JUDGMENT OF THE COURT (Third Chamber)

20 October 2005 *

In Joined Cases C-327/03 and C-328/03,

REFERENCES for a preliminary ruling under Article 234 EC, from the Bundesverwaltungsgericht (Germany), by decisions of 30 April 2003, received at the Court on 28 July 2003, in the proceedings:

Bundesrepublik Deutschland

v

ISIS Multimedia Net GmbH und Co. KG, represented by **ISIS Multimedia Net Verwaltungs GmbH** (C-327/03),

Firma O2 (Germany) GmbH und Co. OHG (C-328/03),

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J. Malenovský, S. von Bahr (Rapporteur), A. Borg Barthet and U. Lõhmus, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 November 2004,

after considering the observations submitted on behalf of:

— the Bundesrepublik Deutschland, by S. Prömper and K. Schierloh, acting as Agents,

— ISIS Multimedia Net GmbH und Co. KG, represented by ISIS Multimedia Net Verwaltungs GmbH, by R. Schütz, Rechtsanwalt,

— Firma O2 (Germany) GmbH und Co. OHG, by M. Hoffmann, Rechtsanwalt,

— the United Kingdom Government, by K. Manji, acting as Agent, and S. Moore, Barrister,

— the Commission of the European Communities, by C. Schmidt and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2004,

gives the following

Judgment

1 The references for a preliminary ruling concern 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 Those references were made in proceedings between the Bundesrepublik Deutschland and ISIS Multimedia Net GmbH und Co. KG, represented by ISIS Multimedia Net Verwaltungs GmbH ('ISIS Multimedia'), and between the Bundesrepublik Deutschland and Firma O2 (Germany) GmbH und Co. OHG ('Firma O2')

concerning the charge made by the Regulierungsbehörde für Telekommunikation und Post (Regulatory Authority for Telecommunications and Post; 'the Regulatory Authority') in connection with applications for the allocation of telephone numbers.

Relevant provisions

Community legislation

3 Article 11 of Directive 97/13 provides:

'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

4 Relevant national legislation includes Paragraph 43(3) of the Law on telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl. 1996 I, p. 1120) ('the TKG') and the Regulation on fees in connection with telecommunications numbers (Telekommunikations-nummerngebührenverordnung) of 16 August 1999 (BGBl. 1999 I, p. 1887) ('the TNGebV').

5 Paragraph 43 of the TKG provides that the Regulatory Authority is to assume the task of managing numbering and that the decision to allocate a telephone number, on application, gives rise to a charge. The event giving rise to the charge and its amount is laid down by regulatory action, in accordance with the Law on administrative charges (Verwaltungskostengesetz) of 23 June 1970 (BGBl. 1970 I, p. 821).

6 Paragraph 1 of the TNGebV, read in conjunction with point B 1 of the Annex to that provision, in its original version, provides that the allocation of a block of 1 000 10-digit telephone numbers for local networks is to give rise to a charge of DEM 1 000 (about EUR 500). If an application for numbers is refused, a fee is levied in the amount of a quarter of the charge made for the allocation of numbers, in this case DEM 250 (about EUR 125).

The main proceedings and the questions referred for a preliminary ruling

7 ISIS Multimedia and Firma 02, which are telecommunications undertakings, applied to the Regulatory Authority to be allocated telephone numbers.

8 ISIS Multimedia received 37 of the 43 blocks of 1 000 10-digit numbers for which it had applied. Firma O2 obtained 2 303 of the 2 324 blocks of 1000 10-digit numbers applied for. On that occasion, charges of DEM 38 500 and about DEM 2.3 million respectively were imposed on those two undertakings.

9 The amount of those charges is more than 15 times higher than that of the administrative costs generated by the allocation of telephone numbers and more than three times higher than that of the costs inherent in the refusal of an application for numbers. Moreover, the amount of the charge per number allocated corresponds to about 0.1% of the annual sales likely to be attained with a number.

10 Deutsche Telekom AG ('Deutsche Telekom'), the successor to the historic operator which held a monopoly in telecommunications in Germany, has at its disposal a stock of 400 million telephone numbers which it obtained free of charge. In the view of the Bundesverwaltungsgericht, the national legislature had contemplated making that undertaking subject to payment of a charge fixed by the TNGebV in consideration of the award of that stock, but that was not possible since Deutsche Telekom had not submitted an application for the allocation of numbers and Paragraph 43 of the TKG did not therefore apply.

11 ISIS Multimedia and Firma O2 challenged those decisions of the Regulatory Authority requiring them to pay the charge. Their applications were dismissed at first instance, but they were upheld on appeal. The Regulatory Authority then brought appeals in cassation before the Bundesverwaltungsgericht.

12 That court states that the TKG and the TNGebV are compatible with the German Basic Law. It also takes the view that Article 11(2) of Directive 97/13 allows the

imposition of a charge in respect of the allocation of telephone numbers, which constitute a scarce resource. It asks whether, none the less, it is compatible with that provision, in particular the need to foster competition, to apply to new telecommunications undertakings a charge which reflects in part the economic value of the numbers allocated, even though under national law it is impossible to impose the same charge on Deutsche Telekom in respect of the stock of numbers at its disposal. The Bundesverwaltungsgericht considers that, if account must be taken of the competition situation on the market, it is likely that such a charge is contrary to Article 11(2).

13 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer to the Court for a preliminary ruling the following two questions, which are set out in the same terms in Cases C-327/03 and C-328/03:

'1. Is Directive 97/13 ... to be interpreted as meaning that, in respect of the allocation of telephone numbers by the national regulatory authority, a fee taking account of the economic value of the telephone numbers allocated may be imposed even though a telecommunications undertaking operating on the same market and occupying a dominant position on it took over free of charge from its predecessor in law, the former State undertaking with a monopoly, a very large quantity of telephone numbers and the retrospective imposition of fees in respect of this old stock is not possible for reasons of national law?

If the answer to the first question is in the affirmative:

2. In such a situation may the new entrants to the market, irrespective of the level of their other entry costs and without an associated analysis of their competitive chances in comparison with the dominant undertaking, be charged for the allocation of a telephone number a one-off fee in the amount of a particular

percentage (in this case 0.1%) of the estimated annual sales which can be attained if the telephone number is passed on to a final customer?'

14 By order of the President of the Court of 16 September 2003, Cases C-327/03 and C-328/03 were joined for the purposes of the written procedure, the oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question

15 By its first question, the national court asks, essentially, whether Article 11(2) of Directive 97/13 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that a new operator on the telecommunications market is required to pay a charge in respect of the allocation of telephone numbers taking account of their economic value, even though a telecommunications undertaking having a dominant position on the same market took over free of charge the very large stock of numbers which were available to its predecessor, the former monopoly, and national law precludes retrospective payment of such a charge in respect of that stock.

Observations submitted to the Court

16 ISIS Multimedia, Firma O2 and the Commission of the European Communities submit that the requirement on new operators to pay the charge provided for by the

TNGebV in consideration of the allocation of the telephone numbers necessary to offer their clients voice telephony services for local networks, even though Deutsche Telekom, for the same service, has at its disposal free of charge a very large stock of numbers, is discriminatory and constitutes a restriction on the development of competition. Legislation such as that on which the charge is based is therefore contrary to the conditions set out in the second sentence of Article 11(2) of Directive 97/13.

17 By contrast, the German Government submits, first, that such legislation is not discriminatory since, like its competitors, Deutsche Telekom must pay a charge for the allocation of new telephone numbers.

18 As regards, next, the stock of numbers which Deutsche Telekom took over from its predecessor, the German Government maintains that, at the time when that stock was built up, neither national law nor Community law provided for any charge. There is therefore no need to demand retrospective payment of that charge in respect of that stock, which, in any event, is not possible under national law.

19 The German Government adds, finally, that the fact that Deutsche Telekom did not pay the charge for the stock of telephone numbers at its disposal is justified by the heavy charges borne by that undertaking in respect of the universal service and on account of its having taken over a large number of staff and the resultant obligation to ensure that their pensions are paid.

20 The United Kingdom Government submits, for its part, that the requirement to pay a charge taking account of the economic value of the telephone numbers allocated makes it possible to manage the scarce resource which those numbers constitute, in accordance with the provisions of Article 11(2) of Directive 97/13.

Reply of the Court

21 Under Article 11(2) of Directive 97/13, the charge must satisfy three conditions. First, it must serve to ensure the optimal use of a scarce resource. Next, it must be non-discriminatory. Finally, it must take into account the need to foster the development of innovative services and competition.

22 As regards the first condition, regarding optimal management of a scarce resource, the German and United Kingdom Governments submit that there is a limited quantity of telephone numbers which can be used and that the first condition is therefore satisfied.

23 In that respect, it must be stated that, although Article 11(2) of Directive 97/13 allows the application of a charge to manage a 'scarce resource' in an optimal manner, it does not define that concept.

24 It is therefore necessary to refer to the provisions which precede that article, in particular Article 10(1) of the same directive. Under that provision, the Member

States may limit the number of individual licences for any category of telecommunications services only to the extent necessary to make available sufficient numbers. It follows that the Community legislature has therefore acknowledged that there may be a limited quantity of telephone numbers and, consequently, they constitute a scarce resource.

25 Article 11(2) of Directive 97/13 must therefore be understood as meaning that the Member States may impose a charge on telecommunications undertakings in order to manage the allocation of telephone numbers in an optimal manner.

26 Accordingly, the first condition set out in that provision is satisfied in so far as the requirement to pay a charge, such as that provided for by the legislation at issue in the main proceedings, relates to the allocation of telephone numbers.

27 On the other hand, if an application for the allocation of telephone numbers is refused, which, by definition, does not entail any use of numbers or, consequently, any reduction in the number of numbers available, the provisions of Article 11(2) of Directive 97/13 do not apply. In that case, it is necessary to apply the general rule set out in Article 11(1), according to which the fees imposed on undertakings as part of authorisation procedures must be restricted to the administrative costs related to the processing of an application for numbers. The requirement to pay a charge of more than three times the amount of the administrative costs incurred is therefore contrary to that rule.

28 There remains to be determined whether the requirement to pay a charge for the allocation of telephone numbers, such as that provided for by the legislation at issue

in the main proceedings, satisfies the other two conditions set out in Article 11(2) of Directive 97/13.

29 As regards the condition of non-discrimination, it should be recalled that the latter requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified (see, in particular, Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 91).

30 In that regard, ISIS Multimedia and Firma O2, like Deutsche Telekom, are telecommunications companies operating in the local network sector. In order to offer their services, they must necessarily have telephone numbers available to allocate to their customers. Those companies are therefore in a comparable position from the point of view of offering services. It is not disputed that ISIS Multimedia, Firma O2 and all new operators have to pay the charge referred to in Paragraph 1 of the TNGebV, read in conjunction with point B 1 of the Annex to that paragraph, in order to obtain telephone numbers and gain entry into the local network voice telephony services market, whereas Deutsche Telekom has a large stock of numbers available to it which enables it to operate on that market and for which it did not pay any charge.

31 Deutsche Telekom and its competitors are therefore clearly not treated in the same manner in terms of access to that market.

32 The fact that Deutsche Telekom has to pay the charge to obtain new numbers does not in any way change that finding which relates to the access of operators to the market.

33 In addition, nor does the fact that Deutsche Telekom obtained the stock of numbers from its predecessor lawfully under both German law and the Community provisions applicable at the time when that stock was transferred to it change that finding.

34 The question is none the less raised whether the difference in treatment between new operators and an undertaking such as Deutsche Telekom, which is the successor to the former monopoly, may be justified or whether it constitutes discrimination in breach of Article 11(2) of the Directive.

35 The German Government submits that the fact that Deutsche Telekom did not pay a charge for the stock of telephone numbers at its disposal is justified by the fact that that undertaking must take on universal service tasks and must also ensure that the pensions of the staff it has taken over are paid.

36 In that regard, it must be noted that the German Government has not submitted any figures in support of its contention that the free allocation of that stock constitutes compensation for the charges borne by Deutsche Telekom in respect of its universal service obligations or because of the payment of the pensions of the staff it has taken over. As the Court has held previously, to the extent that Article 11(2) of Directive 97/13 introduces a derogation to the general rule set out in Article 11(1), it must be interpreted restrictively (see Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449, paragraphs 33 and 34). Consequently, justifications based on Article 11(2) cannot be put forward in a purely general manner.

37 Subject to an explanation which would justify the difference in treatment between operators, it must be held that the requirement to pay a charge for the allocation of

telephone numbers, such as that imposed on new operators by the legislation at issue in the main proceedings, which is the precondition of entry of those operators into the local network voice telephony services market, even though the undertaking which succeeded the former monopoly may operate on that market by having a large stock of numbers available to it free of charge, constitutes discrimination against those new operators contrary to Article 11(2) of Directive 97/13.

38 Even if the German Government managed to show the allegedly non-discriminatory nature of the stock of telephone numbers available to Deutsche Telekom, there would remain to determine whether, in accordance with the third condition set out in Article 11(2), the payment of the charge for the allocation of numbers takes into account the need to foster the development of innovative services and competition.

39 In that regard, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 83).

40 The Court has already had to examine the competition law question raised by legislation providing for the allocation free of charge to a public undertaking in a dominant position of certain operating facilities, in that case additional frequencies in the digital mobile telecommunications sector, whereas a new operator had had to pay a fee to obtain a licence for the same sector. In that respect, the Court held that such legislation is likely to infringe Article 82 EC by extending or strengthening the dominant position of that undertaking. It stated, however, that the competition rules do not preclude such legislation if the fee paid previously by the public undertaking in a dominant position to obtain a licence in the field of mobile telecommunications and the allocation free of charge of additional frequencies appear to be equivalent in

economic terms to the fee imposed on the competitor (see *Connect Austria*, cited above, paragraphs 85 to 90).

41 A similar examination must therefore be carried out comparing charges applied to the undertaking in a dominant position and to its competitors for the allocation of telephone numbers.

42 Clearly, in that regard the undertaking in a dominant position, namely Deutsche Telekom, did not pay any charge for the allocation of a very large quantity of telephone numbers and that undertaking is required to pay a charge only for the allocation of new numbers, whereas its competitors, the new operators, have to pay a charge upon allocation of the first number.

43 It is common ground that that charge, which is calculated on the basis of the economic value of the numbers allocated, constitutes a considerable burden on telecommunications undertakings. In the case of new operators, that burden is imposed on their budget right from the initial stage of setting up in the local network sector.

44 It follows that new operators are not placed on an equal footing with the undertaking in a dominant position in respect of obtaining telephone numbers and that competition on the local network voice telephony services market is therefore distorted.

45 Instead of making a significant contribution to the entry of new operators into the market, as stated in recital 5 in the preamble to Directive 97/13 (see *Albacom and Infostrada*, cited above, paragraph 35), by lessening disparities in relation to competition between the undertaking in a dominant position and new operators on the telecommunications market, legislation such as that in the main proceedings has the effect of maintaining those disparities. It constitutes a barrier to entry of new operators into that market and therefore acts as a brake on the development of competition and the fostering of innovative services, contrary to the third condition in Article 11(2) of Directive 97/13.

46 The answer to the first question must therefore be that Article 11(2) of Directive 97/13 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that a new operator on the telecommunications market is required to pay a charge in respect of the allocation of telephone numbers taking account of their economic value, even though a telecommunications undertaking having a dominant position on the same market took over free of charge the very large stock of numbers which were available to its predecessor, the former monopoly, and national law precludes retrospective payment of such a charge in respect of that stock.

The second question

47 In view of the answer given to the first question, it is unnecessary to answer the second question.

Costs

48 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:

Article 11(2) 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 must be interpreted as precluding national legislation such as that at issue in the main proceedings which provides that a new operator on the telecommunications market is required to pay a charge in respect of the allocation of telephone numbers taking account of their economic value, even though a telecommunications undertaking having a dominant position on the same market took over free of charge the very large stock of numbers which were available to its predecessor, the former monopoly, and national law precludes retrospective payment of such a charge in respect of that stock.

[Signatures]