OPINION OF ADVOCATE GENERAL LENZ
delivered on 12 September 1996 *

A — Introduction

1. In the present proceedings for infringement of the Treaty, the Commission accuses the Grand Duchy of Luxembourg of having failed to fulfil its obligations under Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity. [1] It is alleged that Luxembourg did not adopt the laws, regulations and administrative provisions necessary to comply with that directive within the prescribed period or at least did not inform the Commission of them.

2. Article 17 of the directive required the Member States to take the measures necessary to comply with it by no later than 6 November 1992 and to inform the Commission thereof forthwith.

3. Since the Commission received no notification and Luxembourg did not comply with the reasoned opinion delivered pursuant to Article 169, the Commission has brought an action in which it claims that the Court should:

— declare that, by not adopting the laws, regulations and administrative provisions necessary to comply with Council Directive 91/263/EEC on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, 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 17 of Directive 91/263/EEC;

— in the alternative, declare that in any event, by not immediately informing the Commission of such measures, the Grand Duchy of Luxembourg has failed to fulfil its obligations under those same provisions;

— order the Grand Duchy of Luxembourg to pay the costs.

* Original language: German.

1 — OJ 1991 L 128, p. 1.

4. In its defence, the Grand Duchy of Luxembourg states that a draft measure transposing the directive and the directive supplementing it has been prepared. It maintains, however, that the aims of Directive 91/263 have already been attained: appropriate statutory provisions were introduced as long ago as 1988 and August 1992 and, besides, a very liberal policy is pursued as regards terminal equipment.

5. On that ground, the Grand Duchy of Luxembourg claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

6. The Commission did not respond to the arguments put forward by the Grand Duchy in its defence until the hearing, at which it stated that, in its view, neither the statutory provisions introduced by the Grand Duchy nor its liberal practice sufficed to satisfy the requirements of Directive 91/263.

B — Analysis

7. The Grand Duchy of Luxembourg contests the Commission's allegation that it has infringed the treaty. In its view, the directive is already applicable in Luxembourg — even in the absence of any express implementing measure — and/or the aim sought by the directive has already been attained.

8. One aim of Directive 91/263 consists of the mutual recognition of the conformity of telecommunications terminal equipment. Luxembourg contends that such mutual recognition is already dealt with by a 1988 law. This is the law which transposed into Luxembourg domestic law Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. [2] In the process of transposition the whole content of that directive was incorporated in the relevant statute.

9. As the Commission rightly argued at the hearing, it is impossible to comply with the requirements of Directive 91/263 by implementing Directive 86/361, since Directive 91/263 has much broader aims.

2 — OJ 1986 L 217, p. 21.

10. According to Article 1 of Directive 86/361, the aim of that directive was mutual recognition of the results of tests of conformity with common conformity specifications for mass-produced telecommunications terminal equipment. As appears from the preamble to Directive 86/361, mutual recognition of type approval for telecommunications terminal equipment constitutes a major step towards the creation of an open and unified market for such equipment. Since situations differed in several Member States, however, progress towards that objective could only be made in stages. [3]

11. The seventh recital in the preamble refers to mutual recognition of conformity tests on mass-produced terminal equipment as an initial stage on the way towards that objective. In this connection, the approach was to be founded upon the definition of common technical specifications based on international standards and specifications and on the harmonization of general technical requirements. [4] In other words, that first stage was concerned with the harmonization of standards. Lists of laboratories and of authorities competent to issue type approval in the individual Member States were to be drawn up. The laboratories have the task of verifying that the relevant equipment conforms with the common standards and, if so, of drawing up a certificate of conformity containing all the measurement data. The aim of Directive 86/361 is mutual recognition of the results of such tests in the individual Member States with the result that they will not have to be carried out again for the purpose of type approval in other Member States. [5]

12. As the Commission has rightly argued, type approval in each Member State is still necessary. In contrast, Directive 91/263 provides for the full recognition of type approvals of terminal equipment which satisfy the requirements of the directive. In other words, not only the results of the test but also the type approval issued in another Member State are to be recognized. It might therefore be assumed that the process of mutual recognition which began with Directive 86/361 has been completed by Directive 91/263.

13. Directive 86/361 itself looked forward to a second stage in which an open and unified market would be created in terminal equipment. [6] Accordingly, Article 5 of Directive 91/263 provides that Member States shall not impede the placing on the market and the free circulation and use on their territory of terminal equipment which complies with the provisions of that directive. It is presumed that terminal equipment which is in conformity with the national standards implementing the relevant harmonized standards complies with the essential requirements with regard to user safety and safety of employees of public telecommunications network

3 — Fifth and sixth recitals in the preamble to Directive 86/361.

4 — Eighth recital in the preamble to Directive 86/361.

5 — Article 6(2) of Directive 86/361.

6 — Tenth recital in the preamble to Directive 86/361 and Article 9 of Directive 86/361.

operators (Article 4(a) and (b) of the directive). The relevant mutual recognition of type approval is dealt with in Article 6(1), to which the Commission has referred. (The transformation of the requirements referred to in Article 4(c) to (g) into common technical regulations is covered by Article 6(2).)

14. No corresponding provisions were included in Directive 86/361. That directive was concerned only with the harmonization of standards and the mutual recognition of test results relating to the conformity of equipment with common specifications. It was still necessary for the terminal equipment to obtain type approval in each individual Member State.

15. It follows that the aims of Directive 91/263 are much more ambitious than those of Directive 86/361, as a result of which implementation of the directive on the first stage is not sufficient to satisfy the requirements of Directive 91/263.

16. The Commission has further pointed out that Directive 91/263 cannot be regarded as supplementing Directive 86/361 either; instead, the former replaces the latter. The fields legislated for by the two directives are different and Directive 91/263 makes the older directive redundant. After Directive 91/263 was adopted, mutual recognition of the results of tests carried out on mass-produced terminal equipment for conformity with common specifications was no longer important. Accordingly, Article 16 of Directive 91/263 repeals the earlier directive.

17. In my view, not all the provisions of Directive 86/361 are made redundant by Directive 91/263. Harmonization of standards is the precondition enabling Directive 91/263 to provide for mutual recognition of type approvals. Directive 86/361 becomes redundant when the harmonization provided for therein has been achieved, but not merely as a result of the adoption of a new directive.

18. I can, however, subscribe to the Commission's view in so far as the new directive imposes new requirements on the Member States — once the aims of the 1986 directive have been achieved. For this reason, the implementation of Directive 86/361 in domestic law is not capable of satisfying the requirements of Directive 91/263; especially where the national law contains an exact copy of Directive 86/361.

19. Lastly, the Commission considered the various provisions of the two directives in detail. Directive 91/263 is not applicable only to terminal equipment but also to equipment which is capable of being connected to a

public telecommunications network, but is not intended for such a purpose. [7] In the Commission's view, this constitutes a field of application additional to that of Directive 86/361. I agree in so far as Directive 86/361 referred only to terminal equipment. However, it defined the expression 'terminal equipment' in terms of connection to the termination of a public telecommunications network. [8] This could include terminal equipment which is only capable of being so connected. This is evidenced also by the fact that, according to the 1986 directive's definition, type approval means the confirmation delivered by the competent authority 'that a particular terminal equipment type is authorized or *recognized as suitable to be connected* to a particular public telecommunications network'. [9]

20. Nevertheless, the provisions of Directive 91/263, the German version of which refers no longer to 'Geräten' but to 'Einrichtungen', are wider in so far as special rules are laid down for equipment which is only *capable* of being connected to a public telecommunications network (and which, according to the definition set out in Article 1(2) of the 1991 directive, is no longer to be regarded as terminal equipment). According to those rules, such equipment must be accompanied by a manufacturer's or supplier's declaration stating that it is not intended to be connected to a public telecommunications network and that such connection in a Member State of the EC will be in violation of the national law implementing Directive 91/263. In addition, such equipment has to have a special symbol affixed to it. [10] Since no such provision was contained in Directive 86/361, it is clear that implementing the 1986 directive cannot satisfy the requirements of the 1991 directive.

21. In this connection the Commission adverts to two requirements for terminal equipment which are mentioned for the first time in Directive 91/263: requirements relating to electromagnetic compatibility and effective use of the radio frequency spectrum. This also makes it clear that the requirements of the new directive go further than those of the 1986 directive.

22. A further point — as mentioned by the Commission — is the introduction of an EC mark of conformity for terminal equipment complying with the provisions of the directive. [11] No such provision was contained in the 1986 directive.

7 — Article 2 of Directive 91/263.
8 — Article 2, point 2 of Directive 86/361.
9 — Article 2, point 10 of Directive 86/361 (my emphasis).
10 — Article 2(1) of Directive 91/263.
11 — Article 11 of Directive 91/263.

23. Consequently, it must be held that the legislative content of Directive 91/263 is much wider than that of the 1986 directive, and so implementation of the original directive is not sufficient in order to comply with the requirements at issue here.

24. The second argument put forward in favour of the directive's applying in Luxembourg is that the necessary legal and administrative provisions have been adopted in order to create a competitive situation on the telecommunications market. Thus, the former administration of postal and telecommunications services has been transformed into a public institution with legal personality and financial independence.

25. As against this, the Commission rightly asserts that whilst the directive at issue does assume that there is such a separation between the undertaking offering goods and services in the telecommunications field and the authority responsible for type approval, that separation already had to be effected pursuant to Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment. [12] Consequently, that measure is not capable of contributing towards the implementation of Directive 91/263.

12 — OJ 1988 L 131, p. 73.

26. Lastly, Luxembourg claims, in arguing that the aims of Directive 91/263 have already been attained in the Grand Duchy, that a very liberal policy is pursued there with regard to terminal equipment and that in the past no provisions were adopted requiring foreign equipment to conform. All terminal equipment for which Member States have granted type approval is freely obtainable on the Luxembourg market.

27. Although the Commission is prepared to confirm this, it points out that it is only an administrative practice. I must therefore agree with its view that, for reasons of legal certainty, the directive must be implemented by formal measures.

28. I therefore consider that Luxembourg's claim that the aims of the directive have already been attained cannot be upheld. Those aims include, not only that the provisions of the directive should be applied, but that they should be applied on a legislative basis.

29. Luxembourg further submits that a draft law implementing the directive at issue,

together with Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment, [13] is already in existence. That submission cannot refute the claim that the directive has not been implemented.

30. Consequently, it appears from the foregoing that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Directive 91/263 in so far as it has not adopted the laws, regulations and administrative provisions necessary in order to comply with that directive by the prescribed date.

31. Since it is clear that the Grand Duchy of Luxembourg has failed to transpose the relevant directive into national law in time, the Court does not need to consider the Commission's alternative claim that Luxembourg failed to inform it of the measures taken in order to implement the directive.

32. As far as the costs are concerned, the first subparagraph of Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they were applied for in the successful party's pleading. Since the Commission has applied for costs, the Grand Duchy of Luxembourg must be ordered to pay them.

C — Conclusion

33. In view of the foregoing, I propose that Court should:

(1) declare that, by not adopting the laws, regulations and administrative provisions necessary to comply by the prescribed date with Council Directive

13 — OJ 1993 L 290, p. 1.

91/263/EEC on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, 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 17 of Directive 91/263/EEC;

(2) order the Grand Duchy of Luxembourg to pay the costs.