OPINION OF ADVOCATE GENERAL ELMER
delivered on 11 May 1995 *

Introduction

1. This action for infringement of the Treaty concerns the transposition into Luxembourg law of Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1] (hereinafter referred to as 'the Directive'). According to Article 15 of the Directive, Member States were required to take the measures necessary to comply with the Directive before 5 June 1993 and to inform the Commission thereof forthwith.

The parties' observations

2. It is common ground in this case that the Grand Duchy of Luxembourg did not within the period prescribed transpose the Directive into Luxembourg law by laying down express provisions of law or the like, and that legislation on services and infrastructures within the telecommunications sector is at present only at the draft stage. In the Luxembourg Government's view, however, that does not constitute an infringement of the Treaty, as it considers that all necessary steps have been taken to ensure the existence of procedures in conformity with the Directive.

The Luxembourg Government bases its argument in the first place on an examination of the rules applicable in this field, namely the Law of 10 August 1992, [2] which converted the public postal and telecommunications administration into a private undertaking, and the Grand Ducal regulation of 29 June 1993, which came into force on 1 July 1993 and revoked previous regulations on the conditions for access to and the supply of telephone and telegraphic services. The Luxembourg Government also refers to the 'General Conditions for Telecommunications Services' laid down by the private postal and telecommunications undertaking, which regulate access to and supply of telephone and telegraphic services and lay down prices for the services offered.

3. The Commission, on the other hand, examines the various provisions of the Directive and claims that they are not transposed, or not correctly transposed, into Lux-

* Original language: Danish.

1 — OJ 1992 L 165, p. 27.

2 — Published in *Memorial A*, p. 2006.

embourg law. The 'General Conditions for Telecommunications Services' are laid down by a private undertaking and cannot take the place of legislation giving private persons rights against the private telecommunications undertaking. In addition, the said general conditions lack, to a considerable extent, the clarity and precision necessary to ensure compliance with the Directive and to establish thereunder a transparent system as required by the Directive.

Discussion

4. According to the third paragraph of Article 189, a directive is binding upon the Member States, as to the result to be achieved, but the article leaves to the national authorities the choice of form and methods.

In accordance therewith, the Court has consistently held that it follows from the third paragraph of Article 189 that the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated verbatim in express specific legislation. Depending on the content of the directive, it is sufficient that there shall be a general legal context guaranteeing the full application of the directive in a clear and precise manner so that the persons concerned by the directive, in so far as it is intended to create rights for individuals, may ascertain the full extent of their rights and, where appropriate, rely on them before a national court. [3]

The Court has further stated that a general administrative practice or administrative notice or circular, which may readily be altered by the administration and which is not sufficiently widely published cannot be regarded as constituting a correct compliance with the obligation imposed by Article 189 of the Treaty on the Member States to which the directive is addressed. [4]

Moreover in its judgment in Case C-131/88 *Commission* v *Germany* [5] the Court stated that:

'... the fact that a practice is consistent with the protection afforded under a directive does not justify failure to implement the directive in the national legal order by means of provisions which are capable of creating a situation which is sufficiently precise, clear

3 — See for example the judgments in Case C-131/88 *Commission* v *Germany* [1991] ECR I-825 and in Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567.

4 — See *inter alia* the judgment in Case C-131/88, cf. footnote 3.

5 — And in the judgment in Case C-361/88 *Commission* v *Germany*, cf. footnote 3.

and open to permit individuals to be aware of and enforce their rights'.

The Court further declared that:

'... in order to ensure full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question'.

5. The purpose of Council Directive 92/44/EEC is to create rights for private persons, since it contains *inter alia* rules ensuring for users access to information on leased line offerings, rules on the supply conditions, which are to be published, users' rights in the event of termination of such offerings, requirements with regard to non-discrimination in relation to the conditions of access, criteria for use and the like, requirements with regard to public control, principles for billing of charges and a conciliation procedure. Users of leased lines in Luxembourg are therefore to be placed in a position, by the very transposition of the Directive into Luxembourg law, to obtain full knowledge of the rights referred to in the Directive and if appropriate to enforce them before a national court.

6. The Luxembourg Government revoked the previous rules in the field of telecommunications, but instead of itself adopting new rules in accordance with the Directive, the government left it to the private postal and telecommunications undertaking to lay down rules on the subject in the form of general business conditions and a price list. The Luxembourg Government has therefore in fact omitted to adopt any rules in this sphere and instead has left it to a private undertaking to lay down its own business conditions and the like.

7. It is true that the capital of this undertaking belongs to the Luxembourg State, [6] and the board of management of the undertaking consists of 12 members appointed by the Grand Duke upon a recommendation from the government. Six of those members are representatives of the State, two are users or experts from the telecommunications sector and four are representatives of the staff. [7] The management takes decisions by a simple majority and the president, who is appointed from amongst the representatives of the State, has a casting vote in the event of a tie. [8]

The competent minister supervises the activities of the undertaking and under Article 23 of the Law of 10 August 1992 he must in

6 — Cf. Law of 10 August 1992, Article 30.
7 — Cf. Law of 10 August 1992, Article 8.
8 — Cf. Law of 10 August 1992, Article 9.

certain cases approve decisions of the management. The minister is not however required by that article to approve the management's adoption of general business conditions or price lists.

8. Even though the competent Luxembourg minister generally supervises the activities of the postal and telecommunications undertaking and ensures, in doing so, that it observes the requirements of Community law in the matter, and even though it must be assumed that the Luxembourg State, by its representation on the undertaking's board of management, is careful to ensure that the undertaking's general business conditions and price lists comply therewith, the Grand Duchy of Luxembourg has not hereby, in my view, created the precise legal framework to ensure compliance with the Directive or the clear, precise and open legal situation which will put the private person in a position to know and enforce his rights, as required by the case-law of the Court before a directive may be regarded as having been correctly transposed.

Even though the members of the board of management are nominated by the State, the assumption must nevertheless be that the members of the board in a private undertaking are exclusively, or at least primarily, required to safeguard the interests of the undertaking in the performance of their duties. In so far as rules are adopted according to Community law to safeguard the interests of those having dealings with the undertaking, it is particularly clear that the transposition of a directive cannot be left to the discretion of what is in principle a private undertaking, in spite of the fact that the State may have nominated the members of the board of management.

The adoption of the provisions of the Directive in the general conditions for contracts and price lists for the services offered, which are issued by the private postal and telecommunications undertaking, cannot therefore be regarded as constituting a correct transposition of the Directive, since the Luxembourg State has not created the necessary legal basis for compliance with the Directive. Neither by law nor by administrative provisions on which the citizen may rely has a duty therefore been imposed on the private undertaking in the general conditions and price lists to comply with the requirements of the Directive.

9. In the light of these rather general observations I shall now examine the transposition into Luxembourg law of the various articles of the Directive.

Articles 3 and 4

10. *Article 3* of the Directive requires Member States to ensure that information on a

number of detailed matters relating to leased line offerings is published in such a way as to provide easy access to it for users. It includes a requirement for information on changes in existing offerings and new types of leased line offerings to be published at the latest two months before the implementation of the offering. *Article 4* gives further details of the supply conditions to be published pursuant to Article 3, including information with regard to the typical delivery and repair times.

11. Article 7(4) of the Luxembourg Law of 10 August 1992 provides that:

'The undertaking shall publish the general conditions for the contracts offered by it, which shall be laid down and may be amended by the board of management. References to the published conditions and the amendments thereto shall be published in the *Memorial*, Recueil administratif et économique, at least six full days before they come into force.'

By means of that provision of the Law the Grand Duchy of Luxembourg has ensured that the private postal and telecommunications undertaking publishes the collected general conditions for contracts and that that publication is referred to in the Luxembourg official gazette.

However, the Law contains no provision prescribing what information is to be contained in the general conditions since, as referred to above, under Article 7(4) of the Law, they are to be laid down and *amended* by the management of the private postal and telecommunications undertaking.

Since a transposition of the provisions of the Directive in the general conditions of the private undertaking as referred to above cannot be regarded as establishing a sufficient legal framework, Articles 3 and 4 cannot be considered to have been correctly transposed.

12. The inadequate transposition of Article 3 is further emphasized by the fact that alterations to the existing services, under Article 14 of the general conditions, are to be published only six days at least before they come into force, whereas Article 3(1) of the Directive requires publication as soon as possible and no later than two months before the implementation. Similarly Article 3(3) of the Directive requires that information concerning new types of leased line offerings is to be published no later than two months before implementation, but there is no provision to that effect in the general conditions.

13. Finally the general conditions contain no information with regard to the typical delivery period, just as Article 12(1) of the general

conditions regarding the typical repair times states only that they are effected as soon as possible.

Article 5

14. *Article 5* prescribes that existing offerings are to continue for a reasonable period of time and that users affected are to be consulted before termination. Moreover Member States are required to ensure that where users do not agree with the termination date they may bring the case before the national regulatory authority.

15. The Law of 10 August 1992 contains no rules with regard to continuing offerings or user consultation. Article 6(4) to (7) of the general conditions on the other hand contains rules on the conditions under which the postal and telecommunications undertaking may terminate existing offerings. That article contains no provision to the effect that existing offerings, before termination, must be continued for an appropriate period, or on consultation of users, and in its defence the Luxembourg Government has not commented on how it contends that that part of the Directive is transposed in Luxembourg.

16. As regards the possibility of bringing cases before the national regulatory authority, the Law of 10 August 1992 provides in Article 22(1) that:

'The competent Minister shall be the superior supervisory authority as regards the activities of the undertaking which are of public interest ...'

On this point the Luxembourg Government has stated in its observations that:

'Customers who regard their interests as being disregarded may apply to the Minister exercising supervision.'

At the hearing the government also explained that it was correct, as stated by the Commission, that the rules of the Directive concerning the possibility of making a complaint had not been reproduced in law or by notice, but that in Luxembourg there is a particularly liberal practice of allowing all citizens to approach the competent minister.

17. The drafting of the Law of 10 August 1992 to the effect that the competent minister supervises the postal and telecommunications undertaking's general activities is so wide and unspecific that it cannot in my view be regarded as creating sufficient legal certainty that the Grand Duchy of Luxembourg has provided for users of leased lines

the opportunity to bring before a national regulatory authority complaints regarding termination of offerings, and similarly from the drafting of the provision the users of leased lines are not enabled to ascertain that they have that right.

Accordingly, since, in accordance with the Court's settled case-law, a practice which meets the requirements of a directive is not sufficient to constitute a correct transposition of the directive, it must be accepted that the mere existence of a possibly liberal practice with regard to the opportunity to make complaints does not constitute a correct transposition in the Grand Duchy of Luxembourg of the requirement prescribed by Article 5 of the Directive that it should be possible to bring cases regarding termination of offerings before a national regulatory authority.

Article 6

18. According to *Article 6*, Member States are to ensure that restrictions on access to and usage of leased lines are aimed only at ensuring compliance with the essential requirements, compatible with Community law, and that they are imposed through regulatory means by the national authorities; they are also to ensure that it appears from the provisions which of the requirements listed in the article are the basis of such restrictions. *Article 6(4)* prescribes that the access conditions related to terminal equipment shall be considered to be fulfilled when the terminal equipment complies with the connection requirements set out in Council Directive 91/263/EEC of 29 April 1991. [9]

The Luxembourg Government has stated in its defence that only one restriction has been accepted in Luxembourg and is contained in Article 2(2) of the general conditions, according to which:

'An application for access to telecommunications offerings shall be regarded as an implied acceptance of any restrictions laid down by an authority or a recognized private foreign undertaking on the application of which the undertaking has no influence.'

As that restriction is contained only in the private postal and telecommunications undertaking's general conditions, the requirement of Article 6(1) of the Directive that restrictions shall be imposed by the national regulatory authorities through regulatory means is not fulfilled.

9 — OJ 1991 L 128, p. 1.

As regards Article 6(4) of the Directive regarding access to terminal equipment, the Commission has stated that Luxembourg has not yet given the Commission any information with regard to a transposition into Luxembourg law of Directive 91/263/EEC and that the Commission has consequently brought an action before the Court in this matter.

Article 7

19. *Article 7* provides that Member States are to ensure that telecommunications organizations provide a minimum set of leased lines (cf. Annex II to the Directive).

The Luxembourg Government has contended that all the services listed are offered and contained in the postal and telecommunications undertaking's price list.

However, neither the Luxembourg Law of 10 August 1992 nor the general conditions contain references to the obligation imposed by Article 7. As I pointed out above, reproducing the provisions of the Directive in the price list cannot be regarded as a correct transposition of the Directive.

Article 8

20. *The first subparagraph of Article 8(1)* requires the Member States to ensure that the procedures regarding decisions claiming that users of leased lines have failed to comply with the usage conditions shall be laid down in such a way that the decision is reached in the shortest possible time. According to *the second subparagraph of Article 8(1)*, the treatment of the case must be transparent and take due account of the rights of the parties. Moreover a decision may be taken only after both parties have been given the opportunity to state their case, the decision shall be accompanied by a statement of the reasons on which it is based, it shall be notified to the parties within one week of its adoption and it shall not be enforced until the parties have been notified.

The Luxembourg Government has contended that the procedures laid down in the general conditions comply with these criteria.

As I have already said, however, a reference to procedures in the general conditions cannot be regarded as supplying sufficient legal certainty for compliance with those provisions in the Directive and cannot therefore constitute a correct transposition of Article 8(1).

21. Under *Article 8(2)* of the Directive, telecommunications organizations are to adhere to the principle of non-discrimination when they make use of the public telecommunications network for providing services which are or may be provided also by other service providers.

Luxembourg has not stated during the course of the action that the private telecommunications undertaking is required to adhere to that principle of non-discrimination and as a result of the absence of such legislation private persons have no opportunity of bringing actions for infringement of this principle before the courts.

22. Under *Article 8(3)* a telecommunications organization which in particular cases wishes to vary its conditions must seek the agreement of the national regulatory authority.

No provision to that effect is to be found in any of the Luxembourg rules and the Luxembourg Government has not stated whether that part of Article 8 has been transposed. In these circumstances it must be assumed that it has not.

Article 9

23. Under *Article 9(1)* Member States are to encourage the establishment by 31 December 1992, in consultation with users, of common ordering procedures, a so-called one-stop-ordering procedure and a so-called one-stop-billing procedure. *Article 9(2)* requires the Member States to report to the Commission within one year after the Directive is brought into effect on the results achieved.

The Luxembourg Government has simply stated in its written pleadings that several agreements on these points are being negotiated. During the oral procedure, however, the government's representative stated that the Luxembourg Government had explained this in a letter of 30 March to the Commission. However, the Commission stated during the oral procedure that the said letter regarding results in Luxembourg did not seem to have been received, but that, even if it had, such a letter could not take the place of a report.

For the sake of finding a correct solution to this case and giving the Commission an opportunity to make adjustments in its conduct of the action, I think it is regrettable that the Luxembourg Government has contended only during the oral procedure that it complied with its obligations under this provision by a letter of 30 March 1994 which has not previously been mentioned. The letter ought to have been sent to the Commission and to the Court before the hearing so

that the Commission might have had the opportunity to investigate whether such a letter had been received and to comment in detail upon it.

In my view that letter should not be taken into account in the judgment, [10] since the Court has no information with regard to what it contained either. It may therefore be assumed that the Grand Duchy of Luxembourg has not fulfilled its obligation under Article 9(2) to send a report to the Commission.

Article 10

24. It may be seen from *Article 10(1)* of the Directive that Member States are required to ensure that tariffs for leased lines follow the basic principle that they are cost-orientated and transparent, and that various rules which are specified in detail are observed. Under *Article 10(2)* Member States are to ensure that telecommunications organizations formulate and put into practice by 31 December 1993 at the latest a cost accounting system, and under *Article 10(3)* the cost accounting systems applied are to be kept available in sufficient detail.

The Luxembourg Government has contended that the principles referred to in Article 10(1) are observed in the price list of services offered and that the principles referred to in Article 10(2) are observed in the account introduced in 1993 and that the undertaking's first balance-sheet will shortly be available. It has not hitherto been possible by reason of internal problems to comply with Article 10(3), but according to the Luxembourg Government that will not cause problems in future.

However, in the Law establishing the private postal and telecommunications undertaking there are no references to the principles contained in Article 10(1) and (2).

Even if it is assumed that the principles referred to in the Directive are, as contended by the Luxembourg Government, observed in practice in the price list, that does not in my view, as I have already stated, comply with the requirements laid down by the consistent case-law of the Court as regards the legal basis which must guarantee the full implementation of the Directive in a sufficiently clear and precise manner so that users of leased lines may be enabled to ascertain the full extent of their rights.

10 — Cf. Article 42(2) of the Rules of Procedure.

As users of leased lines cannot ascertain from the Luxembourg rules the principles according to which tariffs are calculated, the requirement in the Directive that tariffs are to be transparent is not satisfied either.

25. As regards the Luxembourg Government's argument that it has not been possible to comply with Article 10(3) as a result of difficulties in the internal legal system, the Court has consistently declared [11] that a Member State may not plead provisions, practices or circumstances of its own legal system in order to justify a failure to comply with obligations and time-limits resulting from Community law.

Article 11

26. *Article 11(1)* requires the Member States to notify the Commission before 1 January 1993 of the name of the national regulatory authority which is to carry out the regulatory functions mentioned in the Directive, and under *Article 11(2)* that national authority is to make available at least for each calendar year and to send to the Commission reports as to how the supply conditions laid down in Article 3 have been met.

In that connection the Commission has stated that no information as to the name of the national regulatory authority was received in compliance with Article 11(1) by 1 January 1993 and that the reports prescribed by Article 11(2) were not received either.

The Luxembourg Government admitted during the oral procedure that the obligation imposed by Article 11(1) had not been complied with, and as regards Article 11(2) it again mentioned that difficulties in the internal legal order prevented compliance with the obligation. As stated above, in section 25, that argument cannot be accepted.

It must therefore be concluded that the Grand Duchy of Luxembourg has not fulfilled its obligations under Article 11 of the Directive.

11 — See *inter alia* the judgments in Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367 and in Case C-252/89 *Commission* v *Luxembourg* [1991] ECR I-3973.

Article 12

27. Finally *Article 12* of the Directive introduces a conciliation procedure under the chairmanship of the Chairman of the ONP Committee. In its defence the Luxembourg Government has stated that the procedure laid down in Article 12 corresponds to the practice followed in Luxembourg, but no references to such a procedure are to be found in either the Law of 10 August 1992 or the general conditions.

As previously stated, the fact that practice in a State is in accordance with the requirements of a directive cannot be regarded as a sufficient transposition of the directive, and accordingly Article 12 cannot be regarded as correctly transposed.

Summary

28. On the basis of this examination of the defective transposition of the various provisions of the Directive into Luxembourg law, it must be concluded that the Grand Duchy of Luxembourg cannot be regarded as having correctly transposed into its national legal system Articles 3, 4, 5, 6(1), 7, 8(1) and (3) or Articles 9 to 12 of the Directive.

Costs

29. The Commission has claimed that the Grand Duchy of Luxembourg should be ordered to pay the costs. In accordance with Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for.

Opinion

30. I shall accordingly recommend the Court to give judgment as follows:

— By not adopting within the prescribed period the measures necessary to implement Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and under Article 15 of that directive.

— The Grand Duchy of Luxembourg must be ordered to pay the costs.