

JUDGMENT OF THE COURT (Sixth Chamber)  
13 December 2001 \*

In Case C-79/00,

REFERENCE to the Court under Article 234 EC by the Tribunal Supremo (Spain) for a preliminary ruling in the proceedings pending before that court between

**Telefónica de España SA**

and

**Administración General del Estado,**

third party:

**Retevisión SA,**

on the interpretation of Articles 4(2) and 9(2) 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 (ONP) (OJ 1997 L 199, p. 32),

\* Language of the case: Spanish.

THE COURT (Sixth Chamber),

composed of: F. Macken (Rapporteur), President of the Chamber, C. Gulmann, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,  
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Telefónica de España SA, by J.A. García San Miguel Y Orueta, procurador de los Tribunales,
- the Spanish Government, by S. Ortiz Vaamonde, acting as Agent,
- the Belgian Government, by A. Snoecx, acting as Agent,
- the Italian Government, by U. Leanza, acting as Agent, assisted by G. Aiello, avvocato dello Stato,
- the Commission of the European Communities, by C. Schmidt and G. Valero Jordana, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Telefónica de España SA, represented by R. García Boto and N. Rabazo Auñón, abogados, of the Spanish Government, represented by S. Ortiz Vaamonde, of the Italian Government, represented by G. Aiello, and of the Commission, represented by G. Valero Jordana, at the hearing on 22 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2001,

gives the following

### Judgment

- 1 By order of 14 February 2000, received at the Court on 3 March 2000, the Tribunal Supremo (Supreme Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 4(2) and 9(2) 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 (ONP) (OJ 1997 L 199, p. 32, hereinafter ‘the directive’).
  
- 2 That question was raised in proceedings between Telefónica de España SA (‘Telefonica’), an entity authorised to provide telecommunications services, and Administración General del Estado concerning, in particular, conformity with the directive of certain provisions of the Royal Decree transposing the directive into Spanish law.

## Legal framework

### *Community legislation*

3 The first paragraph of Article 1 of the directive states that its purpose is, *inter alia*, to secure in the Community the interconnection of telecommunications networks and in particular the interoperability of services, and to ensure provision of universal service in an environment of open and competitive markets.

4 Recital 5 in the preamble to the directive is worded as follows:

‘... following the removal of special and exclusive rights for telecommunications services and infrastructure in the Community, the provision of telecommunications networks or services may require some form of authorisation by Member States;... organisations authorised to provide public telecommunications networks or publicly available telecommunications services in all or part of the Community should be free to negotiate interconnection agreements on a commercial basis in accordance with Community law, subject to supervision and, if necessary, intervention by national regulatory authorities;...’.

5 Recital 6 states:

‘... in order to stimulate development of new types of telecommunications services, it is important to encourage new forms of interconnection and special network access at points other than the network termination points offered to the majority of end-users...’.

6 Recital 12 states:

‘... national regulatory authorities must be able to require organisations to interconnect their facilities, where it can be demonstrated that this is in the users’ interests’.

7 Article 2(1)(a) of the directive defines ‘interconnection’ as the ‘physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation.’

8 The first sentence of Article 3(1) of the directive provides that:

‘Member States shall take all necessary measures to remove any restrictions which prevent organisations authorised by Member States to provide public telecommunications networks and publicly available telecommunications services from negotiating interconnection agreements between themselves in accordance with Community law.’

9 Under Article 4(1) and (2) of the directive:

‘1. Organisations authorised to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have a right and, when requested by organisations in that category, an obligation

to negotiate interconnection... the national regulatory authority may agree to limit this obligation on a temporary basis and on the grounds that there are technically and commercially viable alternatives to the interconnection requested, and that the requested interconnection is inappropriate in relation to the resources available to meet the request....

2. Organisations authorised to provide public telecommunications networks and publicly available telecommunications services as set out in Annex I which have significant market power shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users.'

10 Article 9(1) and (2) of the directive provides:

'1. National regulatory authorities shall encourage and secure adequate interconnection in the interests of all users, exercising their responsibility in a way that provides maximum economic efficiency and gives the maximum benefit to end-users. In particular, national regulatory authorities shall take into account:

— the need to ensure satisfactory end-to-end communications for users,

— the need to stimulate a competitive market,

- the need to ensure the fair and proper development of a harmonised European telecommunication market,
  
- the need to cooperate with their counterparts in other Member States,
  
- the need to promote the establishment and development of trans-European networks and services, and the interconnection of national networks and interoperability of services, as well as access to such networks and services,
  
- the principles of non-discrimination (including equal access) and proportionality,
  
- the need to maintain and develop universal service.

2. ...

In particular, in relation to interconnection between organisations set out in Annex II, national regulatory authorities:

- may set *ex ante* conditions in the areas listed in Part 1 of Annex VII;

I - 10106

— shall encourage coverage in interconnection agreements of the issues listed in Part 2 of Annex VII.’

11 The areas listed in Part 1 of Annex VII to the directive are the following:

‘(a) Dispute resolution procedure,

(b) Requirements for publication/access to interconnection agreements and other periodic publication duties,

(c) Requirements for the provision of equal access and number portability,

(d) Requirements to provide facility sharing, including collocation,

(e) Requirements to ensure the maintenance of essential requirements,

(f) Requirements for allocation and use of numbering resources (including access to directory services, emergency services and pan-European numbers),

- (g) Requirements concerning the maintenance of end-to-end quality of service,
  
- (h) Where applicable, determination of the unbundled part of the interconnection charge which represents a contribution to the net cost of universal service obligations.’

12 Part 2 of the same annex, at (c), (m) and (o), relates to the following matters:

‘(c) Locations of the points of interconnection,

...

(m) Achievement of equal access,

...

(o) Access to ancillary, supplementary and advanced services.’

- 13 Article 1(2) of Commission Recommendation 2000/417/EC of 25 May 2000 on unbundled access to the local loop: enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet (OJ 2000 L 156, p. 44) provides:

‘Without prejudice to the application of Community competition rules, it is recommended that in Member States where full unbundled access is not yet available, appropriate legal and regulatory measures be adopted to mandate, by 31 December 2000, full unbundled access to the copper local loop of notified operators under transparent, fair, and non-discriminatory conditions.’

### *National legislation*

- 14 Transposition into Spanish law of the directive was effected by Royal Decree 1651/1998 of 24 July 1998 approving the regulation implementing Title II of Law 11/1998, which made general provision for telecommunications, with regard to interconnection and access to the public networks and numbering (BOE No 181 of 30 July 1998, p. 25865, hereinafter ‘Royal Decree 1651/1998’).

15 Article 9 of Royal Decree 1651/1998 is worded as follows:

‘Operators of public telecommunications networks who are deemed to occupy a dominant position in the market shall be subject to the following obligations:

...

3. To offer interconnection at local and higher-level switching centres.

In the event that, for technical reasons, any of a dominant operator’s switching centres are for the time being unable to provide interconnection, the operator shall indicate a timetable for making the technical adjustments to them which will enable interconnection to take place.

The Telecommunications Market Commission may require operators to give a technical explanation for their failure to offer interconnection at certain switching centres, and call for the introduction of technical alternatives enabling virtual interconnection to be made to them on a provisional basis. This interconnection shall be effected in such a way as to provide technical, financial and operational conditions similar to those appertaining to direct interconnection with the abovementioned switching centres.

I - 10110

4. To provide access to the subscriber loop on such date and under such conditions as the Ministry of Internal Development may for that purpose determine, if appropriate, following submission of a report by the Telecommunications Market Commission.

5. Not to prevent interconnection agreements containing conditions relating to services which are not mentioned in the reference interconnection offer.

....'

### The main proceedings

- 16 Telefónica considers certain provisions of Royal Decree 1651/1998 to be unlawful on the ground that the Spanish Government acted *ultra vires* its regulatory competence in the course of transposing the directive; it therefore brought an action before the Tribunal Supremo in which it sought, *inter alia*, the setting aside of Article 9(3), (4) and (5) of that decree.
- 17 In the referring court's view, the directive appears to entrust the precise determination of interconnection points solely to negotiation between operators because that question is not included in the matters which, under Part 1 of Annex VII, may be subject to *ex ante* conditions set by national regulatory authorities.

18 The referring court considers, however, that that initial conclusion might be inconsistent with the general principle laid down in Article 4(2) of the directive under which operators with significant market power are obliged to meet all reasonable requests for access to the network. According to the referring court that obligation appears to cover all material items necessary for that purpose, including interconnection points, which must therefore remain accessible without restriction to the other operators.

19 In light of those considerations the Tribunal Supremo decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Does a combined interpretation of Articles 4(2) and 9(2), in conjunction with Annex VII, Part 2(c), 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 (ONP), allow

(a) the national regulatory authorities to impose *ex ante* on an operator having significant market power the obligation to provide other operators with access to the subscriber loop and to offer interconnection at local and higher-level switching centres; or

(b) on the contrary do those authorities have the power — with regard to access and interconnection at those specific network points — only “to promote”

agreements negotiated between the various operators, but not to impose such access and interconnection as an *ex ante* obligation on an operator with significant market power?’

### The question referred for a preliminary ruling

#### *Observations submitted to the Court*

- 20 Telefónica maintains that the directive does not permit the national regulatory authorities to impose *ex ante* on an operator having significant market power obligations concerning access and interconnection points on the network. The directive merely allows national regulatory authorities to encourage inclusion of that question in the agreements negotiated between the different operators. That interpretation is corroborated by recital 5 in the preamble to and Articles 3 and 9(2) of the directive.
- 21 According to Telefónica, it also follows from Article 4(1) of the directive that interconnection is a right coupled with a duty to negotiate and that therefore the conditions under which interconnection may occur is a matter to be determined by the parties rather than by intervention by the national regulatory authorities.
- 22 Telefónica goes on to submit that the fact that the Community authorities are in the process of determining the rules governing access to the local subscriber loop demonstrates that the directive does not permit the national regulatory authorities to lay down or predetermine conditions in that connection.

- 23 The Spanish Government observes, as a preliminary point, that the directive does not govern access to the local subscriber loop. However, Recommendation 2000/417 requests Member States to make such access mandatory by 31 December 2000. So it is consonant with Community law to require access to be allowed to the local subscriber loop and to make such access subject to certain conditions.
- 24 As to interconnection between telecommunications networks, the Spanish and Italian Governments essentially maintain that the Community legal framework enables national authorities to require operators with significant market power to offer interconnection at local and higher-level switching centres. In light of the aim of the directive and of Articles 1 and 9 thereof, if a Member State considers that the market will not be totally competitive and that users' interests will not be guaranteed because an operator having significant market power refuses to offer interconnection to certain levels of the network, that Member State could require that operator to offer such interconnection.
- 25 The Commission maintains that it follows from Article 1 of the directive that the harmonisation brought about by it is not complete. Thus, as a matter of principle, the directive allows the Member States to complement it by imposing fresh obligations on operators having significant market power, with the result that the directive does not preclude the national authorities from imposing on an operator with significant market power an *ex ante* requirement to provide other operators with access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.

### *Findings of the Court*

- 26 The first paragraph of Article 1 of the directive indicates that the aim of the directive is, *inter alia*, to ensure interconnection of telecommunications networks,

the interoperability of services and provision of a universal service in an environment of open and competitive markets.

- 27 As stated in recital 5, the directive relies for the attainment of its objectives primarily on commercial negotiations between the operators providing telecommunications services.
- 28 None the less, it is also clear from that recital, as it is from recital 12, that the directive permits Member States to limit the freedom of those operators to decide whether to enter into interconnection agreements in order to ensure the adequacy of those agreements.
- 29 On the other hand, as stated in recital 2, the directive merely puts in place the general framework within which its objective must be pursued, without seeking to achieve complete harmonisation.
- 30 It is in light of those considerations that Articles 4(2) and 9(2) of the directive must be interpreted.
- 31 As regards Article 4(2), it is clear from its wording that it merely imposes obligations on operators having significant market power.

- 32 However, the fact that such operators are required under Article 4(2) of the directive to satisfy only reasonable requests for interconnection does not mean that Member States are precluded under that provision from permitting their national regulatory authorities to impose *ex ante* on those operators conditions or obligations with regard to access.
- 33 Article 4(2) of the directive cannot therefore be construed as precluding a Member State from adopting provisions authorising a national regulatory authority to require an operator having significant power on the market to provide access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.
- 34 Article 9(2) permits the national regulatory authorities to lay down *ex ante* conditions in the areas set out in Part 1 of Annex VII to the directive and to encourage inclusion in the interconnection agreements of the matters mentioned in Part 2 of that annex.
- 35 It cannot be inferred from the wording of that provision that it is only in the areas set out in Part 1 of Annex VII to the directive that the Member States may authorise their national regulatory authorities to lay down *ex ante* conditions or obligations.

36 Moreover, it would not be compatible with the subject-matter and structure of the directive, as described in paragraphs 26 to 29 of this judgment, to preclude the Member States from authorising their national regulatory authorities to lay down *ex ante* conditions or obligations relating to matters referred to in Part 2 of Annex VII to the directive, even when such authorisation appears necessary in order to facilitate the introduction of competition and to further the interests of users.

37 In light of all those considerations it should be stated in reply to the question referred for a preliminary ruling that Articles 4(2) and 9(2) of the directive must be interpreted as not precluding the Member States from authorising national regulatory authorities to impose on an operator having significant power on the market the *ex ante* obligation to provide access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.

## Costs

38 The costs incurred by the Spanish, Belgian and Italian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Tribunal Supremo by order of 14 February 2000, hereby rules:

**Articles 4(2) and 9(2) 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 (ONP) must be interpreted as not precluding the Member States from authorising national regulatory authorities to impose on an operator having significant power on the market the *ex ante* obligation to provide access to the local subscriber loop and to offer interconnection at local and higher-level switching centres.**

Macken

Gulmann

Schintgen

Skouris

Cunha Rodrigues

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber