OPINION OF ADVOCATE GENERAL LÉGER

delivered on 21 September 2000 [1]

1. By this application the Commission of the European Communities seeks a declaration that, by failing to bring into force the laws, regulations and administrative provisions needed in order to comply with Article 8(3) and Article 9(2) 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, [2] the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive. The Commission also asks the Court to order the Grand Duchy of Luxembourg to pay the costs.

2. Certain provisions of Luxembourg law did not comply with the Directive and certain measures still needed to be adopted in order to complete the transposition of the Directive into national law.

3. By letter of 24 July 1998, the Commission gave the Luxembourg Government two months in which to submit its observations.

4. The Luxembourg Government submitted its observations by letter of 18 September 1998. It subsequently notified the Commission of a Grand-Ducal decree relating in part to the Directive.

5. As the Commission considered that the Luxembourg authorities had not given a satisfactory response to all the the complaints contained in the letter of formal notice, it decided to deliver a reasoned opinion to the Luxembourg Government by letter of 8 February 1999, to which it received a reply by letter of 13 April 1999.

6. The Commission makes two complaints against the Grand Duchy of Luxembourg.

7. It considers that the Grand Duchy of Luxembourg has not transposed the obligation imposed on the Member States by Article 8(3) to ensure that information concerning the conditions which will be

1 — Original language: French.

2 — OJ 1997 L 117, p. 15, hereinafter 'the Directive'.

attached to any individual licence is published in an appropriate manner.

8. Not all of the information required under that article has been published. The Grand-Ducal Regulation provided for by Article 7(2)(e) of the Luxembourg Law of 21 March 1997 on telecommunications [3] has not been adopted in so far as concerns the conditions governing specifications for the operation of a radio paging service.

9. The Commission also maintains that the obligation imposed by the second indent of Article 9(2) of the Directive, which requires Member States intending to grant individual licences to set reasonable time-limits, being not more than six weeks after receipt of the application, has been incorrectly transposed.

10. Under Article 4(4) of the Grand-Ducal Regulation of 2 July 1998 establishing the criteria and procedures for granting telecommunications licences at the request of the applicant, [4] the period allowed for the Institut Luxembourgeois des Télécommunications (Luxembourg Telecommunications Institute) [5] to consider the application is six weeks, to which is added a period of 30 days granted to the applicant to allow him to submit his observations, [6] and a further period of 15 days for the ILT, following receipt of those observations. [7] The minister then has another 15 days within which to make his decision; [8] the total period may therefore be three and a half months or more.

11. The Commission points out that, under Article 9(2) of the Directive, such an extension of the statutory time-limit is not automatic and may be allowed only in specific cases. It maintains that, by failing to provide that an applicant must be informed, within a period of six weeks, of the decision taken on his licence application, the Grand Duchy of Luxembourg has not fulfilled its obligation under the Directive.

12. In its defence, the Luxembourg Government states that a draft Grand-Ducal Regulation laying down the conditions governing specifications for the establishment and operation of a radio paging service was submitted for its opinion to the Conseil d'État (Council of State) on 7 December 1999 and communicated to the Commission at the beginning of December 1999. It adds that the opinion

3 — *Mémorial* A 1997, p. 761.

4 — *Mémorial* A 1998, p. 982, hereinafter 'the 1998 Regulation'.

5 — Hereinafter 'the ILT'.

6 — Article 4(5) of the 1998 Regulation.

7 — Ibid., Article 5(1).

8 — Ibid., Article 5(4).

of the consultative bodies to which the draft was submitted should be forthcoming before long and that the provisions should therefore be transposed during the first half of the year 2000.

13. With regard to the complaint that the Directive has been incorrectly transposed, the Luxembourg Government maintains that Article 5 of the 1998 Regulation accords with Article 9(2) of the Directive. It argues that Article 9(2) should be interpreted as requiring the Member State concerned to inform the applicant, within the prescribed time-limit, of the decision taken on his application, not to issue him with a definitive licence within that period. Article 5 of the 1998 Regulation provides that the applicant is to receive a draft licence or a draft refusal.

14. In its reply, the Commission points out that the Luxembourg authorities do not deny the infringement. It adds that the Directive requires that the applicant be informed, within a period of six weeks, of a decision granting or refusing him a licence. In contrast, the procedure as regulated by Luxembourg law results in a period of three and a half months or more — a great deal longer, therefore, than the six weeks prescribed by the Directive.

The failure to fulfil obligations

15. It should be borne in mind that the Directive concerns the procedures associated with the granting of authorisations, and the conditions attached to such authorisations, for the purpose of providing telecommunications services, including authorisations for the establishment and operation of the telecommunications networks required for the provision of such services. [9]

16. Under the first paragraph of Article 25, the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive and to publish the conditions and procedures attached to authorisations as soon as possible and, in any event, not later than 31 December 1997. They must immediately inform the Commission thereof.

17. *As regards the Commission's first complaint*, it should be noted that the Luxem-

9 — Article 1(1).

bourg Government, somewhat inconsistently, contends that the Court should dismiss the application, whilst at the same time acknowledging that a draft regulation was communicated to the Commission in December 1999, that is, two years after the expiry of the time-limit laid down in Article 25 of the Directive. Moreover, it is clear from the defence that the regulation to which the Luxembourg Government is referring is not a definitive text and cannot therefore be regarded as an effective transposition of the Directive into the positive law of that Member State.

18. It should therefore be held that Article 8(3) of the Directive has not been fully transposed, since there is no legislation establishing the conditions governing specifications for the operation of a radio paging service or, in any event, that legislation has not been adopted within the time-limit prescribed by the Directive.

19. *As regards the Commission's second complaint*, that the Grand Duchy of Luxembourg has failed to apply Article 9(2) of the Directive, it is worth noting the precise wording of that provision.

20. Article 9(2) provides:

'Where a Member State intends to grant individual licences:

— it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation,

and

— it shall set reasonable time limits; *inter alia*, it shall inform the applicant of its decision as soon as possible but not more than six weeks after receiving the application. In the provisions adopted to implement this Directive, Member States may extend this time limit to up to four months in objectively justified cases which have been defined specifically in those provisions. In the case of comparative bidding procedures in particular, Member States may further extend this time limit by up to four months. These time limits shall be without prejudice to any applicable

international agreements relating to international frequency and satellite coordination.'

21. By stipulating that the Member State 'shall set reasonable time limits', the second indent of Article 9(2) of the Directive unequivocally confirms the Community legislature's aim of limiting the time devoted by Member States to considering applications for individual licences.

22. It is evident from that provision that a Member State must inform the applicant of its decision within a period of six weeks *at the latest*. The fact that the Directive requires the competent authorities to reach a decision quickly and makes no reference to the possibly provisional nature of that decision, provides justification for the second indent of Article 9(2) to be interpreted as meaning that the decisions which must be taken within the time-limit it prescribes are definitive.

23. As is clear from the defence, the Luxembourg Government maintains that the Member States have to inform the applicant 'of the decision taken on his application' but are not required to issue him with a definitive licence within that period. Read in the light of Articles 4 and 5 of the 1998 Regulation, this expression reveals that, in that text, the decision of which the applicant must be notified by the national authorities within a period of six weeks is not necessarily definitive.

24. In fact, Article 4(4) of the 1998 Regulation provides that the ILT 'has a period of six weeks within which to draw up and send to the applicant a draft licence or draft refusal'; this presupposes that the decision, by its very nature, may be altered. This interpretation is confirmed by Article 5 of the 1998 Regulation, which vests in the ministerial authority the power to take decisions concerning the granting of licences without it appearing that the authority is bound by the draft or the initial decision taken by the ILT and although the power is necessarily exercised after the expiry of the six-week period within which the ILT must notify the applicant.

25. It is therefore apparent that the Grand Duchy of Luxembourg has not fully transposed the Directive into its national legal system.

26. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

Conclusion

27. I therefore propose that the Court should declare that:

(1) By failing to bring into force within the prescribed period the laws, regulations and administrative provisions needed in order to comply with 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, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive.

(2) The Grand Duchy of Luxembourg is ordered to pay the costs.