OPINION OF ADVOCATE GENERAL ALBER
delivered on 19 November 1998 *

A — Introduction

1. In these infringement proceedings the Commission alleges that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications. [1] It considers that Luxembourg has failed to adopt all the laws, regulations and administrative provisions necessary to transpose the Directive, or at least failed to communicate them to the Commission.

2. The major aim of the Directive is to harmonise and liberalise the market for satellite equipment and services. Therefore, the Directive requires Member States to abolish existing exclusive and special rights for operators of satellite communications and to grant any operator the right to provide telecommunications services. Member States are also required to adopt rules governing the licensing and declaration procedures necessary for the operation of satellite earth stations and, in particular, the allocation of licences and frequencies, including the related costs. However, it is claimed that Luxembourg has failed to do precisely that within the prescribed time-limit so that the Commission has been compelled to bring this action.

B — Facts

3. In accordance with Article 4 of the Directive, Member States are to supply 'to the Commission, not later than nine months after this Directive has entered into force, such information as will allow the Commission to confirm that Articles 1 and 2 have been complied with'. The Directive entered into force on 8 November 1994 [2] and consequently the time-limit for communicating the measures taken expired on 8 August 1995.

4. Since the Commission had received no communication from the Luxembourg Government regarding the measures adopted, the Commission called on it, by a letter 27 October

* Original language: German.

1 — OJ 1994 L 268, p. 15.

2 — See Article 5 of the Directive.

1995, to submit its observations pursuant to Article 169 of the EC Treaty.

5. In reply to that formal notice the Luxembourg Government informed the Commission, by a letter of 20 December 1995, of the existence of a draft Law on Telecommunications which was to cover, *inter alia*, the abolition of special and exclusive rights and the procedure for allocating licences. Furthermore, with reference to the transposition, *inter alia*, of Directive 94/46, Luxembourg communicated, by a letter of 27 May 1997, the Grand-Ducal Regulation of 25 April 1997 laying down the minimum requirements of the contract documents for the establishment and operation of GSM [3] and GSM/DCS 1800 networks.

6. However, the Commission considered that that Regulation specifically did not cover satellite communications and related solely to terrestrial mobile communications.

7. Finally, on 7 July 1997 the Commission sent the Luxembourg Government a reasoned opinion. In it the Commission alleged that the Grand Duchy of Luxembourg had failed to comply with its obligation correctly to transpose the Directive. The Commission called on the Luxembourg Government to take the necessary measures to comply with the reasoned opinion within two months of its notification.

8. With reference to the transposition, *inter alia*, of Directive 94/96, the Luxembourg Government again communicated to the Commission, by a letter of 14 July 1997, the Grand-Ducal Regulation of 25 April 1997 and the Law of 21 March 1997 on telecommunications. With regard to the letters submitted by Luxembourg, the Commission considers that they are not such as to bring about transposition of the Directive. It considers firstly, that the Regulation of 25 April 1997 does not apply to satellite communications, [4] and secondly, that the Law of 21 March 1997 must be supplemented by implementing measures with regard to the criteria and procedures for allocating licences to provide satellite services.

9. Other documents were communicated to the Commission, informally, on 28 and 30 July 1997. Firstly, there were the drafts of two Grand-Ducal regulations laying down the requirements of the contract documents for the establishment and operation of fixed telecommunications networks adopted pursuant to Paragraph 7(2)(a) and (b) of the Law of 21 March 1997. Those drafts were communicated to the Commission officially on 8 September 1997 as measures to transpose Directives 92/44/EC, 95/62/EC, 97/13/EC

3 — Global System for Mobile Communications (GSM).

4 — Since the Luxembourg Government no longer relies on this Regulation in its defence, it need not be examined further.

and 97/33/EC. The two Grand-Ducal regulations were adopted on 22 December 1997 and finally published in the *Official Journal of the Grand Duchy of Luxembourg* on 29 December 1997. According to the Commission, it received no reply to its question of whether the scope of those regulations also extended to satellite services.

10. Secondly, another regulation — the Grand-Ducal Regulation of 23 April 1997 concerning transmitting earth stations and satellite earth stations, including the mutual recognition of conformity — was communicated unofficially to the Commission. However, according to the Commission, that Regulation transposed only Article 1 of Directive 94/46 and, moreover, was not communicated officially.

11. Therefore, the Commission concludes that the Grand Duchy of Luxembourg has failed fully to transpose Directive 94/96, or at least failed to communicate to the Commission the measures taken to transpose it. It considers that the measures cover only parts of the Directive or require more detailed implementing provisions which, however, have not been adopted or communicated.

12. Consequently, it has brought an action before the Court of Justice and claims that the Court should:

— declare that, by failing to adopt the laws, regulations or administrative provisions necessary to comply with Commission Directive (94/46/EC) of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive;

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

13. In its defence the Grand Duchy of Luxembourg submits that Directive 94/46 was transposed by the Law of 21 March 1997 as regards the abolition of exclusive or special rights relating to satellite communications. It claims that that Law also applies specifically to satellite communications since it covers telecommunications in general. Although a licence is required to provide satellite services, it is issued almost automatically since a simple declaration is sufficient. The use of frequencies is covered by a general licence, this being necessary to take account of the particular features of certain geographical sites in order to safeguard the proper operation of satellite services in general. However, that is merely a

formality. Furthermore, the Law of 10 April 1997 implemented the agreements concluded within the framework of Intelsat. [5] As for the Eurosat [6] agreement, a draft Law has already been submitted.

14. As far as transmitting earth stations and satellite earth stations and the mutual recognition of conformity are concerned, it considers that those requirements were transposed by the Grand-Ducal Regulation of 23 April 1997.

15. For that reason the Grand Duchy of Luxembourg claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

5 — International Telecommunications Satellite Organisation (Intelsat).

6 — European Telecommunications Satellite Organisation (Eutelsat).

16. The parties' other arguments will, where necessary, be examined during the legal analysis which follows.

C — Legal analysis

17. The Grand Duchy of Luxembourg denies that it has failed to comply with its obligations under the Treaty as the Commission alleges. It considers that the Directive was transposed with regard to the abolition of exclusive or special rights by the Law of 21 March 1997 and with regard to transmitting earth stations and satellite earth stations by the Grand-Ducal Regulation of 23 April 1997.

18. The aim of Directive 94/46 is to create the legal framework necessary to remove constraints and develop new activities in the field of satellite communications and thus harmonise and liberalise the market in satellite equipment and satellite services by abolishing the exclusive and special rights in that field which run counter to liberalisation. In order to achieve that aim, the Directive requires the Member States to take all necessary measures to ensure that any operator has the right to supply telecommunication services. [7] In that context, the Member States are required to

7 — See the final sentence of Article 2(2)(a) of the Directive.

abolish or withdraw any exclusive and special rights which run counter to it.

19. Furthermore, in accordance with Article 2(2)(b), the Member States must communicate 'the criteria on which authorisations are granted, together with the conditions attached to such authorisations and to the declaration procedures for the operation of transmitting earth stations'.

20. With regard to this case, that means that the Grand Duchy of Luxembourg was required, for the purposes of full transposition of Directive 94/46, to take measures to enable and safeguard the establishment and operation of satellite services. Furthermore, the appropriate laws, regulations and administrative provisions covering the procedure for obtaining authorisation to operate satellite services must be adopted. They must include, in particular, the procedures for granting such authorisation, the requirements for allocating licences and frequencies and lay down the related charges and costs.

21. Therefore, the Commission also points out that the Grand Duchy of Luxembourg was required to create a legal framework precisely setting out the procedure, from the declaration to the allocation of licences and frequencies.

22. In accordance with Paragraph 14(3) of the Law of 21 March 1997, it is for the minister responsible to lay down the declaration procedure. The amount of charges payable by the operator of the satellite communications was to be set by a Grand-Ducal regulation, pursuant to Paragraph 14(4) of the Law of the 21 March 1997. However, the Commission rightly points out that none of those rules have yet been adopted or published.

23. As regards the allocation and use of frequencies, Paragraphs 29 et seq. of the Luxembourg Law of 21 March 1997 contain the outline provisions and general principles which apply to that procedure. However, the details relating to the procedure for allocating frequencies and the amount of charges payable by operators were to be set out in detail by the minister or by Grand-Ducal regulations.

24. The Luxembourg Government points out that, although authorisation is necessary to establish and operate satellite communications, it is granted almost automatically and, in particular, points out that a simple notification to the competent authorities is sufficient. More precisely, within the framework of the procedure for allocating frequencies and licences, operators are coordinated in order to safeguard the operation in parallel of communications services. Consequently, Paragraph 29 et seq. of the Law of 21 March 1997 also provides that that procedure requires more detailed implementing provisions.

25. In order for Directive 94/46 to be transposed, the further implementing provisions referred to in the Law of 21 March 1997 had to be adopted and communicated to the Commission in accordance with Article 2(2)(b). However, that has not been done.

26. Furthermore, the Commission alleges that, if at any rate one considers their wording, the Luxembourg rules in question concern only satellite communications services and not also the satellite network services referred to in the second indent of Article 2(1)(a)(iv). Since the Law of 21 March 1997 refers in general to the operation of telecommunications networks and the Grand-Ducal regulations — adopted on the basis of that Law — laying down the requirements of the contract documents use only the generic term 'telecommunications', the Commission considers that their scope may indeed also cover satellite network services, but that this is not specifically apparent from the wording. The Commission claims that it has addressed questions to the Grand Duchy of Luxembourg many times on this point but it has never received any reply.

27. It should be borne in mind that the abovementioned Grand-Ducal Regulation of 22 December 1997 laying down the requirements of the contract documents was not communicated to the Commission with reference to the transposition of Directive 94/46.

28. If, as the Commission has correctly stated, it is assumed that a licence is necessary to establish and operate a satellite network, it must be noted in any event that the regulations laying down detailed rules for the procedure for allocating licences, required under Paragraphs 10(2) and 65 of the Law of 21 March 1997, have not been adopted.

29. It follows from the foregoing that the Law of 21 March 1997 laid down the outline provisions and general rules concerning the establishment and operation of satellite communications, from the making of the declaration until the allocation of frequencies and licences, but lacks provisions governing each of those procedures in greater detail. In particular, the Law of 21 March 1997 does not make clear how authorisations, frequencies or licences are to be obtained in each case or what related costs and charges are entailed for the applicant.

30. However, in order to achieve the aim of the Directive, namely the harmonisation and liberalisation of the market for satellite equipment and satellite services, the Grand Duchy of Luxembourg was required to take all necessary measures to ensure that all operators were granted the right to provide telecommunications services. Therefore, Luxembourg should have also communicated the criteria on which authorisations are granted, the conditions to be attached to such authorisations and the detailed declaration procedure for the operation of satellite earth stations.

31. Furthermore, the Grand Duchy of Luxembourg denies that it failed to comply with its obligations under the Treaty by referring to the Law of 10 April 1997. It claims that that Law reproduced the agreements of the International Telecommunications Satellite Organisation (Intelsat). As for the Eutelsat agreement, the legislative procedure has not yet been completed.

32. Firstly, it must be noted that that Law was not communicated to the Commission and, secondly, that the argument that a draft Law concerning the implementation of the Eutelsat agreement has been submitted cannot remedy a failure to transpose the Directive.

33. As for the terminal equipment and satellite earth station equipment, the Luxembourg Government relies on the Grand-Ducal Regulation of 23 April 1997.

34. The Commission asserts that that document was never officially communicated to it.

35. That Regulation was adopted pursuant to Paragraph 28(2) of the Law of 21 March 1997. It lays down the conditions for the allocation of authorisations to use telecommunications terminal equipment stations and satellite earth stations where they are to be connected to a publicly accessible telecommunications network.

36. However, that does not relieve the operator of satellite services of the need to obtain a licence for the establishment and operation of satellite services.

37. Consequently, in that respect too, the Luxembourg Government could not claim that detailed provisions and rules had been adopted and communicated to the Commission.

38. It follows from the foregoing that, by failing to adopt and communicate to the Commission all the laws, regulations or administrative provisions necessary to transpose Directive 94/46, in particular those relating to the procedure starting from the declaration to the allocation of licences and frequencies and to the related costs and charges, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive.

39. In accordance with the first paragraph of Article 69(2) of the Rules of Procedure of the

Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for. Since the Commission has applied for costs, the Grand Duchy of Luxembourg must therefore be ordered to pay them.

D — Conclusion

40. As a result of the foregoing considerations, I propose that the Court should:

(1) declare that, by failing to adopt all the laws, regulations or administrative provisions necessary to comply with Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, in particular those relating to the procedure starting from the declaration to the allocation of licences and frequencies and to the related costs and charges, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that Directive;

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