JUDGMENT OF THE COURT (Fourth Chamber)

24 April 2008 *

In Case C-55/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Köln (Germany), made by decision of 26 January 2006, received at the Court on 2 February 2006, in the proceedings

Arcor AG & Co. KG,

v

Bundesrepublik Deutschland,

intervening party:

Deutsche Telekom AG,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis (Rapporteur), R. Silva de Lapuerta, E. Juhász and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2007,

after considering the observations submitted on behalf of:

— Arcor AG & Co. KG, by K. Kleinlein, Rechtsanwalt and G. Metaxas, dikigoros,

— the Bundesrepublik Deutschland, by M. Deutsch, Rechtsanwalt,

— Deutsche Telekom AG, by F. Hölscher and U. Karpenstein, Rechtsanwälte,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by C. Gibbs and G. Peretz, acting as Agents,

— the Commission of the European Communities, by G. Braun and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(4), 3(3) and 4(1) to (3) of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4).

2 The reference was made in the context of a dispute between Arcor AG & Co. KG ('Arcor') and the Federal Republic of Germany concerning partial approval of the rates of Deutsche Telekom AG ('Deutsche Telekom') for access to the local loop.

Legal context

Community law

Regulation No 2887/2000

3 Recitals 5, 6, 11 and 13 to 15 in the preamble to Regulation No 2887/2000 state the following:

'(5) The provision of new loops with high capacity optical fibre directly to major users is a specific market that is developing under competitive conditions with new investments. This Regulation therefore addresses access to metallic local loops, without prejudice to national obligations regarding other types of access to local infrastructures.

(6) It would not be economically viable for new entrants to duplicate the incumbent's metallic local access infrastructure in its entirety within a reasonable time. Alternative infrastructures such as cable television, satellite, wireless local loops do not generally offer the same functionality or ubiquity for the time being, though situations in Member States may differ.

...

(11) Costing and pricing rules for local loops and related facilities should be transparent, non-discriminatory and objective to ensure fairness. Pricing rules should ensure that the local loop provider is able to cover its appropriate costs in this regard plus a reasonable return, in order to ensure the long term development and upgrade of local access infrastructure. Pricing rules for local loops should foster fair and sustainable competition, bearing in mind the need for investment in alternative infrastructures, and ensure that there is no distortion of competition, in particular no margin squeeze between prices of wholesale and retail services of the notified operator. In this regard, it is considered important that competition authorities be consulted.

…

(13) In its Recommendation 2000/417/EC of 25 May 2000 on unbundled access to the local loop enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet (OJ 2000 L 156, p. 44) and its Communication of 26 April 2000 (OJ 2000 C 272, p. 55), the Commission set out detailed guidance to assist national regulatory authorities on the fair regulation of different forms of unbundled access to the local loop.

(14) In accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty, the objective of achieving a harmonised framework for unbundled access to the local loop in order to enable the competitive provision of an inexpensive, world-class communications infrastructure and a wide range of services for all businesses and citizens in the Community cannot be achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved by the Community. In accordance with the principle

of proportionality as set out in that Article, the provisions of this Regulation do not go beyond what is necessary in order to achieve this objective for that purpose. They are adopted without prejudice to national provisions complying with Community law which set out more detailed measures …

(15) This Regulation complements the regulatory framework for telecommunications, in particular Directives 97/33/EC and 98/10/EC. …'

4 Article 1 of Regulation No 2887/2000, entitled 'Aim and Scope', is worded as follows:

'1. This Regulation aims at intensifying competition and stimulating technological innovation on the local access market, through the setting of harmonised conditions for unbundled access to the local loop, to foster the competitive provision of a wide range of electronic communications services.

2. This Regulation shall apply to unbundled access to the local loops and related facilities of notified operators as defined in Article 2(a).

…

4. This Regulation is without prejudice to the rights of Member States to maintain or introduce measures in conformity with Community law which contain more detailed

provisions than those set out in this Regulation and/or are outside the scope of this Regulation inter alia with respect to other types of access to local infrastructures.'

5 According to Article 2 of Regulation No 2887/2000 the following definitions apply:

'(a) "notified operator"; means operators of fixed public telephone networks that have been designated by their national regulatory authority ['NRA'] as having significant market power in the provision of fixed public telephone networks and services under Annex I, Part 1, of Directive 97/33/EC or Directive 98/10/EC;

(b) "beneficiary"; means a third party duly authorised in accordance with Directive 97/13/EC or entitled to provide communications services under national legislation, and which is eligible for unbundled access to a local loop;

(c) "local loop"; means the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network;

…'

6 Article 3(2) and (3) of Regulation No 2887/2000, entitled 'Provision of unbundled access', states:

'2. Notified operators shall from 31 December 2000 meet reasonable requests from beneficiaries for unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolution procedure referred to in Article 4(5). Notified operators shall provide beneficiaries with facilities equivalent to those provided for their own services or to their associated companies, and with the same conditions and time-scales.

3. Without prejudice to Article 4(4), notified operators shall charge prices for unbundled access to the local loop and related facilities set on the basis of cost-orientation.'

7 Article 4 of Regulation No 2887/2000, entitled 'Supervision by the [NRA]', provides:

'1. The [NRA] shall ensure that charging for unbundled access to the local loop fosters fair and sustainable competition.

2. The [NRA] shall have the power to:

(a) impose changes on the reference offer for unbundled access to the local loop and related facilities, including prices, where such changes are justified; and

(b) require notified operators to supply information relevant for the implementation of this Regulation.

3. The [NRA] may, where justified, intervene on its own initiative in order to ensure non-discrimination, fair competition, economic efficiency and maximum benefit for users.

4. When the [NRA] determines that the local access market is sufficiently competitive, it shall relieve the notified operators of the obligation laid down in Article 3(3) for prices to be set on the basis of cost-orientation.

5. Disputes between undertakings concerning issues included in this Regulation shall be subject to the national dispute resolution procedures established in conformity with Directive 97/33/EC and shall be handled promptly, fairly and transparently.'

The former regulatory framework for telecommunications ('the FRF')

— Directive 90/387/EEC

8 According to Article 1(1) thereof, 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 (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October

1997 (OJ 1997 L 295, p. 23; 'Directive 90/387'), applicable at the time of the facts in the main proceedings, concerns the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services.

9 Under Article 2(8) of that directive 'open network provision conditions' means:

'the conditions … which govern open and efficient access to public telecommunications networks and, where applicable, public telecommunications services and the efficient use of those networks and services.

Without prejudice to their application on a case-by-case basis, open network provision conditions may include harmonised conditions with regard to:

— technical interfaces, including the definition and implementation of network termination points, where required,

— usage conditions,

— tariff principles and

— access to frequencies and numbers/addresses/names, where required in accordance with the reference framework of the Annex.'

10 Article 3(1) of Directive 90/387 provides:

'Open network provision conditions must comply with a number of basic principles set out hereafter, namely that:

— they must be based on objective criteria,

— they must be transparent and published in an appropriate manner,

— they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.'

11 Article 5a(3) of Directive 90/387 states that:

'Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the [NRA] has a right of appeal to a body independent of the parties involved.'

12 Point 3, concerning harmonised tariff principles, of the annex to Directive 90/387, entitled 'Reference Framework for the application of ONP conditions', states the following:

'Tariff principles must be consistent with the principles stated in Article 3(1).

Those principles imply, in particular, that:

— tariffs must be based on objective criteria and, until such time as competition becomes effective in keeping down prices for users, must in principle be cost oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provisions conditions. Where an organisation no longer has significant market power in the relevant market, the requirement for cost-orientation may be set aside by the competent [NRA]. One of the aims should be the definition of efficient tariff principles throughout the Community while ensuring a general service for all,

— tariffs must be transparent and must be properly published,

— in order to leave users a choice between the individual service elements and where technology so permits, tariffs must be sufficiently unbundled in accordance with

the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must, as a general rule, be charged independently of the inclusive features and transportation as such,

— tariffs must be non-discriminatory and guarantee equality of treatment, except for restrictions which are compatible with Community law.

Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing in the global cost of the resources used, the need for a reasonable level of return on investment and, where appropriate, the financing of universal service in accordance with the interconnection Directive.

There may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-peak periods, provided that the tariff differentials are commercially justifiable and do not conflict with the above principles.'

— Directive 97/33/EC

13 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), applicable at the time of the facts in the main proceedings, states the following in recital 10 in the preamble thereto:

'Whereas pricing for interconnection is a key factor in determining the structure and the intensity of competition in the transformation process towards a liberalised market; whereas organisations with significant market power must be able to demonstrate that their interconnection charges are set on the basis of objective criteria and follow the principles of transparency and cost-orientation, and are sufficiently unbundled in terms of network and service elements offered; whereas publication of a list of interconnection services, charges, terms and conditions enhances the necessary transparency and non-discrimination; whereas flexibility in the methods of charging for interconnection traffic should be possible, including capacity-based charging; whereas the level of charges should promote productivity and encourage efficient and sustainable market entry, and should not be below a limit calculated by the use of long-run incremental cost and cost allocation and attribution methods based on actual cost causation, nor above a limit set by the stand-alone cost of providing the interconnection in question; whereas charges for interconnection based on a price level closely linked to the long-run incremental cost for providing access to interconnection are appropriate for encouraging the rapid development of an open and competitive market.'

14 According to Article 1 thereof, Directive 97/33 establishes a regulatory framework for securing in the European Community the interconnection of telecommunications networks and in particular the interoperability of services, and with regard to ensuring provision of universal service in an environment of open and competitive markets.

15 Article 2 of that directive defines the concept of 'interconnection' as being the physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation or to access services provided by another organisation.

16 Article 7 of that directive, entitled 'Principles for interconnection charges and cost accounting systems', provides as follows:

'…

2. Charges for interconnection shall follow the principles of transparency and cost-orientation. The burden of proof that charges are derived from actual costs including a reasonable rate of return on investment shall lie with the organisation providing interconnection to its facilities. …

3. [NRAs] shall ensure the publication, in accordance with Article 14(1), of a reference interconnection offer. The reference interconnection offer shall include a description of the interconnection offerings broken down into components according to market needs, and the associated terms and conditions including tariffs.

Different tariffs, terms and conditions for interconnection may be set for different categories of organisations which are authorised to provide networks and services, where such differences can be objectively justified on the basis of the type of interconnection provided and/or the relevant national licensing conditions. [NRAs] shall ensure that such differences do not result in distortion of competition, and in particular that the organisation applies the appropriate interconnection tariffs, terms and conditions when providing interconnection for its own services or those of its subsidiaries or partners …

The [NRA] shall have the ability to impose changes in the reference interconnection offer, where justified.

Annex IV provides a list of examples of elements for further elaboration of interconnection charges, tariff structures and tariff elements. Where an organisation makes changes to the published reference interconnection offer, adjustments required by the [NRA] may be retrospective in effect, from the date of introduction of the change.

…

5. The Commission shall … draw up recommendations on cost accounting systems and accounting separation in relation to interconnection. [NRAs] shall ensure that the cost accounting systems used by the organisations concerned are suitable for implementation of the requirements of this Article, and are documented to a sufficient level of detail, as indicated in Annex V.

[NRAs] 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 [NRA] or another competent body, independent of the telecommunications organisation and approved by the [NRA]. A statement concerning compliance shall be published annually.

…'

17 Annex IV to Directive 97/33, entitled 'List of examples of elements for interconnection charges', is worded as follows:

'Interconnection charges refer to the actual charges payable by interconnected parties.

The tariff structure refers to the broad categories into which interconnection charges are divided, e.g.

— charges to cover initial implementation of the physical interconnection, based on the costs of providing the specific interconnection requested (e.g. specific equipment and resources; compatibility testing),

— rental charges to cover the on-going use of equipment and resources (connection maintenance, etc.),

— variable charges for ancillary and supplementary services (e.g. access to directory services; operator assistance; data collection; charging; billing; switch-based and advanced services etc.),

— traffic related charges, for the conveyance of traffic to and from the interconnected network (e.g. the costs of switching and transmission), which may be on a per minute basis, and/or on the basis of additional network capacity required.

Tariff elements refer to the individual prices set for each network component or facility provided to the interconnected party.

Tariffs and charges for interconnection must follow the principles of cost-orientation and transparency, in accordance with Article 7(2).

…'

18 Annex V to Directive 97/33, entitled 'Cost accounting systems for interconnection', indicates, by way of example, some elements which may be included in such accounting systems. That annex is worded as follows:

'Article 7(5) calls for details of the cost accounting system; the list below indicates, by way of example, some elements which may be included in such accounting systems.

The purpose of publishing this information is to provide transparency in the calculation of interconnection charges, so that other market players are in a position to ascertain that the charges have been fairly and properly calculated.

This objective should be taken into account by the [NRA] and the organisations affected when determining the level of detail in the information published.

The list below indicates the elements to be included in the information published.

1. The cost standard used

   e.g. fully distributed costs, long-run average incremental costs, marginal costs, stand-alone costs, embedded direct costs, etc.

   including the cost base(s) used,

   i.e. historic costs (based on actual expenditure incurred for equipment and systems) or forward-looking costs (based on estimated replacement costs of equipment or systems).

2. The cost elements included in the interconnection tariff

   Identification of all the individual cost components which together make up the interconnection charge, including the profit element.

3. The degrees and methods of cost allocation, in particular the treatment of joint and common costs

Details of the degree to which direct costs are analysed, and the degree and method by which joint and common costs are included in interconnection charges.

4. Accounting conventions

i.e. the accounting conventions used for the treatment of costs covering:

— the timescale for depreciation of major categories of fixed asset (e.g. land, buildings, equipment, etc.),

— the treatment, in terms of revenue versus capital cost, of other major expenditure items (e.g. computer software and systems, research and development, new business development, direct and indirect construction, repairs and maintenance, finance charges, etc.)

…'

— Directive 98/10/EC

19 Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24), applicable at the material time in the main proceedings, is intended, according to Article 1 thereof, to ensure the harmonisation of conditions for open and efficient access to and use of fixed public telephone networks and fixed public telephone services in an environment of open and competitive markets, in accordance with the principles of open network provision.

20 Article 17 of that directive, entitled 'Tariff principles', provides:

'…

2. Tariffs for use of the fixed public telephone network and fixed public telephone services shall follow the basic principles of cost-orientation set out in [the] annex … to Directive 90/387/EEC.

3. Without prejudice to Article 7(3) of Directive 97/33/EC on Interconnection, tariffs for access to and use of the fixed public telephone network shall be independent of the type of application which the users implement, except to the extent that they require different services or facilities.

…'

21 Article 18(1) and (2) of that directive, entitled 'Cost accounting principles', provides:

'1. Member States shall ensure that, where an organisation has an obligation for its tariffs to follow the principle of cost-orientation in accordance with Article 17, the cost accounting systems operated by such organisations are suitable for the implementation of Article 17 and that compliance with such systems [is] verified by a competent body which is independent of those organisations. [NRAs] shall ensure that a statement concerning compliance is published annually.

2. [NRAs] shall ensure that a description of the cost accounting systems referred to in paragraph 1, showing the main categories under which costs are compiled and the rules used for the allocation of costs to voice telephony services, is made available to them on request. National regulatory authorities shall submit to the Commission, on request, information on the cost accounting systems applied by the organisations concerned.'

— Recommendation 98/195/EC

22 On 8 April 1998 the Commission adopted Recommendation 98/195/EC on interconnection in a liberalised telecommunications market (Part 1 — Interconnection pricing) (OJ 1998 L 73, p. 42).

— Recommendation 98/322/EC

23 On 8 April 1998 the Commission adopted, pursuant to Article 7(5) of Directive 97/33, Recommendation 98/322/EC on interconnection in a liberalised telecommunications market (Part 2 — Accounting separation and cost accounting) (OJ 1998 L 141, p. 6).

— Recommendation 2000/417/EC

24 On 25 May 2000 the Commission adopted Recommendation 2000/417/EC on unbundled access to the local loop to enable the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet (OJ 2000 L 156, p. 44).

— The Communication on unbundled access to the local loop

25 On 23 September 2000 the Commission published Communication 2000/C 272/10 'Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high-speed Internet'.

The new regulatory framework

26 On 7 March 2002 the European Council and the Parliament adopted four directives concerning the new regulatory framework applicable to electronic communications

('the NRF'), namely, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), and Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

27 Article 26 and the second subparagraph of Article 28(1) of Directive 2002/21 repeal, inter alia, Directives 90/387, 97/33 and 98/10 with effect from 25 July 2003.

28 Pursuant to Article 19 of Directives 2002/19 and 2002/20, Article 29 of Directive 2002/21 and Article 39 of Directive 2002/22, those directives entered into force on the day of their publication in the *Official Journal of the European Communities*, in this case, on 24 April 2002.

National legislation

The Law on telecommunications

29 Paragraph 24 of the Law on telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl 1996 I, p. 1120; 'the TKG 1996'), in the version applicable in the case in the main proceedings, states:

'1. Rates shall be based on the costs of efficient service provision and shall accommodate the requirements under Paragraph 24(2) below. …

2. Rates must not:

(1) contain surcharges which can be imposed solely as a result of the provider's dominant position, within the meaning of Paragraph 19 of the Law against restraints of competition, in the relevant telecommunications market;

(2) contain discounts which prejudice the competitive opportunities of other undertakings on the telecommunications market or

(3) confer advantages on certain operators compared with other operators using equivalent or similar telecommunications services on the telecommunications market in question,

unless there is evidence of an objectively justifiable reason therefor.'

30 Paragraph 27(1) of the TKG 1996 provides that the NRA is to approve rates either on the basis of the cost of providing an efficient service for each type of service or on the basis of the average price, set by that authority, for a basket of services. Paragraph 27(4) empowers the Federal Government to issue regulations setting out the rules applying to different types of approvals and defining the terms and conditions under which the NRA is required to decide which of the procedures listed in Paragraph 27(1) is to apply.

Telecommunications Rates Regulation

31 The Telekommunikations-Entgeltregulierungsverordnung (Telecommunications Rates Regulation) of 1 October 1996 (BGB1 1996 I, 1492; 'the TEntgV') contains, inter alia, the following provisions:

'*Paragraph 2*

1. The company which filed the application referred to in Paragraph 27(1) of the TKG [1996] must produce the following documents relating to the service in question in each case:

(1) a detailed description of the service, including information on the quality of the service and a copy of the terms and conditions applying to it,

(2) turnover figures for the last five years and also forecast turnover for the year of filing and for the next four years,

(3) information on sales volumes and, if possible, on price elasticity of demand for the period referred to in point (2),

(4) figures for the trend in the various costs referred to in Paragraph 2 (cost statements) and the trend in variable cost margins for the period referred to in point (2);

(5) information on the financial impact on customers, as regards in particular the structure of demand from private and business customers, and on competitors who receive the service as a preliminary service, and

(6) in the case of differential rates, information on the effects on the user groups affected by the differential rates, as well as objective justification for the proposed differential rates.

2. Cost statements according to the fourth point of subparagraph 1 above shall comprise costs that can be directly allocated to the given service (direct costs) and costs that cannot be directly allocated to the given service (common costs). Statements relating to common costs shall set forth how the common costs are allocated to the given service. In such allocation, the filing company shall take account of the criteria of the Council directives adopted under Article 6 of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision … Also to be included in the cost statements according to sentence 1 above is an account of:

(1) the method used to determine the costs;

(2) the level of payroll costs, depreciation, cost of capital, costs in relation to materials;

(3) target and actual capacity utilisation in the reference period; and

(4) the quantities used as a basis for calculating the costs of providing the service, including the relevant prices, and in particular the elements of the public telecommunications network and the cost of using those elements.

3. The [NRA] may reject an application for rates approval where the company fails to produce the documents referred to in Paragraphs 1 and 2 in full.

Paragraph 3

1. The [NRA] is to examine the documentation submitted by the filing company with a view to establishing whether and to what extent the rates proposed are based on the cost of efficient service provision within the meaning of subparagraph 2 below.

2. The costs of efficient service provision are derived from the long-term additional costs of providing the service plus an appropriate amount for volume-neutral common costs, both inclusive of an appropriate return on capital employed, to the extent that these costs are required to provide the offering.

3. In the context of the examination provided for in subparagraph 1 above, the [NRA] shall, for the purposes of comparison, refer additionally to, in particular, the prices and costs of companies offering corresponding services on comparable markets in a competitive situation. In doing this, the particular features of the reference markets must be taken into account.

4. Where cost statements under Paragraph 2(2) exceed the cost of efficient service under that provision, they are to be deemed expenditure surplus to efficient provision. That expenditure and other neutral expenditure shall only be taken into account in the rates approval procedure if, and for such duration as, there is a legal requirement to that effect or the filing company provides other objective justification therefor.'

The case in the main proceedings and the questions referred

32 Deutsche Telekom is a notified operator of fixed public telephone networks within the meaning of Regulation No 2887/2000.

33 Arcor, formerly Mannesmann Arcor AG & Co, is a beneficiary within the meaning of that regulation and, on that basis, it supplies, inter alia, ISDN telephone extensions for end consumers. Those connections can, however, be used only if Arcor has unbundled access to the respective local loop in Deutsche Telekom's telecommunications network.

34 As is apparent from the decision to refer, on 30 September 1998 Arcor signed a first contract with Deutsche Telekom on unbundled access to the latter's local loops.

35 On 8 March 1999 Arcor lodged a complaint with the Commission based on Article 86 of the EC Treaty (now Article 82 EC) against Deutsche Telekom concerning the prices it charged for access to its local networks, each of which contains a number of local loops connecting end-users.

36 By a decision of 30 March 2001, amended on 17 April 2001, the NRA, namely the Bundesnetzagentur (Federal Network for Electricity, Gas, Telecommunications, Post and Rail) partially approved Deutsche Telekom's rates for unbundled access to its local loop (monthly licence fee for use of the line and a one-off provision and cancellation fee) from 1 April 2001. Those rates included numerous types of access charged at varying amounts. According to the decision to refer, the approval for the monthly licence fee expired on 31 March 2003, and, as for the rest, the approval expired on 31 March 2002 at the latest.

37 On 30 April 2001 Arcor brought an action before the competent court seeking partial annulment of the approval decision referred to above on the ground that the approved rates are too high. In that regard, it claims, inter alia, that the investment value of the local loop was incorrectly determined by applying the analytical cost model and the annuity method and by failing to take account of other costs and expenses. According to Arcor, that evaluation made it possible to calculate the rates for unbundled access to the local loop not on the basis of the costs of the existing network but on the basis of fictitious costs relating to the putting in place of a new local network.

38 By Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 [of the] EC [Treaty] (Cases COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9), Deutsche Telekom AG was fined EUR 12.6 million for infringement of Article 82(a) EC by charging its competitors and

end-users unfair monthly and one-off charges for access to the local network, thus significantly impeding competition on the market for access to the local network.

39 It is in those circumstances that the Verwaltungsgericht Köln (Administrative Court, Cologne) (Germany) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1(4) of Regulation … No 2887/2000 to be understood as meaning that the conditions for cost-orientation under Article 3(3) of that regulation lay down minimum requirements in the sense that national law of the Member States may not deviate from that standard to the prejudice of beneficiaries?

(2) Are imputed interest and cost-accounting depreciation also encompassed by the cost-orientation requirement under Article 3(3) of Regulation … No 2887/2000?

(3) If Question 2 is to be answered in the affirmative:

(a) Is the calculation basis for that interest and depreciation the replacement value of the assets after the depreciation made prior to the time of valuation, or is the calculation basis exclusively the current replacement value, expressed in terms of current daily prices at the time of valuation?

(b) In any event, do the costs used as the calculation basis for imputed interest and cost-accounting depreciation, in particular those which are not directly associated with service (overheads), have to be proven by comprehensible documents detailing the costs of the notified operator?

(c) If Question 3(b) is to be answered either entirely or partially in the negative:

May the costs alternatively be proven by a valuation made on the basis of an analytical cost model?

Which methodological and other substantive requirements do those alternative methods of valuation have to satisfy?

(d) Is the [NRA] entitled, when assessing cost-orientation in the context of its authority under Article 4(1) to (3) of Regulation … No 2887/2000, to a "margin of discretion" which is subject only to limited judicial control?

(e) If Question 3(d) is to be answered in the affirmative:

Is that margin also applicable, in particular, to methods of cost calculation and questions of determining the appropriate amount of imputed interest (for borrowed and/or own capital) and appropriate depreciation periods?

Where do the boundaries of that margin of discretion lie?

(f) Do the cost-orientation requirements at least serve to protect the rights of competitors as beneficiaries, with the consequence that those competitors can claim legal protection against rates for access which are not set on the basis of cost-orientation?

(g) Does the notified operator bear the burden of unprovability (burden of proof) if, in the supervisory procedure under Article 4 of Regulation … No 2887/2000 or in the subsequent judicial proceedings, costs are totally or partially unverifiable?

(h) If Questions 3(f) and 3(g) are to be answered in the affirmative:

Is the burden of proof for the cost-orientation also on the notified operator if a beneficiary competitor brings an action against rates approved by a regulatory authority under national law on the ground that, since they were not set on the basis of cost-orientation, the approved rates for access are too high?'

The questions

40 By a series of questions the national court asks the Court of Justice to interpret several provisions of Regulation No 2887/2000 and, in particular, those relating to the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

41 As is apparent from the decision to refer, the questions referred raise four distinct issues.

42 The first concerns the definition of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, as laid down in Article 3(3) of Regulation No 2887/2000.

43 The second concerns the scope of that principle in the light of Article 1(4) of that regulation.

44 The third relates to the discretion of the NRAs in the application of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

45 The fourth and final question concerns procedural aspects and, in particular, review by the courts where that principle is to be applied.

46 It is thus on that basis that the questions referred by the national court need to be answered.

Questions 2 and 3(a) and (c): the definition of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation

47 Without expressly seeking a definition of the principle that rates for unbundled access to the local loop and related facilities are to be set on the basis of cost-orientation, as

laid down in Article 3(3) of Regulation No 2887/2000, the national court invites the Court of Justice to adopt a position on the costs which have to be taken into consideration in order to orientate the rates for unbundled access to the local loop (Question 2), on the calculation basis for those costs (Question 3(a)), and on the proof of those costs (Question 3(b) and (c)).

48 Before answering those questions, it should be noted that Regulation No 2887/2000 does not define the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

49 As is apparent from the wording of Article 3(3), that regulation is merely drafted in general terms to the effect that notified operators are to charge prices for unbundled access to the local loop set on the basis of cost-orientation.

50 In those circumstances, it must be examined whether there are any indications concerning the principle of cost-orientation in the directives of the FRF and, in particular, in Directives 97/33 and 98/10, applicable in the case in the main proceedings, which, according to recital 15 in its preamble, Regulation No 2887/2000 is intended to complement.

51 In that regard, it should be noted that the principle of cost-orientation is referred to, in a general way, in several directives of the FRF, such as Directives 97/33 and 98/10.

52 Article 7(2) of Directive 97/33, which does not refer to rates but to charges for interconnection, states that those charges are to follow the principles of transparency and cost-orientation.

53 Article 17(2) of Directive 98/10 provides that tariffs for use of the fixed public telephone network and fixed public telephone services are to follow the basic principles of cost-orientation set out in the annex to Directive 90/387.

54 In that regard, the second paragraph of point 3 of that annex provides that tariffs must be based on objective criteria and, in principle, be set on the basis of cost-orientation.

55 However, although there are a few explainations in the case-law of the meaning of certain specific costs (see Case C-146/00 *Commission* v *France* [2001] ECR I-9767; Case C-109/03 *KPN Telecom* [2004] ECR I-11273; and Case C-438/04 *Mobistar* [2006] ECR I-6675), Directives 97/33 and 98/10 do not provide any definition of the principle of cost-orientation.

56 It is apparent from the above that, generally, Community law lays down, in various areas of the telecommunications sector, the principle of cost-orientation of rates or prices without specifying what that means in each of the areas concerned (interconnection, voice telephony or the local loop).

57 In those circumstances, to define the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, account must be taken not only of the wording of that principle but also of its context and the objectives pursued by the legislation laying down that principle.

58 In that regard, it should be pointed out, first, that, according to recital 7 in the preamble to Regulation No 2887/2000, unbundled access to the local loop allows new entrants to compete with notified operators in offering high bit-rate data transmission services for continuous internet access and for multimedia applications based on digital subscriber line technology.

59 In addition, according to Article 1(1) thereof, the aim of Regulation No 2887/2000 is to intensify competition, through the setting of harmonised conditions for unbundled access to the local loop, in order to foster the competitive provision of a wide range of electronic communications services.

60 However, that regulation does not lay down, to that end, a principle that rates for unbundled access to the local loop are set freely, in the spirit of an open competitive market, by the rules of supply and demand.

61 As is apparent from the wording used in Article 3(3) of Regulation No 2887/2000, operators charge prices on the basis of the costs which they have incurred and not on the basis of free competition.

62 In that regard, it should be noted that Article 4(4) of that regulation provides that, when the NRA determines that the local access market is sufficiently competitive, it is to relieve the notified operators of the obligation for prices to be set on the basis of cost-orientation.

63 It is also in that sense that, in Article 1(6) of Recommendation 2000/417, which is referred to in recital 13 in the preamble to Regulation No 2887/2000, the Commission states that, for as long as the level of competition in the local access network is insufficient to prevent excessive pricing of unbundled access to local loops, it is recommended that prices for unbundled access to local loops follow the principle of cost-orientation.

64 It follows that the pricing principle laid down in Article 3(3) of Regulation No 2887/2000 does not follow the rules of an open competitive market driven by the rules of supply and demand. On the contrary, that principle imposes the obligation on notified operators to set their rates for access to the local loop on the basis of cost-orientation for a given period and with the aim of enabling the market concerned to be opened up to competition gradually.

65 Second, it is apparent from recital 11 in the preamble to Regulation No 2887/2000, read in conjunction with Article 3(3) thereof, that, for unbundled access to the local loop, rates must be set on the basis of cost-orientation, in the sense that the rules on rates must enable the provider of the local loop, in this case the notified operator, such as Deutsche Telekom, to be able to cover the costs already incurred in relation to the provision of that loop.

66 It thus follows from those provisions that the pricing rule laid down in Article 3(3) of Regulation No 2887/2000 requires that, when setting rates for unbundled access to the local loop on the basis of cost-orientation, the notified operator must take account of quantitative elements which are in line with the costs which he incurred in putting that loop in place.

67 Third, and as is also apparent from recital 11 in the preamble to Regulation No 2887/2000, the notified operator must derive a reasonable return from the setting of rates for unbundled access to its local loop in order to ensure the long-term development and upgrade of local access infrastructure.

68 Therefore, in the context of unbundled access to the local loop, the pricing principle laid down in Article 3(3) of Regulation No 2887/2000 allows the notified operator to charge other telecommunications operators suitable fees to enable it, at least, to ensure the proper functioning of the local infrastructures in the case of unbundled access to them.

69 It follows from the above findings that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000, is to be understood as the obligation on notified operators, in the course of the gradual opening of the telecommunications market to competition, to set those rates in accordance with the costs incurred in putting in place the local loop, while deriving a reasonable return from the setting of those rates in order to ensure the long-term development and upgrade of existing telecommunications infrastructures.

Question 2: costs

70 It should be pointed out, at the outset, that Regulation No 2887/2000 does not contain any provision indicating the costs which must be taken into consideration when the notified operator offers rates for unbundled access to its local loop.

71 However, as has been pointed out in paragraph 67 above, it is apparent from reading recital 11 in the preamble to Regulation No 2887/2000, in conjunction with Article 3(3) of that regulation, that the notified operator is to offer tariffs for unbundled access to the local loop in accordance with the costs it has already incurred in putting the local network in place and, with the remuneration it receives, ensures the economic viability of that network.

72 It follows from those provisions that, in providing unbundled access to its local loop to other telecommunications operators, the notified operator reflects in particular in the proposed tariffs the costs relating to the investments made. Therefore, in fixing the tariffs for unbundled access to the local loop, account must be taken of the costs which the notified operator had to incur for the investments made in putting its local infrastructures in place.

73 That conclusion is confirmed, first, by Annex IV to Directive 97/33 which refers, by way of example, to elements for interconnection charges, namely actual charges payable by interconnected parties. That annex mentions, inter alia, charges to cover initial implementation of the physical interconnection, rental charges to cover on-going use of equipment and resources, variable charges for ancillary and supplementary services, and traffic related charges.

74 In that context, Annex V to that directive contains, second, and by way of example, a list of costs which must be taken into account when setting interconnection charges and which relate to the investments made, such as costs based on actual expenditure incurred for equipment and systems.

75 It is in those circumstances that the national court asks the Court of Justice whether interest and depreciation are encompassed by the costs which have to be taken into consideration when setting tariffs for unbundled access to the local loop in accordance with the principle laid down in Article 3(3) of Regulation No 2887/2000.

76 Even if in its question the national court makes a general reference to interest and depreciation, it is apparent from the decision to refer, from the context of the dispute

in the main proceedings and the observations submitted to the Court of Justice that it is essentially necessary to examine whether the interest on the capital invested and the depreciation of the fixed assets deployed for the initial implementation of the local telecommunications infrastructures are encompassed by such costs.

77 The interest on the capital invested are costs to be taken into account to set rates for unbundled access to the local loop in accordance with the principle laid down in Article 3(3) of Regulation No 2887/2000. Those costs represent the revenue which would have been earned on that capital had it not been invested in the local loop.

78 The same is true of interest on loans, which represents, in reality, the cost of the debt incurred in connection with investments made in the initial implementation of the local loop.

79 As regards the depreciation of the fixed assets deployed for the construction of the local network, it should be noted that the taking into account of that depreciation makes it possible to catch the loss in real value of those assets and constitutes a cost for the notified operator.

80 In that regard, that depreciation relates to the investments made by the notified operator in the initial implementation of the local loop and, consequently, it falls within the operating costs which need to be taken into account in accordance with the pricing principle laid down in Article 3(3) of Regulation No 2887/2000.

81 That finding is confirmed, in addition, by Annex V to Directive 97/33 which provides that among the elements which may be included in the cost accounting system are the accounting conventions used for the treatment of costs covering the timescale for depreciation of major categories of fixed assets.

82 Also to that effect, Recommendation 98/322, whose annex concerning the guidelines on implementing accounting separation refers, in point 4 thereof, to operating costs of operators and includes among the costs — thus the costs incurred — depreciation.

83 That same point of the annex to Recommendation 98/322 also refers to the cost allocation process, described in point 3 of that annex, and states that that process is valid for operating costs and investment costs and, in that regard, it expressly refers to depreciation as a category of operating costs.

84 It follows from all of the above considerations that the answer to Question 2 must be that the interest on the capital invested and the depreciation of the fixed assets deployed for the initial implementation of the local loop are among the costs to be taken into account in accordance with the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000.

Question 3(a): concerning the calculation basis of costs

85 The national court requests the Court to answer the question whether the calculation basis of costs which must be taken into account when setting rates for unbundled

access to the local loop is the replacement value of the assets after the deduction for depreciation made prior to the time of valuation, or exclusively the current replacement value, expressed in terms of current prices at the time of valuation.

86 By that question the national court asks whether the calculation basis of costs must be based on the costs which represent the construction ex nihilo by an operator, other than the notified operator, of a new local access infrastructure for the provision of equivalent telecommunications services ('the current cost') or on the costs actually incurred by the notified operator and taking account of depreciation already made ('the historic cost').

87 It should be pointed out, at the outset, that Regulation No 2887/2000 does not give any guidance on the calculation basis of costs which must be taken into account when setting rates for unbundled access to the local loop.

88 In those circumstances, it needs to be examined whether Directives 97/33 and 98/10, which Regulation No 2887/2000 seeks to supplement, contain any guidance on that issue.

89 In the first place, Deutsche Telekom, the German Government and the Bundesrepublik Deutschland, as party to the main proceedings, submit that, in spite of the lack of guidance in Regulation No 2887/2000 and the directives of the FRF applicable in the case in the main proceedings, significant indications do exist that the Community legislature opted in favour of a calculation method based on current costs.

90 Indications to that effect are said to be apparent, first, from point 6 of Recommendation 98/195, which provides that activity-based allocations are to use current costs rather than historic costs, and that same point of the recommendation shows that the NRAs set deadlines for their notified operators to implement new costs accounting systems based on current costs where such systems are not already in place.

91 The same goes, second, for point 4 of Recommendation 98/322 which provides that the evaluation of network assets at forward-looking or current value of an efficient operator is a key element of the current cost accounting methodology.

92 Third, Article 1(6) of Recommendation 2000/417 confirms the abovementioned indications in providing that, in the application of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, as a general rule current costs have to be taken into account, namely the costs of building an efficient modern equivalent infrastructure and providing such a service at the time of valuation of the network.

93 Fourth, point 6 of Communication 2000/C 272/10, entitled 'Duties of national regulatory and competition authorities', also refers to the pricing system based on current costs.

94 In response to that line of argument, the Court finds that it is necessary to rely on Recommendation 2000/417 which, as opposed to the other recommendations cited above, concerns specifically unbundled access to the local loop and also refers to Directives 97/33 and 98/10. Even if recommendations are not intended to produce

binding effects, the national courts are bound to take the recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions (see Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraph 18, and Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraph 41). Article 1(6) of Recommendation 2000/417 lays down the principle of a forward-looking approach based on current costs. As is apparent from that provision, that approach will foster fair and sustainable competition and provide alternative investment incentives.

95 However, it is clear from that provision that a different approach, in particular one based on historic costs to avoid distortions of competition, cannot be ruled out. Thus, the NRA is in a position to take account of each individual competitive situation.

96 In the second place, Deutsche Telekom, the German Government and the Bundesrepublik Deutschland, as party to the main proceedings, submit that, even supposing that it is not apparent from the regulatory framework applicable in the case in the main proceedings that the calculation of costs must be based on current costs, economic considerations specific to the telecommunications sector require in any case, as shown by the practice followed in certain Member States, a method of calculation based exclusively on those costs.

97 In that regard, it must be held that, in view of the technological evolution in the telecommunications sector, it is possible that the current cost of certain investments, related in particular to the material used for the network put in place, may, in certain cases, be lower than the historic cost.

98 It follows that the possibility for the notified operator to base the calculation basis of costs exclusively on the current costs of its investments enables it, in reality, to choose those which could enable it to set rates for unbundled access to the local loop as high as possible and to not take account of pricing elements which would favour beneficiaries. In that respect, the notified operator could effectively circumvent the rules concerning the setting of rates for unbundled access to the local loop on the basis of cost-orientation.

99 It must thus be held that a method of calculation based exclusively on current costs is also not the most appropriate method of applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

100 In the third place, Arcor submits that, as the calculation basis, account must be taken of historic costs and not current costs, since, in the latter case, a beneficiary within the meaning of Regulation No 2887/2000 would be required to pay the notified operator an excessively high price given the age of the local access infrastructure; moreover, the network might already have been amortised.

101 In that regard, it should be pointed out, first, that unbundled access to the local loop enables new telecommunications operators, which do not own their own infrastructures, to enter into competition with notified operators by using the latters' infrastructures. As indicated in recital 6 in the preamble to Regulation No 2887/2000, it would be impossible to rapidly open the telecommunications sector to competition if it were necessary to wait for every operator concerned to be able to construct its own local infrastructure.

102 It is precisely with the aim of avoiding a new distortion of competition related to the lack of new networks for operators other than notified operators that Regulation No 2887/2000 provided for unbundled access to the local loop.

103 In those circumstances, it should be pointed out, second, that the pricing rule laid down in Article 3(3) of that regulation ensures that the local loop provider is able to cover its related costs in this regard plus a reasonable return in order to ensure the long-term development and upgrade of local access infrastructure.

104 Consequently, if, as claimed by Arcor, for the application of the pricing rule laid down in Article 3(3) of Regulation No 2887/2000, the cost calculation basis were based exclusively on historic costs, which, depending of the age of the network, could potentially lead to account being taken of an almost entirely depreciated network and thus result in a very low tariff, the notified operator would be faced with unjustified disadvantages.

105 First, it would be required to open its network to competitors and, consequently, to accept the potential loss of part of its clientele.

106 Second, the remuneration which it would receive in consideration for the provision of unbundled access to the local loop would not enable it to make a reasonable profit from the operation, bearing in mind that it is also required, as stated in recital 11 in the preamble to Regulation No 2887/2000, to ensure the long-term development and upgrade of the local infrastructure.

107 It should be added in that regard that the costs related to maintaining and upgrading the local infrastructure are calculated in any case on the basis of the actual value of the notified operator's fixed assets.

108 It follows that the cost calculation basis which must be taken into account when setting rates for unbundled access to the local loop cannot be based exclusively on historic costs, otherwise the notified operator would suffer, compared with the beneficiary, unjustified disadvantages, which is precisely what Regulation No 2887/2000 seeks to prevent. The aim of that regulation is to enable both beneficiaries and the notified operator to operate on the market so as to establish normal competition in the medium term.

109 It results from all of the above that there is no indication in Regulation No 2887/2000 and Directives 97/33 and 98/10 of the FRF in favour of a method of calculation based exclusively on current costs or historic costs and that the taking into account of only one or other of those bases is likely to call into question the aim of that regulation, namely to intensify competition through the setting of harmonised conditions for unbundled access to the local loop, in order to foster the competitive provision of a wide range of electronic communications services.

110 In those circumstances, it is necessary to consider, irrespective of the reference made by the national court to current costs and historic costs, whether there is any other indication in Directives 97/33 and 98/10, which Regulation No 2887/2000 aims to supplement, concerning the calculation basis of costs.

111 In that regard, the Court notes that, according to recital 10 in the preamble to Directive 97/33, the level of charges should promote productivity and encourage efficient and sustainable market entry and should not be below a limit calculated by the use of long-run incremental cost and cost allocation and attribution methods based on actual cost causation, nor above a limit set by the stand-alone cost of providing the interconnection in question.

112 Also to that effect, Article 7(2) of that directive provides that charges for interconnection are to follow the principles of transparency and cost-orientation and that the burden of proof that charges are derived from actual costs including a reasonable rate of return on investment is to lie with the organisation providing interconnection to its facilities.

113 Equally, Annex IV to Directive 97/33 categorises interconnection charges as actual charges payable by interconnected parties.

114 In Annex V to Directive 97/33 the Community legislature refers to the 'cost standard used' and, where it is necessary to determine the method of calculation of those costs, that annex uses 'historic costs' as a reference, based on actual expenditure incurred for equipment and systems, or 'forward-looking costs', based on estimated replacement costs of equipment or systems.

115 It results from the abovementioned provisions that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation requires account to be taken of actual costs, namely costs already paid by the notified operator and forward-looking costs based on an estimation of the costs of replacing the network or certain parts thereof.

116 In the absence of specific Community legislation, it is the task of the NRAs to define the detailed rules for determining the calculation basis on which depreciation must be taken into account.

117 Thus, pursuant to the provisions of Directive 97/33, which also apply to the local loop under Regulation No 2887/2000, the method of cost calculation may be based both on costs already paid by the notified operator — which presupposes the taking into account, as the basis of reference, of costs at their historic value — and on forward-looking costs, which does not exclude the taking into account, as the basis of reference, of costs at their current value.

118 It is under those conditions that the NRAs have to calculate the actual costs which have to be taken into account for the application of the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

119 It follows from all of the above considerations that the answer to Question 3(a) must be that, when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000, in order to determine the calculation basis of the costs of the notified operator, the NRAs have to take account of actual costs, namely costs already paid by the notified operator, and forward-looking costs, the latter being based, where relevant, on an estimation of the costs of replacing the network or certain parts of it.

Question 3(b) and (c): proof of costs

120 By Question 3(b) the national court asks the Court of Justice to determine whether the costs which have to be taken into account in the application of the pricing

principle laid down in Article 3(3) of Regulation No 2887/2000 have to be proven by complete and comprehensible accounting documents.

121 If that question is to be answered in the negative, the national court asks, by Question 3(c), whether those costs may be proven by a valuation made on the basis of a bottom-up or top-down analytical cost model. In that regard, the national court also asks the Court to determine, in particular, the methodological requirements of that valuation.

— Question 3(b): accounting documents

122 As regards proof, on the basis of complete and comprehensible accounting documents, of the costs which have to be taken into consideration when applying the pricing principle laid down in Article 3(3) of Regulation No 2887/2000, it should be noted that that regulation and Directives 97/33 and 98/10 do not contain any provisions in that regard.

123 Arcor submits, however, that there are indications in Annex V to Directive 97/33 that the Community legislature sought to ensure the adoption of a cost-accounting system based on detailed documents in such a way that a notified operator cannot circumvent that system by sending incomplete and incomprehensible accounting documents. That implies that the NRAs are to use theoretical cost-accounting models.

124 Supposing that to be the case, in the absence of an express provision to that effect, it cannot be inferred from Annex V to Directive 97/33 alone that there is an obligation to prove in each case, by means of complete and comprehensible documents, the costs taken into account when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation.

125 In that regard, the Court observes that Article 4(2)(b) of Regulation No 2887/2000 provides that the NRA is to have the power to require notified operators to supply information relevant for the implementation of that regulation.

126 Thus, pursuant to that provision, NRAs may request information even in respect of documents justifying costs which have to be taken into consideration when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000.

127 It follows from the above that the answer to Question 3(b) must be that, pursuant to Article 4(2)(b) of Regulation No 2887/2000, the NRA may request notified operators to supply relevant information on the documents justifying the costs taken into account when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation. Since Community law does not contain any provision concerning the accounting documents to be checked, it is the task of the NRAs alone, in accordance with the law applicable, to examine whether, for the purposes of cost-accounting, the documents produced are the most appropriate ones.

— Question 3(c): analytical cost models

128 As regards analytical cost models, it should be noted, as a preliminary point, that, in the analytical model for bottom-up costs, it is necessary to take account of the current value of the investments in the construction of a new network. That model is based on the costs which an operator would incur to acquire and exploit its own network. By contrast, the top-down model is based on the costs actually incurred by the notified operator.

129 In that regard, it should be noted at the outset that neither Regulation No 2887/2000 nor Directives 97/33 and 98/10 contain any concrete and consistent guidance on the question referred by the national court.

130 In addition, the fifth recital in the preamble to Recommendation 98/322 states that although the bottom-up economic/engineering models are becoming highly sophisticated, they are as yet imperfect, and thus reconciliation of top-down and bottom-up approaches is advised for the foreseeable future.

131 Therefore, it is apparent from Regulation No 2887/2000 and the legislation of the FRF applicable in the case in the main proceedings that there is no evidence to establish to the required legal standard that the Community legislature opted for either a bottom-up or a top-down accounting model.

132 In the absence of further clarification, it must be found that Community law leaves to the NRAs, on the basis of the applicable law, the choice of cost-accounting method which they deem most appropriate in a specific case.

133 In those circumstances it is not necessary to answer the subsequent question concerning the methodological requirements of the valuation based on an analytical model of bottom-up or top-down costs.

134 The answer to Question 3(c) must therefore be that when NRAs are applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, Community law does not preclude them, in the absence of complete and comprehensible accounting documents, from determining the costs on the basis of an analytical bottom-up or top-down cost model.

Question 1: the scope of the principle that rates for access to the local loop are to be set on the basis of cost-orientation

135 By its first question the national court asks whether Article 1(4) of Regulation No 2887/2000 must be understood as meaning that the principle that rates for access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of that regulation, constitutes a minimum requirement from which national law of the Member States may not deviate to the prejudice of beneficiaries.

136 In that regard, pursuant to Article 1(4) thereof, Regulation No 2887/2000 is without prejudice to the rights of Member States to maintain or introduce measures in conformity with Community law which contain more detailed provisions than those set out in that regulation and/or are outside the scope of that regulation, inter alia with respect to other types of access to local infrastructures.

137 As regards Article 3(3) of that regulation, it should also be pointed out that it merely states, in a general manner, that notified operators are to charge prices for unbundled access to the local loop set on the basis of cost-orientation, without any further details.

138 In view of the wording of those provisions of Regulation No 2887/2000 and the facts of the case in the main proceedings, it must be found that, by its first question, the national court asks the Court of Justice, in essence, whether detailed national measures, adopted in accordance with the provisions of Article 1(4) of that regulation, are capable of rendering inapplicable the principle that rates for access to the local loop are to be set on the basis of cost-orientation, as laid down in Article 3(3) of that regulation.

139 In that regard, the Court notes, first, that Article 1(4) of Regulation No 2887/2000 does grant the Member States the possibility to maintain in force or to introduce measures which contain more detailed provisions than those laid down in that regulation and, in particular, those concerning the principle that rates for access to the local loop are to be set on the basis of cost-orientation.

140 However, such a provision cannot be interpreted as granting the Member States the right to derogate from that principle by maintaining in force or adopting national measures.

141 It is apparent from the wording of Article 1(4) of Regulation No 2887/2000 that that provision permits the Member State concerned to supplement, by means of detailed national provisions, the relevant provisions of that regulation, in this case those concerning the principle that rates for access to the local loop are to be set on the basis of cost-orientation, but not to derogate from it.

142 The discretionary power which Article 1(4) of Regulation No 2887/2000 grants to the Member State concerned is necessary in the light of the fact that, as pointed out in paragraphs 48 and 49 above, that regulation does not contain any specific information concerning the definition of that principle.

143 Consequently, the possibility of maintaining in force or introducing measures containing more detailed provisions, recognised in Article 1(4) of Regulation No 2887/2000, authorises the Member States to lay down provisions of national law giving concrete expression to the principle that rates for access to the local loop are to be set on the basis of cost-orientation provided that they respect the limits laid down in Article 1(4).

144 In addition, it should be pointed out that that regulation was adopted, as is stated in recital 14 in the preamble thereto, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty and it is only in that context that it is expressly stated that the Member States retain the possibility to establish specific rules in the field in question.

145 Furthermore, the parties to the main proceedings which submitted observations to the Court of Justice do not argue that the principle that rates for access to the local loop are to be set on the basis of cost-orientation can not apply by reason of Article 1(4) of Regulation No 2887/2000, since the national provisions applicable in the main proceedings, namely Paragraph 24 of the TKG 1996 and Paragraphs 2 and 3 of the TEntgV, constitute a detailed application of that principle.

146 By contrast, they have submitted that the pricing principle at issue in the main proceedings must be given concrete expression by national provisions in the context of the discretion which the Member States enjoy in the field and that, in any event, that discretion has not been exceeded in this instance.

147 In those circumstances, the question arises, second, as to whether the national provisions at issue in the main proceedings, such as Paragraph 24 of the TKG 1996 and Paragraphs 2 and 3 of the TEntgV, constitute detailed provisions within the meaning of Article 1(4) of Regulation No 2887/2000.

148 It is clear from a mere reading of those national provisions that they are detailed provisions within the meaning of Article 1(4) of that regulation.

149 Those national provisions implement, in accordance with Community law, the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation by means of technical measures regarding, inter alia, the charges and documents which have to be produced by the undertaking which has made an application for rates approval.

150 It follows from the above that the answer to Question 1 must be that the possibility granted to the Member States, in Article 1(4) of Regulation No 2887/2000, to adopt detailed national measures cannot render inapplicable the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation as laid down in Article 3(3) of that regulation.

Question 3(e): the discretion of the NRAs in applying the principle that rates for access to the local loop are to be set on the basis of cost-orientation

151 It should be pointed out that Article 4(1) of Regulation No 2887/2000, entitled 'Supervision by the [NRA]', provides that the NRA is to ensure that charging for unbundled access to the local loop fosters fair and sustainable competition.

152 In that regard, Article 4(2) of that regulation states that the NRA is to have the power, first, to impose changes on the reference offer for unbundled access to the local loop and related facilities, including prices, where such changes are justified, and, second, to require notified operators to supply information relevant for the implementation of that regulation.

153 It is apparent from those provisions that the NRAs have broad discretion to intervene in the various pricing aspects for the provision of unbundled access to the local loop, including the discretion to change prices, and thus the proposed tariffs.

154 In that regard, in accordance with the principle laid down in Article 3(3) of Regulation No 2887/2000, the level of rates for unbundled access to the local loop must be set on the basis of actual costs, namely the historic and forward-looking costs incurred by the notified operator.

155 In those circumstances, it follows that the broad discretion granted by Regulation No 2887/2000 to the NRAs as regards the assessment of pricing aspects of unbundled access to the local loop also concerns the evaluation of the costs incurred by the notified operator.

156 Therefore, it must be held that the broad discretion enjoyed by the NRAs under Article 4(2) of Regulation No 2887/2000 also relates to the costs taken into account, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost-accounting models used to prove them.

157 In addition, it is also apparent from Article 4(2) of that regulation that, in the context of the broad discretion granted to them by those provisions, the NRAs are also entrusted with the power to conduct proceedings to control the pricing for unbundled access to the local loop in that they may request information concerning, inter alia, costs incurred in applying the principle that rates for access to the local loop are to be set on the basis of cost-orientation.

158 It follows that Regulation No 2887/2000 grants the NRAs not only broad discretion, but also the appropriate means to enable them to examine, in the most effective way, the correct application of the principle laid down in Article 3(3) of that regulation.

159 The answer to Question 3(e) must therefore be that it is apparent from Article 4(1) and (2) of Regulation No 2887/2000 that, when examining the rates of notified operators for the provision of unbundled access to their local loop in light of the pricing principle laid down in Article 3(3) of that regulation, the NRAs have a broad discretion concerning the assessment of the various aspects of those tariffs, including the discretion to change prices, and thus the proposed tariffs. That broad discretion also relates to the costs incurred by notified operators, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost-accounting models used to prove them.

Question 3(d) and (f) to (h): the procedural aspects related to the application of the principle that rates for access to the local loop are to be set on the basis of cost-orientation

160 The national court requests the Court of Justice, first, to rule on the scope of the review by the courts of decisions of the NRAs concerning the application of the pricing principle laid down in Article 3(3) of Regulation No 2887/2000.

161 Second, the national court requests the Court of Justice to give a ruling on whether telecommunications operators falling within the category which Regulation No 2887/2000 classes as beneficiaries, namely competing third parties operating in the telecommunications sector, are able to challenge before the courts decisions of the NRAs authorising the tariffs of notified operators for the provision of unbundled access to their local loop.

162 Third and finally, it asks, in that context, who is to bear, in particular in court proceedings or the supervisory procedure laid down in Article 4 of Regulation No 2887/2000, the burden of proving that the principle that rates for access to the local loop are to be set on the basis of cost-orientation referred to in Article 3(3) of that regulation has been respected.

Question 3(d): the scope of the review by the courts

163 It should be pointed out at the outset that neither Regulation No 2887/2000 nor the directives of the FRF envisage harmonisation of the national rules concerning the applicable court proceedings or, in that regard, the scope of any review by the courts.

164 The German Government, the Bundesrepublik Deutschland, as party to the main proceedings, and Deutsche Telekom base their argument on the case-law according to which, when Community law grants the Community institutions a wide measure of discretion by reason of complex economic assessments which they carry out in the field at issue, any review by the Community judicature must be limited to verifying that the measures in dispute are not vitiated by a manifest error or a misuse of powers, or that the institution in question did not clearly exceed the bounds of its

discretion (see, inter alia, Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 34, and Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 75).

165 By transposing that case-law by analogy to the case in the main proceedings, it is claimed that the assessments made by the NRAs concerning the application of the pricing principle laid down in Article 3(3) of Regulation No 2887/2000, namely those concerning the costs to be taken into account, their method of calculation and the accounting evidence of those costs in the case of the fictitious valuation of the local telecommunications infrastructures, constitute complex economic assessments and, consequently, the review by the national courts should also be limited.

166 In that regard, according to the case-law, in the absence of relevant Community rules it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 17, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited).

167 In that regard, it needs to be pointed out that, as rightly submitted by Arcor and, more generally, the Lithuanian Government, it is apparent from recital 11 in the preamble to Regulation No 2887/2000 as well as Articles 3(2) and (3) and 4(3) of that regulation that the NRAs must ensure the application of rates for access to the local loop in transparent, fair and non-discriminatory conditions.

168 It is thus the task of the national courts to ensure compliance with the obligations resulting from Regulation No 2887/2000 regarding unbundled access to the local loop by means of procedures consistent with the pricing principle laid down in Article 3(3) of that regulation, and in accordance with the conditions referred to above.

169 It follows that Community law does not lay down any rule requiring the Member States to put in place a specific means of review with respect to decisions of the NRAs concerning the rates of notified operators for access to their local loops.

170 It follows from all of the above considerations that the answer to Question 3(d) must be that it is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and effectiveness of judicial protection, the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review with respect to decisions of the NRAs concerning the authorisation of the rates of notified operators for unbundled access to their local loop. In those circumstances, the national courts must ensure that the obligations resulting from Regulation No 2887/2000 regarding unbundled access to the local loop by means of procedures consistent with the pricing principle laid down in Article 3(3) of that regulation are in fact complied with in transparent, fair and non-discriminatory conditions.

Question 3(f): the right to appeal against decisions of the NRAs regarding the rates of notified operators for unbundled access to their local loop

171 By Question 3(f) the Court of Justice is essentially invited to consider whether beneficiaries within the meaning of Regulation No 2887/2000 may challenge the decisions of the NRAs authorising the rates of notified operators for unbundled access to their local loop by virtue of the requirements regarding the cost-orientation of rates.

172 In order to answer that question it is necessary to examine the regulatory framework to which Article 3(3) of Regulation No 2887/2000 belongs.

173 In that regard, according to the wording of Article 5a(3) of Directive 90/387, Member States are to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the NRA has a right of appeal to a body independent of the parties involved.

174 That provision is an expression of the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under Community law (see, by way of analogy, Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 30 and the case-law cited).

175 Given that a decision of the NRA taken in relation to Article 4 of Regulation No 2887/2000 falls within the scope of Directive 90/387, Article 5a(3) of that directive requires that national law provides for suitable mechanisms under which the 'party affected' by that decision has a right of appeal to an independent body. That guarantee applies to both the addressee of that decision and the beneficiaries within the meaning of Regulation No 2887/2000.

176 As regards the right of appeal of third parties, it must be held that, since a beneficiary is not the addressee of a decision of the NRA, he acquires the status of 'party affected'

when his rights are potentially affected by such a decision by reason of its content and the activity exercised or envisaged by that party (see, by way of analogy, *Tele2 Telecommunication*, paragraph 39).

177 In the case in the main proceedings, it must be found that Arcor, having concluded with the notified operator a contract concerning access to the local loops, is a party affected within the meaning of Article 5b(3) of Directive 90/387, because a decision of the NRA concerning the requirements regarding the cost-orientation of rates for unbundled access to the local loop necessarily affects its rights as a party to such a contract. However, the Court points out that a contractual link such as the one in the case in the main proceedings is not required for the rights of a beneficiary to be potentially affected by such a decision.

178 It follows from the above that the answer to Question 3(f) must be that Article 4(1) of Regulation No 2887/2000, read in conjunction with Article 5a(3) of Directive 90/387, requires that the national courts interpret and apply the domestic rules of procedure governing the bringing of appeals in such a way that a decision of the NRA concerning the authorisation of rates for unbundled access to the local loop may be challenged before the courts, not only by the undertaking to which such a decision is addressed but also by beneficiaries within the meaning of that regulation whose rights are potentially affected by it.

Question 3(g) and (h): the burden of proof

179 By Question 3(g) and (h) the national court asks the Court of Justice to determine who is to bear the burden of proving that the principle that rates for unbundled access

to the local loop are to be set on the basis of cost-orientation has been respected, in the context of the supervisery procedure laid down in Article 4 of Regulation No 2887/2000 or during judicial proceedings brought against the decision of the NRA authorising the rates of a notified operator.

180 As regards, first, the burden of proving that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation has been respected in the supervisory procedure laid down in Article 4 of Regulation No 2887/2000, it should be noted that neither that regulation nor Recommendation 2000/417 contains any provision to that effect.

181 It must therefore be examined whether such an inference can be made from the directives of the FRF.

182 In that regard, Article 7(2) of Directive 97/33 provides that the burden of proof that charges are derived from actual costs, including a reasonable rate of return on investment, is to lie with the organisation providing interconnection to its facilities.

183 It thus follows that that directive contains provisions from which it may be concluded that, in the context of administrative proceedings for the authorisation of rates, it is the task of the notified operator to establish the quantitative elements on which its proposed pricing is based.

184 In addition to that unambiguous statement in the FRF, it should also be pointed out, in respect of unbundled access to the local loop, that, first, the notified operator is required to submit its rates to the NRA for authorisation, and that, second, that operator alone is capable of providing information on the costs relating to the putting in place of its network.

185 In those circumstances, and given that the elements on which the proposed pricing is based concern primarily the notified operator, it must be concluded that it is the task of the latter, in the course of the supervisory procedure laid down in Article 4 of Regulation No 2887/2000, to supply evidence that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation has been respected.

186 By contrast, that finding does not concern beneficiaries within the meaning of Regulation No 2887/2000.

187 Since Community law does not provide for any rule relating to the burden of proving that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation has been respected in the supervisory procedure, it is the task of the Member States to establish in accordance with their rules of procedure, in the context of the supervisory procedure laid down in Article 4 of Regulation No 2887/2000, the rules of evidence applicable, including the allocation of the burden of that proof between the NRA which made the decision to authorise the rates of the notified operator and the beneficiary challenging that decision.

188 As regards, second, the burden of proving that the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation has been respected in judicial proceedings brought against the decision of the NRA authorising the tariffs of a notified operator, it must be pointed out that neither Regulation No 2887/2000 nor the FRF provide any assistance in that regard.

189 It follows that, since Community law does not lay down any rule concerning the burden of proving that that principle has been respected in such judicial proceedings, it is for the Member States to establish, in accordance with their rules of procedure,

the rules of evidence applicable, including the allocation of that burden of proof between the NRA which made the decision to authorise the rates of the notified operator and the party challenging that decision.

190 In that regard, it must be pointed out that the competence reserved to the Member States must be exercised in accordance with the Community principles of effectiveness and equivalence of judicial protection.

191 It is apparent from the case-law that the Member States must ensure that evidential rules — and, in particular the rules on the allocation of the burden of proof applicable to actions relating to a breach of Community law — are, firstly, not less favourable than those that apply to similar domestic actions and, secondly, that they do not make it in practice impossible or excessively difficult for individuals to exercise rights conferred by Community law (see Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 69 and the case-law cited).

192 It results from the above that the answer to Question 3(g) and (h) is that Regulation No 2887/2000 must be interpreted as meaning that, during the procedure supervising the pricing for unbundled access to the local loop conducted by an NRA pursuant to Article 4 of that regulation, it is for the notified operator to provide the evidence that its rates respect the principle that rates are to be set on the basis of cost-orientation. On the other hand, it is for the Member States to allocate the burden of proof between the NRA which made the decision to authorise the rates of the notified operator and the beneficiary challenging that decision. It is also for the Member States to establish, in accordance with their rules of procedure and the Community principles of effectiveness and equivalence of judicial protection, the rules on the allocation of that burden of proof when a decision of the NRA authorising the rates of a notified operator for unbundled access to its local loop is challenged before the courts.

Costs

193 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The interest on the capital invested and the depreciation of the fixed assets deployed for the initial implementation of the local loop are among the costs to be taken into account in accordance with the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop.**

2. **When applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, laid down in Article 3(3) of Regulation No 2887/2000, in order to determine the calculation basis of the costs of the notified operator, the national regulatory authorities have to take account of actual costs, namely costs already paid by the notified operator, and forward looking costs, the latter being based, where relevant, on an estimation of the costs of replacing the network or certain parts thereof.**

3. **Pursuant to Article 4(2)(b) of Regulation No 2887/2000, the national regulatory authority may request notified operators to supply relevant information**

on the documents justifying the costs taken into account when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation. Since Community law does not contain any provision concerning the accounting documents to be checked, it is the task of the national regulatory authorities alone, in accordance with the law applicable, to examine whether, for the purposes of cost-accounting, the documents produced are the most appropriate ones.

4. When national regulatory authorities are applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, Community law does not preclude them, in the absence of complete and comprehensible accounting documents, from determining the costs on the basis of an analytical bottom-up or top-down cost model.

5. The possibility granted to the Member States, in Article 1(4) of Regulation No 2887/2000, to adopt detailed national measures cannot render inapplicable the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation as laid down in Article 3(3) of that regulation.

6. It is apparent from Article 4(1) and (2) of Regulation No 2887/2000 that, when examining the rates of notified operators for the provision of unbundled access to their local loop in light of the pricing principle laid down in Article 3(3) of that regulation, the national regulatory authorities have a

broad discretion concerning the assessment of the various aspects of those tariffs, including the discretion to change prices, and thus the proposed tariffs. That broad discretion also relates to the costs incurred by the notified operators, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost-accounting models used to prove them.

7. It is a matter solely for the Member States, within the context of their procedural autonomy, to determine, in accordance with the principles of equivalence and effectiveness of judicial protection, the competent court, the nature of the dispute and, consequently, the detailed rules of judicial review with respect to decisions of the national regulatory authorities concerning the authorisation of rates of notified operators for unbundled access to their local loop. In those circumstances, the national courts must ensure that the obligations resulting from Regulation No 2887/2000 regarding unbundled access to the local loop by means of procedures consistent with the pricing principle laid down in Article 3(3) of that regulation are in fact complied with in transparent, fair and non-discriminatory conditions.

8. Article 4(1) of Regulation No 2887/2000, read in conjunction with Article 5a(3) 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, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, requires that the national courts interpret and apply the domestic rules of procedure governing the bringing of appeals in such a way that a decision of the national regulatory authority concerning the authorisation of rates for unbundled access to the local loop may be challenged before the courts, not only by the undertaking to which such a decision is addressed but also by beneficiaries within the meaning of that regulation whose rights are potentially affected by it.

9. Regulation No 2887/2000 must be interpreted as meaning that, during the procedure supervising the pricing for unbundled access to the local loop conducted by a national regulatory authority pursuant to Article 4 of that regulation, it is for the notified operator to provide the evidence that its rates respect the principle that rates are to be set on the basis of cost-orientation. On the other hand, it is for the Member States to allocate the burden of proof between the national regulatory authority which made the decision to authorise the rates of the notified operator and the beneficiary challenging that decision. It is also for the Member States to establish, in accordance with their rules of procedure and the Community principles of effectiveness and equivalence of judicial protection, the rules on the allocation of that burden of proof when a decision of the national regulatory authority authorising the rates of a notified operator for unbundled access to its local loop is challenged before the courts.

[Signatures]