JUDGMENT OF THE COURT (First Chamber)

20 October 2005 *

In Case C-334/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 July 2003,

Commission of the European Communities, represented by A. Alves Vieira, S. Rating and G. Braga da Cruz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and P. de Pitta e Cunha, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting of 2 June 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to ensure, in practice, the transposition of Article 4d of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunication services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13) ('Directive 90/388'), the Portuguese Republic has failed to fulfil its obligations.

Legal context

Community law

2 According to recital 23 in the preamble to Directive 96/19, 'the telecommunications organisations in many Member States enjoy legal privileges to install their network on public and private land, without charge or at charges set simply to recover incurred costs' and 'if Member States do not grant similar possibilities to new licensed operators to enable them to roll out their network, this would delay them and in certain areas be tantamount to maintaining exclusive rights in favour of the telecommunications organisation'.

3 Article 2 of Directive 90/388 provides:

'1. Member States shall withdraw all those measures which grant:

(a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or

(b) special rights which limit to two or more the number of undertakings authorised to provide such telecommunications services or to establish or provide such networks, otherwise than according to objective, proportional and non-discriminatory criteria; or

(c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory criteria, several competing undertakings to provide such telecommunications services or to establish or provide such networks.

2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.

...'

4 Under Article 4d of Directive 90/388:

'Member States shall not discriminate between providers of public telecommunications networks with regard to the granting of rights of way for the provision of such networks.

Where the granting of additional rights of way to undertakings wishing to provide public telecommunications networks is not possible due to applicable essential requirements, Member States shall ensure access to existing facilities established under rights of way which may not be duplicated, at reasonable terms.'

5 Article 5(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) provides that, in order to determine the burden which the provision of universal service represents, organisations with universal service obligations are required, at the request of their national regulatory authority, to calculate the net cost of such obligations.

National law

6 Article 12(1) of Law No 91/97 of 1 August 1997 (*Diário da República* I, Series A, No 176, of 1 August 1997, p. 4010) defines the 'basic telecommunications network' as a public network which meets the telecommunications needs of citizens and of economic and social activities throughout the national territory, and which ensures international connections.

7 Article 12(2), as amended by Law No 29/2002 of 6 December 2002 (*Diário da República* I, Series A, No 282, of 6 December 2002, p. 7556), defines the basic telecommunications network as being comprised of all of the parts of the network which are necessary in order to provide a universal telecommunications service.

8 Under Article 13 of Law No 91/97, operators of basic telecommunications networks are exempted from the payment of tax or charges for the installation of the telecommunications infrastructure, for access to the various parts of the installation and for the apparatus necessary for the operation of the network concerned.

9 On 20 March 1994 the Portuguese State and PT Comunicações, a subsidiary of Portugal Telecom SA in the area of fixed telephony services, signed a concession contract for the supply of communication services that are regarded as public services, authorising PT Comunicações to use and operate the telecommunications infrastructures for an initial period of 30 years.

10 Under the basic rules of this concession of the public telecommunications service, approved by Decree-Law No 40/95 of 15 February 1995 (*Diário da República* I, Series A, No 39, of 15 February 1995, p. 969), PT Comunicações was granted the exclusive right to install, manage and operate the infrastructure comprising the 'basic telecommunications network'. As set out in Article 2(1)(a) of those basic rules annexed to Decree-Law No 40/95, the purpose of the concession in question was the 'establishment, management and operation of the infrastructure comprising the basic telecommunications network'. The concession also entrusted the property of the infrastructure to PT Comunicações, with the obligation to maintain it in good working condition, particularly with regard to the functioning, security and maintenance of the network, and to expand the infrastructure qualitatively and quantitatively so as to ensure the provision of telecommunications services for general use, as a universal service, throughout the national territory.

11 As consideration for the concession, PT Comunicações was obliged, under Articles 24, 25 and 32 of the basic concession rules, to pay the State, as the grantor, a fee equivalent to 1% of the gross operating income earned from providing the services transferred. The concessionaire was provided with a right to compensation if it incurred a loss as a result of performing its universal service obligations.

12 The infrastructure comprising the basic telecommunications network belonged to the Portuguese State until the transfer of the network to PT Comunicações at the end of 2002. The transfer was made for a value equivalent to the total amount of the royalty owed to the State at that time under the concession contract from 1995 to the end of its initial period of validity.

13 On 17 February 2003, by means of Decree-Law No 31/2003 of 17 February 2003 *(Diário da República* I, Series A, No 40, of 17 February 2003, p. 1044*)* a new concession contract was approved which modified the basic rules of the concession. It did not effectively change the basic network operator's obligations. Article 6(b) of the annex to that decree-law provides that, as the concessionaire, PT Comunicações is required to provide the services which form the subject-matter of the public telecommunications service concession, and to guarantee the interoperability, continuity, availability, durability and quality of those services.

Pre-litigation procedure

14 On 2 May 2002 the Commission sent the Portuguese authorities a letter of formal notice, requesting them to submit their observations on the circumstance that PT Comunicações, as the sole company responsible for the management and operation of the basic telecommunications network, was exempted from the payment of any tax on the installation of its network under Article 13 of Law No 91/97, thus constituting an infringement of the principle of non-discrimination in the grant of rights of way, as laid down in Article 4d of Directive 90/388.

15 In a letter of 2 July 2002, the Portuguese Government stated its intention to remedy the alleged discriminatory treatment. However, after receiving no further reply, the Commission sent out a reasoned opinion in a letter of 19 December 2002 requesting

the Portuguese Republic to take the measures necessary to comply with that opinion within two months of its notification.

16 As the Portuguese Government did not reply to that reasoned opinion, the Commission decided to bring the present action.

The action

Arguments of the parties

17 According to the Commission, through the exemption provided for in Article 13 of Law No 91/97, read in conjunction with Decree-Law No 31/2003 and Decree-Law No 40/95, which preceded it, which establish that PT Comunicações is responsible for the installation and operation of the basic network, the Portuguese Republic treated the company differently from other operators. As there is no specific justification for that different treatment, it breaches Article 4d of Directive 90/388.

18 Since PT Comunicações provides services through its basic telecommunications network which compete directly with the services provided by other operators, the privileges in question give PT Comunicações a direct advantage over its competitors. The fact that the new operators incur higher costs than the existing operator may mean that the development of their networks is delayed.

19 The Commission takes the view that this difference in treatment cannot be justified.

20 In contrast, the Portuguese Government argues that it is not reasonable to characterise disparate treatment of different situations as discrimination. Any undertaking which is responsible for providing the universal service has obligations to develop and maintain the network which are not imposed on competing operators.

21 The Portuguese Government argues that its sole aim in exempting PT Comunicações from any tax owed for utilisation of the public domain and allowing it to carry out work on the latter without municipal consent was to eliminate obstacles to the development of the basic network infrastructure and to make it easier to complete the works necessary for the installation, preservation and maintenance of that infrastructure. It did not intend to give PT Comunicações any advantage over its competitors.

22 The Portuguese Government draws attention to the fact that PT Comunicações is required to give competing operators access to the basic network in a transparent and non-discriminatory manner. In other words, it may not derive any advantage, in connection with the provision of telecommunications services, from the tax exemption granted to it for the expansion and maintenance of the network.

Findings of the Court

23 Article 4d of Directive 90/388 which requires that Member States do not discriminate between the providers of public telecommunications networks in the grant of rights of way for the provision of those networks, is a specific application of the general principle of equality (see, by analogy, in regard to Article 7(5) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20), Case C-17/03 *VEMW and Others* [2005] ECR I-4989, paragraph 47).

24 The prohibition of discrimination, which is one of the fundamental principles of Community law, requires that comparable situations should not be treated in a different manner unless such a distinction can be objectively justified (see, inter alia, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67).

25 In this case, it is common ground that PT Comunicações is exempted from payment of the taxes and charges connected with the installation of the telecommunications infrastructure, the access to the various parts of the installation and the apparatus necessary for the operation of the transferred network.

26 The first point to be noted is that it is not conclusive in this regard whether this exemption stems from Article 13 of Law No 91/97, read in conjunction with Decree-Law No 31/2003 and Decree-Law No 40/95, which preceded it, as the Commission maintains, or whether, instead, it follows, as the Portuguese Government argues, from the case-law of the Portuguese administrative tribunals providing that utilisation of the public domain for the provision of a public service may give rise to taxation only if there is a private use of semi-public assets in order to meet needs that are private, in addition to those that are collective. In both cases the existence of the exemption is attributable to the domestic legal position in the Member State concerned.

27 Furthermore, it is not inconceivable that the position of an undertaking responsible for providing the universal service, which is under obligations to develop and maintain the network, might be compared with that of other telecommunications operators which provide the services of their choice under the terms that they consider to be the most profitable.

28 Admittedly, utilisation of the public domain for private purposes may be differentiated from utilisation of the public domain for purposes meeting collective needs. However, in contrast to what the Portuguese Government argues, the comparison between the circumstances of undertakings in the telecommunications sector should not be confined to a comparison between only those undertakings with public service obligations.

29 The position of PT Comunicações, as the provider of a public network, must be compared with that of its competitors, which also carry out their activities in the telecommunications market and intend to put in place alternative networks. Failing this, the objective of the Community legislation, namely the establishment of a competitive market in the telecommunications sector, would be seriously jeopardised. As is apparent from recital 23 in the preamble to Directive 96/19, if Member States do not grant new licensed operators the same legal rights and privileges to install their networks on public and private land as were granted to existing telecommunications organisations, the rolling-out of the new operators' networks would be delayed, which would, in certain sectors, be tantamount to maintaining exclusive rights for the existing organisations.

30 It is necessary, therefore, to determine whether the disparate treatment established here, consisting of exemption from the payment of tax and charges under the national provisions at issue, is justified in the light of Directive 90/388.

31 Firstly, under Article 9, read in conjunction with Article 8(1)(a), of the basic rules of the public telecommunications service concession, the Portuguese State made PT Comunicações responsible for maintaining the infrastructure concerned in good condition with regard to its functioning, its security and its maintenance, as well as for expanding the network, both qualitatively and quantitatively, so as to ensure the provision of telecommunications services for general use, as a universal service, throughout the national territory.

32 However, compensation for the costs resulting from that obligation is not, in this case, capable of justifying discrimination between operators as regards the grant of rights of way.

33 The net cost of implementing a universal service should have been assessed in accordance with Article 5(3) of Directive 97/33, read in conjunction with Annex III thereto. No such assessment of net costs was carried out in this case. Consequently, there is no need to determine whether the exemption from municipal taxes constitutes a means of financing the provision of the universal service or whether, as the Portuguese Government maintains, this exemption does not go beyond what is necessary to cover the cost of the service in accordance with the decision in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747).

34 Secondly, the fact that PT Comunicações is required to give competing operators access to the basic telecommunications network in a transparent and non-discriminatory manner also cannot provide justification for the different treatment at issue. It is true that sharing or coordination arrangements and the establishment of rules apportioning the costs of facility- or property-sharing are encouraged in Article 12(2) 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). However, the fact that other operators have access to the network does not justify disparate treatment in regard to the costs arising from the implementation of a new network.

35 Thirdly, no account may be taken of the fact that the Portuguese Government proposes, when transposing Directive 2002/21, to ensure the imposition of a transparent and non-discriminatory municipal tax on rights of way, since the assessment of whether or not a Member State has failed to fulfil its obligations must be made in the light of the situation in that Member State at the expiry of the period laid down in the reasoned opinion.

36 On the basis of all of the foregoing, it must be held that, by failing to ensure the transposition of Article 4d of Directive 90/388, the Portuguese Republic has failed to fulfil its obligations.

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by failing to ensure the transposition of Article 4d of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive 96/19/EC of 13 March 1996, the Portuguese Republic has failed to fulfil its obligations;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]