Joined Cases C-392/04 and C-422/04

i-21 Germany GmbH and Arcor AG & Co. KG, formerly ISIS Multimedia Net GmbH & Co. KG

v

Bundesrepublik Deutschland

(References for a preliminary ruling from the Bundesverwaltungsgericht)

(Telecommunication services — Directive 97/13/EC — Article 11(1) — Fees and charges for individual licences — Article 10 EC — Primacy of Community law — Legal certainty — Final administrative decision)

Summary of the Judgment

1. *Approximation of laws — Telecommunications sector (European Parliament and Council Directive 97/13, Art. 11(1))*

2. Member States — Obligations — Obligation of cooperation
(Art. 10 EC; European Parliament and Council Directive 97/13, Art. 11(1))

1. Article 11(1) of Directive 97/13 on a common framework for general authorisations and individual licences in the field of telecommunications services precludes the application of a fee for individual licences calculated by taking into account the regulatory body's general administrative costs linked to implementing those licences over a period of 30 years.

It is clear from the wording of that provision that any fees imposed by the Member States on undertakings which hold individual licences seek only to cover the administration costs generated by the work involved in implementing those licences. Although the concept of administrative costs is sufficiently wide to cover so-called 'general' administrative costs, the latter must, however, relate only to the four activities expressly referred to in Article 11(1) of Directive 97/13. Furthermore, the fee must be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to render the information readily accessible. The calculation of those costs over a period of 30 years entails an extrapolation of the expenditure that may be incurred in the future which, by definition, does not represent the expenditure actually incurred. In the absence of a mechanism to revise the amount of fee claimed, that amount cannot be strictly proportionate to the work involved, as Article 11(1) of Directive 97/13 expressly requires.

(see paras 28, 29, 32, 33, 39, 42, operative part 1)

2. Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies. Compliance with that principle prevents administrative acts which produce legal effects from being called into question indefinitely. However, there may be a limit to this principle in certain cases. An administrative body responsible for the adoption of an administrative decision is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review and possibly to reopen that decision if four conditions are fulfilled. First, the admin-

istrative body must, under national law, have the power to reopen that decision. Secondly, the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance. Thirdly, that judgment must, in the light of a decision given by the Court subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling in the circumstances set out in the third paragraph of Article 234 EC. Fourthly, the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court. The undertaking is thus required to have exhausted all legal remedies available to it.

Moreover, the principle of equivalence requires that all the rules applicable to appeals, including the prescribed time-limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law. It follows that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'downright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act which does not comply with Community law.

Accordingly, where, pursuant to rules of national law, the authorities are required to withdraw an administrative decision which has become final if that decision is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law. In that regard, it is for the national court, pursuant to Article 10 EC, read in conjunction with Article 11(1) of Directive 97/13, to ascertain whether legislation which is clearly incompatible with Community law, such as the imposition of a very high fee to cover an estimation of the general costs over a period of 30 years, constitutes manifest unlawfulness within the meaning of the national law concerned. If that is the case, it is for the national court to draw the necessary conclusions under its national law with regard to the withdrawal of those assessments.

(see paras 51-53, 62, 63, 69-72, operative part 2)