JUDGMENT OF THE COURT (Second Chamber)

22 November 2007 *

In Case C-262/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesverwaltungsgericht (Germany), made by decision of 17 May 2006, received at the Court on 15 June 2006, in the proceedings

Deutsche Telekom AG

v

Bundesrepublik Deutschland, represented by the **Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk, P. Kūris (Rapporteur) and J.-C. Bonichot, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2007,

after considering the observations submitted on behalf of:

— Deutsche Telekom AG, by T. Mayen, U. Karpenstein, and B. Stamm, Rechtsanwälte,

— the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, by Dr Bayer, Mr Meyer-Sebastian, E. Greiwe, M. Dorsch, acting as Agents, and by B. Kuhrmeyer and R. Busch,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Aiello, avvocato dello Stato,

— the Lithuanian Government, by S. Žalimienė, acting as Agent,

— the Commission of the European Communities, by G. Braun and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 27 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; 'the Framework Directive') and Article 16(1)(a) 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; 'the Universal Service Directive').

2 The reference was made in appeal proceedings on a point of law ('Revision') between the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks; 'the regulatory authority') and Deutsche Telekom AG ('Deutsche Telekom'), regarding a decision of 8 June 2004 by which the regulatory authority found that the tariffs charged by Deutsche Telekom and the related clauses of its general terms

and conditions in respect of certain 'offer packages' fell within the requirement for authorisation within the meaning of Paragraph 25(1) of the Law on Telecommunications (Telekommunikationsgesetz) of 25 July 1996 (BGBl. 1996 I, p. 1120; 'the TKG 1996').

Legal context

Community legislation

3 Article 17 of Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24) sets out the following tariff principles:

'1. Without prejudice to the specific provisions of Article 3 in relation to affordability or to paragraph 6, national regulatory authorities shall ensure that organisations providing voice telephony services which either have significant market power or have been designated in accordance with Article 5 and have significant market power comply with the provisions of this Article.

2. Tariffs for use of the fixed public telephone network and fixed public telephone services shall follow the basic principles of cost orientation set out in Annex II to Directive 90/387/EEC.

3. Without prejudice to Article 7(3) 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), tariffs for access to and use of the fixed public telephone network shall be independent of the type of application which the users implement, except to the extent that they require different services or facilities.

4. Tariffs for facilities additional to the provision of connection to the fixed public telephone network and fixed public telephone services shall, in accordance with Community law, be sufficiently unbundled so that the user is not required to pay for facilities which are not necessary for the service requested.

5. Tariff changes shall be implemented only after an appropriate public notice period, set by the national regulatory authority, has been observed.

6. Without prejudice to Article 3 in relation to affordability, a Member State may authorise its national regulatory authority not to apply paragraphs 1, 2, 3, 4 or 5 of this Article in a specific geographical area where it is satisfied that there is effective competition in the fixed public telephone services market.'

4 According to recital 12 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7; 'the Access Directive'), in order to ensure continuity of existing

agreements and to avoid a legal vacuum, the new regulatory framework for telecommunications must maintain the obligations imposed under the previous legislation until such time as they are reviewed.

5 Article 16(1) of the Framework Directive provides that as soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities are to carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

6 The first paragraph of Article 27 of the Framework Directive provides that:

'Member States shall maintain all obligations under national law referred to in Article 7 of the Access Directive and Article 16 of the Universal Service Directive until such time as a determination is made in respect of those obligations by a national regulatory authority in accordance with Article 16 of this Directive.'

7 Article 7 of the Access Directive reads as follows:

'Review of former obligations for access and interconnection

1. Member States shall maintain all obligations on undertakings providing public communications networks and/or services concerning access and interconnection

that were in force prior to the date of entry into force of this Directive under Articles 4, 6, 7, 8, 11, 12, and 14 of Directive [97/33], Article 16 of Directive [98/10], and Articles 7 and 8 of Directive 92/44/EC [of the Council of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27)], until such time as these obligations have been reviewed and a determination made in accordance with paragraph 3.

2. The Commission will indicate relevant markets for the obligations referred to in paragraph 1 in the initial recommendation on relevant product and service markets and the Decision identifying transnational markets to be adopted in accordance with Article 15 of the [Framework] Directive.

3. Member States shall ensure that, as soon as possible after the entry into force of this Directive, and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with Article 16 of the [Framework] Directive to determine whether to maintain, amend or withdraw these obligations. An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of obligations.'

8 Article 16 of the Universal Service Directive provides:

'Review of obligations

1. Member States shall maintain all obligations relating to:

(a) retail tariffs for the provision of access to and use of the public telephone network, imposed under Article 17 of Directive [98/10];

(b) carrier selection or pre-selection, imposed under Directive [97/33]

...'

National legislation

9 Paragraph 24 of the TKG 1996 provides, inter alia, that tariffs are to be based on the costs of efficient service provision and are to satisfy the following requirements, that is to say, they are not to contain any surcharges which can be imposed solely as a result of the operator's dominant position within the meaning of Paragraph 19 of the Law against restraints of competition (Gesetz gegen Wettbewerbsbeschränkungen, in the version published in the BGBl. 1989 I, p. 2486) in the relevant telecommunications market, not to contain any discounts which prejudice the competitive opportunities of other undertakings in a telecommunications market and not to create any advantages for individual users in relation to other users of identical or similar telecommunications services in the relevant telecommunications market, unless there is evidence of an objectively justifiable reason therefor.

10 Paragraph 25 of the TKG 1996 provides:

'(1) As provided for by Paragraphs 24 and 27 to 31 of this Law tariffs and tariff-related clauses of general terms and conditions for the provision of transmission lines and voice telephony within the framework of Licence Classes 3 and 4 within the meaning of Paragraph 6 of this Law shall be subject to approval by

the regulatory authority, provided the licensee has a dominant position within the meaning of Paragraph 22 of the Law against restraints of competition in the relevant market.

(2) Tariffs and tariff-related clauses of general terms and conditions for telecommunications services other than those referred to in Paragraph 25(1) above provided by companies having a dominant position within the meaning of Paragraph 22 of the Law against restraints of competition in the relevant market shall be subject to the procedure under Paragraph 30 of this Law in accordance with Paragraphs 24, 27(4) and 31 of this Law.

(3) Paragraphs 25(1) and (2) above shall apply accordingly to tariffs and tariff-related clauses of general terms and conditions of an undertaking constituting a single undertaking with the licensee within the meaning of Paragraph 25(1) above or an undertaking within the meaning of Paragraph 25(2) above. A single undertaking is created through any linkage of undertakings within the meaning of Paragraphs 36(2) and 37(1) and (2) of the Law against restraints of competition.'

11 Article 150 of the Law on telecommunications (Telekommunikationsgesetz) of 22 June 2004 (BGBl. 2004 I, p. 1190), as amended by the Law of 7 July 2005 (BGBl. 2005 I, p. 1970; 'the TKG 2004'), governs tariffs as follows:

'(1) Determinations of dominant positions in the market made by the regulatory authority before this Law came into force, and the resulting obligations, shall remain valid until they are replaced by new decisions in accordance with Part 2. This shall also apply where determinations of dominant positions in the market

are only mentioned in the preamble to administrative measures. The first sentence shall apply, by analogy, to the obligations referred to in Paragraphs 36, 37 and 39, second edition, [of the TKG 1996].

...'

The case in the main proceedings and the questions referred

12 In 2003, Deutsche Telekom marketed various 'offer packages' of telecommunications services which included services that were subject to the requirement to obtain authorisation from the regulatory authority provided for in Paragraph 25(1) of the TKG 1996 as well as services which were not.

13 A number of complaints led the regulatory authority to open an investigation in December 2003 to determine whether those packages were, as a whole, subject to that requirement.

14 By a decision of 8 June 2004, the regulatory authority found that the tariffs charged and the clauses of the tariff-related general terms and conditions fell within the requirement for authorisation provided for in Paragraph 25 of the TKG 1996.

15 Deutsche Telekom lodged an appeal against that decision together with an application for interim relief before the Verwaltungsgericht Köln (Administrative Court, Cologne).

16 By judgment of 15 September 2005, that court granted the appeal brought by Deutsche Telekom, on the ground that the transitional provision contained in Paragraph 150(1) of the TKG 2004 covers only obligations which do not require any implementing measures and are enforceable in themselves, which are criteria that Paragraph 25(1) of the TKG 1996 does not satisfy.

17 In those circumstances, the regulatory authority brought an appeal on a point of law before the Bundesverwaltungsgericht (Federal Administrative Court, Germany) which decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions:

'(1) Are the first paragraph of Article 27 of the [Framework Directive] and Article 16(1)(a) of the [Universal Service Directive] to be understood as meaning that a statutory requirement provided for under earlier national law for the authorisation of charges for the supply of voice telephony services to end-users by an undertaking with a dominant position in that market, and hence an administrative measure confirming that requirement, should be temporarily maintained?

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

(2) Does Community law preclude such extensive continuation?'

The questions referred

18 By its first question, the national court is essentially asking whether the aim of Article 27 of the Framework Directive and Article 16(1)(a) of the Universal Service

Directive is to maintain temporarily in force a statutory requirement for authorisation in respect of certain telephony tariffs charged by an undertaking with a dominant position in the market in question, provided for under earlier national law, and an administrative measure confirming that requirement.

19 It is common ground that no decision under Article 16 of the Framework Directive has been adopted by the regulatory authority inasmuch as the analysis of the relevant market for voice telephony services had not been completed at the time of proceedings before the referring court.

The interpretation of Article 27 of the Framework Directive and Article 16 of the Universal Service Directive

20 As regards a literal interpretation of Article 27 of the Framework Directive, it must be pointed out that 'all obligations' under Member States' legislation and referred to in Article 7 of the Access Directive and Article 16 of the Universal Service Directive are to be maintained. Article 7 concerns obligations on undertakings providing public communications networks and/or services concerning access and interconnection that were in force prior to the date of entry into force of the Framework Directive. Article 16(1)(a) of the Universal Service Directive provides for all obligations relating to retail tariffs for the provision of access to and use of the public telephone network to be maintained.

21 It follows, as the Advocate General noted in point 30 of his Opinion, that all obligations thus referred to and imposed under Member States' legislation which preceded the regulatory framework stemming from the Framework Directive, Access Directive, Universal Service Directive and Directive 2002/20/EC of the

European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ('the new regulatory framework') are to be temporarily maintained, regardless of their nature.

22 The fact that it is for the regulatory authority to decide when to bring the temporary situation to an end, as a result of carrying out the market analysis referred to in Article 16 of the Framework Directive, does not alter this interpretation as the authority does no more than implement the obligations imposed by the legislation in force, which stems from the new regulatory framework. Indeed, the amendment, maintenance or withdrawal of the obligations is determined in accordance with this framework.

23 Such an interpretation also accords with the origin and scheme of the new regulatory framework.

24 As regards its origin, it is common ground that the Proposal for a Directive of the European Parliament and of the Council, of 12 July 2000, on a common regulatory framework for electronic communications networks and services (COM(2000) 393 final), contained no express transitory provision.

25 The Opinion of the Economic and Social Committee, of 24 January 2001, on the 'Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services' (OJ 2001 C 123, p. 56), states in paragraph 4.4 that it must be 'clearly stated that existing legislation should only be applied until such time as the first analysis of relevant markets is carried out in accordance with the new directive'.

26 That proposal was referred to in Common Position (EC) No 38/2001 of 17 September 2001 adopted by the Council with a view to adopting a European Parliament and Council Directive on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2001 C 337, p. 34), from which it is apparent that the Council was concerned to ensure legal clarity and to take further account of the diversity of national situations.

27 It clearly follows that the Community legislature did not intend to limit the categories of obligations referred to in the first paragraph of Article 27 of the Framework Directive.

28 As regards the scheme of the new regulatory framework, it must be pointed out, first of all, that the obligations imposed on an undertaking with a dominant position on a given market were laid down in the very wording of the former regulatory framework, whereas in the new regulatory framework, it is the national regulatory authorities who have the power to define the relevant market and apply the regulatory instruments to the market definition. Similarly, those authorities carry out the analysis of the market and designate the undertakings having significant power in that market.

29 Secondly, Article 7 of Access Directive refers, from among the obligations that were in force prior to the date of entry into force of that directive and which the Member States are to maintain, first, to Article 4 of Directive 97/33, which directly creates obligations on operators, and second, to Articles 6, 7, 8, 11, 12 and 14 of Directive 97/33, Article 16 of Directive 98/10 and Articles 7 and 8 of Directive 92/44, which delegate implementation of the abovementioned provisions to the Member States, to be carried out either by the State authorities or by the national regulatory authorities.

30 Thirdly and finally, the Court would point out that according to recital 28 in the preamble to the Universal Service Directive, it is considered necessary to ensure the continued application of the existing provisions relating to the minimum set of leased line services in Community telecommunications legislation, in particular in Council Directive 92/44, until such time as national regulatory authorities determine that such provisions are no longer needed because a sufficiently competitive market has developed in their territory.

31 First of all, the objective of continuity is expressly implemented by Annex VII to the Universal Service Directive, relating to the conditions applicable to the minimum set of leased lines referred to in Article 18 of that directive, and by Article 16(1)(c) thereof, which provides for obligations to be maintained relating to leased lines, referred to in Articles 3, 4, 7 and 10 of Directive 92/44, which impose obligations on the Member States, and Articles 6 and 8 of Directive 92/44 whose regulatory nature is unquestionable.

32 Furthermore, Article 16(1)(a) and (b) of the Universal Service Directive provides for the maintenance of obligations relating both to retail tariffs referred to in Article 17 of Directive 98/10 and to carrier selection or pre-selection referred to in Directive 97/33.

33 It follows from the foregoing that the obligations set out above concern both individual acts and regulatory measures applied by an authority whose appointment depends on the constitutional arrangements of each Member State.

34 Finally, that interpretation is confirmed by an examination of the purpose of the provisions in question.

35 Recital 12 and Article 7 of the Access Directive are concerned with the need to avoid a legal vacuum between the former and new regulatory frameworks. To this end, it is provided that all existing obligations, whatever their basis, are to be maintained.

36 Accordingly, by referring expressly to Article 7 of the Access Directive and Article 16 of the Universal Service Directive, Article 27 of the Framework Directive was necessarily meant to achieve the same purpose, namely to ensure continuity, irrespective of the nature and basis of the obligations imposed on operators, between the former and new regulatory frameworks.

Paragraph 25(1) of the TKG 1996

37 Paragraph 25(1) of the TKG 1996 subjected tariffs for voice telephony services charged by undertakings having a dominant position in the relevant market to end-users to prior approval in accordance with Paragraphs 24 and 27 to 31 of that Law.

38 Article 17(1) of Directive 98/10, expressly maintained in force by Article 16(1)(a) of the Universal Service Directive, referred to in Article 27 of the Framework Directive, sets out the role of the national regulatory authorities and the obligation on licensees having a dominant position in the market to comply with the provisions of Article 17. Article 17(2) provides that tariffs for use of the fixed public telephone network and fixed public telephone services are to follow the basic principles of cost orientation.

39 According to Paragraph 24 of the TKG 1996, tariffs are to be based on the costs of efficient service provision and are to satisfy the requirements laid down in Paragraph 24(2), which provides, inter alia, that tariffs may not contain any surcharges which can be imposed solely as a result of the operator's dominant position in the relevant telecommunications market.

40 It follows that a provision such as Paragraph 25 of the TKG 1996, containing a general requirement for approval and at the same time referring to the principle of cost orientation laid down in a provision such as Paragraph 24 of that law, may be regarded as implementing Article 17 of Directive 98/10.

41 It follows from the foregoing that an obligation such as that laid down in Paragraph 25 of the TKG 1996 constitutes an obligation within the meaning of Article 16(1)(a) of the Universal Service Directive, and must therefore be maintained temporarily.

42 It is true, as Deutsche Telekom argues, that the national regulatory authority could thereby delay the application of the new Community rules by refraining from undertaking the relevant market study. In that case, however, it would be for the national authorities and, where appropriate, the competent courts, to draw the appropriate inferences and for the Commission to exercise its powers with a view to ensuring full application of Community law.

43 In view of all the above considerations, the answer to the first question referred to the Court must be that the first paragraph of Article 27 of the Framework Directive and Article 16(1)(a) of the Universal Service Directive must be interpreted as

meaning that a statutory requirement for the approval of tariffs for the supply of retail voice telephony services provided by undertakings with a dominant position in that market, such as that provided for in Paragraph 25 of the TKG 1996, enacted by national law and preceding the new regulatory framework, together with administrative measures confirming that requirement, must be temporarily maintained.

44 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

45 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 (Second Chamber) hereby rules:

The first paragraph of Article 27 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) and Article 16(1)(a) 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) must be interpreted as meaning that a statutory requirement for the approval of tariffs for the supply of retail voice telephony services provided by undertakings with a dominant position in that market, such as that provided for in Paragraph 25 of the Law on Telecommunications (Telekommunikationsgesetz) of 25 July 1996, enacted by national law and preceding the regulatory framework resulting from those directives, together with administrative measures confirming that requirement, must be temporarily maintained.

[Signatures]