JUDGMENT OF THE COURT (Fifth Chamber)
25 February 1999 *

In Case C-59/98,

Commission of the European Communities, represented by Giuliano Marenco, Principal Legal Adviser, and José F. Crespo Carrillo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg, represented by Nicolas Schmit, Head of the International Economic Relations and Cooperation Directorate in the Ministry of Foreign Affairs, acting as Agent, 6 rue de la Congrégation, Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with 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,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann, J. C. Moitinho de Almeida, C. Gulmann (Rapporteur) and D. A. O. Edward, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 November 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 February 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with 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) (hereinafter 'the Directive'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

2 In particular, the Directive amended Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) the purpose of which was to abolish special and exclusive rights in

the field of telecommunications services and to ensure that any operator is entitled to supply such services.

3 The aim of the Directive is to establish the requisite legal framework for the removal of restrictions and the promotion of new activities in the satellite telecommunications field. In this connection, Member States must in particular, pursuant to Article 2 of Directive 90/388 as amended by Article 2(2)(b) of the Directive, 'communicate the criteria on which authorisations are granted, together with the conditions attached to such authorisations and to the declaration procedures for the operation of transmitting earth stations'.

4 Article 4 of the Directive provides that Member States shall supply to the Commission, not later than nine months after the Directive has entered into force, such information as will allow the Commission to confirm that its provisions have been complied with. Since the Directive entered into force on 8 November 1994, the prescribed period in which the Member States had to notify the transposing measures ended on 7 August 1995.

5 By that date, however, the Grand Duchy of Luxembourg had still not informed the Commission of any measures transposing the Directive. The Commission therefore gave the Luxembourg Government formal notice by letter of 27 October 1995, calling on it to submit its observations within two months, in accordance with the procedure laid down in Article 169 of the EC Treaty.

6 By letter of 20 December 1995, the Luxembourg Government informed the Commission that, on 1 December 1995, it had approved a new draft law on telecommunications.

7 With respect to the transposition of Council Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community (OJ 1987 L 196, p. 85) and Directive 90/388 as amended by Article 2 of the Directive, the Luxembourg Government communicated to the Commission, by letter of 27 May 1997, the Règlement Grand-Ducal du 25 avril 1997 fixant les conditions minimales du cahier des charges pour l'établissement et l'exploitation de réseaux de services GSM et GSM/DCS 1800 (Grand-Ducal Regulation of 25 April 1997 laying down the minimum requirements for specifications for the establishment and operation of GSM and GSM/DCS 1800 networks, hereinafter 'the Grand-Ducal Regulation of 25 April 1997 on GSM networks').

8 On finding that the Grand-Ducal Regulation of 25 April 1997 on GSM networks did not cover satellite communications but only terrestrial mobile communications, the Commission formed the view that not all the rules necessary for transposing the Directive had been adopted. On 7 July 1997, the Commission therefore sent the Grand Duchy of Luxembourg a reasoned opinion in which it advised the Grand Duchy that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with the Directive, it had failed to fulfil its obligations under the Directive. In that opinion, the Commission called upon the Grand Duchy to adopt the measures needed to comply with the opinion within two months of receipt thereof.

9 With respect to the transposition of the Directive, the Luxembourg Government, by letter of 14 July 1997, again notified the Commission of the Grand-Ducal Regulation of 25 April 1997 on GSM networks and also notified it of the Loi du 21 mars 1997 sur les Télécommunications (Law of 21 March 1997 on Telecommunications) (hereinafter 'the Law of 21 March 1997'), which entered into force on 1 April 1997.

10 On 28 and 30 July 1997, the Commission also received, albeit informally, the Règlement Grand-Ducal du 23 avril 1997 relatif aux équipements terminaux de télécommunications et aux équipements de stations terrestres de communications par satellite, incluant la reconnaissance mutuelle de leur conformité (Grand-Ducal Regulation of 23 April 1997 on telecommunications terminal equipment and terrestrial satellite

communication stations equipment, including the mutual recognition of their conformity), the draft Règlement Grand-Ducal fixant les conditions du cahier des charges pour l'établissement et l'exploitation de réseaux fixes de télécommunications et de services de téléphonie (Grand-Ducal Regulation laying down the requirements for specifications for the establishment and operation of fixed telecommunications networks and telephony services), provided for by Article 7(2)(a) of the Law of 21 March 1997, and the draft Règlement Grand-Ducal fixant les conditions du cahier des charges pour l'établissement et l'exploitation de réseaux fixes de télécommunications (Grand-Ducal Regulation laying down the requirements for specifications for the establishment and operation of fixed telecommunications networks), provided for by Article 7(2)(b) of the Law of 21 March 1997.

11 The two abovementioned draft Grand-Ducal regulations were communicated to the Commission officially, with respect to the transposition of other directives, by letter of 8 September 1997. They were adopted on 22 December 1997 and published in the *Memorial: Journal Officiel du Grand-Duché de Luxembourg* on 29 December 1997.

12 The Commission took the view that the scope of those regulations might extend to satellite services if such services were not clearly excluded from them and so, by letter of 22 December 1997, asked the Luxembourg Government for clarification on the point. No answer was received. In any event, the Luxembourg Government did not communicate the said regulations with respect to the transposition of the Directive.

13 Having formed the opinion that not all the measures needed to transpose the Directive had been taken and that the Luxembourg Government had not complied with the reasoned opinion, the Commission brought the present action.

14 The Commission maintains that proper implementation of the Directive requires the Grand Duchy of Luxembourg to enable the providers of satellite services to operate in that market and, in particular, to transmit from Luxembourg territory to

the satellite of their choice through the lifting of restrictions on the provision of such services and the establishment of a regulatory framework setting out the criteria and procedures for the grant of licences required to operate in Luxembourg, including the procedures for obtaining frequencies and coordinating transmission sites in order to avoid potentially harmful interference, in accordance with Article 2(2)(b) of the Directive.

15 The Commission argues that the regulations for implementing the Law of 21 March 1997 which are provided for in Article 10(2) in relation to the criteria and procedures for the grant of licences upon application, in Article 14(4) in relation to the level of fees payable in respect of the services covered by the declaration, in Article 30(4) in relation to the charges payable for the exclusive allocation of frequencies, and in Article 65 in relation to the amount of fees payable in respect of the annual management costs of individual licences, have still not been adopted.

16 Further, the Commission points out that it has not been informed of the publication of the forms for applying for licences provided for in Article 10(2) of the draft regulation on the criteria and procedures for the grant of licences, or of the adoption by the minister responsible for communications of declaration procedures applying to those services for which a declaration must be made pursuant to Article 14(3) of the Law of 21 March 1997, or of the adoption of any legislation specifying the procedure for the allocation of frequencies referred to in Article 30(1) of that Law.

17 The Luxembourg Government disputes the Commission's allegation that it has not fulfilled its obligations. In particular, it contends that the Directive was transposed by the Law of 21 March 1997 as regards the abolition of exclusive or special rights

in the satellite telecommunications field. It maintains that that Law does apply to satellite communications because it covers telecommunications generally. Whilst the provision of satellite services does require authorisation, such authorisation is granted almost automatically in that a simple notification is sufficient; and whilst the use of frequencies is subject to the grant of a general authorisation, such a system is necessary — because of the peculiarities of certain geographical sites — to ensure the proper functioning of satellite services generally. Nevertheless, in the case of Luxembourg, the granting of such authorisation is, the defendant maintains, a mere formality.

18 The Commission states in its reply that it does not allege that Luxembourg has failed to abolish all measures which might have conferred special or exclusive rights in the satellite communications field but that it has failed to adopt the regulations referred to in paragraphs 15 and 16 above.

19 In this connection, it must be remembered that, in order to achieve its objective, the Directive requires the Member States to take all necessary measures to guarantee every operator the right to provide services in the satellite communications field. The Member States must therefore, in accordance with Article 2(2)(b) of the Directive, communicate the criteria on the basis of which authorisations are granted, together with the conditions attached to such authorisations and to the declaration procedures for the operation of transmitting earth stations.

20 It is to be noted, first of all, that, under the Luxembourg legislation, an authorisation is required to establish and operate satellite communications services. Under Article 14(3) of the Law of 21 March 1997, it is for the minister responsible to

determine the declaration procedures which operators of telecommunications services must follow. Similarly, the level of fees payable by operators of satellite communications services must, under Article 14(4) of that Law, be fixed by Grand-Ducal regulation.

21 Next, as regards the allocation and use of frequencies, Article 29 et seq. of the Law of 21 March 1997 lay down the framework provisions and general principles which apply to that procedure. The precise steps in the procedure for the allocation of frequencies and the level of fees payable by operators must be determined by the minister.

22 Lastly, given that the Law of 21 March 1997 and the Grand-Ducal regulations enacted on the basis of that Law refer to the operation of telecommunications networks generally, it must be concluded, as the Commission rightly does that a licence is also required to establish and operate a satellite network, a fact which, moreover, is not disputed by the Luxembourg Government. Under Article 10(2) and Article 65 of the Law of 21 March 1997, the criteria on which such licences are granted and the level of fees payable by every operator must also be fixed by Grand-Ducal regulation.

23 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.

24 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, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. The Commission asked for an order on costs against the Luxembourg Government. Since that party has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with 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, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

2. Orders the Grand Duchy of Luxembourg to pay the costs.

Puissochet Jann Moitinho de Almeida

Gulmann Edward

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber