



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 March 2013*

(Telecommunication services — Directive 2002/20/EC — Articles 3 and 12 to 14 — Rights to use radio frequencies — Fees for rights to use radio frequencies — One-off fees for grant and renewal of rights to use radio frequencies — Method of calculation — Alteration of existing rights)

In Case C-375/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 16 June 2011, received at the Court on 15 July 2011, in the proceedings

Belgacom SA,

Mobistar SA,

KPN Group Belgium SA

v

Belgian State,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, Acting President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2012,

after considering the observations submitted on behalf of:

- Belgacom SA, by N. Cahen and I. Mathy, avocates,
- Mobistar SA, by V. Vanden Acker, avocate,
- KPN Group Belgium SA, by A. Verheyden and K. Stas, avocats,
- the Belgian Government, by T. Materne and M. Jacobs, acting as Agents, assisted by D. Lagasse, avocat,

* Language of the case: French.

— the Cypriot Government, by D. Kalli, acting as Agent,
— the Lithuanian Government, by D. Kriauciūnas and A. Svinkūnaitė, acting as Agents,
— the Netherlands Government, by C. Wissels and C. Schillemans, acting as Agents,
— the European Commission, by C. Vrignon, L. Nicolae and G. Braun, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 25 October 2012,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 12 to 14 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 request has been made in proceedings between Belgacom SA ('Belgacom'), Mobistar SA ('Mobistar') and KPN Group Belgium SA ('KPN Group Belgium'), on the one hand, and the Belgian State, on the other, concerning the conformity of fees due by those mobile telephone operators under Articles 2 and 3 of the Law of 15 March 2010 (*Moniteur belge* of 25 March 2010, p. 18849 ('the Law of 15 March 2010')), amending Article 30 of the Law of 13 June 2005 on electronic communications (*Moniteur belge* of 20 June 2005, p. 28070 ('the Law of 13 June 2005')), with the fee scheme provided for by the Authorisation Directive.

Legal context

European Union law

- 3 Article 8(1) and (2) of Directive 2002/21/CE of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('the Framework Directive') (OJ 2002 L 108, p. 33), entitled 'Policy objectives and regulatory principles', provides:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

...

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*:

...

- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- (c) encouraging efficient investment in infrastructure, and promoting innovation; and
- (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

...'

4 Recitals 32 and 33 in the preamble to the Authorisation Directive state:

'(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.

(33) Member States may need to amend rights, conditions, procedures, charges and fees relating to general authorisations and rights of use where this is objectively justified. Such changes should be duly notified to all interested parties in good time, giving them adequate opportunity to express their views on any such amendments.'

5 Article 3(1) and (2) of the Authorisation Directive, entitled 'General authorisation of electronic communications networks and services', is worded as follows:

'1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. ...'

6 Article 12 of the Authorisation Directive, entitled 'Administrative charges', provides:

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

- (a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as 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.

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

7 Article 13 of that directive, entitled 'Fees for rights of use and rights to install facilities', 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].'

8 Article 14 of the Authorisation Directive, entitled 'Amendment of rights and obligations', states:

'1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner. Notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

2. Member States shall not restrict or withdraw rights to install facilities before expiry of the period for which they were granted except where justified and where applicable in conformity with relevant national provisions regarding compensation for withdrawal of rights.'

9 Part B of the Annex to the Authorisation Directive provides:

'Conditions which may be attached to rights of use for radio frequencies

...

Usage fees in accordance with Article 13 of this Directive.

...'

10 Article 14 of the Authorisation Directive, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37), provides:

'1. Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner, taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio frequencies. Except where proposed amendments are minor and have been agreed with the holder of the rights or general authorisation, notice shall be given in an appropriate manner of the intention to make such amendments and interested parties, including users and consumers, shall be allowed a sufficient period of time to express their views on the proposed amendments, which shall be no less than four weeks except in exceptional circumstances.

2. Member States shall not restrict or withdraw rights to install facilities or rights of use for radio frequencies before expiry of the period for which they were granted except where justified and where applicable in conformity with the Annex and relevant national provisions regarding compensation for withdrawal of rights.'

11 Article 5(1) of Directive 2009/140 provides:

'Member States shall adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of such provisions.

They shall apply those measures from 26 May 2011.

...'

Belgian law

12 Article 30 of the Law of 13 June 2005 provided as follows:

'1. Rights of use referred to in Articles 11 [rights to use a number] and 18 [rights to use radio frequencies] may be subject to fees in order to guarantee optimal use of those resources. The fees shall be recovered by the [Belgian Institute of Postal Services and Telecommunications (Institut belge des services postaux et des télécommunications) ('the IBPT')].

2. The King, after having heard the views of the [IBPT], shall fix the amount and detailed rules for the fees referred to in paragraph 1.'

13 Article 2 of the Law of 15 March 2010 provides:

'1. Article 30 of the Law of 13 June 2005 ... is amended as follows:

(1) Between paragraphs 1 and 2, the following paragraphs 1/1, 1/2, 1/3 and 1/4 are inserted:

"1/1. For the purpose referred to in paragraph 1, operators authorised to hold rights of use for radio frequencies in order to operate a network and to provide mobile electronic communications services to the public shall pay, at the beginning of the period of validity of the rights of use, a one-off fee.

The one-off fee shall be determined when frequencies are assigned.

The one-off fee shall be:

(1) EUR 51 644 per MHz per month for frequency bands 880-915 MHz and 925-960 MHz. Acquisition of the rights of use for frequency bands 880-915 MHz and 925-960 MHz also implies acquisition of rights of use for frequency bands 1710-1785 and 1805-1880 MHz: the amount of radio spectrum allocated in bands 1710-1785 and 1805-1880 MHz shall be equal to twice the amount of radio spectrum allocated in bands 880-915 MHz and 925-960 MHz, rounded off to a multiple of 5 MHz higher. By way of derogation from the foregoing, until 26 November 2015, the one-off fee for the amount of radio spectrum allocated as at 1 January 2010 in bands 880-915 MHz and 925-960 MHz shall also apply to the maximum amount of radio spectrum which could be allocated on 1 January 2010 in bands 1710-1785 and 1805-1880 MHz;

- (2) EUR 20 833 per MHz per month for frequency bands 1920-1980 MHz and 2110-2170 MHz, except where the total quantity of spectrum held by the operator in those frequency bands does not exceed 2 x 5 MHz. In that case, the one-off fee is EUR 32 000 per MHz per month;
- (3) EUR 2 778 per MHz per month for frequency bands 2500-2690 MHz.

Where frequencies are assigned by auction, the minimum amount of the one-off fee referred to in this paragraph shall constitute the candidates' opening bid.

1/2. In respect of each period of renewal of an authorisation, operators shall pay a one-off fee.

The amount of the one-off fee shall correspond to the one-off fee referred to in the first subparagraph of paragraph 1/1.

In calculating the amount of the one-off fee, account shall be taken of the particular rights of use which the operator wishes to retain following renewal.

If an operator wishes to assign spectrum, it must be in a continuous block.

- 1/3. The payment of the one-off fee shall be made, as the case may be, within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/1 and within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/2.

By way of derogation from the preceding subparagraph, the operator shall be allowed to make the payment as follows:

- (a) the operator shall pay on a pro rata basis the number of months remaining until the following calendar year, as the case may be, within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/1 and within 15 days following the start of the validity period referred to in the first subparagraph of paragraph 1/2;
- (b) moreover, the operator shall pay by 15 December at the latest all of the one-off fee for the coming year. If the authorisation expires during the coming year, the operator shall pay on a pro rata basis the number of months remaining until the expiration of the rights of use;
- (c) the legal interest rate, calculated in accordance with Article 2(1) of the Law of 5 May 1865 on interest-bearing loans, shall be applicable, as the case may be, from the 16th day following the start of the validity period referred to in the first subparagraph of paragraph 1/1 or from the 16th day following the start of the validity period referred to in the first subparagraph of paragraph 1/2;
- (d) simultaneously with the payment of the one-off fee, the operator shall pay the interest on the outstanding amount payable.

The operator shall inform the [IBPT] of its choice within two working days following, as the case may be, the start of the validity period referred to in the first subparagraph of paragraph 1/1 or the start of the validity period referred to in the first subparagraph of paragraph 1/2.

In no case shall the one-off fee be reimbursed in whole or in part.

1/4. If an operator does not pay the one-off fee in whole or in part for the respective frequency bands as provided for in paragraph 1/1 (1), (2) or (3), it shall lose all rights of use for the respective frequency bands.² The words ‘except as provided for in paragraphs 1/1, 1/2, and 1/3’ shall be added to paragraph 2.”

14 Article 3 of the Law of 15 March 2010 provides:

‘As a transitional measure, if the deadline for declining tacit renewal of an authorisation has already expired by the time the present law enters into force, operators may nevertheless decline renewal of their rights of use up to the first day of the new, extended period of rights of use, without being required to pay the one-off fee relating to that new period.’

15 Article 4 of the Law of 15 March 2010 provides:

‘The present law shall enter into force the day it is published in the *Moniteur belge* [*Moniteur belge* of 25 March 2010, p. 18849].’

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

16 Belgacom, Mobistar and KPN Group Belgium are operators of mobile telephone networks holding various authorisations with rights of use for radio frequencies 900 MHz, 1800 MHz and 2000 to 2600 MHz in Belgium.

17 The Law of 12 December 1994 (*Moniteur belge* of 22 December 1994, p. 31624) liberalised the mobile telephone sector in Belgium by allowing the Council of Ministers (Conseil des ministres) to grant to operators other than the former public operator individual authorisations for the supply of mobile telephone services on frequency band 900 MHz for a period of 15 years from the date of issue of the authorisations.

18 On 27 November 1995, the Council of Ministers granted authorisation to Mobistar whilst on 2 July 1996 Belgacom Mobile was granted authorisation, with retroactive effect to 8 April 1995, to operate a network for the 900 MHz channels, which it used already under a management contract with the Belgian State. In return, both operators each had to pay a one-off licence fee of approximately BEF 9 billion (EUR 223 104 172.30) and annual fees to the IBPT for the use of the frequencies.

19 In 1997, the Belgian Government decided to open up the DCS-1800 MHz band for use in order to allow for a third or possible fourth operator on the market. The Royal Decree of 24 October 1997 relating to the establishment and operation of DCS-1800 GSM mobile telephony networks laid down the procedure for obtaining an authorisation for the establishment and operation of DCS-1800 GSM mobile telephony networks by providing that such an authorisation would be valid for a 15-year period from the date of issue of the operating authorisation. On 2 July 1998, KPN Group Belgium (formerly KPN Orange SA, then BASE SA) obtained authorisation for the 1800 MHz band in return for the payment of a one-off licence fee of BEF 8005 billion (EUR 198 438 766.50) and annual fees for the use of the frequencies.

20 Given the disadvantages of using the 1800 MHz frequencies compared to the 900 MHz frequencies, including the weaker range of the base stations which requires the installation of a greater number of antenna sites to achieve the same coverage, the IBPT decided in 2003 to assign certain 900 MHz channels to KPN Group Belgium and, in exchange, to also assign certain 1800 MHz channels to Belgacom and Mobistar. Consequently, since 2003, KPN Group Belgium has enjoyed additional 900 MHz frequencies, in return for Belgacom and Mobistar having 1800 MHz band frequencies. The balance of the channels thus allocated to each of those three operators should stay in place until 2015.

- 21 The Royal Decree of 18 January 2001 established a procedure for granting authorisations for 3G UMTS systems using frequency bands 1885 to 2025 MHz and 2110-2200 MHz. Belgacom, Mobistar and KPN Group Belgium applied for and obtained authorisation to operate those systems in return for a one-off licence fee of EUR 150 million paid by each of those operators for a 20-year period with possible extension by royal decree for five-year periods.
- 22 At the moment of each granting of those authorisations, Belgacom, Mobistar and KPN Group Belgium undertook to pay in return:
- a one-off licence fee;
 - an annual fee for making the frequencies available; and
 - an annual fee for managing the authorisations.
- 23 By decision of 25 November 2008, the IBPT declined the tacit renewal of the authorisations to use second generation (2G) radio frequencies that had been given to Belgacom, Mobistar and KPN Group Belgium, in order to impose a new fee and put in place a spectrum policy that was as efficient as possible.
- 24 Belgacom, Mobistar and KPN Group Belgium challenged that decision before the Cour d'appel de Bruxelles, which annulled it by judgment of 20 July 2009 in respect of Belgacom and by judgment of 22 September 2009 in respect of Mobistar. Following those judgments, the IBPT decided to withdraw its decision of 25 November 2008 concerning KPN Group Belgium, in order to ensure identical treatment of all three operators.
- 25 Following those judgments by the Cour d'appel de Bruxelles, on 15 March 2010 the Belgian legislature adopted a law modifying Article 30 of the Law of 13 June 2005. It is apparent from Articles 2 and 3 of the Law of 15 March 2010, referred to in paragraphs 13 and 14 of this judgment, that it provides for:
- a one-off fee to replace the former one-off licence fee charged to mobile telephone operators in order to guarantee optimal use of those radio frequencies, which is due not only at the time of granting those authorisations and the right to use radio frequencies, but equally at each renewal of an existing authorisation;
 - an amount of one-off fee varying according to the radio frequency concerned and calculated on the basis of the one-off licence fee paid by the operators when they received their authorisation for the first time, at the end of either a comparative tendering procedure or a sale by auction;
 - the option for mobile telephone operators to renounce their rights of use before start of the period of validity of their rights of use without being required to pay the one-off fee for the renounced rights; and
 - in addition to the one-off fee, the obligation for operators holding an authorisation to pay two fees each year: a fee aimed at covering the cost of making the frequencies available and a fee intended to cover the costs of managing the authorisation.
- 26 Belgacom, Mobistar and KPN Group Belgium brought an action before the Constitutional Court (Cour constitutionnelle) seeking annulment of Articles 2 and 3 of the Law of 15 March 2010. In support of their claims they argued inter alia that those provisions are contrary to Articles 3 and 12 to 14 of the Authorisation Directive. More specifically, they object to the fact that the one-off fee is payable not only at the time authorisation is granted, but also when it is renewed and is in addition to the fee for making the frequencies available, which they pay annually. Belgacom, Mobistar and KPN Group

Belgium also contest the amount and detailed rules for calculating the one-off fee, in that it is calculated not according to the economic value of the frequencies, but rather according to their market value for operators.

- 27 The national court indicates that it is apparent from the *travaux préparatoires* for the Law of 15 March 2010 that the one-off fee is compensation for the use of the frequencies and pursues the same objective as the annual fees for making the frequencies available, whilst not being a substitute for those fees. It adds that it is also apparent from the *travaux préparatoires* that the legislature considered that Articles 2 and 3 of the Law of 15 March 2010, the validity of which is challenged before that court, comply with the Authorisation Directive, since they provide for a split of the compensation owing for the fees payable for the rights of use comprising a one-off part and an annual part. The one-off fee in fact covers the right to use the frequencies and corresponds to the value of the spectrum as a scarce resource, whilst the annual fee covers the cost of using those frequencies, that is, the control, coordination, examination and other activities of the competent authority.
- 28 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Do Articles 3, 12 and 13 of [the Authorisation Directive], as they currently apply, permit Member States to charge operators holding individual rights to use mobile phone frequencies for a period of 15 years, in the context of authorisations to install and operate on their territory mobile phone networks issued under the scheme instituted under the former legal framework, a one-off fee for the renewal of their individual rights to use frequencies the amount of which, relating to the number of frequencies and months to which the rights of use relate, is calculated on the basis of the former one-off licence fee that was associated with the issuance of the aforementioned authorisations, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and a fee covering the cost of managing the authorisation?
 2. Do Articles 3, 12 and 13 of the same Authorisation Directive permit the Member States to charge operators hoping to acquire new rights to use mobile phone frequencies a one-off fee the amount of which is determined at auction on the assignment of frequencies, in order to reflect the value of frequencies, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual fee for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?
 3. Does Article 14(2) of the same Authorisation Directive permit the Member States to charge mobile phone operators, in respect of a new renewal period of their individual rights to use mobile phone radio frequencies, to which certain of them were already entitled, before the beginning of that new period, a one-off fee relating to the renewal of the rights to use frequencies they enjoyed at the start of that new period, intended to encourage optimal use of the frequencies by way of reflecting their value, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual fee for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?

4. Does Article 14(1) of the same Authorisation Directive permit the Member States to add, as a condition of acquiring and renewing rights to use frequencies, a one-off fee that is determined at auction, without limit, when that one-off fee is additional to both an annual fee for making frequencies available (intended first and foremost to cover the costs of making frequencies available while at the same time also partially reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the frequencies) and an annual charge for the management of authorisations to install and operate mobile phone networks issued under the scheme instituted under the former legal framework?’

The questions referred for a preliminary ruling

The first two questions

Admissibility

- 29 The Cypriot Government questions the admissibility of the second question referred, arguing that an answer to that question is not objectively necessary to resolve the dispute in the main proceedings. The second question concerns the granting of new rights of use for radio frequencies, whilst the order for reference indicates that the dispute concerns the renewal of rights of use for radio frequencies.
- 30 It should be borne in mind that, according to the Court’s settled case-law, questions on the interpretation of European Union law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, C-378/10 *VALE Építési* [2012] ECR, paragraph 18 and the case-law cited).
- 31 In the present case, the second question referred concerns the interpretation of the Authorisation Directive in terms of whether it allows Member States to charge a one-off fee to mobile telephone operators hoping to acquire new rights to use radio frequencies. It is, moreover, apparent from the case-file that Articles 2 and 3 of the Law of 15 March 2010, which are the subject-matter of the actions for annulment in the main proceedings, provide for a one-off fee not only for the renewal of rights of use for radio frequencies but also for new acquisitions of rights of use for radio frequencies.
- 32 In those circumstances, the interpretation sought cannot be regarded as bearing no relation to the actual facts of the main action or its purpose. Consequently, the second question referred for a preliminary ruling must be considered admissible.

Substance

- 33 By its first two questions, which will be examined together, the national court asks, in essence, whether Articles 3, 12 and 13 of the Authorisation Directive must be interpreted as precluding Member States from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee for both a new acquisition of rights of use for radio frequencies and for the renewal of those rights, when that one-off fee is in addition to both an annual fee for making frequencies available, intended first and foremost to cover the costs of making frequencies available while at the same time also partially

reflecting the value of frequencies, the purpose of the one-off fee and the annual fee being to encourage optimal use of the scarce resource that radio frequencies are, and a fee covering the cost of managing the authorisation.

- 34 It also asks about the compliance with those provisions with the Authorisation Directive, the detailed rules for fixing the amount of the one-off fee for the rights of use for radio frequencies, which is determined either by reference to the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or through auction when the frequencies are assigned.
- 35 As a preliminary point, it is clear that Articles 3 and 12 of that directive, which relate to the Member States' obligation to ensure the freedom to provide electronic communications networks and services and the detailed rules for levying 'administrative charges' respectively, are not intended to apply to a fee such as that at issue in the main proceedings, which does not come within either of those two situations.
- 36 As is apparent from the first two questions, the national court is asking the Court to interpret the Authorisation Directive as it concerns, firstly, the issue whether Member States may charge a one-off fee to mobile telephone operators and, secondly, the detailed rules for fixing the amount of the one-off fee for both the granting and the renewal of the rights of use for radio frequencies.
- 37 Regarding the charging of a one-off fee, it is clear, as a preliminary observation, that the Authorisation Directive refers only to the procedure for granting rights of use for radio frequencies and does not contain any specific provision laying down the conditions for the procedure for renewing previously-allocated rights of use for radio frequencies.
- 38 As pointed out by the Advocate General in point 40 of his Opinion, however, as individual rights of use are granted by a Member State for a limited period, renewal of an authorisation must be regarded as a granting of new rights for a new period.
- 39 Consequently, it must be held that under the Authorisation Directive, the procedure for granting rights of use for radio frequencies and the procedure for renewal of those rights must be subject to the same scheme. Accordingly, Article 13 of the Authorisation Directive must be applied in the same way to both procedures.
- 40 It should be noted that, according to settled case-law, 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; Case C-85/10 *Telefónica Móviles España* [2011] ECR I-1575, paragraph 21; and Joined Cases C-55/11, C-57/11 and C-58/11 *Vodafone España and France Telecom España* [2012] ECR, paragraph 28).
- 41 As is apparent from the order for reference, in the main proceedings the national court is asking, in essence, whether Article 13 of the Authorisation Directive must be interpreted as precluding Member States from charging operators a one-off fee for the 'rights of use for radio frequencies' such as that at issue in the main proceedings, when they are already charged an annual fee for making the frequencies available and a fee covering the cost of managing the authorisation.
- 42 It should be borne in mind that Article 13 of the Authorisation Directive authorises Member States to set, in addition to charges designed to cover administration costs, a supplementary charge for the rights of use for radio frequencies with the purpose of ensuring optimal use of those 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, and *Telefónica Móviles España*, paragraph 24).

- 43 Moreover, Article 13 of the Authorisation Directive does not provide expressly for either the specific form that fee charged for the use of the radio frequencies must have or how frequently it is to be charged.
- 44 However, recital 32 in the preamble to the Authorisation Directive does state that the fees for the use of radio frequencies may be charged as a lump sum or in periodic amounts.
- 45 Furthermore, it is apparent from the Court's case-law that the Authorisation Directive does not circumscribe the purpose for which such fees must be collected (see, to that effect, *Telefónica Móviles España*, paragraph 33).
- 46 Article 13 of that directive does, however, require Member States to ensure that fees for the use of radio frequencies are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives, including the promotion of competition and efficient use of radio frequencies, as laid down in Article 8 of the Framework Directive.
- 47 It is also apparent from Article 13 of and recital 32 in the preamble to the Authorisation Directive that a fee charged to operators of telecommunications services for the use of resources must pursue the purpose of ensuring optimal use of such resources and not hinder the development of innovative services and competition on the market.
- 48 Articles 12 and 13 of the Authorisation Directive do not, therefore, preclude national legislation, such as that at issue in the main proceedings, which provides for the charging of a fee intended to favour optimal use of frequencies, even when it is in addition to another annual fee which also pursues in part the same objective, provided that all those fees satisfy the conditions set out in paragraphs 46 and 47 of the present judgment, which it is for the national court to determine.
- 49 As regards the detailed rules for fixing the amount of a one-off fee for rights of use for radio frequencies such as that at issue in the main proceedings, it should be noted that the Authorisation Directive lays down the requirements with which Member States must comply in determining the amount of a fee for the use of radio frequencies, without thereby expressly providing a specific method for determining the amount of such a fee (*Telefónica Móviles España*, paragraph 25).
- 50 It should be remembered 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 (*Telefónica Móviles España*, paragraph 27).
- 51 In those circumstances, 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 (*Telefónica Móviles España*, paragraph 28).
- 52 It follows, as observed by the Advocate General in points 54 and 55 of his Opinion, that the fixing of a fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.

- 53 It would appear, in the light of the principles applied by the Kingdom of Belgium in fixing the amount of the former one-off licence fee, that either method can be used to obtain amounts which bear some relation to the foreseeable profits from the radio frequencies concerned. The Authorisation Directive does not preclude the use of such a criterion for the fixing of the amount of those fees.
- 54 In the light of all the foregoing considerations, the answer to the first two questions is that Articles 12 and 13 of the Authorisation Directive must be interpreted as not precluding a Member State from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee payable for both a new acquisition of rights of use for radio frequencies and for renewals of those rights, in addition to an annual fee for making the frequencies available, intended to encourage optimal use of the resources, and also to a fee covering the cost of managing the authorisation, provided that those fees genuinely are intended to ensure optimal use of the resource made up of those radio frequencies and are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives in Article 8 of the Framework Directive, which it is for the national court to assess.
- 55 Subject to that same condition, the fixing of the amount of a one-off fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.

The fourth question

- 56 By its fourth question, which should be answered before the third question, the national court asks, in essence, whether Article 14(1) of the Authorisation Directive must be interpreted as precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.
- 57 It should be observed that Article 14(1) of the Authorisation Directive provides that a Member State may amend the rights, conditions and procedures concerning rights of use for radio frequencies in objectively justified cases and in a proportionate manner. Moreover, notice is to be given in an appropriate manner of the intention to make such amendments and interested parties must be allowed a sufficient period, which is to be no less than four weeks, in which to express their views.
- 58 It is, moreover, apparent from point 6 of Part B in the Annex to the Authorisation Directive that the charging of fees for rights of use for radio frequencies pursuant to Article 13 of that directive is one of the conditions which may be attached to rights of use for radio frequencies.
- 59 It follows that the charging of a one-off fee such as that at issue in the main proceedings is an amendment to the conditions applicable to operators holding rights of use for radio frequencies. Consequently, a Member State is required to ensure that conditions put in place for amending the scheme of fees charged to mobile telephone operators holding rights of use for radio frequencies are observed.
- 60 Consequently, it should be observed that a Member State wishing to amend the fees applicable to previously-granted rights of use for radio frequencies must ensure that that amendment complies with the conditions laid down in Article 14(1) of the Authorisation Directive, that is to say, it must be objectively justified and effected in a proportionate manner, and notice must have been given to all interested parties in order to enable them to express their views. It is for the national court to assess, in the light of the circumstances at issue in the main proceedings, whether the conditions laid down in Article 14(1) of the Authorisation Directive have been observed.

- 61 It should be noted in that context that the introduction of a fee in accordance with the conditions laid down in Article 13 of the Authorisation Directive, as referred to in paragraphs 46 and 47 of this judgment, must be considered to be objectively justified and effected in a proportionate manner.
- 62 In the light of the foregoing, the answer to the fourth question is that Article 14(1) of the Authorisation Directive must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings, provided that that amendment is objectively justified and effected in a proportionate manner and notice has been given to all interested parties in order to enable them to express their views, which it is for the national court to assess in the light of the circumstances at issue in the main proceedings.

The third question

- 63 By its third question, the national court asks, in essence, whether Article 14(2) of the Authorisation Directive must be interpreted as precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.
- 64 It should be noted that, under Article 14(2) of the Authorisation Directive, a Member State may not restrict or withdraw rights of use for radio frequencies, except where justified and, where applicable, in conformity with the Annex to the Authorisation Directive and with relevant national provisions regarding compensation for withdrawal of rights.
- 65 It is apparent in that regard that, unlike Article 14(1), in Article 14(2) of the Authorisation Directive the concepts of restriction and withdrawal of rights of use for radio frequencies cover only situations where the content and scope of those rights may be amended.
- 66 In acknowledging that, even given the period allowed for transposition, the Authorisation Directive was in any event applicable to the facts at issue in the main proceedings, the fact of charging mobile telephone operators fees such as those at issue in the main proceedings is not liable to influence the content and scope of the rights of use for radio frequencies granted to the operators concerned. Consequently, the amendment to the fees scheme is not a restriction or withdrawal of the rights of use for radio frequencies for the purposes of Article 14(2) of the Authorisation Directive.
- 67 In the light of the foregoing, the answer to the third question is that Article 14(2) of the Authorisation Directive must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.

Costs

- 68 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 (Fourth Chamber) hereby rules:

1. **Articles 12 and 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 not precluding a Member State from charging mobile telephone operators holding rights of use for radio frequencies a one-off fee payable for both a new acquisition of rights of use for radio frequencies and for renewals of those rights, in addition to an annual fee for making the frequencies available, intended to encourage optimal use of the resources, and also to a fee covering the cost of**

managing the authorisation, provided that those fees genuinely are intended to ensure optimal use of the resource made up of those radio frequencies and are objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives in Article 8 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), which it is for the national court to assess.

Subject to that same condition, the fixing of the amount of a one-off fee for rights of use for radio frequencies by reference either to the amount of the former one-off licence fee calculated on the basis of the number of frequencies and months to which the rights of use relate, or to the amounts raised through auction, may be an appropriate method for determining the value of the radio frequencies.

2. Article 14(1) of Directive 2002/20 must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings, provided that that amendment is objectively justified and effected in a proportionate manner and notice has been given to all interested parties in order to enable them to express their views, which it is for the national court to assess in the light of the circumstances at issue in the main proceedings.
3. Article 14(2) of Directive 2002/20 must be interpreted as not precluding a Member State from charging a mobile telephone operator a fee such as that at issue in the main proceedings.

[Signatures]