SpA*, C-253/02 *Vodafone Omnitel SpA, formerly Omnitel Pronto Italia SpA* and C-256/02 *WIND Telecomunicazioni SpA*, 8 June 2004 (not reported), OJ C 228, 11.09.2004, p. 17;

ECJ, Case C-500/01 *Commission v. Spain* [2004] ECR I-583;

ECJ, Joined cases C-292/01 *Albacom SpA* and C-393/01 *Infostrada SpA* [2003] ECR I-9449;

ECJ, Case C-13/01 *Safalero Srl* [2003] ECR I-8679;

ECJ, Case C-97/01 *Commission v. Luxembourg* [2003] ECR I-5797;

ECJ, Case C-462/99 *Connect Austria* [2003] ECR I-5197;

ECJ, Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641;

ECJ, Case C-463/00 *Commission v. Spain* [2003] ECR I-4581;

ECJ, Case C-211/02 *Commission v. Luxembourg* [2003] ECR I-2429;

ECJ, Case C-221/01 *Commission v. Belgium* [2002] ECR I-7835;

ECJ, Joined cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845;

ECJ, Case C-286/01 *Commission v. France* [2002] ECR I-5463;

ECJ, Case C-503/99 *Commission v. Belgium* [2002] ECR I-4809;

ECJ, Case C-483/99 *Commission v. France* [2002] ECR I-4781;

ECJ, Case C-367/98 *Commission v. Portugal* [2002] ECR I-4731;

ECJ, Case C-296/00 *Carbone* [2002] ECR I-4657;

ECJ, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607;

ECJ, Case C-79/00 *Telefónica de España v. Administración General del Estado* [2001] ECR I-10075;

ECJ, Case C-146/00 *Commission v. France* [2001] ECR I-9767;

ECJ, Case C-17/00 *De Coster* [2001] ECR I-9445;

ECJ, Case C-429/99 *Commission v. Portugal* [2001] ECR I-7605;

ECJ, Joined cases C-396/99 and C-397/99 *Commission v. Greece* [2001] ECR I-7577;

ECJ, Case C-254/00 *Commission v. Netherlands* [2001] ECR I-7567;

ECJ, Case C-278/99 *Georgius van der Burg* [2001] ECR I-2015;

ECJ, Case C-151/00 *Commission v. France* [2001] ECR I-625;

ECJ, Case C-448/99 *Commission v. Luxembourg* [2001] ECR I-607;

ECJ, Case C-423/99 *Commission v. Italy* [2000] ECR I-11167;

ECJ, Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745;

ECJ, Case C-422/99 *Commission v. Italy* [2000] ECR I-10651;

ECJ, Case C-384/99 *Commission v. Belgium* [2000] ECR I-10633;

ECJ, Case C-319/99 *Commission v. France* [2000] ECR I-10439;

ECJ, Case C-58/99 *Commission v. Italy* [2000] ECR I-3811;

ECJ, Case C-293/98 *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)* [2000] ECR I-629;

ECJ, Case C-254/97 *Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l'Economie et des Finances and Ministère de l'Agriculture, de la Pêche et de l'Alimentation* [1999] ECR I-4809;

ECJ, Case C-59/98 *Commission v. Luxembourg* [1999] ECR I-1181;

ECJ, Case C-42/97 *European Parliament v. Council* [1999] ECR I-869;

ECJ, Case C-302/94 *The Queen v. Secretary of State for Trade and Industry, Ex parte: British Telecommunications plc* [1996] ECR I-6417 (British Telecommunications II);

ECJ, Case C-392/93 *The Queen v H. M. Treasury, ex parte British Telecommunications plc.* [1996] ECR I-1631 (British Telecommunications I);

ECJ, Case C-259/94 *Commission v. Greece* [1995] ECR I-1947;

ECJ, Case C-220/94 *Commission v. Luxembourg* [1995] ECR I-1589;

ECJ, Case C-384/93 *Alpine Investments* [1995] ECR I-1141;

ECJ, Case C-314/93 *Criminal Proceedings against Francois Rouffeteau and Robert Badia* [1994] ECR I-3274;

ECJ, Case C-92/91 *Criminal Proceedings against Annick Neny* [1993] ECR I-5383;

ECJ, Case C-69/91 *Criminal Proceedings against Francine Gillon* [1993] ECR I-5335;

ECJ, Joined cases C-46/90 and C-93/91 *Procureur du Roi v. Lagache* [1993] ECR I-5267;

ECJ, Joined cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v. Commission* [1992] ECR I-5833;

ECJ, Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941;

ECJ, Case C-202/88 *France v. Commission* [1991] ECR I-1223;

ECJ, Case 247/86 *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v. SA Novasam* [1988] ECR 5987;

ECJ, Case 311/84 *CBEM v. Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA* [1985] ECR 3261;

ECJ, Case 41/83 *Italy v. Commission* [1985] ECR 873;

ECJ, Case 155/73 *Criminal Proceedings against Giuseppe Sacchi* [1974] ECR 409.

### **List of cases quoted (in order of case number)**

- ECJ, Case C-211/09 *Commission v. Greece*, 26 November 2009 (not yet reported);
- ECJ, Case C-202/09 *Commission v. Ireland*, 26 November 2009 (not yet reported);
- ECJ, Case C-243/08 *Pannon GSM Zrt*, 4 June 2009 (not yet reported);
- ECJ, Case C-192/08 *TeliaSonera Finland Oyj*, 12 November 2009 (not yet reported);
- ECJ, Case C-132/08 *Lidl Magyarország Kereskedelmi bt*, 30 April 2009 (not yet reported);
- ECJ, Case C-40/08 *Asturcom Telecomunicaciones*, 6 October 2009 (not yet reported);
- ECJ, Case C-8/08 *T-Mobile Netherlands and others*, 4 June 2009 (not yet reported);
- ECJ, Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH*, 19 February 2009 (not yet reported);
- ECJ, Case C-539/07 *Commission v. Italy*, 15 January 2009 (not yet reported);
- ECJ, Case C-493/07 *Commission v. Slovakia*, 25 July 2008 (not yet reported);
- ECJ, Case C-492/07 *Commission v. Poland*, 22 January 2009 (not yet reported);
- ECJ, Case C-458/07 *Commission v. Portugal*, 12 March 2009 (not yet reported);
- ECJ, Case C-431/07 *P Boygues SA and Boygues Télécom SA v. Commission*, 2 April 2009 (not yet reported);
- ECJ, Case C-424/07 *Commission v Germany*, 3 December 2009 (not yet reported);
- ECJ, Case C-336/07 *Kabel Deutschland Vertrieb und Service GmbH & Co. KG*, 22 December 2008 (not yet reported);
- ECJ, Case C-326/07 *Commission v. Italy*, 26 March 2009 (not yet reported);
- ECJ, Case C-324/07 *Coditel Brabant SA* [2008] ECR I-8457;
- ECJ, Case C-274/07 *Commission v. Lithuania* [2008] ECR I-7117;
- ECJ, Case C-230/07 *Commission v. Netherlands* [2008] ECR I-144\*;
- ECJ, Case C-227/07 *Commission v. Poland* [2008] ECR I-8403;
- ECJ, Case C-220/07 *Commission v. France* [2008] ECR I-95\*;
- ECJ, Case C-202/07 *P France Télécom SA v. Commission*, 2 April 2009 (not yet reported);

ECJ, Joined Cases C-152/07 *Arcor AG & Co. KG*, C-153/07 *Communication Services TELE2 GmbH* and C-154/07 *Firma 01051 Telekom GmbH* [2008] ECR I-5959;

ECJ, Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2008] ECR I-1265;

ECJ, Case C-52/07 *Kanal 5 Ltd and TV 4 AB*, 11 December 2008 (not yet reported);

ECJ, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd*, 8 September 2009 (not yet reported);

ECJ, Case C-441/06 *Commission v. France* [2007] ECR I-2887;

ECJ, Case C-387/06 *Commission v. Finland* [2008] ECR I-1\*;

ECJ, Case C-301/06 *Ireland v. Parliament and Council*, 10 February 2009 (not yet reported);

ECJ, Case C-296/06 *Telecom Italia SpA* [2008] ECR I-801;

ECJ, Case C-275/06 *Productores de Música España (Promusicae)* [2008] ECR I-271;

ECJ, Case C-262/06 *Deutsche Telekom AG* [2007] ECR I-10057;

ECJ, Case C-250/06 *United Pan-Europe Communications Belgium SA* [2007] ECR I-11135;

ECJ, Case C-195/06 *Kommunikationsbehörde Austria (KommAustria)* [2007] ECR I-8817;

ECJ, Case C-125/06 P *Commission v. Infront WM AG* [2008] ECR I-1451;

ECJ, Case C-64/06 *Český Telecom* [2007] ECR I-4887;

ECJ, Case C-55/06 *Arcor AG & Co. KG* [2008] ECR I-2931;

ECJ, Case C-426/05 *Tele2 Telecommunication GmbH* [2008] ECR I-685;

ECJ, Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349;

ECJ, Case C-366/05 *Optimus – Telecomunicações SA* [2007] ECR I-4985;

ECJ, Case C-306/05 *SGAE*, Case C-306/05 *SGAE* [2006] ECR I-11519;

ECJ, Case C-256/05 *Telekom Austria*, 6 October 2005 (not reported), OJ C 10, 14.01.2006, p. 7;

ECJ, Case C-169/05 *Uradex SCRL* [2006] ECR I-4973;

ECJ, Case C-31/05 *Commission v. France*, 14 July 2005 (not reported), OJ C 271, 29.10.2005, p. 11;

ECJ, Case C-475/04 *Commission v. Greece* [2006] ECR I-69\*;

ECJ, Case C-438/04 *Mobistar* [2006] ECR I-6675;

ECJ, Joined cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG* [2006] ECR I-8559;

ECJ, Case C-376/04 *Commission v. Belgium*, 28 April 2005 (not reported), OJ C 143, 11.06.2005, p. 14;

ECJ, Case C-375/04 *Commission v. Luxembourg*, 28 April 2005 (not reported), OJ C 143, 11.06.2005, p. 14;

ECJ, Case C-369/04 *Hutchison 3G UK* [2007] ECR I-5247;

ECJ, Case C-349/04 *Commission v. Luxembourg*, 16 June 2005 (not reported), OJ C 193, 06.08.2005, p. 8;

ECJ, Case C-339/04 *Nuova società di telecomunicazioni SpA* [2006] ECR I-6917;

ECJ, Case C-299/04 *Commission v. Greece*, 14 April 2005 (not reported), OJ C 143, 11.06.2005, p. 13;

ECJ, Case C-284/04 *T-Mobile Austria* [2007] ECR I-5189;

ECJ, Joined cases C-282/04 and C-283/04 *Commission v. Netherlands* [2006] ECR I-9141;

ECJ, Case C-254/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 13;

ECJ, Case C-253/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 13;

ECJ, Case C-252/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 48, 25.02.2006, p. 7;

ECJ, Case C-250/04 *Commission v. Greece*, 15 December 2005 (not reported), OJ C 36, 11.02.2006, p. 12;

ECJ, Case C-240/04 *Commission v. Belgium*, 10 March 2005 (not reported), OJ C 115, 14.05.2005, p. 8;

ECJ, Case C-236/04 *Commission v. Luxembourg*, 10 March 2005 (not reported), OJ C 115, 14.05.2005, p. 7;

ECJ, Case C-217/04 *United Kingdom v European Parliament and Council* [2006] ECR I-3771;

ECJ, Case C-104/04 *Commission v. France*, 16 June 2005 (not reported), OJ C 193, 06.08.2005, p. 6;

ECJ, Case C-89/04 *Mediakabel BV* [2005] ECR I-4891;

ECJ, Case C-33/04 *Commission v. Luxembourg* [2005] ECR I-10629;

ECJ, Joined cases C-544/03 *Mobistar* and C-545/03 *Belgacom* [2005] ECR I-7723;

ECJ, Case C-334/03 *Commission v. Portugal* [2005] ECR I-8911;

ECJ, Joined cases C-327/03 *Bundesrepublik Deutschland v ISIS Multimedia Net* and C-328/03 *Bundesrepublik Deutschland v Firma O2 (Germany)* [2005] ECR I-8877;

ECJ, Case C-113/03 *Commission v. France*, 9 September 2004 (not reported), OJ C 262, 23.10.2004, p. 10;

ECJ, Case C-109/03 *KPN Telecom BV* [2004] ECR I-11273;

ECJ, Case C-19/03 *Verbraucher-Zentrale Hamburg* [2004] ECR I-8183;

ECJ, Case C-411/02 *Commission v. Austria* [2004] ECR I-8155;

ECJ, Case C-350/02 *Commission v. Netherlands* [2004] ECR I-6213;

ECJ, Joined cases C-250/02 *Telecom Italia Mobile SpA*, C-251/02 *Blu SpA*, C-252/02 *Telecom Italia SpA*, C-253/02 *Vodafone Omnitel SpA, formerly Omnitel Pronto Italia SpA* and C-256/02 *WIND Telecomunicazioni SpA*, 8 June 2004 (not reported), OJ C 228, 11.09.2004, p. 17;

ECJ, Case C-211/02 *Commission v. Luxembourg* [2003] ECR I-2429;

ECJ, Case C-141/02 P *Commission v max.mobil* [2005] ECR I-1283;

ECJ, Case C-500/01 *Commission v. Spain* [2004] ECR I-583;

ECJ, Joined cases C-292/01 *Albacom SpA* and C-393/01 *Infostrada SpA* [2003] ECR I-9449;

ECJ, Case C-286/01 *Commission v. France* [2002] ECR I-5463;

ECJ, Case C-221/01 *Commission v. Belgium* [2002] ECR I-7835;

ECJ, Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641;

ECJ, Case C-97/01 *Commission v. Luxembourg* [2003] ECR I-5797;

ECJ, Case C-13/01 *Safalero Srl* [2003] ECR I-8679;

ECJ, Case C-463/00 *Commission v. Spain* [2003] ECR I-4581;

ECJ, Joined cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845;

ECJ, Case C-296/00 *Carbone* [2002] ECR I-4657;

ECJ, Case C-254/00 *Commission v. Netherlands* [2001] ECR I-7567;

ECJ, Case C-151/00 *Commission v. France* [2001] ECR I-625;

ECJ, Case C-146/00 *Commission v. France* [2001] ECR I-9767;

ECJ, Case C-79/00 *Telefónica de España v. Administración General del Estado* [2001] ECR I-10075;

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