EXCLUSIVITY (TELECOMMUNICATIONS) THE LUXEMBOURG CASE

Subject: Exclusivity
"Essential requirements"
Implementation of Directive
Transparency

Industry: Telecommunications

Parties: Commission of the European Communities
Grand Duchy of Luxembourg

Source: Judgment of the Court, dated12 June 2003, in Case C-97/01 (*Commission of the European Communities v Grand Duchy of Luxembourg*)

(Note. There are two points of interest here: a point of procedure and a point of substance. The procedural point concerns the failure of a Member State to ensure the full implementation of a Commission Directive on competition in the markets for telecommunications services. The substantive point concerns the importance to the proper working of the Directive of provisions designed to secure access to "rights of way" in the telecommunications sector. The procedural point covers the case in which a Directive is transposed into national law, but not in such a manner as to guarantee fully the effectiveness of the Community legislation. The Court held that the Grand Duchy of Luxembourg was in breach of its duties under the EC Treaty. As to the point of substance, one of the objectives of the Commission Directive was to break the exclusivity enjoyed by certain undertakings in the telecommunications field and to allow wider access to rights of way. This access may be refused only where "essential requirements" for the operation of telecommunications activities are invoked and are clearly and reasonably prescribed by the appropriate national authorities. It was the Commission's complaint in this case that the Grand Duchy had failed to implement the Directive in such a way as to avoid unreasonable refusal of access. Essential requirements are defined in the Directive and referred to in paragraph 5 of the judgment below. The Commission provided an example of the difficulties experienced by a telecommunications operator - Coditel - in the circumstances described in paragraphs 20ff of the judgment. While not pursuing the Commission's point in this regard, the Court made it clear that the aims of a Directive could be frustrated if, as in the present case, there was not enough transparency to enable traders to benefit from its provisions.)

Judgment

1. By application lodged at the Registry of the Court of Justice on 27 February 2001, the Commission of the European Communities brought an action under Article 226 of the EC Treaty for a declaration that, by failing to ensure, in practice, the effective transposition into Luxembourg law of Article 4d of

Commission Directive EEC/388/90 of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive EC/19/96 of 13 March 1996 (hereinafter the Directive), the Grand Duchy of Luxembourg has failed to fulfil its obligations.

Legal framework

Community legislation

2. Article 2 of the Directive provides:

> 1. Member States shall withdraw all those measures which grant:
> (a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or
> (b) special rights which limit to two or more the number of undertakings authorised to provide such telecommunications services or to establish or provide such networks, otherwise than according to objective, proportional and non-discriminatory criteria; or
> (c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory [criteria,] several competing undertakings to provide such telecommunications services or to establish or provide such networks.
> 2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.
> Without prejudice to Article 3c and the third paragraph of Article 4, Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.
> Member States shall, however, ensure that all remaining restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications services, over infrastructures provided by third parties and by means of sharing of networks, other facilities and sites are lifted and the relevant measures notified to the Commission no later than 1 July 1996.
> As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a(2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the necessary structural adjustments. ...
> 3. Member States which make the supply of telecommunications services or the establishment or provision of telecommunications networks subject to a licensing, general authorisation or declaration procedure aimed at compliance with the essential requirements shall ensure that the relevant conditions are objective, non-discriminatory, proportionate and

transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any refusal.

The provision of telecommunications services other than voice telephony, the establishment and provision of public telecommunications networks and other telecommunications networks involving the use of radio frequencies, may be subjected only to a general authorisation or a declaration procedure...

3. Following a request made on 28 June 1996 by the Grand Duchy of Luxembourg pursuant to the fourth subparagraph of Article 2(2) of the Directive, the Commission granted the Grand Duchy, by Decision EC/568/97 of 14 May 1997, additional periods for the implementation of the Directive as regards full competition in the telecommunications markets. Such periods postponed until 1 July 1998 the abolition of exclusive rights in respect of voice telephony (Article 1 of that decision) and until 1 July 1997 the lifting of the other restrictions on the provision of already liberalised telecommunications services (Article 2 of that decision).

4. In the terms of Article 4d of the Directive:

Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks.

Where the granting of additional rights of way to undertakings wishing to provide public telecommunications networks is not possible due to applicable essential requirements, Member States shall ensure access to existing facilities established under rights of way which may not be duplicated...

5. Article 2(6) of Council Directive EEC/387/90 of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, provides that, for the purposes of Directive 90/387, "essential requirements" mean:

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. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the inter-operability of services, data protection, the protection of the environment and town and country planning objectives as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems...

National legislation

6. Article 7 of the Luxembourg Law of 21 March 1997 on telecommunications (*Mémorial* A 1997, p. 761, hereinafter the Law on telecommunications)

establishes a licensing system for the provision of telecommunications networks, telephony, mobile telephony and radio-messaging services.

7. The first subparagraph of Article 34(1) of the Law on telecommunications provides:

> ... the holder of a licence to provide a telecommunications network ... may make use of the public land of the State and municipalities to install cables, overhead lines and associated equipment and carry out all works in connection therewith, having regard to their purpose and the laws, regulations and administrative provisions governing such use.

8. Under Article 35 of the Law on telecommunications:

> 1. Prior to installing the cables, overhead lines and associated equipment on public land of the State and municipalities, the holder of a licence for the provision of a telecommunications network ... shall submit a location plan and system details for the approval of the authority responsible for the public land of the State and municipalities.
>
> 2. The authorities may not impose on the holder of a licence for the provision of a telecommunications network ... any tax, fee, toll, charge or payment whatsoever for the right to use the public land of the State and municipalities.
>
> The holder of a licence for the provision of a telecommunications network ... shall also be entitled, free of charge, to a right of way for the cables, overhead lines and associated equipment in the public infrastructure situated on the public land of the State and municipalities.

9. Article 35(3) of the Law on telecommunications provides that the costs inherent in the modification of the cables, overhead lines and associated equipment are the responsibility of the holder of a licence for the provision of a telecommunications network.

Pre-litigation procedure

10. By letter of 22 July 1999 to the Luxembourg authorities, the Commission reminded them of the obligations resulting from Article 4d of the Directive.

11. Since it was not satisfied with the results of a bilateral meeting held on 10 September 1999 nor by the reply of the Luxembourg authorities by letter of 16 September 1999, on 17 January 2000, the Commission sent the Grand Duchy of Luxembourg a letter of formal notice requesting it to submit its observations regarding the transposition of Article 4d of the Directive.

12. In default of any reply to that letter, on 3 August 2000, the Commission issued a reasoned opinion requesting that Member State to take the measures necessary to comply with that opinion within a period of two months from its notification.

13. Having received no response from the Luxembourg authorities, the Commission brought this action.

The action

Arguments of the parties

14. According to the Commission, the failure to provide, in a non-discriminatory way, rights of way to telecommunications providers may arise either from the fact that the provisions of the Law on telecommunications are not correctly applied, or from the fact that it would be necessary to enact additional measures in the Luxembourg legal system to ensure the effective transposition of Article 4d of the Directive.

15. In order to show that the Grand Duchy of Luxembourg has not taken all the measures necessary to ensure the effective and non-discriminatory grant of rights of way to holders of licences, the Commission relies on three arguments:
- the uncertainties of the Luxembourg legal framework;
- the failure to prescribe the essential requirements of the grounds for a refusal to grant rights of way, and
- possible discrimination.

[Paragraphs 16 to 18 describe the complex distribution of powers among various Luxembourg municipal and other authorities.]

19. In addition, Article 35(1) of the [Luxembourg] Law on telecommunications provides that the right is subject to the prior approval of the technical location plan and details of the system by the authority responsible for the relevant public land. First, it is for that body to determine, in practice, the conditions for access to the land of the State and municipalities. Second, it is necessary for a telecommunications provider to obtain a particular highway permit. According to the Commission, the question whether the procedure for obtaining a highway permit forms part of the application for approval of the location plan and details of the system mentioned in Article 35(1) of that law or whether it is additional to that application is not clearly established.

20. That statement can be substantiated by a concrete example. The Compagnie générale pour la diffusion de la télévision (hereinafter Coditel), which is a holder of a licence to establish and provide a fixed telecommunications network under the Law on telecommunications, has, since March 1999, made applications to various relevant Luxembourg organisations and administrative authorities for permission to lay cables.

21. CFL has informed Coditel that the application for cable laying cannot be granted, giving as the only reason for such refusal considerations connected to its own strategy. With regard to the application for a highway permit lodged by Coditel with the Administration des Ponts et Chaussées, the latter invoked, in its reply of 23 September 1999, technical difficulties connected to the coordination of the applications from various telecommunications providers in order to justify postponing dealing with the file. The letter which Coditel sent to the

Administration de l'Enregistrement et des Domaines as well as various letters sent to the Luxembourg Minister for Public Works have elicited no reply.

22. Secondly, the Commission points out that the Directive recognises the possibility of the grant of rights of way being refused in the case of applicable essential requirements. In this case, however, the decisions by the various organisations and administrative authorities refusing Coditel's applications for the grant of rights of way, in particular those of the Administration des Ponts et Chaussées and CFL, make no reference to applicable essential requirements as referred to in Article 4d of the Directive.

23. Thirdly, the Commission observes that the first subparagraph of Article 4d of the Directive prohibits "discriminat[ion] between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks". However, according to information available to the Commission, no new provider which has sought the grant of rights of way over public land to enable it to connect local networks to foreign networks and thus to offer telecommunications services in competition with the Entreprise des Postes et Télécommunications (Post and Telecommunications Undertaking, hereinafter EPT), has yet obtained any. It is EPT which has been awarded the contract for cable laying along certain motorways, whereas rights of way have so far been refused to other holders of telecommunications network provider's licences.

24. In its defence, the Luxembourg Government contends that the principle of non-discrimination between providers of public telecommunications networks set out in Article 4d of the Directive has been transposed into Luxembourg law, which the Commission does not dispute. The exercise of rights of way is subject to precise rules established and published by the respective competent authorities. Those rules are the same for every applicant for a right of way and are not specific to the telecommunications sector, which enjoys no special rights.

[Paragraphs 25 to 29 set out the detailed arguments in support of the propositions in paragraph 24.]

Findings of the Court

30. 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 obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-103/00, *Commission* v *Greece*, paragraph 23, and Case C-323/01, *Commission* v *Italy*, paragraph 8).

31. Consequently, the changes which the Règlement Grand-Ducal of 8 June 2001 introduced into Luxembourg law cannot be taken into account in the Court's consideration of the merits of this action for failure to fulfil obligations.

32. Also, according to settled case-law, in relation to the transposition of a directive into the legal order of a Member State, it is essential that the national

legislation in question effectively ensures that the directive is fully applied, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights (Case C-365/93, *Commission* v *Greece*, paragraph 9, and Case C-144/99, *Commission* v *Netherlands*, paragraph 17).

33. In view of the foregoing considerations, it is necessary to assess whether the Luxembourg law in force at the time when the period laid down in the reasoned opinion expired met the requirements of Article 4d of the Directive.

34. According to the first subparagraph of that provision, "Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks".

35. Under the first subparagraph of Article 34(1) of the Law on telecommunications, a right of way subject to the laws, regulations and administrative provisions governing the use of the public land of the State and municipalities forms part of the licence granted for the provision of a telecommunications network.

36. However, such a measure does not suffice to meet the requirements of Article 4d of the Directive, which seeks to ensure the effective exercise of rights of way with the aim of liberalising the provision of telecommunications infrastructures. Effective transposition of that provision requires that the competent authority for the grant of such rights be clearly designated and that transparent administrative procedures be established to implement them. It is not thus in this case.

37. In relation to the designation of the competent authority, even if the Member States are free to delegate powers to their domestic authorities as they consider fit and to implement directives by means of measures adopted by various authorities (see Joined Cases 227/85 to 230/85, *Commission* v *Belgium*, paragraph 9), the fact remains that individuals must be made fully aware of their rights.

38. The system of licensing in issue in respect of the granting of rights of way over public land lacks transparency. In respect of public railway land, it is clear from the contents of the file that the Luxembourg authorities themselves disagree on the question whether the authority competent to deal with an application to lay cables along the rail network is CFL, as the Luxembourg Minister for Transport contended, or the State, as maintained by the Luxembourg Institute of Telecommunications.

39. In relation to the procedures for the granting of rights of way, the use of public land of the State and municipalities is, according to Article 35(1) of the Law on telecommunications, subject to the prior approval of the location plan and system details by the authority responsible for the relevant land. In addition, holders of a telecommunications network provider's licence which envisage using the rights of way that the latter includes must obtain highway permits from the State authorities and all the local authorities concerned according to the locations of the networks. The Luxembourg Government does not maintain that it has

established and published implementing provisions in that regard. Even if the procedures applied by the various competent authorities may be obtained on request by interested parties or, in certain cases, through the internet, the fact remains that all the administrative procedures as a whole are far from transparent and that, therefore, such situation is capable of discouraging interested parties from making applications for rights of way.

40. In the light of all the foregoing considerations, it must be held that, by failing to ensure the effective transposition of Article 4d of the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations.

Costs

41. 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, the Grand Duchy of Luxembourg must be ordered to pay the costs.

Court's Ruling

The Court hereby:
1. Declares that, by failing to ensure the effective transposition of Article 4d of Commission Directive EEC/388/90 of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive EC/19/96 of 13 March 1996, the Grand Duchy of Luxembourg has failed to fulfil its obligations;
2. Orders the Grand Duchy of Luxembourg to pay the costs. ■

Acquisitions: Deutsche Post / Securicor

Commission clears Deutsche Post's sole control of Securicor distribution activities
The Commission has granted clearance under the Merger Regulation to the acquisition by Deutsche Post AG (DPAG) of sole control of Securicor Omega Holdings Ltd, a mail, parcel, freight delivery and logistics company currently controlled by DPAG and Securicor Plc. The deal gives rise to only limited overlaps which do not trigger dominance concerns in either the UK or Ireland, which are the only two Member States of the European Community where both are active in these postal distribution activities.

Source: Commission Statement IP/03/868, dated 19 June 2003