



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 March 2012¹

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

Vodafone España SA
v
Ayuntamiento de Santa Amalia (C-55/11),
Ayuntamiento de Tudela (C-57/11),
and
France Telecom España
v
Ayuntamiento de Torremayor (C-58/11)

(Reference for a preliminary ruling from the Tribunal Supremo (Spain))

(Electronic communications networks and services — Authorisation Directive — Fees for rights to install facilities — Direct effect)

1. These references for a preliminary ruling concern whether and, if so, under what conditions Article 13 of Directive 2002/20/EC² ('the Authorisation Directive') permits Member States to charge undertakings that use a network to provide mobile telephony services,³ but who are not the owners of that network, a fee for the right to install facilities on municipal public property. The Court is also asked whether that provision has direct effect.

Legal framework

European Union (EU) electronic communications directives

Directive 97/13/EC⁴

2. Directive 97/13 established a common framework for general authorisations and individual licences in the field of telecommunications services, based on principles that 'should cover all authorisations which are required for the provision of any telecommunications services and for the establishment and/or operation of any infrastructure for the provision of telecommunications services'.⁵

1 — Original language: English.

2 — Directive 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).

3 — I shall refer to undertakings providing mobile telephony services as mobile telephony operators.

4 — Directive 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).

5 — Recital 2 in the preamble to Directive 97/13.

3. Articles 6 and 11 dealt with fees and charges that Member States were permitted to impose for, respectively, general authorisation procedures and individual licences. Article 11(2) provided:

‘... 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.’

The 2002 package

4. Since 2002, electronic communications networks and services have been regulated principally by a package of five linked directives:⁶ the Framework Directive,⁷ the Authorisation Directive,⁸ the Access Directive,⁹ the Universal Service Directive¹⁰ and the Directive on privacy and electronic communications.¹¹ I shall refer to them jointly as ‘the 2002 package’.

– The Framework Directive

5. Article 8 of the Framework Directive defines the policy objectives and regulatory principles that Member States must ensure in implementing the 2002 package:

‘...’

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

- (a) ensuring that users ... derive maximum benefit in terms of choice, price, and quality;
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

...

3. The national regulatory authorities shall contribute to the development of the internal market by inter alia:

- (a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

...’

6 — Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) amended certain provisions of these directives but not Article 13 of the Authorisation Directive. It required implementation by 25 May 2011. The main proceedings concern municipal regulations adopted before that time. I shall therefore refer throughout this Opinion to the texts of the 2002 package prior to their amendment.

7 — 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).

8 — Cited in footnote 2 above.

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).

10 — Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51).

11 — Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

6. Article 11, entitled ‘Rights of way’,¹² sets out principles of transparency and non-discrimination that Member States must respect when their authorities consider applications for rights to install facilities on, over or under public or private property.

7. Under Article 12(1), Member States must encourage the sharing of facilities installed on, over or under public or private property.

8. Article 26 repealed Directive 97/13.¹³ Unlike Articles 6 and 11 of the latter directive, the Framework Directive does not deal expressly with fees and charges that Member States are permitted to impose. Those provisions are found in the Authorisation Directive.

– The Authorisation Directive

9. The Authorisation Directive ‘create[s] a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with [Article 52(1) TFEU] ...’.¹⁴ Recital 31 states that ‘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’.

10. The aim of the Authorisation Directive is ‘to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the [EU]’.¹⁵

11. The directive establishes a general authorisation scheme. Once authorisation is granted, Member States may no longer render the provision of electronic communications networks and services dependent on ‘an explicit decision or any other administrative act by the national regulatory authority’.¹⁶ They should use the least onerous general authorisation scheme possible to allow the provision of those networks and services¹⁷ and to offer undertakings certain entitlements under EU law.¹⁸

12. Article 4(1)(b) of the Authorisation Directive states that an undertaking holding a general authorisation must ‘have [its] application for the necessary rights to install facilities considered in accordance with Article 11 of [the Framework Directive]’.¹⁹ Member States may decide whether or not to grant those rights ‘to undertakings other than providers of electronic communication networks or services’.²⁰

12 — The term ‘rights of way’ in this directive appears to have a broader sense than that generally accepted in legal systems using the English language (and possibly other languages), encompassing as it does the right to install facilities on, over or under land rather than merely the right to pass over land. To avoid confusion, I shall enclose it in quotation marks in this Opinion to indicate that it is used in the sense meant by the directive.

13 — Article 26 of the Framework Directive.

14 — Recital 3 in the preamble to the Authorisation Directive. See also Article 3(1).

15 — Article 1(1) of the Authorisation Directive.

16 — Article 3(2) of the Authorisation Directive. See also recital 8 in the preamble.

17 — Recital 7 in the preamble to the Authorisation Directive. A general authorisation is the legal framework through which a Member State ‘ensur[es] rights for the provision of electronic communications networks or services and lay[s] down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive’: Article 2(2)(a) of the Authorisation Directive. The Annex to the Authorisation Directive sets out conditions that may be attached to a general authorisation.

18 — Article 4 of the Authorisation Directive. See also recital 10 in the preamble.

19 — See point 6 above.

20 — Recital 14 in the preamble to the Authorisation Directive.

13. An undertaking holding a general authorisation and providing electronic communications networks and services must also have the right to ‘negotiate interconnection with and where applicable obtain access to or interconnection from other providers ... under the conditions of and in accordance with [the Access Directive]’.²¹

14. If a Member State imposes ‘administrative charges ... on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted’, such charges must be consistent with the conditions in Article 12(1) of the Authorisation Directive. They must thus:

- ‘(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), which may include ... regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and
- (b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.’

15. Article 13 of the Authorisation Directive provides:

‘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].’²²

– The Access Directive

16. The Access Directive ‘harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities’.²³ It notes that ‘[a]n operator may own the underlying network or facilities or may rent some or all of them’.²⁴

17. ‘Access’ means ‘the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services’. It covers ‘access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means ..., access to physical infrastructure including buildings, ducts and masts; access to relevant software systems ... access to fixed and mobile networks ...’.²⁵

21 — Article 4(2)(a) of the Authorisation Directive.

22 — Where (like most other language versions) the English version of this provision speaks of rights to install *facilities* and the need to ensure optimal use of *resources*, some other versions (in particular, the Spanish, French and Portuguese) use the word ‘resources’ for both concepts. The distinction between them should be borne in mind when reading the Opinion in one of the latter group of languages, in particular with regard to the meaning of the first sentence in Article 13 and in the context of the second question raised.

23 — Article 1(1) of the Access Directive.

24 — Recital 3 in the preamble to the Access Directive.

25 — Article 2(a) of the Access Directive.

18. ‘Interconnection’ means ‘the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking’.²⁶

Directive 2002/77/EC²⁷

19. Directive 2002/77 sets out principles governing competition in the markets for electronic communications networks and services. Article 2(3) provides that ‘Member States shall ensure that no restrictions are imposed or maintained on the provisions of electronic communications services ... over infrastructures provided by third parties, or by measures of sharing networks, other facilities or sites’. This is without prejudice to the provisions of the 2002 package.

National legislation

20. By General Law No 32/2003,²⁸ Spain implemented the 2002 package. Article 49(3) of the General Law provides:

‘... 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.

...’

21. Under Spanish law, municipalities enjoy a degree of fiscal autonomy in the communications sector. Royal Legislative Decree No 2/2004²⁹ approved the revised text of the law governing local finances.³⁰ It grants local authorities the power to charge a fee for the private use or the special right of use of local public land and, in particular, the area under, on and over municipal public roads.³¹

22. There are two different bases for determining the fee payable. Under the general formula, the amount of the fee is calculated by reference to the market value of the use of the property had it not been in public ownership.³² Under the special formula, the fee is based on 1.5% of the gross turnover of the operator in the relevant municipality (less the costs of interconnection).³³ The latter formula is apparently applied in cases of intensive use and where it is difficult to set a value on the occupation of land held in public ownership. The general formula is applied in cases of less intensive or more occasional use. The special formula may not be used to calculate the fee payable by mobile telephony operators.

26 — Article 2(b) of the Access Directive.

27 — Commission Directive of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

28 — Ley General de Telecomunicaciones (‘the General Law’).

29 — Real Decreto legislativo 2/2004, de 5 de marzo, por el que se aprobó el texto refundido de la Ley Reguladora de las Haciendas Locales (‘the Royal Decree’).

30 — Texto refundido de la ley reguladora de las haciendas locales.

31 — Article 20(1) and (3) of the Royal Decree.

32 — Article 24(1)(a) of the Royal Decree.

33 — Article 24(1)(c) of the Royal Decree.

23. The municipalities of Torremayor, Santa Amalia and Tudela (amongst others) have implemented the General Law and the Royal Decree.³⁴

24. The municipality of Torremayor imposes a fee for:

‘... the right of private use or the special right of use in respect of the area under, on or over municipal public roads granted in favour of undertakings or entities which use public land for the provision of utility services which are in the public interest or which affect the majority or a significant part of the community’.³⁵

25. Mobile telephony is a service subject to that fee.³⁶

26. Article 2(2) of the Ordenanza Fiscal Torremayor provides that the special right of use is established ‘whenever, in order to provide a utility service, it is necessary to use antennas, facilities or networks, which materially occupy the area under, on or over municipal public roads, regardless of who owns them’.

27. Article 3(1) defines who is subject to the fee. Article 3(2) states:

‘... the operating undertakings and entities referred to in paragraph 1 shall be treated as liable for the charge both where they are the proprietors of the networks via which the utility service is provided and where they are not the proprietors but hold, in relation to those networks, the rights of use, access or interconnection.’

28. The municipality of Santa Amalia³⁷ has adopted an identical regulation. That adopted by the municipality of Tudela³⁸ is similar.

29. The municipalities use the same formula to calculate the fee.

30. To calculate the amount due, the basic fee is multiplied by a coefficient that reflects the market share of the operator to whom the fee is charged. The basic fee is calculated using a formula whose factors include estimated average telephone use per urban unit, the share of mobile telephony use, the number of fixed telephone lines installed in the municipality, the number of inhabitants in the municipality and estimated average telephony and service use per mobile telephone.

31. By way of example, in 2008 Tudela charged a fee of EUR 41 348 to Vodafone (based on a market share of 32.54%) and of EUR 21 830 to Orange (based on a market share of 17.18%).

The main proceedings and the questions referred

32. Each of the municipalities’ regulations has been challenged before the Spanish courts by mobile telephony operators who use facilities owned by other undertakings to provide their services.

34 — Around 1 390 municipalities have apparently implemented the relevant legislation based on one of the two model regulations prepared by the Federación Española de Municipios y Provincias. There are over 8 000 municipalities in Spain.

35 — Article 2(1) of the Ordenanza Fiscal reguladora de la tasa por aprovechamiento del dominio público a favor de empresas explotadoras de servicios de suministros de interés general, adopted by the Ayuntamiento de Torremayor (‘the Ordenanza Fiscal Torremayor’).

36 — Article 2(3) of the Ordenanza Fiscal Torremayor.

37 — Ordenanza Fiscal reguladora de la tasa por aprovechamiento especial del dominio público local a favor de empresas explotadoras de servicios de suministros de interés general, approved by the Pleno del Ayuntamiento de Santa Amalia (‘the Ordenanza Fiscal Santa Amalia’).

38 — Ordenanza Fiscal reguladora de las tasas por la utilización privativa o aprovechamiento especial del dominio público local por empresas explotadoras de servicios de telefonía móvil en el término municipal de Tudela (‘the Ordenanza Fiscal Tudela’).

33. Complaints by Vodafone España, SA ('Vodafone') against the Ordenanza Fiscal Santa Amalia and the Ordenanza Fiscal Tudela, and by France Telecom España, SA ('Orange') against the Ordenanza Fiscal Torremayor were dismissed. Each decision was the subject of a separate appeal brought before the Tribunal Supremo (Supreme Court), which has decided to refer the following questions to the Court for a preliminary ruling:

- '(1) Must Article 13 of [the Authorisation Directive] be interpreted as precluding national legislation under which a fee for the right to install facilities on municipal public land may be required from 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 payable 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?'

34. The Court joined the three cases by order of 18 March 2011.

35. Written observations have been submitted by the Spanish Government, the Polish Government, the European Commission, Vodafone, Orange and the municipality of Tudela.

36. At the hearing on 18 January 2012, all parties, except for the Polish Government, presented oral argument.

Factual background

37. Before turning to the questions referred, I consider it useful to have a basic understanding of what telecommunication involves and why mobile telephony operators use facilities owned by others.³⁹

38. Telecommunication means the transmission and reception of information over a distance. It requires (i) a transmitter to convert information into a signal, (ii) a medium to carry the signal and (iii) a receiver to convert the signal into information. An appliance that functions as a transmitter and receiver is called a transceiver. A mobile telephone is a transceiver because it can convert a voice message into a signal and receive and convert signals containing a voice message.

39. A collection of transmitters and receivers can form a network. Within a network, a router may be used to ensure that the proper recipient receives the transmitted signal. If the signal is transmitted over a long distance, a repeater may amplify it. An 'electronic communications network' thus consists of 'transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, ...'.⁴⁰

39 — In preparing this factual background, I was fortunate to rely on the informative web pages maintained by the International Telecommunication Union and the Organisation for Economic Cooperation and Development.

40 — Article 2(a) of the Framework Directive. This definition was replaced by a new, but similar, definition in Article 1(2)(a) of Directive 2009/140.

40. Information can be transmitted using wireless technology or through a transmission device such as a wire or cable. Radio waves and optic fibre are types of medium. Mobile telephony operators mostly use radio waves as a medium, whereas fixed telephony operators rely more on cables and other physical means.

41. Mobile telephony operators need access to fixed and mobile networks to provide their customers with an ‘electronic communications service’ or ‘service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks’.⁴¹

42. If the operator in question owns a network, its customers can make calls to and receive calls from others belonging to the same network. That operator may own all or some of the infrastructure that constitutes the network and enables the provision of the relevant service(s). However, its customers will also wish to communicate with customers of other operators delivering a similar service but belonging to a different network, owned by other undertakings who may be competitors or not. These customers may have a mobile or fixed telephone or both, and different networks may exist for each.

43. Providers of electronic communications services thus need to interconnect with networks and have access to infrastructure such as routers, or optic fibre or copper cables owned by other undertakings in order to enable their customers to make and receive calls. Interconnection is a type of access implemented between public operators.⁴² Operators negotiate a price and conclude agreements to obtain interconnection and other forms of access.

Assessment

Question 1

44. The Tribunal Supremo asks in essence whether a fee charged to undertakings which, without being proprietors of an existing network, use it to provide mobile telephony is a fee for ‘rights to install facilities on, over or under public or private property which reflect[s] the need to ensure the optimal use of these resources’ under Article 13 of the Authorisation Directive.

Views presented to the Court

45. The Tribunal Supremo, Vodafone, Orange, the Commission and the Polish Government consider that the text of Article 13 of the Authorisation Directive, read within the context of the other directives in the 2002 package, does not support such an interpretation. Article 13 permits Member States to impose a fee for the installation, but not the use, of physical infrastructure on, over or under public property.

46. By contrast, the Spanish Government and the municipality of Tudela argue that, in those circumstances, mobile telephony operators occupy public property. Subjecting only the owners of facilities to a fee would put fixed telephony operators at a competitive disadvantage because they own most networks; that would also be contrary to the principle of neutral technology. The Spanish Government thus argues that the expression ‘fees for ... rights to install facilities’ covers fees for the *use* of such facilities that are owned by other undertakings.⁴³

41 — Article 2(c) of the Framework Directive.

42 — See the definition in point 18 above.

43 — In its written observations, the municipality of Tudela appeared to adopt the same position and advanced a teleological interpretation of Article 13. At the same time, and this became even more obvious at the hearing, the municipality of Tudela argued that the first sentence of Article 13 does not cover the fee at issue in the main proceedings, and therefore it was free to levy it (despite accepting that users of facilities occupy local public land in the same way as undertakings who install facilities). See also points 65 to 70 below.

The meaning of Article 13 of the Authorisation Directive

47. Article 13 consists of two sentences. The first sentence provides that Member States may 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’. If Member States impose such fees, the second sentence states that they ‘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]’.

48. The first sentence permits Member States to impose a fee in connection with three specific events (the grant of three defined rights), whereas the second sets out the conditions that those fees must satisfy. Fees that satisfy some or all of the conditions in the second sentence but are not levied in connection with one of the events defined in the first sentence may not be levied.

49. The first question thus concerns whether the use of facilities owned by another undertaking constitutes an event that may give rise to a fee covered by the first sentence of Article 13 of the Authorisation Directive.⁴⁴

50. I consider it does not.

51. In my opinion, the installation of facilities means putting in place infrastructure with a material presence that enables the provision of electronic communications networks and services through its use. For the purposes of Article 13, liability to pay the fee will be incurred by the undertaking holding the right to install such facilities, irrespective of who owns them.

52. In the absence of a specific definition in the relevant directive, the concept of ‘facilities’ must in my view be given its meaning of physical means or equipment required in order to do something. In a telecommunications context, that means the physical equipment needed to achieve transmission and reception of information over a distance. And to ‘install’ such equipment can only mean to put it in place physically so that it can function for that purpose and during some time.

53. Such an interpretation is borne out by Article 2(e) of the Framework Directive, which describes ‘associated facilities’ as ‘facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service’.⁴⁵ Access to facilities covers, among others, ‘access to physical infrastructure including buildings, ducts and masts’.⁴⁶ The sharing of ‘facilities’ covers ‘physical co-location and duct, building, mast, antenna or antenna system sharing’.⁴⁷

54. Reading Article 13 together with these definitions in the other linked directives thus suggests that the term ‘facilities’ can be interpreted only so as to mean physical infrastructure enabling provision of electronic communications networks and services.

55. The object and purpose of Article 13 confirm that interpretation.

44 — That question thus differs from that at issue in Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom* [2005] ECR I-7723, which involved an annual tax on ownership of infrastructure like pylons, masts and antennae and was considered under Article 49 EC (now Article 56 TFEU) and Community legislation governing competition in the telecommunications markets applicable at the time.

45 — The amended version of the Framework Directive describes ‘associated facilities’ so as to include ‘buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets’; see Article 1(2)(e) of Directive 2009/140.

46 — Article 2(a) of the Access Directive.

47 — Recital 23 in the preamble to the Framework Directive. My interpretation of the term ‘facilities’ in Article 13 of the Authorisation Directive does not preclude that the same term may have a broader meaning in other directives of the 2002 package. See, for example, Annex I to the Universal Service Directive, Part B.

56. Article 13 authorises Member States to charge a fee because the installation of facilities involves occupying public (or private) property in a way that reduces the availability of that property for other uses and purposes.

57. It is implicit in Article 13 that ‘rights of way’ are ‘scarce’ resources, as are radio frequencies and numbers.⁴⁸ Their use must therefore be managed. Article 13 allows Member States to do so by means of a fee that ‘reflect[s] the need to ensure the optimal use of these resources’.

58. The installation of, for example, a mast on public land means that certain other ‘rights of way’ on that land cannot be granted. National authorities may also wish to prevent masts from being installed, for example, in a town centre or near a forest. In that regard, the legislator accepted that ‘facility sharing can be of benefit for town planning, public health, or environmental reasons, and should be encouraged by national regulatory authorities on the basis of voluntary agreements’,⁴⁹ and that ‘the development of the electronic communications market, with its associated infrastructure, could have adverse effects on the environment and the landscape’.⁵⁰ Unlike the municipality of Tudela, I do not accept that, as a general matter, public land is less scarce than numbers and radio frequencies. Nor do I accept that Article 13 provides a basis for imposing a fee on all *beneficiaries* of facilities installed on that land.

59. I also disagree with the Spanish Government that *use* made by a mobile telephony operator of another undertaking’s facilities affects the availability of ‘rights of way’ in the same way as their installation. The municipality of Tudela also argued that that use constituted a form of occupation of public property. That seems to me misconceived.

60. If an undertaking installs a cable under a public road in order to transmit signals, whether between fixed phones or mobile and fixed phones, it is the installation of the cable that requires a ‘right of way’ as long as the cable is installed. Once installed, whatever the number of signals transmitted through the cable, use of the cable does not alter the availability of ‘rights of way’.⁵¹ It is true that users other than the undertaking installing the facilities also benefit from the ‘rights of way’ granted to the latter. In a competitive market, however, it must be presumed that the agreed price for that use (that is, ‘access’) will include compensation for that benefit.

61. Moreover, reading Article 13 as authorising Member States to impose a fee for use of facilities is difficult to reconcile with the objectives set out in Article 8 of the Framework Directive.⁵²

62. Article 8(2)(b) of that directive provides that national authorities must ensure that ‘there is no distortion or restriction of competition in the electronic communications sector’. That objective, the Court has held, ‘can be guaranteed only if equality of opportunity is secured as between the various economic operators’.⁵³

48 — That is consistent with the commitments of the EU and the Member States in the World Trade Organisation (‘WTO’) with regard to the regulation of telecommunications networks and services. The WTO Reference Paper of 24 April 1996 provides that ‘any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner’ (first sentence of point 6). Recital 29 in the preamble to the Framework Directive refers to the WTO commitments of the EU and Member States in relation to standards and the regulatory framework of telecommunications networks and services.

49 — Recital 23 in the preamble to the Framework Directive.

50 — Recital 24 in the preamble to the Access Directive.

51 — It appears evident that those facilities can be put to their designated use by any undertaking only *after* their installation.

52 — The reference to Article 8 of that directive was included in Article 13 of the Authorisation Directive after the Parliament expressed concern that divergence between Member States in user fee systems created barriers to the internal market. See the amended proposal for the Authorisation Directive (COM(2001) 372 final), p. 4.

53 — See also Case C-85/10 *Telefónica Móviles España* [2011] ECR I-1575, paragraph 30 and case-law cited.

63. In my view, equality of opportunity is not secured where undertakings owning facilities used for the provision of electronic communications networks and services can recover the fee paid for rights to install them from the price negotiated with operators who use those facilities if, as is the case in the main proceedings at issue, those operators are also required to pay the municipalities a fee for that use. In those circumstances, competition is distorted because the user of the facilities bears a double financial burden. This could deter operators from entering the market and result in higher prices for consumers.

64. Depending on the level of the fee, subjecting the use of another undertaking's facilities to a fee could encourage new and existing operators to invest in the installation of their own facilities and deploy their own network instead of seeking access to those of others. Although I do not mean to suggest that investment in new infrastructure may not enhance competitive conditions and undermine dominant positions of undertakings owning considerable parts of the existing infrastructure, other concerns are that additional pressures on available access to 'rights of way' may arise and the costs of delivering services may increase. This is difficult to reconcile with the need for Member States to encourage the sharing of facilities and property,⁵⁴ and to exercise that responsibility in a manner that 'promotes efficiency, sustainable competition, and gives the maximum benefit to end-users'.⁵⁵

65. Finally, it seems to me that Article 13 of the Authorisation Directive cannot be read so as to cover fees for use of facilities owned by another undertaking because that use simply does not fall within the scope of that directive.

66. The aim of the Authorisation Directive is to create a legal framework that 'ensure[s] the freedom to provide electronic communications networks and services, subject only to the conditions laid down in [that directive]'⁵⁶ and to harmonise and simplify authorisation rules and conditions.⁵⁷ The conditions set out concern general authorisation of electronic communications networks and services, rights of use for radio frequencies and numbers and rights to install facilities.⁵⁸

67. A charge or fee thus falls within the scope of the Authorisation Directive if it is levied in connection with access to the market for electronic communications networks and services or to resources such as numbers, radio frequencies and 'rights of way'. If that is the case, Member States may impose fees and charges only for the purposes and subject to the conditions described in Articles 12 and 13.⁵⁹ They may not impose any other fees or charges. That conclusion is consistent with the Court's decision that Member States may not levy fees or charges in relation to authorisation procedures other than those provided for in Directive 97/13,⁶⁰ which was repealed by the Framework Directive.⁶¹ Unlike the municipality of Tudela, I thus do not consider that a Member State is free to levy any fee that is not covered by Article 12 or 13 of Authorisation Directive.

54 — Article 12(1) of the Framework Directive. Indeed, in the circumstances described in Article 12(2) and recital 23 in the preamble to the same directive, Member States may impose facility sharing.

55 — Article 5(1) of the Access Directive.

56 — Recital 3 in the preamble to the Authorisation Directive.

57 — Article 1(1) of the Authorisation Directive.

58 — The Annex to the Authorisation Directive provides a maximum list of conditions that may be attached to a general authorisation (Section A), rights of use for radio frequencies (Section B) and rights of use for numbers (Section C).

59 — I do not agree with the Commission that Article 13 derogates from Article 12. Both provisions describe separate events that can be made subject to a fee or charge. The wording also suggests that the charges and fees described in the two provisions are not mutually exclusive because Article 12 envisages, for example, that an administrative charge may be imposed on undertakings to whom a right of use has been granted, whereas Article 13 permits Member States to charge a fee in consideration of that right. In any event, the interpretation of Article 12 is the subject of other cases currently pending before the Court: see, for example, Case C-485/11 *Commission v France*.

60 — Case C-284/10 *Telefónica de España* [2011] ECR I-6991, paragraph 19 and case-law cited. Article 13 of the Universal Service Directive allows Member States to impose a mechanism for sharing the net cost of universal service obligations.

61 — See point 8 above.

68. A fee such as that at issue in the main proceedings is imposed in connection with access to, and interconnection with, the facilities owned by another undertaking and is therefore governed by the Access Directive.

69. The Access Directive ‘establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities’.⁶² It is based on the understanding that ‘some undertakings rely on infrastructure provided by others for delivery of their services’⁶³ and that ‘in an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves’.⁶⁴ Article 5 describes the powers and responsibilities of national regulatory authorities with regard to access and interconnection and lists circumstances in which government intervention is permitted where commercial negotiations fail in order to encourage and ensure adequate access and interconnection and interoperability of services.⁶⁵ That responsibility must be exercised ‘in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users’.⁶⁶ For these purposes, national authorities are permitted to oblige undertakings to provide access and to interconnect as a means of increasing competition and to impose the obligations identified in Articles 9 to 13 of the Access Directive.⁶⁷

70. Nowhere does the Access Directive provide for the power to require users to pay a fee for access to, and interconnection with, the facilities of another undertaking.⁶⁸ Although I accept that Member States enjoy a degree of discretion in choosing the form and method of implementing directives, it appears to me that a fee of the type at issue in the main proceedings constitutes a significant obstacle to the freedom of mobile telephony operators to provide their services; and cannot serve any of the objectives of the Access Directive or the other linked directives, or implement any of the obligations assumed under those directives.

71. I therefore conclude that Article 13 of the Authorisation Directive does not authorise Member States to charge mobile telephony operators a fee for their use of facilities installed on public property and owned by another undertaking, because such a fee is not in consideration of ‘rights of way’.

Question 2

72. The second question concerns the meaning of the second sentence of Article 13 of the Authorisation Directive.

73. As I have indicated, I consider that Article 13 does not provide a basis for imposing fees of the type at issue in the main proceedings.⁶⁹ On that basis, the second question becomes unnecessary.

74. However, in case the Court should disagree with my conclusions on the first question, I shall consider the meaning of the requirement that fees must be ‘objectively justified ..., non-discriminatory and proportionate in relation to their intended purpose’.⁷⁰ It would then be for the national court to decide whether the fees at issue satisfied those conditions.

62 — Article 1(2) of the Access Directive.

63 — Recital 6 in the preamble to the Access Directive.

64 — Recital 5 in the preamble to the Access Directive.

65 — Recital 6 in the preamble to the Access Directive.

66 — Article 5(1) of the Access Directive.

67 — Articles 5 and 8(1) of the Access Directive.

68 — In particular, in the provisions authorising Member States in certain circumstances to control prices in markets with inefficient competition and costs of access and interconnection, no reference is made to the power to subject use of facilities to a fee; or to the need to take into account the fee payable in setting up, for example, a cost recovery mechanism or a pricing methodology.

69 — See points 47 to 71 above.

70 — The second question does not refer to the requirement of transparency.

75. The second question also concerns the meaning of the phrase ‘the need to ensure the optimal use of [the resource at issue]’.⁷¹ It appears to me that that requirement belongs to the first sentence of Article 13.⁷² If a fee does not reflect that need, it is unnecessary to consider the conditions in the second sentence.

The condition that the fee must be objectively justified

76. In my opinion, a fee under Article 13 of the Authorisation Directive is not objectively justified if its value is not linked to the intensity of the use of the ‘scarce’ resource and the current and future value of that use. In that regard, the Authorisation Directive considers that fees for rights to install facilities may be imposed on individual undertakings.⁷³

77. Member States may not in my view impose fees for rights to install facilities that allegedly reflect the need to ensure the optimal use of ‘rights of way’, but that are not established on the basis of parameters that relate to that objective, such as the intensity, duration and value of the undertaking’s use of the property in question or alternative uses to be made of the property.⁷⁴

78. If the Court accepts that the first sentence of Article 13 covers a fee for the *use* of facilities, I consider that the same principles should apply. In those circumstances, the use of facilities affects the availability of ‘rights of way’. It thus must be possible to determine the value of the fee in a manner representing the intensity of that use of the ‘scarce’ resource as well as alternative uses.

79. A fee based on the gross revenue earned by an undertaking seems likely to be levied principally to generate revenue, which is not an objective justification for a fee within the meaning of Article 13.⁷⁵ The Court has also held that the calculation of a fee (described in Article 13 of the Authorisation Directive) based on the turnover of the undertaking considerably increases the amount due and thereby ‘creates a significant obstacle to the freedom to provide telecommunication services’.⁷⁶ The fact that the fee may mostly affect dominant operators does not alter that conclusion.

The condition that the fee must be proportionate

80. A fee is not proportionate if it is based on parameters and set at a level that goes beyond what is necessary to ensure the optimal use of the ‘scarce’ resource that the fee seeks to protect.

81. That is also the case if the fee is either so high as to deter investment in the installation of networks and facilities and hamper competition, or so low that it fails to contribute to the efficient management of the use of the resource.⁷⁷

71 — The Court has held that ‘the setting of fee amounts involves complex economic assessments’ and thus ‘national authorities cannot be required to comply with rigid criteria in that regard, provided that they remain within the limits resulting from Community law’: Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 92. See also *Telefónica Móviles*, cited in footnote 53 above, paragraph 25.

72 — See points 62 to 64 above.

73 — Recital 31.

74 — In *Telefónica Móviles*, the Court agreed with the Spanish Government and the Commission that ‘the charge must be set at an appropriate level to reflect inter alia the value of the use of those [scarce] resources, which requires account to be taken of the economic and technical situation of the market concerned’; cited in footnote 53 above, paragraph 28.

75 — In its account of the historical background of the fee, the municipality of Tudela appeared to accept that the initial objective of the fee was to generate revenue based on the benefits accrued from using the local public land, that is to say, the value of the services provided by using facilities installed on that land.

76 — Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449, paragraphs 39 and 40.

77 — See also *Telefónica Móviles*, cited in footnote 53 above, paragraph 29.

82. Unlike the Tribunal Supremo, however, I do not accept that in all circumstances the more intensive the use of the ‘scarce’ resource the higher the fee that should be imposed for that use. It is possible, for example, to conceive of a situation where a fee for rights to install facilities might be reduced to take account of the degree to which an undertaking allows its facilities to be used by other undertakings. In those circumstances, a *lower* fee for more intensive use might contribute to optimal use of the property.

83. The municipality of Tudela further argues that its fee should be calculated based on parameters that represent the market value of the public property on which the facilities are installed.

84. Even if (*quod non*) the fee could be brought within the first sentence of Article 13, I am not convinced by that argument.

85. In the formula applied by the municipalities, the only relevant parameter is the number of fixed telephone lines installed in the municipality in a given year. That figure bears no relation, however, to the specific use made by the mobile telephony operator of facilities owned by another undertaking. Nor does the market share of the mobile telephony operator in the local market correlate in any obvious way to the intensity of its use of municipal property on which the relevant networks and associated facilities are installed, even if it may be linked to the need to access and interconnect with those networks and facilities.

86. As regards the average mobile telephony use per urban unit, the number of inhabitants and the average telephone and service use per mobile telephone, these parameters might bear a connection with the intensity of use of the network and facilities owned by another undertaking. They appear none the less entirely unrelated to the actual mobile telephony services delivered by the operator paying the fee and for which facilities installed on public property were used.

The condition that the fee must not be discriminatory

87. A fee is discriminatory when ‘like cases [are treated] differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences’.⁷⁸ That may be the case, for example, when fees charged to operators making comparable use of a resource are not equivalent in economic terms or when those charged in connection with different uses are equivalent.⁷⁹

88. It is for the referring court to decide whether mobile and fixed telephony operators, irrespective of their place of incorporation, using facilities installed on, over or under public property are in comparable situations. In that regard, I consider it relevant whether each relies on comparable access to and interconnection with another undertaking’s facilities installed on public (or private) property to deliver their services and whether they are in a competitive relationship.

89. If the referring court finds that they are in comparable situations, the amount due for their use of another undertaking’s facilities must be calculated based on the same objective parameters. This is also consistent with the obligation to prevent discrimination against the use of particular technology.⁸⁰ In that regard, for example, if fixed telephony operators that interconnect with another undertaking’s facilities can deduct the costs of interconnection from the fee due to the municipality, mobile telephony operators in similar circumstances must also have that option.

78 — *Connect Austria*, cited in footnote 71 above, paragraph 115 and case-law cited. See also Case C-431/07 P *Bouygues* [2009] ECR I-2665, paragraph 114 and case-law cited.

79 — See also *Telefónica Móviles*, cited in footnote 53 above, paragraph 31 and case-law cited.

80 — Recital 18 in the preamble to the Framework Directive.

90. I do not consider it relevant under Article 13 whether the user is the owner of the facilities. What matters under that provision is the event giving rise to the liability to pay the fee. The same formula should thus be applied to determine the liability of telephony operators who do not own facilities and those who do and make comparable use of them. In those circumstances, and assuming national law also imposes a fee for rights to install facilities, a positive answer to the first question would imply that certain undertakings might need to pay a fee both for installing facilities *and* for their use of facilities. That is the logical consequence of accepting the argument of the Spanish Government.⁸¹

91. By contrast, undertakings installing facilities, whether or not they are mobile telephony operators, do not appear to be in a comparable situation to mobile telephony operators using another undertaking's facilities. The former's use of public grounds directly affects the availability of access to that resource and impairs the proprietor's exclusive rights over it. The latter's use does not have such an effect. In economic terms, the two types of use cannot be regarded as equivalent.

Conclusion

92. I therefore consider that the answer to the second question is that a fee is set under conditions that do not satisfy the requirements of an objective justification, proportionality and non-discrimination if it is based on the revenue or the market share of an undertaking and other parameters that bear no correlation to the availability of access to a 'scarce' resource as a result of the undertaking's actual use of that resource.

Question 3

93. By the third question, the referring court asks whether Article 13 of the Authorisation Directive has direct effect.

94. It is settled case-law that an unconditional and sufficiently precise provision of a directive can be invoked against the Member State in proceedings before a national court if that Member State failed to implement the directive or did so late or incorrectly.⁸²

95. The third question arises because Vodafone and Orange rely on Article 13 of the Authorisation Directive to challenge the fees imposed by the three municipalities. The Spanish Government and the municipality of Tudela consider that a response to the third question is unnecessary because the fee is not inconsistent with the Authorisation Directive.

96. In my opinion, Article 13 has direct effect.

97. As several parties have pointed out in their observations, the Court in *Connect Austria* held that Article 11(2) of Directive 97/13 had direct effect.⁸³ That provision governed fees imposed 'where scarce resources are to be used' and 'which reflect the need to ensure the optimal use of these resources'. It was repealed by the Framework Directive.⁸⁴

81 — It also appears to me that, in those circumstances, operators using the facilities of other undertakings cannot avoid paying the fee by investing in the development of their own infrastructure.

82 — Case C-203/10 *Auto Nikolovi* [2011] ECR I-1083, paragraph 61 and case-law cited.

83 — Cited in footnote 71 above.

84 — See point 8 above.

98. It seems to me that the wording used in Article 13 of the Authorisation Directive is clearer and more precise than that of Article 11(2) of Directive 97/13.⁸⁵ The circumstances in which Member States may charge a fee under Article 13 are defined in unequivocal terms and Article 13 does not require implementing measures to enable an individual to invoke it against a Member State that imposes a fee in circumstances falling outside the scope of Article 13.

99. In my view, the answer to the third question is accordingly that Article 13 of the Authorisation Directive has direct effect.

Conclusion

100. In the light of the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Tribunal Supremo to the following effect:

- (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) does not authorise Member States to charge mobile telephony operators a fee for the use of facilities installed on public property and owned by another undertaking.
- (2) On a proper construction of the second sentence of Article 13 of the Authorisation Directive, a fee does not satisfy the requirements of an objective justification, proportionality and non-discrimination, and the need to ensure the optimal use of the resources concerned if it is based on the revenue or market share of an undertaking or on other parameters that bear no correlation to the availability of access to a 'scarce' resource as a result of the undertaking's actual use of that resource.
- (3) Article 13 of the Authorisation Directive has direct effect.

⁸⁵ — Unlike the municipality of Tudela, I consider it irrelevant to the Court's consideration of the third question that the Tribunal Supremo has previously considered the legality of the fee *without* consideration of EU law. Nor am I convinced by the argument that the mere existence of disagreement between parties about the meaning of the expression 'install facilities' demonstrates that the wording used in Article 13 lacks clarity and precision, and that the provision therefore cannot have direct effect.