OPINION OF ADVOCATE GENERAL TESAURO
delivered on 23 May 1996 *

1. This reference for a preliminary ruling is concerned with the interpretation 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 (ONP [1]; hereinafter 'the ONP Directive') and with the interpretation and validity of Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [2] (hereinafter 'the leased lines Directive').

In particular, the High Court of Justice, Queen's Bench Division (Divisional Court), asks the Court to specify the field of application and scope of a number of provisions of the above directives for the purpose of ascertaining whether the UK implementing provisions are compatible with Community law; to declare whether, in the event that the directives have been wrongly transposed by the national legislature, the conditions are met whereby the undertakings which have suffered injury may seek damages from the State for the loss or damage sustained; and, in addition, to rule in the alternative on the validity of the leased lines Directive having regard to the principles of proportionality and non-discrimination.

Relevant Community and national legislation

2. The ONP Directive, which was adopted on the basis of Article 100a of the Treaty, sets as its main aim 'the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services' (Article 1(1)). As specified by Article 1(2), those conditions 'are designed to facilitate the provision of services using public telecommunications networks and/or public telecommunications services, within and between Member States', in particular where the provider is established in a Member State other than that of the person for whom the services are intended.

Article 2 of the ONP Directive provides, *inter alia*, as follows:

'For the purposes of this Directive:

1. "telecommunications organizations" means public or private bodies, to which a

* Original language: Italian.
1 — OJ 1990 L 192, p. 1.
2 — OJ 1992 L 165, p. 27.

Member State grants special or exclusive rights for the provision of a public telecommunications network and, where applicable, public telecommunications services.

For the requirements of this Directive, Member States shall notify the Commission of the bodies to which they have granted special or exclusive rights;

2. "special or exclusive rights" means the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity.'

3. Annex I to the ONP Directive lists a number of specific areas for which open network provision conditions may be drawn up; head 1 covers the area of leased lines.

The leased lines Directive constitutes the first application of the ONP Directive to a particular area. Also adopted on the basis of Article 100a of the Treaty, it is concerned with 'the harmonization of conditions for open and efficient access to and use of the leased lines provided to users on public telecommunications networks, and the availability throughout the Community of a minimum set of leased lines with harmonized technical characteristics' (Article 1).

4. After providing that the definitions given in the ONP Directive are to apply, where relevant to it, Article 2 of the leased lines Directive defines the other concepts specific to the area in question.

For present purposes, attention is drawn to the definitions of 'leased lines' ('the telecommunications facilities provided in the context of the establishment, development and operation of the public telecommunications network, which provide for transparent transmission capacity between network termination points and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision)') and 'users' ('end users and service providers, including telecommunications organizations where the latter are engaged in providing services which are or may be provided also by others').

5. With a view to attaining the objective set out in Article 1, the leased lines Directive imposes on Member States a number of

obligations relating to network supply conditions (Articles 3 to 10).

These obligations relate in particular to: availability of information on offerings of leased lines (Article 3); publication of supply conditions (Article 4); conditions for the termination of offerings (Article 5); restrictions on access to leased lines and their usage, which are permissible only if specific essential requirements are complied with (Article 6); powers of control of the national regulatory authority (Article 8); establishment of common ordering and billing procedures (Article 9), and tariffing principles and cost accounting (Article 10).

In addition, Article 7 requires a minimum set of leased lines to be provided in accordance with harmonized technical characteristics. Article 7(1) in fact provides that 'Member States shall ensure that the respective telecommunications organizations separately or jointly provide a minimum set of leased lines in accordance with Annex II, in order to guarantee a harmonized offering throughout the Community'. [3]

6. Pursuant to the obligation imposed upon it by Article 2(1) of the ONP Directive, which, as I have mentioned, requires Member States to notify the Commission of the bodies to which they have granted special or exclusive rights, the United Kingdom notified the names of over 120 cable companies. Those companies were already in possession of the licence provided for by the relevant statute, [4] which authorized them to operate telecommunications systems in the United Kingdom and designated them 'Public Telecommunications Operators'. These operators included the applicant in the main proceedings, British Telecommunications plc (hereinafter 'BT' or 'the applicant'), Mercury Communications Ltd ('Mercury') and City of Kingston Communications (Hull) plc ('Kingston').

7. The leased lines Directive was implemented in the United Kingdom by the Telecommunications (Leased Lines) Regulations 1993, [5] which amended in some respects the licence conditions of the three abovementioned operators, BT, Mercury and Kingston.

Those amendments essentially imposed on those operators all or some of the obligations laid down in Articles 3 to 10 of the leased

3 — Annex II, for its part, defines the types and technical characteristics of the lines, which must be provided 'as soon as possible and not later than the date on which this Directive is brought into effect'.

4 — Telecommunications Act 1984, considered at greater length in point 9, *infra*.

5 — SI 1993, No 2330.

lines Directive. [6] In particular, the obligation to provide a minimum set of leased lines under Article 7 of the directive was imposed solely on BT and on Kingston, but in the latter's case only as regards the area in which it carries on its business. Similar obligations were not imposed on other Public Telecommunications Operators on the UK market.

The UK regulatory regime

8. It is worth dwelling, if only briefly, on the specific features of the UK regulatory regime for the telecommunications sector. As we know, in recent years the UK telecommunications market has attained a particularly high degree of liberalization on the basis of independent domestic economic-policy choices made in advance of the time-scale laid down by the Community legislation. In the words used by the national court in the order for reference, the UK regime is 'by far the most liberal in the European Community, and one of the most liberal in the world'.

9. The liberalization process in the sector began in 1984 when the British Telecommunications Act 1984 ('the 1984 Act') abolished the monopoly over the operation of telecommunications systems hitherto held by a public corporation also known as British Telecommunications.

On the one hand, under the 1984 Act, all the rights and obligations of the predecessor monopoly operator were transferred to the applicant, which had been set up by that Act in the form of a company limited by shares; on the other, it provided for the system currently in force under which any person intending to run a telecommunications system within the United Kingdom is required to obtain a licence which must specify exhaustively the activities which he is authorized to exercise.

10. Pursuant to the new legislation, BT was granted in June 1984 a licence for 25 years. That licence, whereby the applicant is designated as a 'Public Telecommunications Operator', authorizes it to run telecommunications systems throughout the United Kingdom, with the exception of the area in which Kingston is licensed to operate.

In particular, BT is required to provide voice telephony services to anyone who requires them, at prices such that they may not necessarily cover the cost of providing them. Moreover, the applicant, uniquely among

6 — Under the procedure laid down by Article 13 of the leased lines Directive, the United Kingdom applied to the Commission to defer certain obligations imposed by the directive for a fixed period; the relevant applications, to which the Commission had not yet responded at the date of the order for reference, sought, among other things, deferral as regards Mercury of the obligation imposed by Article 10 and partial deferral as regards BT and Kingston of the obligation imposed by Article 7.

licensees, is subject to regulation in respect of changes in the prices charged for its services ('price cap'). Finally, it should be noted that the State had gradually sold off by July 1993 its shareholding in BT.

11. The considerable opening up of the market made possible by the 1984 Act has led to the granting of more than 600 licences authorizing various activities in the sector and to the designation of the over 120 Public Telecommunications Operators to which I have already referred. Generally, in order to perform their functions, those operators may be empowered to acquire land compulsorily, to enter land for exploratory purposes and to acquire land by agreement subject to certain statutory provisions under the 1984 Act.

The content of the licences, however, varies considerably in relation to each operator. For instance, despite the liberalization of the market, in the specific field of fixed-link telecommunications services (or services without mobile terminals), the United Kingdom initially granted the appropriate licences only to the applicant (and to Kingston, but confined to its area of operation) and Mercury, which, in particular, had been authorized to interconnect with the applicant's network. In this way, the United Kingdom initiated a 'duopoly policy' specifically in the fixed-link sector.

12. In the early 1990s, the duopoly was also abandoned in that sector, giving way to a policy of more sophisticated competition, although it was limited to links within the United Kingdom.

From 1991, according to the published policy of the national regulatory authority, all applications for fixed-link licences submitted by private undertakings satisfying objective and transparent criteria have been considered against a general presumption in favour of allowing them unless there are justified reasons for refusing them. [7] However, the opening-up of the market did not apply to the sector of international circuits, since still only BT and Mercury have international operating licences.

13. In order to ensure the proper functioning of such a complex system in which numerous licensed operators are authorized to equip themselves with their own infrastructure, provided that they comply with various specific conditions, the 1984 Act itself imposed an obligation on operators to agree to interconnect their network with other operators' systems on request. This allows the customers of an operator to have

7 — The new policy on the grant of licences in the fixed-link sector, which commenced in 1991, resulted in numerous applications. Particulars provided by the national court, relating to the March 1991 to June 1994 period, show that as at the latter date, of 86 applications submitted, 45 had been granted, 33 were pending, 6 had been withdrawn and only 2 had been rejected for objective reasons.

access to the networks run by other operators and thus, ultimately, to communicate with users who benefit from the services provided by those operators.

Even as regards international communications, which, as I have mentioned, may be made only via BT's and Mercury's networks, other operators may take up the possibility afforded by interconnection with those networks and this enables them to offer an international service to their customers even though they do not have the necessary infrastructure.

14. However, the virtually complete liberalization of the market carried out over the time-scale and in the ways described above does not seem to have been accompanied, or at least not yet, by a substantial increase in competition in the sector in question. It appears unquestionable from the documents before the Court that, overall, BT continues to be by far and away the most significant operator in terms of turnover and market share in the telecommunications sector.

In the specific sector of leased lines, for example, it appears from the information provided by the United Kingdom that, at the time when the directive was implemented, BT had about 800 000 leased lines throughout the country, whereas Mercury had about 9 100 and the remaining operators a total of about 300. [8]

Facts and questions submitted for a preliminary ruling

15. BT has challenged the national regulations purporting to implement the leased lines Directive in the national court, where it seeks, as the order for reference states, 'annulment or declaration of invalidity of the implementing regulations'. The applicant is also claiming damages for the loss which it claims it has sustained owing to the incorrect transposition of the directive; in the alternative, it contests the validity of the directive itself.

Kingston and Mercury both intervened in the main proceedings, the former being in complete agreement with BT's arguments and claims, the latter being in agreement on certain issues only.

16. Those arguments and submissions may be briefly summarized as follows. Since, following the complete liberalization of the UK market in telecommunications services from

8 — These figures are challenged by BT, which puts the exact number of leased lines held by it in 1994 at around 570 000. As for Kingston, it is common ground that it has a *de facto* monopoly in the area in which it operates under its licence.

1991 onwards, neither BT nor any other undertaking operating in the sector any longer has special or exclusive rights within the meaning of the directives in question, BT considers that the obligations under Articles 3 to 10 of the leased lines Directive cannot be imposed on it, since, according to the directive itself, such obligations should be imposed only on undertakings still having special or exclusive rights.

In the alternative, BT claims that, if the United Kingdom were authorized or bound to impose the obligations in question upon it, they should also be imposed, by virtue of the principle of non-discrimination, on all the other undertakings licensed to operate in the market in question or at least on those actually operating thereon.

Next, should the leased lines Directive authorize Member States to transpose it in such a manner as to cause the obligations in question to be borne by only one of the operators on the market, BT argues that the directive itself is invalid for infringing the principle of non-discrimination.

17. The applicant further submits that the directive is invalid in any event for infringing the principle of proportionality, in so far as it imposes the supply of a particular type of line (2 048 kbit/s) for which there is no present or potential demand in the United Kingdom.

18. Lastly, BT asks the national court to order the United Kingdom to pay damages for the loss which it alleges it has sustained on account of the purportedly incorrect transposition of the leased lines Directive.

19. Accordingly, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'1. (a) Are Council Directives 90/387/EEC and 92/44/EEC to be construed as entitling or requiring Member States to perform the obligations imposed upon them by Articles 3 to 10 of Directive 92/44/EEC by imposing requirements only on public or private bodies ("undertakings") within the meaning of Article 2(1) of Council Directive 92/44/EEC, i. e. those to which a Member State has granted "special or exclusive rights" in respect of the provision of leased lines?

(b) If the answer to Question 1(a) is in the negative, in what circumstances is a Member State entitled or required to perform the said obligations by imposing requirements upon an undertaking which does not have such "special or exclusive rights"?

2. (a) For the purposes of Directive 92/44/EEC, is a Member State entitled to treat an undertaking as having "special or exclusive rights" within the meaning of Article 2 of Directive 90/387/EEC where:

(i) the running of a telecommunication system within the Member State concerned without a licence granted by the competent authorities of that State is a criminal offence;

(ii) the published policy of the Member State concerned is that all applications for licences relevant to the provision of the service in question are considered by the Member State, within the framework of the applicable national law, on their merits and on the basis of a general presumption on the part of the licensing authority that applications will be granted unless there are specific reasons to the contrary, and without applying any limit to the number of such licences granted;

(iii) several undertakings (including the applicant and the interveners herein) are actually providing leased lines within the terms of such licences?

(b) If the factors set out in Question (a) above are not determinative of the answer to that question, what other criteria are relevant?

3. Subject to the answers to Question 1 and/or 2:

(a) is Directive 92/44/EEC to be interpreted as entitling a Member State to refrain from imposing the obligations envisaged in Articles 3 to 10 of that Directive or any of them upon an undertaking:

(i) which is authorized by the Member State to provide leased lines but is not currently offering that service;

(ii) which is offering the service in question?

(b) If the answer to Question 3(a)(i) and/or (ii) above is in the affirmative, in which circumstances and by reference to which criteria is Directive 92/44/EEC to be interpreted as permitting a Member State to refrain from imposing the said obligations, or any of them, upon such an undertaking?

(c) In particular,

(i) is the Directive to be interpreted as permitting a Member State so to refrain on the ground that the actual provision of leased lines by an undertaking is, in the estimation of that Member State, *de minimis*?

(ii) If so, how is the *de minimis* exception to be defined? In particular, may a Member State confine its assessment to the market position at the date of implementation of the Directive, or must it have regard also to the potential development of the market?

(iii) Does the principle of non-discrimination, taken in conjunction with the principle of legal certainty, require any *de minimis* threshold, if permissible, to be specified in the national measures implementing the Directive?

4. Subject to the answers to Questions 1 and/or 2 above, is Directive 92/44/EEC and in particular Article 7(1) to be interpreted as entitling or requiring a Member State to impose upon two of the undertakings authorized by the Member State to provide the service in question, but upon no other such undertaking, the obligation to provide a minimum set of leased lines in accordance with Annex II?

5. If the answer to any part of Questions 3 or 4 is in the affirmative, is Directive 92/44/EEC *pro tanto* invalid as in breach of, inter alia, the principle of non-discrimination?

6. Is Directive 92/44/EEC, and in particular Article 7(1) together with Annex II, invalid as infringing the principle of proportionality to the extent that it requires the provision within all Member States of 2 048 kbit/s digital structured leased lines in accordance with technical characteristics specified in the said Annex?

7. (a) Is a Member State liable as a matter of Community law to compensate an undertaking in damages for loss which it has suffered as a consequence of:

(i) the wrongful implementation in relation to that undertaking of the obligations referred to in Articles 3 to 10 of Directive 92/44/EEC or any of those obligations;

(ii) the implementation of the Directive in question in such a way as to infringe the principle of equal treatment?

(iii) the implementation of the obligations in question in circumstances where the relevant provisions of the Directive are invalid as infringing the principle of equal treatment and/or the principle of proportionality?

(b) If the answers to Question 7(a)(i), (ii) and iii), or any of them, is in the affirmative, under what conditions does such liability arise?'

20. Before entering into the substance of the national court's questions, a general observation should be made.

It is clear, even on first reading, that the leased lines Directive aims to regulate access to networks in the sector in question by reference to the *de facto* situation common to most Member States at the time of its adoption, that is to say, a market situation still characterized by undertakings with special or exclusive rights in respect of infrastructure. It is also clear that, on the contrary, it does not take account of the special features of a market, such as that in the United Kingdom, which has already been virtually completely liberalized.

21. This is evidenced in particular by the wording of a number of recitals in the preamble to the directive. The third, for instance, which refers to the provisions of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, [9] states that '... Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to and use of the network objective and non-discriminatory and publish them'.

Next, the eleventh recital states that '... Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall ensure that those who so request can obtain leased lines within a reasonable period'.

22. Such statements confirm, if such confirmation is necessary, that the directive at issue is not intended to interfere with the grant by Member States of special or exclusive rights

9 — OJ 1990 L 192, p. 10.

with regard to the installation and operation of public networks; on the contrary, on the assumption that such rights exist, it sets out to avoid any distortion of competition to which they may potentially give rise.

23. Moreover, in a memorandum dated 23 June 1994, the Commission itself, while stressing the need to change the criteria for the application of the ONP Directive so as to take account of the progressive liberalization of telecommunications infrastructure required by the Community directives, stated as follows:

'The concept of special and exclusive rights has been used up to the present as the major criteria for applying Open Network Provision conditions. With the future abolition of special and exclusive rights, the issue of the entities to be covered by Open Network Provision must be re-visited.' [10]

24. The Community legislature has recognized that the leased lines Directive is not an appropriate regulatory framework for (already) liberalized or shortly to be liberalized markets in the telecommunications sector. [11] Consequently, on 4 January 1996, the Commission submitted a proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications [12] (hereinafter 'the proposal for amendment'), whose most significant passages I shall be considering later.

25. The fact remains that, whilst the leased lines Directive as it stands at present requires the United Kingdom, in common with the other Member States, to achieve a number of results in terms of harmonization, it is worded in such a way that some provisions relating to the manner of pursuing those aims are bound to present obvious difficulties as regards their application to the situation in the United Kingdom.

It follows that, in view of the exceptional nature of that situation and the essentially transitional nature of the rules laid down, the United Kingdom must qualify for the margin of discretion necessary in order to attain the aims of harmonization set forth in the directive — while remaining subject to the obligation to pursue them — in ways which are more consonant with the peculiar features of its own national market, which are not presumed to exist by the directive.

More specifically, it must be determined, inter alia in the light of the changes put

10 — Memorandum on the future approach to Open Network Provision, OPN Committee, 23 June 1994 (ONCOM94-29), p. 3.

11 — See, for example, the content of the Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures (OJ 1994 C 379, p. 4).

12 — OJ 1996 C 62, p. 3.

forward in the proposal for amendment, what consequences the lack of harmony between the leased lines Directive and the specific situation on the UK market may have in relation to the individual questions raised by the national court.

The first question

26. By its first question, the national court essentially asks whether, in order to satisfy the requirements of Articles 3 to 10 of the leased lines Directive, a Member State may or must impose the requirements laid down therein only on those undertakings which, in so far as they have special or exclusive rights within the meaning of the ONP Directive, may be classed as 'telecommunications organizations' within the meaning of the directives in question.

Articles 3 to 10 of the leased lines Directive lay down a series of obligations which the Member States are under a duty to impose on operators of public telecommunications networks in order to ensure open and efficient access to and use of the leased lines provided to users on those networks.

27. The answer to the first question seems to me to be all too obvious and, in fact, the national court itself seems to take it as a foregone conclusion: according to the present wording of the directive, the obligations in question are aimed at telecommunications organizations. Whilst it is true that not all the provisions in question indicate precisely on what bodies the Member States are required to impose the individual obligations, [13] it is also true that where, in contrast, the provision in question does specify the actual addressees of the obligation, they are expressly stated to be the telecommunications organizations operating in the various Member States. [14]

That fact cannot be ignored; it seems to me, therefore, to be beyond question that the obligations set forth in Articles 3 to 10 of the leased lines Directive can only be deemed to refer to telecommunications organizations as defined by that directive and the ONP Directive, that is to say, all public and private bodies to which a Member State grants special or exclusive rights for the installation and operation of a public telecommunications network or for the provision of public telecommunications services.

28. By contrast, Article 2 of the proposal for amendment to which I have already referred provides, in order to adapt the leased lines Directive to suit the competitive environment, that throughout the text of the directive the expression 'telecommunications

13 — See, for example, Articles 3 and 4.

14 — The form of words most frequently used in the provisions in question is as follows: 'Member States shall ensure that [their] telecommunications organizations ...' (see, for instance, the third subparagraph of Article 6(4); Article 7(1) (cited earlier) and Article 10(2)).

organizations' should be replaced by 'organizations notified in accordance with Article 11(1a)'.

In the amended version of the latter provision, the proposal provides for the creation of a mechanism whereby the 'national regulatory authorities shall notify to the Commission the names of those organizations providing leased lines subject to requirements under this Directive'; consequently, the proposal suggests — to my mind, correctly — that the obligations under the directive itself should be imposed on particular organizations, identified by the competent national authorities, which provide the service in the sector in question, irrespective as to whether or not they have special or exclusive rights.

29. The fact remains, however, that as they are worded at present, the provisions of Articles 3 to 10 and hence the obligations set out therein can only be regarded as being directed at the telecommunications organizations.

If this fact is irrefutable, then the question arises of establishing on which undertakings that obligation must fall where the reference market is no longer characterized by undertakings with special or exclusive rights in respect of infrastructure, but instead by numerous undertakings operating under a system of free competition. This is precisely what the national court's second, third and fourth questions seek to establish.

The second question

30. By its second question the national court seeks to establish in the first place whether, regard being had to the particular situation existing on the UK telecommunications market, *all* public service operators which are operating in that market must or may be regarded as telecommunications organizations, that is to say, holders of special or exclusive rights within the meaning of the directives in question.

More specifically, the national court asks the Court whether the numerous undertakings operating in the market in public telecommunications services in a Member State by virtue of a compulsory licence granted by the public authorities pursuant to a policy under which all applications are granted unless there are specific reasons for refusing them may on that very account all be regarded as organizations with special or exclusive rights within the meaning of the ONP and leased lines Directives.

31. In that connection, BT argues, in support of its view that, at least ever since liberalization in 1991, no operator of public

telecommunications services established in the United Kingdom is any longer a holder of special (let alone exclusive) rights within the meaning of the directives in question, that access to the activity of an operator of telecommunications systems is essentially open and that the obligation to obtain a licence is not a determinative factor in order to maintain a view to the contrary.

In almost all Member States, the exercise of manifold and diverse commercial activities requires a licence. In BT's view, it would be mistaken and at odds with the spirit of the relevant Community concept to take the view that each licence-holder has special (let alone) exclusive rights in respect of the exercise of the activity in question simply because it successfully performed an administrative formality.

32. I must admit that this argument is well founded.

First of all, there is textual evidence. As I have already mentioned, under Article 2(1) of the leased lines Directive and Article 2(2) of the ONP Directive, special or exclusive rights means, for the purposes of the leased lines Directive, the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity.

33. Furthermore, the Community concept of special or exclusive rights, especially as regards special rights in the telecommunications sector, has been subsequently specified by the Commission in the recent Directive 94/46/EC of 13 October 1994, [15] which was adopted following the judgment of the Court of 17 September 1992 in *Spain* v *Commission*. [16]

Although that directive does not formally amend the concept of special or exclusive rights embodied in the ONP Directive, in so far as it refers expressly only to Directive 90/388/EEC, which was the subject of the Court's judgment in *Spain* v *Commission*, it nevertheless constitutes a useful guide for the interpretation of the definition of that concept.

34. Article 2(a)(ii) of Directive 94/46/EC provides that special rights are rights that are granted by a Member State to a limited number of undertakings through any legislative,

15 — 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).

16 — Joined Cases C-271/90, C-281/90 and C-289/90 *Spain* v *Commission* [1992] ECR I-5833. In that judgment, whilst the Court did uphold the validity of Directive 90/388/EEC, it annulled it to the extent to which it purported to govern special rights on the ground that it was not possible to determine from either the relevant article or the preamble to the measure what types of rights were actually involved or in what respect the existence of those rights was contrary to the Treaty.

regulatory or administrative instrument which, within a given geographical area,

'— limits to two or more the number of such undertakings authorized to provide a service or undertake an activity, *otherwise than according to objective, proportional and non discriminatory criteria*,

or

— designates, *otherwise than according to such criteria*, several competing undertakings as being authorized to provide a service or undertake an activity,

or

— confers on any undertaking or undertakings, *otherwise than according to such criteria*, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.' [17]

17 — Emphasis added.

35. Accordingly, bearing in mind also the facts set forth in detail in the order for reference and, for that very reason, incapable of being called in question here, no conclusion other than that argued for by the applicant can be reached: the numerous public service operators licensed in the United Kingdom to provide public telecommunications services cannot be regarded as holding special or exclusive rights simply because they are under an obligation to obtain a licence.

36. Article 2 of Directive 90/388/EEC on competition in the markets for telecommunication services, to which I have already referred, itself affords evidence of the fact that, under the system intended by the Community legislature, the obligation to obtain a licence in order to exercise a particular activity in the telecommunications field does not enable the existence of special or exclusive rights on the part of the licence-holder to be inferred or presumed.

After providing that 'Member States shall withdraw all special or exclusive rights for the supply of telecommunications services ...', the second paragraph of that provision states that 'Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent'. Consequently, the withdrawal of special or exclusive rights in a particular sector continues to be an objective

which can be reconciled perfectly with maintaining the obligation that a licence or authorization should first be obtained for the purposes of exercising an activity in that sector.

37. As to the fact that, in the United Kingdom, the award of licences for the operation of public telecommunications services within the meaning of the 1984 Act — albeit subject to differing rules and time-scales — is accompanied in most cases by a number of specific prerogatives, in my view this does not change the terms of the question. As I have already mentioned, those prerogatives consist in the operator's right to enter or acquire land for the purpose of installing infrastructure and to place network equipment over or under public highways or on private land with the owner's consent (which can be dispensed with only by the court).

Those powers, however, seem quite manifestly to be strictly necessary for the very exercise of the activity which each operator is authorized to carry out under its licence; this is not sufficient to my mind in order to claim that the bodies in question have special or exclusive rights within the meaning of the leased lines Directive.

38. What is more, according to the published policy of the competent authority in 1991, the scrutiny to which applications for licences are subject could theoretically lead to their being refused only where specific reasons exist for refusing them; and the number of licences which may be awarded by the competent authorities is unlimited.

39. The terms in which the second question should be answered should therefore be that undertakings operating in the market for public telecommunications services of a Member State by virtue of a compulsory licence which gives them particular prerogatives and is awarded by the competent authority after considering the merits of the application by reference to the applicable national legislation on the basis of a presumption that the application will be accepted unless there are specific reasons for refusing it, are not, *ipso facto*, holders of special or exclusive rights for the purposes of the application of the leased lines Directive.

The third and fourth questions

40. By the third and fourth questions, which constitute the central issue of this dispute, the national court seeks to establish whether or not the UK legislation implementing the leased lines Directive is compatible therewith in so far as it imposes all or some of the obligations referred to in Articles 3 to 10 of that directive only on three of the numerous undertakings operating in the reference market.

The national court asks the Court whether, and, if so, on what terms, the directive authorizes a Member State to impose those obligations only on some of the telecommunications organizations operating in its territory. In particular, it asks whether such a power can be based on the fact that the actual supply of leased lines by an undertaking is, in the State's view, minimal; if this is the case, the national court asks whether the State may confine its assessment to the market situation at the time when the directive was implemented or whether it must also consider the potential development of the market, possibly by ensuring that a *de minimis* threshold is expressly indicated in the measure implementing the directive.

41. The fourth question refers in particular to Article 7 and deals with the specific issue of universal service; the national court asks whether that provision should be interpreted as allowing Member States to impose the obligation to provide a minimum set of leased lines only on two of the numerous undertakings licensed to provide the service in question in the reference market.

Since the issue is substantially the same in each case, I consider it appropriate to deal with the third and fourth questions together.

42. The applicant argues that all the obligations under Articles 3 to 10 of the leased lines Directive, including the obligation to provide a minimum set of leased lines, should be imposed proportionately on all the undertakings operating in the reference market in compliance with the principle of non-discrimination.

The United Kingdom, supported by France and the Commission, claims, by contrast, that the Member States have a broad margin of discretion in order to determine the undertaking or undertakings among those present on the national territory which are to be subject to those obligations. Accordingly, the UK authority legimately imposed those obligations on BT and, in part, on Mercury and Kingston on account of BT's uncontested dominant position on the reference market, Mercury's position of considerable strength on the market and Kingston's *de facto* monopoly in the defined geographical area in which it operates.

43. Given that, as I have already mentioned, the answer to the questions is bound to be affected by the fact, to which I intimated above, that the UK operators of public telecommunications services are not telecommunications organizations within the meaning of the current version of the leased lines Directive.

44. Articles 3 to 10 (excluding Article 7) of the leased lines Directive require the Member States, as I have already said, to ensure that their telecommunications organizations provide leased lines in accordance with particular conditions and requirements. In general, those provisions lay down obligations with regard to publication of and access to technical and commercial information on the lines offered, technical access to lines and the contractual terms of offerings (termination of offerings, ordering and billing procedures, cost-orientated tariffs, etc.).

In truth, the *rationale* for those obligations is the existence of market situations characterized by the presence of a *de jure* monopolistic operator or a number of oligopolistic operators. In those circumstances, there is a real need to guarantee appropriate corrective mechanisms so as to ensure that those organizations do not exploit their privileged position in order to have an adverse effect on the market. Where there is a liberalized market, however, it may prove necessary for those obligations to be complied with only by bodies which, for historical reasons, still have a particularly significantly strong position on the market which enables them in any event to present their offering on conditions that do not take account of competition from smaller, less powerful undertakings. Where, within a particular market, there was a real situation of competitive equilibrium, there would, in the final analysis, be no reason to impose such obligations, since each of the requirements which those obligations were designed to safeguard would be automatically guaranteed simply by the operation of free competition.

45. These thoughts bring me to the conclusion that, where there is a liberalized market as there is the United Kingdom, it may not be necessary to impose the obligations in question on all the undertakings operating in the market, whereas it may prove appropriate to impose them only on those bodies which, for the aforementioned reasons, are in a *de facto* situation which is so privileged as to enable them to have an adverse effect on the market, for example by impeding access to the public network.

The leased lines Directive specifically seeks to avoid such a distortion of competition; in order for the directive to be properly transposed by the national legislature in a State in which there are no longer special or exclusive rights in respect of infrastructure, it is sufficient, to my mind, for that result to have been attained; and it should be so attained, if necessary, by imposing the obligations relating to offering conditions only on those bodies which, on account of their strong position on the market, might be in a position to hinder users' or competitors' access to the public network.

46. The proposal for amendment of 6 March 1996 affords significant confirmation that my findings are well founded. Article 2(2) of the proposed directive provides that Member States are to ensure that 'at every point in their territory at least one organization is subject to the provisions of this directive' and that 'obligations resulting from this Directive are not imposed on organizations without significant market power'.

Consistently with the withdrawal of special and exclusive rights in respect of infrastructure pursued by various other Community instruments, the proposed rules therefore expressly authorize Member States to impose the obligations set out in Articles 3 to 10 of the leased lines Directive only on some of the various operators in the sector in question, provided that they are identified on the basis of their market power.

47. As regards Article 7, which, as I have already said, requires Member States to ensure that their telecommunications organizations separately or jointly provide a minimum set of leased lines in order to guarantee a harmonized offering throughout the Community, the terms of the problem are not dissimilar.

The idea of universal service is relevant in the first place in general terms inasmuch as it evidences the need to reconcile two requirements to which the Community legislature, by means of differing instruments depending on the particular case, attributes equal importance: on the one hand, liberalization of the markets in the sectors of commercial public services (telecommunications and also, as we know, however, electricity, water, gas, and postal services); on the other, guaranteeing the supply of an efficient service to every user on request.

Universal service entails an obligation on the undertaking responsible for providing it to satisfy demand irrespective as to whether the undertaking covers its costs; consequently, in a liberalized market in which the obligation to provide a universal service is no longer the *quid pro quo* for a special or exclusive right vested in one or a few particular undertakings, there is the risk that the obligation in question will affect the undertaking (or undertakings) on which it is imposed in an unduly costly, unjustified or, simply, discriminatory manner. On the other hand, where there is a *de facto* monopoly operator or one or more undertakings with a dominant position in a particular, already liberalized, market, it might be inconsistent to distribute that obligation amongst all operators by imposing it also on those without adequate strength on the market.

48. In this case, too, it clearly emerges that, when it drew up the leased lines Directive, the Community legislature had in mind the situation in which the markets are still characterized by special and exclusive rights in respect of infrastructure.

In view, however, of the progressive, gradual abolition of special and exclusive rights (albeit with different timing and using different methods) in almost all the sectors which I have mentioned, the Community legislature has shown itself sensitive to the need to determine, on the basis of objective and dynamic criteria which take account of economic and also technical requirements, on which undertakings the obligation to provide a universal service should be imposed.

49. In the first place, as we have seen, the proposal for amendment provides that the obligation to provide a universal service in the leased lines sector should be imposed on at least one of the bodies operating in each Member State and that that body should be identified and selected essentially on the basis of its strength on the market.

Commission Directive 96/19/EC, which has just been adopted in order to achieve full competition in telecommunications markets, [18] requires Member States to notify the measures which they propose to adopt in order to ensure a universal service to the Commission, which is required to check that they are transparent and proportionate.

In addition, the proposal for a European Parliament and Council Directive on interconnection in telecommunications, submitted by the Commission on 31 August 1995, which aims precisely at ensuring, not only network interoperability, but also the provision of a universal service, [19] regulates this area in detail. The proposal provides that that obligation has to be imposed on telecommunications organizations which have 'significant market power' on the basis of dynamic mechanisms designed to ensure, where necessary and under the supervision of the competent national and Community authorities, a fair distribution of the burdens of that service (see Articles 4 and 5).

50. On the other hand, the present version of Article 7 of the leased lines Directive simply requires each Member State to ensure that a service is provided in the sector in question to every potential user who requests it. As it is worded at present, Article 7 requires nothing else.

In those circumstances, it seems reasonable to me to state, once again consistently with the development of the relevant Community legislation, that, in order for that requirement to be complied with, it is sufficient for the legislature of a Member State whose telecommunications market has already been liberalized to impose the obligation in question on at least one of the telecommunications organizations operating in its territory.

51. In the final analysis, Articles 3 to 10 of the leased lines Directive should be interpreted as meaning that Member States whose telecommunications market, in particular the leased lines sector, is no longer characterized by the presence of special or exclusive rights in respect of infrastructure are in any event bound to impose the obligation to provide a universal service on at least one of the telecommunications organizations licensed to operate in the sector in question; whereas they are under a duty to impose the remaining obligations (laid down by Articles 3, 4, 5, 6, 8, 9 and 10) on at least one of those

18 — 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).

19 — COM(95) 379 final, OJ 1995 C 313, p. 7.

organizations where this is justified by *de facto* circumstances making it necessary to regulate the conduct of that organization on the market in question.

The fifth question

52. In view of my proposed answers to the third and fourth questions, the reply to the national court's fifth question concerning the invalidity of the leased lines Directive for allegedly infringing the principle of non-discrimination seems to me to have already more than been taken into account.

It is obvious in fact that, in so far as, as we have seen, the directive itself does not require the Member States to implement it in such a way as to infringe the principle of non-discrimination, there is no question as to the validity of the directive itself on that score. There might, however, possibly have been a question mark hanging over at most the validity of the national implementing provisions. But this, too, is ruled out by my earlier remarks.

The sixth question

53. In its sixth question, the national court asks the Court to rule on the validity of the leased lines Directive, which, according to the applicants, infringes the principle of proportionality in so far as it requires the provision of a particular type of line (2 048 kbit/s), for which there is no present or potential demand in the United Kingdom.

The type of line in question is expressly listed in Annex II to the directive, which, as I have pointed out, lays down the technical characteristics of the lines whose supply Member States must assure, in order, as Article 7, which has been repeatedly cited, states, 'to guarantee a harmonized offering throughout the Community'.

54. The requirement that the leased lines offered in the various Member States should have harmonized technical characteristics is also set out in the 12th recital in the preamble, which declares as follows: 'Whereas, in order to make leased lines available to a sufficient extent to users for their own use, for shared use or for the provision of services to third parties, it is necessary that Member States ensure that a harmonized set of leased lines with defined network termination points is made available in all Member States both for communications within a Member State and between Member States; ...'.

It is therefore clear that, by means of the harmonization of technical specifications, the directive seeks, inter alia, to abolish obstacles to trade in transfrontier technical services owing to the different regulations applicable in the Member States.

55. The obligation to ensure the availability of the types of line specified in Annex II therefore constitutes an essential requirement for the purposes of achieving the harmonization intended by the directive and the Member States are not entitled to forgo complying with that requirement without thereby failing to fulfil the objectives of the directive.

Moreover, there is no doubt that the fact that there is no demand in a Member State for a particular type of line is completely irrelevant as regards the obligation imposed on that Member State to ensure that such a line is available, at least in relation to transfrontier services.

Matters might be different if it could be shown that there was no demand for the type of line in question in the Community market; yet, according to uncontested information provided by the Commission, at least in France, Germany and Italy there is at present a market for that type of line; in the final analysis, this confirms that the criticisms of the validity of the directive from this point of view are unjustified.

The seventh question

56. In its seventh question, the national court asks the Court about the consequences to be drawn from the alleged wrong transposition of the leased lines Directive by the legislature in the United Kingdom from the point of view of the State's liability in damages.

In view of the replies which I have suggested to the previous questions and assuming that the Court accepts them, it seems only too clear to me that in this case the question of State liability does not arise, since the State in question has implemented the directive in a manner which is not incompatible with its aims and hence, in the ultimate analysis, correctly.

57. In the event, however, that the Court should decide differently, the question of the liability of the State and its duty to make reparation to individuals which have suffered damage as a result of a breach of Community law would arise again, in particular with

respect to an incorrect, albeit timeous, transposition of the provisions of a directive into national law.

58. That question has been amply dealt with and discussed in my Opinions in *Brasserie du Pêcheur and Factortame III*, [20] *Dillenkofer and Others* [21] and, more specifically, *British Telecommunications*, [22] which I delivered on 28 November 1995 and to which I would refer for any further clarification of this point.

By judgment of 5 March 1996 in *Brasserie du Pêcheur and Factortame III*, the Court declared, inter alia, that 'where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals'. [23]

That case-law has recently been confirmed by reference to facts not dissimilar to those before the Court in this case by the judgment of 26 March 1996 in *British Telecommunications*, which was concerned with the incorrect transposition of a directive. [24]

59. In this case, it is unnecessary to dwell on whether the other conditions mentioned above are present, it being sufficient to point out that, quite clearly, the transposition carried out by the UK legislature cannot be classed as a serious and manifest breach of the provisions of the directive as required by the Court's case-law. [25]

In this connection, what seems decisive to me is the fact, which I have repeatedly stressed, that the directive in question, which aims to ensure harmonization of the conditions of supply of leased lines, seems quite obviously to have been drawn up so as appropriately to regulate market situations characterized by the existence of only one or a small number of bodies with special or exclusive rights in respect of telecommunications infrastructure, whilst it fails to take account of the special features of a market, such as the UK market, which had already been liberalized at the time when the directive was adopted.

20 — Joined Cases C-46/93 and C-48/93, [1996], ECR I-1029.

21 — Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, [1996] ECR I-4845.

22 — Case C-392/93, [1996] ECR I-1631.

23 — Judgment in *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, operative part.

24 — See the judgment in *British Telecommunications* [1996] ECR I-1631, in particular at paragraph 42.

25 — See the judgment in *Brasserie du Pêcheur and Factortame III*, in particular paragraphs 55 to 64.

Conclusions

60. In the light of the foregoing, I therefore suggest that the Court should answer the national court's questions in the following terms:

(1) Article 2(1) of Directive 92/44/EEC and Article 2(1) and (2) of Directive 90/387/EEC should be interpreted as requiring Member States to fulfil their obligations under Articles 3 to 10 of Directive 92/44/EEC by imposing obligations on telecommunications organizations within the meaning of Article 2(1) of Directive 90/387/EEC, that is to say, public or private bodies, to which a Member State has granted special or exclusive rights for the provision of a public telecommunications network and, where applicable, public telecommunications services.

(2) Article 2(1) of Directive 92/44/EEC and Article 2(1) and (2) of Directive 90/387/EEC should be interpreted as meaning that, for the purposes of the application of Directive 92/44/EEC, the numerous undertakings operating in a Member State's market in public telecommunications services by virtue of a compulsory licence which gives them particular prerogatives and is awarded by the competent authority after considering the merits of the application by reference to the applicable national legislation on the basis of a presumption that applications will be accepted, without limitations as to their number, unless there are specific reasons for refusing them, are not bodies with special or exclusive rights within the meaning of Directive 90/387/EEC.

(3) Articles 3 to 10 of Directive 92/44/EEC should be interpreted as meaning that a Member State in which undertakings authorized to operate in the leased lines sector do not have special or exclusive rights in respect of infrastructure is

bound in each case to impose the obligation to provide a universal service on at least one of those undertakings, whilst it is bound to impose the remaining obligations on at least one of those undertakings where that is necessitated by the circumstances of the case.

(4) Consideration of Directive 92/44/EEC has not disclosed any factors such as to affect its validity.

(5) In this case, the requirements are not present in order for the State concerned to be ordered to make reparation for the damage which individuals claim to have suffered on account of the allegedly incorrect implementation of Directive 92/44/EEC.