JUDGMENT OF THE COURT (Fifth Chamber)

18 January 2001 *

In Case C-448/99,

Commission of the European Communities, represented by M. Nolin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by P. Steinmetz, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to bring into force all of the laws, regulations and administrative provisions necessary to comply with Articles 8(3) and 9(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 November 1999, the Commission of the European Communities brought an action under Article 226 EC seeking a declaration that, by failing to bring into force all of the laws, regulations and administrative provisions necessary to comply with Articles 8(3) and 9(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15) ('the directive'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

2 According to Article 1(1), the directive concerns the procedures associated with the granting of authorisations for the purpose of providing telecommunications services.

3 Article 3(3) of the directive provides that these services may be provided either without authorisation or on the basis of general authorisations, to be supplemented where necessary by rights and obligations requiring an individual assessment of applications and giving rise to one or more individual licences.

4 Article 8(3) of the directive provides:

'Without prejudice to Article 20, Member States shall ensure that information concerning the conditions which will be attached to any individual licence is published in an appropriate manner, so as to provide easy access to that information. Reference to the publication of this information shall be made in the national official gazette of the Member State concerned and in the *Official Journal of the European Communities*.'

5 Article 9(2) of the directive provides:

'Where a Member State intends to grant individual licences:

— it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation, and

— it shall set reasonable time limits; *inter alia*, it shall inform the applicant of its decision as soon as possible but not more than six weeks after receiving the application. In the provisions adopted to implement this Directive, Member States may extend this time limit to up to four months in objectively justified cases which have been defined specifically in those provisions. In the case of comparative bidding procedures in particular, Member States may further extend this time limit by up to four months. These time limits shall be without prejudice to any applicable international agreements relating to international frequency and satellite coordination.'

6 Member States were required under the first paragraph of Article 25 of the directive to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than 31 December 1997 and immediately to inform the Commission accordingly.

7 The Luxembourg authorities notified to the Commission a number of regulations and draft regulations adopted with a view to transposing the directive into national law. After examination of those texts, the Commission formed the view that some of their provisions were at variance with the directive and that further measures had to be taken to ensure full transposition of the directive. The Commission accordingly put the Grand Duchy of Luxembourg on formal notice, by letter of 24 July 1998, to submit its observations within two months.

8 The Luxembourg authorities submitted their observations by letter of 18 September 1998. The Commission took the view that these failed to address all of the heads of complaint set out in its letter of formal notice and therefore, by letter of 8 February 1999, sent to the Grand Duchy of Luxembourg a reasoned opinion

calling on it to take all necessary measures of compliance within two months of its notification.

9 The Luxembourg authorities replied to the reasoned opinion by letter of 13 April 1999. However, since it took the view that the directive had still not been satisfactorily transposed, the Commission decided to bring the present action.

10 The Commission relies on two heads of complaint against the Grand Duchy of Luxembourg.

11 It first points out that Article 8(3) of the directive has not been fully transposed and that a Grand-Ducal regulation laying down the conditions governing specifications for the operation of paging services, as provided for in Article 7(2)(e) of the Luxembourg Law on Telecommunications of 21 March 1997 (*Memorial* A 1997, p. 761), still requires to be adopted and published. The Commission cites in this regard the judgment in Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 26, to the effect that a national law which contains no substantive provision transposing a directive but merely empowers an authority subsequently to adopt the requisite substantive provisions cannot be regarded as effecting a complete and accurate transposition of that directive.

12 The Grand Duchy of Luxembourg argues in its defence that a draft Grand-Ducal regulation laying down those conditions was sent to the Conseil d'État (Council of State) for consideration on 7 December 1999 and was notified to the Commission at the beginning of December 1999.

13 In view of the fact that this text was not definitive, it must be held that the transposition of Article 8(3) of the directive into domestic law was not fully

achieved, in the absence of legislation laying down the conditions governing specifications for the operation of paging services or, in any event, in the absence of adoption of such legislation within the period laid down in the reasoned opinion.

14 The action brought by the Commission must therefore be regarded as being well founded in so far as it concerns that provision in the directive.

15 Second, the Commission takes the view that the Grand Duchy of Luxembourg has incorrectly transposed the obligation under Article 9(2), second indent, of the directive inasmuch as the period which the national regulation lays down for the definitive allocation of licences exceeds the period of six weeks mentioned in that provision. If the directive imposes an obligation to inform an applicant of the decision to grant or refuse a licence, this involves an enforceable decision giving rise to a right on the applicant's part or refusing him such a right, since any other construction would deprive the provisions governing allocation periods of their effectiveness. Thus, the fact that an applicant receives after six weeks a draft licence or a draft refusal would not be equivalent to a decision within the meaning of the directive. The Commission points out that the procedure, as regulated by Luxembourg law, results in a period of three and a half months, or more, for the granting of licences.

16 The Grand Duchy of Luxembourg submits that Article 5 of the Grand-Ducal regulation of 2 July 1998 complies fully with the directive. It contends that Article 9(2) of the directive must be construed as not being intended to confer a definitive licence on an applicant but rather to inform him as to whether his application has been successful no later than six weeks after the issuing authority has received that application. It concludes that the Luxembourg rules guarantee that an applicant will receive information as to whether his application has been

successful within a period not exceeding the six weeks laid down by Article 9(2) of the directive.

17 It should be noted in this regard that, in specifying that the Member State must 'set reasonable time limits', Article 9(2), second indent, of the directive confirms in clear terms the Community legislature's desire to limit the time which Member States may spend in examining individual licence applications.

18 Recital 17 in the preamble to the directive states that 'national regulatory authorities should... endeavour... to shorten the time limits for taking a decision on the grant of individual licences... in response to commercial needs'.

19 It follows from Article 9(2) that the Member State is required to inform an applicant of its decision within a period no longer than six weeks. The requirements that decisions be taken quickly by the competent authorities, as demanded by the directive, and the absence of any reference to the decision as being interim in nature show that the second indent of Article 9(2) is to be interpreted as meaning that the decisions which must be taken within the period which it lays down are to be definitive. That, however, is not the case according to Luxembourg law.

20 In the light of the foregoing, the action brought by the Commission must be considered to be well founded in so far as it concerns that provision of the directive.

21 Consequently, by failing to bring into force all of the laws, regulations and administrative provisions necessary to comply with Articles 8(3) and 9(2) of the directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

Costs

22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Grand Duchy of Luxembourg and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to bring into force all of the laws, regulations and administrative provisions necessary to comply with Articles 8(3) and 9(2) of

Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

2. Orders the Grand Duchy of Luxembourg to bear the costs.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 18 January 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber