OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 31 May 2001 [1]

1. The Commission of the European Communities seeks a declaration from the Court of Justice that the Hellenic Republic has failed to fulfil the obligations incumbent upon it in the mobile and personal communications sector. The breach consists of a failure to grant new licences according to the DCS 1800 and DECT standards.

I — Legislation

2. Commission Directive 96/2/EC of 16 January 1996 [2] amended, with regard to mobile and personal communications, Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. [3]

3. According to the eighth recital in the preamble to Directive 96/2, 'Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition, in particular by the extension of a dominant position ...'. [4]

4. Article 2(1) of Directive 96/2 states that: 'Without prejudice to Article 2 of Directive 90/388/EEC, and subject to the provision set out in paragraph 4 of this Article, [5] Member States shall not refuse to allocate licences for operating mobile systems according to the DCS 1800 standard at the latest after adoption of a decision of the European Radiocommunications Committee on the allocation of DCS 1800 frequencies and in any case by 1 January 1998.'

1 — Original language: Spanish.

2 — OJ 1996 L 20, p. 59.

3 — OJ 1990 L 192, p. 10.

4 — Directive 96/2 recommends that, in the mobile and personal communications sector, Member States should give preference to the use of Pan-European standards, such as GSM, DCS 1800, DECT — digital European cordless telecommunications services — and ERMES (seventh recital). The DCS 1800 standard, which is to be seen as part of the GSM system family, incorporates frequencies in the 1700 to 1900 Mhz band (eighth recital).

5 — That paragraph provides that 'Member States shall adopt, where required, measures to ensure the implementation of this Article, taking account of the requirement to ensure effective competition between operators competing in the relevant markets'.

5. Article 2(2), which is also subject to paragraph 4, prohibits Member States from refusing 'to allocate licences for public access/Telepoint applications, including systems operation on the basis of the DECT standard as from the entry into force of this Directive'. [6]

6. Directive 96/2 inserted several provisions into the original text of Directive 90/388, including Article 3a, the second and third paragraphs of which read as follows:

'As far as frequencies are available, Member States shall award licences according to open, non-discriminatory and transparent procedures.

Member States may limit the number of licences for mobile and personal communications systems to be issued only on the basis of essential requirements and only where related to the lack of availability of frequency spectrum and justified under the principle of proportionality.'

6 — In accordance with Article 5, this took place on 15 February 1996.

7. According to the 13th indent of Article 1(1) of Directive 90/388, [7] 'essential requirements' means 'the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services ...'. These reasons include in particular 'the efficient use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems.'

II — The facts

8. Under Presidential Decree No 437/1995, issued by the president of the Hellenic Republic, two licences were granted to the national telecommunications organisation OTE (*Organismos Tilepikoinoniom Ellados A.E.*); the first licence was for the provision of numeric mobile radiotelecommunication services according to the DCS 1800 standard, [8] while the second was a general licence for the provision of telepoint/public access services using CT2 and DECT technology. [9] Both licences were awarded directly to the aforementioned organisation without any announcements or prior communication and, therefore, without having given other undertakings the opportunity to submit applications. The

7 — Pursuant to the wording inserted by Article 1 of Directive 96/2.

8 — Case C-396/99.

9 — Case C-397/99.

successful undertaking assigned the first of the two licences to its subsidiary, CosmOTE.

9. On 29 July 1997, the Commission received two complaints regarding the conditions in which both the licences had been granted and, on 5 September 1997, the Commission forwarded the complaints to the Greek authorities so that the latter could comment upon them.

10. The Greek Government replied by a letter dated 28 November. On the matter of the DCS 1800 licence, it stated that only one third of the frequency spectrum had been assigned to the national telecommunications organisation, leaving 2 x 50 Mhz available for use by other operators. The Greek Government went on to say that, before granting new DCS 1800 authorisations, it would ensure that they were not a barrier to free competition in the mobile telephony market. As to the DECT licences, the Greek Government stated that it had not, in fact, refused to grant a licence to the complainant and that it was processing the latter's application.

11. After it had received and considered the replies from the Greek Government, the Commission sent it two letters of formal notice; the first, dated 28 April 1998, in respect of the DCS 1800 licences and the second, dated 12 May 1998, in respect of the DECT licences.

12. The Greek Government replied to both letters on 31 July 1998. In its replies, the defendant Member State informed the Commission that Article 2(1) and (2) of Directive 96/2 had been transposed into Greek law by Presidential Decree No 124/1998, Articles 3 and 7 of which provide that the grant of licences for mobile and personal communications may be limited where the reason for the limitation is the lack of available frequencies, provided that it is justified under the principle of proportionality, and taking account of the need to avoid harmful interference, to promote investment and to safeguard competition. The Greek Government also stated that it was drafting regulations concerning the procedure and the conditions for awarding DCS 1800 and DECT licences, and that these would be approved within a short period of time.

13. In two subsequent letters, both dated 29 September 1998, the Greek Government claimed that it was not in a position to call for tenders for new DCS 1800 and DECT mobile telephony licences because, although there were frequencies available, it was not possible to allocate them owing to the lack of a proper monitoring system to protect against their possible illegal use.

14. The Commission took the view that the aforementioned situation was attributable to the fact that the Greek Government had delayed in establishing a frequency monitoring system and, on 17 December 1998, it sent two reasoned opinions, in which it gave the Greek Government a two month period, starting with the date of receipt, to remedy the situation giving rise to the breach.

15. The defendant replied to both reasoned opinions by two letters dated 23 February 1999. On the matter of the DCS 1800 licences, the Greek Government informed the Commission that it had engaged in discussions with the three mobile telephony organisations regarding the amendment, extension or harmonisation of their existing licences, and regarding the operation of the spectrum available for the GSM-900 and DCS 1800 systems. The defendant added that, in the meantime, it was drafting the necessary regulations and, by way of a new argument, it indicated that implementation of the policy required by the Community institutions necessitated the availability of a spectrum which was adequate in qualitative terms. The defendant also explained that it was promoting the establishment of a radio frequency management system. As to the DECT licences, the Greek Government reiterated its argument that the spectrum was not available, owing to the lack of a proper monitoring system which would enable there to be effective operation by users.

16. Subsequently, on 13 October 1999, the Commission brought the two actions which have been joined in these proceedings.

III — The procedure before the Court of Justice and the claims of the parties

17. The President of the Court of Justice, by order dated 1 December 1999, decided to join the two cases in view of the connection between their subject matter.

18. The Commission seeks a declaration from the Court of Justice that the Hellenic Republic has failed to fulfil the obligations incumbent upon it under Article 2(1) (Case C-396/99) and Article 2(2) (Case C-397/99) of Directive 96/2, in conjunction with the second and third paragraphs of Article 3a of Directive 90/388, and it also seeks an order for the Hellenic Republic to pay the costs.

19. For its part, the defendant is seeking dismissal of the actions and an order for the Commission to pay the costs.

20. Following the report of the Judge-Rapporteur, having heard the views of the Advocate General, and with the express agreement of the parties, the Court of Justice decided to dispense with the oral phase of the proceedings, pursuant to Article 44a of the Rules of Procedure.

21. At the general meeting held on 13 March 2001, the Court of Justice deci-

ded to request, from the competent division, a French translation of Order No 78574 of the Greek Ministry of Transport and Communications, which was delivered to my office on 30 April 2001.

IV — Analysis of the actions

1. *The aim of Directive 96/2*

22. The purpose of Directive 96/2 is to extend the scope of Directive 90/388 to mobile and personal communications. In view of the fact that the latter seeks to establish an open market in the telecommunications services sector, the former pursues the same aim in the specific sector with which it is concerned, and does so by amending certain provisions of Directive 90/388 and by inserting new provisions into it.

23. The aim of Directive 96/2 is, therefore, freedom of competition in the mobile and personal communications market. In accordance with that aim, Article 2 prohibits Member States from refusing authorisations for DCS 1800 mobile systems with effect from 1 January 1998 [10] (paragraph (1)), and from doing likewise in respect of DECT licences with effect from 15 February 1996 [11] (paragrap(2)).

24. After those dates, the market for mobile and personal communications carried by the two systems referred to above was required to be open, the consequence of which is threefold:

(1) Member States may not limit the number of licences, except where the reason for doing so is a lack of available frequencies. In addition, the limitation must be justified by non-economic reasons in the public interest, such as, for example, the efficient use of the frequency spectrum and the avoidance of harmful interference. In any event, the decision to stipulate the number of licences must be justified under the principle of proportionality. [12]

(2) The licences which are awarded must not be subject to unjustified restric-

10 — Or with effect from the date on which the European Radiocommunications Committee adopted a decision on the allocation of DCS 1800 frequencies.

11 — The date on which the directive entered into force.

12 — See the third paragraph of Article 3a and the 13th indent of Article 1(1) of Directive 90/388, which were inserted by Directive 96/2.

tions, whether or not these are technical in nature, and nor must they confer exclusive rights. [13]

(3) The procedures for granting licences must be transparent and public, and must be conducted in accordance with objective criteria and be non-discriminatory in effect. [14]

2. *The breaches complained of*

25. The final consequence assumes relevance in the cases which I must consider now. The Commission claims its applications that Presidential Decree No 124/1998 cannot be regarded as sufficient to implement fully Directive 96/2, since it does not lay down either the conditions or the procedure for granting licences. Those who wish to obtain mobile and personal communications licences are unable to submit either applications or tenders because they have no knowledge of the conditions for operation or the selection criteria. Free competition in this market is thus impeded.

26. In my view, the Court should accept the Commission's arguments. Freedom of competition in the mobile and personal communications market requires there to be no restrictions on the opportunity to enter that market. Where access is dependant upon obtaining an authorisation, then, for such an opportunity to exist, it is essential that applicants are aware of the procedure that they must follow and the criteria that will determine the granting of licences, and these must, in all cases, involve equal treatment for the applicants and prohibit any hint of discrimination. There is no greater disregard for free entry to a market than the failure to provide a door through which to gain access and a window through which to observe the manner in which, and to whom, authorisations are awarded.

27. That is the situation which exists in these cases, where, since the dates indicated above, [15] no new licences for mobile and personal communications using DCS 1800 and DECT technology have been put out to tender in public, transparent procedures. In fact, that could not have happened because Greek law does not contain any provisions regulating the procedure and the criteria for granting such authorisations.

28. Presidential Decree No 124/1998, referred to above, merely provides for the possibility of limiting licences for mobile and personal communications systems

13 — See subparagraph (iii) of the first paragraph of Article 3a, Article 3c (both of which were inserted by Directive 96/2) and the first paragraph of Article 2 of Directive 90/388. Article 1(2) originally excluded mobile telephony from the scope of the directive. The new wording of this provision, inserted by Directive 96/2, widens the scope of Directive 90/388 to include that communication system.

14 — See the second paragraph of Article 2, and Articles 3a and 3b of Directive 90/388 (the latter two of which were inserted by Directive 96/2).

15 — See point 23 of this Opinion.

when the frequency spectrum has been used up, [16] prohibits unjustified technical restrictions in cases where there are frequencies available, [17] and establishes general, guiding criteria in accordance with which licences for DCS 1800 and DECT systems are to be granted, [18] but it does not lay down any rules or procedures to be followed in order to obtain a licence.

enactment of Ministerial Order No 78574 of 24 November 1999, which completes the regulatory framework established under Presidential Decree No 124/1998, by laying down the procedures and the criteria for awarding licences.

A. The mobile and personal communications sector in Greece

3. *The defence submitted by the Greek Government*

30. The structure of the mobile and personal communications market in Greece at the time when Directive 96/2 entered into force, and on the dates with effect from which Member States were no longer entitled to refuse DCS 1800 and DECT licences, [21] is immaterial to the resolution of these proceedings, the object of which is to ascertain whether the Hellenic Republic failed to grant new licences in accordance with the provisions cited.

29. The defendant, abandoning the line of defence which it had pursued in the administrative phase of the proceedings, [19] has redirected the debate towards an area which appears to be safer for its own interests but which is more difficult for the Court of Justice, in that it is supported by facts which are difficult to evaluate. The Greek Government now claims that, when Directive 96/2 was adopted, freedom of competition existed in the national mobile and personal communications market [20] and that this situation should be taken into account when implementing Directives 90/388 and 96/2. The defendant adds that the actions brought by the Commission have been devoid of any purpose since the

31. I have noted that Directive 96/2 aims to establish an open market in the mobile and personal communications sector; that, in order to achieve that aim, the directive prohibits Member States, with effect from specified dates, from refusing to grant licences for the DCS 1800 and DECT systems; and that a prerequisite for the effectiveness of this prohibition is the existence of procedures for the granting of authorisations.

16 — See Article 3(1).

17 — See Article 3(2).

18 — See Article 3(2), *in fine*, and Article 7.

19 — This concerned the lack of a proper system to monitor the use of the existing frequency spectrum (for both DCS 1800 and DECT technology) in order to prevent possible illegal use. This plea in law, which the defendant has abandoned, is outside the scope of the legal debate and, accordingly, should not receive a response from the Court of Justice. I will therefore refrain from making any observations on the matter.

20 — For both DCS 1800 and DECT technology.

21 — See point 23 above.

By way of exception, Member States are entitled not to comply with the obligation to grant applications for licences but only if there are no frequencies available and there are certain reasons in the public interest, and, provided the principle of proportionality is observed. [22]

32. Directive 96/2 aims to establish freedom of competition in the mobile and personal communications sector and to peseve that situation where it already exists. Consequently, despite the fact that there was already an open market for such communications in Greece, the defendant still had a duty to fulfil its obligations under Directive 96/2. As the Commission points out in its reply, the existence of competition in the market is not a reason which justifies restricting the number of authorisations. If that were not the case, there would be a risk that an economic sector apparently fulfilling the stated aim of the Community legislature would, over time and as a result of few new competitors gaining access to it, become closed and remain the preseve of only a few operators, namely those who held licences when Directive 96/2 entered into force.

33. It is true that the obligation to award new authorisations falls currently before me if there are no frequencies available, but that is not the situation in the case which I am considering now. The Greek Government itself acknowledges that there was a spectrum available for the two systems, [23] but it has failed to cite non-economic reasons in the public interest which would justify and legitimise its failure to fulfil its obligations under Directive 96/2.

B. Ministerial Order No 78574

34. The defendant, in its second plea in defence of the actions, asserts that the Commission's claims have been devoid of any object since the enactment of Ministerial Order No 78574 of 24 November 1999, approving the regulations concerning the criteria and the procedure for the granting, renewal, amendment, suspension and revocation of special licences.

35. First, even if it were possible to regard the regulations in question as having satisfied the requirements imposed under Directive 96/2, the breach complained of would still exist. It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and that the Court of Justice

22 — See point 24 above and Article 3a of Directive 90/388.

23 — In the letters it sent to the Commission on 29 September 1998.

cannot take account of any subsequent changes. [24] In the cases before the Court, it is obvious that the Ministerial Order, which is dated 24 November 1999, entered into force after expiry of the two-month period stipulated in the reasoned opinions. [25]

36. The debate could have ended here, but the Commission has gone a stage further, analysing the contents of the regulations and concluding that the default of which it complains did not cease with their entry into force. I concur with that view.

37. The obligations imposed under Directive 96/2, which the Commission claims that Greece has failed to fulfil, are very precise. They are expressed as a negative in Article 2 (the Member States 'shall not refuse' DCS 1800 and DECT licences) but, in fact, the directive is concerned with positive obligations: the Member States must be in a position to authorise the DCS 1800 and DECT services for which they receive applications, provided that there are frequencies available and that none of the reasons contained in Directive 90/388, [26] which justify limitation of the number of licences, apply.

38. Member States cannot simply 'not refuse' the applications made to them for licences, and instead they must establish a complete legal framework which enables them to grant licences 'according to open, non-discriminatory, and transparent procedures'. [27] To my mind, the Greek regulations in question are incomplete and, in order to be fully effective and applicable, they require accompanying provisions. In other words, the legislation in force in the defendant Member State does not fulfil the obligations imposed by Directive 96/2, according to which, with effect from specified dates, applications received from operators for DCS 1800 and DECT licences are not to be refused, to which end it is essential that the Member State is in a position to grant such licences.

39. Article 2(1) of the regulations provides that the number of licences may be limited in the situations defined in the relevant legislation. This provision is later reiterated at the beginning of Article 2(5), which adds that, following the report of the National Telecommunications Commission, any limitation is to be approved, by the Minister of Transport and Communications in a reasoned order which also has to specify the procedure for tendering for licences in accordance with the rules and the criteria laid down in Article 2(5). Licences are

24 — See, *inter alia*, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13; Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 19; and Case C-147/00 *Commission* v *France* [2001] ECR I-2387.

25 — The Greek Government replied to the reasoned opinions on 23 February 1999, meaning that this was the latest possible date on which it could have received them, and, consequently, the two-month period granted by the Commission started to run on the following day, in other words, 24 February 1999. It is clear that, by the time the Ministerial Order was adopted (24 November 1999), the period had already expired (24 April 1999).

26 — See Article 3a, inserted by Directive 96/2.

27 — See the second paragraph of Article 3a, cited above.

granted on the following bases: the best rating by reference to parameters 'laid down in the current legislation'; the best rating by reference to the highest price, based on a calculation carried out in accordance with a mathematical model which must be specified by the minister in the aforementioned order; and a tendering procedure. [28]

40. On the face of it, Ministerial Order No 78574 contains a complete set of regulations but, in reality, that is not the case. That is borne out by the fact that it is sufficient to note that it does not provide for the granting of DCS 1800 and DECT licences, which is a requirement of Article 2 of Directive 96/2. If, on the day after the order entered into force, an operator in the mobile and personal communications market had applied for an authorisation to operate according to those standards, it would have received a negative response because, despite the existence of available frequency bands for both systems, no decision had been adopted to determine the number of licences available, the tendering procedure or the methods of evaluating tenders.

41. I have already pointed out that a prerequisite for freedom of access to the mobile and personal communications sector is that applicants are conversant with the procedure they must follow and the criteria in accordance with which licences will be awarded. The Greek Ministerial Order which I have analysed merely sketches out that procedure and those criteria, and the outline needs to be finished so that it acquires a definite form which will enable interested parties to compete in the market in question on an equal footing. [29]

42. In short, I believe that, by failing to lay down the conditions and the procedures for granting licences according to the DCS 1800 and DECT standards, the Hellenic Republic has failed to fulfil its obligations in the personal and mobile communications sector under Article 2 of Directive 96/2, in conjunction with Article 3a of Directive 90/388.

V — Costs

43. Since the Commission's claims are well founded, the defendant must be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure.

28 — See Article 2(5)(D) of the Ministerial Order.

29 — In its reply, the Commission states that it is not surprising in those circumstances that no licences to use DCS 1800 frequencies have been applied for and that the only application relating to the DECT system was very rudimentary.

VI — Conclusion

44. In view of the foregoing considerations, I propose that the Court of Justice should allow the joined actions before it and declare that the Hellenic Republic has failed to fulfil its obligations under Article 2(1) and (2) of Commission Directive 96/2/EC of 16 January 1996, in conjunction with the second and third paragraphs of Article 3a of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, in that it has failed to lay down, within the prescribed periods, the conditions and the procedures for granting mobile and personal communications licences according to the DCS 1800 and DECT standards; and I also propose that the defendant should be ordered to pay the costs.