OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 July 2003 [1]

1. The Commission of the European Communities has brought an action for a declaration that the Kingdom of Spain has failed to fulfil its obligations under Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, [2] as amended by Commission Directive 96/19/EC of 13 March 1996 [3] (hereinafter 'Directive 90/388 as amended').

I — Legal background

A — *Community law*

3. Tariff rebalancing is one of the operations preparatory to opening up the voice telephony market to competition.

2. The Commission takes the view that the Spanish authorities have failed to adopt all the measures necessary to enable the traditional telecommunications operator, Telefónica de España, SA (hereinafter 'Telefónica'), to rebalance its tariffs in accordance with Article 4c of Directive 90/388 as amended.

4. Before the process of liberalisation commenced, in 1990, the tariffs for telecommunications services were subject to strict regulation in the various Member States. As a general rule, the tariffs for certain services, such as the initial connection charge, monthly rental or local call rates, were set at below the costs incurred in providing those services. In contrast, other services, such as regional and international calls, were charged at rates higher than the real costs. The telecommunications organisations thus offset the losses made on some services against the profits earned on others.

1 — Original language: French.
2 — OJ 1990 L 192, p. 10.
3 — OJ 1996 L 74, p. 13.

5. Under those circumstances, the immediate opening up of the voice telephony market to competition would have involved a number of dangers.

6. The new operators would have been able to concentrate their activities in the most profitable market segments (namely, regional and international calls). Given the high prices charged by the traditional operator, they could have set lower tariffs and in that way quickly returned a profit and gained market share. That development would have forced the traditional operator to reduce its margins on the profitable segments and would thus have deprived it of the ability to offset the losses incurred on the less profitable services, which it would nevertheless continue to offer (namely, the monthly subscription and local calls).

7. Before opening up the market to competition, the Community legislature therefore required Member States to place the telecommunications organisations in a position to 'rebalance' their tariffs, that is to say, to align their tariffs with real costs. Specifically, that operation had to take the form of a reduction in the charges for regional and international calls and an increase in connection charges, the monthly rental and local call rates.

8. Directive 96/19 sought to liberalise voice telephony services and the provision of telecommunications infrastructure no later than 1 January 1998.[4] The fifth recital in the preamble to the Directive provides:

'... the continuation of the exception granted with respect of voice telephony is no longer justified. The exception granted by Directive 90/388/EEC should be ended and the Directive... amended accordingly. In order to allow telecommunications organisations to complete their preparation for competition and in particular to pursue the necessary rebalancing of tariffs, Member States may continue the current special and exclusive rights regarding the provision of voice telephony until 1 January 1998. Member States with less developed networks or with very small networks must be eligible for a temporary exception... . Such Member States should be granted, upon request, an additional transitional period respectively of up to five and of up to two years, provided it is necessary to complete the necessary structural adjustments. The Member States which may request such an exception are Spain, Ireland, Greece and Portugal with regard to less developed networks...'.

4 — See the second recital.

9. The 20th recital in the preamble to Directive 96/19 reads as follows:

'As regards the cost structure of voice telephony, a distinction must be made between the initial connection, the monthly rental, local calls, regional calls and long distance calls. The tariff structure of voice telephony provided by the telecommunications organisations in certain Member States is currently still out of line with cost. Certain categories of calls are provided at a loss and are cross-subsidised out of the profits from other categories. Artificially low prices, however, impede competition since potential competitors have no incentive to enter into the relevant segment of the voice telephony market and are contrary to Article 86 of the Treaty, as long as they are not justified under Article 90(2) of the Treaty... . Member States should phase out as rapidly as possible all unjustified restrictions on tariff rebalancing by the telecommunications organisations and in particular those preventing the adaptation of rates which are not in line with costs and increase the burden of universal service provision.'

10. Article 4c of Directive 90/388, inserted by Directive 96/19, provides:

'... Member States shall allow their telecommunications organisations to re-balance tariffs taking account of specific market conditions and of the need to ensure the affordability of a universal service, and, in particular, Member States shall allow them to adapt current rates which are not in line with costs and which increase the burden of universal service provision, in order to achieve tariffs based on real costs. Where such rebalancing cannot be completed before 1 January 1998 the Member States concerned shall report to the Commission on the future phasing out of the remaining tariff imbalances. This shall include a detailed timetable for implementation....'

11. On 10 June 1997, the Commission adopted Decision 97/603/EC concerning the granting of additional implementation periods to Spain for the implementation of Directive 90/388 as regards full competition in the telecommunications markets. [5]

12. Under Article 1 of that decision, the Kingdom of Spain was authorised to postpone until 1 December 1998 the performance of certain obligations, in particular the effective granting of new licences for the provision of voice telephony and of public telecommunications networks.

5 — OJ 1997 L 243, p. 48.

13. Lastly, on 18 December 2000, the European Parliament and the Council of the European Union adopted Regulation (EC) No 2887/2000 on unbundled access to the local loop. [6]

14. According to the second recital in the preamble to that instrument, local loop unbundling complements the existing provisions of Community law guaranteeing universal service and affordable access for all citizens of the European Union, by increasing competition, ensuring economic efficiency and bringing maximum benefit to users.

15. According to the third recital in the preamble to Regulation No 2887/2000, the 'local loop' is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network. [7]

16. The seventh recital in the preamble to Regulation No 2887/2000 states that 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 (DSL) technology as well as voice telephony services.

17. Article 3(3) of Regulation No 2887/2000 provides:

'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.'

B — *Spanish law*

18. The Spanish authorities have put in place a number of measures to allow the rebalancing of the rates charged by Telefónica. [8]

6 — OJ 2000 L 366, p. 4.

7 — See, also, Article 2(c) of that regulation.

8 — See the application (paragraphs 13 to 20) and the defence (paragraphs 13 to 29).

19. The first measure is the Orden por la que se determinan las tarifas y condiciones de interconexión a la red adscrita al servicio público de telefonía básica que explota el operador dominante para la prestación del servicio final de telefonía básica y el servicio portador soporte del mismo of 18 March 1997 (Order fixing tariffs and conditions for interconnection to the public voice telephony network utilised by the dominant operator). [9] The measure consisted in increasing the monthly rental by 16% and the price of local calls by 13% and reducing charges for provincial, interprovincial and international calls by 5%, 15% and 12%.

20. The Spanish authorities then adopted the Orden sobre reequilibrio tarifario de servicios prestados por 'Telefónica Sociedad Anónima' of 31 July 1998 (Order concerning the tariff rebalancing of services provided by Telefónica). [10] They set the monthly rental charge at ESP 1 442 for 'residential' lines and at ESP 1 797 for 'líneas de enlace' (trunk lines).

21. On 16 April 1999 the Spanish authorities further reduced the charges for provincial, interprovincial and international services.

22. On 15 October 1999 they adopted Real Decreto-Ley por el que se adoptan medidas para combatir la inflación y facilitar un mayor grado de competencia en las telecomunicaciones [11] (Royal Decree Law 16/1999 containing certain measures to counter inflation and increase competition in the telecommunications market), which made provision for new increases in telephone subscription charges. According to the timetable envisaged, the charge had to increase three times by ESP 100, on 1 August 2000, 1 March 2001 and 1 August 2001.

23. The Spanish authorities then set up a new pricing system, based on a capping mechanism, enacting the Orden por la que se dispone la publicación del Acuerdo de la Comisión Delegada del Gobierno para Asuntos Económicos of 31 July 2000 (order for publication of the decision of the Government Commission on Economic Affairs of 27 July 2000, establishing a new pricing mechanism for the services provided by Telefónica). [12]

24. That new mechanism (otherwise referred to as the 'price cap') applies to

9 — *BOE* No 74 of 27 March 1997, p. 10079.
10 — *BOE* No 188 of 7 August 1998, p. 26858.
11 — *BOE* No 248 of 16 October 1999, p. 36561.
12 — *BOE* No 183 of 1 August 2000, p. 27564.

the services provided by Telefónica and covers the period 2001-2002. It is based on calculation formulae involving Spanish Government forecasts of changes in the retail price index (hereinafter 'the RPI') and adjustment factors. It was extended to cover 2003 by the Orden por la que se dispone la publicación del Acuerdo de la Comisión Delegada del Gobierno para Asuntos Económicos del Acuerdo por el que se modifica el Acuerdo of 10 May 2001 (Order for publication of the decision of the Government Commission on Economic Affairs amending the decision of that commission of 27 July 2000, establishing a new pricing mechanism for the services provided by Telefónica). [13]

25. The price cap mechanism, as set out in the aforementioned Orders, establishes the following pricing structure:

— all fixed telephony and fixed calls to mobile telephony services shall be subject to regulated change equivalent to the annual variation in the forecast RPI - 9% in 2001, the annual variation in the forecast RPI - 8% in 2002 and to the annual variation in the forecast RPI - 4% in 2003;

— subscription charges may not rise in 2001, but may be increased by a maximum of the annual variation in the forecast RPI + 9.4% in 2002 and by the annual variation in the forecast RPI + 6% in 2003;

— connection charges may rise by a maximum of the annual variation in the forecast RPI - 16.5% in 2001 and 2002 and by the annual variation in the forecast RPI - 2% in 2003.

26. The other provisions of national law relevant to examination of the action are the measures concerning unbundling of the local loop.

27. Real Decreto-Ley 7/2000 de Medidas Urgentes en el Sector de las Telecomunicaciones of 23 June 2000 (Royal Decree-Law on urgent measures in the telecommunications sector) [14] imposed a duty to provide

13 — *BOE* No 118 of 17 May 2001, p. 17456.

14 — *BOE* No 151 of 24 June 2000, p. 22458.

services with full unbundled access and shared access to the local loop. That measure was supplemented by Real Decreto 3456/2000 por el que se aprueba el Reglamento que establece las condiciones para el acceso al bucle de abonado de la red pública telefónica fija de los operadores dominantes of 22 December 2000 (Royal Decree approving the Rules establishing the terms of access to the loop for subscribers to the fixed public telephony network of the dominant operators). [15]

28. Article 5(1) of that instrument provides that the tariffs for access to the local loop must be set on the basis of cost orientation.

29. The Orden... por la que de dispone la publicación del Acuerdo de la Comisión Delegada del Gobierno para Asuntos Económicos por el que de establecen los precios de la primera oferta de acceso al bucle de abonado en las modalidades de acceso completamente desagregado, de acceso compartido y de acceso indirecto, a la red pública telefónica fija de 'Telefónica de España, Sociedad Anónima Unipersonal' of 29 December 2000 (Order for the publication of the decision of the Government Commission on Economic Affairs, setting the prices of the first offering of access by subscribers to the loop and the full unbundled access, shared access and indirect access to the Telefónica fixed public telephony network) [16] sets the monthly rates for unbundled access to the local loop. Those are ESP 2 163 in 2001, ESP 2 100 in 2002 and ESP 2 050 in 2003.

II — Pre-litigation procedure

30. The pre-litigation procedure consisted of two phases.

31. In the first phase, the Commission criticised the Spanish authorities for failing to send it a report on the phasing out of restrictions on tariff rebalancing, in accordance with Article 4c of Directive 90/388 as amended.

32. Accordingly, on 11 December 1998, the Commission sent a formal notice stating that the Kingdom of Spain had not yet submitted to it a detailed timetable for the phasing out of restrictions on tariff rebalancing.

15 — *BOE* No 307 of 23 December 2000, p. 45567.

16 — *BOE* No 131 of 30 December 2000, p. 49758.

33. On 11 February 1999, the Spanish authorities replied that the Orden of 31 July 1998 effected the tariff rebalancing and that the timetable could be spread over the period to 31 December 2000.

34. Taking the view that the measures taken were insufficient and that the Spanish authorities had acknowledged that they had not drawn up a detailed timetable for implementation, the Commission issued its reasoned opinion on 4 May 1999.

35. In the meantime, by letter of 26 April 1999, the Spanish authorities had notified the Commission of new measures, adopted on 16 April 1999, for the reduction of the provincial, interprovincial and international call rates.

36. In order to take account of those measures, the Commission, by letter of 26 May 1999, informed the Kingdom of Spain that its reasoned opinion had been superseded.

37. In the second phase of the procedure, the Commission continued its examination of the case in the light of a complaint lodged by Telefónica on 23 November 1998.

38. Telefónica contended, in effect, that the Spanish legislation did not allow it to increase the monthly subscription charge in such a way as to cover the 'deficit resulting from access'. The deficit resulting from access is the difference between the access income, that is to say, revenue from monthly subscriptions and from the initial connection charge, and network access costs, that is to say, the cost of the fixed telephony infrastructure linking final users to the switching facilities of the telecommunications operator.

39. On 25 November 1999, the Commission requested certain information from the Spanish Government in connection with the complaint lodged by Telefónica.

40. By letter of 21 January 2000, the Spanish authorities replied that they were not able to ascertain whether the deficit resulting from access which Telefónica alleged in fact existed. In addition, they informed the Commission of their intention to set up the price cap arrangements.

41. On 4 May 2000, the Commission sent a letter of formal notice to the Spanish Government. It charged the Government with failing to allow Telefónica sufficient flexibility to enable it to rebalance tariffs as required by Article 4c of Directive 90/388 as amended.

42. Not satisfied by the Spanish authorities' response to that notice, on 29 January 2001 the Commission delivered a reasoned opinion. The Commission pointed out that the tariff rebalancing process had not been completed in 1999 and probably would also not be in 2001. The Commission also stated that Telefónica's deficit resulting from access in 1999 was ESP 258 billion.

43. In their reply of 29 March 2001, the Spanish authorities disputed the Commission's assessment. In their view, the deficit resulting from access supposedly experienced by Telefónica in 1999 was ESP 173 449 billion, that is, ESP 85 billion less than the figure put forward. Additionally, the Spanish authorities announced a series of amendments to the price cap mechanism.

44. On 18 April 2001, Telefónica made it known that, because of the measures announced by the Spanish Government, it was withdrawing its complaint.

45. On 27 July 2001, the Commission sent the Kingdom of Spain a supplementary reasoned opinion to take account of three events occurring in 2001. Those events were the enactment of instruments requiring Telefónica to offer services with unbundled access to the local loop,[17] changes made in May 2001 to the price cap system[18] and the exact assessment, by the Spanish Government, of Telefónica's deficit resulting from access in 1999.[19]

46. The Spanish authorities replied to that supplementary reasoned opinion by letter of 9 October 2001. Not satisfied by their response, the Commission brought the present proceedings on 21 December 2001.

III — The claims and pleas of the parties

47. In its application, the Commission submits that the Kingdom of Spain has failed correctly to apply the Community provisions on tariff rebalancing.

48. In the Commission's view, the Spanish authorities should have allowed Telefónica to rebalance its tariffs in accordance with Article 4c of Directive 90/388 as amended.

17 — See point 27 of this Opinion.
18 — Ibid. (point 24).
19 — Ibid. (point 43).

By obliging Telefónica to retain a tariff structure which harmed its competitors and by maintaining tariffs not consistent with real costs, the Spanish authorities have created a situation detrimental to the development of competition.

49. Mindful of the constraints imposed by the price cap mechanism, the Commission takes the view that the monthly subscription charges could not be based on real costs earlier than the beginning of 2003. It asserts that the hypothetical productivity gains of 6% per annum, calculated by the Spanish authorities, required to eliminate the deficit resulting from access were improbable, since infrastructure-related efficiency gains are modest.

50. The Spanish Government, for its part, argues that Directive 90/388 as amended does not require it to impose on Telefónica tariffs based on real costs. That directive merely obliges it to phase out the restrictions which prevent Telefónica from bringing its tariffs into line with real costs. Article 4c of Directive 90/388 as amended does not therefore, it contends, impose an obligation of result on the Government, but an obligation of means.

51. The Spanish Government also points out that Article 4c of Directive 90/388 as amended sets no exact time-limit for complying with the requirement to phase out restrictions on tariff rebalancing. On the contrary, that provision is, it asserts, founded on the notion that it was unlikely that the obligation could be fulfilled before 1 January 1998, given that it expressly contemplates the possibility of submitting a detailed timetable to the Commission, in the event of late compliance.

52. In order to determine the time-limit afforded to Member States to comply with the obligation in question it is therefore necessary, according to the Spanish Government, to refer to the case-law of the Court, according to which failure to fulfil obligations must be assessed on the basis of the circumstances in the Member State as pertaining at the end of the period set by the reasoned opinion. In the present case, it claims, the period set by the supplementary reasoned opinion expired at the end of October 2001.

53. So, the Kingdom of Spain asserts, it could not, at that time, be criticised for any failure to fulfil obligations. It is in its view common ground that, even on the basis of productivity increases of 3% to 4%, Telefónica will not have recorded any deficit resulting from access in 2002 or 2003.[20] The fact that Telefónica withdrew its complaint in April 2001 is, it contends, the best possible proof of the truth of that claim.

20 — It should be observed that the Kingdom of Spain filed its defence on 25 March 2002. On that date the parties therefore plainly could not know Telefónica's results for 2002 and 2003 since there were no such results.

54. The Kingdom of Spain therefore asks the Court to dismiss the action and to order the Commission to pay the costs.

IV — Assessment

55. Article 4c of Directive 90/388 as amended requires Member States to take the measures necessary to enable their telecommunications organisations to rebalance their tariffs, that is to say, to align their tariff structure with real costs.

56. In order to determine the merits of the Commission's action, it is therefore appropriate to ascertain whether Telefónica did in fact bring its charges into line with real costs. If it did not, it will be necessary to enquire whether that tariff imbalance is the result of Telefónica's conduct or of the measures taken by the Spanish authorities. That second stage in the analysis is thus necessary because, as the Spanish Government has pointed out, Article 4c of Directive 90/388 as amended does not require it to rebalance tariffs, but to take the measures necessary to enable Telefónica to do so.

57. As a preliminary point, however, I should refute the Spanish Government's argument that the time-limit for performance of the obligation in question expired at the end of October 2001.

58. It is apparent from the 20th recital in the preamble to Directive 96/19 that Member States had to phase out restrictions on tariff rebalancing 'as rapidly as possible'. The fifth recital in the preamble to the Directive, for its part, states that tariff rebalancing is a measure preparatory to opening up the market to competition, which opening up had to occur by 1 January 1998 at the latest. Further, Article 4c of Directive 90/388 as amended stipulates that the tariff rebalancing itself had to take place before 1 January 1998 since, if it did not, Member States would be obliged to forward a report to the Commission containing a detailed timetable for implementation.

59. It emerges from those circumstances that the Member States were bound to phase out the restrictions on tariff rebalancing as soon as possible after the entry into force of Directive 96/19[21] and, at the latest, by 1 January 1998.

21 — Directive 96/19 came into force on 11 April 1996 (in accordance with Article 3 thereof).

60. Article 4c of Directive 90/388 as amended does, admittedly, allow a Member State to derogate from those time-limits if it sends the Commission a detailed timetable. In my view, however, that exception cannot apply in the present case. The Spanish Government has not in fact demonstrated that it had adopted a detailed timetable for implementation within the prescribed period [22] and that such a timetable had been approved by the Commission. [23]

61. Similarly, I do not believe that Decision 97/603 had the effect of postponing implementation of the obligation in dispute. As the Commission stated, [24] the operative part of that decision sets out specifically the obligations for which an extension of the implementation period is granted, and the elimination of restrictions on tariff rebalancing is not one of them. [25]

22 — See in particular, as regards that requirement, the Opinion of Advocate General Geelhoed in Case C-146/00 *Commission* v *France* [2001] ECR I-9767, point 44, where he asserts that the requirement relating to a detailed timetable clearly cannot be satisfied merely by stating a final date.

23 — The requirement for that approval is, I consider, implicit in Directive 96/19. Since the detailed timetable postpones the time-limit for fulfilling the obligation in question (and the tariff rebalancing) and since that timetable could be the basis for bringing a further action against the Member State for failure to fulfil its obligations, it is scarcely conceivable that the Commission exercises no control over the timetables forwarded by the Member States. On the contrary, it is apparent to me that the internal logic and the purpose of Directive 96/19 require the Commission to indicate its agreement on those timetables for implementation.

24 — See the application (paragraph 66).

25 — The obligations of which postponement is authorised are the effective grant of new licences for the provision of voice telephony and public telecommunications networks (point 12 of this Opinion) and notification to the Commission and publication of all licensing or declaration procedures for the provision of voice telephony and the establishment of public telecommunications networks, and of details of the national scheme envisaged to share the net cost of the provision of the universal service obligation (Article 1(a) and Article 1(b) of Decision 97/603).

62. Accordingly, I take the view that the Kingdom of Spain had a duty to take the measures necessary in order to phase out the restrictions on tariff rebalancing as soon as possible after the entry into force of Directive 96/19 and, at the latest, by 1 January 1998. It is therefore in the light of those facts that I shall examine the two elements constituting the failure to fulfil its obligations of which the Kingdom of Spain stands accused.

A — *The existence of tariff imbalances*

63. According to the 20th recital in the preamble to Directive 96/19, tariff balancing must be achieved in respect of all five charges comprising the service provided by the telecommunications organisation, namely, the initial connection, the monthly subscription, local calls, national calls and international calls.

64. My view is that, in order to ascertain whether there are imbalances in Telefónica's tariff structure, the Court can rely on both the methods of calculation proposed by the Commission. [26]

26 — See the application (paragraphs 46 to 50).

(1) The first method of calculation

65. The first method consists in assessing whether there is a deficit resulting from access on the basis of Telefónica's accounts, inspected by the Comisión del Mercado de Telecomunicaciones (Spanish Telecommunications Market Commission). As I have stated,[27] the deficit resulting from access is the difference between income from access, that is to say, the revenue from monthly subscriptions and from initial connections, and the costs of access, namely, the cost of the fixed telephony infrastructure connecting final users to the switching facilities of the telecommunications operator.

66. In the defence,[28] the Spanish Government expressly acknowledged that in 1999 Telefónica experienced a deficit resulting from access of ESP 173 449 billion. It added that the foregoing figure had been the basis for the adjustments made in May 2001 to the price cap scheme. It is therefore common ground that there was a tariff imbalance for the 1999 financial year.

67. As regards the following years, I would draw attention to the fact that, in their letter of 9 October 2001,[29] the Spanish authorities gave a number of forecasts of Telefónica's profit margins based on the various hypotheses for productivity gains.

68. It can be discerned from those forecasts that, even with productivity gains of 6% per annum from 1999 (the most favourable hypothesis), Telefónica would have continued to suffer a deficit resulting from access until the beginning of 2002. Furthermore, in the (more plausible, according to the Commission) hypothesis of productivity gains of between 3% and 4% per annum from 1999, Telefónica's deficit resulting from access would not have been eliminated before the start of 2003.

69. The Spanish Government's arguments seeking to refute that analysis are unconvincing.

70. On the one hand, the Spanish Government disputes the Commission's assessment of the amount of Telefónica's deficit resulting from access for 1999.[30] It holds that the figure is too high because the Commission included the cost relating to non-

27 — Point 38 of this Opinion.

28 — Points 27 and 28.

29 — Annex 24 to the application.

30 — See the defence (paragraph 34).

profitable telephone lines, whereas that cost was, it contends, already included in the net cost of the universal service obligation.

71. It is sufficient to note, in that regard, that the deficit resulting from access for 1999 is information which the Spanish Government itself advanced in the pre-litigation procedure, [31] and which it has expressly confirmed in the present proceedings. [32] It is hard to see, therefore, in what respect the Commission could have made an error in assessing the amount in question. In any event, the Spanish authorities have not stated what is, in their view, the exact amount of the deficit resulting from access incurred by Telefónica in 1999.

72. On the other hand, the Spanish Government contends that the deficit resulting from access for 2000, which that Government itself notified to the Commission by its letter of 9 October 2001, is also incorrect. [33] That figure is, in its view, an overestimation by some ESP 30 billion in that it includes, wrongly, the cost of the universal service intended for non-profitable areas or for special charges for certain users.

73. Nor, I believe, is that argument tenable, since the Spanish Government offers no evidence relating to the error which it claims it made.

74. Be that as it may, the Spanish Government acknowledges that, even taking into account the error referred to, Telefónica's deficit resulting from access will not have been eliminated by the beginning of 2002 (on the basis of hypothetical productivity gains of between 3% and 4% per annum from 1999). [34] Since that phasing out of the deficit resulting from access, even assuming that it is proven, will have occurred after expiry of the period set by the reasoned opinion (27 October 2001), [35] it cannot be taken into account in assessing the present failure by a State to fulfil its obligations.

(2) The second method of calculation

75. The second method of calculation consists of comparing the monthly rental invoiced by Telefónica with the charge for unbundled access to the local loop.

31 — Letter of 29 March 2001 (Annex 22 to the application, second subparagraph of paragraph 3).

32 — The defence (paragraphs 27 and 28).

33 — Ibid. (paragraph 35).

34 — Ibid. (paragraph 36, second subparagraph).

35 — The initial two-month period granted by the Commission was extended by one month at the request of the Spanish authorities (see the defence, paragraph 11). Since the supplementary reasoned opinion was issued on 27 July 2001, the period expired three months later, that is to say, on 27 October 2001.

76. As the Commission has observed, [36] charges for unbundled access to the local loop must be based on real costs, in compliance with Article 3(3) of Regulation No 2887/2000. The monthly rental must also be based on real costs, under Article 4c of Directive 90/388 as amended.

77. In addition, the components making up the cost of unbundled access to the local loop should be comparable to those involved in providing the monthly subscriber service. In both cases the infrastructure required is the same (the metallic pair in the fixed public telephone network connecting the operator's switching facility to the end-user's terminal) and the pricing structure includes comparable components (namely, the start-up costs and connection costs, on the one hand, and the charge for use of unbundled lines and the rental charge, on the other). The monthly subscription charge should therefore be globally comparable to the rate for unbundled access to the local loop.

36 — See the application (paragraph 48).

78. In the present case, it emerges from the evidence in the case-file that Telefónica set the monthly rental for residential lines as follows:

— approximately ESP 1 742 for 2001; [37]

— ESP 1 942 for 2002, [38] and

— ESP 2 100 FOR 2003. [39]

79. However, in relation to unbundled access to the local loop, it has been seen

37 — That figure is calculated by adding together the telephone rental charge set by the Order of 31 July 1998 (point 20 of this Opinion), namely, ESP 1 442, and the three successive increases by ESP 100 in August 2000, March 2001 and August 2001 required by Royal Decree Law 16/1999 (point 22 of this Opinion).

38 — That figure was proposed by the Commission (see the application, paragraph 56) and expressly confirmed by the Spanish Government (see the defence, paragraphs 28 and 35).

39 — That figure was proposed by the Commission (see the application, paragraph 56) and expressly confirmed by the Spanish Government (see the defence, paragraph 28).

that the Spanish authorities set a different tariff. The aforementioned Order of 29 December 2000[40] set that charge at ESP 2 163 in 2001, ESP 2 100 in 2002 and ESP 2 050 in 2003.

80. The foregoing comparison reveals that the monthly rental will have remained less than the charge for unbundled access to the local loop in 2001 (with a difference of 19.43%) and in 2002 (with a difference of 7.52%). Only in 2003 will the monthly rental be higher than the charge for access to the local loop (with a difference of 2.38%).

81. The Spanish Government's arguments seeking to refute that analysis are unconvincing.

82. The Spanish Government considers that the fact that the monthly rental is less than the charge for unbundled access to the local loop is not such as to impede competition or to place new operators at a disadvantage. In its view, a finding that there are distortions of competition can only be made taking into account a number of factors, and in particular the fact that new entrants are not subject to universal service obligations.[41]

83. The Spanish Government also asserts that since August 1998 the monthly rental has risen by more than 56% for residential lines, with the effect that the sacrifice required of consumers as regards the fixed cost of the telephone service will allow elimination of the deficit resulting from access in 2002.

84. I consider those arguments to be irrelevant. In the defence, the Spanish Government seems not in fact to dispute that the second method of calculation is appropriate nor even that there is a difference between the monthly rental and the charge for access to the local loop. As for the first method of calculation, the Spanish Government appears to recognise that there was a deficit resulting from access until the start of 2002.[42]

85. Consequently, I take the view that the Court can find, from the evidence in the case-file, that the traditional Spanish operator will not have rebalanced tariffs as required by Article 4c of Directive 90/388

40 — Point 29 of this Opinion.

41 — See the defence (paragraphs 39 to 41).

42 — See the defence (paragraph 54).

as amended before the start of 2003 and, in any event, before expiry of the time-limit set by the reasoned opinion.

86. It remains therefore to ascertain whether those tariff imbalances are the result of Telefónica's conduct or of the measures implemented by the Spanish authorities.

B — *Responsibility for the tariff imbalances*

87. It is pertinent to note that, in practical terms, tariff rebalancing should take the form of an increase in the initial connection charge, the monthly rental and charges for local calls and of a reduction in the charges for regional and international calls.

88. Until the price cap system came into force in 2001, the Spanish authorities themselves carried out the various increases and reductions in the charges for the components of the voice telephony service. Accordingly, it is known that:

— the Order of 18 March 1997 increased the monthly rental and the price of local calls by 16% and 13% and brought down the price of provincial, interprovincial and international calls by 5.15% and 12%;

— the Order of 31 July 1998 set the monthly rental charge at ESP 1 442 for residential lines and ESP 1 797 for 'líneas de enlace';

— on 16 April 1999, the Spanish authorities again lowered provincial, interprovincial and international call charges, and that

— Royal Decree Law 16/1999 implemented three successive increases of ESP 100 in the monthly rental in August 2000, March 2001 and August 2001.

89. It follows from the foregoing that, until implementation of the price cap mechanism, Telefónica had no margin of discretion in setting its charges. It is legitimate to find, therefore, that the absence of any tariff rebalancing for 1999 and 2000 is exclusively attributable to the Spanish authorities.

90. As regards the following years, the price cap scheme afforded a degree of freedom to the traditional Spanish operator. [43] That scheme, which is based on a system of maximum and minimum prices, specifies the limits within which, each year, Telefónica can increase or reduce its charges.

91. It would appear nevertheless that the freedom given to Telefónica was insufficient to enable it to rebalance tariffs as required by Directive 90/388 as amended.

92. Indeed, in the defence, [44] the Spanish Government disputed the Commission's assertion that Telefónica would not have used its freedom to set tariffs in 2002 and 2003. The Government stated that 'Telefónica used the full margin of discretion afforded it [by the price cap scheme] by increasing the rental charges for business and residential lines on 1 January 2002 to the maximum limit established for the whole year'.

93. So, it emerges from the considerations set out above [45] that the exercise of that freedom, even to the maximum extent, was insufficient to achieve the balanced tariffs required by Directive 90/388 as amended. The tariff imbalances observed for the period 2001-2002 cannot therefore, in my view, be imputed to the conduct of Telefónica. On the contrary, those imbalances appear to be the result of the measures, in particular of the maximum and minimum prices, put in place by the Spanish authorities.

94. On the basis of the evidence in the case-file, I therefore propose that the Court should declare that the Kingdom of Spain failed to take all the measures necessary to enable its telecommunications operator to rebalance its tariffs in accordance with Article 4c of Directive 90/388 as amended.

43 — Point 25 of this Opinion.

44 — Paragraphs 51 and 52.

45 — Points 63 to 85 of this Opinion.

V — Conclusion

95. I therefore suggest that the Court should grant the application and

(1) Declare that, by failing to adopt all the measures necessary to enable the traditional telecommunications operator, Telefónica de España SA, to rebalance its tariffs in accordance with Article 4c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive 96/19/EC of 13 March 1996, the Kingdom of Spain has failed to fulfil its obligations under those directives;

(2) Order the Kingdom of Spain to pay the costs.