OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 10 June 2008 [1]

I — Introduction

1. In the present proceedings, brought under Article 226 EC, the Commission of the European Communities seeks from the Court of Justice a declaration that the Republic of Poland has failed to fulfil its obligations under Article 4(1) and the first subparagraph of Article 5(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive' or 'Directive 2002/19'). [2]

2. The claim by the Commission, to the effect that the Republic of Poland has incorrectly transposed provisions of Community law, calls for an analysis of the limited powers of intervention afforded to the public authorities in liberalised markets, such as the telecommunications market.

3. Far from exhibiting a neutral attitude, when the defendant Member State transposed Directive 2002/19 into national law, it took action to stimulate the opening-up process by imposing on every operator a statutory obligation to negotiate access to the network, but it did not make that obligation conditional on a prior analysis of competition.

4. The examination of the difficulties raised by the action and the provision of a considered response entail a degree of complexity, since Polish law does not preclude agreements between undertakings [3] and, on the contrary, requires that, at the very least, negotiations must take place.

5. Moreover, in the absence of the desired outcome, Polish law authorises

1 — Original language: Spanish.

2 — OJ 2002 L 108, p. 7.

3 — Article 3 of Directive 2002/19 calls on Member States to ensure that there are no restrictions which prevent undertakings from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law.

the competent national authority to take a binding decision on substitution, which appears consistent with the requirements of more established traditional liberalism. [4]

6. Accordingly, it is necessary to avoid any confusion and, following the necessary conceptual sterility, to reveal the solution which is concealed like treasure within the Community legal framework. [5]

II — The legal framework

A — *Community law*

1. The principle of cooperation in good faith

7. Article 10 EC provides that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community', and 'shall facilitate the achievement of the Community's tasks'. Furthermore, '[t]hey shall abstain from any measure which could jeopardise the attainment of the objectives' of the Community.

2. Directive 2002/19

8. The directive is situated within the so-called 'new regulatory framework', [6] adopted on 7 March 2002 and published on 24 April 2002. [7]

9. With the so-called Framework Directive acting as a metronome and setting its rhythm, [8] Directive 2002/19 is concerned with the harmonisation of access and interconnection in order to make the supply of networks and of services compatible with the principles of the internal market.

4 — The economic slogan 'laissez faire, laissez passer', made popular by the economic theories of Adam Smith, constituted a clear statement of ideas.

5 — As occurs in the case before the Court, the obvious nature of the difficulty does not always mean that there is a simple solution, since, as Quevedo y Villegas, F. writes in 'Los Sueños', *El mundo por de dentro*, Espasa Calpe, Madrid, 2002, colección Biblioteca Austral, No 20, p. 187, giving an allegorical warning about human hypocrisy, '… A philosopher is not someone who knows where the treasure is but rather someone who digs and unearths it. However, that person is not a complete philosopher unless, having taken possession of the treasure, he uses it well'.

6 — In the Opinion in Case C-262/06 *Deutsche Telekom* [2007] ECR I-10057, I use that term to refer to four directives of the European Parliament and of the Council: Directive 2002/19; Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive' or 'Directive 2002/21'); and Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

7 — OJ 2002 L 108, pp. 7, 21, 33 and 51.

8 — Cited in footnote 6, where that term is explained.

10. Community telecommunications law has developed on two fronts which, despite their close links, may be easily distinguished by those affected.

11. Thus, in addition to the legislation applicable to operators, where the rules on interconnection and competition are intertwined, there is another, more diffuse sphere which governs the rights of users in accordance with the principles of liberalisation of the sector and of guaranteeing universal service, and takes on particular significance when it affects the fundamental freedoms of individuals. [9]

12. The present case clearly comes within the first of those spheres.

13. In accordance with Article 4(1) of the Access Directive:

'Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.'

14. The first subparagraph of Article 5(1) provides that national regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of directive 2002/21, encourage and where appropriate ensure, in accordance with the provisions of this directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance

9 — It would be appropriate to cite, by way of example, the protection of personal data and respect for privacy on the Internet.

with Article 8, national regulatory authorities shall be able to impose, to the extent that it is necessary, obligations:

(a) on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case, in order to ensure end-to-end connectivity;

(b) on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms and to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State in question.

15. Although Article 18 of the Access Directive set 24 July 2003 as the deadline for Member States to adopt and publish the laws, regulations and administrative provisions necessary to comply with its provisions, the act of accession of the Republic of Poland [10] extended the time-limit for transposition until 30 April 2004.

B — *The Polish Law on telecommunications*

16. Article 26 of the Polish Law on telecommunications [11] requires all operators of public communications networks to negotiate an access contract at the request of an undertaking or of one of the bodies listed in Article 4(1), (2), (4), (5), (7) and (8), with a view to providing publicly-available telecommunications services and ensuring their interoperability.

17. In order to prevent laxity, Article 27(1) provides that the president of the Urzad Komunikacji Electronicznej (Electronic Communications Authority; 'UKE') may indicate a time-limit for the decision-making process, which must not exceed 90 days from the request to conclude an access contract.

10 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 987).

11 — Law of 16 July 2004 (Dz. U. 2004, No 171, p. 1800).

18. If the negotiations do not commence, if access to the telecommunications network is refused, or if the time-limit indicated expires, either party may request the president of the UKE to adopt a decision regarding the matters pending or to define the terms of the collaboration (Article 27(2)), and must include in its request a draft access contract stating the respective positions of the parties and the contractual terms which are the subject of disagreement (Article 27(3)).

19. When adopting a decision, the president of the UKE must take into account the interests of users, the obligations imposed on undertakings, the promotion of modern telecommunications services, the nature of the matters in dispute, the feasibility of the proposals and the alternative solutions, paying particular attention to the technical and economic aspects of access. [12] The president must also take extreme care to maintain the integrity and interoperability of services, by ensuring that there are no discriminatory conditions and that competition may develop. [13]

20. The dominant position of an undertaking in the sphere of interconnected networks, the public interest, including protection of the environment, and the continuity of universal service are also criteria for the purposes of the compulsory arbitration [14] which the president of the UKE performs. [15]

21. With regard to the amendment of a decision on access adopted in the aforementioned manner, Article 28(5) of the Law on telecommunications stipulates that, if the parties reach an agreement, the administrative decision is annulled automatically with regard to all matters covered by the agreement, [16] although the president of the UKE retains the power to amend the decision at the request of one of the parties or of his own motion where it is justified in the interests of consumer protection, effective competition or the interoperability of services. [17]

22. Likewise, for the same reasons, Article 29 provides that, in addition to amending his own decision, the president of the UKE may

12 — Article 28(1)(1), (2), (3) and (4).

13 — Article 28(1)(5).

14 — On that term, see Bellodi L., *Telecomunicazioni e concorrenza nel diritto comunitario*, Scientifica, Naples, 1999, p. 209.

15 — Article 28(1)(6), (7) and (8).

16 — Article 28(5).

17 — Article 28(6).

amend, of his own motion, the wording of an access contract or require the parties to do so. [18]

23. Moreover, Article 45 of the Polish Law on telecommunications permits the president of the UKE to impose on an undertaking which controls access to end-users the regulatory provisions which are essential to ensure that end-users may make calls to individuals who use the services of another operator, including the obligation to provide interconnection, provided that the measures concerned are proportionate and appropriate to the difficulty which has arisen.

III — The prior administrative procedure, the positions of the parties and the procedure before the Court of Justice

24. On 21 March 2005, the Commission notified the defendant Member State of its concerns regarding the compatibility of the 2004 Law on telecommunications with Article 4(1) and the first subparagraph of Article 5(1) of the Access Directive.

18 — Subject always to the reference in Article 30 of the Law to the administrative procedure laid down for the amendment of access contracts.

25. In its reply of 25 May 2005, the Polish Government maintained that those articles are lawful, argued that the extension of the obligation to negotiate is necessary in order to reduce the costs borne by independent operators of building new infrastructure, and acknowledged that the provisions of the first subparagraph of Article 5(1) had been indirectly transposed.

26. The Commission was not satisfied with those explanations and, on 4 July 2006, sent the Member State a reasoned opinion. On 4 September 2006, Poland challenged that opinion on the grounds that, although the Access Directive does not expressly provide that the obligation to negotiate access contracts must be laid down in law, that obligation encourages sustainable competition and promotes interoperability, thereby protecting consumers. Accordingly, that obligation is based on the first subparagraph of Article 5(1) of the Access Directive, which is a programmatic provision calling on the regulatory authorities to ensure access to and interconnection with the network.

27. On 8 May 2007, the Commission brought the present proceedings under the second subparagraph of Article 226 EC. The applicant institution and the defendant Member State have maintained their respective positions throughout the proceedings.

28. Since neither party requested a hearing before the expiry of the period for making such a request, after the general meeting of 6 May 2008, the proceedings were ready for the drafting of an opinion.

IV — Analysis of the complaints of failure to fulfil obligations

A — *Introduction*

29. Since the dawn of the liberalisation of telecommunications, the Commission has made clear its concern about access to essential facilities and has taken action in cases of abuse where undertakings with exclusive rights to the infrastructure required to provide a service refuse to allow competitors access to that infrastructure.

30. The adoption of liberal principles also necessitated the opening-up of the arrangements for entering the market and, to ensure that a flexible system of access was a reality, Community law provided for the amendment of the traditional definition of access.

31. However, the implementation of freedom of competition alone was not sufficient to establish fair competition. The de facto monopoly of former public operators and their long-held rights, together with their detailed knowledge of the market and the privileged position they had occupied, meant that it was necessary to encourage the emergence of other undertakings, by introducing accompanying measures in their favour.

32. The doctrine of essential facilities [19] is set out in the Commission Notice on the application of the competition rules to access agreements in the telecommunications sector ('Access Notice'), [20] which seeks to promote the interconnection of new operators with equal rights to the existing telecommunications infrastructure and networks, owned, in most cases, by the former monopolists.

33. In that connection, the Access Notice sets out the following requirements, which are to be taken cumulatively: the facility in question is regarded as 'essential', in the sense that it is vital in order to be able to compete

19 — Doherty, B., *Just what are essential facilities?*, CMLR, 2001, pp. 397 to 436, and Richer, L., *Le droit à la paresse? Essential Facilities, version française,* Dalloz, 1999, No 44, p. 523.

20 — OJ 1998 C 265, p. 2.

with the undertaking which controls the facility and may not reasonably be reproduced; and, although it would be possible to provide access to other companies, access is prevented or made subject to unreasonable restrictions. [21]

34. In a case which did not concern telecommunications, the Court held that, if a facility is regarded as essential, the owner must negotiate use of the facility with other undertakings, provided that the nature of their business means that they require access to the facility. However, that finding was tempered by a number of conditions which require strict interpretation and are designed to prevent abuses of a dominant position (Article 82 EC). [22]

35. Access agreements are privileged mechanisms for the attainment of unimpeded competition, and, accordingly, the Commission reserved to itself the right to resolve disputes with a Community dimension, [23] while conferring on national courts responsibility for resolving disputes without such a dimension.

36. Recital 5 in the preamble to Directive 2002/19 states that, in an open and competitive market, there should be no restrictions that prevent undertakings from negotiating, particularly when the agreements concerned have a cross-border dimension, and stipulates that, *in principle*, [24] negotiations should take place on a commercial basis and in good faith.

37. However, all State intervention in this sector is aimed at safeguarding a number of public interests, such as the promotion of development, the operation of the networks, and territorial, economic and social cohesion.

38. Accordingly, it is not appropriate to restrict a market economy without cause, since its limitation is justified only in the interests of the aims pursued by Community law and in accordance with the principles of appropriateness and proportionality.

21 — Many of those restrictions, identified in United States case-law, are set out in paragraph 91 of the Access Notice.

22 — In Case C-7/97 *Bronner* [1998] ECR I-7791, the Court analysed the earlier case-law (judgments in Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223; Case 311/84 *CBEM* [1985] ECR 3261; and Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743) and held that the refusal by the proprietor of the only nationwide newspaper home-delivery scheme to allow another publisher to carry out distribution, where other methods exist, such as by post and through sale in shops and at kiosks, and, moreover, where there are no technical, legal or economic obstacles making it impossible, or difficult, for competitors to provide their own delivery system, does not constitute abuse of a dominant position.

23 — Paragraph 26 of the Access Notice.

24 — Emphasis added.

39. Thus, recital 9 in the preamble to Directive 2002/19 states that '[m]andating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services…'.

40. In that regard, the Commission claims that there has been a twofold failure by the Republic of Poland to fulfil its obligations under Directive 2002/19: first, the Commission complains that the Law governs the powers of the national regulatory authority in such a way that it provides for compulsory negotiation; second, the Commission complains that the national regulatory authority does not have the power to achieve certain objectives.

B — *The first complaint of failure to fulfil obligations*

41. The Commission complains that Article 4(1) of Directive 2002/19 was incorrectly transposed because Poland: (1) imposes on undertakings a statutory obligation to conclude agreements, while the Directive provides that that is a specific obligation to remedy an irregular situation, which is binding exclusively on the national regulatory authority; (2) does not take into account the circumstances prevailing in the sector and does not differentiate between operators according to their influence; and (3) confuses the obligation to negotiate interconnection, laid down by the Directive, with the conclusion of an access contract.

42. In the current state of telecommunications in the European Union, *ex ante* obligations are lawful only when required by the market where freedom of competition is at serious risk.

43. The Access Directive takes up that challenge and states clearly in recital 13 in its preamble, that '… [t]he aim is to reduce *ex ante* sector specific rules progressively as competition in the market develops…', although it does not discount that option where the emergence of new technologies gives rise to a bottleneck which calls for its application, for example, in the field of broadband access networks.

44. Recital 27 in the preamble to the Framework Directive offers some clarification, stating that there is not effective competition

in markets where one or more undertakings operate with significant market power, when national and Community law remedies 'are not sufficient to address the problem'.

45. The situation evolved over the years until such time as the Framework Directive declared that 'the conditions for effective competition in the telecommunications sector' had been successfully created.' [25]

46. Accordingly, the inclusion in the Law transposing the Community legislation [26] of an obligation to conclude agreements is contradictory and is incompatible with the fundamental principle to the effect that, by this time, freedom of competition must be established as an undisputable reality.

47. It might be possible to seek justification in the argument that the starting point for the Polish legislature was an absence of genuine freedom in the light of signs which distorted its market, but those uncertainties are swiftly dispelled by the argument that, in that case, the transposition effected by the Polish legislature would have been of a legal provision other than the Access Directive, which is part of the 'new regulatory framework'.

48. Community law does not ignore reactions to certain unusual ailments which are liable to infect healthy competition.

49. However, in order to diagnose any deficiencies and prescribe the appropriate treatment in each case, there is a need for specialised, impartial bodies, such as the national regulatory authorities which are entrusted with those tasks by Directive 2002/19.

50. At national level, Article 12(1) provides that it is for the national regulatory authority, rather than the legislature, to ensure that operators meet reasonable requests for access

25 — Recital 1.

26 — Even though the action relates to the Access Directive, the fact that that directive is based on the Framework Directive cannot be ignored.

to, and use of, specific network elements and associated facilities.

51. Moreover that obligation extends only to the cases listed non-restrictively in the article, such as where access is denied or where unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level.

52. Those corrective measures include the obligation 'to negotiate in good faith with undertakings requesting access' (Article 12(1)(b) of Directive 2002/19), together with an assessment of whether such obligations would be appropriate and proportionate to the objectives set out in Article 8 of the Framework Directive (Article 12(2) of Directive 2002/19), which the national regulatory authority must perform in accordance with realistic technological and economic criteria and in the interests of appropriate protection. [27]

53. Community law does not require the automatism imposed by the legislature of the Republic of Poland; on the contrary, Community law provides that independent bodies should decide what is appropriate in each case, after analysing the market. [28]

54. The attitude of the Polish State therefore halts the dynamism inherent in a sector which is constantly changing as a result of the continuous advances in the field of electronic communications.

55. In view of the likelihood that competition will develop at different speeds, according to the market segment and the Member State, it must also be possible to withdraw obligations, to which end national regulatory authorities should be able to relax regulatory obligations where competition is delivering the desired results (recital 13 in the preamble to the Access Directive). [29]

27 — Article 12(2) refers to the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved; the feasibility of providing the access proposed; the initial investment by the facility owner; the need to safeguard competition in the long term; any relevant intellectual property rights; and the provision of pan-European services.

28 — Furthermore, Article 16(3) of the Framework Directive provides that where a national regulatory authority concludes that the market is effectively competitive, it must not impose or maintain the specific obligations referred to in paragraph 2 (which include, by reference, the obligations set out in Article 8 of the Access Directive).

29 — Article 8 of the Access Directive, although it applies to different obligations (the ones laid down in Articles 9 to 13), provides that national regulatory authorities must have the power to amend or withdraw such obligations.

56. The Polish Law is incompatible with that need for flexibility, since, by providing for the restrictions concerned, it freezes the degree of regulation, thereby preventing the independent regulatory authority from smothering the flames of intervention.

57. The Access Directive lays down the obligations of all operators in accordance with the principles of transparency and publicity, [30] although it places particular emphasis on the obligations relating to undertakings with 'significant market power', [31] a term which, in my opinion, illustrates the transition from monopoly to liberalisation and is better suited than the term 'dominant position' to a sector unburdened by mercantilism.

58. Although the provision of interconnection is defined in general terms, there is an asymmetry in the applicable conditions which vary according to the market power of the undertaking concerned; initially, as regards an undertaking with significant market power, no additional market analysis is required [32] but merely a justification as to the appropriateness of those conditions. [33]

59. Article 8 of the Access Directive refers explicitly to the concept of 'an operator… having significant market power on a specific market', and is the subject of two references from other provisions of the directive.

60. Article 4 of the Access Directive makes the offer of access and interconnection conditional on obligations imposed by the national regulatory authority in accordance with Article 8.

61. Article 12, which lays down the obligation to negotiate in good faith, also refers to Article 8, in that the obligations imposed by national regulatory authorities must comply with its provisions.

30 — Saracci, F., *L'interconnexion, objet du droit communautaire des télécommunications:exemple de régulation (application comparée France-Italie)*, Atelier national de reproduction de thèses, 2004, p. 97, points out that telecommunications are invigorated by the traditional principles of Community law, such as equality and non-discrimination, classified by the Court as fundamental rights (judgments in Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, and Case 149/77 *Defrenne* [1978] ECR 1365).

31 — Under Article 14(2) of the Framework Directive, an undertaking has significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, with economic strength such that it may behave to an appreciable extent independently of competitors, customers and ultimately consumers.

32 — Which is based in general terms on Article 16 of Directive 2002/21.

33 — Recital 15 in the preamble to Directive 2002/19.

62. However, the Polish Law does not provide for two sets of rules depending on the market power of the undertaking concerned.

63. Furthermore, the fact that the Polish Law treats 'access' [34] and 'interconnection' [35] in the same way for the purposes of Article 4(1) of Directive 2002/19 unquestionably supports the claim that Poland has failed to fulfil its obligations. [36]

64. Interconnection concerns relationships between individuals, is similar in nature to a private law institution, [37] and constitutes a mechanism for interaction between differently designed networks.

65. By contrast, the concept of access gives rise to more far-reaching legal effects than the simple interconnection of infrastructures, in that it entails making available a whole range of facilities or services, including interconnection, which is a specific type of access implemented between public network operators (Article 2(b), *in fine,* of Directive 2002/19).

66. In that regard, the disputed provision does not comply with the requirements of the principle of minimum intervention, which reflects the principle of proportionality, a concept which has been clearly defined in the case-law of the Court [38] and is founded on appropriateness, necessity and the cost-benefit relationship.

67. The argument of the Government of Poland, to the effect that telecommunications companies have accepted its legislation without complaint, is irrelevant, since individuals are unable to monitor the correct application of Community law, in the same way as mere administrative practices, which

34 — Defined in Article 2(a) of Directive 2002/19.

35 — Defined in Article 2(b) of Directive 2002/19.

36 — It is surprising that Article 2(6)(a) of the Polish Law on telecommunications describes connection as another element of access.

37 — Saracci, F., *op. cit.*, p. 106, and Strubel, X., *Brèves observations sur la nature juridique du contrat d'interconnexion de réseaux de télécomunications*, Lex Electronica, No 4/1998, in www.lex-electronica.org.

38 — In my view, the following early cases are worthy of note: Case 11/70 *Internationale Handelgesellschaft* [1970] ECR 1125; Case 5/73 *Balkan* [1973] ECR 1091; Case 36/75 *Rutili* [1975] ECR 1219; Case 118/75 *Watson and Belmann* [1976] ECR 1185; Case 114/76 *Bela Mühle* [1977] ECR 1211; Case 122/78 *Buitoni* [1979] ECR 677; Case 240/78 *Atalanta* [1979] ECR 2137; and Case 44/79 *Hauer* [1979] ECR 3727.

by their nature are alterable at will by the authorities and are not given the appropriate publicity, do not guarantee the correct transposition of a directive. [39]

68. Therefore, the mechanisms provided for in the Polish Law on telecommunications differ from the ones set out in the Access Directive. The Polish Law is incompatible with the directive in that it converts the exception into the rule, treats the possibility for the national regulatory authority to require the negotiation of interconnection in the same way as a general obligation to conclude access contracts, and, furthermore, imposes on the regulatory authority an obligation to intervene which the authority is unable to withdraw or even amend. Accordingly, on those grounds it is appropriate to uphold the first complaint put forward by the Commission.

C — *The second complaint of failure to fulfil obligations*

69. The Commission maintains that, in accordance with Article 5(1) of the Access Directive, national regulatory authorities must be given the power to intervene specifically in order to ensure compliance with the objectives set out in Article 8 of the Framework Directive, by laying down transparent, proportionate and non-discriminatory conditions, and claims that the Polish Law does not provide for those exceptional powers.

70. Once again, it is necessary to seek the solution in Directive 2002/21, Article 8 of which commences Chapter III, entitled 'Tasks of national regulatory authorities.' [40]

71. Although I agree with the defendant Government that Article 8 of the Framework Directive is drafted in extremely general terms, the particular legislative technique used for directives occasionally creates a high degree of abstraction in order to allow the Member States sufficient latitude and thereby maintain their effectiveness.

72. In any event, paragraphs 2, 3 and 4 of Article 8 lay down, respectively, the

39 — Judgments in Case C-197/96 *Commission* v *France* [1997] ECR I-1489; Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865.

40 — Article 5 of Directive 2002/19 refers to the objectives in Article 8 of Directive 2002/21.

objectives of ensuring competition in the provision of electronic communications networks, the development of the internal market, and the promotion of the interests of European Union citizens.

73. In the judgment in *Centro Europa 7* [41] (paragraph 81), the Court held that Article 8 of the Framework Directive places on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures aimed at promoting effective, unimpeded competition in the provision of electronic communications services. That finding does not support the mere programmatic nature which Poland asserts is attributable to the provision.

74. In that connection, the uniform application of Community law and the principle of equality require that the terms and the scope of a provision must also be applied uniformly, particularly where that provision makes no express reference to the law of the Member States. [42]

75. The Court has explained that the transposition of Community legislation into national law does not necessarily require the Community provision to be enacted in precisely the same words and it will suffice if the legal context ensures the full application of the Community provision in a sufficiently clear and precise manner. [43]

76. The argument to the effect that activities incompatible with the Community provisions do not take place within the Member State concerned does not justify the absence of applicable provisions in national law. [44]

77. For the purposes of resolving the difficulty, it must be noted that Article 5(1) of the Access Directive imposes on regulatory authorities the continuing obligation [45] to analyse the market in order to encourage and ensure adequate access and interconnection, and interoperability of services.

78. Accordingly, the authorisation which the Commission complains is absent from the Polish Law must be aimed not only at

41 — Case C-380/05 *Centro Europa 7* [2008] ECR I-349.

42 — Judgments in Case 327/82 *Ekro* [1984] ECR 107; Case C-287/98 *Linster* [2000] ECR I-6917; and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817.

43 — Judgment in Case 252/85 *Commission* v *France* [1988] ECR 2243.

44 — Judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851.

45 — On this point, I agree with the arguments put forward by the Polish Government.

enabling any specific actions by regulatory authorities but must also entail a power of supervision, which the application does not mention.

79. Article 5 of Directive 2002/19 provides, '[i]n particular', for a number of obligations which the regulatory authorities must be in a position to impose in order to ensure end-to-end connectivity and access for end-users to digital radio and television broadcasting services (second subparagraph of Article 5(1)).

80. However, those obligations are not laid down in a restricted manner but rather in a way which allows national regulatory authorities sufficient latitude to impose them in conditions of efficiency, sustainable competition, and maximum benefit to end-users.

81. That view is borne out by the judgment of the Court in *Telefónica de España*, [46] which concerned the powers of national regulatory authorities under Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision. [47]

82. That judgment, [48] which concerned the Kingdom of Spain, provides the Republic of Poland with less ephemeral protection than Frédéric Chopin and George Sand found at the Carthusian Monastery of Jesus of Nazareth at Valldemosa, [49] in that, on the basis of a form of positive connection [50] between the national authorities and the Interconnection Directive, the Court held that the former were granted a wide range of powers so that, in addition to encouraging negotiated agreements between competitors, they were also entitled to impose an *ex ante* obligation [51] to provide access to the local loop and interconnection at local and higher-level switching centres.

46 — Case C-79/00 *Telefónica de España* [2001] ECR I-10075.

47 — OJ 1997 L 199, p. 32.

48 — Which followed the Opinion of Advocate General Jacobs.

49 — The famous couple, together with the writer's children, moved to Majorca in autumn 1838, hoping to enjoy a mild winter which would alleviate the tuberculosis from which the Polish musician was suffering. However, the inclement weather, particularly the damp, precipitated their departure in February 1839 but not before Chopin had made progress in the composition of his 24 Preludes opus 28, once the Pleyel piano he had ordered arrived from Paris following the completion of a number of tedious customs formalities. George Sand captured their experiences on the island in an intimate, romantic tone in *Winter in Majorca*, translated by Robert Graves, Academy Chicago Publishers, Chicago, 1992.

50 — Which could be summed up as 'anything not prohibited by the Directive is permitted'.

51 — Vis-à-vis the operator with significant market power.

83. In the light of those factors, which demonstrate that the powers of the regulatory authorities are not clearly defined, the argument of the Commission is vitiated by a lack of proof [52] and is incompatible with the complaint that Article 5 of the Access Directive was incorrectly transposed, since, in line with the foregoing considerations, Articles 26 to 30 of the Polish Law on telecommunications afford the national regulatory authority wide powers of intervention. [53]

84. In addition, although I agree with the applicant that it is not appropriate to make those powers conditional on the existence of a prior dispute between operators, it is not possible to infer a prohibition in those terms from the Access Directive, since, although Articles 26 to 30 of the Polish Law are restricted to the context of an administrative procedure, that is not the case with Article 45 of the Law, which expressly calls on the president of the UKE to lay down the necessary regulatory obligations to comply with the requirements of Article 1(2) and (3) of the Law on telecommunications, which are the same as the ones set out in Article 8 of the Framework Directive.

85. Accordingly, it is my view that the infringement complained of by the Commission in the second ground is unfounded because the aims laid down in general terms in Community law [54] are reflected in the body of provisions comprising Articles 26 to 30 and Article 45 of the contested national Law.

V — Costs

86. In accordance with Article 69(2) and (3) of the Rules of Procedure, where an action is partially successful, the Court may order that the costs be shared between the parties or rule that each party must bear its own costs.

87. In view of the fact that only one of the complaints put forward by the Commission against the Republic of Poland has been successful, in the interests of equity it is appropriate that each party bears its own costs.

52 — In Case C-387/06 *Commission* v *Finland*, an action for failure to fulfil obligations the facts of which were similar to those of the present case, the Court dismissed the claim that the national provision restricted the powers of the regulatory authority on the grounds that the Commission had neither analysed the provision in detail nor proved that the national body was unable to adopt the measures required to achieve the aims of Article 8 of the Framework Directive.

53 — Leaving aside the fact that those articles infringe the directive, which is the reason why it is appropriate to uphold the first complaint of failure to fulfil obligations.

54 — I must draw attention to Article 5 of Directive 2002/19, in conjunction with Article 8 of Directive 2002/21.

VI — Conclusion

88. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) Declare that, by imposing on all telecommunications operators the statutory obligation to negotiate access contracts, the Republic of Poland has failed to fulfil its obligations under Article 4(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

(2) Dismiss the remainder of the action.

(3) Order each party to pay its own costs.