Reports of Cases

OPINION OF ADVOCATE GENERAL
Wahl
delivered on 8 July 2015 [1]

Case C-346/13

Ville de Mons
v
Base Company SA, formerly KPN Group Belgium SA,

(Request for a preliminary ruling from the cour d'appel de Mons (Belgium))

(Reference for a preliminary ruling — Electronic communications networks and services — Authorisation Directive — Article 13 — Fee for rights to install facilities — Scope — Municipal regulations making owners of mobile telephone transmission pylons and masts subject to payment of a tax)

1. The present request for a preliminary ruling, which concerns the interpretation of Article 13 of Directive 2002/20/EC, [2] a provision which has direct effect according to the case-law of the Court, [3] illustrates the questions which still remain regarding the consequences of European harmonisation in relation to the authorisation of electronic communications networks and services for the exercise by the Member States of their competence in matters of direct taxation.

2. This request has been made in a dispute between Base Company SA, formerly KPN Group Belgium SA ('Base Company'), one of three operators active on the Belgian mobile telephone market, and Ville de Mons ('the city of Mons') regarding taxes levied on that undertaking in respect of its transmission pylons and masts located in that city.

3. It should be noted that the dispute is one of many proceedings [4] concerning taxes imposed by a number of Belgian municipalities and provinces on mobile telephone operators under the fiscal autonomy conferred on them by the constitution, [5] and it raises in particular the question whether the rule in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518) regarding the interpretation of Article 11 of Directive 97/13/EC [6] can be applied to the present case. More generally, the case will lead the Court to provide a number of clarifications on the approach to be taken with regard to financial charges levied on providers of electronic communications networks and services.

1 — Original language: French.

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 — Judgment in *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446, paragraph 39).

4 — This is shown not only by the many decisions on this subject adopted by Belgian administrative and judicial bodies but also by the cases referred to the Court, including *Belgacom* (C-454/13) and *Belgacom* (C-571/13), pending before the Court.

5 — It should be pointed out that, alongside the proceedings on provisions of EU law, the Belgian Cour constitutionnelle (Constitutional Court) is hearing a number of actions, which are currently pending, that raise questions relating to the competent authorities' decisions to adopt the taxes in question. It should also be stated that in Judgment No 189/2011 of 15 December 2011 (*Moniteur belge*, 7 March 2012, p. 14181) that court has already ruled on the constitutionality of such taxes. That ruling was mentioned by the Belgian Cour de cassation (Court of Cassation) in judgments delivered on 30 March 2012.

6 — 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).

I – **Legal framework**

A – *EU law*

4. Directive 97/13 had established a common framework for general authorisations and individual licences in the field of telecommunications services with a view to liberalising those services and facilitating the entry of new operators into the market. It was one of the measures taken for the full liberalisation of telecommunications services and infrastructure envisaged for 1 January 1998.

5. With this in mind, Directive 97/13 laid down, in addition to rules on the procedures associated with the granting of authorisations and the content of those procedures, a number of rules relating to financial payments (fees and charges) connected with those procedures which the Member States were able to impose on undertakings in the telecommunications sector.

6. Article 6 of Directive 97/13, entitled 'Fees and charges for general authorisations procedures', provided:

'Without prejudice to financial contributions to the provision of universal service in accordance with the Annex, Member States shall ensure that any fees imposed on undertakings as part of the authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable general authorisation scheme. Such fees shall be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.'

7. Article 11 of Directive 97/13, entitled 'Fees and charges for individual licences', provided:

'1. Member States shall ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences. The fees for an individual licence shall be proportionate to the work involved and be published in an appropriate and sufficiently detailed manner, so as to be readily accessible.

2. Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

8. Directive 97/13 was repealed by Article 26 of Directive 2002/21/EC.[7]

9. Article 2 of the Framework Directive provides:

'For the purposes of this Directive:

...

(e) "associated facilities" means those 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. It includes conditional access systems and electronic programme guides;

...'

7 — Directive 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) ('the Framework Directive').

10. Article 1 of the Authorisation Directive, entitled ‘Objective and scope’, states:

‘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.’

11. Article 13 of the Authorisation Directive, entitled ‘Fees for rights of use and rights to install facilities’, reads 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 [the Framework Directive].’

B – *Belgian law*

12. On 5 March 2007, the Municipal Council of the city of Mons adopted a tax regulation introducing a tax on mobile telephone transmission pylons and masts (‘the tax regulation’), which was applicable from the 2007 fiscal year onwards.

13. Article 1 of the tax regulation provides that that tax applies to ‘transmission pylons or masts of a certain size which are free-standing structures, in place during the fiscal period, intended to support the various types of antennas necessary for the proper functioning of the mobile telecommunications network, and which it was not possible to place on an existing site (roof, church …)’.

14. Under the first paragraph of Article 3 of that tax regulation, ‘the [contested] tax is payable by any natural or legal person which owns one of the structures referred to in Article 1 [of that tax regulation]’.

15. Article 4 of the tax regulation provides that the amount of the tax payable per mobile telephone transmission pylon or mast is EUR 2 500.

II – **Facts, the question referred and the procedure before the Court**

16. According to the information submitted to the Court, Base Company is a mobile telephone operator and, for that purpose, it owns and operates a network of pylons supporting telecommunications antennas for mobile telephones on the territory of the city of Mons.

17. The authorities of the city of Mons sent Base Company three notices of assessment pursuant to the tax regulation, imposing the contested tax in respect of the 2008 fiscal year in a total amount of EUR 7 500. An objection was lodged against those notices of assessment with the local authority of the city of Mons. After that objection had been rejected, an action was brought against the notices of assessment at the Tribunal de première instance de Mons (Mons Court of First Instance) (Belgium), which annulled them.

18. The city of Mons lodged an appeal against that judgment at the Cour d'appel de Mons (Court of Appeal, Mons) which, having doubts as to the applicability of Article 13 of the Authorisation Directive in the main proceedings, decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 13 of [the Authorisation Directive] preclude local authorities from introducing a tax, for budgetary or other reasons, on the economic activity of telecommunications operators, in the form of the presence on their territory of GSM pylons, masts or antennas used for the purposes of that activity?'

19. Written observations were submitted by the parties in the main proceedings and by the European Commission.

20. A hearing was held on 13 May 2015, in which the parties in the main proceedings, the Belgian Government and the Commission took part.

III – **Analysis**

21. In essence, the referring court is seeking to ascertain whether a tax introduced by a national public authority applying specifically to pylons and masts used for mobile telephones falls within the scope of Article 13 of the Authorisation Directive and, if so, whether that article precludes such a tax.

22. Very different answers have been proposed to this question, which is straightforward in principle.

23. The city of Mons, supported by the Belgian Government, claims that the tax at issue cannot be precluded by the Authorisation Directive. It states in particular that the Court has already ruled in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518), with regard to Article 11(2) of Directive 97/13 — a provision whose wording is very similar to Article 13 of the Authorisation Directive — that the directives concerning authorisation to provide telecommunications networks and services cannot be applicable to taxes where the event which gives rise to the taxes is not the grant of a licence. It also points out that the tax is payable by any person which owns a pylon or mast which it was not possible to place on an existing site and that it is not, as is required by Article 13 of the Authorisation Directive, linked to the grant of a right of use for radio frequencies or a right to install facilities or, ultimately, in consideration for some service.

24. Base Company claims that the contested tax, the event giving rise to which is the installation by operators providing electronic communications networks and services of infrastructure which can be classified as 'facilities' within the meaning of that provision, does fall within the scope of Article 13 of the Authorisation Directive. In addition, it claims that in so far as that flat-rate tax is, inter alia, discriminatory, disproportionate and not objectively justified, it does not satisfy the cumulative conditions laid down by that provision.

25. The Commission considers that, in the light of the criterion which seems to have been identified in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518), namely the existence of a direct link between the tax at issue and the grant to an operator of an authorisation to provide electronic communications networks and services, the only possible conclusion is that the contested tax does not fall under Article 13 of the Authorisation Directive. The Commission states, however, that it 'regrets' that judgment and asks the Court to adopt the opposite solution in this case. The Commission takes the view that the contested tax, which applies to 'associated facilities' within the meaning of Article 2(e) of the Framework Directive, was presumably intended to be paid in

consideration for the installation of structures necessary for the provision of such networks and services and can therefore be classified as a 'fee' within the meaning of Article 13 of the Authorisation Directive. If this latter conclusion were to be accepted, the referring court would therefore have to satisfy itself that all the conditions laid down by that provision are met.

26. As I mentioned in the introduction to this Opinion, the case at issue illustrates the tension which undeniably exists between the harmonisation resulting from the objectives pursued by the Authorisation Directive and the wish of certain national authorities to maintain the option, for mainly budgetary reasons,[8] to tax certain operators in respect of the activity which they carry on and their presence in a certain area.

27. Whilst this is not the first time this problem has been brought before the Court, certain clarifications are expected in the light of the most recent case-law.

28. In my view, these necessary clarifications concern two aspects which I will examine in turn. The first aspect, which is not raised directly by the question asked, but is a key factor in examining the taxes payable by operators of telecommunications services and networks, relates to the question whether Member States may impose certain fees outside the scope of Article 13 of the Authorisation Directive. The second aspect concerns the factors which must be taken into account for the fee in question to be considered to fall within that scope and, as the case may be, to determine whether that fee satisfies the conditions laid down by that provision.

A – *May the Member States impose fees outside the scope of the Authorisation Directive?*

29. Although the extent to which the national authorities may impose fees not falling within the scope of Article 13 of the Authorisation Directive is not mentioned directly by the request for a preliminary ruling, it is raised indirectly by the referring court, as is evident from the documents submitted to the Court.

30. It is clear from the decision to refer the case, first, that the referring court proceeded from the assumption that the contested tax was neither a fee within the meaning of Article 13 of the Authorisation Directive nor an administrative charge within the meaning of Article 12 of that directive and, second, that the referring court is uncertain about the relevance and the scope of the case-law according to which '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'.[9]

31. With regard to this first aspect, and although this has been a matter of debate having regard, in particular, to *Albacom and Infostrada*[10] in respect of the interpretation of Article 11 of Directive 97/13, in my view it is only 'within the framework of the Authorisation Directive' that 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.[11]

8 — For an overview of local financial issues, reference should be made inter alia to the various studies published in the *Revue de fiscalité régionale et locale*, 2014/2, pp. 93 to 106.

9 — The referring court mentions the judgment in *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446, paragraph 28) and the reference made in that judgment to the judgments in *Nuova società di telecomunicazioni* (C-339/04, EU:C:2006:490, paragraph 35) and *Telefónica Móviles España* (C-85/10, EU:C:2011:141, paragraph 21).

10 — C-292/01 and C-293/01, EU:C:2003:480. Paragraph 42 of that judgment states that 'Directive 97/13 ... prohibit[s] Member States from imposing financial charges other than and in addition to those allowed by the directive, such as the contested charge in the main proceedings, on undertakings which hold individual licences in the telecommunications sector solely because they hold such licences'.

11 — Judgment 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).

32. Article 13 of the Authorisation Directive, a directive which was adopted on the basis of Article 95 EC (now Article 114 TFEU), does not completely limit the Member States' tax sovereignty, but covers only taxes the event giving rise to which is linked directly or indirectly to the general authorisation procedure or the granting of rights of use. In other words, it seems that Article 13 of the Authorisation Directive does not set out exhaustively all the fees and charges that may be imposed on electronic communications operators but seeks to place those which may be imposed in the context of 'authorisations for the provision of electronic communications networks and services' (see Article 1(2) of the Authorisation Directive). It is only where Member States decide to impose tax charges on mobile telephone operators covered by an authorisation that they must comply with the provisions of the directive.

33. Two considerations reinforce my conclusion.

34. First of all, this interpretation is fully consistent with the line taken by the Court with regard to administrative charges within the meaning of Article 12 of the Authorisation Directive when it heard an action for failure to fulfil obligations [12] or a request for a preliminary ruling. [13]

35. Second, and above all, that line appears to have been recently confirmed by the Court in a request for a preliminary ruling relating specifically to the interpretation of Article 13 of the Authorisation Directive in relation to taxes imposed by the province of Antwerp on two providers of electronic communications networks and services. In *Belgacom and Mobistar* the Court ruled that Article 13 of the Authorisation Directive does not concern all fees to which operators of electronic communications networks and services are subject. In reaching that conclusion, it relied on the wording used in Articles 1(2) and 13 of the Authorisation Directive. [14]

36. In summary, the Authorisation Directive applies to authorisations for the *provision* of communications networks and services. The Member States may not levy any charges in relation to such provision other than those expressly provided for by that directive.

37. They do, however, retain some freedom in setting taxes which are not in relation to such provision. I say 'some' as, whatever the area in which the competent authority in taxation matters acts, it must always comply with the requirements under EU law. Even in the case of fees not covered by Article 13 of the Authorisation Directive, the court must still satisfy itself that they are not likely to undermine the effectiveness of the Authorisation Directive, in particular by creating obstacles to the entry of new operators into the market and, more broadly, ascertain whether or not they infringe EU law provisions and principles, such as those guaranteeing freedom of establishment and equal treatment of operators in the sector.

38. Having made these clarifications, I will now turn to the problem specifically raised by the referring court and on which the debate in the main proceedings has focused, namely whether the contested tax is likely to fall within the scope of Article 13 of the Authorisation Directive and, if so, whether it satisfies the conditions laid down by that provision.

39. I will first endeavour to set out the principles which should, in my view, be drawn from the case-law developed thus far by the Court and then examine the specific case of the contested tax.

12 — Judgment in *Commission* v *France* (C-485/11, EU:C:2013:427).

13 — Judgment in *Vodafone Malta and Mobisle Communications* (C-71/12, EU:C:2013:431).

14 — C-256/13 and C-264/13, EU:C:2014:2149, paragraphs 34 and 35.

B – *The principles drawn from case-law from Mobistar and Belgacom Mobile to Belgacom and Mobistar: towards a reconsideration of the issue of an authorisation (or licence) as the exclusive criterion for the application of Article 13 of the Authorisation Directive*

40. All the parties seem to agree that the circumstances giving rise to the judgment in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518) originate from disputes which are very similar to the present case.

41. It should be recalled that, in those joined cases, mobile telephone operators were seeking the annulment of tax regulations under which Belgian municipalities taxed owners of mobile telephone antennas, masts and pylons.

42. Although in those cases Article 11 of Directive 97/13 had been mentioned only incidentally during the hearing [15] — as the questions referred for a preliminary ruling related only to Article 49 EC (now Article 56 TFEU) and Directive 90/388/EEC [16] — the Court nevertheless stated that 'the event which [gave] rise to the taxes on communications infrastructures [was] not the issue of a licence' and that '[t]herefore, Directive 97/13, which was relied on by Mobistar at the hearing, [was] not applicable to the facts of the case'. [17]

43. By ruling in this way it seems that the Court made 'the issue of a licence' the decisive criterion for distinguishing fees which fall within the scope of Directive 97/13 from those which do not fall within its scope.

44. This is certainly not an isolated finding, as the Court seems to have subsequently confirmed the importance to be attached to the event which gives rise to various fees and charges, namely whether or not it was linked to the grant of an authorisation, in determining whether charges or fees fell within the scope of Articles 12 and 13 of the Authorisation Directive.

45. For example, in *Commission* v *France*, [18] which concerned an additional charge levied on operators holding a general authorisation and which provided their services to end users on the electronic communications market, the Court held that a charge the event giving rise to which was not linked to the general authorisation procedure for access to the electronic communications services market but which was linked to the operator's activity, consisting in providing electronic communications services to end users in France, did not fall within the scope of Article 12 of the Authorisation Directive.

46. Similarly, in *Vodafone Malta and Mobisle Communications* [19] the Court ruled that Article 12 of the Authorisation Directive did not preclude national legislation imposing a charge referred to as an 'excise duty' which was payable by operators providing mobile telephony services and which was calculated as a percentage of the charges paid to them by the users of those services, provided the trigger for that duty was linked, not 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 was ultimately borne by the user of those services.

15 — See Opinion of Advocate General Léger in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:203), point 14.

16 — Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended by Commission Directive 96/2/EC of 16 January 1996 (OJ 1996 L 20, p. 59).

17 — Judgment in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518, paragraph 37).

18 — C-485/11, EU:C:2013:427, paragraphs 31 and 34.

19 — C-71/12, EU:C:2013:431, paragraphs 24 and 25.

47. As has been highlighted during the present proceedings, although the wording of Article 11(2) of Directive 97/13 is different from Article 13 of the Authorisation Directive, as the latter article is undeniably more specific in regard to the purpose of the fees in question (first sentence of Article 13) and the conditions which those fees must meet (second sentence of Article 13), it seems that the objectives pursued by those two provisions are identical.

48. They seek to establish the possibility for Member States, under certain conditions, to introduce fees which reflect the need to ensure the optimal use of scarce resources. Those provisions both ultimately seek to promote competition, the development of the internal market or the interests of the citizens of the European Union (see, in particular, Article 8 of the Framework Directive).

49. Accordingly, there is no reason in principle to depart from the principles identified in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518, paragraph 37).

50. Does this mean that the criterion relating to the grant of a licence alone is relevant in determining whether or not a tax falls within the scope of Article 13 of the Authorisation Directive?

51. I do not think so, for several reasons.

52. First of all, it should be borne in mind that in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518) the application of Directive 97/13 had been raised only in a secondary and incidental manner. This is shown by the brevity of the passage on the applicability of Directive 97/13.

53. Second, as is clear from its wording, Article 13 of the Authorisation Directive concerns the arrangements for imposing fees for rights of use for radio frequencies or numbers or the right to install facilities on public or private property. The Court has stated in this regard that as 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, Article 13 of the Authorisation Directive must be applied in the same way to both procedures.[20]

54. It inevitably follows that, beyond even the question whether the event giving rise to the tax is linked *directly* to the grant of an authorisation (or licence), fees should also be covered where the event which gives rise to them is the grant of rights of use for radio frequencies or numbers and rights to install facilities in the broad sense. It does not seem appropriate to retain the apparently restrictive solution adopted by the Court in *Mobistar and Belgacom Mobile* (C-544/03 and C-545/03, EU:C:2005:518). In my view, whilst the grant of a licence or specific tights in a general authorisation procedure is undeniably a sufficient condition to conclude that the Authorisation Directive is applicable, it cannot become a prerequisite for such applicability.

55. In these conditions, it seems that the criterion for the application of the Authorisation Directive to fees must be clarified. The question is not so much whether the fees are linked directly to the grant of a licence or an authorisation but whether they must be placed in the context of an authorisation procedure, like those applying, in accordance with the wording of Article 13 of that directive, to the installation of facilities necessary for the functioning of the mobile telephone network.

20 — See judgment in *Belgacom and Others* (C-375/11, EU:C:2013:185, paragraph 39).

C – *The application of the analytical framework established by Article 13 of the Authorisation Directive in the main proceedings*

56. As Advocate General Sharpston stated in her Opinion in *Vodafone España and France Telecom España*, the examination whether a national financial charge is consistent with Article 13 of the Authorisation Directive requires, in accordance with the wording of that provision, a two-stage examination. [21]

57. Thus, after examining whether the contested tax is likely to fall within the scope of Article 13 of the Authorisation Directive — which seems to be the case — I will briefly consider whether it satisfies the conditions laid down by the second sentence of that provision.

1. Does the contested tax fall within the scope of Article 13 of the Authorisation Directive?

58. In the main proceedings, of the three categories of fees mentioned in Article 13 of the Authorisation Directive, namely those for rights of use for radio frequencies, those for rights of use for numbers and those for the right to install facilities on, over or under public or private property, only the latter are referred to by the national court.

59. In my view, fees relating to rights to install facilities must be seen from the perspective of the Authorisation Directive. In order to determine whether a certain tax falls within the scope of the Authorisation Directive, regard must be had to its *purpose*.

60. In this regard, the Court held that the term 'facilities' and the expression 'install' used in Article 13 of the Authorisation Directive 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, respectively. [22]

61. All this leads me to think that the contested tax has the characteristics of a fee levied on the right to install facilities on, over or under public or private property, which does fall within the scope of Article 13 of the Authorisation Directive.

62. First, that tax is solely payable in respect of the siting of pylons or masts which, under the tax regulation, are structures 'intended to support the various types of antennas necessary for the proper functioning of the mobile telecommunications network'. Those pylons and masts are undeniably physical infrastructure enabling provision of electronic communications networks and services. The contested tax is therefore imposed in respect of the right to *install facilities* in the city of Mons and not, as was the case in *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446), only the use of those facilities.

63. Second, that tax is payable by the owners of those facilities, which, in all likelihood, are also *providers* of electronic communications networks or services. Whilst the tax regulation in question does not make operators of such networks or services liable to tax per se, it would appear, in the absence of information to the contrary, that only operators holding the authorisation to provide mobile telephone networks or services own transmission pylons or masts necessary for their proper functioning.

21 — C-55/11, C-57/11 and C-58/11, EU:C:2012:162, points 47 to 49 and 73.

22 — See, to that effect, judgments in *Belgacom and Mobistar* (C-256/13 and C-264/13, EU:C:2014:2149, paragraph 33) and *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446, paragraph 32).

64. Lastly, although motivated by budgetary considerations, the contested tax in the main proceedings can be seen as a fee to be paid by operators in consideration for the option available to them to install, on public or private property, the structures necessary for the provision of electronic communications networks and services and is directed at *the optimal use of resources*. Under Article 1 of the tax regulation, the tax applies to structures '*which it was not possible to place on an existing site* (roof, church …)'.[23] As the Commission has stated, the tax therefore takes account of the impact of the installation of pylons and masts on the availability of public or private land. The contested tax was introduced to be levied on any facility located on public or private property which thereby reduces the availability of that property for other purposes or uses. The aim is therefore to ensure the optimal use of the available land.

65. It should be stated in this regard that the Member States' intended use of the income from the tax is immaterial.[24] Similarly, at the risk of undermining the effectiveness of the Authorisation Directive, the reasons for introducing certain taxes should not be decisive. Otherwise it would have to be feared that Member States could circumvent the application of the rules laid down by the Authorisation Directive by reference to budgetary or environmental objectives which they intend to pursue.

66. In these circumstances, it would appear that there is a direct link between the grant of the right to install facilities for the purposes of the Authorisation Directive and the contested tax. Although, as is mentioned by the city of Mons, the payment of that tax does not constitute a prerequisite for access to the market for the provision of telecommunications services and networks, operators wishing to continue to use facilities owned by them in that city are nevertheless liable to pay that tax each year.

67. In conclusion, it appears that the fee at issue is levied on operators of electronic communications networks and services who enjoy the rights conferred by Article 13 of the Authorisation Directive and it therefore falls within the scope of that provision.

68. It should be stated that the contested tax has different characteristics from the tax imposed by the province of Antwerp in *Belgacom and Mobistar* (C-256/13 and C-264/13, EU:C:2014:2149).

69. In concluding that the tax at issue in that case did not fall within the scope of the Authorisation Directive, the Court observed that the tax was payable by any legal entity incorporated under Belgian or foreign law which had an establishment in the province of Antwerp, used by or reserved for the use of that legal entity regardless of the nature of the establishment and the activity of those subject to the tax. The amount of that tax depended on the area occupied by the establishments. Those subject to the tax were therefore not just operators providing electronic communications networks or services or those enjoying the rights provided for by Article 13 of the Authorisation Directive.[25]

70. By contrast, in the main proceedings, the municipal tax at issue is not a general tax in so far as it is not levied on any economic operator which is subject to corporation tax and which has one or more establishments in the municipality, whether it be pylons and masts intended to support the various types of antennas necessary for the proper functioning of the mobile telecommunications network or other areas, as was provided for in the tax regulation of the province of Antwerp.

23 — My emphasis.

24 — With regard to the matter of the use of the income from the charge, see, by analogy, judgment in *Telefónica Móviles España* (C-85/10, EU:C:2011:141, paragraph 25).

25 — Judgment in *Belgacom and Mobistar* (C-256/13 and C-264/13, EU:C:2014:2149, paragraph 36).

71. The tax at issue in the present case was introduced in order to take account of the occupation of a proportion of the land to the possible detriment of other users. In other words, although it is established that the tax at issue seeks to ensure the optimal use of the affected resources by setting an appropriate level to reflect the value of those resources,[26] it does fall within the scope of the Authorisation Directive.

72. Two final clarifications must be made, however, in reading the judgment in *Belgacom and Mobistar* (C-256/13 and C-264/13, EU:C:2014:2149).

73. First, determining whether or not the tax at issue falls within the scope of Article 13 of the Authorisation Directive cannot be confined to a purely formal examination of the wording used by the legislature or by the competent regulatory authority at national level to refer to the tax at issue. The national authorities would in that case only have to refer to a tax in terms similar to those used by the Council of the province of Antwerp in the wording of tax regulations at issue in that case in order to circumvent the application of Article 13 of the directive, even though it seems that in practice the tax at issue is essentially payable by operators of mobile telephone communications networks and services which hold operating authorisations and wish to install facilities in connection with their activities.

74. It would seem that if it transpires that despite the general nature of the words used to refer to a tax, the persons subject to that tax in the specific case are only operators providing electronic communications networks and services or those enjoying the rights provided for by Article 13 of the Authorisation Directive, that tax must be considered to fall within the scope of that provision.

75. Second, were the Court to disagree with my conclusion that the levying of fees like that in the main proceedings does fall within the scope of Article 13 of the Authorisation Directive, it would still have to be determined, as I have stated above (see point 37 of this Opinion), whether such a tax is likely to undermine the effectiveness of the Authorisation Directive and of the provisions and principles of EU law.

76. I still have to ascertain the extent to which the tax contested in the main proceedings satisfies the conditions laid down in the second sentence of Article 13 of the Authorisation Directive.

2. Does the contested tax satisfy the conditions laid down in Article 13 of the Authorisation Directive?

77. If the Court were to concur with the conclusion that the contested tax falls within the scope of Article 13 of the Authorisation Directive and having been established that the objective of the fee is to ‘reflect the need to ensure the optimal use of resources’, it will have to be determined, in the light of all the circumstances of the case, whether it satisfies, first, the condition that its objective must be to ‘reflect the need to ensure the optimal use of resources’ and, second, the requirement that fees must be ‘objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose’. It should be noted that these are cumulative conditions.

78. Although this is clearly a task for the referring court alone, a few clarifications should be given as to the meaning of these requirements.

79. With regard, first, to the objective pursued by the levying of the contested tax, the referring court will have to determine, first of all, whether, aside from the clearly budgetary objective pursued by the tax regulation,[27] it properly reflected the need to ensure the optimal use of resources.

26 — See, in this regard, judgment in *Belgacom and Others* (C-375/11, EU:C:2013:185, paragraph 51).

27 — According to the explanatory statement for the tax regulation, ‘it is necessary to protect municipal finances’.

80. Second, with regard to the necessary characteristics of the tax at issue, it will be necessary, first, to examine whether the fee is objectively justified. In this respect the referring court will have to ascertain whether the amount of the fee is linked to the intensity of use of the 'scarce resources' and to the present and future value of that use. This assessment requires account to be taken of the economic and technical situation of the market concerned.[28] In this regard, the referring court will have to satisfy itself that the fee was calculated on the basis of parameters that relate to the need to ensure the optimal use of resources, 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.[29] Without wishing to encroach upon the assessment which will ultimately have to be made in the main proceedings, it seems that no such examination has been made. Thus, it has not been claimed that the amount of the contested tax, which is flat-rate in nature, was set on the basis of criteria linked to the intensity of use of the facilities or the value of that use.

81. Third, with regard to the transparency of the fee, the national court will have to satisfy itself that the tax was set in a clear and comprehensible manner by an accessible act. That condition, which has not been discussed, moreover, seems to be satisfied in this case.

82. Fourth, as regards the assessment of the proportionality of the contested fee, the referring court will have to satisfy itself that the fee was set at an appropriate level having regard to the need to ensure the optimal use of scarce resources. Here too, without wishing to prejudge the assessment to be made by the referring court, it is to be feared that, in view of its purely flat-rate character, the tax is not proportionate.

83. Lastly, it will have to be ascertained that the fee was set in a non-discriminatory manner, that is to say it does not result in comparable situations being treated differently. The referring court will thus have to determine whether operators of electronic communications networks and services in comparable situations are subject to the same level of financial burden.

IV – **Conclusion**

84. In the light of the foregoing considerations, I propose that the Court answer the question referred by the cour d'appel de Mons as follows:

Article 13 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) must be interpreted as relating to a specific fee the event giving rise to which is the installation of facilities within the meaning of that provision, such as pylons and masts necessary for electronic communications networks and services, payable by the operators of such services and networks which hold an authorisation and own those facilities.

To be permitted, such a fee must reflect the need to ensure the optimal use of resources and must be objectively justified, transparent, non-discriminatory and proportionate. The national court must satisfy itself, in the light of the specific circumstances of the present case and having regard to the objective evidence submitted to it, that these conditions are satisfied.

28 — See, to this effect, the judgment in *Belgacom and Others* (C-375/11, EU:C:2013:185, paragraph 51 and the case-law cited).

29 — Opinion of Advocate General Sharpston in *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:162, point 77).