JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 *

In Case C-85/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 19 January 2010, received at the Court on 12 February 2010, in the proceedings

Telefónica Móviles España SA

v

Administración del Estado,

Secretaría de Estado de Telecomunicaciones,

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz (Rapporteur), Judges,

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

having regard to the written procedure and further to the hearing on 20 January 2011,

after considering the observations submitted on behalf of:

— Telefónica Móviles España SA, by M. Lanchares Perlado, Procurador, and by J. Garciá Muñoz and A. Moreno Rebollo, abogados,

— the Spanish Government, by J.M. Rodríguez Cárcamo, acting as Agent,

— the European Commission, by L. Lozano Palacios and C. Vrignon, and by G. Braun, 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 11(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications (OJ 1997 L 117, p. 15).

2 The reference has been made in proceedings between Telefónica Móviles España SA ('Telefónica Móviles'), on the one hand, and the Administración del Estado and the Secretaría de Estado de Telecomunicaciones, on the other, concerning the assessment relating to the period from 1 November to 31 December 2001 as to the fee for allocating public radio frequencies necessary for the provision of telecommunications services.

Legal context

European Union ('EU') legislation

Directive 97/13

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

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

5 According to recital 4 to Directive 97/13, 'conditions attached to authorisations are necessary in order to attain public interest objectives to the benefit of telecommunications users', and 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 to Directive 97/13 states that the directive 'will make a significant contribution to the entry of new operators into the market, as part of the development of the Information Society'.

7 Recital 12 to Directive 97/13 states that '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 limitation on the number of individual licences, Article 10(1) of Directive 97/13 provides:

'Member States may limit the number of individual licences for any category of telecommunications services and for the establishment and/or operation of telecommunications infrastructure, only to the extent required to ensure the efficient use of radio frequencies or for the time necessary to make available sufficient numbers in accordance with Community law'.

9 As regards the fees and charges for individual licences, Article 11 of Directive 97/13 provides:

'1. Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and

be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.

2. Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

Directive 2002/20/EC

10 Recital 32 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:

'In addition to administrative charges, usage fees may be levied for the use of radio frequencies and numbers as an instrument to ensure the optimal use of such resources. Such fees should not hinder the development of innovative services and competition in the market. This Directive is without prejudice to the purpose for which fees for rights of use are employed. Such fees may for instance be used to finance activities of national regulatory authorities that cannot be covered by administrative charges. …'

National legislation

11 As regards the fee for the allocation of public radio frequencies, Article 73 of General Law 11/1998 on Telecommunications (Ley No 11/1998 General de Telecomunicaciones) of 24 April 1998 (BOE No 99 of 25 April 1998, p.13909) ('Law 11/1998'), in its original version, provided:

'1. The allocation of a public radio frequency to one or more persons or entities is subject to an annual fee being levied in accordance with the conditions set out in this article. The amount of this fee shall be used to fund research and training in the field of telecommunications and the performance of the public service obligations provided for under Articles 40 and 42 of the present Law.

In order to calculate the amount of the fee which is payable, account must be taken of the market value of the use of the allocated frequency and the potential profitability for the beneficiary.

In order to determine the market value and the potential profitability for the beneficiary of the allocated frequency, account must be taken, inter alia, of the following factors:

(1) the level of use and of congestion of the various frequency bands in the various geographical areas;

(2) the type of service for which the allocation is to be used and, in particular, whether it entails public service obligations as laid down in Title III;

(3) the allocated frequency band or sub-band in the spectrum;

(4) the equipment and technology used;

(5) the commercial value derived from the use or exploitation of the allocated public radio frequencies.

2. The total fee to be paid shall be calculated by multiplying the number of units of public radio frequency allocated ["allocated frequency units"] allocated by the value assigned to each unit. In the island territories, the area to be used for calculating the allocated frequency units in order to determine the corresponding fee shall be determined by excluding the coverage not requested which includes the maritime area. For the purposes of the present paragraph, [allocated frequency unit] means a standard measurement corresponding to the actual or potential occupation, for a period of one year, of a bandwidth of one kilohertz over an area of one square kilometre.

3. The weight to be attributed to the factors listed above shall be determined by the Ministerial Order referred to in Article 16, unless the number of licences is to be limited, in accordance with Articles 20 and 21. In those circumstances, the determination shall be made by the Ministerial Order approving the tendering specifications of the corresponding call for tenders.

…

8. The amount of the fee governed by the present article shall serve to cover the costs incurred in applying the licensing system provided for under the present Law, should the fees and charges laid down in Article 71, 72 and 74 prove insufficient.'

12 In accordance with Article 73(3) of Law 11/1998, Annex II to the Order of the Minister for Internal Development of 22 September 1998 establishing the rules applicable to individual licences for telecommunications services and networks and the conditions to be met by licence-holders defined those five component factors of the fee, laid down in Article 73(1) of that law, referring to them as coefficients C1 to C5 respectively, attributing to them a value. The allocated frequency unit was accordingly set at ESP 0.0544, equivalent to EUR 0.000327.

13 Article 73 of Law 11/1998 was amended by Article 14 of Law 14/2000 on fiscal, administrative and social measures (Ley 14/2000 de Medidas fiscales administrativas y del orden social) of 29 December (BOE No 313 of 30 December 2000, p. 46631), inter alia, through the deletion of the second sentence of the first subparagraph of Article 73(1) and Article 73(8). Moreover, Article 73(3) was amended to the effect that the weight to be attributed to each of the five component factors was to be determined by the Finance Law.

14 Pursuant to Article 73(3) of Law 11/1998, Article 66 of Law 13/2000, the 2001 Finance Law (Ley 13/2000 de Presupuestos Generales del Estado para el año 2001) of 28 December 2000 (BOE No 312 of 29 December 2000, p. 46513) set the five factors for 2001. The resulting amount, payable for spectrum use by second generation digital telephony systems (GSM and DCS-1800), was increased for the year 2001 as compared with the level reached for the year 2000, whereas the amounts for spectrum use by analogue technologies were not changed.

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

15 Telefónica Móviles provides telecommunications services on the Spanish market. During the year 1998, Telefónica Móviles concluded a public services operation agreement with the Spanish State, for the provision of a 'value added telecommunications service' for personal mobile communications throughout the country using the DCS-1800 system.

16 Telefónica Móviles was awarded the public radio frequencies necessary for the provision of the service and it was agreed that the applicable fee would be the figure obtained by multiplying the number of allocated frequency units by the price per unit in force at the time of payment.

17 After submitting a complaint in respect of an assessment for the period from 1 November to 31 December 2001, which was dismissed by the competent administrative authority, Telefónica Móviles lodged an administrative appeal, which was also dismissed. Claiming that the Spanish legislation in force at the material time contravened Article 11 of Directive 97/13, Telefónica Móviles brought an appeal on a point of law before the referring court.

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

'1. On a proper construction of Article 11(2) of Directive [97/13] and, in particular, the requirements to ensure optimal use of scarce resources and to foster innovative services, is it contrary to those provisions for national legislation to separate the proceeds of a charge on this type of resource (the fee for allocation of public

radio frequencies) from the specific purpose for which it was previously expressly earmarked (the funding of research and training in the field of telecommunications and the performance of public service obligations), without specifying any other particular purpose?

2. Is it contrary to Article 11(2) [of Directive 97/13/EC] and, in particular, the requirements to ensure optimal use of scarce resources and to foster innovative services, for national legislation to increase, significantly and without apparent justification, the amount of the fee for a DCS-1800 digital system whilst leaving it unchanged for first generation analogue systems such as TACS?'

Consideration of the questions referred

19 By those questions, which should be considered together, the national court seeks to establish whether the requirements laid down in Article 11(2) of Directive 97/13 – under which a charge imposed on operators of telecommunications services for the use of scarce resources must seek to ensure optimal use of those resources and must take into account the need to foster the development of innovative services and competition – must be interpreted as precluding national legislation which provides for a fee to be levied on operators of telecommunications services holding individual licences for the use of radio frequencies, but does not allocate a specific use to the income derived from that fee, and which significantly increases the fee for a particular technology but leaves it unchanged for another.

20 As is clear from recitals 1, 3, 4 and 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).

21 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 (*Albacom and Infostrada*, paragraph 38). Accordingly, Member States may not levy any fees or charges in relation to authorisation procedures other than those provided for by Directive 97/13 (Case C-339/04 *Nuova società di telecomunicazioni* [2006] ECR I-6917, paragraph 35).

22 As is stated in recital 12 to Directive 97/13, those charges 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).

23 As regards, more specifically, any fees imposed by Member States on undertakings which hold individual licences under Article 11 of Directive 97/13, Article 11(1) provides that those fees are to seek only to cover the administration costs generated by the work involved in implementing those licences (Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 28).

24 As regards the use of scarce resources, Article 11(2) of Directive 97/13 authorises Member States to set, in addition to charges designed to cover administration costs, a supplementary charge with the purpose of ensuring optimal use of such resources (see, to that effect, Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net and Firma O2* [2005] ECR I-8877, paragraph 23). In addition, that supplementary charge must, under the terms of Article 11, be non-discriminatory and take into account the need to foster the development of innovative services and competition.

25 Article 11(2) of Directive 97/13 accordingly lays down the requirements with which Member States must comply in determining the amount of a charge for the use of scarce resources, without thereby expressly providing a specific method for determining the amount of such a charge or the use which must subsequently be made of the income from that charge.

26 It should therefore be determined whether the requirements laid down in Article 11(2) of Directive 97/13, referred to in the questions referred, circumscribe the use which Member States may make of income obtained from the charge at issue or even the amounts determined in respect of those different technologies.

27 It is also apparent from the European Commission's written observations that the authorisation to use public property which constitutes a scarce resource enables the holder of that authorisation to make significant economic gains and grants that holder advantages as compared with other operators who are also seeking to use and exploit that resource, which justifies imposing a charge which reflects, inter alia, the value of the use of the scarce resource at issue.

28 In those circumstances, as the Spanish Government and the Commission have argued, the purpose of ensuring that operators make optimal use of scarce resources to which they have access means that the charge must be set at an appropriate level to reflect inter alia the value of the use of those resources, which requires account to be taken of the economic and technical situation of the market concerned.

29 An excessive charge is likely to discourage the use of the scarce resources at issue and thereby result in under-utilisation of those resources. Similarly, too low a charge risks undermining the efficiency of the use of those resources.

30 As regards the requirement that the need to foster the development of innovative services and competition be taken into account, this entails that the amount of the charge cannot have the effect of hindering the access of new operators to the market or of reducing the capacity of telecommunications service operators for innovation (see, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 125). It also means that competition must not be distorted, which can be guaranteed only if equality of opportunity is secured as between the various economic operators (see, to that effect, *ISIS Multimedia Net and Firma O2*, paragraphs 38 and 39).

31 Thus, Member States cannot, in principle, apply different charges to competing operators for the use of scarce resources whose values appear to be equivalent in economic terms (see, to that effect *ISIS Multimedia Net and Firma O2*, paragraphs 40 and 41).

32 Directive 97/13 does not in any way indicate, however, as regards the establishment of full competition on the market for telecommunications services, that the requirements laid down in Article 11(2) thereof, referred to in the questions, would mean that the charge at issue must be used for a particular purpose, or that a particular use must be subsequently made, of the income from that charge, by the Member State concerned. It follows that the Member State concerned can freely use that income.

33 That is borne out, moreover, by the 'Authorisation' Directive, even if it is inapplicable *ratione temporis* to the case before the national court, recital 32 to which states that Member States should be able to levy usage fees for the use of radio frequencies and numbers as an instrument to ensure the optimal use of such resources, without the directive circumscribing the purpose for which fees for rights of use are employed.

34 Furthermore, the requirements that a charge imposed on operators of telecommunications services for the use of scarce resources must ensure an optimal use of those resources and must take account of the need to foster the development of innovative services and competition cannot, in light of the foregoing, preclude Member States from establishing, for the purposes of determining the amount of that charge, a distinction – even a significant one – between, on the one hand, the digital or analogue technology used and, on the other, within each technology, the different uses which are made of it, so that equality of opportunity is secured as between the various economic operators.

35 In addition, those requirements cannot, in principle, prevent Member States from increasing, even significantly, the charge payable for a particular technology in response to both technical and economic developments on the market for telecommunications services, but leaving unchanged the charge for another technology, provided that the

different amounts imposed reflect the respective economic values of the uses made of the scarce resource at issue.

36 Lastly, the sole fact that such an increase in the amount of the charge is substantial – which, in the present case, is common ground between the parties which submitted written observations to the Court – does not in itself mean that this is incompatible with the purpose that a charge for the use of scarce resources must have under Article 11(2) of Directive 97/13, in so far as the requirements arising from that purpose are respected, that is to say, provided that the charge is neither excessive nor too low.

37 It is for the national court, however, to determine whether the national legislation at issue in the main proceedings complies with the conditions laid down in paragraphs 34 to 36 of this judgment.

38 In those circumstances, it must be held that the requirements laid down in Article 11(2) of Directive 97/13, referred to in the questions referred, do indeed influence the level of that charge, but do not oblige Member States to use that charge for a particular purpose or to use the income from that charge in a particular manner.

39 The fact that a Member State had previously, in its legislation, allocated income from the charge levied on the use of scarce resources to fund research and training in the field of telecommunications – as was provided under the second sentence of the first subparagraph of Article 73(1) of Law 11/1998, in its original version – cannot have any bearing on the interpretation of Directive 97/13 and thus does not call into question the above assessment.

40 In the light of all the foregoing, the answer to the questions referred is that the requirements laid down in Article 11(2) of Directive 97/13 – under which a charge imposed on operators of telecommunications services for the use of scarce resources must seek to ensure optimal use of those resources and must take into account the need to foster the development of innovative services and competition – must be interpreted as not precluding national legislation which provides for a fee to be levied on operators of telecommunications services holding individual licences for the use of radio frequencies, but does not allocate a specific use to the income derived from that fee, and which significantly increases the fee for a particular technology but leaves it unchanged for another.

Costs

41 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:

The requirements laid down in Article 11(2) of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications – under which a charge imposed on operators of telecommunications services for the use of scarce resources must seek to ensure optimal use of those resources and must take into account the need to foster the development of innovative services and competition – must be interpreted as not precluding

national legislation which provides for a fee to be levied on operators of telecommunications services holding individual licences for the use of radio frequencies, but does not allocate a specific use to the income derived from that fee, and which significantly increases the fee for a particular technology but leaves it unchanged for another.

[Signatures]