Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

9 October 2014*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Article 32 — Additional mandatory services — Compensation mechanism for the cost associated with providing those services — Meaning of 'court or tribunal' for the purposes of Article 267 TFEU — Lack of jurisdiction of the Court)

In Case C-222/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Teleklagenævnet (Denmark), made by decision of 22 April 2013, received at the Court on 25 April 2013, in the proceedings

TDC A/S

v

Erhvervsstyrelsen,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2014,

after considering the observations submitted on behalf of:

— TDC A/S, by O. Spiermann, advokat,

— the Erhvervsstyrelsen, by J. Pinborg, advokat,

— the Danish Government, initially by V. Pasternak Jørgensen, and subsequently by C. Thorning, acting as Agents, and by J. Pinborg and P. Biering, advokater,

— the European Commission, initially by M. Simonsen, and subsequently by L. Nicolae and G. Conte, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2014,

* Language of the case: Danish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 32 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('the Universal Service Directive').

2 The request has been made in proceedings between TDC A/S ('TDC') and the Erhvervsstyrelsen (Danish Business Authority) concerning the refusal of a request for compensation for the cost of providing additional mandatory services.

Legal context

EU law

3 Article 1 of the Universal Service Directive, entitled 'Subject-matter and scope', provides in paragraph 1:

'Within the framework of Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2012 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)], this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the [European Union] of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. The Directive also includes provisions concerning certain aspects of terminal equipment, including provisions intended to facilitate access for disabled end-users.'

4 Article 32 of the Universal Service Directive, entitled 'Additional mandatory services', provides:

'Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.'

Danish law

5 The Law on competition and consumer matters in the telecommunications market (Lov om konkurrence- og forbrugerforhold på telemarkedet), applicable to the dispute in the main proceedings, transposed the Universal Service Directive into Danish law.

6 According to the Teleklagenævnet (Telecommunications Complaints Board), Paragraph 16(2) of that law, as codified by Consolidated Law No 780 of 28 June 2007 and amended by Law No 1412 of 27 December 2008 ('the 2007 Law') stipulated that the following services had to be provided through the designation of one or more universal service operators: fixed telephony, the Integrated Services Digital Network (ISDN), leased lines, services for people with disabilities, directory enquiry services and safety services.

7 The order for reference also states that Paragraph 20 of the 2007 Law contained rules on compensation for losses in the provision of the universal service. Those rules were incorporated in substantially identical terms to those of that paragraph in Law No 169 on electronic communication networks and services (lov nr. 169 om elektroniske kommunikationsnet og –tjenester) of 3 March 2011 ('Law No 169').

8 After the Kingdom of Denmark had been served with a letter of formal notice and a reasoned opinion by the European Commission, Law No 169 was amended by Law No 250 of 31 March 2012, and it now provides that the undertaking concerned may recover losses which occurred after 1 April 2012 in relation to safety and maritime emergency services, without deducting profits made in connection with other services arising from that undertaking's universal service obligation.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 TDC, which used to be owned by the State until it was privatised in 1997, is the principal operator in the electronic services communications sector in Denmark.

10 Since 1998 TDC has been responsible for providing safety and maritime emergency services in Denmark and Greenland, which make it possible for sea-going vessels to call for assistance when they are in distress. In addition TDC provides services in Denmark which are covered by the universal service obligation under Chapter II of the Universal Service Directive, and in particular basic telephony.

11 Under the 2007 Law, TDC could obtain from the State compensation for the net costs incurred in connection with those safety and maritime emergency services only if all the universal service obligations and the additional mandatory services were loss-making.

12 TDC lodged a complaint with the Commission claiming that that law did not comply with Article 32 of the Universal Service Directive. After a number of exchanges of views with the Danish authorities and TDC, the Commission sent the Kingdom of Denmark a letter of formal notice and a reasoned opinion on 27 January and 29 September 2011, respectively.

13 The order for reference states that the Kingdom of Denmark decided to amend the Danish legislation in question with effect from 1 April 2012. Since that date, the State must defray the cost associated with safety and maritime emergency services provided in Denmark and Greenland. The Commission accordingly decided not to bring an action against the Kingdom of Denmark for failure to fulfil its obligations.

14 Following those amendments, Danish legislation makes provision for compensation by the State of the net cost of safety and maritime emergency services, irrespective of whether the other universal service obligations give rise to a profit or a loss.

15 On 29 July 2011 TDC applied to the Erhvervsstyrelsen for compensation for expenditure incurred in connection with the provision of safety and maritime emergency services for the year 2010. On 26 September 2011 TDC made an identical application for compensation for the years 2007 to 2009.

16 On 24 November 2011 the Erhversstyrelsen rejected the applications for compensation on the grounds, inter alia, that the claim for 2007 was time-barred, that the deadline for the same application for the years 2008 and 2009 had expired, and that the 2007 Law, then in force, did not make it possible to grant the application for compensation for 2010 without deducting profits from services covered by the universal service obligation under Chapter II of the Universal Service Directive.

17 TDC appealed against the decisions of the Erhvervsstyrelsen rejecting its applications before the Teleklagenævnet, which, by decision of 17 September 2012, upheld the decisions of the Erhvervsstyrelsen concerning the applications for compensation for the years 2007 to 2009.

18 As regards the application for compensation for the year 2010, the Teleklagenævnet decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the [Universal Service Directive], and in particular Article 32, preclude a Member State from laying down rules which do not entitle an undertaking to recover from that Member State separately the net costs of providing additional mandatory services not covered by Chapter II of that directive, where the undertaking’s profits from other services which are covered by the undertaking’s universal service obligations under Chapter II of that directive exceed the losses associated with the provision of the additional mandatory services?

(2) Does the Universal Service Directive preclude a Member State from laying down rules which entitle undertakings to recover from the Member State the net costs of providing additional mandatory services which are not covered by Chapter II of that directive, only if the net costs amount to an unreasonable burden for the undertakings in question?

(3) If Question 2 is answered in the negative, can the Member State decide that there is no unreasonable burden associated with the provision of additional mandatory services not covered by Chapter II of that directive, if the undertaking has, overall, achieved profits from the provision of all those services where that undertaking has a universal service obligation, in particular the provision of services which the undertaking would also have provided if it had not been a universal service operator?

(4) Does the Universal Service Directive preclude a Member State from laying down rules according to which a designated undertaking’s net costs relating to its universal service obligation pursuant to Chapter II of that directive are to be calculated on the basis of all income and costs associated with the provision of the service in question, in particular that income and those costs which the undertaking would also have incurred if it had not been a universal service operator?

(5) Are the answers to Questions 1 to 4 affected by the fact that the management of an additional mandatory service is to be provided in Greenland, which, by virtue of Annex II to the [Treaty], is an overseas country or territory, if the Danish authorities entrust the management of that service to an undertaking established in Denmark and that undertaking has no other activities in Greenland?

(6) Of what significance are Article 107(1), Article 108(3) TFEU and Commission Decision [2012/21/EU] of 20 December 2011 on the application of Article 106(2) [TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [(OJ 2012, L 7, p. 3)] to the answers to Questions 1 to 5?

(7) Of what significance is the principle of minimum distortion of competition in, inter alia, Article 1(2), Article 3(2) and recitals (4), (18), (23) and (26) in the preamble and Part B of Annex IV to the Universal Service Directive to the answers to Questions 1 to 5?

(8) If the provisions of the Universal Service Directive preclude national schemes as referred to in Questions 1, 2 and 4, do those provisions or preclusions have direct effect?’

The jurisdiction of the Court

19 The Commission has expressed doubts as to whether the Teleklagenævnet is a court or tribunal for the purposes of Article 267 TFEU, stating that that body does not meet all the criteria established by the case-law of the Court for it to qualify as a court or tribunal. The Commission submits, first, that it is not mandatory to refer a matter to that body, since appeals against the decisions of the Erhvervsstyrelsen may be brought either before the Teleklagenævnet or directly before the courts. Secondly, Danish legislation does not provide any specific guarantees in relation to the dismissal of the members of the Teleklagenævnet or the annulment of the appointment of those members, and consequently the legislation is not such as to prevent undue intervention or pressure from the executive on the members of that body.

20 In the order for reference, the Teleklagenævnet submits that it does satisfy all the criteria established by the case-law of the Court for determining whether a body of a Member State is a court or tribunal for the purposes of Article 267 TFEU.

21 First, the Teleklagenævnet states that it is a permanent public body for resolving disputes, established by Law No 169, and that the rules governing its functioning are laid down in Decree No 383 of 21 April 2011.

22 Secondly, it states that its decisions in administrative matters are final in actions against decisions taken by the Erhvervsstyrelsen and that its decisions are binding on the parties, subject to an appeal before the ordinary courts within a period of eight weeks. In principle, the Erhvervsstyrelsen may not challenge decisions of the Teleklagenævnet before the ordinary courts.

23 Thirdly, the Teleklagenævnet indicates that its members are appointed by the Minister for Enterprise and Growth for a period of four years and it is possible to renew their term. The Minister may appoint, among those members, a lawyer as vice-president who may replace the president in the event that the president is unable to act or has been recused. Those members are personally and professionally independent of the administration and are not subject to the authority of the Minister. The Teleklagenævnet is made up of a president, who must be a lawyer, and four to six other members. It makes decisions by simple majority, and in the event of a split vote, the president is to have the casting vote.

24 Fourthly, the Teleklagenævnet states that the procedure before it is entirely written, but that it must be ensured that the parties are able to present their observations so as to clarify all the relevant circumstances of the case, in accordance with the principle of *audi alteram partem*.

25 Thus, the Teleklagenævnet is established by law, it is established on a permanent basis, its members offer guarantees of full independence, its jurisdiction is compulsory and it applies rules of law and a procedure comparable to that followed in the ordinary courts in keeping with the principle of *audi alteram partem*.

26 The Danish Government, in response to a question put by the Court, submits that the Teleklagenævnet must be regarded as a court or tribunal for the purposes of Article 267 TFEU. It states that that body meets the criteria of establishment by law, permanence and application of rules of law. It also states that, although it is true that the conditions for dismissing members of that body are not defined in a specific way by Danish legislation, those members are protected against arbitrary and unlawful dismissal in accordance with the general rules of administrative law and employment law. At the hearing, the Danish Government stated that the power to dismiss those members lies with the person who has the power of appointment, that is to say, the Minister for Enterprise and Growth.

27 It should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgment in *Belov*, C-394/11, EU:C:2013:48, paragraph 38, and order in *Merck Canada*, C-555/13, EU:C:2014:92, paragraph 16).

28 First, it is necessary to examine the criterion concerning the independence of the Teleklagenævnet.

29 The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (judgment in *RTL Belgium*, C-517/09, EU:C:2010:821, paragraph 38 and the case-law cited).

30 There are two aspects to that concept. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (see, to that effect, judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 18).

31 The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment in *Wilson*, EU:C:2006:587, paragraph 52 and the case-law cited).

32 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment in *Wilson*, EU:C:2006:587, paragraph 53 and the case-law cited). In order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions (judgment in *D. and A.*, C-175/11, EU:C:2013:45, paragraph 97, and order in *Pilato*, C-109/07, EU:C:2008:274, paragraph 24 and the case-law cited).

33 In the present case, as concerns the rules for appointing members of the Teleklagenævnet, it is clear, in particular from the observations of the Danish Government, that those members are appointed by the Minister for Enterprise and Growth for a period of four years and it is possible to renew their term.

34 In relation to the issue of dismissing the members of the Teleklagenævnet, the Danish Government at the hearing confirmed that members could be removed from office by the Minister, who also has the power to appoint them.

35 It is clear from the order for reference and the observations of the Danish Government that, although Danish legislation makes provision for a specific procedure for the dismissal of judges of the ordinary courts, the members of the Teleklagenævnet may be dismissed, and that the conditions for their dismissal are not subject to any specific rules, other than the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.

36 Thus, it does not appear that the dismissal of members of the Teleklagenævnet is subject to specific guarantees which would dispel any reasonable doubt as to the independence of that body (see, by analogy, order in *Pilato*, EU:C:2008:274, paragraph 28).

37 Furthermore, as is apparent from the documents before the Court, an appeal against a decision of the Teleklagenævnet may be made before the ordinary courts. If such an appeal is made, the Teleklagenævnet has the status of a defendant. That involvement of the Teleklagenævnet in proceedings challenging its own decision implies that, when it adopts that decision, the Teleklagenævnet is not acting as a third party in relation to the interests at stake and does not possess the necessary impartiality (see, to that effect, judgment in *RTL Belgium*, EU:C:2010:821, paragraph 47). That structuring of the legal remedies against a decision of the Teleklagenævnet thus emphasises the non-judicial nature of the decisions delivered by that body (see, by analogy, order in *MF 7*, C-49/13, EU:C:2013:767, paragraph 19).

38 It follows from all of the foregoing considerations that, without it being necessary to consider whether the Teleklagenævnet meets the other criteria for assessing whether that body is a court or tribunal for the purposes of Article 267 TFEU, it must be concluded that the Court does not have jurisdiction to answer the questions referred.

Costs

39 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The Court of Justice of the European Union has no jurisdiction to answer the questions referred by the Teleklagenævnet (Denmark) in its decision of 22 April 2013.

[Signatures]