JUDGMENT OF THE COURT (Seventh Chamber)

21 July 2011 *

In Case C-284/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 20 April 2010, received at the Court on 7 June 2010, in the proceedings

Telefónica de España SA

v

Administración del Estado,

THE COURT (Seventh Chamber),

composed of D. Šváby, President of the Chamber, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: N. Jääskinen,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 May 2011,

after considering the observations submitted on behalf of:

— Telefónica de España SA, by J.A. García San Miguel y Orueta, procurador, and by M. Ferre Navarrete, abogado,

— the Spanish Government, by J.M. Rodríguez Cárcamo and M. Muñoz Pérez, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and S. Gonçalves do Cabo, acting as Agents,

— the European Commission, by G. Braun and G. Valero Jordana, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 6 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 has been made in proceedings between Telefónica de España SA ('Telefónica') and Administración del Estado concerning assessments issued by the Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission, 'TMC'), for the 2000 financial year, in respect of a fee payable by the holders of general authorisations and individual licences for the supply of telecommunications services to third parties.

Legal context

European Union law

Directive 97/13

3 It is clear from recital 1 in the preamble thereto that Directive 97/13 envisaged the 'complete liberalisation of telecommunications services and infrastructures by 1 January 1998, with transition periods for certain Member States'.

4 Recital 3 in the preamble to that directive stated that 'a common framework should be established for general authorisations and individual licences granted by Member States in the field of telecommunications services'.

5 'Recital 4 in the preamble to Directive 97/13 stated that "conditions attached to authorisations are necessary in order to attain public interest objectives to the benefit of telecommunications users' and that "the regulatory regime in the field of telecommunications … should take into account the need to facilitate the introduction of new services as well as the widespread application of technological improvements'.

6 Recital 5 in the preamble to Directive 97/13 stated that the directive 'therefore will make a significant contribution to the entry of new operators into the market, as part of the development of the Information Society'.

7 Under the terms of recital 12 in the preamble to Directive 97/13 'any fees or charges imposed on undertakings as part of authorisation procedures must be based on objective, non-discriminatory and transparent criteria.'

8 As regards the fees and charges for general authorisations procedures, Article 6 of that directive provided:

'Without prejudice to financial contributions to the provision of universal service in accordance with the Annex, Member States shall ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme. Such fees shall be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.'

9 As regards fees and charges for individual licences, Article 11(1) of the directive provided:

'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.'

Directive 2002/20/EC

10 Recital 31 in the preamble to 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) (OJ 2002 L 108, p. 21) states:

'… Any applicable administrative charges should be in line with the principles of a general authorisation system. An example of a fair, simple and transparent alternative for these charge attribution criteria could be a turnover related distribution key. Where administrative charges are very low, flat rate charges, or charges combining a flat rate basis with a turnover related element could also be appropriate.'

11 In relation to those administrative charges, Article 12 of that directive reads as follows:

'1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:

(a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), … and

(b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

2. Where national regulatory authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.'

National law

12 Article 71 of General Law 11/1998 of 24 April 1998 on Telecommunications (BOE No 99 of 25 April 1998, p. 13909; 'Law 11/1998') provides:

'Without prejudice to the financial charge which may be levied on operators for the financing of universal service in accordance with Article 39 and Title III, every holder of a general authorisation or an individual licence for the supply of services to third parties shall be required to pay to the State an annual fee not exceeding two per thousand of its gross operating income, which shall be applied for the purpose of defraying the costs, including management costs, incurred by the [TMC] in the implementation of the scheme of licences and general authorisations established pursuant to this law.

For the purposes of the previous paragraph, "gross" income shall mean the total income earned by the holder of the licence or authorisation from the operation of the networks or from the supply of telecommunications services falling within the scope of this law.

The fee shall become due annually. The procedure for levying the fee shall be determined by regulation.

For the purposes of the previous paragraph, each year the Finance Law shall, taking into account the relative amounts of the income received by way of the fee and the costs arising from issuing and monitoring the use of the individual licences and general authorisations, determine the percentage to be applied to the gross operating income earned by the operator, subject to the maximum established in this article, in order to determine the amount of the fee.

The difference between the estimated income of this type and the income actually received shall be taken into account for the purposes of reducing or increasing the percentage to be determined in the Finance Law for the following year. The objective shall be to achieve a balance between the income from the fee and the costs arising from the aforementioned activity carried out by the [TMC].'

13 That latter provision was implemented by Royal Decree 1750/1998 of 31 July 1998 on regulation of fees laid down by Law 11/1998 (BOE No 205 of 27 August 1998, p. 29227), of which Articles 3 to 8 provide:

'*Article 3* Chargeable event

The activity carried out by the [TMC] for the purposes of implementing the scheme of general authorisations or individual licences for the supply of services to third parties shall constitute the chargeable event.

Article 4 Chargeable person

Natural or legal persons who are holders of general authorisations or individual licences for the supply of services to third parties shall be chargeable persons.

Article 5 Basis of assessment

The basis of assessment shall be the gross operating income invoiced in the relevant year, as defined in Article 71 of [Law 11/1998].

Article 6 Rate

The rate initially applicable shall be the rate set out in paragraph 1 of the third transitional provision until such time as it may be replaced by a rate determined pursuant to legislation from time to time in force.

Article 7 Fee payable

The fee payable shall be the amount obtained by applying the rate in force pursuant to the relevant Finance Law to the basis of assessment.

Article 8 Payment

The fee shall become due on 31 December each year.

Notwithstanding the above, if, for reasons attributable to the holder, the authorisation or licence is cancelled prior to 31 December, the fee shall become payable on the date of such occurrence.'

The dispute in the main proceedings and the question referred for a preliminary ruling

14 Telefónica brought an administrative appeal before the Audiencia Nacional (National High Court) against the assessments issued against it by the TMC, which was dismissed by judgment of that court of 10 February 2004, on the ground that there was a full correlation between the chargeable event, which was the holding of general authorisations or individual licences, and the basis of assessment, which was the gross income earned by the holder of the authorisation or licence. Telefónica lodged an

appeal on a point of law against that judgment before the Tribunal Supremo (Supreme Court).

15 On the view that the outcome of the proceedings before it depends on the interpretation of Directive 97/13, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Directive [97/13] and, in particular, Article 6 thereof, permit Member States to charge holders of general authorisations an annual fee which is calculated on the basis of a percentage of gross operating income invoiced in the relevant year, subject to such amount not exceeding two per thousand, and which is applied for the purpose of defraying the costs, including management costs, incurred by the telecommunications regulatory body in the implementation of the scheme of licences and general authorisations, as provided for in Article 71 of [Law 11/1998]?'

Consideration of the question referred

16 By its question, the national court asks, in essence, whether Article 6 of Directive 97/13 must be interpreted as precluding legislation of a Member State introducing a fee imposed on holders of general authorisations, which is calculated annually on the basis of the gross operating income of the chargeable operators and is applied for the purpose of defraying the administrative costs connected with the implementation of the scheme of general authorisations and individual licences.

17 In that regard, it should be pointed out from the outset that, while the national legislation at issue in the main proceedings applies both to holders of general authorisations and to holders of individual licences, the reference for a preliminary ruling relates only to the interpretation of those provisions of Directive 97/13 relating to fees imposed upon holders of general authorisations.

18 As is clear from recitals 1 and 3 to 5 in the preamble, Directive 97/13 is among the measures adopted to achieve the complete liberalisation of telecommunications services and infrastructures. To that end, Directive 97/13 established a common framework applicable to authorisation schemes, intended to facilitate significantly the entry of new operators into the market. In addition to laying down rules for authorisation procedures and the content of authorisations, that framework sets out the nature and scope of the financial payments related to those procedures which Member States may impose on undertakings in the field of telecommunications services (Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449, paragraphs 35 and 36, and Case C-85/10 *Telefónica Móviles España* [2011] ECR I-1575, paragraph 20).

19 The common framework which Directive 97/13 seeks to establish would be rendered redundant if Member States were free to establish the financial charges to be borne by undertakings in the sector. Accordingly, Member States may not levy any fees or charges in relation to authorisation procedures other than those provided for by that directive (Cases C-339/04 *Nuova società di telecomunicazioni* [2006] ECR I-6917, paragraph 35, and *Telefónica Móviles España,* paragraph 21).

20 As is stated in recital 12 in the preamble to Directive 97/13, those payments must be based on objective, non-discriminatory and transparent criteria. Moreover, they must not conflict with the objective of the complete liberalisation of the market, which implies opening it completely to competition (*Albacom and Infostrada*, paragraph 37, and *Telefónica Móviles España*, paragraph 22).

21 As regards, more specifically, any fees imposed by Member States on undertakings which hold general authorisations, Article 6 of Directive 97/13 provides that, besides financial contributions to the provision of universal service, they are to seek only to cover the administrative costs relating to the general authorisations procedures.

22 The effect of Article 6 is that those fees may cover only the costs incurred in four administrative activities, namely the issue, management, control and enforcement of the applicable general authorisation scheme.

23 Although such fees may cover so-called 'general' administrative costs, those must, however, relate only to the four activities referred to in the previous paragraph and the fees may not thus include expenditure relating to other tasks such as the general supervisory activities of the national regulatory authority and, in particular, monitoring possible abuses of a dominant position. Indeed, that form of monitoring goes beyond the work strictly generated by the implementation of general authorisations (see, by analogy, as regards the fees imposed pursuant to Article 11 of Directive 97/13, Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraphs 32, 34 and 35).

24 Furthermore, any fees imposed on undertakings as part of the general authorisation procedures must, under the very terms of Article 6 of Directive 97/13, be published in an appropriate and sufficiently detailed manner so as to be readily accessible.

25 On the other hand, Article 6 of Directive 97/13 provides neither for a specific method for determining the amount of such a fee nor for the methods of collecting it.

26 It follows from the above that Member States are entitled to impose a fee such as that at issue in the main proceedings on holders of general authorisations in order to finance the activities of the national authority responsible for management of the general authorisation system, the amount of which must be determined on the basis of objective, non-discriminatory and transparent criteria.

27 It also follows that such a fee may only cover the costs resulting from the administrative activities referred to in paragraph 22 of this judgment. Thus, the combined revenue received by Member States by way of the fee at issue cannot exceed all of the costs incurred in those administrative activities, which is a matter for the national court to ascertain.

28 However, contrary to what Telefónica claims in its written observations submitted to the Court, Directive 97/13 cannot be interpreted to the effect that there must be an exact correlation between the amount of the fee imposed on a chargeable operator and the costs actually incurred by the competent national authority and relating to that operator for a specific period, given that no provision of Directive 97/13 requires such a correlation.

29 In that regard, it is important to note, firstly, that Directive 97/13 merely states, in Articles 6 and 11, that the fees imposed on holders of general authorisations and holders of individual licences may 'seek only' to cover the administrative costs incurred respectively in the issue, management, control and enforcement of the applicable general authorisations scheme or the individual licences. Secondly, while the second sentence of Article 11(1) of that directive expressly provides that the amount of the fee claimed must be proportionate to the work involved (see, to that effect, *i-21 Germany and Arcor*, paragraph 39), it is important on the other hand to note that Article 6 does not impose the requirement of a proportionate relationship between the fee applicable to general authorisations granted to a chargeable operator and the

work involved in the issue, management, control and enforcement of those general authorisations for that operator.

30 Moreover, that is borne out by Article 12 of the Authorisation Directive which, even if it is inapplicable *ratione temporis* to the main proceedings, provides in paragraph 1(b) that any administrative charges incurred in the enforcement of the general authorisation scheme are to be imposed upon the individual undertakings in a proportionate manner. It follows that the criterion of proportionality provided for in Article 12 relates to the imposition of administrative costs upon chargeable persons and not to the relationship between the fee applicable to general authorisations and the work involved.

31 As regards whether Member States are entitled to determine, as does the legislation at issue in the main proceedings, the amount of that fee on the basis of the gross operating income of the chargeable persons, it must be considered, firstly, as was pointed out by the Spanish and Portuguese Governments and by the Commission in their written observations submitted to the Court, whether it is an objective, transparent and non-discriminatory criterion. Secondly, that criterion for determining the amount is not, as observed by the Commission at the hearing, unconnected with the costs incurred by the competent national authority.

32 In those circumstances, Directive 97/13 does not preclude Member States from determining the amount of a fee under Article 6 of that directive on the basis of the gross operating income of the chargeable persons.

33 Such an interpretation is, moreover, borne out by recital 31 in the preamble to the Authorisation Directive, under which turnover can be considered to be a fair, simple and transparent criterion of attribution of such a fee between the holders of general authorisations.

34 As regards whether Member States may impose on holders of general authorisations an annual fee aimed at defraying administrative costs, it must be noted that holders of general authorisations may be made liable to pay a fee to cover, in addition to the costs of issuing the general authorisation, the administrative costs incurred in the management, control and enforcement of the authorisation during its period of validity. These are costs incurred in activities which are, as a general rule, carried out continuously after the grant of a general authorisation. Accordingly, Article 6 of Directive 97/13 does not preclude holders of general authorisations being charged, periodically, a fee aimed at covering the administrative costs relating to the general authorisations procedures, such as the annual fee at issue in the main proceedings.

35 In the light of all of the foregoing considerations, the answer to the question referred is that Article 6 of Directive 97/13 must be interpreted as not precluding legislation of a Member State introducing a fee imposed on holders of general authorisations, calculated annually and on the basis of the gross operating income of the chargeable operators, which seeks to cover the administrative costs relating to the issue, management, control and enforcement of those authorisations, to the extent that the combined revenue received by that Member State by way of such a fee does not exceed all of those administrative costs, which is a matter for the national court to ascertain.

Costs

36 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 (Seventh Chamber) hereby rules:

Article 6 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 not precluding legislation of a Member State introducing a fee imposed on holders of general authorisations, calculated annually and on the basis of the gross operating income of the chargeable operators, which seeks to cover the administrative costs relating to the issue, management, control and enforcement of those authorisations, to the extent that the combined revenue received by that Member State by way of such a fee does not exceed all of those administrative costs, which is a matter for the national court to ascertain.

[Signatures]