

JUDGMENT OF THE COURT (Sixth Chamber)

16 October 2001 *

In Case C-429/99,

Commission of the European Communities, represented by A. Alves Vieira,
acting as Agent, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, P. de Pitta e Cunha and
N. Ruiz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting all the measures necessary to comply with 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 (OJ 1990 L 192, p. 10), in the version resulting from 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

* Language of the case: Portuguese.

(OJ 1996 L 74, p. 13), the Portuguese Republic has failed to fulfil its obligations under that provision,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, C. Gulmann (Rapporteur), J.-P. Puissochet, and V. Skouris, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 May 2001,

gives the following

Judgment

- 1 By application lodged at the Registry of the Court of Justice on 5 November 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by not adopting all the measures necessary to comply with the fourth subparagraph of Article 2(2) of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunica-

tions services (OJ 1990 L 192, p. 10), in the version resulting from 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 (OJ 1996 L 74, p. 13), the Portuguese Republic has failed to fulfil its obligations under that provision.

2 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 public 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’.

3 Article 2 of Directive 90/388 provides:

‘1. Member States shall withdraw all those measures which grant:

(a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or

...

2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.

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

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

As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a(2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the necessary structural adjustments. Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation. The information provided shall be made available to any interested party on demand having regard to the legitimate interest of undertakings in the protection of their business secrets.

...'

- 4 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 markets (OJ 1997 L 133, p. 19) provides:

‘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 the following conditions are implemented according to the timetable laid down hereafter:

...’

- 5 The Portuguese Republic adopted the Regulamento de Exploração do Serviço Fixo de Telefone (Rules on the provision of fixed telephone services), approved by Decree-Law No 240/97 of 16 September 1997, Article 47(1)(a) of which provides 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.
- 6 On 27 May 1998 the Commission sent the Portuguese Government a letter of formal notice pointing out that, since ‘call-back’ services were services which added value and not voice telephony services, they do not enjoy the additional period for implementation allowed to that Member State by Article 3 of Decision 97/310 and that, therefore, they should have been liberalised on the entry into force of Directive 90/388.

- 7 In its reply of 14 July 1998, the Portuguese Government put forward the argument that ‘call-back’ is a technological system of voice telephony which, when incorporated into telecommunications networks, allows the transport capacity of a network to be exploited, outside the country in which it is established, making possible spoken communications in real time.
- 8 The Portuguese authorities repeated this argument in a letter of 18 June 1999, in response to the reasoned opinion sent by the Commission to the Portuguese Republic on 4 May 1999.
- 9 Taking the view that ‘call-back’ is only a service of routing and charging offered as an extra to the voice telephony service, and cannot be regarded as a substitute for that service since it does not include the transport of the voice and that, therefore, the definition of voice telephony applied in Portuguese law is wider than the Community definition in Article 1 of Directive 90/388, thus increasing the exclusive rights granted to Portugal Telecom under Decision 97/310, the Commission decided to bring this action.
- 10 In its defence the Portuguese Government contends that the authorisation, granted to it by Article 3 of Decision 97/310, to maintain some exclusive rights, covers ‘call-back’ services.
- 11 It argues that, to assume that the prohibition of ‘call-back’ services is not covered by the additional temporary derogation granted in Decision 97/310, would be contrary to the spirit and purposes of that very derogation. Thus, the appearance of that type of service two years prior to the end of the period of additional derogation would have presented Portugal Telecom with a choice between

reducing its charges according to a different timetable from that envisaged at the outset, which would have been incompatible with the policy of gradual adjustment of charges, or keeping to the programme originally decided upon, thereby losing international traffic at the usual price and, therefore, the resources necessary for it to complete the process of re-adjustment within the period, and under the conditions, prescribed by the Commission in Decision 97/310.

- 12 In its reply the Commission first of all points out that paragraph 26 of the grounds of Decision 97/310 states that '[p]ursuant to the general principle of proportionality, any additional implementation period granted must be strictly proportional to what is necessary to achieve the necessary structural adjustments...'. In this case, that decision granted an additional period to retain the exclusive privilege, which only Portugal Telecom enjoyed, strictly to the extent necessary to increase the rate of telephone distribution in Portugal, and not for reasons 'of commercial exploitation' of the voice telephony service.

- 13 The Commission argues that European experience shows that, so far as international calls are concerned, 'call-back' services play a marginal role in international call traffic. The impact of 'call-back' services in international call traffic will be less and less marked, as Portugal Telecom gradually adjusts its international charges.

- 14 The Commission points out that Directive 90/388 harmonised the definition of voice telephony so that every subsequent legislative text invoking that definition, *inter alia* Decision 97/310, must use the Community definition of voice telephony service. Any attempt to widen that definition, so as to make it cover a completely different set of services, would tend to render redundant the liberalisation of telecommunications markets which had been achieved, particularly by Directive 90/388, thus undermining the reasons for the adoption of Decision 97/310.

- 15 The Commission finally adds that, since Article 3 of Decision 97/310 grants an additional period for the withdrawal of all the measures which grant exclusive rights for the supply of the voice telephony service, it is a provision in the nature of an exception, and exceptions to the fundamental freedoms of movement must be interpreted strictly.
- 16 In its rejoinder, the Portuguese Government contends that in Portuguese law the definition of voice telephony already corresponds, essentially, to that which follows from Article 1 of Directive 90/388. It argues that the dispute is not about the meaning of ‘voice telephony service’, but the question whether the temporary exclusive rights to commercial exploitation of the supply of voice telephony services granted to Portugal Telecom can be reconciled, from an economic point of view and against the background of the applicable legislation, with the ‘call-back’ system.
- 17 Therefore it is not a matter of widening the definition of voice telephony or the extent of the derogation granted by Article 3 of Decision 97/310, but simply of defining the meaning of that derogation according to its principles and purposes, which were to allow the temporary retention of the charges for the international service at a higher level than that which would result from free competition, so as to generate the resources necessary to increase the rate of telephone distribution.
- 18 The practical effect of ‘call-back’ services, according to the Portuguese Government, is to supply a voice telephony service on terms different from those which are offered by the party which retains the exclusive rights to supply that service, that is to say to subject that service to competition. To that extent, they contravene the exclusive rights which Portugal Telecom may retain until 1 January 2000.

- 19 In that connection, it must be pointed out that, although the Commission and the Portuguese Republic agree that 'call-back' is not a voice telephony service within the meaning of Article 1 of Directive 90/388, the Portuguese Government argues that the retention of the exclusive rights granted to Portugal Telecom is incompatible with a 'call-back' system subjected to competition, as such liberalisation would prejudice the financial stability of the public operator and hinder tariff adjustments.
- 20 However, the derogation which the Portuguese Republic enjoys under Article 3 of Decision 97/310 is expressly limited to the field of voice telephony alone. In those circumstances and taking account of the fact that any derogation from the rules intended to guarantee the effectiveness of rights granted by the EC Treaty must be strictly interpreted, it must be held that the said Member State has infringed its obligation, under Article 2(2) of Directive 90/388, to abolish the exclusive rights relating to voice telephony before 1 January 1998.
- 21 Accordingly it must be held that by the postponing until 1 January 2000 the abolition of Portugal Telecom's exclusive rights in respect of the 'call-back' system, the Portuguese Republic has failed to fulfil its obligations under the fourth subparagraph of Article 2(2) of Directive 90/388.

Costs

- 22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that by postponing until 1 January 2000 the abolition of the exclusive rights enjoyed by Portugal Telecom in respect of the 'call-back' system, the Portuguese Republic has 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, in the version resulting from Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets;
2. Orders the Portuguese Republic to pay the costs.

Macken

Colneric

Gulmann

Puissochet

Skouris

Delivered in open court in Luxembourg on 16 October 2001.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber