OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 9 December 2004 [1]

1. By the questions submitted in these joined cases the Bundesverwaltungsgericht (Federal Administrative Court) Germany seeks a preliminary ruling on the interpretation of Article 11(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 [2] (hereinafter 'the Directive').

I — The relevant legislation

A — *Community law: Directive 97/13*

1. Introduction

2. That court wishes to know whether the national regulatory authorities [3] may require new operators to pay a fee for the allocation of telephone numbers, calculated on the basis of their economic value, when the dominant company in the market, as the successor to the former State monopoly, received those numbers free of charge.

3. During the 1990s, telecommunications became one of the driving forces of the economy, with considerable growth potential. Technological development made it possible to introduce new services, above all in the field of mobile and satellite telephony, using digital technology, in which advances in multimedia exchange opened the way for a wide variety of services. [4]

1 — Original language: Spanish.

2 — OJ 1997 L 117, p. 15.

3 — Under Article 2(1)(b) of the Directive, they are functionally independent bodies charged by a Member State with the elaboration of, and supervision of compliance with, authorisations.

4 — For a brief account of this development, see the introductory summary of the 'Communication from the Commission to the Council and the European Parliament — the Consultation on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks', Brussels, 3 May 1995, COM(95)158 final.

4. The European Community satisfied the conditions for participating in that upsurge, and therefore the institutions decided to promote liberalisation in this sphere; the Commission committed itself to a future single market in a Green Paper published in 1987, in which it invited all the leading operators to engage in a debate on the subject and called for progressive opening up of the sector, at the same time guaranteeing the right of citizens to benefit from modern communications systems. [5]

5. But the desired flexibility did not imply that the Member States would be deprived of their powers of control through the relevant authorisation procedures. Specifically, in another Green Paper, [6] the Commission maintained that those channels constituted an essential way of creating fair conditions for the development of competition through application of common principles governing the granting of licences.

6. The Directive responded to that need by putting forward, as I stated in my Opinion in *Albacom and Infostrada*, [7] only one option, based on the principles of proportionality, transparency and non-discrimination, the aim being to create an environment compatible with freedom of establishment and freedom to provide services (recitals 1, 2, 4 and 11; Article 3(2)).

7. Accordingly, the freedom to supply telecommunications services and the liberalisation of the operation of their networks are the guiding principles embodied in the rules of the Directive. The Community legislature intends them to be distributed and used without hindrance or, where appropriate, in accordance with general authorisations, [8] reducing individual licences [9] to the status of exceptions or additions to the universal permits (recitals 7 and 13 and Articles 3(3) and 7).

5 — 'Towards a dynamic European economy, Green Paper on the development of the common market for telecommunications services and equipment', Brussels, 16 December 1987, COM (87)290 final, pp. 6 and 16 et seq. of the Summary.

6 — 'Green Paper on the liberalisation of telecommunications infrastructure and cable television networks' — Part II, Brussels, 25 January 1995, COM(94)682 final, p. 61 et seq. Also Commission Communication, 'Towards a new framework for Electronic Communications infrastructure and associated services — The 1999 Communications Review', Brussels, 10 November 1999, COM(99)539 final, p. 25.

7 — Opinion delivered on 12 December 2002 in Joined Cases C-292/01 and C-203/01 *Albacom and Infostrada* [2003] ECR I-9449, points 2 to 7 of which are almost literally reproduced in points 6 to 11 of this Opinion.

8 — According to the first indent of Article 2(1)(a) of the Directive, 'general authorisation' means 'an authorisation, regardless of whether it is regulated by a "class licence" or under general law and whether such regulation requires registration, which does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation'.

9 — '"Individual licence" means an authorisation which is granted by a national regulatory authority and which gives an undertaking specific rights or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority' (second indent of Article 2(1)(a) of the Directive).

8. In order to implement that liberalising rule, the Directive also applies the guiding principle that there should be no limit to the number of individual licences which the Member States may grant, except to the extent necessary to ensure the efficient use of radio frequencies or the existence of sufficient numbers. Therefore, any undertaking which fulfils the conditions published in national legislation should be entitled to receive an individual licence (Articles 10(1) and 9(3)).

2. Tax provisions

9. Articles 6 and 11 of the Directive follow the same course of promoting competition in the telecommunications market and not imposing on undertakings more restrictions or charges than necessary,[10] thereby complying with the principle of proportionality. They are headed, respectively, 'Fees and charges for general authorisation procedures' and 'Fees and charges for individual licences'.

10. 'Article 6

...

Without prejudice to financial contributions to the provision of universal service in accordance with the Annex, Member States shall ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme. Such fees shall be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.'

11. 'Article 11

...

1. Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.

10 — The conditions to which authorisations should be made subject are set out in the Annex to the Directive.

2. Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and shall take into particular account the need to foster the development of innovative services and competition.'

B — *German law*

12. In Germany, the body of legislation which covers the levying of a charge for the allocation of telephone numbers comprises the Telekommunikationsgesetz (Law on telecommunications, hereinafter 'the TKG') [11] and the Telekommunikations-Nummerngebührenverordnung (Regulation on fees in connection with telecommunications numbers, hereinafter 'the TNGebV'). [12]

13. Paragraph 43 of the TKG empowers the authority responsible for numbering to impose a charge for the allocation of numbers, using the TNGebV to determine the criteria for quantifying it.

11 — BGBl. 1996, I. p. 1120.
12 — BGBl. 1999, I, p. 1887.

14. The annex to the TNGebV provides that, for the allocation of a block of 1 000 10-digit numbers for local networks, DEM 1 000 (equivalent to EUR 500) is to be charged, whereas if the application is refused the charge is reduced to DEM 250 (now EUR 125).

II — The facts, the main proceedings and the questions referred to the Court of Justice

15. The companies Isis Multimedia Net GmbH und Co. KG and Firma 02 (Germany) GmbH u. Co. OHG (hereinafter 'Isis' and 'Firma', respectively) both applied to the Regulierungsbehörde fur Telekommunikation und Post (German Regulatory Authority for Telecommunications and Post, hereinafter 'the Regulatory Authority') to be granted a number of the abovementioned blocks for local networks. Isis received 37 of the 43 blocks for which it applied, whereas Firma obtained 2 303 of the 2 324 applied for.

16. By assessment of 21 June 2000, the Regulatory Authority called on Isis to pay DEM 38 500 and on Firma to pay DEM 2 308 250, pursuant to the TNGebV.

17. Deutsche Telekom AG (hereinafter 'Deutsche Telekom'), the successor to the historic operator, and, in the past, the holder of a monopoly in the German market, obtained free of charge, before the TKG entered into force, a reserve of 400 million numbers, which it still has at its disposal, and, under national law, it is not subject to any obligation to pay for them or return them.

18. Isis and Firma challenged the assessments served on them and, after their claim had failed at first instance, the Oberverwaltungsgericht (Higher Administrative Court) upheld their claims on appeal and ordered the respondent administration to repay the charges collected and accrued interest thereon.

19. Appeals in cassation were brought, whereupon the Bundesverwaltungsgericht stayed its proceedings and submitted the following question to the Court in both cases:

'Is 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 to be interpreted as meaning that, in respect of the allocation of telephone numbers by the national regulatory authority, a fee taking account of the economic value of the telephone numbers allocated may be imposed even though a telecommunications undertaking operating on the same market and occupying a dominant position on it took over free of charge from its predecessor in law, the former State undertaking with a monopoly, a very large quantity of telephone numbers and the retrospective imposition of fees in respect of this old stock is not possible for reasons of national law?'

20. The German court submitted a second question, to be answered in the event of the first being answered in the affirmative:

'In such a situation may the new entrants to the market, irrespective of the level of their other entry costs and without an associated analysis of their competitive chances in comparison with the dominant undertaking, be charged for the allocation of a telephone number a one-off fee in the amount of a particular percentage (in this case 0.1%) of the estimated annual sales which can be attained if the telephone number is passed on to a final customer?'

III — Procedure before the Court of Justice

21. By order of 16 September 2003, the President of the Court of Justice decided to join the two cases in view of their related subject-matter.

22. Observations were submitted, within the period laid down in Article 20 of the EC Statute of the Court of Justice, by the Commission, the German and United Kingdom Governments and the appellants in the main proceedings.

23. At the hearing on 11 November 2004, oral argument was presented by representatives of the parties which participated in the written phase of the proceedings.

IV — Analysis of the questions referred to the Court

A — *Interpretation of the tax provisions of the Directive*

24. The questions from the Bundesverwaltungsgericht provide the Court of Justice with an opportunity to clarify the limits which freedom of competition imposes on the Member States when they levy charges for the grant of individual licences in the telephony sector. In addition, the answers may help to define the status of the successors in law to the former State monopolies and their relationship with new competitors after completion of the process of liberalisation of telecommunications in 1998.

25. As I have indicated, the creation of a single European market in that sector would not have been possible in the Community context without basic rules capable of guaranteeing equality of opportunity as between the various rivals. Those rules comprise the principles of transparency, non-discrimination and proportionality, which Article 11 of the Directive explicitly incorporates in order to set up channels of authorisation, a particularly sensitive and very important stage since the individual licences open the doors to trade for the operators concerned. Every obstacle in that phase consolidates the status quo and restricts competition. [13]

26. Article 11 of the Directive (like Article 6) contains tax provisions, inserted in a text of a procedural nature, whose aim is to contribute to the opening up process by eliminating barriers to access for new entrants. As I stated in my Opinion in *Albacom and Infostrada* (point 28), those rules must be interpreted in harmony with the abovementioned objective: in that phase, the burdens borne by undertakings must not discourage them from their commitment to enter the market.

27. Two tax concepts are embodied in that provision: one is the 'fee' for individual

13 — According to the Commission 'licences in the field of telecommunications implicitly restrict freedom to provide services and can distort market structures' (Communication cited in footnote 4, p. vii).

licences, in Article 11(1) and the other, where scarce resources are to be used, is a 'charge', in Article 11(2). The first, for which the chargeable event is the administrative action relating to the issue, management, control and enforcement of the applicable individual licences, is intended to cover the costs incurred in undertaking the various procedures. The second, which also falls upon the holders of individual licences, seeks to optimise the use of scarce resources. Both levies are to be applied in accordance with the principles of objectivity, non-discrimination and transparency and, in the case of the second one, the rate of the charge and contribution must not be of a level which would discourage the entry of new competitors or the introduction of new telecommunications services. I expressed similar views in points 36 to 43 of my Opinion in *Albacom and Infostrada*.

28. The assessments at issue in the main proceedings, and the German legislation covering them, in so far as they involve payment of a sum exceeding the cost of the service supplied, are covered only by Article 11(2) of the Directive, and accordingly the first issue to be resolved is whether telephone numbers constitute a scarce resource within the meaning of that provision.

B — *Telephone numbers: a 'scarce resource'*

29. Uniform application of the Directive calls for a common definition of the term 'scarce resources', a task which to date the Court of Justice has not had an opportunity to undertake. In my opinion that concept necessarily embraces all resources that must be preserved because, for technical, economic or practical reasons, they cannot be reproduced indefinitely. [14] The exponential increase in the number of users and the corresponding increase in the number of providers has an impact on the quantity of numbers available, so that they become a precarious asset in need of appropriate procedures and rules for fair allocation, [15] in order to ensure that all competitors are on the same level playing field when they enter the market, that being the decisive time for ensuring equality of treatment in a context of free competition. [16]

30. That approach coincides with the will of the Community authorities, who have expressed, sometimes explicitly and on other occasions tacitly, their concern about future scarcity and their desire to avoid restructur-

14 — That definition was used by the Verwaltungsgericht, Cologne, in a judgment of 15 December 2000, published in *Multimedia und Recht*, 5/2001, p. 327.

15 — The same idea is expressed by L. Gramlich in *Rechtsfragen der Nummerierung nach § 43 Telekommunikationsgesetz*, Archiv für Post und Telekommunikation 1998, p. 16; and J. Scherer, 'Entwicklungslinien des Telekommunikationsrecht' in *Computer und Recht* 2000, p. 42.

16 — See S. Ploster, *Das Telekommunikationsrecht der Europäischen Gemeinschaften*, Vienna, 1999, p. 78.

ing of the numbering system. Thus, in its 'Green Paper on a numbering policy for telecommunications services in Europe' the Commission stated that, during the period of transition to total liberalisation, that resource would become as important as rights to frequencies and rights of way, since, although, in contrast to the latter, they are not technically constrained, a similar situation arises because changes to them prove costly and are highly resented by the public. [17] Three years later, in the Communication cited in footnote 6, it stated unambiguously that that resource is indeed scarce (p. 26).

31. The Directive itself, albeit implicitly, adopts exactly the same position, distinguishing, as I have pointed out, between general authorisations, on the one hand, in the form of pre-defined permits of a general nature for undertakings to participate in the telecommunications market without the need for a specific decision by the competent authority, but possibly subject to subsequent monitoring, and, on the other hand, individual licences, in the form of specific permits entitling the holders to operate, which require an ad hoc administrative decision. [18] Now, a reading of the 13th recital in the preamble to the Directive, of Article 7(1)(a) and of Article 10(1), in conjunction with points 4.1 and 4.2 of the annex, prompts the inference that the objective scope of the second class of permits includes the exploitation of scarce resources, which, together with radio frequencies, include telephone numbers, as confirmed by Directive 2002/20/EC, [19] which leaves room for the requirement of a fee for their use (Article 13).

32. If numbers are treated in the same way as radio frequencies, which without doubt are physically limited, they must be recognised as being worth preserving, thereby falling within the concept of 'scarce resources' used in Article 11(2) of the Directive.

C — *The conditions laid down in Article 11 (2) of the Directive*

33. Under that provision, the Member States may levy a charge for exploitation of the abovementioned scarce resources only if they satisfy a threefold condition, in that they must do so by means of charges (1) which take account of the need to guarantee their optimum use, (2) which are not discriminatory, and (3) which encourage the development of innovative services and competition.

17 — 'Towards a European Numbering Environment — Green Paper on a numbering policy for telecommunications services in Europe', COM(96)590 final, p. 1 and footnote 3.

18 — I expressed similar views in points 30 and 31 of my Opinion in *Albacom and Infostrada* when suggesting an interpretation of Articles 2, 5 and 9 of the Directive.

19 — Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ 2002 L 108, p. 21).

1. The optimum use of scarce resources

34. I have already pointed out, in my Opinion in *Albacom and Infostrada* (point 42), that the nature of that contribution is very different from that of the 'fee' provided for in Article 11(1) because it does not seek to recover the costs incurred by the Administration in granting and managing the licences, but is designed to optimise the use of scarce resources. It is a contribution in which there is no notion of compensation and which is in the nature of a tax, albeit with a particular allocation (point 35 of that Opinion).

35. That specific objective consists in turning to account assets whose limited nature justifies a levy, since there would be no infringement of that provision if the funds obtained were used to enhance infrastructure and research into new technologies. In any event, the Community legislature left in the hands of the Member States the power to decide on the course to be taken, [20] albeit not in absolute terms, since the nature of the levy makes it necessary to apply its proceeds to that particular purpose. The desired harmonisation makes that necessary.

36. We thus have approximation regarding the taxable event and the class of expenditure to which the income must be allocated but perhaps it may be necessary to go further and apply it to the rate of the charge. For example, the charge paid in Germany, if a licence is granted, is equivalent to no less than 15 times the administrative costs and, even where it is considered high, it cannot be objected to on the basis of Community law provided that the financial revenue it provides is invested for the purpose of improving the use of limited resources. However, it cannot escape notice that the appreciable differences in fiscal pressure as between the various Member States may become serious obstacles to the effectiveness of freedom of movement, through the adverse impact on competition, [21] whereas Article 11(2) itself seeks to promote competition by means of the levies which it regulates. [22]

37. Therefore, a disproportionate or excessively high level of charge, apart from

20 — Recital 32 in the preamble to the 'authorisation directive' acknowledges that it does not aim to indicate the purposes for which usage fees are to be employed.

21 — At the end of point 51 of my Opinion in *Albacom and Infostrada*, I stated that 'disparities in the tax treatment of the same taxable event by the Member States are likely to cause significant distortions of competition, which would affect the freedom of movement of persons, capital and goods, and the freedom to provide services'. (J. Scherer, op. cit, p. 42, criticises the Directive regarding the latitude given to the Member States, in that they are allowed to impose charges of varying amounts for the allocation of scarce resources, raising real barriers to access to the market. S. Polster, op. cit., p. 78, endorses that view, drawing attention to the lack of precise guidance for determination of the maximum permissible level for such charges. For its part, the European Telecommunications Office, in a report it prepared for the Commission (*Annexes to the second interim report. Fees for licensing telecommunications services and networks*, July 1999, p. 5), stated that the divergences between the burdens borne by operators may have an adverse impact on the sector, to the detriment of certain national markets as compared with others.

22 — In Recital 31 in the preamble to the 'authorisation directive' it is stated that administrative charges imposed by the Member States should not distort competition or create barriers for entry into the market.

impinging on other fundamental legal principles, is liable to infringe the Directive whenever it constitutes an obstacle to access for new telecommunications providers.

2. The prohibition of all discriminatory treatment

38. The concept of discrimination is of great importance in the case-law of the Court of Justice. Discrimination arises when comparable situations are treated differently without any objective justification, to the detriment of some persons as compared with others. [23] In short, if, in reliance on Article 11(2) of the Directive, Member States impose charges on the holders of individual licences in order to optimise the use of certain resources, they are obliged to adjust them so as to ensure that no arbitrary distinctions are created as between operators in the sector.

39. That imperative highlights the importance of the questions on which a ruling is sought in this case, the factual background to which reflects a situation that, with slight differences, arose in the majority of the Member States after the end of the process of liberalising telecommunications and abolition of the State monopolies: competition on unequal conditions between companies that took over from the historical operators that dominated the national markets and the new providers that aspire to establish themselves in the wider single European market.

40. The Directive requires that Deutsche Telekom, Isis and Firma should compete on equal terms; nevertheless, whilst Deutsche Telekom obtained a considerable volume of numbers without having to pay any charge whatsoever, the other two providers paid a charge under Paragraph 43(3) of the TKG, even though their respective positions appear comparable: the three undertakings operate in the same sector and are engaged in the same business and, consequently, from an economic point of view the possession of telephone numbers affects them in the same way.

41. Against that background, it is necessary to clarify whether the Directive allows a situation such as the one with which the main proceedings are concerned.

42. At first sight, the answer would appear to be negative: where the circumstances are not different, the legal treatment should not

23 — The earliest cases include Joined Cases 17/61 and 20/61 *Klöckner-Werge and Others* [1962] ECR 325, in particular at 345; see, more recently, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 57, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 115, to which I shall refer again later.

be different. But a contributory time factor should not be overlooked, in so far as Deutsche Telekom replaced the former sole operator before the TKG entered into force and for that reason its acquisition of its stock of numbers is rooted in the past, when the legal situation was different; accordingly, it is not unreasonable to assert that its position cannot be relied on as a basis of comparison for the purposes of the test of equal treatment.

43. But the analysis to be undertaken is not amenable to such automatism, in that the factual background must be looked at in its entirety, all aspects being taken into account however irrelevant they might be presumed to be. In the *Connect Austria* judgment referred to earlier, it was ruled that in order to decide whether the grant without charge of a licence to the public undertaking before liberalisation took place satisfies the legal requirement of equality as between the operators concerned, it is necessary to take account of the date when that licence was granted, the law in force at the time, a possible operating requirement and, where relevant, the economic value of that licence as from the time it began to be exploited (paragraph 94). [24]

44. The companies which have replaced the State operators as a general rule occupy a dominant position in the national markets, despite the progress achieved in the opening up of telecommunications. [25] The Bundesverwaltungsgericht recognises that Deutsche Telekom is dominant in the sector and that its position is not weakened, as the German Government suggests, by the fact that it took over the debts of the former monopoly, since the acquisition free of charge of 400 million numbers [26] of course strengthens its control in the prevailing climate of freedom of competition, and it may be expected in the future that, because of that copious stock of numbers and the corresponding obligation of its rivals to pay a high levy, its privilege will be consolidated to the detriment of fair competition. [27]

45. In addition, the German legislation contains no mechanism to offset those disadvantages. According to the German

24 — Having regard to those parameters, the Court ruled that Articles 9(2) and 11(2) of the Directive do not preclude national legislation under which additional frequencies in the DCS 1800 frequency band may be allocated to a public undertaking in a dominant position which already holds a GSM 900 licence, without imposing a distinct fee on it, whereas an undertaking which starts to operate on the market in question has to pay a fee to acquire a DCS 1800 licence, provided that the charge imposed on the former for its GSM 900 licence, including the subsequent allocation, without further payment, of additional frequencies in the DCS 1800 frequency band appears to be equivalent in economic terms to the fee imposed on the competitor (paragraph 118).

25 — According to the Community case-law, an undertaking holds a dominant position where it has the capacity to hinder competition in a given market, and to act independently of its competitors, its customers and, ultimately, of consumers (Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, paragraph 38; Case 31/80 *L'Oréal* [1980] ECR 3775; and Case 322/81 *Michelin* [1983] ECR 3641, paragraph 30).

26 — It should be borne in mind that, as a result of the grant of significantly fewer numbers (230 000) and the withholding of 21 000 numbers, Firma was obliged to pay a charge of DEM 2 308 250 (EUR 1 154 125). The charge corresponding to the 400 million numbers allocated to Deutsche Telekom would be equivalent to DEM 400 000 000 (EUR 200 000 000).

27 — In paragraphs 85 and 86 of *Connect Austria*, it is stated that the fact that an undertaking starting operations must pay a charge for the grant of a licence whereas a public undertaking in a dominant position can obtain one without payment constitutes an advantage vis-à-vis the latter's competitors which enables it to increase its dominance by offering reduced rates of charges.

Government, under the existing law it is not possible to require Deutsche Telekom ex post facto to pay a charge for the numbers acquired before the entry into force of the TKG; having considered that possibility, [28] the national legislature found it to be legally incorrect and rejected it. [29]

46. There is therefore a situation of inequality capable of distorting the conditions of competition and the functioning of the market and it seems that German law does not provide a solution.

47. It remains to be determined whether there is any justification for that different treatment. It cannot be excused by reliance on past events and the contention that the free gift of that enormous stock of numbers made within the legal framework in force at that time cannot be changed, since its effects reach into the present: the benefits granted in the past to the former exclusive concessionaire, and then passed on to its successor, have repercussions today which are detrimental to third parties. In dealing with the new situation, the legislature must respect Community law as now in force, including the cardinal principle that anti-competitive discrimination is prohibited, a rule which, as I have pointed out, also underlies the process of liberalisation of the markets in the field of telecommunications, which started before the TKG was enacted. [30]

48. The German Government seeks to account for the present position by claiming that the numbers given to Deutsche Telekom relate to long-established customers, and therefore are not in circulation, unless they

28 — In paragraph 4 of the first ground of the order for reference in this case, it is stated that 'although the framer of the regulation assumed that Deutsche Telekom AG would have to pay fees amounting to around DEM 386 000 000 for the stock of telephone numbers it had taken over, it cannot be required to do so because at no time has it lodged an application for allocation of the telephone numbers in question and only a decision on such an application gives rise to the obligation to pay'.

29 — M. Wissmann (editor), in *Telekommunikationsrecht*, Heidelberg, 2003, pp. 351 and 1219, refers to the legal uncertainty prevailing in Germany as to the economic evaluation of the stock of numbers held by Deutsche Telekom. There is discussion in the legal literature and case-law as to the possibility of requiring it to pay a charge for the grant of those numbers prior to 1 August 1996, it being argued that the precise purpose of the TKG was to establish a level playing field. It is also contended that that company should not secure an advantage from the earlier creation of a monopoly within a closed market. The contrary view focuses on the fact that the transfer took place in the light of the legal situation then prevailing and of the distribution of competences between the Bundesministerium für Post und Telekommunikationen (Federal Ministry of Telecommunications and Post), Deutsche Telekom and its predecessor.

30 — The point of departure was Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10). The first amendment was made by Commission Directive 94/46/EC of 13 October 1994 in particular with regard to satellite communications (OJ 1994 L 268, p. 15). Commission Directive 95/51/EC of 18 October 1995 (OJ 1995 L 256, p. 49) abolished the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services. In the same year, Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 (OJ 1995 L 321, p. 6) laid down the conditions for opening up of the fixed voice telephony market. Directive 90/388 was amended again by Commission Directive 96/2/EC of 16 January 1996 (OJ L 20, p. 59) to bring within its scope mobile and personal communications. Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) amended the 1990 measure to promote the implementation of full competition in telecommunications markets. The latest change was made by Commission Directive 1999/64/EC of 23 June 1999 (OJ 1999 L 175, p. 39), the aim of which was to ensure that telecommunications networks and cable TV networks owned by a single operator were separate legal entities. Part of the earlier legislation was repealed and replaced by Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

become free, in which case they revert to the Regulatory Authority which, in the new competitive environment, can allocate them to a provider, including Deutsche Telekom, subject to payment of the relevant charge. But that explanation does not change anything, since Deutsche Telekom, far from being subject to the same regime as the others, has free enjoyment of numbers for which its competitors have to pay.

49. It adds, as an attenuating circumstance, that, with the numbers, the abovementioned company 'inherited' a large volume of burdens which offset the advantages received, including the obligations attaching to universal service when the markets were opened up and also the taking over of about 80 000 civil servants; [31] but that statement is not backed up by evidence and, in any event, it is for the national court to evaluate it when deciding as to the permissibility of the different treatment meted out to the competing undertakings.

50. In short, there is a non-uniform regime the justification for which must be appraised by the Bundesverwaltungsgericht having regard to the circumstances of the case; the following excuses will not be acceptable: (1) that the charge for the allocation of telephone numbers was not payable when the now dominant undertaking took over from the former monopoly; (2) that that company, once the regime entered into force, is, like the others, subject to the charge for the allocation of additional numbers.

31 — It is difficult to consider as a burden the taking over of 80 000 civil servants, unless the hackneyed idea that they are pampered, ill-prepared and of low efficiency is accepted, as embodied in the literature of the nineteenth century, where one of many examples is that given by Anton Chekhov in his story *Ward No 6*, in which Andrei Yefimitch laments: 'I serve in a pernicious institution and receive a salary from people whom I am deceiving. I am not honest, but then, I of myself am nothing, I am only part of an inevitable social evil: all local officials are pernicious and receive their salary for doing nothing' (English translation by Constance Garnett).

3. Compatibility with the principle of freedom of competition

51. The final requirement that Article 11(2) of the Directive applies as a precondition for the legitimacy of imposing levies on the holders of individual licences in respect of scarce resources is that they must be oriented towards the development of innovative services and competition.

52. The liberalisation of telecommunications means that the markets must be opened up, a process that must not be frustrated by charges which restrict competition by imposing different rates on providers who are in comparable situations, whereby some are privileged at the expense of others, since, as was made clear in *Connect Austria*, freedom of competition requires equality of

opportunity as between competing operators (paragraph 83). Also, the aim of that Community measure and the exceptional nature of Article 11(2), which must be construed strictly in accordance with the general rules of legal interpretation, [32] preclude the application to new entrants of any limitations or charges that exceed what is necessary, as I pointed out in my Opinion in *Albacom and Infostrada* (point 43).

53. Moreover, undertakings which aspire to create a niche for themselves in that economic sector find themselves obliged to bear substantial investment costs, for which reason the initial phase of their strategy is of particular importance to the development of competition in so far as the relevant administrative procedures and the resultant costs [33] may bring with them the undesired effect of protection and consolidation of the position of the companies that are already established. [34]

54. But the distortion of competition is attributable not only to economic factors but also to those of a technical nature, both of which aspects complement and reduce the degree of latitude available to the State authorities, whether they exercise statutory powers or discharge a purely executive role. [35] One of those technological factors is, precisely, the stock of numbers, a scarce resource which has become very important since the free play of market forces is conditional upon the prior availability of a sufficiency of numbers, and also fair distribution of them amongst the competing undertakings. [36]

55. If the allocation free of charge to the successor to the historic monopoly of an enormous proportion of that limited resource is accompanied by an obligation on new entrants to pay a sum far in excess of the costs of the administrative action involved in the allocation of numbers, it seems beyond doubt that a lending hand is being given to consolidation of the pre-existing dominant position, hindering the entry of other undertakings, to the detriment of the open competition sought by the Directive in general and by Article 11(2) thereof in particular. Deutsche Telekom not only has a considerable portion of the 'cake' but also obtained it for absolutely nothing, whereas the rest of those at the table have to pay a high price for their slices, so that the requisite equality of opportunity in marketing the product is undermined.

32 — In its judgment in *Albacom and Infostrada*, the Court of Justice stated that the text of Article 11(2) of the Directive must be restrictively interpreted.

33 — In the Communication cited in footnote 6, the Commission appreciates that the requirement of advance authorisation may become an unjustified obstacle owing to the rules and slow and pointlessly laborious administrative procedures. It also mentions the need for the fiscal charges to be reduced (pp. 25 and 26). If the facts of the cases before the national court are analysed carefully, it will be seen, as I have pointed out, that the charge at issue is 15 times higher than the costs of the activity carried on.

34 — A. Heffermann, in *Telekommunikationsrecht, Liberalisierung und Wettbewerb*, Vienna, 2002, p. 91, states that the competition rules have become very important as a result of the consolidation of market forces following liberalisation of the sector, a fact which in his view is particularly noteworthy owing to the present dominant position of the former State monopolies, as has become apparent in the present proceedings.

35 — See M. Möstl, 'Lizenzgebühren im Bereich von Post und Telekommunikation' in *Neue Zeitschrift für Verwaltungsgerecht 2001*, p. 738.

36 — See M. Wissmann (editor), op. cit., pp. 326 and 1196.

56. Consequently, the Directive and Article 11(2) thereof must be interpreted as meaning that the allocation of telephone numbers must not be subject to a levy determined by reference to their economic value, in excess of the cost of the administrative action taken for that purpose, when an undertaking which, as successor to the former State monopoly, controls the sector has received free of charge its predecessor's stocks of numbers and, in accordance with national law, that allocation, which does not constitute compensation for 'inherited' charges, cannot be the subject of a retroactive levy.

57. The negative answer I suggest for the second question renders superfluous any consideration of the second question, since it follows from the foregoing that the requirement of a sole charge for new undertakings that is equivalent to a specified percentage of the economic value of the numbers allocated, calculated in accordance with specific rules (0.1% of the potential turnover after their allocation to an end user) is not permissible without a prior analysis of their capacity to compete with the dominant company already established in the market on the basis of the other costs that they must bear in order to gain entry to the sector.

V — Conclusion

58. Having regard to the foregoing considerations, I suggest that the Court of Justice answer the first question referred to it by the Bundesverwaltungsgericht in the present joined cases by ruling that 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, and in particular Article 11(2) thereof, must be interpreted as precluding the imposition on the allocation of telephone numbers of a levy determined by reference to their economic value, far in excess of the cost of the administrative action taken for that purpose, when an undertaking which, as successor to the former State monopoly, controls the sector has received free of charge its predecessor's stocks of numbers and, in accordance with national law, that allocation, which does not constitute compensation for 'inherited' charges, cannot be the subject of a retroactive levy.