

OPINION OF ADVOCATE GENERAL  
LÉGER

delivered on 17 May 2001<sup>1</sup>

1. By application dated 3 November 1999, the Commission of the European Communities brought this action under Article 226 EC for a declaration that the Portuguese Republic has failed to fulfil its obligations under the fourth sub-paragraph of Article 2(2) of Commission Directive 90/388/EEC<sup>2</sup> as amended by Commission Directive 96/19/EC.<sup>3</sup>

2. The Portuguese Republic contends that the action should be dismissed.

## I — Legal background

### A — *Community law*

Directives 90/388 and 96/19

3. The seventh indent of Article 1(1) of Directive 90/388 defines ‘voice telephony’ in these terms:

‘the commercial provision for the public of the direct transport and switching of speech in real-time between switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point’.

4. Under Article 2(1)(a) of Directive 90/388, as amended by Directive 96/19, the Member States are to withdraw all those measures which grant exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services.

5. Article 2(2) of Directive 90/388 as amended by Directive 96/19 provides:

1 — Original language: French.

2 — Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10).

3 — Commission Directive of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13).

‘Member States shall take the measures necessary to ensure that any undertaking is

entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.

two years, provided it is needed to achieve the necessary structural adjustments. ...'

#### Commission Decision 97/310/EC

Without prejudice to Article 3c and the third paragraph of Article 4, Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.

6. By this decision of 12 February 1997 (hereinafter 'the Decision') the Commission allowed the Portuguese Republic additional periods for the implementation, in particular, of Directive 90/388 as regards full competition in the telecommunications markets.<sup>4</sup>

Member States shall, however, ensure that all remaining restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications services, over infrastructures provided by third parties and by means of sharing of networks, other facilities and sites are lifted and the relevant measures notified to the Commission no later than 1 July 1996.

7. In the terms of its Article 3, 'Portugal may postpone until 1 January 2000 the abolition of the exclusive rights currently granted to Portugal Telecom as regards the provision of voice telephony and the establishment and provision of public telecommunications networks, provided that [certain conditions] are implemented according to [a given timetable] ...'.

As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a(2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to

#### B — *The Portuguese legislation*

8. It follows from Article 47(1)(a) of Regulamento de Exploração do Serviço Fixo de

<sup>4</sup> — OJ 1997 L 133, p. 19.

Telephone (Rules on the provision of fixed telephone services), approved by Decree-Law No 240/97 of 16 September 1997, that the commercial supply, direct or indirect, of a fixed telephone service by unauthorised entities, when it involves international connections which use 'call-back' systems, is an infringement of the exclusive rights of the holder of the licence for the supply of fixed telephone services.

## II — Claims and pleas in law of the parties

9. Taking the view that the 'call-back' system is a service which adds value and not a voice telephony service and that it therefore does not benefit from the additional period for implementation allowed to the Portuguese Republic, the Commission, on 27 May 1998, sent the Portuguese Government a letter of formal notice.

10. In its reply of 14 July 1998, the Portuguese Government contended that the system was a voice telephony service. In its submission 'call-back' is a technological system introduced into telecommunications networks which allows advantage to be taken of the transport capacity of a network, outside the territory in which it is established, and also allows spoken communications in real time.

11. The Portuguese Government repeated this argument in its letter of 18 June 1999 in response to the reasoned opinion of the Commission of 4 May 1999.

12. In its application the Commission describes the 'call-back' system as a service, the purpose of which is to reverse the traffic on the public telephone network of operators of the switched telephone network.<sup>5</sup> The service consists of re-routing calls on the public switched networks in order to take advantage of the lowest available tariffs. According to the Commission the 'call-back' system is a service of routing and charging offered as an extra to the voice telephony service. It cannot be considered to be a substitute for this service since it does not involve the direct transport of the voice, which is left to the operator of the public network.

13. The Commission claims that since it is not a voice telephony service within the meaning of Directive 90/388, the 'call-back' service should have been liberalised in Portugal on the entry into force of that Directive. The prohibition to which it is subject under Decree-Law No 240/97 is therefore contrary to Directive 90/388.

14. In its defence the Portuguese Government submits that the permission which it

<sup>5</sup> — According to the Commission, the function of switching circuits includes the operations of connection and handling of calls and control. Handling calls consists of making and intercepting connections according to instructions given by the subscriber.

was granted to maintain, until 1 January 2000, exclusive rights in respect of voice telephony, covers the 'call-back' service.

15. It points out that, although the operator of the 'call-back' service effectively takes the place of the operator of the voice telephony service, it is really the latter who remains in control of the direct transport of the voice.

16. The position of the Portuguese Government is, in its submission, dictated by the spirit and purpose of the derogation granted by the Decision, which is based on the need to provide for further transitional periods so as not to jeopardise the financial stability of the public telecommunications operators, and to allow the necessary structural adjustments prior to the liberalisation of telecommunications services, particularly as regards tariffs.

17. Otherwise, those adjustments could not be effected since they would then be dictated by market forces. The 'call-back' service would distort the operating conditions of the voice telephony service.

18. In its reply the Commission points out that under paragraph 26 of the grounds of the Decision, the additional period provided for by Directive 90/388 must be strictly

proportional to what is necessary to achieve the requisite structural adjustment. In the case of the Portuguese Republic, these adjustments consist in expanding the distribution of the system of voice telephony. However, the position is not the same as regards the modernisation of the telephone network since Portugal Telecom is in advance of other telecommunications operators in the Community.

19. The Commission adds that the outcome of the action depends on the definition of the term 'voice telephony service'. As the term was harmonised by Directive 90/388, every subsequent legislative measure which refers to it must be interpreted in accordance with its definition in the Directive.

20. The Commission points out that an operator of a 'call-back' service can never take the place of an operator of a voice telephony service. The latter provides the transport and the switching of the voice in real time between two network termination points, and is therefore necessary to the proper functioning of the 'call-back' system.

21. In the Commission's submission the purpose of the Decision has nothing to do with the commercial operation of the voice telephony service. The additional period allowed to the Portuguese Republic is justified only by the necessity to expand

the distribution of the telephone system in Portugal. The retention of Portugal Telecom's exclusive licence is limited to the voice telephony service. Because it is a derogation from one of the Community rules of freedom of movement, this provision must be interpreted strictly.

22. Finally, the Commission points out that the 'call-back' system operates only for international calls. The actual impact of the liberalisation of this service is therefore minor, more especially as even among this type of call its position is marginal.

23. In its rejoinder, the Portuguese Government states that it does not dispute that the term 'voice telephony service' corresponds, essentially, to the meaning given in Article 1 of Directive 90/388. It must therefore be construed and applied in accordance with that definition.

24. In its submission the case does not concern this term, but the subject-matter of the exclusive rights which Portugal Telecom enjoys in the field of voice telephony, and the setting up and provision of public telecommunications networks. These rights do not strictly coincide with the voice telephony service, but include the prohibition of the freedom to provide 'call-back' services.

25. The question which arises is whether the temporary exclusive rights to commercial operation of the voice telephony service granted to Portugal Telecom are compatible, from an economic point of view and in the light of the applicable legislation, with the 'call-back' system.

26. The Portuguese Government points out that 'call-back' is a method of changing the direction of the direct routing of the voice, which continues to be transported on the public switched network. It is therefore a service provided by means of apparatus connected at network terminal points. It allows its operator to change the conditions of commercial operation of the voice transport service offered by the operator of the public network. Since it owes its existence to the price differences between different providers of voice telephony services and it assumes that the competition between them is legal, the competitive operation of the 'call-back' service is incompatible with the exclusive rights covering the voice telephony service.

27. The Portuguese Government argues that the Decision must be construed in accordance with its aim, which is to protect the voice telephony services from competition, in order to reconcile the expansion of telephone distribution with tariff adjustments. The practical effect of the 'call-back' system is to provide a voice telephony service on conditions different from those

which are offered by the holder of the exclusive right to operate voice telephony.

III — The action for failure to fulfil obligations

28. Such a reading would not be incompatible with the principle of proportionality as the Decision makes no mention of the extent of the competition which Portugal Telecom might face.

29. According to the Portuguese Government, the Commission's contention that the 'call-back' service is marginal in international traffic cannot be accepted.

30. The scale of the service varies in relation to the amount of competition between operators. Its prohibition under national law explains the absence of data on the real impact which it would have had, had it been permitted. Since the end of the additional period allowed to the Portuguese Republic, it is significant that no application has been made for an operator's licence for the 'call-back' service, which can perhaps be seen as a sign of the re-adjustment of Portugal Telecom's prices in line with competitive models, and as evidence of the opportunistic nature of the interest shown in the 'call-back' system during the period of protection allowed to Portugal Telecom.

31. Under the terms of Article 3 of the Decision, the Portuguese Republic was allowed to postpone, until 1 January 2000, the abolition of the exclusive rights currently granted to Portugal Telecom in respect of voice telephony and the putting in place and provision of public telecommunications networks.

32. The outcome of the present action depends on whether, as the Portuguese Government claims, the retention of these exclusive rights precludes the liberalisation of the 'call-back' service.

33. Let me make clear from the outset that, according to the parties, 'call-back' is a service offered to the public in addition to the simple direct transport and the simple switching of the voice in real time.

34. Like the Commission, the Portuguese Government does not dispute that the 'call-back' service is not, strictly speaking, a voice telephony service within the meaning of Article 1 of Directive 90/388. It states that it 'does not claim to stretch this definition so as to include the "call-back" service'.<sup>6</sup> In its submission although the operator of the 'call-back' service effectively takes the place of the operator of the

<sup>6</sup> — Paragraph 4 of the rejoinder.

voice telephony service, the latter remains no less responsible for effecting the direct transport of the voice. The operator of the 'call-back' service lays down, firstly, the conditions on which the transport is brought about, and, secondly, those on which the service is provided from a commercial point of view.<sup>7</sup>

35. However, according to the Portuguese Government, the temporary exclusive rights to commercial operation of the voice telephony service are incompatible with a 'call-back' system open to competition, since such liberalisation would jeopardise the financial equilibrium of the public operator and constitute an obstacle to the tariff adjustments.

36. Apart from the fact that there is no basis for this argument in the text of the Decision, which restricts the postponement of the abolition of the exclusive rights enjoyed by Portugal Telecom to voice telephony and to the putting in place and provision of public telecommunications networks, it means counter to the principle that derogations from the rules of Community law must be interpreted strictly.

37. It should be borne in mind that, as is clear from the preamble to Directive 96/19/EC, that derogation from Article 90 of the EC Treaty (now Article 86 EC), in connection with Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and

Article 86 of the EC Treaty (now Article 82 EC), had been introduced, in 1990, pursuant to Article 90(2) of the Treaty, so far as voice telephony was concerned.<sup>8</sup>

38. That derogation from the rules of freedom of competition and freedom to provide services was terminated by Directive 96/19, save for Member States with less developed or very small networks which enjoyed, under certain conditions, a temporary derogation.<sup>9</sup> Therefore, the Decision by which the Commission allowed additional periods to the Portuguese Republic, in application of those provisions, prolonged, for the benefit of the Member State, the derogation which it had initially been granted.

39. According to the settled case-law of the Court, every derogation from the rules intended to guarantee the effectiveness of the rights recognised by the Treaty must be strictly interpreted.<sup>10</sup> Therefore it is correct that the exclusive rights to which Portugal Telecom is entitled should be confined as provided by Article 3 of the Decision — outside the field of public telecommunica-

<sup>8</sup> — Third and fourth recitals.

<sup>9</sup> — Fifth recital of Directive 96/19 and Article 2(2) of Directive 90/388.

<sup>10</sup> — See, for example, Case C-40/93 *Commission v Italy* [1995] ECR I-1319, paragraph 23.

<sup>7</sup> — Paragraph 14 of the defence.

tions networks —, to the field of voice telephony.

rights in respect of voice telephony does not exceed two years.

40. This construction of Article 3 of the Decision does not seem contrary to the aims of Directive 90/388 expressed in the preamble to Directive 96/19/EC and in the Decision itself.

41. The retention of exclusive rights is justified by the need for telecommunications operators to make structural adjustments in particular in the form of the gradual modification of charges and the expansion of the distribution of the voice telephony network.

42. The Portuguese Government has not shown how the exclusion of the 'call-back' service from the exclusive rights granted to the Portuguese Republic regarding voice telephony would prejudice those aims.

43. It is clear from the observations of the Commission, which were not disputed on this point, that the 'call-back' system is limited to international calls.<sup>11</sup> Moreover, the period of extension of the exclusive

44. No evidence has been adduced to support the idea that the liberalisation of the 'call-back' system two years before that of voice telephony would have sufficed, or merely have tended, to jeopardise the aims of Directive 90/388, as regards voice telephony. In particular, the Portuguese Government has not put forward, in support of its statements, any evaluation of the part that a 'call-back' service could play within the telecommunications services overall, in case of liberalisation of its method of operation, or on the actual competition which such a service would constitute for the voice telephony service, within a period of two years.

45. In the absence of such information, it is doubtful that the Court is in a position to assess the merits of the Portuguese Government's arguments that the Commission's interpretation is liable to undermine the aims of Directive 90/388, with regard to certain Member States, in respect of voice telephony.

46. Therefore this application must be upheld.

<sup>11</sup> — Paragraph 11 of the application and 21 of the reply.



#### IV — Conclusion

47. In the light of these considerations, I propose that the Court should:

- (1) declare that by postponing until 1 January 2000 the abolition of Portugal Telecom's exclusive rights in respect of the 'call-back' system, the Portuguese Republic failed to fulfil its obligations under the fourth subparagraph of Article 2(2) of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, and by virtue of Article 3 of Commission Decision 97/310/EC of 12 February 1997 concerning the granting of additional implementation periods to Portugal for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications market;
  
- (2) order the Portuguese Republic to pay the costs.