OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 4 July 2002 [1]

I — Introduction

1. In this case the Commission claims that the Court should declare that, by failing to ensure the transposition in practice of Article 4d of Directive 90/388/EEC, as amended by Directive 96/19/EC, the Grand Duchy of Luxembourg has failed to fulfil its obligations.

1 — Original language: Dutch.

II — The legal background

A — *Community law*

2. Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, [2] as amended by Commission Directive 96/19/EC of 13 March 1996, [3] which relates to the implementation of full competition in telecommunications markets, provides, in Article 2, as follows:

'1. Member States shall withdraw all those measures which grant:

(a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services;

or

2 — OJ 1990 L 192, p. 10.
3 — OJ 1996 L 74, p. 13.

(b) special rights which limit to two or more the number of undertakings authorised to provide such telecommunications services or to establish or provide such networks, otherwise than according to objective, proportional and non-discriminatory criteria; or

(c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory criteria, several competing undertakings to provide such telecommunications services or to establish or provide such networks.

2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.

Without prejudice to Article 3c and the third paragraph of Article 4, Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.

Member States shall, however, ensure that all remaining restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications services, over infrastructures provided by third parties and by means of sharing of networks, other facilities and sites are lifted and the relevant measures notified to the Commission no later than 1 July 1996.

As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a(2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the necessary structural adjustments. Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation. The information provided shall be made available to any interested party on demand having regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Member States which make the supply of telecommunications services or the establishment or provision of telecommuni-

cations networks subject to a licensing, general authorisation or declaration procedure aimed at compliance with the essential requirements shall ensure that the relevant conditions are objective, non-discriminatory, proportional and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any refusal.

The provision of telecommunications services other than voice telephony, the establishment and provision of public telecommunications networks and other telecommunications networks involving the use of radio frequencies, may be subjected only to a general authorisation or a declaration procedure.

...'

3. On 28 June 1996 the Luxembourg authorities requested additional implementation periods pursuant to Article 2(2) of Directive 90/388/EEC. By Decision 97/568/EC[4] of 14 May 1997 the Commission allowed Luxembourg to postpone until no later than 1 July 1998 the abolition of exclusive rights granted at that time as regards voice telephony (Article 1) and to postpone until no later than 1 July 1997 the lifting of restrictions on the provision of already liberalised telecommunications services (Article 2).

4. Article 4d of Directive 90/388/EEC, as amended by Directive 96/19/EC, provides:

'Member States shall not discriminate between providers of public telecommunications networks with regards to the granting of rights of way for the provision of such networks.

Where the granting of additional rights of way to undertakings wishing to provide public telecommunications networks is not possible due to applicable essential requirements, Member States shall ensure access to existing facilities established under rights of way which may not be duplicated, at reasonable terms.'

5. Article 2(6) 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,[5] as amended by 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

4 — OJ 1997 L 234, p. 7.

5 — OJ 1990 L 192, p. 1.

to a competitive environment in telecommunications, states that for the purposes of the directive:

'"essential requirements" shall mean the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as 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....'

B — *National law*

6. Article 7 of the Luxembourg Law on telecommunications of 21 March 1997, published in the *Mémorial* (Official Journal of the Grand Duchy of Luxembourg) of 27 March 1997, provides for a licensing system for the operation of telecommunications networks and services relating to telephony, mobile telephony and radiopaging.

7. The first subparagraph of Article 34(1) of the Law on telecommunications provides that the holder of a licence to operate a telecommunications network may make use of the public land of the State and municipalities to install cables, overhead lines and associated facilities, having regard to the intended purpose and the laws, regulations and administrative provisions governing the use of such land.

8. Under Article 35 of that law, the licence holder must submit for approval to the competent authorities a plan relating to the establishment of cables, overhead lines and associated facilities on the public land of the State or municipalities which shows the location and nature of the system concerned.

The authorities may not impose on the licence holder, for the right to use the public land, any kind of tax, fee, toll, charge or payment.

Furthermore, the licence holder has the right to install the cables, overhead lines and related facilities free of charge on the physical infrastructure (roads, bridges, etc.)

situated on the public land of the State and municipalities.

9. Under Article 35(3) of the Law on telecommunications, the costs incurred in altering the cables, overhead lines and related facilities are to be met by the holder of the licence to operate a telecommunications network.

III — Procedure

10. After a formal complaint had been raised against the Grand Duchy of Luxembourg, the Commission reminded the Luxembourg authorities, on 22 July 1999, of their obligations under Article 4d of Directive 90/388/EEC, as amended by Directive 96/19/EC. Since talks held on 10 September 1999 and a written response by letter of 16 September 1999 were not satisfactory, the Commission sent the Grand Duchy of Luxembourg a letter of formal notice on 17 January 2000. The Luxembourg Government did not respond to that formal notice. By letter of 3 August 2000 the Commission then issued a reasoned opinion, calling upon the Luxembourg Government to take the measures necessary to fulfil its obligations within two months. At a subsequent meeting with the Luxembourg authorities on 19 September 2000 the Commission put further questions regarding the grant of non-discriminatory rights of way. Since no formal response to the letter of formal notice was forthcoming, the Commission brought an action on 27 February 2001.

IV — Arguments of the parties

11. As is evident from the previous paragraph, the Commission is acting in part in response to a complaint lodged by Coditel. That undertaking, which has had a licence to operate telecommunications networks since 20 January 1999, has, since that time, applied unsuccessfully to the Luxembourg authorities for the grant of the required rights of way and complains that it seemed impossible to obtain the required licences.

12. In this case the Commission is raising a single complaint against the Grand Duchy of Luxembourg. The complaint is to the effect that the applicable Luxembourg legislation provides insufficient safeguards to ensure that rights of way are granted to licence holders in a non-discriminatory manner. The law is essentially correct, but it contains insufficient safeguards to ensure the non-discriminatory grant of rights of way. This inadequacy of safeguards stems either from the fact that the provisions of

the Luxembourg Law on telecommunications of 21 March 1997 are not applied properly, that is to say in a non-discriminatory manner, or from the fact that the Luxembourg legislature has failed to take the necessary additional measures to enable licence holders actually to exercise the rights which a licence confers on them.

13. The Commission puts forward three arguments in support of that complaint:

— the ambiguities of the Luxembourg legal framework;

— the failure to state reasons for or to invoke applicable essential requirements in the refusals;

— possible discrimination.

14. The Commission considers that although the right of way for network operators holding a relevant licence exists according to the letter of the law, it would appear to be impossible to exercise such right in practice. It is often unclear who the competent authorities are and the procedures to be followed are opaque. Furthermore, they vary according to the competent authority and there are no rules on coordination between them. A particular obstacle is posed by the fact that the rules in the law of 21 March 1997 are not coordinated with the procedure which must be followed to obtain a licence to use the public highway. An additional practical problem is that the data which are necessary to draw up the location plan to be submitted are difficult to obtain without assistance from the authorities responsible for the relevant land.

15. Secondly, the Commission notes that the competent Luxembourg authorities could, under Directive 90/388/EEC, as amended, have lawfully refused the application for a right of way by invoking the so-called 'essential requirements' related to non-economic public interests. In the present case the competent Luxembourg authorities and institutions have in no way invoked such essential requirements. Under Article 4d of amended Directive 90/388/EEC, only recourse to those requirements could have justified a refusal to grant a right of way.

16. Thirdly, the Commission recalls that the abovementioned Article 4d prohibits any discrimination between providers of public telecommunications networks with

regard to the granting of rights of way for the provision of such networks. However, it is evident from the information available to the Commission that no telecommunications network operator that has put itself forward has yet been granted rights of way over public land. Consequently, the local networks cannot be connected with cross-border networks and licences holders cannot offer any facilities and services which are comparable with those of Luxembourg's Post and Telecommunications Undertaking (hereinafter: 'the EPT'). The Commission also points out that it was the EPT which acquired the right to lay cables along certain motorways. Other licence holders wishing to operate a network have thus far been denied such a right. In this connection the Commission also notes that even if the cables which the EPT had laid along the relevant motorway were intended for traffic control and information for the road operator, it is not obvious that the EPT would have wanted to acquire this right if it had had no prospect of being able to lay its own connecting cables in the channels laid for traffic signalling. In the absence of any objective justification for this, in practice, exclusive right of the EPT, which could have resulted from possibly applicable essential requirements in the public interest, this constitutes a clear case of discrimination against other interested operators.

17. The Luxembourg authorities point out that the Law on telecommunications provides for a licensing system. Under Article 34(1) of that law, the right of way forms an integral part of such licensing. The principle of non-discrimination between providers of public telecommunications networks, as laid down in Article 4d of Directive 90/388/EEC, as amended, has thus been transposed into Luxembourg law.

18. In the view of the Luxembourg Government's representatives, exercise of the right of way is subject to precise provisions which have been published by the competent authorities concerned. These rules are the same for every party interested in a right of way.

19. The rights which the licence holders have under the Law on telecommunications do not alter the fact that they must comply with other laws and regulations in order to exercise them. The general provisions governing the use of public land situated alongside roads are applicable to the acquisition of the necessary licence to use the public highway.

20. As regards the case of Coditel cited by the Commission, the Luxembourg Government notes that this undertaking initially submitted its application for an access licence to the wrong authority. According to Luxembourg case-law, [6] the Minister for Transport and not the operator of the rail network is the competent authority. Moreover, this undertaking then submitted an

6 — Judgment of the Luxembourg Tribunal administratif (Administrative Court) of 13 December 2000.

incomplete file in its fresh application. That application did not contain the plan showing the locations and capacities of the equipment to be laid. Furthermore, the Luxembourg Government disputes the contention that inaccessible technical data, which could be provided only by the operator of the relevant public networks, were necessary to draw up such a plan. In its view, all that is involved is a topographic plan for which the data are publicly available and can be obtained from the land register.

21. Finally, the Luxembourg Government points out that it amended the procedure to which this case relates by Grand-Ducal Regulation of 8 June 2001. That regulation lays down rules governing the approval conditions and the conditions relating to the use of the rail and road network by network operators, operators of electricity networks and gas transportation undertakings. The Minister for Public Works remains the competent authority for the issue of licences to use the public highway. However, the applications were handled by the operator of the rail infrastructure (CFL), as regards the rail network, and by the Waterways Service, as regards the road network.

V — Appraisal

22. The purpose of the directive, as amended, is to open up the markets for telecommunications fully to competition. To that end, the Member States are required to liberalise their markets so that providers other than traditional national telecommunications undertakings are given an opportunity not only to offer their services over existing networks but also to set up competing networks.

23. For the latter purpose, the rights of way over public land are an essential prerequisite. In the absence of such rights a licence to operate a telecommunications network cannot be implemented. This right means providers of public telecommunications networks gain access to public and private sites to lay cables and place the necessary facilities in order to enable them to reach the end user. In cases where a right of way has to be denied owing to applicable essential requirements, access must be granted to the telecommunications network infrastructure already in existence.

24. As is evident from the foregoing, that right of way is important because in the absence of such a right of way it is difficult or impossible for new operators who have obtained licences to compete with the generally monopolistic national telecommunications organisation already in existence. The intended liberalisation of and competition on these markets thereby

becomes impossible or is subject to serious delay. This essentially means that monopolies on protected national markets remain in place for the time being. That is a situation which is expressly contrary not only to the objectives of the directive but also to the purpose of the EC Treaty itself. Therefore, the Member States must not only open up their markets for telecommunications by way of non-discriminatory licensing systems, but also and above all remove any legal, administrative or factual obstacle to the exercise of the rights which a new operator is able to derive from its licence.

25. As the Commission, too, does not dispute, the right of way has been incorporated in the Luxembourg Law on telecommunications. It is to be found in Article 34(1) thereof. However, implementation of the directive involves more than merely transposing it into national law. As I have already stated in my Opinion in *Marks & Spencer*,[7] the result sought by a directive requires not only proper transposition but also application of the relevant national law in conformity with the purpose of the directive. In the present case this supposes that interested parties are also in fact able to exploit the opportunities for which the directive makes provision. Being able to exercise the right of way means *inter alia* that the procedures must be clear, that the interested parties must be given a definitive answer within a reasonable period, and that there must be not only compliance with the requirements stemming from the principle of effectiveness but also observance of the principle of non-discrimination, which essentially means providing sufficient safeguards to prevent discrimination as regards the grant of rights of way and the exercise thereof.

The directive also provides that the Member States must not discriminate with regard to the granting of rights of way and that if, in the establishment or provision of telecommunications networks, essential requirements in the public interest come into play and if, with those in mind, the Member States operate a licensing system, then they must lay down objective, non-discriminatory, proportionate and transparent conditions, with reasons having to be given for any refusal and possibilities being provided for appealing against such a refusal.

26. It is clear from the factual situation outlined by the Commission that it is by no means a simple matter actually to exercise the right of way. Although the Luxembourg Government contends that a right of way is inherent in the licence, it would appear in practice that all kinds of obstacles have to be overcome. These obstacles are connected with opaque procedures which are not coordinated with one another and with an unclear demarcation of administrative powers.

7 — Opinion in Case C-62/00 [2002] ECR I-6325, at I-6328. Also according to the case-law of the Court, proper transposition is not sufficient and the rules thus transposed must be made to work and actually complied with in practice. This obligation to achieve a result is abundantly illustrated in, for example, the case-law concerning compliance with Community rules on the environment.

27. In practice two procedures are necessary in order to exercise a right of way. Firstly, a location plan must be submitted for approval and, secondly, a licence to use the public highway must be held.

28. The laying of a network generally involves several plots and sections of land, which means that an operator wishing to exercise his right of way must consult various authorities such as the Department for Registration and Land, the Waterways Department and the relevant municipal corporations. Quite apart from the fact that this can constitute a barrier *per se* in terms of administrative costs, it most definitely does so where the procedural provisions differ depending on the authority which is being dealt with. During the pre-litigation procedure the Luxembourg authorities also conceded that the rules applicable to the approval procedure set out in Article 35 of the Law on telecommunications are unclear, in particular as regards their connection with the procedure for acquiring a licence to use the public highway. At that time they also acknowledged that they had never laid down and published any implementing rules, with the result that the various authorities with the relevant powers had never in fact granted a right of way.

29. During the litigation procedure the Luxembourg Government indicated that the procedures operated by the various competent authorities can be requested from it and are generally also available on the internet. To my mind, this explanation is unconvincing. Licence holders wishing to exercise the rights conferred on them by a licence must apply not only to the authorities of the State of Luxembourg but also to the municipal authorities, depending on the location of the network. This body of rules with which licence holders can be confronted is undeniably opaque. They have insufficient understanding of the procedural conditions which must be satisfied in order to obtain the necessary access authorisation. The recognition by the Luxembourg authorities that this constitutes a serious obstacle is evident from the fact that they have since set up a working party charged with coordinating the rules on gaining access to State land with the rules which apply in the municipal sphere to municipal land.

30. As is evident from the foregoing, location plans must be submitted in order to obtain the necessary authorisations and licences to lay telecommunications networks. It is complained that the data necessary for such a plan are often difficult to obtain. Those data are generally held by the competent lands administrator. I am somewhat surprised at the Luxembourg Government's argument that all that is involved is a topographic plan for which the data can be obtained from the land register. It is precisely where networks are being laid that exhaustive knowledge of other facilities located in the ground, such as pipelines, other networks (electricity)

and sewer systems, is necessary. In general the technical data in relation to these are held by the administrators of the relevant sections of the public land. Therefore, the cooperation of these administrators is necessary in order to draw up technically reliable location plans. Since this constitutes a potential obstacle which could thwart the laying of the networks required by the licence holder, I consider that the active cooperation of the Luxembourg authorities is necessary in order to obtain the desired data. Otherwise, it would be more difficult to attain the objectives pursued by the directive, namely a market on which licence holders can compete using their own networks.

31. In addition to the required approval of the location plan, a licence to use the public highway must also be held before a right of way is granted. Only then can the necessary channels and associated facilities be installed on the public land. During talks with the Commission the Luxembourg authorities pointed to the difficulties arising from the legislation on the construction of major roads. For example, the Law of 26 May 1998 provides that the necessary maintenance work on existing constructions within 25 metres of the motorways is to be subject to the express written approval of the Minister for Public Works and that other construction, reconstruction or alteration work is prohibited. This essentially means that no rights of way relating to new networks can be exercised on this section of the land as a whole. Nevertheless, the Commission points out that new supply and distribution cables have been laid along the motorways since this law came into force. Consequently, what is probably involved is unclear wording of the law, in the light of the implementation practice which is contrary to the letter thereof. It should be clear that this legislation provides insufficient legal certainty for individuals and that it leaves scope for *de facto* discriminatory implementation practice.

32. The Luxembourg Government has pointed to the fact that new legislation has since been enacted, [8] which regulates the problems to which this case relates. That legislation appears to streamline the procedures as regards the acquisition of rights of way and the necessary licences to use land along and on public highways and railways, in both cases in accordance with the principles of transparency and non-discrimination. Be that as it may, that legislation was enacted after the end of the period laid down in the reasoned opinion and therefore cannot, according to the established case-law of the Court, be taken into account. [9]

33. It can be concluded from the foregoing that the practice which has existed thus far

8 — Règlement grand-ducal du 8 juin 2001 déterminant les conditions d'utilisation du domaine routier et ferroviaire de l'État par les opérateurs de télécommunications, les gestionnaires de réseaux de transport d'électricité et les entreprises de transport de gaz naturel, *Mémorial* of 13 June 2001.

9 — See, most recently, also judgment of 6 June 2002 in Case C-177/01 *Commission* v *France* [2002] ECR I-5137.

is inconsistent with the purpose of the directive. I consider that the opaqueness and complexity of the rules with which licence holders for the operation of telecommunications networks have to deal when exercising their rights is contrary to the directive because they actually make it difficult for new entrants to gain access to the relevant market and thus fail to prevent discrimination between the undertaking EPT already operating on this market and possible (foreign) interested parties. The Luxembourg authorities are therefore acting in contravention of the directive.

VI — Conclusion

In the light of the foregoing, I would recommend that the Court:

— declare that, by failing to take all the measures necessary to ensure the actual and non-discriminatory exercise of the right of way and by thus acting in contravention of Article 4d of Directive 90/388/EEC, as amended by Directive 96/19/EC, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

— order the Grand Duchy of Luxembourg to pay the costs.