



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2012\*

(Directive 2002/20/EC — Electronic communications networks and services — Authorisation — Article 13 — Fees for rights of use and rights to install facilities)

In Joined Cases C-55/11, C-57/11 and C-58/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decisions of 28 and 29 October and 3 November 2010 respectively, received at the Court on 7 February 2011, in the proceedings

**Vodafone España SA**

v

**Ayuntamiento de Santa Amalia (C-55/11),**

**Ayuntamiento de Tudela (C-57/11),**

and

**France Telecom España SA**

v

**Ayuntamiento de Torremayor (C-58/11),**

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 January 2012,

after considering the observations submitted on behalf of:

— Vodafone España SA, by M. Muñoz de Juan, E. Gardeta González, J. Viloría Gutiérrez and V.J. Buendía Sierra, abogados,

\* Language of the case: Spanish.

- France Telecom España SA, by E. Zamarriego Santiago, M. Muñoz de Juan and J. Buendía Sierra, abogados,
- the Ayuntamiento de Tudela, by T. Quadra-Salcedo Fernández del Castillo and J. Zornoza Pérez, abogados,
- the Spanish Government, by M. Muñoz Pérez and S. Centeno Huerta, acting as Agents,
- the Polish Government, by M. Szpunar, acting as Agent,
- the European Commission, by G. Braun and F. Jimeno Fernández, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2012,

gives the following

### **Judgment**

- 1 These references for a preliminary ruling concern the interpretation of Article 13 of 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).
- 2 The references have been made in proceedings between, first, Vodafone España SA ('Vodafone España') and the Ayuntamientos de Santa Amalia (C-55/11) and de Tudela (C-57/11), and, second, France Telecom España SA ('France Telecom España') and the Ayuntamiento de Torremayor (C-58/11) concerning the fees which Vodafone España and France Telecom España were subject to for the private use and the special right of use for the area under and on municipal public land.

### **Legal context**

#### *European Union law*

- 3 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), provides in Article 11:

'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.'

- 4 Directive 97/13 was repealed by Article 26 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, 'Framework Directive').

5 Article 11(1) of the Framework Directive is worded as follows:

‘Member States shall ensure that when a competent authority considers:

- an application for the granting of rights to install facilities on, over or under public or private property to an undertaking authorised to provide public communications networks, or

...

The competent authority:

- acts on the basis of transparent and publicly available procedures, applied without discrimination and without delay, and
- follows the principles of transparency and non-discrimination in attaching conditions to any such rights.

...’

6 Article 12 of the Framework Directive provides:

‘1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall encourage the sharing of such facilities or property.

2. In particular where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network or take measures to facilitate the coordination of public works only after an appropriate period of public consultation during which all interested parties must be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.’

7 Recitals 30 to 32 of the Authorisation Directive state:

‘(30) Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority in managing the authorisation system and for the granting of rights of use. Such charges should be limited to cover the actual administrative costs for those activities. For this purpose transparency should be created in the income and expenditure of national regulatory authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.

(31) Systems for administrative charges should not distort competition or create barriers for entry into the market. With a general authorisation system it will no longer be possible to attribute administrative costs and hence charges to individual undertakings except for the granting of rights to use numbers, radio frequencies and for rights to install facilities. 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.

(32) 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. Where, in the case of competitive or comparative selection procedures, fees for rights of use for radio frequencies consist entirely or partly of a one-off amount, payment arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio frequencies. The Commission may publish on a regular basis benchmark studies with regard to best practices for the assignment of radio frequencies, the assignment of numbers or the granting of rights of way.'

8 Article 13 of the same directive, entitled 'Fees for rights of use and rights to install facilities', states:

'Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property which reflect the need to ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of [the Framework Directive].'

9 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), states in the first subparagraph of Article 12(1) thereof:

'A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.'

#### *Spanish legislation*

10 General Law 32/2003 on telecommunications (Ley 32/2003, General de Telecomunicaciones) of 3 November 2003 (BOE No 264 of 4 November 2003, p. 38890), as is apparent from its preamble, transposed into Spanish law the telecommunications directives adopted in 2002, including the Authorisation Directive.

11 Under Article 49 of that law:

'1. Operators and holders of rights of use of public radio frequencies or numbering resources shall be liable for payment of the charges laid down by law.

2. Those charges shall be used to cover:

(a) the administrative costs incurred in regulatory work involving preparation and implementation of secondary Community legislation and administrative acts, such as those relating to interconnection and access;

(b) the costs incurred in the management, control and enforcement of the scheme laid down in this Law;

- (c) the costs incurred in the management, control and enforcement of rights of occupation of public land and rights of use of public radio frequencies and numbering;
- (d) the management of the notifications governed by Article 6 of this Law;
- (e) the costs of international cooperation, harmonisation and standardisation and market analysis.

3. Without prejudice to paragraph 2, the charges imposed for use of public radio frequencies, numbering and the public land needed for the installation of electronic communications networks shall be used to cover the requirement to ensure the optimal use of those resources, account being taken of the value of the property in respect of which a right of use is granted and its scarcity. Those charges must be non-discriminatory, transparent, objectively justified and proportionate to their aim. In addition, they must promote the fulfilment of the objectives and principles laid down in Article 3, in the terms laid down by regulation.

4. The charges referred to in the preceding paragraphs shall be imposed in an objective, transparent and proportionate manner so that additional administrative costs and attendant charges are minimised.

5. The Ministerio de Ciencia y Tecnología (Ministry of Science and Technology), the Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission) and the Agencia Estatal de Radiocomunicaciones (State Agency for Radiocommunications), together with the regional authorities which manage and calculate the charges under paragraph 2, shall publish a yearly overview of the administrative costs which justify their imposition and of the total sum collected.'

- 12 Royal Legislative Decree No 2/2004, approving the revised text of the law governing local finances (Real Decreto Legislativo 2/2004, por el que se aprobó el texto refundido de la Ley reguladora de las Haciendas Locales), of 5 March 2004 (BOE No 59 of 9 March 2004, p. 10284), provides, in Article 20(1) and (3), for the right for local authorities to impose charges for the private use, or the special right of use, of local public land, in particular, the area under, on and over municipal public roads.

### **The actions in the main proceedings and the questions referred for a preliminary ruling**

- 13 It is apparent from the decisions to refer that, in accordance with Spanish law, several municipalities of the Kingdom of Spain, including the Ayuntamientos de Santa Amalia, de Tudela and de Torremayor, adopted regulations which charge undertakings fees for the private use, or the special right of use, of municipal public land in order to provide utility services which are in the public interest, whether or not those undertakings are proprietors of the facilities necessary for that provision of services and materially occupy that land. The provision of mobile telephony services is included in the services on which a fee is charged pursuant to those regulations.
- 14 Vodafone España and France Telecom España are telecommunications operators which provide mobile telephony services in Spain.
- 15 Vodafone España brought appeals against the regulations adopted by the Ayuntamientos de Tudela and de Santa Amalia respectively before the Tribunal Superior de Justicia de Navarra (High Court of Justice, Navarra) (Spain) and the Tribunal Superior de Justicia de Extremadura (High Court of Justice, Extremadura) (Spain). France Telecom España, for its part, brought an appeal before the Tribunal Superior de Justicia de Extremadura against the tax regulation adopted by the Ayuntamiento de Torremayor. In those appeals, the operators disputed the compliance of those regulations with

European Union law. The actions were dismissed by judgments of 30 December 2008 of the Tribunal Superior de Justicia de Navarra and of 12 and 29 June 2009 of the Tribunal Superior de Justicia de Extremadura.

- 16 Vodafone España therefore appealed in cassation to the Tribunal Supremo (Supreme Court) (Spain) against the judgments of 30 December 2008 of the Tribunal Superior de Justicia de Navarra and of 12 June 2009 of the Tribunal Superior de Justicia de Extremadura. France Telecom España appealed in cassation against the judgment of 29 June 2009 to the Tribunal Superior de Justicia de Extremadura.
- 17 In the orders for reference, the Tribunal Supremo first analysed Articles 12 and 13 of the Authorisation Directive and expressed a doubt concerning the competence of Member States to impose a fee for the right to install resources not only on the operator who is the proprietor of the electronic telecommunications network but also on operators who merely receive interconnection services and who, as a result, are limited to having access to that network and to using it.
- 18 Second, the referring court raises the question whether the fees at issue satisfy the requirements of Article 13 of the Authorisation Directive.
- 19 Third, the Tribunal Supremo is of the opinion that it must also be verified whether Article 13 of the Authorisation Directive fulfils the conditions laid down in the case-law of the Court of Justice to have direct effect. It states that the case-law of the Court of Justice concerning the direct effect of Article 11(2) of Directive 97/13 seems to indicate that it has direct effect.
- 20 In those circumstances, the Tribunal Supremo decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-55/11, C-57/11 and C-58/11, to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 13 of [the Authorisation Directive] be interpreted as precluding national legislation under which a fee may be required for the right to install facilities on municipal public land from operating undertakings which, without being proprietors of the network, use it to provide mobile telephony services?
- (2) In the event that the levy is found to be compatible with Article 13 of [the Authorisation Directive], do the conditions in accordance with which the fee is required under the contested local regulation satisfy the requirements of objectivity, proportionality and non-discrimination laid down in that provision, together with the need to ensure the optimal use of the resources concerned?
- (3) Is it appropriate to recognise Article 13 of [the Authorisation Directive] as having direct effect?’
- 21 By Order of the President of the Court of 18 March 2011, Cases C-55/11, C-57/11 and C-58/11 were joined for the purposes of the written and oral procedure as well as the judgment.

### **The request to have the oral procedure reopened**

- 22 By letter lodged at the Court Registry on 25 April 2012, the Ayuntamiento de Tudela requested that the oral procedure be reopened, maintaining that the Opinion of the Advocate General, delivered on 22 March 2012, was based on incorrect premisses.

- 23 In that regard it is settled case-law that the Court may order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information or that the case should be examined on the basis of an argument which has not been the subject of debate between the parties (see, *inter alia*, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-323/09 *Interflora and Interflora British Unit* [2011] ECR I-8625, paragraph 22).
- 24 In the present case, the Court is of the view that it has all the material necessary to answer the questions raised by the referring court and that there is no need to consider the case by reference to an argument which has not been the subject of debate before it.
- 25 Accordingly, there is no need to grant the request of the Ayuntamiento de Tudela for the reopening of the oral procedure.

### **Consideration of the questions referred**

#### *The first question*

- 26 By its first question the referring court asks, in essence, whether national legislation which imposes a charge for the use of municipal public land not only on operators who are proprietors of the telephony networks on that land but also on operators holding rights of use, access or interconnection to those networks, is within the scope of the possibility offered to Member States by Article 13 of the Authorisation Directive to impose fees for ‘the rights to install facilities on, over or under public or private property’ in order to take account of the need to ensure the optimal use of these facilities.
- 27 In particular, the referring court inquires of the Court of Justice whether such a charge may be imposed not only on the operator who, in accordance with Article 11(1) of the Framework Directive, is holder of rights to install facilities on, over or under public property and who, in accordance with Article 12 of that directive and with Article 12 of the Access Directive, may have to share those facilities, but also on operators providing mobile telephony services using those facilities.
- 28 As a preliminary point, it should be noted that, within the framework of the Authorisation Directive, Member States may not levy any fees or charges in relation to the provision of networks and electronic communication services other than those provided for by that directive (see, by analogy, Case C-339/04 *Nuova società di telecomunicazioni* [2006] ECR I-6917, paragraph 35, and Case C-85/10 *Telefónica Móviles España* [2011] ECR I-1575, paragraph 21).
- 29 As is apparent from recitals 30 to 32 and Articles 12 and 13 of the Authorisation Directive, Member States are thus only entitled to impose either administrative charges to cover the administrative costs incurred in the management, control and enforcement of the general authorisation scheme or fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property.
- 30 In the main proceedings, the referring court seems to start from the premiss that the charges at issue do not fall within the scope of Article 12 of that directive or the concept of fees for the rights of use for radio frequencies or numbers within the meaning of Article 13 thereof. The question therefore concerns solely the fact whether the possibility for Member States to impose fees for the ‘rights to install facilities on, over or under public or private property’ under Article 13 permits the application of fees such as those at issue in the main proceedings, in so far as they apply to operators which, without being proprietors of those facilities, use them to provide mobile telephony services and thereby use that public property.

- 31 Although neither the concept of installation of facilities on, over or under public or private property nor the person responsible for paying the fee for the rights relating to that installation are defined as such in the Authorisation Directive, it must be noted first, that, it follows from the first indent of Article 11(1) of the Framework Directive that the rights to install facilities on, over or under public or private property are granted to an undertaking authorised to provide public communications networks, namely to one which is entitled to install the necessary facilities on, under or in the spaces above the ground.
- 32 Second, as the Advocate General noted at points 52 and 54 of her Opinion, the terms ‘facilities’ and ‘install’ refer to the physical infrastructure enabling provision of electronic communications networks and services and to their physical installation on the public or private property concerned.
- 33 Accordingly, the only person who may be charged the fee for the rights relating to the installation of facilities referred to in Article 13 of the Authorisation Directive is the holder of those rights, who is also the proprietor of the facilities installed on, over or under the public or private property concerned.
- 34 Therefore, the imposition of fees such as those at issue in the main proceedings cannot be accepted as being ‘fees for the rights to install facilities on, over or under public or private property’ within the meaning of Article 13 of the Authorisation Directive, in so far as they apply to operators who, without being proprietors of those facilities, use them to provide mobile telephony services and thereby use the public land.
- 35 Having regard to all of those considerations, the answer to the first question is that Article 13 of the Authorisation Directive must be interpreted as precluding the imposition of a fee for the right to install facilities on, over or under public or private property on operating undertakings which, without being proprietors of those facilities, use them to provide mobile telephony services.

*The second and third questions*

- 36 In view of the answer to the first question, it is necessary to answer only the third question of the referring court, by which it asks in essence whether Article 13 of the Authorisation Directive has direct effect, so that, in circumstances such as those in the main proceedings, an individual may rely upon it before the national courts.
- 37 In that regard, it should be noted that, according to the settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, to that effect, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103; Joined Cases C-152/07 to C-154/07 *Arcor and Others* [2008] ECR I-5959, paragraph 40, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33).
- 38 In this case, as the Advocate General noted at points 48, 97 and 98 of her Opinion, Article 13 of the Authorisation Directive satisfies those criteria. That provision provides, in unconditional and precise terms, that Member States may impose fees for rights in three specific cases, namely for the rights of use for radio frequencies or numbers or for the rights to install facilities on, over or under public or private property.

39 It follows from the foregoing that the answer to the third question is that Article 13 of the Authorisation Directive has direct effect and therefore it grants individuals the right to rely upon it before the national courts to dispute the application of a decision by a public authority that is incompatible with that article.

### **Costs**

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

1. **Article 13 of 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) must be interpreted as precluding the imposition of a fee for the right to install facilities on, over or under public or private property on operating undertakings which, without being proprietors of those facilities, use them to provide mobile telephony services.**
2. **Article 13 of Directive 2002/20 has direct effect and therefore it grants individuals the right to rely upon it before the national courts to dispute the application of a decision by the public authority that is incompatible with that article.**

[Signatures]