Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

17 December 2015*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/20/EC — Articles 12 and 13 — Administrative charges — Fee for rights to install facilities — Scope — Municipal legislation — Charge on mobile telephony antennae)

In Case C-454/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance de Bruxelles (Court of First Instance, Brussels, Belgium), made by decision of 17 May 2013, received at the Court on 13 August 2013, in the proceedings

Proximus SA, formerly Belgacom SA,

v

Commune d'Etterbeek,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, C. Toader, D. Šváby, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2015,

after considering the observations submitted on behalf of:

— Proximus SA, formerly Belgacom SA, by B. Den Tandt and H. De Bauw, advocaten,

— the commune d'Etterbeek, by I. Lemineur, P. Vassart and T. Swennen, avocats,

— the European Commission, by J. Hottiaux and L. Nicolae, acting as Agents,

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

gives the following

* Language of the case: French.

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) ('the authorisation directive').

2 This request has been made in proceedings between Proximus SA, formerly Belgacom SA, and the commune d'Etterbeek (municipality of Etterbeek, Belgium) concerning a charge on mobile telephony antennae installed in that municipality.

The legal framework

European Union law

3 Article 1 of the authorisation directive, entitled 'Objective and scope', states in its paragraph 2:

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

4 Article 2 of the authorisation directive, entitled 'Definitions', provides in its paragraph 2(a) that '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'.

5 Article 12 of that directive relates to administrative charges that Member States are entitled to impose on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted and to the detailed rules governing the imposition of those charges.

6 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 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)].'

Belgian law

7 On 26 February 2007, the conseil communal (communal council) of the municipality of Etterbeek adopted a tax regulation imposing an annual charge on mobile telephony antennae ('the tax regulation'), applicable from 1 January 2007 to 31 December 2013.

8 The tax regulation states, in its Article 1, that that charge is applicable to 'mobile telephony antennae installed in the territory of the municipality of Etterbeek' and that 'mobile telephony antenna' means 'all antennae emitting or relaying electromagnetic waves enabling mobile telephony, irrespective of whether they are linked to a separate station or fixed to a mast or to a pylon'.

9 The first paragraph of Article 2 of that tax regulation provides that the amount of the charge at issue in the main proceedings is EUR 4 000 per year per unit, and Article 3 states that that amount is indexed at 2% per year.

10 According to Article 4 of that tax regulation, 'all natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna shall be jointly and severally liable to pay the charge. In the event of co-ownership or joint operation of an antenna by several natural or legal persons, the charge is due jointly and severally by all co-owners and joint holders of a right in rem or a right to operate'.

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

11 It is apparent from the file before the Court that Belgacom SA, predecessor in law to Proximus SA, is the operator of a public telecommunications network and that it is thus the owner and operator of mobile telephony antennae installed in the municipality of Etterbeek.

12 The authorities of the municipality of Etterbeek issued notices of assessment pursuant to the tax regulation, imposing on Belgacom SA the charge at issue in the main proceedings, in the total amount of EUR 108201.60, in respect of the 2009 tax year. Those notices of assessment were the subject of a complaint to the collège des bourgmestre et échevins (municipal council) of the municipality of Etterbeek. When that complaint was rejected, Belgacom SA brought proceedings before the tribunal de première instance de Bruxelles (Court of First Instance, Brussels).

13 In support of its action before the referring court, Belgacom SA claims that the notices of assessment at issue are not compatible with the authorisation directive, since that directive prohibits any charges on mobile telephony operators other than those mentioned in its Articles 12 and 13. According to the applicant, the charge at issue in the main proceedings falls within the scope of the authorisation directive, because mobile telephony antennae constitute 'facilities', within the meaning of that directive. However, that charge does not fulfill the requirements set out in Article 13 of that directive.

14 The municipality of Etterbeek submits that the scope of the authorisation directive relates only to the determination of the conditions of access to the networks. According to the defendant, the charge at issue in the main proceedings is neither a fee referred to in Article 13 of the authorisation directive nor a charge referred to in Article 12 of that directive. It is rather a charge on an economic activity, determined by reference to the localisation of antennae on the territory of the municipality, independently of any authorisation to install facilities.

15 In the light of those observations, the referring court is uncertain as to the applicability of Articles 12 and 13 of the authorisation directive in the main proceedings.

16 It is in those circumstances that the tribunal de première instance de Bruxelles (Court of First Instance, Brussels) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 12 and 13 of [the authorisation directive] be interpreted as precluding the introduction, for budgetary purposes, by legislation of a national or local authority, of a tax on mobile communications infrastructures, installed on public or private property, used to carry on activities provided for in the general authorisation?'

The question referred for a preliminary ruling

17 By its question, the referring court asks, in essence, whether Articles 12 and 13 of the authorisation directive must be interpreted as precluding a charge, such as that at issue in the main proceedings, being imposed on any natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna.

18 It should be recalled, as a preliminary point, that, pursuant to Article 1(2) of the authorisation directive, that directive applies to authorisations for the provision of electronic communications networks and services.

19 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 judgments in *Belgacom and Mobistar*, C-256/13 and C-264/13, EU:C:2014:2149, paragraph 29, and *Base Company*, C-346/13, EU:C:2015:649, paragraph 15).

20 Thus, according to the Court's settled case-law, Member States may not, within the framework of the authorisation directive, levy any charges or fees in relation to the provision of networks and electronic communication services other than those provided for by that directive (judgment in *Base Company*, C-346/13, EU:C:2015:649, paragraph 16; see also, to that effect, judgments in *Vodafone España and France Telecom España*, C-55/11, C-57/11 and C-58/11, EU:C:2012:446, paragraphs 28 and 29, and *Belgacom and Mobistar*, C-256/13 and C-264/13, EU:C:2014:2149, paragraph 30).

21 It follows that, for the provisions of the authorisation directive to be applicable to a charge such as that at issue in the main proceedings, the trigger for that charge must be linked to a general authorisation procedure, which ensures, under Article 2(2)(a) of the authorisation directive, rights for the provision of electronic communications networks or services (judgment in *Base Company*, C-346/13, EU:C:2015:649, paragraph 17; see also, to that effect, judgments in *Fratelli De Pra and SAIV*, C-416/14, EU:C:2015:617, paragraph 41; *Commission* v *France*, C-485/11, EU:C:2013:427, paragraphs 30, 31 and 34; and *Vodafone Malta and Mobisle Communications*, C-71/12, EU:C:2013:431, paragraphs 24 and 25).

22 In that regard, the Court noted, with respect to Article 12 of the authorisation directive, that a charge whose trigger is not linked to a general authorisation procedure for access to the electronic telecommunications services market does not fall within the scope of Article 12 (see, inter alia, judgments in *Vodafone Malta and Mobisle Communications*, C-71/12, EU:C:2013:431, paragraph 25, and *Fratelli De Pra and SAIV*, C-416/14, EU:C:2015:617, paragraph 41).

23 With respect to Article 13 of the authorisation directive, the Court noted that that provision does not concern all fees to which infrastructure permitting the provision of networks and electronic communication services are subject (judgments in *Belgacom and Mobistar*, C-256/13 and C-264/13, EU:C:2014:2149, paragraph 34, and *Base Company*, C-346/13, EU:C:2015:649, paragraph 18).

24 That article concerns 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 (judgments in *Belgacom and Mobistar*, C-256/13 and C-264/13, EU:C:2014:2149, paragraph 31, and *Base Company*, C-346/13, EU:C:2015:649, paragraph 19).

25 In the present case, it is apparent from the order for reference that 'all natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna shall be jointly and severally liable to pay' the charge at issue in the main proceedings, that is 'all antennae emitting or

relaying electromagnetic waves enabling mobile telephony, irrespective of whether they are linked to a separate station or fixed to a mast or to a pylon', 'installed on the territory of the municipality of Etterbeek'.

26 As is apparent from the observations submitted to the Court, the trigger for that charge, which is imposed on all natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna, whether or not they have been granted an authorisation pursuant to the authorisation directive, does not appear to be linked to a general authorisation procedure entitling the undertakings to provide electronic communications networks and services, although that is a matter to be determined by the national court.

27 Moreover, according to the case-law of the Court, the terms 'facilities' and 'install', used in Article 13 of the authorisation directive, respectively refer to the physical infrastructure enabling provision of electronic communications networks and services and to their physical installation on the public or private property concerned (judgments in *Belgacom and Mobistar*, C-256/13 and C-264/13, EU:C:2014:2149, paragraph 33, and *Base Company*, C-346/13, EU:C:2015:649, paragraph 21).

28 Accordingly, although the charge at issue in the main proceedings is imposed on all natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna, which constitutes physical infrastructure enabling the provision of electronic communications networks and services, it does not appear that that charge has the characteristics of a fee which is imposed on undertakings providing electronic communications networks and services in return for the right to install facilities.

29 In the light of the foregoing, the answer to the question referred is that Articles 12 and 13 of the authorisation directive must be interpreted as not precluding a charge, such as that at issue in the main proceedings, being imposed on any natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna.

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:

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 charge, such as that at issue in the main proceedings, being imposed on any natural or legal persons who are proprietors of a right in rem over, or of a right to operate, a mobile telephony antenna.

[Signatures]