

JUDGMENT OF THE COURT (Fifth Chamber)

18 September 2003 *

In Joined Cases C-292/01 and C-293/01,

REFERENCES to the Court under Article 234 EC by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Albacom SpA (C-292/01),

Infostrada SpA (C-293/01)

and

Ministero del Tesoro, del Bilancio e della Programmazione Economica,

Ministero delle Comunicazioni,

* Language of the case: Italian.

on the interpretation of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Albacom SpA, by R. Caiazza and G. Pesce, avvocati,

— Infostrada SpA, by F.G. Scoca, M. Clarich, G. Pizzonia and F. Macaluso, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato,

— Commission of the European Communities, by H. van Lier and E. Traversa, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of of Albacom SpA, represented by R. Caiazzo and A. Santa Maria, avvocato; of Infostrada SpA, represented by F.G. Scoca and G. Pizzonia; of the Italian Government, represented by M. Fiorilli; and of the Commission, represented by E. Traversa, at the hearing on 21 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2002,

gives the following

Judgment

1 By two orders of 12 June 2001, received at the Registry of the Court on 23 July 2001, the Consiglio di Stato (Council of State) referred to the Court for a preliminary ruling under Article 234 EC an identical question on the interpretation of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

- 2 That question was raised in the context of two actions brought by Albacom SpA and Infostrada SpA, holders of licences to operate public telecommunications networks, against an interministerial decree imposing on undertakings which hold such licences a charge calculated on the basis of a percentage of their turnover.

Community legislation

- 3 The 12th recital in the preamble to Directive 97/13 states:

‘... any fees or charges imposed on undertakings as part of authorisation procedures must be based on objective, non-discriminatory and transparent criteria’.

- 4 Article 6 of Directive 97/13, relating to fees and charges for general authorisation procedures, provides:

‘Without prejudice to financial contributions to the provision of universal service in accordance with the Annex, Member States shall ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the

administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme. Such fees shall be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.’

5 Article 11 of the directive, headed ‘Fees and charges for individual licences’, is worded as follows:

‘1. Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.

2. Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.’

National legislation

6 Presidential Decree No 318 of 19 September 1997 (GURI No 221 of 22 September 1997, ordinary supplement, p. 5, hereinafter ‘Decree No 318’)

and the decree of 5 February 1998 (GURI No 63 of 17 March 1998, p. 27), adopted for the purpose of implementing Article 6 of Decree No 318, concern the financial charges imposed on telecommunications undertakings as part of authorisation procedures.

- 7 Article 6(5) of Decree No 318 provides that ‘the charge to be paid by undertakings in respect of the general authorisation procedure shall cover solely the administrative costs incurred in the preparation [of the file], the supervision of service management and the maintenance of the conditions laid down for the authorisation itself’.
- 8 Article 6(20) of that decree contains a similar provision concerning the charge relating to individual licences. Article 6(21) also provides for a charge in the case where scarce resources are used.
- 9 The decree of 5 February 1998 cited above specifies that the holder of an individual licence is required to pay a charge in respect of: (a) the costs of preparing the file and issuing the licence, to be paid at the time the application is made, (b) control and enforcement, to be paid annually, (c) the use of scarce resources, to be paid annually, and (d) the allocation of numbers, to be paid annually.
- 10 The measures which gave rise to the main proceedings are Law No 448 of 23 December 1998, introducing public finance measures for stabilisation and development (budget law 1999) (GURI No 302 of 29 December 1998, ordinary supplement, p. 5, hereinafter ‘Law No 448’) and the interministerial decree of

21 March 2000 adopted by the Minister for the Treasury, Budget and Economic Planning, in agreement with the Minister for Communications (GURI No 92 of 19 April 2000, p. 12) (hereinafter 'the decree of 21 March 2000').

11 Article 20(2) of Law No 448 provides that:

'A charge shall be established for the installation and provision of public telecommunications networks, the provision of public telephony and mobile and personal communications services; that charge is to be paid by the holders of concessions for public telecommunications services or of licences to install and provide public telecommunications networks, public telephony services and public mobile and personal communications services.

That charge shall be calculated as a percentage of turnover of all telecommunications services provided in the previous year, that is, 3% for 1999, 2.7% for 2000, 2.5% for 2001, 2% for 2002 and 1.5% for 2003.

For undertakings whose turnover is less than ITL 200 billion during the reference year for the calculation of the charge, the fees in question shall be fixed at 2% until 2002 and 1.5% in 2003. For the latter, payment is not due in case of operating losses.

Payment shall be made within 30 days from the date of approval of the accounts for the financial year to which the turnover relates. On 15 December of each year, a deposit shall be paid on the charge due for the following year, which amounts

to 70% of the previous year's payment for 1999, 85% for 2000 and 95% for 2001 and subsequent years. For 1999, the deposit shall be determined on the basis of the forecasts for turnover for that year but shall not be less than turnover in 1998.

...'

- 12 The procedures for paying the charge established by Article 20(2) of Law No 448 were laid down in the decree of 21 March 2000.

Main proceedings and the question referred for a preliminary ruling

- 13 Albacom and Infostrada had to pay a deposit on the charge referred to in Article 20(2) of Law No 448 and in the decree of 21 March 2000 (hereinafter 'the contested charge'). The national court states that that sum amounts to ITL 5 300 000 000 for Albacom. The two companies take the view that, by introducing the contested charge, Law No 448 in practice re-establishes the royalty which applied in Italy when telecommunications services were subject to a monopoly and infringes Community law.

- 14 Each of those companies therefore submitted an extraordinary petition to the President of the Republic, seeking annulment of the decree of 21 March 2000. The Ministry of the Treasury, Budget and Economic Planning accordingly requested an opinion from the Consiglio di Stato concerning the validity of that decree.
- 15 That Ministry maintains that the contested charge is neither an extension of the royalty nor a new tax, but rather a means by which the undertakings concerned contribute to the costs borne directly or indirectly by the State in preparing the measures necessary for the liberalisation of the telecommunications sector.
- 16 The Consiglio di Stato states that telecommunications services formerly came under a State monopoly and that statute therefore required all franchises to pay the State an annual royalty of an amount determined in advance.
- 17 The national court adds that that system was significantly changed by Community legislation, in particular 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 (OJ 1996 L 74, p. 13), and by Directive 97/13.
- 18 An initial transposition measure adopted in 1996 made the right of every undertaking to operate services and install telecommunications networks subject to administrative authorisation, without prejudice to statutory franchises.

- 19 The Italian Republic subsequently adopted other measures, including Decree No 318 and the decree of 5 February 1998, which provided *inter alia* for telecommunications networks to be operated by undertakings holding general authorisations and individual licences in the field of telecommunications services.
- 20 Finally, the Consiglio di Stato refers to Law No 448. It points out that, while that law reconfirms that the annual charge previously required of franchisees is not applicable to the providers of public telecommunications services, Article 20(2) of that law nevertheless introduces a new type of payment.
- 21 Having doubts as to whether Article 20(2) of Law No 448 and the decree of 21 March 2000 complied with Community legislation, the national court decided to stay proceedings in the two cases and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Directive 97/13/EC permit Member States to require undertakings holding a licence or authorisation to carry on telecommunications activities to make financial payments, whatever they may be called, other than and in addition to those allowed by the Directive?’

- 22 By order of the President of the Court of Justice of 12 September 2001, Cases C-292/01 and C-293/01 were joined for the purposes of the written procedure, the oral procedure and the judgment.

Question referred for a preliminary ruling

- 23 First of all, it must be noted that the main proceedings concern two undertakings which hold individual licences within the meaning of Directive 97/13 and that the observations presented to the Court concentrated on Article 11 of that directive, concerning the fees and charges which apply to undertakings holding individual licences. The Consiglio di Stato is therefore essentially asking whether the provisions of that directive and, in particular, of Article 11 prohibit Member States from imposing financial charges such as the contested charge on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences.
- 24 In that respect, it is first necessary to ascertain whether Article 11 of Directive 97/13, or any other of its provisions, expressly authorises Member States to impose financial charges such as the contested charge on such undertakings.
- 25 Article 11(1) of Directive 97/13 provides that Member States are to ensure that any fees imposed on undertakings which hold individual licences seek only to cover the administration costs generated by the work involved in implementing those licences. Article 11(2) nevertheless allows the national regulatory authorities to impose charges where scarce resources are to be used.
- 26 Aside from the fees and charges mentioned in Article 11 and the fees intended to cover administrative costs related to the general authorisation procedure laid

down in Article 6, Directive 97/13 expressly provides for only one type of financial charge, namely financial contributions to the provision of universal service, referred to in Article 6 and in paragraph 3(2) of the annex to the directive.

- 27 There is no dispute that the contested charge does not seek to cover the administrative costs relating to an authorisation procedure or to ensure optimal use of a scarce resource. Decree No 318 and the decree of 5 February 1998 establish other charges for those purposes. Moreover, no claim has been made to the effect that the purpose of the contested charge is to finance the provision of universal service.
- 28 The inevitable conclusion is that a charge such as the contested charge does not come under one of the cases expressly mentioned in Articles 6 and 11 of Directive 97/13.
- 29 It therefore needs to be examined, secondly, whether such a charge is prohibited.
- 30 In that regard, it is necessary to consider the objective of Directive 97/13 and the legal context in which it was adopted.
- 31 The Italian Government maintains that a charge such as the contested charge is not contrary to the objective of Directive 97/13 and that it should even be considered permissible, in the light of Article 11(2) of that directive. The government states that, since that provision allows Member States to impose

additional charges in the case of scarce resources such as the limited availability of numbers or radiofrequencies in order to ensure the optimal use of such resources, it must also be possible for Member States to impose additional charges intended to contribute to investments made for the purpose of ensuring the general liberalisation of the telecommunications sector.

- 32 In the present case, the contested charge constitutes a contribution to the investment made by the State in order to liberalise telecommunications and to allow innovative services to develop. Moreover, it applies only for a limited period and complies with the criteria of objectivity, non-discrimination and transparency referred to in the 12th recital in the preamble to the directive.
- 33 It should be noted, however, that Article 11(1) of Directive 97/13 expressly provides that Member States are to ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred by the licensing system. In relation to that general provision set out in Article 11(1), Article 11(2) inserts a reservation limited to the case of scarce resources.
- 34 The wording of Article 11(2) therefore calls for a restrictive interpretation and, in any event, cannot in itself be extrapolated as advocated by the Italian Government.
- 35 Directive 97/13, as is clear from the first, third and fifth recitals in its preamble, is among the measures adopted for the complete liberalisation of telecommunications services and infrastructures as from 1 January 1998, which also include

Directive 96/19 with regard to the implementation of full competition in telecommunications markets. To that end, Directive 97/13 establishes a common framework for general authorisations intended to make a significant contribution to the entry of new operators into the market.

- 36 In addition to laying down rules for authorisation procedures and the content of authorisations, that framework sets out the nature and scope of financial payments related to those procedures which Member States may impose on undertakings in the field of telecommunications services.
- 37 As stated in the 12th recital in the preamble to Directive 97/13, those charges must be based on objective, non-discriminatory and transparent criteria. Moreover, they must not conflict with the objective of the complete liberalisation of the market, which implies opening it completely to competition.
- 38 In that regard, as the Advocate General argues in point 52 of his Opinion, the common framework of general authorisations and individual licences for telecommunications services which the directive seeks to establish would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in the sector.
- 39 In addition, it is significant that, in the first phase of the implementation of Community directives intended to liberalise the national telecommunications market, the Italian Republic discontinued the charge on turnover which telecommunications service franchisees were previously required to pay. Even if

that former charge and the contested charge are not identical, the contested charge, like the former charge, is calculated on the basis of the turnover of undertakings which hold individual licences and thereby reintroduces a financial obstacle to the liberalisation process.

- 40 Such a charge considerably increases the fees and charges which Member States are expressly authorised to impose under Directive 97/13 and creates a significant obstacle to the freedom to provide telecommunications services.
- 41 It follows that such a charge is contrary to the objectives sought by the Community legislature and goes beyond the common framework established by Directive 97/13.
- 42 In the light of the foregoing, the answer to the question referred must be that Directive 97/13 and, in particular, Article 11 thereof prohibit Member States from imposing financial charges other than and in addition to those allowed by the directive, such as the contested charge in the main proceedings, on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences.

Costs

- 43 The costs incurred by the Italian Government and by the Commission, 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 (Fifth Chamber),

in answer to the question referred to it by the Consiglio di Stato by orders of 12 June 2001, hereby rules:

Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services and, in particular, Article 11 thereof, prohibit Member States from imposing financial charges other than and in addition to those allowed by the directive, such as the contested charge in the main proceedings, on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences.

Wathelet

Timmermans

La Pergola

Jann

von Bahr

Delivered in open court in Luxembourg on 18 September 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber