JUDGMENT OF THE COURT (Third Chamber)

21 February 2008 *

In Case C-296/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale del Lazio (Italy), made by decision of 10 May 2006, received at the Court on 3 July 2006, in the proceedings

Telecom Italia SpA

v

Ministero dell'Economia e delle Finanze,

Ministero delle Comunicazioni,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J. Klučka, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 October 2007,

after considering the observations submitted on behalf of:

— Telecom Italia SpA, by F. Satta, F. Lattanzi, C. Tesauro and C. Santacroce, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, Avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 11, 22 and 25 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 The reference was made in proceedings between Telecom Italia SpA ('Telecom Italia') on the one hand and the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance) and the Ministero delle Comunicazioni (Ministry of Communications) on the other concerning the obligation imposed on Telecom Italia to pay a fee based on a year's turnover from the final date laid down for transposition into national law of Directive 97/13.

Relevant provisions

Community legislation

3 Articles 6 and 11(1) of Directive 97/13 concerning the fees and charges for general authorisations procedures and individual licences respectively provide that the

Member States are to 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, as appropriate, enforcement of the system of general authorisations or the applicable individual licences.

4 The general time-limit provided for the entry into force of Directive 97/13 is set out in the first paragraph of Article 25 thereof, which reads as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive and publish the conditions and procedures attached to authorisations as soon as possible and, in any event, not later than 31 December 1997. They shall immediately inform the Commission thereof.'

5 Article 22 of Directive 97/13 contains a specific provision regarding authorisations existing at the date of its entry into force:

'1. Member States shall make all necessary efforts to bring authorisations in force at the date of entry of this Directive into line with its provisions before 1 January 1999.

2. Where application of the provisions of this Directive results in amendments to the terms of authorisations already in existence, Member States may extend the validity

of terms, other than those giving special or exclusive rights which have been or are to be terminated under Community law, provided that this can be done without affecting the rights of other undertakings under Community law, including this Directive. In such cases, Member States shall notify the Commission of the action taken to that end and shall state the reasons therefor.

3. Without prejudice to the provisions of paragraph 2, obligations in authorisations existing at the date of entry into force of this Directive which have not been brought into line by 1 January 1999 with the provisions of this Directive shall be inoperative.

Where justified, Member States may, upon request, be granted a deferment of that date by the Commission.'

National legislation

The Postal and Telecommunications Code

6 Until the implementation of Directive 97/13, the provision of public telecommunications services in Italy was reserved to the State under the first paragraph of Article 1 of the Postal and Telecommunciations Code (Codice postale e delle telecomunicazioni; the 'Codice Postale'), annexed to Presidential Decree No 156 approving the consolidated act containing postal, post bank and telecommunications legislation (approvazione del testo unico delle disposizioni legislative in materia postale, di bancoposta e di telecomunicazioni) of 29 March 1973 (Ordinary Supplement to GURI No 113 of 3 May 1973).

7 Article 188 of the Codice Postale provides that 'concession holders are required to pay the State an annual charge in the amount prescribed in the present Decree or in the instrument granting the concession'. That charge was calculated in proportion to the gross receipts or profits obtained from the service licensed, less the amounts paid to the operator of the public network.

Presidential Decree No 318 of 22 September 1997

8 Directive 97/13 was implemented, inter alia, by Presidential Decree No 318 concerning regulations for the implementation of Community Directives in the field of telecommunications (regolamento per l'attuazione di direttive comunitarie nel settore delle telecomunicazioni) of 19 September 1997 (Ordinary Supplement to GURI No 221 of 22 September 1997; 'Decree No 318/1997').

9 Article 2(3) to (6) of that decree provide as follows:

'3. Until 1 January 1998, the special and exclusive rights for the provision of voice telephony services and the related installation and supply of public telecommunications networks shall be maintained. …

4. The licences for public use and the authorisations referred to in Article 184(1) of the Codice Postale existing at the time of the entry into force of these regulations shall be amended, on the initiative of the [national regulatory authority], before 1 January 1999, with a view to bringing them into line with the provisions contained herein.

5. Where application of the provisions of these regulations makes amendments to the terms of existing licences and authorisations, terms other than those giving special or exclusive rights which have been abolished or are to be abolished under these regulations, shall remain valid, subject to the rights which other undertakings derive, in particular, from Community law.

6. Except for subparagraphs (4) and (5), obligations arising from licences and authorisations existing on the date on which these regulations came into force which have not been brought into line with the provisions of the latter shall be void from 1 January 1999.'

10 Article 6(20) of Decree No 318/1997 provides:

'… the contribution payable by undertakings in respect of the procedures for the grant of individual licences shall cover solely the administrative costs incurred in the preliminary investigation, control of the management of the service and maintenance of the conditions imposed for the licences themselves…'

11 Article 21(2) of Decree No 318/1997 reads as follows:

'Unless otherwise provided in these regulations, the provisions in force in the field of telecommunications shall continue to apply. In particular, the provisions referred to in Article 188 of the Codice Postale shall continue to apply, for the purposes referred to in Article 6(20) and (21) and pending a decision to the contrary by the [national regulatory authority].'

Law No 44812

Article 20(3) of Law No 448 introducing public finance provisions for stabilisation and development (misure di finanza pubblica per la stabilizzazione e lo sviluppo) of 23 December 1998 (Ordinary Supplement to GURI No 302 of 29 December 1998; 'Law No 448/1998') provides:

'3. From 1 January 1999, Article 188 of the [Codice Postale] ceases to be applicable to the providers of public telecommunications services.'

13 Pursuant to Article 20(4) of that law, Article 21(2) of Decree No 318/1997 has been repealed.

The main proceedings and the question referred for a preliminary ruling

14 Telecom Italia, a company incorporated under Italian law, is the former holder of exclusive rights, in the form of an exclusive licence, to provide public telecommunications services in Italy. It challenges before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Latium) the continuation, in respect of 1998, of the annual charge provided by the Codice Postale, which amounts to approximately EUR 385 million, for which it claims reimbursement. That company claims that the opening of the telecommunications market to competition on 1 January 1998 gave rise to the abolition of exclusive rights in that sector. From that date, the only pecuniary charges applicable to telecommunications undertak-

ings in respect of their individual licences were those provided for in Article 11 of Directive 97/13, as confirmed by the Court in Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449.

15 The national court also expresses doubts as to the validity of the annual charge imposed on Telecom Italia for 1998, while asking whether Article 22 of Directive 97/13, which contains a transitional provision for authorisations existing on the date of the entry into force of that directive, such as that granted to Telecom Italia, might not, however, be interpreted as authorising such a charge for that year only. That court is none the less inclined to think, like Telecom Italia, that Article 22 does not contain a transitional provision concerning Article 11 of that directive on charges for individual licences and that it does not therefore allow the imposition of a pecuniary charge such as the charge in the main proceedings.

16 It is in those circumstances that the Tribunale amministrativo regionale del Lazio decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 20(3) of Law No 448/1998 consistent with Articles 11, 22 and 25 of Directive 97/13…?'

The question referred

17 First of all, it should be noted that, in proceedings brought under Article 234 EC, it is not for the Court to rule on the compatibility of national rules with provisions of Community law. On the other hand, the Court is competent to supply the national

court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of the national rules with the provisions of Community law (see, in particular, Case C-130/93 *Lamaire* [1994] ECR I-3215, paragraph 10, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 34 and 35).

18 In that regard, even if, formally, the national court has limited its question to the interpretation of Articles 11, 22 and 25 of Directive 97/13, that fact does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see, in particular, Case C-329/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited).

19 Accordingly, in so far as it is apparent from the case-file submitted to the Court that Telecom Italia has a general authorisation, account should be taken also of Article 6 of Directive 97/13 relating to general authorisations.

20 Consequently, the question referred must be understood as seeking to ascertain whether Articles 6 and 11 of Directive 97/13, read in conjunction with Articles 22 and 25 thereof, preclude a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services and then the holder of a general authorisation, to pay a pecuniary charge such as the charge in the main proceedings, corresponding to the amount previously demanded for the exclusive right, for one year from the final date laid down for transposition of that directive into national law, namely 31 December 1998.

Observations submitted to the Court

21 Telecom Italia and the Commission of the European Communities submit that such a charge is incompatible with Article 11 of Directive 97/13 as interpreted by the Court and that its continuation for one year from the final date laid down for transposition of that directive into national law is not permitted by Article 22 of that directive. In their view, Article 22 permits the terms of authorisations existing on the date of the entry into force of Directive 97/13 to be continued, in so far as those conditions do not give special or exclusive rights. However, the obligation to pay the charge in question in the main proceedings is the consideration for the grant of an exclusive right. It must therefore be considered to be contrary to Article 22.

22 The Italian Government, for its part, makes a distinction between Article 22(2) of Directive 97/13, which provides that the terms giving special or exclusive rights may not be continued after the date of entry into force of that directive, and Article 22(3) thereof, under which the obligations concerning the authorisations existing on that date may be continued until 31 December 1998. That government states that the special and exclusive rights were withdrawn on 31 December 1997, in accordance with Directive 97/13. It adds that the Italian Republic also exercised the right, conferred by Article 22(3), to maintain certain obligations for one year. The payment of the charge imposed by the former holder of exclusive rights falls within those obligations and is therefore compatible with the directive.

The Court's answer

23 The Court has previously had the opportunity to examine the compatibility of Directive 97/13 with an annual charge imposed on a telecommunications undertaking and calculated on the basis of a percentage of its turnover in *Albacom and*

Infostrada, cited above. In paragraph 41 of that judgment, the Court held 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. Moreover, it follows from paragraphs 33 and 42 of that judgment that such a charge is prohibited by Article 11 of that directive, which provides that the fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the delivery, management, review and application of individual licences. Since the fees imposed under Article 6 of that directive are limited in the same way, the same prohibition applies on the basis of that article.

24 Pursuant to Article 25 of Directive 97/13, Articles 6 and 11 had to be implemented, like all provisions of that directive, not later than 31 December 1997.

25 Article 22 of Directive 97/13 contains, however, the derogating provisions applicable to the authorisations existing on the date of entry into force of that directive, under which those authorisations had to be brought into line with the latter before 1 January 1999, in other words not later than one year after the date laid down in Article 25.

26 The question therefore arises whether Article 22 of Directive 97/13 allows, by way of derogation and for one year only, the continuation of a charge such as the charge in the main proceedings as regards the operator to which an exclusive right had been granted before the entry into force of that directive.

27 Article 22 allows not only, in subparagraph 1, an additional period of one year, expiring on 31 December 1998, to bring authorisations existing on the date of entry into force of Directive 97/13 into line with its provisions, but in addition provides

in subparagraph 2 thereof, that the validity of terms linked to existing authorisations may be extended, without prejudice, however, to those giving special or exclusive rights and provided that that extension of validity does not affect the rights of other undertakings under Community law. Article 22(3) concerns obligations in the authorisations existing on the date of entry into force of that directive. That provision, which applies without prejudice to the provisions in Article 22(2), provides that the obligations referred to must be brought into line with that directive by 1 January 1999, unless the Member State concerned has, upon request, been granted a deferment of that date by the Commission.

28 Article 22 of Directive 97/13 does not therefore deal explicitly with the charges applicable to telecommunications undertakings which are holders of authorisations, be they general authorisations or individual licences. Only Articles 6 and 11 of that directive expressly address that issue.

29 Before determining whether Article 22 may none the less be applied to charges such as the charge at issue in the main proceedings, it is necessary to interpret that article by reference not only to its wording but also to its objective and scheme in the context of Directive 97/13 taken as a whole.

30 In that regard, recital 26 in the preamble to that directive serves to clarify the objective of Article 22. The Community legislature stated in that recital that certain telecommunications licences have been granted by the Member States for periods which go beyond 1 January 1999. In order to avoid claims for compensation, it was considered necessary to allow the Member States to extend the validity of certain conditions of those licences, in so far as they do not confer special or exclusive rights. As regards those rights, without prejudice to authorisations granted by the Commission, they must be withdrawn in particular pursuant to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10).

31 The objective of Article 22 of Directive 97/13 is therefore to avoid litigation, by making it possible for contractual relationships entered into between those States and telecommunications undertakings before the entry into force of that directive to continue beyond 1 January 1999, while granting the Member States a period only until that date in order to adapt the content of the contracts in question to the provisions of that directive.

32 The purpose of Article 22 of Directive 97/13, thus clarified in the light of recital 26, therefore appears to have nothing to do with the continuation of a charge connected with a former exclusive right.

33 Analysis of the precise wording of that article supports that finding.

34 First, so far as concerns a Member State which has not obtained an authorisation from the Commission to maintain special or exclusive telecommunications rights, Article 22(2) of Directive 97/13 precludes the continuation of conditions giving such rights beyond 31 December 1997. As the Advocate General has pointed out in paragraph 37 of his Opinion, if an exclusive right is withdrawn, that withdrawal must generally affect the application of the pecuniary charge which is the consideration for it.

35 Secondly, the actual wording of Article 22(3) of Directive 97/13 makes it clear that that paragraph applies without prejudice to the provisions of Article 22(2). Since that subparagraph excludes the terms giving special or exclusive rights, Article 22(3) cannot refer to obligations laid down in such terms, so that it cannot be understood as allowing them to continue until 31 December 1998.

36 Consequently, it must be considered that an obligation taking the form of a charge linked to a former exclusive right does not come within the scope of the obligations referred to in Article 22(3) of Directive 97/13 and such a charge cannot be continued beyond 31 December 1997 pursuant to Article 25 of that directive.

37 The Italian Government stated at the hearing, however, that the payment of the charge in the case in the main proceedings is not linked to the grant of an exclusive right, which has, moreover, been withdrawn. That charge was designed, in fact, to facilitate on the part of the Italian Republic the transition towards a competitive system. Since that Member State had to abandon the system of exclusive rights which it had set up as well as the resources which that system guaranteed it, the continuation of that charge for one year constituted a financial contribution enabling it to adapt gradually to the new system. The word 'obligations' in Article 22(3) of Directive 97/13 is distinct from the word 'terms' used in Article 22(2) and should be read independently of the latter. It thus provides a means for a Member State to impose, for financial reasons, a charge such as the charge at issue in the main proceedings until 31 December 1998.

38 In that respect, it should be pointed out that it is for the national court to determine whether the charge at issue in the main proceedings, which it is not denied is based on Article 188 of the Codice Postale, is linked to the exclusive right relating to the public telecommunications service granted to Telecom Italia before the entry into force of Directive 97/13.

39 Assuming that a charge such as the charge at issue in the main proceedings is not linked to an exclusive right granted before the entry into force of Directive 97/13, it must be examined whether such a charge constitutes an obligation within the meaning of Article 22(3) of that directive, eligible for the derogation laid down in that provision.

40 In that regard, the Italian Government's interpretation is based on the premise that the 'obligations' referred to in Article 22(3) are distinct from the 'terms' in Article 22(2). The latter notion refers only to the advantages granted to the undertaking in its interest, whereas the word 'obligations' includes the charges imposed on undertakings, including those imposed, as in the case in the main proceedings, solely in the financial interest of the Member State concerned, irrespective of the 'terms' of the authorisation.

41 That analysis cannot, however, be accepted. First, according to the scheme of Article 22(2) and (3), and the use of the word 'terms', in particular in Articles 3, 4 and 8 of Directive 97/13 read in conjunction with the annex thereto, in order to describe the conditions which may be attached to authorisations, that word covers the notion of 'obligations' within the meaning of Article 22(3) of that directive. The conditions which may be attached to authorisations as set out in the annex to that directive cover many obligations, including the condition in point 4.3 of that annex, relating to environmental and town and country planning requirements.

42 Secondly, only Articles 6 and 11 of Directive 97/13 deal with the charges applicable to undertakings which hold authorisations in the telecommunications services sector (see, to that effect, *Albacom and Infostrada*, cited above, paragraph 26). As to individual licences, Article 11(1) of that directive provides that the fees imposed by the Member States on undertakings which hold those licences seek only to cover the administration costs generated by the work involved in implementing those licences (*Albacom and Infostrada*, paragraph 25, and Joined Cases C-392/04 and C-422/04 *i-21 Germany* [2006] ECR I-8559, paragraph 28). The same consideration applies to the fees imposed by the Member States for general authorisations pursuant to Article 6 of Directive 97/13, which provides in addition for only one other form of financial contribution, namely contributions to the provision of universal service.

43 Accordingly, the notion of 'conditions attached to authorisations' within the meaning of Directive 97/13 covers different rights and obligations without, however, covering charges imposed on telecommunications undertakings which hold authorisations.

44 It follows that the word 'obligations' within the meaning of Article 22(3) of Directive 97/13 does not cover a pecuniary charge, such as the charge at issue in the main proceedings, which is imposed on a telecommunications undertaking without any link to the conditions of exercise of the authorisation granted to it, for the sole purpose of assisting financially the Member State concerned.

45 Having regard to the foregoing considerations, the answer to the question referred must be that Articles 6, 11, 22 and 25 of Directive 97/13 preclude a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services and then the holder of a general authorisation, to pay a pecuniary charge such as the charge in the main proceedings, corresponding to the amount previously demanded for that exclusive right, for one year from the final date laid down for transposition of that directive into national law, namely 31 December 1998.

Costs

46 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:

Articles 6, 11, 22 and 25 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 preclude a Member State from requiring an operator, formerly the holder of an exclusive right to provide public telecommunications services and then the holder of a general authorisation, to pay a pecuniary charge such as the charge in the main proceedings, corresponding to the amount previously demanded for that exclusive right, for one year from the final date laid down for transposition of that directive into national law, namely 31 December 1998.

[Signatures]