JUDGMENT OF THE COURT (Sixth Chamber)

19 September 2002 *

In Case C-221/01,

Commission of the European Communities, represented by H. van Lier, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented initially by F. van de Craen, and subsequently by A. Snoecx, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32) and, in particular, with Articles 7(5), 9(3) and 14(1) and (2) thereof, the Kingdom of Belgium has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, C. Gulmann (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 June 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32, hereinafter 'the Directive') and, in particular, with Articles 7(5), 9(3) and 14(1) and (2) thereof, the Kingdom of Belgium has failed to fulfil its obligations under that directive.

Legal background

Community law

2 The purpose of the Directive is the harmonisation of conditions of access and interconnection between public telecommunications networks, while ensuring universal service as well as open and efficient access to public telecommunications services and networks.

3 Article 3(1) of the Directive requires Member States to remove any restrictions which prevent authorised telecommunications organisations from negotiating interconnection agreements between themselves. Technical and commercial

arrangements for interconnection are to be a matter for agreement between the parties involved, subject to the provisions of the Directive and the competition rules of the Treaty.

4 Article 7 of the Directive lays down a number of principles for interconnection charges and cost accounting systems which must be applied to telecommunications organisations with significant market power within the meaning of Article 4(3) of that directive. The second subparagraph of Article 7(5) of the Directive provides:

'National regulatory authorities shall ensure that a description of the cost accounting system, showing the main categories under which costs are grouped and the rules used for the allocation of costs to interconnection, is made available on request. Compliance with the cost accounting system shall be verified by the national regulatory authority or another competent body, independent of the telecommunications organisation and approved by the national regulatory authority. A statement concerning compliance shall be published annually.'

5 Article 9 of the Directive defines the general responsibilities of the national regulatory authorities. Paragraphs 2 and 3 of that article state:

'2. General conditions set down in advance by the national regulatory authority shall be published in accordance with Article 14(1).

...

3. In pursuit of the aims stated in paragraph 1, national regulatory authorities may intervene on their own initiative at any time, and shall do so if requested by either party, in order to specify issues which must be covered in an interconnection agreement, or to lay down specific conditions to be observed by one or more parties to such an agreement. National regulatory authorities may, in exceptional cases, require changes to be made to interconnection agreements already concluded, where justified to ensure effective competition and/or interoperability of services for users.

...'

6 Article 10 of the Directive lays down a series of essential requirements for interconnection relating to security of network operations, maintenance of network integrity, interoperability of services and protection of data. The second subparagraph of that article reads as follows:

'Where the national regulatory authority imposes conditions based on essential requirements in interconnection agreements, these conditions shall be published in the manner laid down in Article 14(1).

...'

7 Under Article 12 of the Directive, Member States are to ensure the provision of adequate numbers and numbering ranges for all publicly available telecommunications services. Paragraph 4 of that article provides:

'National regulatory authorities shall ensure that the main elements of the national numbering plans, and all subsequent additions or amendments to them, are published in accordance with Article 14(1), subject only to limitations imposed on the grounds of national security.'

8 Article 14 of the Directive requires the information specified in certain articles of the Directive to be published or made available to interested parties on request and, in some cases, free of charge:

'1. With regard to the information identified in Article 7(3), Article 9(2), Article 10 and Article 12(4), national regulatory authorities shall ensure that up-to-date information is published in an appropriate manner in order to provide easy access to that information for interested parties. Reference shall be made in the national Official Gazette of the Member State concerned to the manner in which this information is published.

2. With regard to the information identified in Article 4(1), Article 5(3), Article 5(5), Article 6(c) and Article 9(3), national regulatory authorities shall ensure that up-to-date specific information referred to in those articles is made available on request to interested parties, free of charge, during normal working

hours. Reference shall be made in the national Official Gazette of the Member State concerned to the times and location(s) at which the information is available.'

9 Article 23(1) of the Directive requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it by 31 December 1997 at the latest and immediately to inform the Commission thereof.

National legislation

10 Article 75(3) of the Law of 21 March 1991 on the reform of certain public economic undertakings (*Moniteur belge* of 27 March 1991, p. 6155, amended, *inter alia*, by the Law of 19 December 1997, *Moniteur belge* of 30 December 1997, p. 34986, hereinafter 'the Law of 21 March 1991') states:

'The Institute [Institut belge des services postaux and des télécommunications, the Belgian regulatory authority, hereinafter "the Institute"] shall be responsible for the general task of supervision and monitoring of the provisions of Chapter x of Title I, of Title III and of Title IV of this law.'

11 Article 79a(1) of the Law of 21 March 1991 states:

'In accomplishing the tasks assigned to it, the Institute may collect all necessary information from undertakings and associations of undertakings. It shall lay down the time-limit for communicating that information to it. When the Institute

requests information from an undertaking or an association of undertakings, it shall indicate the legal basis for and the purpose of its request.'

12 Under Article 109b(4) of the Law of 21 March 1991:

'Every organisation with significant market power in public networks providing fixed telephony or leased lines or voice telephony shall publish, according to the procedures laid down by the King on a proposal by the Institute, a technical interconnection offer, including tariffs, which has received prior approval by the Institute. That offer must be unbundled so that the applicant for reference interconnection is not required to subscribe to unwanted services. The Institute shall determine whether the offer is sufficiently unbundled.

The publication of that offer shall not hinder requests for interconnection negotiations not provided for in that offer.

The offer referred to in the first subparagraph of this paragraph shall set out different conditions depending on whether it is addressed to suppliers....

The Institute shall specify what those conditions are and to what extent they can vary depending on the category to which the party requesting interconnection belongs.

The Institute may impose modifications which it considers to be indispensable to the interconnection offer.

...'

13 Article 5(1) of the Royal Decree of 22 June 1998 laying down the specifications for the voice telephony service and the procedure for the grant of individual authorisations (*Moniteur belge* of 15 July 1998, p. 23299, hereinafter 'the Decree of 22 June 1998 on specifications') as amended provides:

'The operator shall take measures, to be specified in its interconnection agreements, to ensure compliance with the essential requirements and in particular:

1. the interoperability of voice telephony services, *inter alia* in order to ensure, together with interconnected operators, satisfactory end-to-end quality;

2. the protection of data to the extent necessary to comply with the applicable provisions under Article 109b(D) of the Law of 8 December 1992 on the protection of private life with regard to the processing of data of a personal nature and the Law of 30 June 1994 on the protection of private life against the listening in to, taking notes of and recording of private communications and telecommunications.'

14 Article 6(1) of the Royal Decree of 22 June 1998 concerning the conditions for establishing and operating public telecommunications networks (*Moniteur belge* of 24 July 1998, p. 23990, hereinafter 'the Decree of 22 June 1998 on conditions for establishment') as amended provides:

'The operator shall take measures, which he shall set out in his interconnection agreements, to ensure compliance with essential requirements, in particular:

1. the security of network operations;

2. the maintenance of network integrity;

3. the interoperability of services, *inter alia* in order to ensure, together with interconnected operators, end-to-end quality;

4. the protection of data to the extent necessary to comply with the applicable provisions under Article 109b(D) of the Law of 8 December 1992 on the protection of private life with regard to the processing of data of a personal nature and the Law of 30 June 1994 on the protection of private life against the listening in to, taking notes of and recording of private communications and telecommunications.'

15 Under Article 5(3) of the Royal Decree of 20 April 1999 laying down the time-limits and general principles applicable to commercial negotiations carried

on in order to conclude interconnection agreements, the manner of publication of the reference interconnection offer and the conditions to be included in the interconnection agreement (*Moniteur belge* of 21 July 1999, p. 27693):

'When the parties, or one of them, ask the Chamber [for interconnection, leased lines, special access and shared usage (hereinafter "the Chamber")] to intervene, they must communicate to it all the relevant information, including, to the extent that it is applicable, the information referred to in paragraph 1.

In the case referred to in the first subparagraph, the Chamber may call for whatever supplementary information it considers useful.

If a party fails to supply the information referred to in this article, the Chamber may, in order to take a decision, base its action on the information available to it at that time, whether it comes from the parties or not.'

16 Articles 6, 8, 11 and 12 of the Decree of 20 April 1999, which are set out in Chapter I, Section 2 thereof, entitled 'Time-limits and procedures', provide:

'Article 6

The party requesting interconnection shall submit, by registered letter, a completed request accompanied by all the appropriate data, including a

document drawn up by the Institute which states that the party has introduced a valid application to obtain an individual licence or that it has fulfilled the prescribed conditions for operating a telecommunications service or leased lines requiring interconnection.

The party shall also immediately inform the Institute thereof, by registered letter, setting out the following information:

...

Article 8

If, at the end of the period specified in the preceding article, whether or not extended in accordance with Articles 10 and 11, the parties have not reached agreement, they may, jointly or individually, request the Chamber to intervene.

If, after a period of three months from the date of the request for interconnection, it appears that the parties have made no significant progress in their negotiations and that there are sufficient grounds to consider that they will not be able to reach agreement within the period referred to in the preceding article, they may, jointly or individually, request the Chamber to intervene without having to wait for that period to elapse.

In the case where a party refuses to engage in negotiation, the other party may immediately request the Chamber to intervene without having to wait for the periods mentioned in subparagraphs 1 and 2.

...

Article 11

If the parties have provided for an extension of the negotiating period in accordance with Article 10(1), they shall inform the Institute by registered letter of their intention to make use of that period and of the length of the extension envisaged.

If one or several parties wish to extend the period in accordance with Article 10(2) and (3), they shall inform the Chamber thereof by registered letter, containing the following information:

...

Article 12

If the parties fail to conclude an interconnection agreement, the party to whom the request for interconnection was addressed shall draw up an interconnection

offer with a view to intervention by the Chamber and without prejudice to the obligations of Article 109b of the law on reference interconnection offers.

The Institute may decide to modify that interconnection offer with a view to reaching agreement between the parties.

After it has heard the parties, the Institute may grant the status of provisional interconnection agreement to the interconnection offer, whether or not it has been modified in accordance with the second subparagraph. If necessary, that provisional interconnection agreement shall remain in force until the signature by the parties of a definitive interconnection agreement.

...'

17 Articles 17 to 20 of the Decree of 20 April 1999, set out in its Chapter II, Section 2, entitled 'Publication of the reference offer', state:

'Article 17

Following approval of the reference interconnection offer by the Institute, the organisation with significant market power concerned shall publish a notice in the *Moniteur belge* to alert parties interested in the interconnection of that

approval. At the same time, it shall be made known that interested parties to the interconnection can learn of the reference interconnection offer by the organisation concerned on request to that organisation.

Article 18

The communication referred to in the preceding article concerning the reference interconnection offer shall be published by each organisation with significant market power before 30 December of each year.

Article 19

The reference interconnection offer shall be public and free of charge.

Article 20

The reference interconnection offer shall in principle remain valid for the calendar year which follows the year of publication. If an organisation with market power wishes to modify that offer during the current calendar year, it must request prior approval to do so from the Institute.'

18 In Chapter III, entitled 'Technical and financial conditions', Article 21 of the Decree of 20 April 1999 provides:

'In accordance with Article 109b(5) of the Law [of 21 March 1991], the following technical and financial conditions at a minimum are to be set in interconnection agreements:

...'.

19 The first and second subparagraphs of Article 2(2) of the Royal Decree of 10 December 1997 concerning the management of the numbering plan (*Moniteur belge* of 30 December 1997, p. 35171) state:

'The Institute shall be responsible for recording, adding to and, if necessary, amending numbering plans in the context of the provisions of chapters three to nine.

The main elements referred to in the preceding subparagraph shall be published and available from the Institute on request. The Institute shall refer to those main elements in the *Moniteur belge*....'

The pre-litigation procedure

20 By letter of 13 January 1998, the Belgian authorities notified the Commission of the Law of 19 December 1997 amending the Law of 21 March 1991 (*Moniteur belge* of 30 December 1997, p. 34986). That amending law is intended to implement the Directive.

21 By letter of formal notice of 6 August 1998, the Commission informed the Belgian authorities that the measures notified concerning interconnection did not adequately implement all the provisions of the Directive.

22 By letter of 12 October 1998, the Belgian authorities responded to the letter of formal notice by referring to various provisions in the national legislation, in particular the Decrees of 22 June 1998 on specifications and on conditions for establishment, and by submitting certain observations.

23 The Commission, after analysing those provisions and the observations set out in the response by the Belgian authorities to the letter of formal notice, found that Belgian legislation was not in compliance with the Directive and, on 15 April 1999, sent the Kingdom of Belgium a reasoned opinion requesting that Member State to take the measures necessary to comply with that opinion within a period of two months from the date of its notification.

24 By letters of 26 April, 21 June, 18 October and 10 December 1999, the Belgian authorities informed the Commission of the adoption of further legislation, the letter of 21 June 1999 comprising the response to the reasoned opinion.

25 However, while the provisions and information submitted by the Belgian authorities answered some of the Commission's concerns, the Commission remained of the view that the implementation of the Directive was inadequate, in particular with respect to Articles 7(5), 9(3) and 14(1) and (2). It accordingly brought the present action.

First complaint, concerning incorrect implementation of Article 7(5) of the Directive

26 The Commission, in its first complaint, states that, contrary to the Belgian authorities' contention during the pre-litigation procedure, the national legislation does not correctly implement the second subparagraph of Article 7(5) of the Directive, since that law does not contain any mechanism for monitoring compliance. According to the Commission, under the last two sentences of that provision, compliance with the cost accounting system must be verified and a statement concerning compliance must be published annually. Those obligations do not, however, appear in the Belgian legislation.

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

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

Second complaint, concerning the incorrect implementation of Article 9(3) of the Directive

29 In its second complaint, the Commission claims that the fifth subparagraph of Article 109b(4) of the Law of 21 March 1991, as well as Articles 8 and 12 of the Decree of 20 April 1999, which according to the response by the Belgian authorities to the reasoned opinion implemented Article 9(3) of the Directive, do not provide for the national regulatory authorities to 'intervene on their own initiative at any time' in interconnection agreement negotiations, as is required by that provision of the Directive.

30 In its defence, the Belgian Government states that the national legislation gives the Institute the general right to intervene at any time to enforce compliance with both the legal obligations relating to operators and the general objectives of the legislation liberalising the telecommunications market. According to the Government, Articles 75(3) and 79a of the Law of 21 March 1991 enable the regulatory authority to intervene widely and at any time if it finds that a legal obligation is seemingly not being complied with although it is laid down by the Law of 21 March 1991 and/or its implementing decrees.

31 In addition, Article 109b of the Law of 21 March 1991, read in conjunction with Articles 5(3), 6, 11 and 12 of the Decree of 20 April 1999, enables the Institute to be informed of the existence of interconnection negotiations and of the characteristics of the interconnection requested. It can, based on the information available to it, intervene in order to ensure compliance with legal provisions and with the obligations on the parties concerning interconnection, particularly within the framework of those negotiations and discussions. The national regulatory authority thus has available to it a possibility of intervention in accordance with the purposes of the Directive.

32 Nevertheless, the Belgian Government annexed to its rejoinder a draft royal decree which repeats verbatim the wording of Article 9(3) of the Directive.

33 In that respect, as stated by the Advocate General in paragraphs 35 to 37 of his Opinion, it is clear from Article 9(3) of the Directive, as well as the fifth recital in its preamble, that the national regulatory authorities must be empowered to intervene at any moment of the negotiations leading up to an interconnection agreement. The Community legislature clearly envisaged that the power to intervene must be distinct from the power to require changes to interconnection agreements already concluded.

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

35 The Commission's second complaint is therefore also well founded.

Third complaint, concerning the incorrect implementation of Articles 14(1) and (2) of the Directive

36 In its third complaint, the Commission has alleged in its application a breach of the obligations resulting from Article 14(1) of the Directive in conjunction with

Articles 7(3), 9(2), 10 and 12(4) thereof, and of Article 14(2) of the Directive in conjunction with Article 9(3) thereof. In its reply, in the light of the explanations submitted by Belgium in its defence, the Commission withdrew its complaint as regards Articles 7(3) and 9(3). However, it maintained its complaint with regard to Articles 9(2), 10 and 12(4) of the Directive.

Infringement of Article 4(1) of the Directive in conjunction with Articles 9(2) and 10 thereof

37 The Commission states that although it can find that the general conditions for interconnection defined in Article 9(2) of the Directive and the essential requirements referred to in Article 10 have been implemented in Belgian legislation, it cannot detect any provision of that legislation which responds to the obligation, resulting from Article 14(1) of the Directive, to publish that information.

38 The Belgian Government contends that it has correctly implemented Article 14(1) of the Directive as regards the information referred to in Articles 9(2) and 10, since that information is set out in the national legislation, which is published in the *Moniteur belge*. In addition, all updates of national legislation are published in the *Moniteur belge*, which is readily accessible to all interested persons. Thus, Article 14(1) in conjunction with Article 9(2) of the Directive is implemented by the Decree of 20 April 1999, and in particular by Articles 17 to 21 thereof, while Article 14(1) in conjunction with Article 10 of the Directive is implemented by the Decrees of 22 June 1998 on specifications and the conditions for establishment.

39 In that regard, as stated by the Advocate General in paragraphs 49 to 53 of his Opinion, if the information in question — namely, in the context of this complaint, the general conditions and essential requirements set down in advance by the national regulatory authority — is itself published in the national Official Gazette of the Member State concerned, that procedure constitutes publication for the purposes of Article 14(1) of the Directive.

40 Accordingly, the Commission's request for a declaration that the Kingdom of Belgium has failed to implement Article 14(1) of the Directive in conjunction with Articles 9(2) and 10 thereof must be held to be unfounded.

Infringement of Article 14(1) of the Directive in conjunction with Article 12(4) thereof

41 The Commission claims that the main elements of the national numbering plans referred to in Article 12(4) of the Directive are not available on request although Article 14(1) of the Directive requires a system of direct access to information based on publication.

42 The Belgian Government maintains that it has correctly implemented Article 14(1) of the Directive in conjunction with Article 12(4) thereof. It states that, while the first sentence of the second subparagraph of Article 2(2) of the Decree of 10 December 1997 requires that information on the numbering plan be available on request, the second sentence of that provision specifies that the

Institute is to refer to those main elements in the *Moniteur belge*. Thus, reference to publication on the Institute's website of the elements referred to in the first subparagraph of Article 2(2) of that decree will be made in the *Moniteur belge*.

43 In its rejoinder, however, the Belgian Government informed the Court of its intention to amend the wording of the second subparagraph of Article 2(2) of the Decree of 10 December 1997 by replacing the sentence 'The Institute shall refer to these main elements in the *Moniteur belge*' by the exact phrasing used in Article 14(1) of the Directive, as follows: 'The Institute shall publish in the *Moniteur belge* the manner in which this information is to be published'.

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

45 Nevertheless, that provision requires that the manner in which the information is published be referred to in the national Official Gazette of the Member State concerned. It is not clear from the Belgian Government's statements, according to which 'reference' to that information is published in the *Moniteur belge*, that the manner of publishing that information is clearly specified in the Official Gazette of the Kingdom of Belgium.

46 Accordingly, the Commission's complaint must be held to be well founded.

47 It must therefore be held that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Articles 7(5) and 9(3) of the Directive, as well as Article 14(1) in conjunction with Article 12(4) thereof, the Kingdom of Belgium has failed to fulfil its obligations under that directive.

Costs

48 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs, and the Kingdom of Belgium has been unsuccessful for the most part, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Articles 7(5) and 9(3) of Directive

97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), as well as Article 14(1) in conjunction with Article 12(4) thereof, the Kingdom of Belgium has failed to fulfil its obligations under that directive;

2. Orders the Kingdom of Belgium to pay the costs.

Macken Colneric Gulmann

Schintgen Skouris

Delivered in open court in Luxembourg on 19 September 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber