Case C-443/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

7 June 2019

Referring court:

Tribunal Superior de Justicia del País Vasco (High Court of Justice, Basque Country, Spain)

Date of the decision to refer:

24 April 2019

Applicant:

Vodafone España S.A.U.

Defendant:

Diputación Foral de Guipúzcoa (Provincial Council of Guipúzcoa)

Subject matter of the main proceedings

Appeal brought against the decision of the Tribunal Económico-Administrativo Foral de Guipúzcoa (Provincial Tax Tribunal, Guipúzcoa) which dismissed challenges to decisions that partially upheld applications for correction and repayment in respect of self-assessment of the Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (tax on capital transfers and documented legal acts) paid on the grant of sole use of part of the radio spectrum.

Subject matter and legal basis of the request for a preliminary ruling

The purpose of the question referred for a preliminary ruling under Article 267 TFEU is to ascertain whether a rule of national law that levies the general tax on capital transfers and documented legal acts — which applies generally to administrative concessions of publicly owned assets — on use of radio frequencies by a telecommunications operator that is already subject to a charge known as the spectrum fee, is compatible with Directive 2002/20.

Question referred

‘Whether Article 13 and related and supplementary provisions 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 (OJ 2002 L 108, p. 21) must be interpreted as precluding the Kingdom of Spain, and specifically the fiscally autonomous historic territory of Guipúzcoa, from making telecommunications operators’ right of use of radio frequencies — which is already subject to what is known as the spectrum fee — subject to the general tax on capital transfers and documented legal acts that applies generally to administrative concessions of publicly owned assets, in accordance with local laws governing the said tax.’

Provisions of EU law cited

Provisions of EU law

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), in particular Articles 12 and 13.

Case-law of the Court of Justice of the European Union

Judgment of 12 July 2012, *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446)

Judgment of 18 September 2003, *Albacom and Infostrada* (C-292/01 and C-293/01, EU:C:2003:480)

Judgment of 6 October 1982, *Cilfit and Others*, (C-283/81, EU:C:1982:335)

Judgment of 30 January 2019, *Belgium* v *Commission* (C-587/17 P, EU:C:2019:75)

Judgment of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209)

Judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088)

Judgment of 9 September 2015, *X* and *van Dijk* (C-72/14 and C-197/14, EU:C:2015:564)

Judgment of 18 January 2017, *IRCCS — Fondazione Santa Lucia* (C-189/15, EU:C:2017:17)

Provisions of national law cited

Ley General de Telecomunicaciones (General Telecommunications Law) 32/2003 of 3 November 2003

Ley General de Telecomunicaciones (General Telecommunications Law) 9/2014 of 9 May 2014

Norma Foral General Tributaria del territorio histórico de Guipúzcoa del impuesto sobre transmisiones patrimoniales y actos jurídicos documentados (General Tax Law of the historic territory of Guipúzcoa governing the tax on capital transfers and documented legal acts) of 30 December 1987

Ley por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco (Law approving the Economic Agreement with the Autonomous Community of the Basque Country) 12/2002 of 23 May 2002

Ley del Patrimonio de las Administraciones Públicas (Law on Government-Owned Assets) 33/2003 of 3 November 2003

Brief summary of the facts and the main proceedings

1 On 23 April 2018, Vodafone España S.A.U. filed an appeal in administrative proceedings against the decision of the Tribunal Económico-Administrativo Foral de Gipuzkoa (Provincial Tax Tribunal of Guipúzcoa) of 15 February 2018 which dismissed the challenges to decisions by the Servicio de Impuestos Indirectos y Tributos Medioambientales (Department of Indirect Taxes and Environmental Levies) of 25 February 2016 that partially upheld applications for correction and repayment in respect of self-assessment of the Impuesto de Transmisiones Patrimoniales y Actos Jurídicos Documentados (tax on capital transfers and documented legal acts; 'ITP' and 'AJD' or 'ITPO' (Impuesto de Transmisiones Patrimoniales Onerosas) (tax on capital transfers for valuable consideration)) paid on the grant of sole use of part of the radio spectrum.

2 In its appeal, that company stated that after it had submitted self-assessment returns based on the legislation governing ITPO, it concluded that the self-assessments were wrong, both in terms of the calculation of the tax base, which was corrected by the decisions of 25 February 2016, and because the tax itself was in breach of EU legislation.

3 On 6 September 2018 the Diputación Foral de Guipúzcoa (Provincial Council of Guipúzcoa) filed a written response in which it rejected the claim of double taxation, on the grounds that there was a difference between a tax and a charge in the Norma Foral General Tributaria (General Provincial Tax Law).

4 On 23 January 2019, the referring court issued an order giving the parties a period of time in which to submit their views on whether a question of interpretation

should be referred to the Court of Justice in order to ask how Article 13 of Directive 2002/20/EC should be interpreted as regards whether the power which this Member State has to impose a fee (known as the spectrum fee) for the right to use the radio spectrum is compatible with the imposition of an additional charge in respect of a domestic general tax that treats the administrative concession of sole use of those radio frequencies as a capital transfer for valuable consideration.

Main arguments of the parties to the main proceedings

5 In support of its argument that the aforesaid payments should be cancelled, the applicant argued, in summary, that the requirement to pay ITPO involved double taxation, contrary to EU law on the charge for allocation of radio frequencies (the spectrum fee), which is now governed by Section 3 of Annex I to the Ley General de Telecomunicaciones (General Telecommunications Law) 9/2014 of 9 May 2014. This is because the taxable event for ITPO purposes is the administrative concession of sole use of part of the radio spectrum under the provisions described by the applicant; under the Provincial Law governing ITP, this tax base comprises the price or fee paid by the concession-holder plus the annual (spectrum) fee capitalised at 10%.

6 It then went on to describe the arrangements established by Directive 2002/20 (Authorisation Directive), and Articles 12 and 13 in particular. These articles have direct effect by virtue, inter alia, of the judgment of the Court of Justice of the European Union of 12 July 2012, C-55/11 and joined cases, which provides the grounds for a prohibition on Member States levying fees and charges other than those provided for in the directive. Precedents for the judgment are to be found in the judgment of 18 September 2003, *Albacom and Infostrada* (C-292/01 and C-293/01, EU:C:2003:480) and other later judgments which it cites. It argues that the ITPO does not produce optimal use of resources and concludes by noting that the existence of different categories of domestic taxation is irrelevant, as is made clear by the judgment of the Court of Justice of the European Union of 18 January 2017, *IRCCS — Fondazione Santa Lucia* (C-189/15, EU:C:2017:17).

7 For its part, the Provincial Council of Guipúzcoa rejected the claim of double taxation, on the grounds that the General Provincial Tax Law (Article 16(2)) drew a distinction between a tax and a charge. It noted that ITP is a tax and, as such, it is levied on administrative concessions (Article 7(1)(b) of Provincial Law 18/1987). It then addressed the charge for allocation of radio frequencies which, for the purposes of this case, is governed by the Ley General de Telecomunicaciones (General Telecommunications Law) 32/2003, Article 49 of which sets out the purpose of the charge. It concluded that in this case the chargeable event is the allocation of exclusive use of any frequency of this public asset and the funding of administrative costs. It concludes that there is therefore no double taxation, because ITP is levied on the transfer of the assets consequent on use, whereas the charge is for allocation of sole use. It points out that Articles 12 and 13 of Directive 2002/20/EC do not restrict the general power of

Member States to regulate other taxes, such as ITP or the Impuesto sobre Sociedades (Corporation Tax), payable by operators. Continuing to follow the line of the TEA Foral (Provincial Tax Tribunal), it cites judgments given by the High Courts of Justice of Madrid and Galicia, which lead it to the conclusion that ITP does not constitute consideration for the telecommunications service. Finally, it also rejects the argument that the classification of domestic taxation into different categories is irrelevant, on the grounds that they involve different taxable events, just as Corporation Tax or VAT do.

Brief summary of the basis for the request for a preliminary ruling

8 The General Telecommunications Law, which for the purposes of the present case is the General Telecommunications Law 32/2003 of 3 November 2003 (BOE No 264 of 4.11.2003), now repealed, establishes certain telecommunications fees. Article 49(3) stipulates that 'without prejudice to the provisions of paragraph 2, the purpose of the fees for use of the radio spectrum [...] shall be to ensure optimal use of these resources, having regard to the value of the asset of which use is granted and its scarcity'. That provision is now contained in Article 71(3) of the new General Telecommunications Law 9/2014 of 9 May 2014.

Annex I to both laws governs various charges, including the charge for allocation of radio frequencies, which is addressed in Section 3 of Annex I in the following terms: 'The allocation to one or more persons or entities of any frequency of the radio spectrum for sole or special use by operators shall be subject to an annual charge in accordance with the terms of this paragraph. In determining the level of the charge payable by those liable for payment, regard shall be had to the market value of use of the allocated frequency and the profits which the beneficiary could obtain from it [...]'.

This is the first charge that was levied on the appellant telecommunications operator by the competent government body. It is known as the spectrum fee, which is permissible under Article 13 of Directive 2002/20/EC; the directive's objective and safeguards are included in the provisions of the General Law on Telecommunications cited above.

9 The Provincial Council of Guipúzcoa has also demanded payment from the operator of the general tax on capital transfers, in the form of ITPO. Under the Economic Agreement with the national government approved by Law 12/2002 of 23 May 2002, this tax is regulated and administered by the Historic Territory of Guipúzcoa, whose own laws apply instead of those of the national tax authorities.

Under both national regulations and the provincial regulations of Guipúzcoa, which apply in this case, administrative concessions are taxable events, being classified as capital transfers.

10 In view of the above, the referring court wonders whether the question needs to be referred for interpretation under Article 267 TFEU. In its view, it is highly

doubtful whether the two charges that have been applied are compatible with each other under Directive 2002/20, and the issue has not been addressed or clarified by the applicable directives or the case-law of the Court of Justice of the European Union. A reference to the Court of Justice is therefore essential, particularly given that opinions expressed by other courts in the same Member State assume that the two charges are compatible. The referring court therefore does not have the certainty of uniform application of the directive as regards the incompatibility asserted by the appellant operator.

11 The applicant has pointed out that under Article 64(5) of the General Telecommunications Law currently in force in Spain (Law 9/2014) 'failure to pay the tax on capital transfers and documented legal acts' is grounds for revoking the licence, which could be interpreted as meaning that, in the mind of the legislator, the two charges can, or must, coexist, and ITPO is effectively a requirement for holding a licence.

12 In the view of the referring court, the interpretation propounded by the operator Vodafone España S.A.U. based on judgments of the Court of Justice of the European Union, such as its judgment of 12 July 2012 in Cases C-55/11, C-57/11 and C-58/11, which also address the situation in the Kingdom of Spain and which establish that Member States cannot levy fees or charges other than those in Articles 12 and 13 of the directive, is not defeated by the opposing argument put forward by the Provincial Council of Guipúzcoa, based on the domestic judgments it cites, that the spectrum fee and ITPO are levied on different taxable events.

13 Given that in this matter the General Telecommunications Law implements the aforementioned Articles 12 and 13 of the directive, what is meant by the fee in Section 3 of Annex I can only be understood by reference to the licences for use of the radio spectrum as set out in Article 62 of the current law. This provision distinguishes between shared, special and exclusive use, with a licence being required only for the latter two types of use. It stipulates that: 'special use of the radio spectrum means use of frequency bands allocated for shared use, where there is no restriction on the number of operators or users and the relevant technical conditions to be satisfied and the services that can be provided are stipulated in each case'; and 'exclusive use of the radio spectrum means exclusive use, or use by a limited number of users, of certain frequencies in the same physical area of application'. Article 62(3) and (4) refers to cases where rights of use of the radio spectrum are granted under a general or an individual authorisation, and Article 62(5) stipulates that 'in other cases, not provided for in the previous paragraphs, an administrative concession shall be required for the right of sole use of the radio spectrum. In order to obtain such a concession, applicants must be electronic communications operators […]'.

14 This legal and administrative system governing special or sectoral public assets is essentially no different from the arrangements that apply generally to all types of government-owned public assets in the Kingdom of Spain as established by Articles 84 to 104 of Title IV of the Ley del Patrimonio de las Administraciones

Públicas (Law on Government-Owned Assets; 'LPAP') 33/2003 of 3 November 2003. It can therefore be concluded that a telecommunications operator that is granted exclusive use of certain frequencies, as is the case here, obtains a genuine administrative concession of publicly owned assets of the type found in Article 7(1)(b) of the Provincial Law of Guipúzcoa governing ITP and that, as with any concession, it comprises the exercise of temporary exclusive use of the public asset in return for a fee.

15 In short, the transfer of assets entailed by the concession of radio frequencies is no more and no less than the transfer involved in any other concession and, in the view of the referring court, the interpretation propounded by the defendant government is not admissible under telecommunications law and administrative law on publicly owned assets.

16 In view of the above, the domestic distinction on technical taxation grounds between a charge and a tax is irrelevant for the purposes of the directive and the case-law of the Court of Justice of the European Union. Article 13 of the directive authorises Member States to impose 'fees' and 'charges', and the payment required from the operator in order to obtain that administrative grant of use of the radio spectrum is not a tax but a fee for grant of use; that is why, in the generality of factual circumstances that are taxed under Article 7(1)(b) of the Provincial Law governing ITP, a levy, namely the tax, has been able to coexist comfortably and peacefully with another fee, charge or public payment which the concession holder has to pay as a concession fee, even though it is currently classified as a charge under Article 2(2)(b) of the Spanish Ley General Tributaria (General Tax Law) 58/2003 of 17 December 2003 and the corresponding Provincial Law of Guipúzcoa.

17 However, the distinction between a charge and a tax in domestic law and whatever observations anyone may wish to make on the conceptual difference between the purpose of the two concepts and their factual circumstances falls away entirely given that Directive 2002/20 prevents two or more impositions or charges being levied on that same exclusive right of use of the radio spectrum granted to the operator or, to put it another way, on the same 'taxable event' by way of any type of fee, financial payment or charge over and above that provided for in Article 13 of the directive; and that generic prohibition covers any concept in domestic law, however subtle the perspectives and conceptual differences that may be drawn between them, even if the prohibition affects the general system of taxation and its standard categories, such as ITPO.

18 That is the conclusion to be drawn from highly significant paragraphs in the judgment of the Court of Justice of the European Union of 12 July 2012, *Vodafone España and France Telecom España* (C-55/11, C-57/11 and C-58/11, EU:C:2012:446), particularly in paragraphs 26 to 28, in which it held 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', and 'the authorisation directive is a maximum harmonisation

directive, meaning that under that directive, Member States may not levy fees or charges in relation to the provision of networks and electronic communication services other than those provided for by that directive. The common framework which the directive seeks to introduce would be ineffective if Member States could freely determine the taxes to be borne by businesses in the sector.' That case-law was adopted in full by the Tribunal Supremo (Supreme Court) of the Kingdom of Spain.

19 Having put forward its reasons for its initial conviction that the two impositions are incompatible with each other, the referring court sets out the considerations on which it nevertheless bases its request for a preliminary ruling, having regard also to the possibility of an appeal in cassation in the event that an apparent contradiction could be considered to exist between the judgment given by the referring court and the case-law of the Court of Justice. To that end, against the background of the widely disseminated judgment of 6 October 1982, *Cilfit and Others* (C-283/81, EU:C:1982:335) it cites various judgments that support the reference for a preliminary ruling: judgment of 30 January 2019, *Belgium* v *Commission* (C-587/17 P, EU:C:2019:75); judgment of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209), paragraphs 31 to 33; judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088), paragraph 32; judgment of 9 September 2015, *X* and *van Dijk* (C-72/14 and C-197/14, EU:C:2015:564), paragraph 53; judgment of 6 October 1982, *Cilfit and Others* (C-283/81, EU:C:1982:335).