Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 June 2013*

(Electronic communications networks and services — Directive 2002/20/EC — Articles 12 and 13 — Administrative charges and fees for rights of use — Charge applicable to mobile telephony operators — National legislation — Method of calculating the charge — Percentage of the costs paid by users)

In Case C-71/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Qorti Kostituzzjonali (Malta), made by decision of 17 January 2012, received at the Court on 10 February 2012, in the proceedings

Vodafone Malta ltd.,

Mobisle Communications ltd.

v

Avukat Ġenerali,

Kontrollur tad-Dwana,

Ministru tal-Finanzi,

Awtorita' ta' Malta dwar il-Komunikazzjoni,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Third Chamber, E. Jarašiūnas (Rapporteur), A. Ó Caoimh and C. G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 January 2013,

after considering the observations submitted on behalf of:

— Vodafone Malta ltd., by I. Refalo, M. Refalo, L. Hurst, J. Pavia and M. Borg, avukati, and M. Hall, QC,

— Mobisle Communications ltd., by F. Galea Salomone, acting as Agent, I. Gauci and R. Tufigno, avukati,

* Language of the case: Maltese

— the Awtorita' ta' Malta dwar il-Komunikazzjoni, by L. Cassar Pullicino and P. Micallef, avukati,

— the Maltese Government, by P. Grech, D. Mangion and V. Buttigieg, acting as Agents,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,

— Hungary, by Z. Fehér, K. Szíjjártó and Á. Szílágyi, acting as Agents,

— the European Commission, by G. Braun, K. Mifsud-Bonnici, and L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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) (OJ 2002 L 108, p. 21).

2 The request has been made in proceedings between Vodafone Malta ltd. ('Vodafone Malta') and Mobisle Communications ltd. ('Mobisle Communications'), the applicants in the main proceedings, and the Avukat Ġenerali (Attorney General), the Kontrollur tad-Dwana (Comptroller of Customs), the Ministru tal-Finanzi (Ministry of Finance) and the Awtorita' ta' Malta dwar il-Komunikazzjoni (Malta Communications Authority) concerning the levying of excise duty.

Legal context

European Union law

3 Recitals 30 to 31 of the Authorisation Directive state as follows:

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

(31) Systems for administrative charges should not distort competition or create barriers for entry into the market. With a general authorisation system it will no longer be possible to attribute administrative costs and hence charges to individual undertakings except for the granting of rights to use numbers, radio frequencies and for rights to install facilities. Any applicable administrative charges should be in line with the principles of a general authorisation system. An example of a fair, simple and transparent alternative for these charge attribution criteria could be a turnover related distribution key. Where administrative charges are very low, flat rate charges, or charges combining a flat rate basis with a turnover related element could also be appropriate.'

4 Article 1 of the Authorisation Directive, entitled 'Objective and scope', provides as follows:

'1. The aim of this 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 Community.

2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.'

5 Article 2(2)(a) of the Authorisation Directive contains the following definition:

'"general authorisation" means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive.'

6 Article 12 of the Authorisation Directive, entitled 'Administrative charges', is worded as follows:

'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 the Authorisation Directive, entitled 'Fees for rights of use and rights to install facilities', provides as follows:

'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 Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2012 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)].'

Maltese law

8 Article 40 of Act No II of 2005 – Act to implement various budget measures and other administrative measures (Att Numru II ta'1-2005– Att biex jimplementa diversi miżuri ta' l-Estmi u biex jipprovdi għal miżuri amministrattivi oħra) (*Gazzetta tal-Gvern ta' Malta* No 17,734, 1 March 2005) ('Act No II of 2005'), introduced excise duty at a rate of 3% on mobile telephony services (subscriptions and top-up vouchers) and Article 41 of that act laid down the regulations governing those services.

9 Article 41 of Act No II of 2005, which sets out those regulations, is worded as follows:

'Part G

Mobile Telephony Services Regulations

1. The title of these regulations is the Mobile Telephony Services Regulations.

2. These regulations shall apply to all revenue generated by mobile telephony services, as provided for in regulation 4.

3. Mobile telephony operators shall register with the Comptroller [of Customs] in accordance with the Excise Duty Act, hereinafter referred to as "the Act".

4. Excise duty shall be assessed on all the charges made by mobile telephony operators for their services, including subscriptions and top-up vouchers, subject to the following conditions:

The term "operator" shall have the same meaning as defined in Article 2 of the Electronic Communications (Regulation) Act; and

No excise duty shall be levied on the following services:

(a) inbound roaming;

(b) interconnection revenues;

(c) donations of a pecuniary nature transferred from the donor to the donee via services offered by the mobile telephony operator;

(d) free airtime.

5. The person, firm, partnership or company duly registered with the Comptroller shall be responsible for the payment of excise duty as specified in Article 3 of the Act at the time payment of excise duty becomes due.

6.

(1) The records of the revenue generated by the services which are subject to excise duty by virtue of these regulations shall be made available to the Comptroller for any necessary verifications.

(2) A periodic statement giving details of the revenue generated by the services subject to excise duty by virtue of these regulations shall be provided to the Comptroller for any period that may be determined by the Comptroller.

(3) The accounting period shall be three months or such longer period as the Comptroller may determine or as may otherwise be prescribed and a return shall be submitted to the Comptroller within thirty days of the end of each accounting period being reported upon.

(4) Any person who fails to comply with the provisions of these regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred [Maltese] liri.'

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

10 Vodafone Malta and Mobisle Communications operate in the telecommunications sector in Malta, where they both hold a general authorisation for the provision of mobile telephony services.

11 It is apparent from the order for reference that, on 19 April 2005, Vodafone Malta and Mobisle Communications brought proceedings before the Prim'Awla tal-Qorti Ċivili (First Chamber of the Civil Court) for annulment of Articles 40 and 41 of Act No II of 2005, arguing that, in so far as they levy excise duty on certain mobile telephony services, those provisions are at odds with Articles 12 and 13 of the Authorisation Directive.

12 The court of first instance dismissed the actions brought by Vodafone Malta and Mobisle Communications. It took the view that the introduction of the contested excise duty was not at odds with the Authorisation Directive, since the latter did not preclude Member States from imposing charges in respect of the services provided by telecommunications operators other than those specified in the directive. The court at first instance also considered that, since the duty was calculated not on the basis of the operator's turnover but simply on the basis of the price of certain consumer services provided by the operator to the user, the trigger for excise duty was not the authorisation given to the operator to provide the service but the actual use of the service concerned.

13 On 10 December 2008, Vodafone Malta and Mobisle Communications appealed against that judgment before the Qorti Kostituzzjonali (Constitutional Court). They once again submitted before that court that the excise duty at issue should be annulled on the basis that it is at odds with the Authorisation Directive, since Member States cannot impose charges or levies other than those specified in that directive and charges of general application.

14 According to Vodafone Malta and Mobisle Communications, the excise duty on mobile telephony services in question does not represent a charge of general application but a specific charge which applies only to mobile telephony operators.

15 The defendants in the main proceedings contend that excise duty such as that provided for in Act No II of 2005 is different and distinct from the administrative charges described in Articles 12 and 13 of the Authorisation Directive. In their view, it is a charge based on the consumption of services by the user which is collected by the undertaking concerned and that excise duty is different from the charges examined in Joined Cases C-292/01 and C-293/01 *Albacom and Infostrada* [2003] ECR I-9449.

16 In the light of the judgment in Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, the Qorti Kostituzzjonali entertains doubts concerning the scope of the Authorisation Directive and seeks guidance on whether that directive precludes the levying of a charge relating directly to certain services provided by mobile telephony operators.

17 In those circumstances, the Qorti Kostituzzjonali decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the provisions of [the Authorisation] Directive, in particular Articles 12 and 13 thereof, prohibit a Member State from imposing a fiscal burden on mobile telecommunications operators which:

(a) constitutes a duty, referred to as excise duty, introduced by national legislation;

(b) is calculated as a percentage of the charges paid to mobile telephony operators by their users for the services provided to them by those operators, with the exception of those services exempted by law;

(c) is paid to the mobile telephony operators by their users on an individual basis, the sum in question subsequently being passed on to the Comptroller of Customs by all operators providing mobile telephony services and being payable only by those operators and not by other undertakings, including those providing electronic communications networks and other services?'

Consideration of the question referred

18 By its question, the Qorti Kostituzzjonali asks, in essence, whether Articles 12 and 13 of the Authorisation Directive are to be interpreted as precluding the legislation of a Member State, such as the legislation at issue in the main proceedings, under which operators providing mobile telephony services are liable to pay what is referred to as 'excise' duty, which is calculated as a percentage of the payments which they receive from the users of those services.

19 It should be noted at the outset that Article 13 of the Authorisation Directive lays down the conditions under which fees may be imposed for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property. However, as is apparent from the order for reference, the levying of a charge referred to as 'excise duty' on all payments received by mobile telephony operators for their services, such as the charge at issue in the main proceedings, is linked to the 'provision of mobile telephony services'. As a consequence, Article 13 of the Authorisation Directive is irrelevant for the purpose of the main proceedings.

20 With regard to Article 12 of the Authorisation Directive, it should be noted that the directive lays down not only rules governing the procedures for granting general authorisations or rights to use radio frequencies or numbers and the content of those authorisations but also rules setting out the nature and scope of the financial payments related to those procedures which Member States may impose on undertakings in the electronic communications services sector (see, by analogy, *Albacom and Infostrada*, paragraphs 35 and 36, and Case C-284/10 *Telefónica de España* [2011] ECR I-6991, paragraph 18).

21 It is apparent from the wording of Article 12 of the Authorisation Directive that Member States may impose on undertakings providing a service or network under a general authorisation or to which a right to use radio frequencies or numbers has been granted only administrative charges covering the total administrative costs 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) of the directive.

22 The administrative charges referred to in Article 12 of the Authorisation Directive therefore represent remuneration since, first, they may be levied only for the administrative services performed by the national regulatory authorities for electronic communications operators in connection with, inter alia, the general authorisation or the grant of a right to use radio frequencies or numbers and, second, they must cover the administrative costs incurred in providing those services.

23 Thus, it is the Court's settled case-law, in particular with regard to administrative charges imposed by Member States on operators holding a general authorisation under Article 12 of the Authorisation Directive, that the only purpose of such charges is to cover the administrative costs incurred in four administrative activities, namely the issue, management, control and enforcement of the applicable general authorisation scheme (see, by analogy, *Telefónica de España*, paragraph 22).

24 It is apparent from the foregoing that a charge the trigger for which is linked to a general authorisation procedure for access to the electronic telecommunications services market falls within the scope of Article 12 of the Authorisation Directive. The Member States must ensure that such an administrative charge is levied only for the purposes described in Article 12 of the Authorisation Directive and complies with the requirements set out in that provision.

25 On the other hand, a charge the trigger for which is linked not to a general authorisation procedure for access to the electronic telecommunications services market but to the use of mobile telephony services provided by operators and which is ultimately borne by the user of such services does not fall within the scope of Article 12 of the Authorisation Directive.

26 The Court took the view, at paragraphs 35 and 36 of the order of 15 December 2010 in Case C-492/09 *Agricola Esposito*, that the Authorisation Directive was not applicable to a charge for the use of terminal equipment for terrestrial public mobile radio communication, since the basis of assessment of that charge was not the provision of electronic communications networks and services and the private use of mobile telephony services by a subscriber did not involve the provision of an electronic communications network or service for the purpose of that directive.

27 In the present case, it is apparent from the order for reference that the charge at issue in the main proceedings is referred to as 'excise duty', that it is not levied on all electronic telecommunications operators holding a general authorisation but only on operators proving mobile telephony services and that it is calculated as a percentage of the charges paid to those operators by the users of those services. The Qorti Kostituzzjonali also points out that that charge is 'paid to the mobile telephony operators by their users on an individual basis, the sum in question subsequently being passed on to the Comptroller of Customs by all operators providing mobile telephony services and being payable only by those operators and not by other undertakings, including those providing electronic communications networks and other services'.

28 In the light of those considerations, it would appear that the charge at issue in the main proceedings is akin to a tax on consumption, which is a matter for the national court to verify. If that is indeed the case, that charge does not fall within the scope of Article 12 of the Authorisation Directive.

29 In the light of all the foregoing, the answer to the question referred is that Article 12 of the Authorisation Directive must be interpreted as not precluding the legislation of a Member State, such as the legislation at issue in the main proceedings, under which operators providing mobile telephony services are liable to pay 'excise' duty, calculated as a percentage of the charges paid to them by the users of those services, provided the trigger for that duty is not linked to the general authorisation procedure for access to the electronic communications services market but to the use of mobile telephony services provided by the operators and the duty is ultimately borne by the user of those services, which is a matter for the national court to verify.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 12 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 the legislation of a Member State, such as the legislation at issue in the main proceedings, under which operators providing mobile telephony services are liable to pay 'excise' duty, calculated as a percentage of the charges paid to them by the users of those services, provided the trigger for that duty is not linked to the general authorisation procedure for access to the electronic communications services market but to the use of mobile telephony services provided by the operators and the duty is ultimately borne by the user of those services, which is a matter for the national court to verify.

[Signatures]