OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 13 December 2001 [1]

I — Introduction

1. The Austrian Verwaltungsgerichtshof (Federal Administrative Court) has referred two questions in this case.

2. The first question concerns the interpretation of Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP), [2] as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997. [3] More particularly, the Verwaltungsgerichtshof asks about the direct effect of that provision, which gives certain parties a right of appeal to an independent body.

3. The second question — concerning the interpretation of Article 82 EC, Article 86 EC and Article 2 of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications [4] and Articles 9 and 11 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 [5] — is about the admissibility of certain allocations of extra DCS 1800 frequencies. DCS 1800 is part of the existing systems for GSM telephony. The referring court requires an answer to this second question only in so far as Article 5a(3) of Directive 90/387/EEC has direct effect.

II — The legal framework

European law

4. Article 5a(3) of Directive 90/387/EEC reads as follows:

'3. Member States shall ensure that suitable mechanisms exist at national level under

1 — Original language: Dutch.

2 — OJ 1990 L 192, p. 1. Where reference is made in this Opinion to that directive, the reference is to the text as it reads after amendment by Directive 97/51/EC.

3 — OJ 1997 L 295, p. 23.

4 — OJ 1996 L 20, p. 59.

5 — OJ 1997 L 117, p. 15.

which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved.'

5. Paragraphs 3 and 4 of Article 2 of Directive 96/2/EC, which are relevant to the second question put by the referring court, provide as follows: [6]

'3. Member States shall not restrict the combination of mobile technologies or systems, in particular where multistandard equipment is available. When extending existing licences to cover such combinations Member States shall ensure that such extension is justified in accordance with the provisions of paragraph 4.

4. Member States shall adopt, where required, measures to ensure the implementation of this article taking account of the requirement to ensure effective competition between operators competing in the relevant markets.'

6 — Although, as will be seen, I do not get the opportunity to answer the second question in this Opinion, I will nevertheless cite in this legal framework a couple of provisions which are under discussion in the context of the second question. Those provisions give a good idea of the statutory system and serve here to illustrate my observations in relation to the first question.

6. I would also refer to the recitals in the preamble to Directive 96/2/EC. The eighth recital reads as follows:

'In this context, due account should be taken of the requirement to promote investments by new entrants in these areas. Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences for existing GSM or DCS 1800 operators may take place only under conditions ensuring effective competition.'

The 15th recital states, inter alia, as follows:

'In the context of mobile and personal communications systems radiofrequencies are a crucial bottleneck resource. The allocation of radiofrequencies for mobile and personal communications systems by Member States according to criteria other than those which are objective, transparent and non-discriminatory constitutes a restriction incompatible with Article 90 in conjunction with Article 59 of the Treaty to

the extent that operators from other Member States are disadvantaged in these allocation procedures. The development of effective competition in the telecommunications sector may be an objective justification to refuse the allocation of frequencies to operators already dominant in the geographical market.'

7. Article 9(2) of Directive 97/13/EC provides as follows:

'2. 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....'

8. Article 11 of the same directive states:

'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.

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 take into particular account the need to foster the development of innovative services and competition.'

National law

9. The Telekommunikationsgesetz (Law on Telecommunications) [7] provides that the allocation of frequencies for public mobile telecommunications is made by way of a licence granted in accordance with the procedure laid down in Article 22 et seq. of that Law. The national regulatory authority grants the licence to the party that guarantees the most efficient use of the frequencies, which is determined on the basis of the level of the price offered by the party concerned for the use of the frequencies. The frequencies are allocated according to open, just and non-discriminatory principles on the basis of a public invitation to tender. The allocation of additional frequencies to the holder of a licence for the same service constitutes an extension of the existing licence and takes effect pursuant to the provisions of the licence. If the licence contains no provisions on this, the normal procedure is applied.

10. The Telekom-Control-Kommission (Telecom Monitoring Commission) has been designated as the national regulatory authority. [8] The Telekom-Control-Kommission is empowered, inter alia, to grant, withdraw and revoke licences and to approve transfers of and amendments to licences. The Telekom-Control-Kommission was established by statute as an independent collegiate authority. It consists of three members appointed by the Federal Government. One member must belong to the judiciary. The Commission takes its decisions at final (and sole) instance.

11. An appeal against a decision of the Telekom-Control-Kommission can be made to the Verfassungsgerichtshof (Federal Constitutional Court) under Article 144(1) of the Bundes-Verfassungsgesetz (Federal Constitutional Law) (hereinafter the 'B-Vg'). The power of review of the Verfassungsgerichtshof is limited. That Court examines only whether there has been an infringement of a constitutionally guaranteed right or an infringement of a right by reason of the application of an unlawful regulation, an unlawful statute or an unlawful State treaty or convention.

12. Austrian law as applicable to the main proceedings does not provide for an appeal on grounds other than those listed. Matters on which the Telekom-Control-Kommission has taken decisions are excluded, under Austrian law, from the jurisdiction of the Verwaltungsgerichtshof. Under Article 133, point 4, of the B-Vg, the Verwaltungsgerichtshof has no jurisdiction in matters on which another collegiate body comprising at least one member of the judiciary takes decisions at final instance, save where an appeal to the Verwaltungsgerichtshof is expressly declared admissible. This has not happened in respect of decisions of the Telekom-Control-Kommission, which can be regarded as a collegiate body within the meaning of Article 133, point 4.

7 — *Bundesgesetzblatt* 1997 I No 100.

8 — There are some matters, which are not relevant here, in respect of which the Telekom-Control-Kommission does not have competence. The Telekom-Control GmbH has been designated as the national regulatory authority for those matters.

13. The Austrian national legislation has, incidentally, since been amended. As of 1 July 2000 the Verwaltungsgerichtshof has had jurisdiction to hear and determine appeals against decisions of the Telekom-Control-Kommission. This was also the reason why the Commission did not pursue an action for infringement against the Republic of Austria, as the Commission let it be known during the hearing in the present case.

14. Article 125(3) of the Telekommunikationsgesetz is relevant for the purpose of answering the second question put by the referring court. That provision reads as follows:

'The authority may, if necessary, allocate to existing holders of a licence for the provision of reserved mobile telecommunications services within the digital cellular mobile communications sector additional frequencies to the extent of 5 MHz from the frequency band reserved for DCS 1800 if at least three years have elapsed since the entry into force of the decision granting the concession to the applicant for a licence for the DCS 1800 concession to be awarded for 1997. Prior to this date, additional frequencies from the frequency band reserved for DCS 1800 may be allocated to existing licence holders only if it is established that, although they have employed all commercially viable technical possibilities, their user capacity has been exhausted.'

15. With regard to the allocation of 'the remaining frequency band reserved for DCS 1800', paragraph 3a was added to Article 125 of the Telekommunikationsgesetz[9] in 1998. That paragraph provides that in any event a further licence with a duty to provide a service throughout Austria and further localised concessions will be allocated, whereby again holders of existing licences are excluded from the award of an additional licence with a duty to provide a service throughout Austria. Holders of existing licences may ask to be allocated new frequencies, but they are not permitted to use those frequencies prior to the expiry of the three-year period referred to in Article 125(3).

III — Factual and procedural framework

16. Under licensing decisions of the competent Minister of 6 November 1996 and 23 July 1997, Mobilkom Austria AG (hereinafter 'Mobilkom') is entitled to a frequency band of 2 × 8 MHz (39 channels) within the 900 MHz sector. Mobilkom is the successor in title to the former monopolist in the field of post and telecommunications in Austria (Post & Telekom Austria AG). The government is the majority shareholder.

9 — *Bundesgesetzblatt* 1998 I No 98.

17. Pursuant to decisions of the Minister of 25 January 1996 and 23 July 1997, adopted following a public invitation to tender, Ö CALL-MOBIL Telekommunikation Service GmbH (now max.mobil Gesellschaft für Telekommunikation GmbH; hereinafter 'max.mobil') has the same right. This tenderer paid ATS 4 billion for the licence. Payment in the same amount had been prescribed on 2 July 1996 for Mobilkom's legal predecessor. The obligation to pay now rests with Mobilkom.

18. On 19 August 1997 the licence in the DCS 1800 sector was granted, pursuant to a public invitation to tender, to Connect Austria Gesellschaft für Telekommunikation GmbH, the applicant in the main proceedings (hereinafter 'Connect Austria'). Connect Austria had to pay ATS 2.3 billion for that licence. It was allocated a frequency band of 2 × 16.8 MHz (84 channels). It was also offered the prospect of an extension to 2 × 22.5 MHz (112 channels) if it achieved a user volume of 300 000 and a 75% cover rate.

19. By decision of 10 August 1998 the Telekom-Control Kommission allocated an additional frequency band for DCS 1800 to Mobilkom, as an extension to the licence granted to it previously. That additional frequency band was granted with effect from 1 January 1999 to the extent of 2 × 5 MHz (24 DCS 1800 channels) for the provision of GSM telephony using base stations situated in the Federal State of Vienna. An application for allocation of a further frequency band of 2 × 3.4 MHz from the frequency band reserved for DCS 1800 was turned down. That decision of 10 August 1998 was based on Article 125(3) of the Telekommunikationsgesetz. It is that decision which is now being contested before the Verwaltungsgerichtshof.

20. Connect Austria appealed against the decision of 10 August 1998 to the Verfassungsgerichtshof, which ruled by a decision of 24 February 1999 that a constitutionally guaranteed right of the appellant had not been infringed by the contested decision and that its rights had not been infringed through application of an unlawful rule. The appeal was dismissed.

21. In the grounds of its decision, the Verfassungsgerichtshof also considers Article 5a(3) of Directive 90/387/EEC. The Verfassungsgerichtshof considers the content of that provision 'in regard to the right to appeal against the decision of a national regulatory authority, sufficiently precise as to be directly effective, within the meaning of the established case-law of the Court of Justice of the European Communities...,[10] to the extent to which it must provide an effective legal remedy to an independent body.' The directive does not indicate which national court or tribunal has jurisdiction.

10 — The Verfassungsgerichtshof refers to the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

22. The Verfassungsgerichtshof goes on to infer from Article 131(1), point 1, and Article 133, point 4, of the B-Vg 'that an appeal against judicial decisions of collegiate authorities can lie only to the Verwaltungsgerichtshof.' The Verfassungsgerichtshof explains that Article 133, point 4, of the B-Vg appears to preclude an appeal to the Verwaltungsgerichtshof. Nevertheless, the precedence enjoyed by Community law — the Verfassungsgerichtshof proceeds on the assumption that Article 5a(3) of Directive 90/387 has direct effect — means that Article 133, point 4, of the B-Vg must be disapplied for the purpose of applying the directive. An appeal against a decision of the Telekom-Control-Kommission in its role as the 'national regulatory authority' can therefore be lodged with the Verwaltungsgerichtshof.

23. The reasoning of the Verfassungsgerichtshof is also influenced by the fact that the possibility of appeal to the Verfassungsgerichtshof itself cannot be regarded as a right of appeal within the meaning of Article 5a(3) of the said directive, since the Verfassungsgerichtshof has only a limited power of review. In contrast, the review of the legality of administrative action, which it is the function of the Verwaltungsgerichtshof to exercise, does satisfy the requirements of Community law.

24. On the basis of the foregoing reasoning, the Verfassungsgerichtshof referred the appeal by order of 3 March 1999 to the Verwaltungsgerichtshof for a decision pursuant to Article 144(3) of the B-Vg.

The questions referred for a preliminary ruling

25. The Verwaltungsgerichtshof (Austria) subsequently referred the following questions for a preliminary ruling by order of 24 November 1999, which was received at the Court Registry on 2 December 1999:

1. On a proper construction of Article 5a(3) of Directive 90/387/EEC, does that provision have direct effect in the sense that, overriding a contrary domestic rule of jurisdiction, it establishes the jurisdiction of a specific 'independent body' at national level to implement a 'suitable mechanism' for dealing with an appeal brought by an aggrieved party against a decision taken by the national regulatory authority?

2. If the answer to the first question is in the affirmative: are Articles 82 EC and 86(1) EC, Article 2(3) and (4) of Directive 96/2/EC, and Articles 9(2) and 11(2) of Directive 97/13/EC, or other provisions of Community law, to be construed as precluding a provision of national law under which existing holders of a licence for the provision of mobile telephony may be granted additional frequencies for DCS-1800 in the following circumstances:

— it is established that, despite employing all commercially viable technical possibilities, the user capacity of the existing licence holders has been exhausted;

— the existing licence holders include a public undertaking holding a dominant position in the GSM 900 market;

— three years have not yet expired since the date on which the 1997 decision awarding the licence became final, and

— there is no requirement that a separate fee be paid for the use of the additional frequencies? [11]

26. Written observations have been submitted to the Court by the appellant in the main proceedings, Connect Austria, the respondent in the main proceedings, the Telekom-Control-Kommission, and also by Mobilkom Austria, the Austrian Government, the Swedish Government and the Commission. At the Court's hearing on 11 October 2001, all those involved, apart from the Swedish Government, orally explained their positions.

IV — The first question

Observations submitted

27. Connect Austria infers the jurisdiction of the Verwaltungsgerichtshof from the precedence of Community law. In the light of the content of Article 5a(3) of Directive 90/387/EEC, Article 133, point 4, of the B-Vg should be disapplied here. At the hearing, Connect Austria pointed out that the Verwaltungsgerichtshof is the highest court with a general power of judicial review of the Austrian administration. It is established that no other court has jurisdiction to hear and determine the disputes concerned; there is therefore no possibility of a conflict of jurisdiction.

28. Mobilkom raised an entirely different point. Article 5a(3) of Directive 90/387/EEC does not cover the present case, according to Mobilkom. That provision gives a right of appeal to tenderers for the provision of telecommunications services against decisions of the national regulatory authority addressed to them concerning access to networks and interconnection. That article does not give the protection of competition law. Interested third parties cannot derive a right of appeal from that article. Mobilkom proposes that for that reason the Court should reformulate the question put to it.

29. Both the Austrian and Swedish Governments point out that Article 5a(3) does not have direct effect given that it is not unconditional and sufficiently precise, as the established case-law of the Court requires. The Member States must, in fact, adopt additional measures. They designate the competent authority and determine

11 — To make the second question more readable in Dutch, I have radically changed the structure of this question while of course retaining the substance.

how it is organised. The Swedish Government states with reference to the *Dorsch Consult* [12] judgment that the designation of a competent court or tribunal falls within national jurisdiction and that the Court is not involved.

30. The Austrian Government puts forward yet another point. The jurisdiction of the Verfassungsgerichtshof satisfies both the general principles of effective legal protection and the requirements laid down by Article 5a(3) of Directive 90/387. The Austrian Government set out its point of view as follows at the hearing. In its view, the Telekom-Control-Commission must be regarded as a court or tribunal within the meaning of Article 234 EC and, where it is ruling as the highest court, is moreover obliged to refer questions for a preliminary ruling. If it does not comply with that obligation and does not refer questions for a preliminary ruling, this is regarded under Austrian law as an infringement of a constitutional right against which there is a right of appeal to the Bundesverfassungsgericht.

31. The Commission points out that the character of Article 5a(3) is the same as that of Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, [13] which was in dispute in the *Dorsch Consult* judgment. As regards the direct effect of Article 5a(3) of Directive 90/387/EEC, the Commission claims that in terms of its substance that provision has direct effect given that individuals can derive a right of appeal from it. In terms of procedure, the provision does not have direct effect. National law will have to stipulate the authority before which they can exercise their right of appeal. However, the requirement of interpretation in conformity with the directive and of effective protection of the rights of individuals means that the national authorities — such as in this case the Verwaltungsgerichtshof — must consider whether there is a right of appeal against decisions of the regulatory authority in the field of telecommunications. Where no such right of appeal that satisfies Directive 90/387/EEC exists, the persons concerned may demand compensation from the Member State for damage suffered as a result of the failure to transpose the directive within the prescribed time-limit. [14]

32. The Commission claims specifically that Article 5a(3) of Directive 90/387/EEC has not been properly transposed in the Austrian legislation, since there is no independent authority that reviews the lawfulness of the decisions made by the national regulatory authority.

12 — Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961.

13 — OJ 1992 L 209, p. 1.

14 — Case C-111/97 *EvoBus Austria* [1998] ECR I-5411.

The Dorsch Consult judgment

33. In many of the observations submitted, a parallel is rightly drawn between the present case and the *Dorsch Consult* judgment. That judgment concerned the possible direct effect of a provision of a directive in a situation where a directive — the abovementioned Directive 92/50 on public service contracts [15] — had not been transposed within the prescribed time-limit. The question was specifically whether the appeal bodies which the Member States had designated in the field of public works contracts and public supply contracts also had jurisdiction to hear appeals relating to procedures for the award of public service contracts without the national legislature expressly having given them the jurisdiction to do so. The Court reasoned as follows. [16]

34. First of all the Court dealt in general with the responsibility to ensure an adequate legal procedure in the event of disputes involving individual rights derived from Community law. The Court took the view that it was not for it to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law might give rise in the national judicial system. It was for the legal system of each Member State to determine which court or tribunal had jurisdiction to hear disputes involving individual rights derived from Community law. The relative jurisdiction of national courts and tribunals was therefore a matter for the Member States. However, it was the Member States' responsibility to ensure that those individual rights were effectively protected in each case.

35. The Court then considered Directive 92/50. Although that directive required the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it did not indicate which national bodies were to be the competent bodies for that purpose. Those bodies did not need to be the same as those which the Member States had designated in respect of similar procedures in the field of public works contracts and public supply contracts.

36. The Court then gave further consideration to the significance of the failure to transpose Directive 92/50 in due time. The Court reiterated that the obligations arising from a directive were binding on all the authorities of the Member States and therefore also, for matters within their jurisdiction, on the courts. The same held for the obligation to interpret provisions of national law in conformity with the directive.

37. Under certain conditions individuals had the right, the Court stated, to rely in law on a directive as against a defaulting

15 — See point 31 of my Opinion.

16 — Paragraph 40 et seq. of the judgment. The Court follows the same line of reasoning in the *EvoBus Austria* judgment (cited in footnote 14).

Member State, without, incidentally, this minimum guarantee being able to justify a Member State absolving itself from taking in due time the requisite implementing measures. If an interpretation in conformity with the directive was not possible, the persons concerned, using domestic law procedures, could claim compensation for the damage incurred owing to the failure to transpose the directive within the time prescribed.

38. On the basis of that reasoning the Court answered the question referred to it as follows. It did not follow from Directive 92/50 'that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts'.

39. In short, in a situation where a directive has not been transposed, an individual cannot derive a right of appeal directly from Community law. Such a right of appeal could — but this falls to the national court — be derived from an interpretation of the national law in conformity with the directive. To that end the Court went on to suggest a suitable provision of national law.

Opinion

40. In my opinion the Court can take as its basis in the present case the reasoning and judgment in *Dorsch Consult*. I would differentiate a number of steps in applying that reasoning and judgment to the present case.

41. For me, the first step is establishing that Article 5a(3) of Directive 90/387/EEC has not been adequately transposed. In this connection I would call to mind first of all the established case-law of the Court on Article 249 EC, according to which every Member State is obliged in the context of its national legal system to adopt the measures necessary to ensure the full effect of a directive in accordance with the objective pursued by that directive.

42. Directive 90/387/EEC forms part of a package of Community measures adopted in the 1990s with the aim of liberalising the telecommunications sector. Detailed legislation was often necessary to ensure that newcomers would actually gain access to a market which until then had been controlled by a monopolist. A characteristic of a large proportion of that legislation is that it imposes obligations on the former monopolist, from which the newcomers to the market are meant to benefit. By way of illustration I would refer here to the recitals of Directive 96/2/EC cited in point 6 of this Opinion. The need to stimulate investment by new entrants to the market even meant that existing operators of GSM systems might not be able to get DCS 1800 licences. Thus in this case, Article 125 of the Austrian Telekommunikationsgesetz resulted in the existing operators Mobilkom and max.mobil being eligible for a DCS 1800 frequency only under very restrictive conditions. It was necessary to guarantee in that way that newcomers to the market such as Connect Austria were actually able to enter the Austrian GSM market.

43. In a system like that, which has as its objective to eliminate existing inequality between — potential — operators in the market, provision must be made not only for even-handed substantive rules but also for even-handed and effective enforcement.

44. The national regulatory authorities play an important role in that context. Their action must, as is apparent inter alia from the ninth recital of the directive, be first and foremost independent or impartial, as the case may be. They must be independent of the operators in the market and also of central government services in so far as this is necessary in connection with the financial interest that the government often still has in the former monopolist. An independent authority of this very sort — which is essentially composed of experts in the professional field, and parliamentary review of which is, at best, indirect — has its place in a State under the rule of law only if judicial review of its decisions is possible. This is the context into which I would put Article 5a(3) of Directive 90/387/EEC, which states that 'a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved'.

45. The job of the national regulatory authorities, such as the Telecom-Control-Kommission, is primarily a managerial one, which they have taken over from central government. Their core tasks include the award of licences. They are therefore to be regarded as managerial bodies and, contrary to what the Austrian Government claims, have no judicial function. Where the award of licences is concerned, the conditions which the Court requires the

jurisdiction to satisfy in order to refer questions for a preliminary ruling under Article 234 EC are certainly not met. I would refer on this point to the recent *Salzmann* judgment,[17] from which it can be seen that a power to make a reference to the Court exists only if there is a case pending before the referring court or tribunal and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

46. The Austrian Government's position that the national regulatory authorities themselves should be able to refer questions for a preliminary ruling is therefore obviously incorrect. At the risk of stating the obvious, I would also point out that, even if the Court were to endorse the Austrian Government's position, this would not mean that Article 5a(3) of Directive 90/387 was complied with, since that provision requires there to be a right of appeal against a decision of the regulatory authority. The body of the directive implies that the regulatory authority cannot itself be the appeal body.

47. The right of appeal is, in my opinion, essential in the system of the directive and more generally in the system of the liberalisation of telecommunications legislation. Quite apart from the fact that all provisions of EC directives must be implemented scrupulously and in full, this all means that the right of appeal may not be interpreted restrictively. I consider inadmissible any restriction of the scope of the right of appeal or of the types of decisions against which an appeal may be brought.

48. Neither in the body of the directive nor in its recitals, therefore, can I find any argument to support Mobilkom's view that Article 5a(3) does not relate to disputes concerning the allocation of frequencies by the Telekom-Control-Kommission. Article 5a is general in nature and is intended to ensure that the decisions made by the national regulatory authorities are accompanied by the necessary safeguards. It certainly cannot be the case that interested third parties who are directly affected by the decision do not have a right of appeal. Indeed, Article 5a(3) is, precisely, intended partly to protect the interests of newcomers to the market such as Connect Austria.

49. Moreover, it is not possible, in my opinion, for the provision relating to the

17 — Case C-178/99 *Doris Salzmann* [2001] ECR I-4421, paragraphs 13 and 14 of the judgment.

right of appeal to be complied with by means of the limited power of review of the Bundesverfassungsgericht for which Austrian national law provides. It is obvious to me that Article 5a(3) is referring to a comprehensive right of appeal. The unlawfulness of the decision for whatever reason must be open to discussion.

50. That being the case, it is clear to me that Austria has failed to transpose Article 5a(3) of Directive 90/387, since it is not possible to appeal against (certain) decisions of the Telekom-Control-Kommission in a way which complies with the requirements laid down by the directive.

51. The second step relates to the possible direct effect of Article 5a(3). I infer from the *Dorsch Consult* judgment that Article 5a(3) cannot have direct effect. The relative jurisdiction of courts and tribunals is a matter for the Member States. The Member States — and therefore not the Community legislature — have to designate a competent court or tribunal. That is how tasks are divided between the Community and the Member States in the area of legal protection. Community law can lay down substantive requirements in the area of legal protection and does so in many areas. It is for the Member States actually to put that legal protection into practice within their own judicial systems. This is also the light in which I see the Commission's observation that Article 5a(3) of Directive 90/387 has direct effect in terms of content but not in terms of procedure.

52. I come to the same opinion also in the light of the Court's case-law on the direct effect of directives. Only unconditional and sufficiently precise provisions of directives that have not been transposed may be relied on by individuals as against Member States. On this point I believe, following on from what the Commission has said, that although Article 5a(3) of Directive 90/387 is sufficiently precise and unconditional as regards the content of that provision, this does not mean that individuals may rely on that provision before the national courts. [18] In all cases, the intervention of the national legislature is required to designate the court or tribunal which has jurisdiction to hear appeals.

53. This view is also in accordance with the recent *Gharehveran* judgment. [19] In that judgment the Court recognised the right of appeal of an employee as against the Member State in a case where the national legislation, in breach of a directive, excluded that employee from the category

18 — I have taken this form of wording from the judgment in *Francovich and Others*, cited in footnote 10.

19 — Case C-441/99 *Riksskatteverket* v *Soghra Gharehveran* [2001] ECR I-7687.

of persons entitled to claim a particular payment. The Court based that recognition on the fact that the Member State concerned in that case could not rely on the existence of a margin of discretion. In the present case the situation is different: designation of a competent court or tribunal falls expressly within the discretion of the Member State itself.

54. The third step concerns the question whether an interpretation in conformity with the directive can provide relief. According to this doctrine,[20] which has frequently been applied by the Court, the national court must, as far as possible, interpret national law in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC.

55. An interpretation in conformity with the directive does not seem to me a fruitful path to take in the present case either, however. The system of the Austrian Federal Constitution is entirely unambiguous and no longer open to interpretation. Under national law the Austrian Verwaltungsgerichtshof does not have jurisdiction, save where the legislature expressly declares an appeal admissible. An interpretation in conformity with the directive cannot change this in any way. Added to this is the fact that under national law a decision of the Telekom-Control-Kommission became final at a particular point in time and that the creation of a possibility of appeal — *contra legem*! — on the basis of an interpretation in conformity with the directive would seriously prejudice the legal certainty of other interested parties.

56. Nor does the Court's approach in *Dorsch Consult* lead me to take a different view. In *Dorsch Consult* the Court directed the national court to examine whether jurisdiction could be inferred from national law, in particular jurisdiction on the part of the bodies that decided very similar disputes.

57. On this point too, the present case is highly similar to the *Dorsch Consult* case. In both of them there is an obvious national court or tribunal to which jurisdiction could be granted. The grant of jurisdiction to that court or tribunal would in neither case result in an encroachment on the national legal system and would not generate competence issues either. In *Dorsch Consult* a body had been designated to hear disputes very similar to the one at issue in that case; the present case concerns a conflict of the type that is heard by the Austrian Verwaltungsgerichtshof, but which for reasons that have nothing to do

20 — See, for example, Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8 of the judgment.

with the directive was withdrawn from the jurisdiction of that court.

58. Essentially, the Court's solution in the *Dorsch Consult* judgment boils down to a request to the referring court to examine whether it can acquire jurisdiction for itself through an interpretation of national law which is in conformity with the directive. I will not discuss here what that examination by the national court in *Dorsch Consult* produced or may have produced. In the present case, however, I do not consider such an examination useful. Under the Austrian national legislation there is no doubt whatever that the Bundesverwaltungsgericht does not have jurisdiction. This has been firmly established.

59. Of course, and this is the fourth stage, the party concerned who has been adversely affected by the failure to transpose Article 5a of Directive 90/387/EEC has the right to rely in a court of law on the directive as against the Member State Austria. It will, in my view, be possible for such reliance to result in compensation for the person concerned,[21] but not in invalidation of any decision that has already been taken by the Telekom-Control-Kommission.

60. To summarise, although Article 5a(3) of Directive 90/387 has not been transposed in the Austrian legislation, an individual cannot base his right of appeal on the direct effect of that provision, nor on an interpretation of the national legislation that is in conformity with the directive. What remains is an application for compensation as against the Austrian State.

V — The second question

61. In view of my answer in the negative to the first question, I will not be answering the second question. The referring court asks for an answer to the second question only if the first question is answered in the affirmative. Moreover, it has been established sufficiently, in my view, that the Verwaltungsgerichtshof does not have jurisdiction to hear the main action. This means that the second question no longer has any connection with an actual dispute. According to established case-law, the Court does not answer questions put to it in such cases.

21 — I would refer to the established case-law of the Court following the judgment in *Francovich and Others*, cited in footnote 10.

VI — Conclusion

62. On the basis of the foregoing observations I propose that the Court should answer the questions put by the Verwaltungsgerichtshof as follows:

(1) In a situation where Article 5a(3) of Council Directive 90/387/EEC 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, has not been transposed, or has been transposed incompletely, in national legislation, individuals cannot derive their right of appeal to an independent body directly from the directive. If the national legislation expressly excludes a right of appeal, such a right likewise cannot be based on the principle of interpretation in conformity with the directive;

(2) The second question does not require an answer.