certain undertakings regarding telecommunications services, it was under an obligation, on the one hand, to define specifically the type of rights concerned and, on the other, to show in what respect the exercise of such rights was contrary to the various provisions of the Treaty. In view of its failure to do so, the provisions of Directive 90/388 must be annulled to the extent to which they purport to govern special rights.

4. The extension of the monopoly on the establishment and operation of the telephone network to the market in telecommunications services, without any objective justification, is prohibited as such by Articles 86 and 90(1) of the Treaty where that extension results from a State measure, thus leading to the elimination of competition. Such a situation exists where exclusive rights to supply telecommunications services are granted to the telecommunications organizations, with the result that the latter exclude competitors from the market for telecommunications services or, at least, restrict their access to that market. The Commission was therefore justified in requiring, by means of Directive 90/388, the withdrawal of such rights.

REPORT FOR THE HEARING
in Joined Cases C-271/90, C-281/90 and C-289/90 *

I — Facts and procedure

1 — *The directive in question*

On 28 June 1990, the Commission adopted, on the basis of, in particular, Article 90(3) of the Treaty, Directive 90/388/EEC on competition in the markets for telecommunications services ('the Directive') whose terms may, in substance be summarized as follows:

Article 1 defines various terms such as 'telecommunication organizations', 'special or exclusive rights', 'public telecommunications network', 'telecommunications services', 'network termination point', 'essential requirements' and so on. It also states that the Directive is not to apply to telex, mobile radiotelephony, paging and satellite services.

Under Article 2 Member States are required, in particular, to withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

* Languages of the case: Spanish (in Case C-271/90), French (in Case C-281/90), and Italian (in Case C-289/90).

Article 4 requires rules of application relating to leased lines to be adopted and information to be forwarded to the Commission on the factors justifying increases to the charges for leased lines.

Article 6 provides for, *inter alia*, the abolition of existing restrictions on the processing of signals before their transmission via the public network or after their reception, and requires Member States to inform the Commission of the measures taken.

Article 7 provides that after 1 July 1991 certain administrative, technical, controlling and supervisory functions are to be carried out by a body independent of the telecommunications organizations.

Under Article 8, users bound by contracts for the supply of telecommunications services governed by rules granting special or exclusive rights are to be given the right to terminate the contract at six months' notice.

Finally, Article 9 provides that Member States are to communicate to the Commission the necessary information to allow it to draw up, for a period of three years, at the end of each year, an overall report on the application of the Directive.

II — Procedure

The applications of the Kingdom of Spain, the Kingdom of Belgium and the Italian Republic were registered at the Court on 7, 14 and 20 September 1990 respectively. By order of 5 December 1990, the Court granted the French Republic leave to intervene in Case C-271/90 in support of the applicant's conclusions.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The parties were, however, requested to indicate precisely which pleas in law and arguments they intended to maintain, in view of the Court's ruling of 19 March 1991 in Case 202/88 *France* v *Commission* [1991] ECR I-1223.

III — Forms of order sought by the parties

In Case C-271/90, the *Kingdom of Spain*, supported by the *French Republic*, claims that the Court should:

— annul Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as far as Article 2, with regard to special rights, and Articles 8 and 9 are concerned, and

— order the defendant to pay the costs.

The *Commission* contends that the Court should:

— dismiss the action, and

— order the applicant to pay the costs.

In Case C-281/90, the *Kingdom of Belgium* claims that the Court should:

— annul Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, and

— order the defendant to pay the costs.

The *Commission* contends that the Court should:

— dismiss the application for the annulment of Commission Directive 90/388/EEC of 28 June 1990 submitted by the Belgian State, and

— order the applicant to pay the costs.

In Case C-289/90, the *Italian Republic* claims that the Court should:

— annul Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services as far as Articles 2, 4 and 8 are concerned, and

— order the Commission to pay the costs.

The *Commission* contends that the Court should:

— dismiss the Italian Republic's application for the annulment of Commission Directive 90/388/EEC of 28 June 1990 and

— order the applicant to pay the costs.

IV — Pleas in law and arguments of the parties

1 — *Pleas in law contained in the applications*

(a) The *Spanish Government* has put forward five grounds to support its action, namely lack of competence, breach of Article 90(1) of the EEC Treaty, misuse of procedure, lack of reasoning and breach of the principle of proportionality.

The *French Government*, intervening in support of the Kingdom of Spain, makes submissions alleging lack of competence of the Commission under Article 90 of the EEC Treaty, the infringement of essential procedural requirements and misuse of procedure.

(b) The *Belgian Government* relies on two grounds in support of its action, namely breach of Articles 4, 59, 85, 86, 87(1) and 87(2)(c), 90(1) and 90(3), 100A, 145, 155 and 222 of the EEC Treaty and of the general principles governing the institutional balance within the Community, and breach of Article 90(3) and Article 190 of the Treaty. In its

application the *Belgian Government* explains that the first ground for annulment is the truly institutional ground, being based on the reasoned conclusion that the directive in question has as its true object the exercise, on the part of the institution, of a power which, strictly speaking, is a legislative power and not simply a power to prosecute infringements of Community law. The second ground, which is alternative to the first, seeks to have the Directive examined in the light of the obligation to give reasons.

(c) The *Italian Government* relies on five grounds in its application, namely (1) the Commission's lack of competence to adopt the provisions referred to in Articles 1, 2, 4, 6, 7 and 8 of the Directive, breach and misapplication of Article 90(3) of the Treaty, breach of Articles 100A and 155 of the Treaty, (2) breach of the principle requiring prior notice, which may be inferred from Articles 93(2) and 169 of the Treaty, misuse of power, failure to state reasons, (3) other breaches of Article 90 of the Treaty, misuse of power, lack of competence, (4) breach of the principle of proportionality and (5) other breaches of Article 90 of the Treaty and of the principle of proportionality.

2. *The parties' replies to the Court's request to indicate the pleas in law and arguments which they intend to maintain*

(a) The *Spanish Government* states that it no longer relies on its first and third grounds, that is to say those alleging the Commission's lack of competence and the use of an improper procedure, since these have been dealt with in Case C-202/88 *France* v *Commission* [1991] ECR, cited above. As for the second ground, that is to say breach of Article 90(1) of the Treaty, the Spanish Government maintains it in relation to special rights but abandons it in relation to exclusive rights. As for the fourth ground, lack of reasons, the Spanish Government maintains it in relation to the special rights referred to in Article 2 of the Directive and likewise in relation to Articles 8 and 9 of the Directive. Finally, the fifth ground, failure to observe the principle of proportionality, is maintained by the Spanish Government in relation to Article 8 of the Directive.

The *French Government*, intervening in support of the Kingdom of Spain, wishes to maintain all its pleas and arguments against the Directive.

(b) The *Belgian Government* wishes to maintain all the pleas and arguments contained in its application.

(c) The *Italian Government* maintains the first plea (lack of competence, breach of Article 90 and so forth) and the third ground (further breach of Article 90) in relation to the special rights mentioned in Articles 2 and 4 of the Directive. It maintains the fourth ground (breach of the principle of proportionality) in its entirety as well as the fifth (further breach of Article 90 as well as of the principle of proportionality) in relation to Article 8 of the Directive.

(d) The *Commission* maintains in their entirety the arguments raised in its statements of defence and rejoinders.

3. *Summary of the pleas and submissions maintained by the parties*

The pleas and arguments of the parties can be summarized as follows:

(a) *Misuse of procedure*

The *intervener*, the French Republic, considers that the adoption by the Commission, on the basis of Article 90(3), of a directive prescribing the straightforward withdrawal of certain special or exclusive rights in the sphere of telecommunications services constitutes a misuse of procedure.

According to the French Republic, the Commission should either challenge the use by telecommunications undertakings of their rights by applying Article 86 of the Treaty and Council Regulation No 17/62, or it should bring an action under Article 169 of the EEC Treaty against the Member States in question for breach of their Treaty obligations in order to compel them to take the necessary measures to ensure that their telecommunications undertakings abide by the provisions of the Treaty.

However, those two procedures required the infringement or breach of obligations to have been established — and the undertaking of the Member State concerned to have been given notice to submit its observations — steps which the Commission spared itself by improperly resorting to Article 90(3) of the Treaty.

The French Government also points out that the Commission's use of Article 90(3) reverses the burden of proof since it is no longer a matter for the Commission, as under the procedures provided for by Regulation No 17/62 and Article 169 of the Treaty, to prove the infringements allegedly committed by the telecommunications undertakings or the Member States concerned but for the Member States to disprove those charges.

The French Government considers that, since Article 90(3) makes no provision for a preliminary exchange of arguments, the Commission was not entitled to resort to the use of a directive, as provided for by Article 90(3), for 'enforcement' purposes instead of using Article 169 of the Treaty.

In reply to this ground, raised initially by the Spanish Government, the *Commission* states in its defence in Case C-271/90 that, as far as the market in telecommunications services was concerned, infringements of the provisions of the Treaty were evident in most Member States. Article 169 of the Treaty as well as the procedure for applying Article 86 permit only specific, individual enforcement actions to be commenced in respect of

such infringements whereas this sector needed a common and coherent solution for all the Member States in order not only to bring the existing infringements to an end but also to prevent them from recurring. Article 90 of the Treaty is the most appropriate legal basis for achieving this result.

(b) *The Commission's lack of competence*

(aa) *Article 90(3) of the Treaty confers no legislative power on the Commission*

The *Belgian Government* considers that a supervisory role such as that envisaged by Article 90(3) of the Treaty can only be understood in the light of pre-existing rules. Since none of the provisions of the Treaty to which Article 90(1) refers imposes on Member States the obligations contained in Articles 1, 2, 4 and 6 of the Directive, the Commission has assumed the legislative power to organize, all by itself, the common market in telecommunications services, that is to say a sectorial Community policy not provided for by the Treaty.

The *Italian Government* considers that, as far as the special rights mentioned in Articles 2 and 4 of the Directive are concerned, the Commission has exercised a legislative power, the basis for which is not to be found in Article 90(3) nor in any other provision of the Treaty.

The *French Government* also points out that, in adopting a directive in which one provision (Article 2) prescribes the simple withdrawal of exclusive or special rights for the supply of telecommunications services other than the voice telephony service, the Commission has done more than carry out the duty of vigilance and supervision referred to by the Court in its judgment in Joined Cases 188 to 190/80 (*France, Italy and the United Kingdom* v *Commission* [1982] ECR 2545) and has exercised a legislative power which is nowhere conferred upon it.

The *Commission* points out that the aim of the Directive is to ensure that all economic agents have access to the provision of telecommunications services on the basis of objective criteria and are allowed to carry out those activities. The general scope of the Directive and its binding nature do not mean that it has a legislative character, that is to say that it introduces *new* general rules in the Community legal order. The legal rules, which the Directive merely explains and applies to specific cases or to specific theoretical infringements, are already contained in provisions of the Treaty such as Articles 59 and 86, which do have a legislative character. The Commission therefore considers that the Directive is clearly consonant with the supervisory role of ensuring that the existing provisions of the Treaty are observed, conferred on it by Article 90(3).

(bb) *Article 90(1) of the Treaty presupposes the existence of special or exclusive rights*

The *Spanish, Italian and French Governments* argue that Article 90(1) presupposes the existence of special rights. The *French Government* also considers that the provision presupposes the existence of exclusive rights as well. If adopted, the Commission's view that the rights in question are themselves a measure within the meaning of that article would rob this provision of the Treaty of all its useful effect. The Court has held that the fact that an undertaking, to which a Member State grants exclusive rights within the meaning of Article 90 or an extension of such rights following further intervention by that State, has a monopoly, is not *per se* incompatible with the Treaty (Case 155/73 *Sacchi* [1974] ECR 409). The Commission must therefore challenge the use of those rights case by case, in each of the Member States but not the rights themselves.

In the *Commission's* view, Article 90(1) of the Treaty does not in any way constitute an endorsement in Community law of all exclusive or special rights, whatever they may be. It considers that Article 90(1) merely refers to the possible existence of exclusive or special rights and if it mentions them explicitly only in a phrase which is not part of the main provision ('Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty'), this simply means that exclusive or special rights are allowed only if, and to the extent to which, they are not incompatible *per se* with other rules of the Treaty.

(cc) *The exceeding of the powers conferred on the Council by Articles 87 and 100A of the Treaty*

The *Belgian Government* considers that in prescribing the abolition of special and exclusive rights, the Commission has usurped the powers conferred on the Council by Articles 100A and 87 of the Treaty. Like any common policy for a specific sector, the formation of a common market in telecommunications requires harmonization and liberalization to proceed in tandem, not only for reasons of good economic sense or of technical necessity, but above all because of the prime importance of the political interaction between harmonization and liberalization. Therefore, it is for the same institution to legislate for harmonization as well as for liberalization.

The *Italian Government* argues that in prescribing the abolition of special rights the Commission has all but determined Community policy on competition in the telecommunications sector and has, though implicitly, inevitably brought about harmonization of the various interests of the Member States and the different bodies of legislation. However, it is clear from the wording of Articles 100 and 100A of the Treaty that it does not have the power to do so.

The *Commission* denies that the Directive harmonizes the legislation of the Member States in the sphere of communications. The

provisions of the Directive are designed only to eliminate exclusive and special rights, to eliminate restrictions and, in cases where such exclusive or special rights are maintained, to ensure that the conditions of access and of exercise are objective and non-discriminatory.

The Commission also considers that, as is clear from Article 89 of the Treaty, it may ensure that Articles 85 and 86 are applied even if the Council has not adopted measures to define, 'if need be', the scope of their provisions (Article 87(2)(c) of the Treaty).

(c) *Lack of reasoning*

The *Belgian* and *French Governments* argue that, inasmuch as the Directive aims to bring to an end certain infringements of Community law committed by Member States, its statement of reasons is defective since it does not specify the Member States which have committed infringements nor the circumstances in which those breaches were committed. The *Spanish Government* supports this line of argument with regard to special rights referred to in Article 2, as well as with regard to Articles 8 and 9 of the Directive.

The *Commission* states that the Directive contains a full, clear and precise analysis of the existing situation, the infringements in question and the objectives to be attained in order to remedy them. It should not be forgotten that the measure in question is a directive which by its nature is a general measure addressed to all the Member States in circumstances in which there cannot be any question of a detailed examination of each particular situation, even if in drawing it up the Commission took account of all the information at its disposal. Furthermore, the Commission points out that the Member States were involved in the drawing up of the Directive and had the opportunity to give their views on its terms.

(d) *Breach of the principle of proportionality*

According to the *Italian Government*, instead of making the assumption that the mere granting of special or exclusive rights is contrary to the Treaty, entailing an obligation to abolish (Article 2 of the Directive) or restrict (Article 4) such rights, the Commission should have investigated the various types of conduct adopted in the exercise of those rights, ascertained whether the conduct was in accordance with the Treaty and, if not, taken action. By all accounts, abolition would seem to be disproportionate in relation to the aim in view.

For the same reasons, the *Spanish* and *Italian Governments* argue that Article 90(3) of the Treaty does not give the Commission the power to oblige Member States to interfere in an authoritarian way with the terms of contracts which have been freely entered into in the past by organizations and customers (Article 8 of the Directive).

The *Commission* points out that the argument adduced by the Italian Government is really a way of presenting in another form the ground of challenge relating to the Commission's competence (Article 90(1) of the Treaty presupposes the existence of special or exclusive rights), to which it considers that it has already given a sufficient answer.

As for Article 8 of the Directive, which provides for customers of telecommunications organizations to terminate a contract for the supply of telecommunications services with more than one year to run, the Commission observes that such a provision is merely the corollary of the obligation to withdraw special or exclusive rights. As the thirty-first recital to the Directive indicates, it would be pointless to open up the market for telecommunications services to private operators if customers bound by long-term contracts to telecommunications organizations holding exclusive rights continued to be bound for years to the former holder of the monopoly in question.

M. Zuleeg
Judge-Rapporteur