

OPINION OF ADVOCATE GENERAL

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delivered on 1 April 2008¹

I — Introduction

1. The Bundesverwaltungsgericht (Federal Administrative Court), Germany has requested the Court of Justice to rule on the scope attributed to the financing of certain universal service obligations by Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services ('Competition Directive' or 'Directive 90/388')² and Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision ('Interconnection Directive' or 'Directive 97/33').³

2. The referring court asks whether it is lawful to impose, for the benefit of the dominant operator in the public telecommunications network, charges additional to connection charges in a sector characterised

by the liberalisation⁴ fostered by the Competition⁵ and Interconnection Directives,⁶ and completed by the 'new regulatory framework',⁷ adopted on 7 March 2002 and published on 24 April 2002.⁸

3. The undertakings required to pay those additional charges dispute their validity,⁹ invoking the principles of free competition,

4 — I describe the milestones marking the route to liberalisation in my Opinions in Joined Cases C-327/03 and C-328/03 *ISIS Multimedia and Firma O2* [2005] ECR I-8877; Case C-339/04 *Nuova società di telecomunicazioni* [2006] ECR I-6917; Case C-64/06 *Telefónica 02 Czech Republic* [2007] ECR I-4887; and Case C-262/06 *Deutsche Telekom AG* [2007] ECR I-10057.

5 — Amended by Commission Directive 96/19/EC of 13 March 1996, with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13).

6 — In particular, following the wording inserted by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 (OJ 1998 L 268, p. 37), which is applicable *ratione temporis*.

7 — In my Opinion in *Deutsche Telekom*, I use that term to refer to four Directives of the European Parliament and of the Council: Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive); and Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

8 — OJ 2002 L 108, pp. 7, 21, 33 and 51.

9 — The Spanish expression 'disfrutar de una conminación' (literally, 'to enjoy an obligation') is a contradiction in terms. However, intentionally created paradoxes have always existed, such as the title of the opera *The Happy Slaves* which the Bilbaoan Juan Crisóstomo de Arriaga, nicknamed the Spanish Mozart, composed in 1820, before he died at the young age of 20, leaving a musical legacy rich in chromaticisms and beautiful modal ambiguities.

1 — Original language: Spanish.

2 — OJ 1990 L 192, p. 10.

3 — OJ 1997 L 199, p. 32.

the prohibition of discrimination and administrative transparency.

6. That trend crystallised in a new framework, contrasting with the state involvement in the provision of the service which had moulded it to the predominant political will,¹¹ to the detriment of the liberalisation of the sector.

II — The legislation applicable

A — Community law

4. The creation of a competitive, harmonised European market, founded on the free choice of telephony operators, commenced in 1987 with the drafting of the Green Paper on telecommunications.¹⁰

5. The administrative deregulation of the sector significantly transformed its legal status, which had been based on the notion of *publicatio* or keeping the operation of telecommunications networks in the hands of public bodies: the traditional system of state monopolies, incapable of satisfying the demands of the ever-increasing number of users resulting from the revolution which had taken place in the industry, disappeared.

1. Directive 90/388¹²

7. The judgment in *Italy v Commission*¹³ sent shockwaves through the world of telecommunications by holding that the rules on competition apply to public bodies holding special or exclusive rights.

8. Notwithstanding the adjustments made in case-law, there were notable gaps in the system, made evident by the complexity of the field and the continued existence of markets dominated by the state operator, whose participation could be achieved only by means of specific statutory measures.

9. There was an even greater reaction to the expected liberalisation, effected by

10 — *Green Paper on the development of the common market for telecommunications services and equipment*, Brussels, 16 December 1987, COM (87) 290 final, pp. 6, 16 et seq., supplemented by a number of proposals aimed at ensuring the uniformity of the authorisation mechanisms provided for in the legislation of the Member States, such as the proposals contained in the *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.

11 — It is clear from recitals 2 and 7 in the preamble to Directive 90/388 that there was awareness of that situation when the directive was drafted.

12 — 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).

13 — Case 41/83 [1985] ECR 873.

Directive 88/301/EEC¹⁴ and consolidated two years later by Directive 90/388, which abolished special and exclusive rights. There were a number of exceptions, including, in particular, voice telephony, in respect of which the opening-up to competition was delayed until Commission Directive 96/19 of 13 March 1996 amending Directive 90/388.

10. Article 4c of Directive 90/388¹⁵ calls on the Member States to rebalance tariffs, providing for the essential guideline to the effect that the price of universal service provision may be increased, while bearing in mind the need to ensure its affordability. The article is also aimed at ensuring the conciliation of operators' revenues, taking account of specific market conditions and in the spirit of cooperation which is fundamental in order to enable all individuals to enjoy telecommunications services.

2. Directive 97/33¹⁶

11. On a separate front, the route to harmonisation,¹⁷ which ran parallel to the efforts to remove the barriers restricting effective competition between operators,

encouraged the entry of new operators into the market, by ensuring the establishment of a permanent equilibrium between those involved in open network provision.¹⁸

12. However, harmonisation also needed to extend to access to and location of the infrastructures, thereby guaranteeing interconnection between public networks and their suppliers.

13. As I explained in my opinion in *Telefónica O2 Czech Republic*,¹⁹ that objective led to the adoption of Directive 97/33 which concerns certain financial aspects of interconnection between operators and precludes the fixing of tariffs below the threshold of the actual costs, while at the same time preventing mercantilist dabbling by prohibiting charges which exceed that threshold (recital 10).

14. Article 7(2) of Directive 97/33 provides:

'Charges for interconnection shall follow the principles of transparency and cost orientation. The burden of proof that charges are derived from actual costs including a reasonable rate of return on investment shall lie with the organisation providing interconnection

14 — Directive of the Commission of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1998 L 131, p. 73).

15 — Inserted by Directive 96/19.

16 — Replaced by Directive 2002/21.

17 — Unquestionably strengthened by 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 (OJ 1990 L 192, p. 1).

18 — Known by the abbreviation 'ONP'.

19 — Paragraphs 5 and 6.

to its facilities. National regulatory authorities may request an organisation to provide full justification for its interconnection charges, and where appropriate shall require charges to be adjusted. This paragraph shall also apply to organisations set out in Part 3 of Annex I which have been notified by national regulatory authorities as having significant market power on the national market for interconnection.

services concerned by enshrining the principle of transparency.²⁰

B — *The German legislation*

...'

15. In order to prevent fraud, Article 7(4) provides that, in accordance with Community law, interconnection charges must be sufficiently unbundled, so that the applicant is not required to pay for anything not strictly related to the service.

18. Paragraph 35 et seq. of the Telekommunikationsgesetz of 25 July 1996 (Law on telecommunications; 'TKG') sets out the obligations incumbent on the dominant operator with regard to providing access and interconnection.²¹

16. In addition, following the adoption of Directive 98/61, which inserts a paragraph 7 into Article 12 of Directive 97/33, subscribers are granted the right to access the switched services of any interconnected telecommunications provider and the national regulatory authorities are required to ensure that pricing for interconnection is cost-orientated and that any charges imposed do not act as a disincentive for the use of the facility.

19. In accordance with Paragraphs 39 and 27 et seq., all charges relating to access to the network must be submitted for authorisation so that the licence holder does not receive payments in excess of those approved by the administrative authorities.

20. Paragraph 43(6) of the TKG, in the version of the Law of 21 October 2002,²² provides for the levying of additional charges

17. The Community provisions on competition in the field of telecommunications, which are structured towards the protection of consumers, provide for interconnection charges but exclude sums which are not intended to cover the actual costs of the

20 — In Case C-33/04 *Commission v Luxembourg* [2005] ECR I-10629, the Court declared that the Grand Duchy of Luxembourg had failed to fulfil its obligations on the grounds that it had infringed the principle of transparency by failing to verify, in accordance with Directive 97/33, the compliance of cost accounting systems using a competent independent body and by not publishing a statement of compliance.

21 — BGBl. 1996, I, p. 1120.

22 — BGBl. 2002, I, p. 4186.

to compensate for any deficit suffered by the dominant operator.

Paragraph 43(6) of the TKG, ordered, with effect from 1 July 2003, an additional non-cost based contribution in respect of the Telekom-B.2 (Ort.) facility, in the amount of EUR 0.0004 per minute, on the grounds that revenues accruing to Deutsche Telekom from end users did not cover all the costs of activating the local loop.

III — The facts, the main proceedings and the questions referred for a preliminary ruling

21. Arcor AG & Co. KG, Communication Services TELE2 GmbH and Firma 01051 Telekom GmbH operate in Germany using public telecommunications networks, and offer their customers a carrier selection service through interconnection to the local network of Deutsche Telekom.

24. Barely one month later, the Commission²⁴ fined Deutsche Telekom EUR 12 600 000 for abusing its dominant position by requiring its competitors to pay a price for access to the local network which was higher than the one it charged its own subscribers for use of the fixed network.

22. The regulatory authority requires Deutsche Telekom to provide the facility Telekom B.2 (Ort.), in return for a charge paid by Arcor AG & Co. KG, Communication Services TELE2 GmbH and Firma 01051 Telekom GmbH.

25. By decision of 23 September 2003, the regulatory authority annulled (*ex nunc*) the imposition of the additional contributions, which were thus restricted to the period from 1 July to 23 September 2003.

23. By decision of 29 April 2003, following an application by Deutsche Telekom, the Regulierungsbehörde für Telekommunikation und Post (Regulatory Authority for Telecommunications and Post),²³ relying on

26. Each of the three undertakings required to pay the additional charges individually contested the administrative decision approving those charges.

23 — Now the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Postal and Railway Networks).

24 — Decision 2003/707/EC of 21 May 2003 (OJ 2003 L 263, p. 9), in respect of which proceedings have been pending before the Court of First Instance (T-271/03) for more than four years.

27. By judgment of 3 November 2005, the Verwaltungsgericht (Administrative Court), Cologne upheld their claims on the grounds of infringement of Community law, in particular Article 7(2) and Article 12(7) of Directive 97/33, as amended by Directive 98/61.

If the answer to the first question is in the affirmative:

- (2) Is the incompatibility with Community law of such a requirement, which is a provision of domestic law, to be taken into account by the national court in proceedings concerning the approval of a contribution by the interconnected network operator?

28. Germany and Deutsche Telekom brought an appeal before the Bundesverwaltungsgericht, which took the view that Paragraph 43(6) of the TKG may be incompatible with Community law. Accordingly the Bundesverwaltungsgericht stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

IV — The procedure before the Court of Justice

29. The order for reference was registered at the Court Registry on 20 March 2007.

30. By order of 1 June 2007, the President of the Court joined the three cases on account of their objective connection.

‘(1) Are Commission Directives 90/388/EC of 28 July 1990 and Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 to be interpreted as precluding the national regulatory authority from requiring, in 2003, the operator of a network interconnected with a public telecommunications subscriber network to pay a contribution to the market-dominant operator of the local network in order to compensate that operator for the deficit incurred as a result of providing the local loop?

31. Observations were lodged, within the time-limit laid down in Article 23 of the Statute of the Court of Justice, by the German Government and Deutsche Telekom, who propose that both questions referred be answered in the negative, and by the appellant undertakings in the main proceedings and the Commission, who argue that the Court should rule that the requirement concerned is incompatible with Community law.

32. At the hearing on 19 February 2008, oral argument was presented by the representatives of those who participated in the written stage and also by the United Kingdom.

ation of the invention in New York. Therefore, with the passage of time each individual has been placed in his rightful position.²⁸

V — Analysis of the questions referred for a preliminary ruling

A — *The first question*

33. The Court is seised of a large number of proceedings in which telecommunications are of great significance, a phenomenon foreseen since the dawn of the development of such services because of the economic potential inherent in exploiting them.

1. Some preliminary points on universal service

34. It may seem paradoxical but, even though the patent for the telephone was granted to Alexander Graham Bell in 1876²⁵ following a lengthy legal dispute,²⁶ the United States Congress²⁷ recently reinstated the memory and the achievements of the Italian Antonio Meucci, acknowledging that before that date, in 1860, he publicly demonstrated the oper-

35. 'One system, one policy, universal service'.²⁹ That slogan³⁰ revealed the desire to bring the whole population together through a telephone network³¹ in a period when the rivalry between the Bell System and the independent companies turned into hysteria.³²

25 — United States Patent No 174, 465.

26 — On that subject, see Evenson, E., *The Telephone Patent Conspiracy of 1876: The Elisha Gray — Alexander Bell Controversy*, Jefferson (North Carolina), McFarland Publishing, 2000; Catania, B., *Il Governo degli Stati Uniti contro Alexander Graham Bell — Un importante riconoscimento per Antonio Meucci*, AEI-Automazione, Energia, Informazione, vol. 86, No 10 Supplemento de octubre de 1999, pp. 1 to 12; and, by the same author, *Antonio Meucci finally recognised*, Lecture in the presence of the President of Italy, Carlo Azeglio Ciampi, at the Meucci Day in Rome, 28 May 2003.

27 — By Resolution No 269 of 11 June 2002 (107th Congress, 1st session).

28 — After hearing the replies of the prophesying ape, Don Quixote, addressing Sancho, predicts: 'Events will show ... for time, which reveals all things, leaves nothing that it does not drag into the light of day, even things hidden in the bosom of the earth.' Cervantes Saavedra, M. de, *Don Quixote*, translated by J.M. Cohen, Penguin Books, Harmondsworth, 1986, Part II, Chapter XXV, p. 637.

29 — Footnote not relevant to English-language version.

30 — Coined in the United States in 1907 by Theodore Vail, president of the American Telephone and Telegraph Company.

31 — Mueller M., *Universal service and the new Telecommunications Act: mythology made law*, Communications of the ACM, Rutgers University SCILS, March 1997, and Renaudin E., *L'évolution du Service Universel dans le secteur des télécommunications*, DEA Droit public des Affaires, 2003-2004, University of Paris X, Nanterre.

32 — Arlandis J., *Service Universel: évolution d'un concept-clé*, Communications et stratégies, primer trimestre, 1994, No 13, p. 41.

36. The aim of universal service is to offer a quality service at a reasonable price throughout the territory concerned, propositions which are set out in Articles 3 and 9 of Directive 97/33.

37. However, that task of public interest gives rise to a number of difficulties, since, without proper navigation, there is a risk that it will founder in a society characterised by the dualism between those who are able to access certain networks and services and those who are excluded from doing so.

38. With a view to resolving those difficulties, Community law satisfies both the needs of the public and the rules of competition in pursuit of cooperation and commercial freedom, while bearing in mind the need to calculate the cost of the service and distribute it between all the operators. Those aims are reflected in Article 5 of the Interconnection Directive and Articles 12 to 14 of the Universal Service Directive.

39. The dissociation between the notions of historic operator and universal service provider therefore arises as an inevitable consequence, so that any private firm with sufficient capacity may take up the task, while, to avoid any confusion between the roles of judge and litigant, the State changes its status from that of guardian to mere regulator.³³

33 — Renaudin E., *op.cit.*, p. 11.

2. Local calls as part of universal service

40. It is clear from Article 5(2) of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment,³⁴ and from Article 4(2) of Directive 2002/22/EC, that local calls fall within the scope of universal service.

41. However, in its arguments the former monopoly, supported by the German Government, interprets Article 4c of Directive 90/388 in an unusual manner which, in my opinion, is devoid of reason.

42. Deutsche Telekom asserts that the provision is not applicable on the grounds that it has not assumed any universal service obligation.

43. However, the discrepancies between the versions of the provision³⁵ in the different

34 — OJ 1998 L 101, p. 24.

35 — There is a divergence between the various translations of Article 4c: the French ('imposées') and German ('auferlegt wurden') versions imply a sense of imposition, while the English ('entrusted'), Italian ('assegnati') and Spanish ('confiadas') versions give a more flexible connotation to the obligations concerned.

Community languages appear paradigmatic, and, therefore, to reach the correct interpretation, it is necessary to take account of its general scheme and underlying purpose,³⁶ always in the light of the other linguistic versions.³⁷

3. The financing of universal service

(a) Tariff rebalancing³⁸

44. On that interpretation, the argument is easily refuted in the light of liberalisation where any imposition of obligations is of secondary importance. Only if the operators were unable to provide universal service would administrative intervention and the imposition of obligations be unavoidable. However, until such time as that exceptional situation occurs, the universal service obligations are entrusted to the market as a whole.

46. After the basic conditions for opening up the telecommunications market had been created, Advocate General Léger³⁹ observed that effective competition requires a rebalancing of tariffs, designed to prevent the risk of operators focusing their activity on the most profitable market segments (national and international calls), thereby marginalising the less profitable services (local calls) which must also be provided under the universal service obligation.

47. That is the aim pursued by Directive 90/388, as amended by Directive 96/19. Recital 20 in the preamble to the latter directive describes the situation which it seeks to alter, where certain categories of telephone calls are provided at a loss and are cross-subsidised out of the profits from other segments of a particular undertaking's activity.

45. In any event, the facts demonstrate that before and after (as to more than 95%) liberalisation, Deutsche Telekom operated in the universal service segment of local calls.

48. The artificially low prices of local calls impeded competition and did not provide

36 — Judgments in Case 19/67 *Van der vecht* [1967] ECR 445; Case 30/77 *Bouchereau* [1977] ECR 1999; and more recently, Case C-482/98 *Italy v Commission* [2000] ECR I-10861; Case C-1/02 *Borgmann* [2004] ECR I-3219; and Case C-63/06 *Profisa* [2007] ECR I-3239.

37 — Judgment in Case C-372/88 *Cricket St. Thomas* [1990] ECR I-1345, paragraph 19.

38 — Footnote not relevant to English-language version.

39 — At paragraphs 3 and 4 of his Opinion in Case C-500/01 *Commission v Spain* [2004] ECR I-583.

potential competitors with any incentive to enter the less lucrative fields.

phasing out of the remaining imbalances, or a detailed timetable for so doing.⁴³

49. In the judgment in *Commission v Spain*,⁴⁰ the Court, while acknowledging that Article 4c of Directive 90/388 did not lay down a period within which tariffs must be rebalanced, found that Directive 96/19 provided for rebalancing to be carried out at a sustained rate and to be completed no later than 1 January 1998 (paragraph 32).

b) Cross-subsidisation: an inadequate financing mechanism in a market which has been opened up to competition

50. Recital 5 in the preamble to Directive 96/19 states that there will be exceptions to the time-limit where networks are less developed⁴¹ or very small,⁴² in all cases in accordance with a detailed timetable.

52. In the wake of liberalisation, Directive 97/33 used the ingredients of fairness and proportionality, seasoned with the principle of non-discrimination (recital 2), to temper certain conditions for interoperability, presented under the format of accounting separation, in order to avoid any upsets caused by unfair cross-subsidisation,⁴⁴ which is always difficult to digest at the table of free competition.

51. Neither of those exceptions arises in the case before the Court, from which it follows that the tariffs in Germany should have been rebalanced by 2003. In a similar case, the Court declared that France had failed to fulfil its obligations on the grounds that it had not complied with those time-limits, since it had been established that the rebalancing provided for in the third paragraph of Article 4c of Directive 90/388, as amended, had not been completed by 1 January 1998 and that the French Government had not sent the Commission its plans for the gradual

53. Unlike the situation under the monopoly, when such internal transfers — whereby the profits from activities not subject to restrictions were earmarked for covering the losses from the provision of social services (such as universal service) — were accepted, in the new framework of liberalisation they are not tolerated. The reason is that dominant undertakings could use such practices as a missile to eliminate their competitors,

40 — Case C-500/01, cited in the previous footnote.

41 — As was the case in Spain, Ireland, Greece and Portugal.

42 — For obvious reasons, Luxembourg.

43 — Paragraph 35 of the judgment in Case C-146/00 *Commission v France* [2001] ECR I-9767.

44 — Van Bael & Bellis, *Competition Law of the European Community*, Kluwer Law, 4th ed., p. 939.

consciously maintaining predatory prices⁴⁵ and, rather than passing them on to their customers, transferring them to other operators, as the appellants in the main proceedings maintain in their written observations.

(c) The access deficit

56. Losses arise when the costs of providing new undertakings with the use of the local loop exceed the revenues generated by that task.

54. Thus, competition is distorted since the new operators, who are forced to pay the additional charges, have to increase their prices in order to remain profitable, to the detriment of their own competitiveness. Accordingly, the explanation put forward by the German Government at the hearing, to the effect that the situation is beneficial to the other operators, including Arcor, is baseless.

57. That shortfall is deeply rooted in the era of the monopoly, when the financial parameters were drawn up by reference to the effort of the end user and the spirit of cooperation precluded excessive charges, which meant that the actual costs of providing the service were not covered.

55. Deutsche Telekom therefore benefits from protectionism contrary to Article 82 EC et seq., which also appears to be endogenous since, as the undertaking has acknowledged in its observations, the Federal Republic of Germany held a stake of 31.7% in its capital, although at the hearing the representative of Firma 01051 Telekom GmbH put that shareholding as high as 43%.⁴⁶

58. However, the view put forward by the German Government and Deutsche Telekom is no longer consistent with Community law, because the turning point is set at 1 January 1998, with the possibility of an extension until 1 January 2000, for the purpose of ensuring, as a transitional measure, that the former monopolies adapt to the new situation and rebalance the prices they charge.

45 — In the judgment in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, the Court provided methods for establishing the existence of predatory pricing.

46 — In the judgments in Case C-463/00 *Commission v Spain* [2003] ECR I-4581 and Joined Cases C-463/04 and C-464/04 *Federconsumatori and Others* [2007] ECR I-10419, the Court stated that 'it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services'.

59. That may be deduced from Commission Recommendation 98/322/EC of 8 April

1998,⁴⁷ and from its predecessor, the Communication of 27 November 1996.⁴⁸

Article 4c does not preclude continued compensation for those losses.

60. The reason is clear. The distinction between interconnection charges and universal service charges would become blurred if other charges were permitted as an alternative to the rebalancing of tariffs, which specifically promotes the abolition of barriers to carrier pre-selection and the removal of any deficit.

63. Clearly, if Community law proscribes such losses then the suggestion that they may be neutralised by compensating for them in that way amounts to perpetuating them.⁴⁹

64. That gives rise to the need to connect the adjunct and the principal to identical outcomes,⁵⁰ from which it follows that if a debt is cleared then so are its consequences.

(d) Charges additional to connection charges: an ephemeral measure

61. The arguments of Germany and Deutsche Telekom, to the effect that the Directives concerned do not preclude such financing, are without foundation.

65. Like a hypochondriac,⁵¹ Deutsche Telekom complains about an historical shortfall for which, in my opinion, it alone is responsible.

62. I must draw attention to the contradiction between asserting, on the one hand, that Article 4c of Directive 90/388 prohibits charges below the actual cost of providing the service and, on the other hand, that

66. I agree with all those who have participated in the preliminary-ruling proceedings that the losses arising from the local loop in 2003 are caused by the practices of the dominant operator, since I see no obstacle at all which would have prevented it from compensating for those losses by increasing its prices.

47 — On interconnection in a liberalised telecommunications market (Part 2 — Accounting separation and cost accounting) (OJ 1998 L 141, p. 6).

48 — Communication from the Commission of 27 November 1996 on Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the Member States on Operation of such Schemes (COM(96) 608).

49 — As Firma 01051 Telecom GmbH asserts in its observations.

50 — *Sublato principali, tollitur accessorium*.

51 — In 'The Hypochondriac', *The Miser and Other Plays*, translated by J. Wood and D. Coward, Penguin Classics, London, 2000, Molière recounts in a grotesque style the misfortunes of the hypochondriac Argan, slave to fictitious illnesses, who tries to marry his daughter Angélique to the son of a doctor because that relationship would guarantee him lifelong medical care.

67. I am surprised by the revealing arguments of Deutsche Telekom, to the effect that the guidance set out in the judgment in *Commission v Spain*⁵² cannot be extrapolated to the present case because, in the former case, liability for the financial shortfall was apportioned between the telecommunications organisation and the national authorities, a situation which, in the opinion of Deutsche Telekom, is not the same as ‘a deficit attributable solely to the undertaking’.⁵³

68. The Court ruled that Spain had infringed those Directives as a result of the strict price caps set by the regulatory authority. However, in my opinion, although there is some latitude, it must be borne in mind that competition between undertakings is also damaged by additional charges created to sustain the capital of one of those undertakings.

69. Where the financing of universal service is solely cost-orientated, connection to the local loop, the ultimate beneficiary of which is the customer concerned, is subsidised by that beneficiary through the subscriber line charge and only if the pre-existing operator had difficulties rebalancing its tariffs, which did not occur in the present case, would it make sense to value the deficit⁵⁴ and compensate for it, although obviously not when the losses are the result of the operator’s own business strategy.

70. In line with the Commission’s assertion that the additional charges designed to cover the connection costs do not constitute payment for the interconnection services, I agree with the view that, in a sphere not encumbered by legislative obstacles, the addition of those charges becomes a veiled financing mechanism similar to State aid,⁵⁵ which Community law prohibits.

71. Action must be taken against any unjustified charges arising from universal service obligations, and they must be corrected using fair allocation systems.

72. That rule is not absolutely rigid because case-law⁵⁶ excludes from the scope of Article 87(1) EC certain administrative interventions as consideration for obligatory public service benefits⁵⁷ when they do

52 — Case C-500/01.

53 — At the hearing, the German Government emphasised that, since December 1997, Deutsche Telekom has been free to rebalance its prices.

54 — Annex I to Commission Recommendation 98/195/EC of 8 January 1998 on interconnection in a liberalised telecommunications market (Part 1 — Interconnection pricing) (OJ 1998 L 73, p. 42).

55 — In Case 30/59 *Steenkolenmijnen in Limburg v High Authority* [1961] ECR I, the Court gave a wide definition of aid on the grounds that, in addition to positive benefits such as subsidies, it also embraces other benefits which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. In that connection, Community law prohibits benefits which, in any way, favour an undertaking directly or indirectly or are regarded as an economic advantage which the beneficiary company would not have obtained under normal market conditions (judgments in Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41).

56 — See, with regard to the public service of transport, Case C-280/00 *Almark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747; with regard to compensation for the collection and disposal of waste oils, Case C-240/83 *ADBHU* [1985] ECR 531; and, with regard to non-assessment to the tax on direct sales imposed on pharmaceutical laboratories where that tax corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, Case C-53/00 *Ferring* [2001] ECR I-9067.

57 — A concept more common in legal traditions such as those of France and Spain than in the legal traditions of English-speaking countries.

not improve the position of the undertakings concerned.

73. However, extreme care must be taken not to upset competitors and, to that end, in the field of telecommunications, Article 4c of Directive 90/388 provided for Member States to share those uneconomic effects through supplementary charges or a universal service fund, provided that it was 'necessary'.

74. Naturally, that indeterminate legal concept may be supplemented only by regulatory measures which prohibit tariff rebalancing in respect of the cost of the local loop, since, without such obstacles, those additional charges would lack justification.⁵⁸

75. The need to cover losses is also referred to in Article 5(1) and (3) of Directive 97/33, which make clear the importance of calculating the contributions by reference to comparable amounts,⁵⁹ based exclusively on the direct costs of providing the service. That is different to the situation underlying the main proceedings, which involves approved charges imposed on each undertaking without taking account of the overall situation.

76. The final link in the chain is contained in Article 13(1)(a) and (b) of the Universal Service Directive, from which it is clear that the solutions are the use of public funds or a common compensation fund to which all providers contribute, with which the notion of special payments between undertakings is also incompatible.

77. Accordingly, any measure aimed at minimising the required rebalancing of tariffs is not compatible with Community law. That fosters the responsibility of the Member States to set tariffs,⁶⁰ a task which, should the case arise, they must perform transparently, without collusion, and for the purposes of compensation.

78. In an open market such as the telecommunications market, particular importance is attached to transparency⁶¹ because of the requirement of public interest and the need to ensure equality between operators, vital requirements which may not be derogated from without justification.

79. In the light of all of those considerations, it is appropriate for the Court, in reply

58 — Commission Recommendation 98/195/EC is absolutely clear in that regard.

59 — Which of itself entails specifying the individual contributions which correspond to undertakings operating in the telecommunications market.

60 — The third recital in the preamble to Commission Recommendation 98/195/EC observes pertinently that the setting of interconnection tariffs is the responsibility of the Member States, in accordance with the principle of subsidiarity.

61 — It is clear from the gradual strengthening of the principle of transparency in case-law that it is an unwritten source of Community law. See the judgments in *Case C-87/94 Commission v Belgium* [1996] ECR I-2043, and *Case C-275/98 Unitron Scandinavia and 3-S* [1999] ECR I-8291.

to the first question referred for a preliminary ruling, to declare that the Competition and Interconnection Directives preclude a rule, such as the one laid down in German law, under which the dominant undertaking may be compensated for losses by contributions additional to the interconnection costs, which are not calculated exclusively by reference to the costs of the service.

B — *The second question*

80. Having replied to the first question, it is necessary to dispel the uncertainties of the referring court regarding whether it is appropriate to apply the directives concerned in preference to the conflicting national provisions.

81. It is essential to hold up the fundamental principle of the primacy of Community law and to question, in accordance with the case-law of the Court, the application of those provisions, thereby eliminating the conceptual confusion which distorts a crystal-clear view of the situation.

1. Total primacy

82. The uniformity of Community law requires that its primary and secondary provisions must have the same meaning, the same compulsory application, and the

same subject-matter in all the Member States, attributes which would be impossible to attain without the absolute primacy of Community law.⁶²

83. However, that absoluteness is weakened if the indivisibility or unconditional nature of the primacy of Community law is called into question, overlooking the fact that the principle concerns Community law as a whole and applies to all provisions of national law.

84. In that connection, at the dawn of the European Community, the Court of Justice held that⁶³ ‘the law stemming from the Treaty ... could not ... be overridden by domestic legal provisions, however framed’ and that ‘the provisions of Community law take precedence over any conflicting national provision’, from which it follows that primacy extends without exceptions to the constitutions of the Member States.

85. Moreover, in the second opinion in *Pfeiffer*,⁶⁴ I disagreed with those who claimed that primacy may be attributed only to primary Community law or, at the very most, to regulations, a distinction which must be branded artificial and inaccurate.

62 — Simon, D., *Le système juridique communautaire*, 2nd Ed, Presses Universitaires de France, Paris, 1998, p. 284.

63 — Case 6/64 *Costa v ENEL* [1964] ECR 1141.

64 — Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835. At point 42 of the Opinion of 27 April 2004, I analysed the judgment in *Simmenthal*, in which the Court confirmed the primacy of both the Treaty and the directly applicable measures of the institutions, and I took the view that when a Community provision precludes a provision of a Member State, the principle of primacy established nearly 40 years ago must be reiterated, irrespective of the Community source: the Treaty, a regulation or a directive.

2. The direct effects of the Competition and Interconnection Directives

86. The Court began devising the theory of direct effect in *Van Gend & Loos*.⁶⁵ The Court extended the theory to directives in *Van Duyn*,⁶⁶ with regard to the rights directives confer on individuals,⁶⁷ and systematised it in *Ratti*⁶⁸ and *Becker*.⁶⁹

87. The Court wisely placed the emphasis on the function of a directive, holding that, in order to be relied on, it must be unconditional and sufficiently precise,⁷⁰ and that no measures must have been adopted within the prescribed period or the national legislation must be incompatible as a result of defective or inadequate transposition.⁷¹

88. Accordingly, individuals are able to strengthen their legal rights, while the effectiveness of Community law is protected and is not impaired by any failure to implement a directive or by its incorrect transposition.

89. Those factors combined create the framework for the argument in support of the direct application of Article 4c of Directive 90/388 and Article 12(7) of Directive 97/33, with which Paragraph 43(6) of the TKG of 1996 is incompatible.⁷²

90. When it is not possible to interpret national law in a manner consistent with Community law, requiring judicial action in order to achieve harmony means that the fine line between legal creation and interpretation becomes blurred.⁷³

91. It is clear from the disputed provisions that it was illegal to impose the additional connection cost contribution in Germany after 1 January 1998 (Article 4c of Directive 90/388), in accordance with the cost orientation rule (Articles 7(2) and 12(7) of Directive 97/33).

65 — Case 26/62 [1963] ECR 1.

66 — Case 41/74 [1974] ECR 1337.

67 — The Court confirmed that aspect in the judgments in Case 67/74 *Bonsignore* [1975] ECR 297; Case 36/75 *Rutili* [1975] ECR 1219; Case 48/75 *Royer* [1976] ECR 497; Case 30/77 *Bouchereau* [1977] ECR 1999; Case 118/75 *Watson and Belmann* [1976] ECR 1185; Case 8/77 *Sagulo and Others* [1977] ECR 1495; and Case 157/79 *Pieck* [1980] ECR 2171.

68 — Case 148/78 [1979] ECR 1629.

69 — Case 8/81 [1982] ECR 53.

70 — Wathelet, M., 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de Justice', *A true European Law. Essays for Judge David Edward*, Ed. Mark Hoskins & William Robinson, Oxford and Portland, Oregon, 2003, p. 370, maintains that the requirement that a directive must be precise and unconditional needs to be satisfied only where, by relying on the Community provision, the intention is to replace the national provision, but not where the aim is merely to exclude it, despite the fact that the Court has held that the requirement must be satisfied in both cases.

71 — Judgments in Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, and Case C-319/97 *Kortas* [1999] ECR I-3143.

72 — In that regard I agree with the order for reference (paragraph 44 et seq.) which certainly does not appear to call into question the fact that those directives create precise and unconditional rights.

73 — Emmert, F., 'Les jeux sont faits: rien ne va plus ou une nouvelle occasion perdue par la CJCE.', *Revue trimestrielle de droit européen*, No 1, (1995), p. 17.

92. The present case does not concern abstract principles but rather specific legislative provisions which confer on telecommunications operators the right to include only the costs of connection to the local loop in the interconnection charge.

93. Furthermore, the legal proposition in those provisions is founded on the principle of free competition,⁷⁴ which the Court has held⁷⁵ is capable of creating directly effective rights, including in (horizontal) relations between individuals, which the national courts are responsible for safeguarding.

94. The specific definition of the concept of ‘cost orientation for tariffs’ is held up as a mirror when the final price is set, although it does not cloud the substance of the right concerned.

95. The forceful argument put forward by the German Government and Deutsche Telekom in an attempt to conceal the fact that those provisions are precise is vitiated by serious confusion in its drafting, which is dispelled by the realisation that it contains the error of likening the task of ‘incorporating’ an indeterminate concept to that of ‘implementing’ a directive.

96. Accordingly, the national regulatory authority sets the amount of the charge using a legal basis which is so precise and unconditional (the prohibition of unnecessary additional charges to cover the cost) that it does not need to be supplemented by any further Community or national legislation.

97. In any event, it must be borne in mind, as Advocate General Mázak points out in his Opinion⁷⁶ in *Palacios de la Villa*,⁷⁷ that, in accordance with case-law, the fact that provisions of a directive are subject to exceptions or provide for justifications does not mean that the directive lacks direct effect.

3. Vertical, horizontal and triangular relationships

98. The doctrine of direct effect operates on a vertical, one-way plane (from an individual to the State), in that traffic in the opposite direction (reverse vertical relationships)⁷⁸ and perpendicular routes which would enable a directive to be relied on between individuals (horizontal direct effect) are both prohibited.⁷⁹

⁷⁴ — Article 82 EC.

⁷⁵ — In settled case-law, as is clear from the judgments in Cases C-155/73 *Sacchi* [1974] ECR 409; Case C-127/73 *BRT v SABAM* [1974] ECR 51; Case C-179/90 *Merci Convenzionali porto di Genova* [1991] ECR I-5889; Case C-282/95 *P Guérin automobiles v Commission* [1997] ECR I-1503; Case C-242/95 *GT-Link* [1997] ECR I-4449; Case C-22/98 *Becu and Others* [1999] ECR I-5665; Case C-258/98 *Carra and Others* [2000] ECR I-4217; and Case C-99/02 *Commission v Italy* [2004] ECR I-3353.

⁷⁶ — In which he referred to paragraph 105 of the judgment in *Pfeiffer and Others*. In the second opinion in *Pfeiffer* (paragraph 36), I emphasised that it is important not to undo the progress made in relation to direct effect.

⁷⁷ — Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

⁷⁸ — Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609.

⁷⁹ — Case 152/84 *Marshall I* [1986] ECR 723.

99. According to the Court, extending the doctrine of the direct effect of directives to the sphere of relations between individuals would be tantamount to conferring on the Community a power to enact obligations for individuals, whereas that competence is limited to the adoption of regulations or decisions.⁸⁰

100. Nevertheless, time has not succeeded in silencing the calls for horizontal direct effect to be recognised. Advocate General Lenz⁸¹ made such a call in the opinion in *Faccini Dori*,⁸² relying in turn on the arguments previously put forward by advocates general Van Gerven⁸³ and Jacobs.⁸⁴

101. The feeling that an opportunity has been lost appears to hover over those writers,⁸⁵ despite the fact that the Court has not hesitated to apply the doctrine⁸⁶ where a directive affects the rights of individuals who are not part of the vertical relation-

ship, giving rise to the theory of triangular relationships.⁸⁷

102. However, in *Wells*,⁸⁸ a case which concerned the environment,⁸⁹ a field in which the interests at stake are vague, the Court provided firmer guidance. Despite pointing out that 'an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party' (paragraph 56), the Court went on to state, for the first time, that 'adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned' (paragraph 57).

4. The finding that the TKG is incompatible with Community law

103. There is no room for disharmony in the repertoire of Community case-law, although,

80 — Judgment in Case C-192/94 *El Corte Inglés* [1996] ECR I-1281.

81 — Advocate General Lenz called for the law based on the Treaty to develop in the interests of the uniform, effective application of Community law so as to extend the doctrine to relationships between private individuals and thus respond to the legitimate expectations nurtured by citizens of the Union.

82 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

83 — Opinion in Case C-271/91 *Marshall II* [1993] ECR I-4367.

84 — Opinion in Case C-316/93 *Vaneetveld* [1994] ECR I-763.

85 — In addition to the work cited by Emmert, F., that view is also put forward in Tridimas, T., 'Horizontal effect of directives: a missed opportunity?', *European Law Review*, No 6 (1994), pp. 621 to 636.

86 — I made that point in paragraph 41 of my second opinion in *Pfeiffer and Others*.

87 — In the field of public procurement, see the judgment in *Fratelli Costanzo*; on the marketing of proprietary medicinal products, see Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819; and, with regard to technical regulations, see Case C-194/94 *CIA Security International* [1996] ECR I-2201 and Case C-443/98 *Unilever* [2000] ECR I-7535.

88 — Case C-201/02 *Wells* [2004] ECR I-723.

89 — Although the Court had already confirmed the application of indirect horizontal effect to the field of the environment in Case C-435/97 *World Wildlife Fund and Others* [1999] ECR I-5613.

in cases such as the present one, it will yield to the melody of triangular relationships.

relationship) and it acquires substantive connotations such that it becomes a separate problem.

104. I see no grounds precluding such a finding. It is important to recall that the factual and legal relationships underlying the present references for a preliminary ruling involve private persons (Arcor, TELE2 and Telekom GmbH) who have taken action not against another private person but against the State (Regulierungsbehörde für Telekommunikation und Post).

105. Therein lies the essential difference between this and other cases, particularly *Telefónica O2 Czech Republic*, which concerned a dispute between two telecommunications operators over access to the network, resulting in civil proceedings between them, while the regulatory authority was confined to the role of mediator.

106. However, in the dispute which gave rise to the present case, there is no latitude for freedom of action or, therefore, for private law when it comes to setting the charge in question because, in accordance with Community and German law, exclusive competence in that regard rests with the State.

107. In those circumstances, the setting of the additional charge is independent of the prior approval of the interconnection charge (which certainly gave rise to a contractual

108. There is no reason for the Bundesverwaltungsgericht to be disheartened because the right invoked in the present case is not one which is free of any link to the public authorities and liable to cause damage to another individual, as occurred in *Bussen*⁹⁰; instead, like in *Wells* and *Fratelli Constanzo*, the damage flows from the action of the State.

109. Accordingly, the dominant undertaking suffers no horizontal direct effects or genuine damage. Moreover, the right that undertaking seeks to enforce was created by a provision which is contrary to Community law and its position is affected only indirectly, in that it is unable to impose unlawful charges.

110. An affirmative reply to the second question appears unavoidable in the light of the primacy of Community law, pursuant to which the national court must guarantee to individuals the rights flowing from directives where national law precludes respect for those rights.

⁹⁰ — Case C-221/88 *Bussen* [1990] ECR I-495.

VI — Conclusion

111. In the light of the foregoing considerations, I propose that the Court should reply to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht, declaring that:

- (1) Article 4c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services and Articles 7(2) and (4) and 12(7) of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision preclude a national regulatory authority from requiring the operator of a network interconnected with a public subscriber network to pay a contribution to the dominant operator to compensate that operator for the deficit incurred as a result of providing the local loop.
- (2) The national court must take into account the incompatibility with Community law of a provision of national law in proceedings in which the dominant operator seeks compliance with the aforementioned requirement.