OPINION OF ADVOCATE GENERAL POIARES MADURO
delivered on 1 October 2009[1]

I – Factual and legal background

1. One of the most difficult but, at the same time, fundamental tasks of this Court is that of controlling the boundaries of the Union's actions. This is fundamental to the preservation of the balance of power between the States and the Union. It is also vital to the maintenance of a proper balance of power between the Union's own institutions. In addition, the exercise of control over the Union's actions is important to guarantee proper political accountability within States (because the Union affects their internal balances of power) and the appropriate allocation of that political accountability between the Union and the States (so that citizens know who is really responsible for what). Judicial control is not, however, the only way through which the Union's and, in particular, the Community's competences are controlled. The processes of decision-making to which Community competences are subject and the participation they grant to Member States and different Community institutions often constitute the most effective means of controlling those competences. It can comfortably be said that, for a long period of time, this Court was not called on to exercise a predominant role in the control of the Community's competences precisely because there were already strong limits to those competences enshrined in their decision-making processes. Increasingly, however, with the growth of Community competences and the changes in the relevant processes of decision-making, this Court is being called on to exercise that role. One of the most difficult areas involves the extent of the Community competences in the context of the internal market and, particularly, the extent of the Community's authority to legislate on the basis of Article 95 EC. This case is a good example: at its core is the question of whether the Community can regulate prices under Article 95 EC and, if so, to what extent and under which conditions. There is no doubt that, in the context of the functioning of the internal market, the Community has the authority to intervene with respect both to prices set by undertakings (under competition rules) or by the Member States (notably under free movement rules). But can the Community itself adopt legislation, on the basis of Article 95, setting, for example, certain price limits? If so, under which circumstances may it do so? The answer to be provided by the Court depends on our general understanding of the purpose of Article 95. In my view, the interpretation that this Court has given to Article 95 makes it clear that this is not a provision intended to give to the Community a general power of regulation over the internal market. At the same time, however, the Court has not limited Article 95 EC to empowering the Community only to the extent necessary to eliminate obstacles to the functioning of the internal market. The reason for this is to be found in the dual nature of this provision. It is a provision intended for the adoption of measures

1 — Original language: English.

which have as their object the establishment and functioning of the internal market but those Community measures replace State measures that pursue a variety of regulatory goals of the market. The fact that Community intervention is rendered necessary for the purposes of the internal market should not affect the pursuit of those other regulatory goals. Any interpretation to be made of Article 95 must preserve this balance. The justification for Community intervention comes from the goal of market integration but that Community intervention should preserve the political freedom to choose among a variety of policy options in regulating the market. It is this underlying concern that must guide the interpretation and application of Article 95 to the present case.

2. The case involves a challenge to Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ 2007 L 171, p. 32) ('the Roaming Regulation') which amended the Common Regulatory Framework ('the CRF') in order to establish Community-wide maximum prices (called the 'Eurotarriff') in respect of roaming [2] on public mobile phone networks within the Member States. The CRF is a series of Community measures which established a set of harmonised procedures governing the regulatory framework in respect of electronic communication services throughout the Union. The CRF, prior to the enactment of the Roaming Regulation, did not provide the Community institutions with the power to set Community-wide maximum prices in respect of roaming.

3. Vodafone and others brought proceedings in the High Court of Justice of England and Wales challenging the validity of the Roaming Regulation. The national court has referred the following questions to this court under Article 234 EC:

'(a) Is Regulation (EC) No 717/2007 invalid, in whole or part, by reason of the inadequacy of Article 95 EC as a legal basis?

2 — 'Roaming' refers to the use of the network of a mobile communication provider in a Member State other than that of the network of the user's mobile phone.

(b) Is Article 4 of Regulation (EC) No 717/2007 (together with Articles 2(a) and 6(3) insofar as they refer to the Eurotariff and obligations relating to the Eurotariff) invalid on the grounds that the imposition of a price ceiling in respect of retail roaming charges infringes the principle of proportionality and/or subsidiarity?'

4. As these questions indicate, the challenge to the regulation is based on assertions that the Roaming Regulation is invalid on the basis that Article 95 EC did not provide an adequate legal basis for Community action and that, even if this were not so, the imposition of retail price controls by the regulation constituted an infringement of the principles of proportionality and subsidiarity. I propose to deal first with the issue of legal basis before moving on to consider the issues arising in respect of proportionality and subsidiarity.

5. The relevant parts of Article 95 EC provide that:

'1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'

6. The relevant portions of Article 14 provide that:

'1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of the Treaty.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital in ensured in accordance with the provisions of this Treaty.'

A – *Legal basis*

7. As this court has repeatedly stated, Article 95 may be used as a legal basis where there are disparities or potential disparities between national rules 'which are such as to obstruct the fundamental freedoms or to create distortions of competition'.[3] Measures enacted on this basis will be upheld 'only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market'.[4] Article 95 does not provide the basis for a general power to regulate the internal market.[5] Therefore, legislation based on Article 95 must not merely seek to regulate the internal market in ways which are seen as desirable by the Community legislator. As this court has previously held, to permit such use of Article 95 would be to go against the specific wording of the article and would violate the important constitutional principle that the powers of the Community are restricted to those specifically granted to it.[6] Moreover, it would conflict with the existence of other legal bases in the Treaty which specifically grant powers to the Community to regulate particular aspects of the market.

8. This is not to say that legislation adopted under Article 95 may not pursue independent regulatory goals. Indeed, were Article 95 to be interpreted so as to grant to the Community only the powers necessary to eliminate obstacles to market integration, Community intervention would always subordinate other regulatory goals of the market to what would be strictly necessary to eliminate obstacles to free movement. It would amount to an assertion that the Community legislature could only adopt measures which sought to bring about mutual recognition as such measures would always be sufficient to prevent the emergence or continuance of obstacles to free movement. Any other measure would be excessive if, when acting under Article 95 with the purpose of eliminating restrictions on free movement, the Community legislator could never go beyond what would be sufficient to eliminate obstacles to free movement. This would entail that Article 95 could promote market integration only through the deregulation of national markets. Such an interpretation would enshrine in Article 95 a particular policy preference when there is nothing in the Treaty to support such a view. As Advocate General Fennelly has explained, this Court's 'case-law does not require Articles 7a, 57(2) and 100a (now Articles 14, 47(2)

3 — C-301/06 *Ireland* v *Parliament and Council* [2009] ECR I-593 ('*Retention of Data*'), paragraphs 63-64.

4 — Case C-217/04 *United Kingdom* v. *Parliament and Council* [2006] ECR I-3771, paragraph 42.

5 — Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 83.

6 — Ibid.

and 95 EC) of the Treaty to be interpreted as a kind of liberal charter, entailing harmonisation towards the lowest standard or even towards some sort of mean of the pre-existing national standards.' [7] Instead, a proper reading of Article 95 must distinguish between what triggers the Community harmonisation (the risk of free movement restrictions or distortions of competition) and the scope and content of that harmonisation. The latter must be able to pursue the variety of policy goals usually pursued by the national measures which are to be replaced by the Community legislation. In other words, Article 95 EC must be interpreted as allowing the Community legislator to pursue and balance a variety of regulatory goals once its competence is triggered by the need to harmonise a particular field.

9. Article 95 can, indeed, provide the basis for an intensification of regulation in addition to deregulatory measures. This is, in principle, to be decided by the political process. Indeed, Article 95(3) specifically provides that legislation for which it provides the legal basis should pursue a high level of health, safety, environmental and consumer protection. Such goals must, however, be part of an overall legislative framework which has as its object the establishment and functioning of the internal market by means of the approximation and harmonisation of Member State laws, regulations or administrative actions. In other words, the Community measure must contribute to market integration even if it does not need to be limited to what is strictly necessary to further market integration. Although furthering market integration is a necessary requirement for the Community to be competent under Article 95, the exercise of its competence must not be limited to the goal of market integration. If it were, it would put into question the pursuit of other legitimate regulatory goals which the States could no longer pursue on their own.

10. The core of the challenge to the regulation on grounds of its legal basis relates to this point. Vodafone asserts that since the CRF had already provided for comprehensive harmonisation of Member State regulation of the mobile phone industry, the Roaming Regulation could not have had the object of harmonising Member State rules in this area. Accordingly, the regulation involved an impermissible use of Article 95 for the purposes of the regulation of the internal market.

11. However, as the Court has repeatedly pointed out, the fact that comprehensive

7 — Ibid., Opinion of Advocate General Fennelly, point 85.

harmonisation has previously been adopted in a particular area on the basis of Article 95 'in no way means that the Community legislature cannot amend or adapt those rules, or, if necessary, introduce new ones so as to better attain the objectives' of the original harmonising measures. [8] These objectives, as stated above, do not have to be limited to market integration, even if the latter is necessary to justify the exercise of Community competence. To hold otherwise would mean that the Community would be unable to remedy defects in harmonising measures based on Article 95. When the Community legislature acts on the basis of Article 95, it will do so in a manner which reflects particular political choices. This involves the selection of a particular level of, for example, consumer protection and the rejection of other options providing for higher or lower levels of such protection. These choices may have unforeseen negative consequences, or, as happens in democratic polities, changing political majorities may feel that an earlier decision struck an inappropriate balance between the various interests involved. It would be absurd and undemocratic if the Community legislature were unable to revisit earlier political choices taken in the context of legislation passed on the basis of Article 95 in order to reflect changes in public opinion and advances in knowledge or to address unforeseen negative consequences of harmonising measures. Even when a harmonising measure such as the CRF has proved effective in preventing distortions of competition and impediments to free movement and can be seen as ensuring the establishment and functioning of the internal market, the Community legislature must remain free to adapt such a measure in line with developing knowledge or political preferences. [9] The objection to the enactment of the Roaming Regulation on the ground that the CRF had already provided for the harmonisation of the relevant area is, accordingly, without foundation.

12. Those challenging the validity of the Roaming Regulation have further suggested that since it adopted an approach which departed significantly from that set out in the CRF, [10] the Regulation cannot be considered to be an amendment thereto. The fact that the amending measure may be inconsistent with the approach adopted in the CRF does not change the fact that it is an amendment. Amendments may supplement and complement a harmonising measure. [11] They may also change it. Indeed, the need for amendment may arise precisely because particular harmonising measures may come to be seen to be operating in unsatisfactory ways and may therefore require an amendment inconsist

8 — Case C-374/05 *Gintec* [2007] ECR I-9517, paragraph 29.

9 — Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453, paragraph 80, where the court stated that progress in scientific knowledge is not, however the only ground on which the Community legislature can decide to adapt Community legislation since it must, in exercising the discretion it possesses in that area, also take into account other considerations, such as the increased importance given to the social and political aspects of the anti-smoking campaign.

10 — The CRF envisages intervention by national regulators and generally in circumstances where it is shown that a particular market player has 'significant market power'. The Roaming Regulation involves the setting of Community-wide prices even in circumstances where significant market power has not been shown to exist.

11 — *United Kingdom* v. *Parliament and Council*, cited in footnote 4 above.

ent with the original approach. [12] The Court has been clear that harmonised measures can be adapted on the basis of changing political views stating in relation to amendments to the Community's harmonised regime in respect of tobacco products that 'the Community legislature can carry out its task of safeguarding the general interests recognised by the Treaty, … only if it has the freedom to amend the relevant Community legislation so as to take account of any change in perceptions or circumstances'. [13] Changing perceptions may require amendments which depart from the approach adopted in the original harmonising measure. The fact that the Roaming Regulation adopted an approach which was inconsistent with that set down in the CRF does not mean that it cannot be considered to be an amendment thereto. The undoubted limits on the competence of the Community granted by Article 95 cannot function so as to require the Union to adhere to a form of harmonisation even when such harmonisation is no longer seen as appropriate.

13. On the other hand, while the Community legislature is free to revisit, by means of amending legislation, the policy choices made in harmonising measures adopted under Article 95, it may not grant itself authority to legislate in relation to subject-matters falling outside the scope of Article 95 merely by describing such measures as amendments. Legislation which relates, for example, to a subject area different from that of the original harmonising measure, such as an amendment of the CRF which purported to establish, for example, fishing quotas, could not be considered to be a valid amendment. [14] In my view, that would also be the case for a Community law measure which, to take an absurd example, prohibited the provision of roaming services altogether. [15] Neither can the Community, merely by identifying a particular measure as an amendment, validly pass legislation harmonising areas falling within the authority of the Member States without satisfying the requirements that such legislation show that it aims at the elimination of disparities or potential disparities between national rules 'which are such as to obstruct the fundamental freedoms or to create distortions of competition'. [16] In other words, the

12 — *British American Tobacco and Imperial Tobacco*, cited in footnote 9 above, paragraph 80.

13 — Ibid., paragraph 77.

14 — This does not apply in the present case. The power to establish maximum prices in respect of roaming services clearly lies within the subject-matter covered by the original harmonising measures which focused on electronic communication services within the Member States.

15 — The Court accepted, however, in Case C-210/03 *Swedish Match* [2004] ECR I-11893, that a Community measure that entirely prohibited trade in a certain product might be adopted under Article 95 provided that there was a risk of different national laws giving rise to obstacles to trade on that product. The Court seems to accept that the risk of obstacles to trade on such product may justify a Community prohibition on the sale of that product altogether. Even if one may question the extent to which such prohibition still maintains any relationship to the goals of Article 95 (limited free movement may be better than no free movement at all for the purposes of Article 95) the present case does not require from the Court a renewed discussion of this issue. As will become clearer, however, I do advocate that the adoption of any measure (including the measure as amended) does not simply require, as a starting point, a finding of disparities among national laws susceptible of raising obstacles to trade, to be justified under Article 95. It must contribute to the goals pursued under Article 95. It is not required, however, to be limited to those goals.

16 — *Retention of Data*, cited in footnote 3, paragraphs 63-64.

amendment itself does not need to be justified by the need to eliminate obstacles to trade or distortions of competition but the measure as amended must still serve the purposes of Article 95. Determining how these principles apply in individual cases is, however not an easy task.

14. In my view, such a determination requires the Court to place the amendment in the context of the overall legislation so as to assess whether such legislation (as modified by the amendment) can still be regarded as furthering market integration and, therefore, satisfying the conditions for the application of Article 95. The amendment may also be justified if it is necessary to correct a particular problem that the initial harmonising measure prevents the Member States from addressing effectively.

15. In the present case, one approach for finding a basis under Article 95 for the present legislation as amended would be to establish that there existed a risk of divergent national price control measures. Such risk cannot be assessed, however, in light of the situation after the adoption of the CRF and the possible limits imposed by this to the adoption of national price control measures. If that were so it would be impossible for the Community legislator to amend any measure that, in its original form, would be effective in eliminating obstacles to trade even if its impact on other policy goals might now justify a different form of regulation. This would be unacceptable for the reasons discussed above: the adoption of measures under Article 95 must preserve the political freedom to choose among a variety of policy options in regulating the market. The assessment to be made under Article 95 must not ask whether the amendment is necessary, in light of the amended legislation, to prevent obstacles to trade but whether the legislation as amended still serves to prevent obstacles to trade. For this, one has to consider what would be the situation in the absence of any Community regulation of the subject-matter. It is obvious that potential obstacles to trade arising from national price control measures [17] can be prevented either by imposing limits on national regulations on prices or by regulating prices at Community level. The fact that the Community legislator may originally have chosen the first of these approaches to prevent obstacles to trade should not prevent the later adoption of a different approach if other policy goals so require. This does not mean that the choice between two different ways of protecting the goals of Article 95 is totally free for the Community legislator. It may not be so, in light of other Community rules, such as subsidiarity and proportionality. That is, however, a different question

17 — See for example Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421.

from determining whether either of those approaches is acceptable (originally or as an amendment) under Article 95. The latter only requires the existence of national legislative disparities susceptible to create obstacles to trade or distortions of competition and that the Community measure should serve to prevent them. It does not impose a particular regulatory choice as to how they should be prevented.

16. It remains to be determined, in this respect, whether, in the present case, in the absence of Community legislation, there was indeed a risk of different national price control measures and if they were such as to be susceptible to create obstacles to trade and justify the adoption of Community price control measures. In other words, in the absence of the CRF, was there a risk of obstacles to roaming services arising from different national price control measures?

17. That national price control measures can create restrictions to trade is well established in the case-law of the Court. While such measures 'do not in themselves constitute measures having an effect equivalent to a quantitative restriction' they 'may have such an effect when prices are fixed at a level such that imported products are placed at a disadvantage compared to identical national products'. [18] In the context of price systems containing maximum prices, this occurs 'when the prices are fixed at a level such that the sale of imported products becomes either impossible or more difficult than that of domestic products'. [19] This would be the case when maximum prices are set so low that foreign providers cannot make a reasonable profit, [20] when foreign providers are faced with higher costs not taken into account in the setting of the maximum price, or where the price ceiling prevents higher-quality services provided by foreign providers from being correctly remunerated. [21]

18. However, not all national price control measures have the potential to create

18 — Joined Cases 80/85 and 159/85 *Edah* [1986] ECR 3359, paragraph 11. See also Case 65/75 *Tasca* [1976] ECR 291; Case 82/77 *Van Tiggele* [1978] ECR 25; and Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, paragraph 17.

19 — Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 15.

20 — Case C-249/88 *Commission* v *Belgium*, paragraph 17.

21 — See points 69-75 of my Opinion in *Cipolla and Others*, cited in footnote 17.

obstacles to trade and the emergence of such obstacles must be likely. [22] In my view, the Community legislator has not demonstrated, either at the time of the adoption of the original measure or of the amendment, that such risk existed. Paradoxically, the strongest argument for the existence of such risk could be derived from the argument of the claimants that the CRF, as originally enacted by the Community legislature, by requiring a finding of '*significant market power*' ('SMP') before ex ante regulatory intervention could occur, restricted the ability of Member States to establish price controls in the mobile communications sector. One would have to assume from that that the CRF was reacting to a danger that the setting of different maximum or minimum prices by Member State authorities in the mobile communications sector could cause obstacles and competitive distortions to emerge in the Single Market. If that was so, the choice faced by the legislature in designing the CRF was to address this danger either by restricting the ability of Member States to fix prices in this sector or by fixing prices on a Union-wide basis (the assessment of this choice for compliance with the principles of proportionality and subsidiarity would be an entirely different matter). Either choice would contribute effectively to the functioning of the internal market. The legislature, by requiring a finding of SMP before ex ante regulatory intervention could occur, chose the former. The fact that this choice was effective in preventing the emergence of obstacles to trade and competitive distortions should not prevent the adoption of a different regulatory approach so long as this different approach would continue to prevent obstacles to trade and competitive distortions. However, the reality is that the imposition by the CRF of limits on the regulatory intervention of Member States was made in general terms and was neither specifically intended to prevent differences on national price controls nor based on a specific finding of a likely emergence of obstacles to trade from future national price controls. As such, I cannot find that the risk of possible future differences in national price controls creating obstacles to trade has been established to the point of justifying the adoption of Community price control measures under Article 95.

19. However, I believe that the Community legislator could regulate roaming prices

22 — Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 37; *British American Tobacco and Imperial Tobacco*, cited in footnote 9, paragraph 61; *Swedish Match*, cited in footnote 15, paragraph 30; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 29; and *Retention of Data*, cited in footnote 3, paragraph 64.

under Article 95 for a different reason: namely the removal of restrictions to free movement arising from the behaviour of private parties which disfavours cross-border economic activity. The differences in price between calls made within one's own Member State and those made while roaming can reasonably be regarded as discouraging the use of cross-border services such as roaming. [23] The method chosen by the legislature to address the problem of high roaming charges was a Union-wide price cap. This method must be justifiable in the light of the objectives of Article 95. These objectives, as the text of the article makes clear, are '*the establishment and functioning of the internal market*', [24] the internal market being '*an area without internal frontiers in which the free movement of goods, services and capital is ensured in accordance with the provisions of the Treaty*'. [25] The disfavouring of cross-border activities has the potential to impede the establishment of an internal market in which free movement of goods, services and capital is ensured by discouraging customers from engaging in cross border economic activity such as making use of roaming services. There is perhaps no clearer cross-border economic activity in the mobile telecommunications sector than roaming itself. The imposition of a price cap on roaming services can legitimately be seen as serving the establishment of the internal market by removing obstacles to cross-border economic activity.

20. Although the imposition of such a price cap involved the imposition of Community-wide regulation on private actors as opposed to State bodies, acceptance of such a measure does not grant the Community carte blanche to use Article 95 to regulate any economic activity. The Roaming Regulation consisted of an intervention by the Community legislature aimed at addressing not simply acts of private parties which produced undesirable outcomes but acts of private parties which directly disfavoured a cross-border economic activity (roaming) compared to intra-State economic activity (domestic use of mobile phone services). Actions, including those of private actors, which directly disfavour cross-border activities can more readily be characterised as impediments to the establishment of the internal market. Naturally, most private actions in the market would not have the potential to restrict free movement and, as such, they could not in themselves justify the adoption of legislation under Article 95. Only when the actions of the private actors directly involve cross-border activity and would be in a position to effectively restrict that cross-border activity and free movement could Community action to regulate such actions be founded on Article 95.

23 — As I have noted in several Opinions, most recently Case C-115/08 *ČEZ*, point 12, the according to cross-border situations of treatment which is less favourable than the treatment given to purely internal situations can constitute an impediment to the free movement rights on which the internal market depends.

24 — Article 95 EC.

25 — Article 14 EC.

21. In this respect, I am simply asking the Court to apply the logical consequences of its case-law on the horizontal application of free movement rules to its analysis of Article 95. In the latter context, the Court has recognised that, in certain circumstances, the actions of private parties can constitute restrictions to free movement. This was the case, for example, in *International Transport Workers' Federation and Finnish Seamen's Union*,[26] and *Laval un Partneri*,[27] which involved actions by trade unions that prevented a ship owner from re-flagging his vessel in another State and a construction company from providing services in another State. The unions' actions directly interfered with freedom of establishment and freedom to provide services and the Court found that the free movement rules were directly applicable to the labour unions although they were private parties. In reaching this conclusion, the Court drew on past cases that recognised the direct impact that private acts of protest could have on free movement of goods where they prevented the transport of those goods.[28] Article 95 provides the Community legislature with a basis for action in circumstances where merely ensuring that State institutions do not take actions which compromise the fundamental freedoms is insufficient to guarantee the functioning of the internal market.[29] It is thus only natural for those restrictions on free movement to also be susceptible to regulation under Article 95.

22. The Court has famously established, for example, that certain rules of football associations regulating, among other aspects, the cross-border transfer of football players restricted the free movement of workers. It seems clear to me that this would not only justify a Community prohibition of such rules but also the adoption of Community rules under Article 95.[30] If the Community can prohibit a certain action by a private party it should be competent to simply regulate that action. This would not entail giving

26 — C-438/05 [2007] ECR I-10779.

27 — Case C-341/05 [2007] ECR I-11767.

28 — See also Case C-265/95 *Commission* v *France* [1997] ECR I-6959; Case C-112/00 *Schmidberger* [2003] ECR I-5659.

29 — On this point, see Armin von Bogdany and Jürgen Bast, 'The Vertical Order of Competences' in, *Principles of European Constitutional Law*, Oxford, Hart Publishing, 2006. See also Alexander Somek, *Individualism*, Oxford University Press, 2008, p. 128, which argues, not uncritically, that the Court's recent Article 95 case-law 'recogni[ses] that the fundamental freedoms and legislative power of the Union serve one and the same goal'. See also Joseph Weiler, 'The Constitution of the Common Market Place: The Free Movement of Goods' in *The Evolution of EU Law*, eds Paul Craig and Gráinne de Búrca, Oxford University Press, 1999. I am not necessarily advocating, however, such strict parallelism. What I am arguing is that, at least in some cases, the reasons for applying free movement rules to private parties can be extended to Article 95.

30 — Whether, in what manner and to what ends such competence should be used is a different matter and not one on which the Court is required to pronounce in this case.

competence to the Community to regulate all the actions of these private parties. Such competence would exist only when those actions, as mentioned above and in parallel with the horizontal scope of application of free movement rules, directly involve cross-border activity and they would be in a position to effectively restrict that cross-border activity and free movement. In contrast, measures such as an attempt to regulate the prices of suitcases or restaurant meals, for example, would not involve addressing a direct disfavouring of cross-border economic activity and would accordingly be incapable of demonstrating the degree of impact on free movement and the establishment of the internal market necessary to establish the Community's legislative jurisdiction under Article 95.

23. In the same way that the conditions for the application of free movement rules to private parties are more demanding than those applying to State entities, so should Community legislation adopted under Article 95 to regulate the actions of private parties affecting the establishment of the internal market satisfy particular conditions. As in the present case they must directly disfavour a cross-border activity. Once the actions of private actors effectively restrict a cross-border activity those actions should be susceptible to Community regulation.

24. Perhaps the position I am arguing for becomes even clearer if it is characterised as also involving State action (or inaction). It would be possible to say that it is the States' 'acceptance' of the practice of discriminatory prices [31] between roaming and domestic calls by their operators that restricts cross-border mobile communications. As such, it would be possible to justify Community intervention under Article 95 on the fact that national rules did not prevent the discriminatory treatment of cross-border mobile communications.

25. I have one further point to make in relation to the question of legal basis. As I stated above, the amendment may also be justified if it is necessary to correct a particular problem that the initial harmonising measure prevents the Member States from addressing effectively. As both the submissions of Vodafone and recitals 4 and 9 of the Roaming Regulation state, the regulatory framework established by the CRF provided for *ex ante* intervention by national regulators only upon the finding of SMP exercised by particular market participants. Accordingly, in the absence of such a finding, intervention by national regulators was not possible under the established system. Given that the

31 — The phrase 'discriminatory prices' has to be used with caution in this context for several reasons, not least of which is the fact that there may indeed be legitimate justifications for differences in prices to exist between roaming and domestic calls. What appears clear is that there is no clear justification for the existent differences in price and that this was the basis for the Community intervention.

Commission [32] and the European Regulators' Group [33] had found costs for roaming services to be excessive, even in markets which had not been found to be subject to SMP, the CRF itself was an impediment to the ability of national or EU regulators to establish a regulatory framework that would cause a lowering of charges for roaming services. Having identified market failures and social costs existing in the context of the harmonised regulatory regime and, in fact, arising from such regulatory regime the Community legislature must, for the reasons noted above and set out by the Court in *Gintec* and *British American Tobacco and Imperial Tobacco*, [34] have the power to address this situation and to provide powers either at national or Community level to change a regulatory framework it found to be working ineffectively.

B – *Subsidiarity*

26. The Community, therefore, has the power to address the issue of high prices for roaming services by amending the CRF. Nevertheless, as noted above, a distinction must be drawn between the power to regulate on the one hand and the questions of both the intensity of regulation and the level at which such regulation takes place on the other. The fact that legislation passed on the basis of Article 95 as an amendment of an earlier piece of harmonising legislation does not free it from the constraints on Community competence inherent in that article and in the general principles of Community law. Part of the limitations on the use of Article 95 as a legal base is the requirement that the power which such legislation gives to the Community must be exercised in a manner which is proportionate to the goals it pursues and which must be justified in the light of the principle of subsidiarity.

27. The decision of the Community legislature to set Community-wide maximum prices at both wholesale and retail level does raise serious issues in relation to the principle of subsidiarity. In relation to wholesale prices it may readily be appreciated why action at Community-level was required. Wholesale rates are charged by providers outside the customer's Member State. Accordingly the national regulator from the customer's own State will be unable to take action against providers in the State visited by the customer that charge excessive rates to the customer's

32 — See COM(2006) 382 final of 12 July 2006.

33 — ERG response to the European Commission's call for input on its proposed EC regulation in the international roaming market, 22 March 2006.

34 — Cited in footnotes 8 and 9 respectively.

home network. Furthermore, national regulators have no incentive to control the wholesale rates which will be charged to foreign providers and the customers of such foreign providers.

28. The regulation of retail rates is somewhat more problematic. Once maximum wholesale rates are fixed and once the requirement for a finding of SMP before regulatory intervention could take place was removed, the Community could have empowered national regulators to set maximum retail prices for roaming services if they felt that the retail rates charged by providers in their State were excessive. Instead the Roaming Regulation chose to set a Community-wide retail maximum rate. Such a decision to regulate a matter at Community rather than national level does require justification in the light of the commitment of the Community legal order to the principle of subsidiarity. The principle of subsidiarity, as established in Article 5 EC, determines that the Community is only entitled to act if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. In other words, it will have to be established that the Community legislator was in a better position than the national legislator to regulate the retail rates of roaming prices. If in the case of wholesale rates it is clear that there was a collective action problem requiring action at Community level, at the level of retail prices this does not appear obvious (once wholesale prices will be fixed at Community level, Member States could, in principle, freely and effectively fix their retail prices). Could there be another problem hindering Member States capacity to address the problem of high roaming costs at the retail level?

29. The main justification offered by the Roaming Regulation was that its objectives of securing adequate consumer protection and ensuring customers were not charged excessive rates 'cannot be achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved at Community level.' [35]

30. The Council argues that the principle of subsidiarity is essentially a subjective and political principle. [36] Following this reasoning the Council emphasises the intent of the Community legislator and that the objective pursued was, as the regulation's recital

35 — Roaming Regulation, recital 38.

36 — See, on this issue, Armin von Bogdandy and Jürgen Bast, cited in footnote 29 above.

states, to introduce 'a common approach … for ensuring that users of terrestrial public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice'.[37] In my view, neither the objective pursued by the Regulation nor the intent of the legislator is decisive for the purposes of assessing compliance with the principle of subsidiarity. First, the judgment to be made under the principle of subsidiarity is not about the objective pursued but whether the pursuit of that objective requires Community action. Certain Community objectives (which in themselves justify the existence of a Community competence) may be better pursued by the Member States (with the consequence that the exercise of that competence is not justified). Second, the intent of the Community legislator is not sufficient to demonstrate compliance with the principle of subsidiarity. The latter requires that there be a reasonable justification for the proposition that there is a need for Community action.[38] This must be supported by more than simply highlighting the possible benefits accruing from Community action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States. In requiring this, the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously.

31. If, as stated, there was a clear collective action justifying Community action at the level of wholesale prices there appears to be no immediate forceful argument for the harmonisation of retail prices. On the contrary, as argued by the claimants, national regulatory authorities would seem to be in a better position to decide on the need for price controls (and if so at what prices) in the different national markets. The Commission, in its written observations, argues, however, that leaving such matter to be addressed by the Member States would have created distortions of competition because different mobile communications operators would be subject, in different Member States, to different price ceilings. This argument cannot stand. Price

37 — Roaming Regulation, recital 16.

38 — The Parliament and the Council stress in their observations that the decision to regulate at the Community level was supported by the Member States through the ERG. One may argue that the more contested is the need for Community intervention the higher the burden put on the Community legislator to justify such action. On the other hand, even the unanimous support of all Member States in the Council should not be considered decisive in assessing the existence and exercise of a Community competence. It must be remembered that Member States are represented in the Council by their national governments. For this reason, the exercise of a certain competence at the Community level impacts on the domestic balance of power of the Member States and their mechanisms of political accountability. The interpretation and application of competence rules must be equally mindful of these interests.

differences exist in almost any domain among Member States. Such differences in prices may or not entail competitive advantages for the economic operators of some Member States. As in many other areas, it may simply mean that prices vary between Member States. In this respect, there seems to be no clear difference from the market for domestic calls where economic operators may also be subject to different price ceilings. Furthermore, not all competitive advantages can necessarily be labelled as a distortion of competition. The Community legislator would have to develop an argument in support of this conclusion and it failed to do so. [39]

32. On the other hand, given the fact that the Roaming Regulation was intended to expire three years after its enactment, the argument that timely imposition of maximum rates was necessary in order to ensure the achievement of the goals of the regulation carries some weight. This is linked to an argument for legislative efficiency. In light of the need for Community intervention at the level of wholesale prices it could be argued that it would be both more expedient and appropriate to simultaneously regulate retail prices. Wholesale prices could be fixed in light of the intended retail prices and vice versa and consumers could immediately see the results of the Community intervention.

33. The decisive argument derives, however, from the cross-border nature of the economic activity to be regulated. Even if there may not be a sufficiently significant problem of collective action at the level of retail prices one may legitimately believe that Community may be in a better position than Member States to address the problem of roaming retail prices. Due to the transnational character of the economic activity in question (roaming), the Community may be both more willing to address the problem and in a better position to balance all the costs and benefits of the intended action for the internal market.

34. It is the cross-border nature of the economic activity itself that renders the Community legislator potentially more apt than national authorities to regulate it even at the level of retail charges. Given that the

39 — All this should not be confused with the fact, noted above, that price ceilings can impose restrictions on access to national markets. The argument on distorted competition relates to competition in the same market under different price rules, not the fact that imposing certain price ceilings in a national market may prevent out-of-state competitors from successfully competing (in light of the higher quality or lower prices of the products or services that they could potentially offer were it not for the price ceiling in question.

vindication of Community law rights was at issue, the Community legislator may reasonably have concluded that national regulatory authorities may not have attached the degree of priority to such rights which the Community legislator thought necessary. In fact, as it was explained in different parts of the pleadings and at the hearing by different parties, the prices for roaming charges are often set by mobile communications operators as part of a package including other services such as domestic communications. Moreover, roaming is a small part of those services and demand for roaming is less than demand for domestic communications. [40] While regulating this market, one could expect that the focus of national regulators would be on the costs, and other aspects, of domestic communications and not on roaming charges. It is the Community, by virtue of the cross-border character of roaming, that has a special interest in protecting and promoting this economic activity. This is the precise type of situation where the democratic process within the Member States is likely to lead to a failure to protect cross-border activity. [41] As such one can understand why the Community legislator intervened.

35. The Community legislature suggests, in essence, that the question of retail prices could not have been devolved to national level as the 27 different national regulators may have taken too long to introduce effective control of retail prices. Although it is not mentioned in the recital, one may also take the view that the delay on the part of national regulators would be infinite. National regulators may not have placed the same emphasis on addressing roaming costs as on domestic communications costs. Given that the Roaming Regulation acts so as to facilitate cross-border activity and to help in the functioning of the internal market by ensuring adequate facilitation and protection of Community law free movement rights, it was necessary to act at the Community level to ensure that such rights were given the necessary priority.

40 — See, e.g. ERG Common Position on the Coordinated Analysis of the Markets for Wholesale International Roaming, June 2005, paragraph 59 (discussing demand); ERG Response, cited in footnote 33, paragraphs 3.10-3.11 (discussing the possibility that savings in wholesale roaming charges will be used to reduce costs for domestic services).

41 — Several commentators have argued that the EU derives its democratic legitimacy in part from its ability to protect mobile actors whose interests would not be adequately represented in democratic process within particular Member States. See more recently, Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement', U. Iowa Legal Studies Research paper No 09-23, May 2009.

36. Finally, as the Council notes, the setting of a price ceiling allows for national variations

to be taken into account in the determination of prices below this level. As such the Community regulation still leaves some margin for the intervention of the Member States. In light of all of the aforementioned considerations, the Community regulation cannot be said to violate the principle of subsidiarity.

C – *Proportionality*

37. In relation to the question of proportionality, the Court must assess whether the legislature's decision on how to address the problem of high roaming charges was proportionate in terms of both the goals of Article 95 relating to the establishment of the internal market and the policy objective of consumer protection when balanced against the loss of autonomy on the part of Member States and the interference with the rights of the claimants.

38. Those challenging the validity of the Roaming Regulation have argued that, in providing for a Union-wide price cap the Community legislature went beyond what was necessary to achieve the goal of a reduction in the price of roaming services and thereby unjustifiably interfered with the plaintiffs 'right to property and their right to engage in commerce. As the jurisprudence of this Court has made clear on many occasions, in assessing the proportionality of decisions made by the legislature, the Court is required to accord a margin of discretion to the legislature. Accordingly, in principle and in these domains, 'judicial review of the exercise of [the legislature's] powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.' [42] It is true that price controls are one of the most intrusive forms of intervention in the market and constitute a particularly strong limitation of rights to property and the freedom of economic initiative. The decision to enact them should not be taken lightly by the legislator. However, it does not appear that the Community legislature did so in the present instance.

39. First of all, the Community legislator appears to have decided to intervene as a last resort. The Impact Assessment Report details the measures taken by the Commission to attempt to reduce retail roaming prices, including competition law investigations, transparency initiatives, regulatory action under the previous framework, and political pressure. [43] The Commission issued warnings that regulatory action would follow if prices did not

42 — C-127/95 *Norbrook Laboratories* [1998] ECR 1531, paragraphs 89-90.

43 — Impact Assessment of Policy Options in Relation to a Commission Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community COM(2006) 382 final, 12 July 2006, p. 27.

'move substantially closer to a market-oriented level', to no avail. [44] It also compiled extensive information regarding roaming prices, showing that 'retail [roaming] charges were very high without clear justification', that 'high retail mark-ups' were being charged, and that reductions in wholesale charges were often not passed on to retail consumers. [45] It found that operators had been making retail profit margins above 200% for calls originated while roaming and of close to 300% or 400% for received calls while roaming [46] and that prices varied widely in ways that could not be explained by underlying costs. Based on the information before it, it concluded that retail prices for roaming 'stand in no meaningful relation to the underlying costs of providing the service', [47] and that there was no reason to believe that decreases in wholesale prices would lead to decreases in retail prices. [48]

40. The regulatory approach adopted also does not seem unreasonable in light of the conflicting evidence presented by the parties in relation to the point of whether the form of intervention adopted by the Community legislator was necessary. For example, those supporting the validity of the regulation pointed to findings of the European Regulators Group that prices for roaming services were excessive and that retail price control may be necessary should market forces prove insufficient to ensure price reductions. [49] Vodafone on the other hand noted how the same group advocated that initially a flexible approach which took account of national circumstances should be adopted. [50] However, the Community legislature is not required to adopt all of the advice of such expert groups. The European Regulators Group stated that high retail mark-ups exist [51] and that reductions in wholesale prices were likely to be passed on to users as discounts in pricing for domestic services, [52] a solution that, as mentioned in the above discussion on the option of national regulation, would not vindicate the Community law rights at issue. Cross-border communications would continue to be 'discriminated' against. Moreover, the European Regulators Group merely suggested that the Community legislature wait to see if market forces would drive down retail prices. Given the abundant evidence that reductions in wholesale prices were not being passed on to retail users, [53] the Community legislature was not required to adopt such a wait and see approach. As the Commission argued, and the European Regulators Group itself recognised, timeliness

44 — Viviane Reding remarks to European Regulators Group, Towards a True Internal Market for Electronic Communications, Paris, 8 February 2006, p. 5; see also Impact Assessment, cited in footnote 43, p. 12

45 — Impact Assessment, cited in footnote 43, p. 12.

46 — Impact Assessment, cited in footnote 43, pp. 6, 47.

47 — Impact Assessment, cited in footnote 43, p. 17.

48 — Impact Assessment, cited in footnote 43, p. 48.

49 — ERG response, cited in footnote 33, pp. 1-2.

50 — Ibid., p. 2.

51 — ERG response, cited in footnote 33, paragraph 2.6.

52 — ERG response, paragraphs 3.10-3.11.

53 — See, e.g., Impact Assessment, cited in footnote 45. GSM argues that the Regulatory Impact Assessment failed to take adequate account of recent reductions in retail prices. However, the Impact Assessment acknowledged that significant price cuts had been announced but noted that Vodafone, T-Mobile, Telefónica O2 and Orange had announced the price cuts during the final week of the impact assessment consultation period and concluded that the cuts were in response to the threat of regulation rather than to market forces (Impact Assessment, pp. 10, 27). Moreover, the reduction in retail prices was small when considered in light of the retail profits of up to 400%, as noted in recital 1 of the Roaming Regulation.

was an important factor to be taken into account and bearing this in mind, in addition to the clear finding that prices charged for roaming were excessive, the decision to regulate retail prices fell within the range of options reasonably open to the legislature.

41. Moreover, the Community legislature's use of price controls is not intended to achieve long term regulation of market prices but is instead an attempt to lower prices (and possibly trigger effective market competition) in response to prices that were artificially clustered because of a market failure which competition rules were not in a position to address. This is illustrated by recitals 5, 6 and 9 of the Roaming Regulation, which discuss the fact that the European Regulators Group had been struggling to address the high prices through the current competition rules, and by Recital 28, which emphasises that the regulation should encourage innovative offers to roaming customers at rates below the maximum rates allowed. By limiting the duration of the regulation to three years, the Community legislature also limited the extent that these controls would intrude on the market and allowed for the market to be given 'a second opportunity' to correct this failure.

42. While price controls should always be assessed carefully, due to the extreme nature of their impact on the market, the limited duration of these controls and their aim of correcting a market failure that competition rules were not in a position to address make them more readily acceptable in this case. Moreover, the existence of a sunset clause reduces its impact on the rights of the economic operators. Such clauses ensure that the Community legislature will periodically reassess its interventions in areas, such as roaming, that are undergoing rapid social and economic change. [54] If the Community legislature were to extend the price controls or make them

54 — The need for periodic review of the Community legislature's choices in this rapidly developing market is made clear in the Framework Directive itself (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 (OJ 2002 L 108, p. 33)). Recital 27 of the Framework Directive, discussing ex ante regulations designed to ensure the development of competitive communications markets, states that: 'The Commission should review the guidelines regularly to ensure that they remain appropriate in a rapidly developing market'.

permanent, that decision would also need to be proportionate and additional reasons would need to be presented to justify it.

43. Vodafone also noted that, following the enactment of the regulation, prices for roaming services had clustered around the maximum limit and asserted that this was evidence that the Regulation had stifled price competition in this area. However, the clustering of prices in this manner could equally be regarded as evidence of the absence of price competition in relation to roaming, supporting the conclusion that the previous higher prices would have remained in place were it not for the legislator intervention. Therefore, in the light of all of the above it cannot be stated that the legislature's choice was manifestly in error and thereby involved an unjustifiable interference with the rights of the plaintiffs.

44. An assessment of proportionality also requires the Court to consider whether the greater ability of the Community to achieve the goals of the relevant legislation is such as to justify the loss of Member State autonomy involved in the approach chosen by the legislature. [55] The submissions of the parties on this point were relatively sparse. It is clear that the setting of a Community-wide maximum price does reduce the autonomy of the regulatory institutions of the Member States. However, given the almost-unanimous support amongst the relevant Member State agencies for the introduction of the regulation in question, such an argument loses some of its force and in the light of the limited scope of the rules in question (roaming services), the margin of discretion which the Court accords to the legislature on these matters and the absence of any substantiated arguments to the contrary brought forward in this respect by the claimants, the regulation cannot be said to be disproportionate in this regard.

55 — Although the Court's recent judgments have focused on the proportionality of Community legislation in light of its substantive aims, as in *Swedish Match*, cited in footnote 15, the proportionality in light of the impact on Member State autonomy must also be considered. On this point, see Mattias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', *European Law Journal*, Vol. 12, No 4, July 2006, pp. 522-24. Advocate General Fennelly has also argued, although on a different basis, that unlike internal market objectives, substantive objectives, such as the promotion of health, cannot alone be used to satisfy proportionality (Case C-74/99, *Imperial Tobacco and Others* [2000] ECR I-8599, Opinion, point 149).

II – Conclusion

45. In the light of the above I propose that the Court should answer the questions submitted by the national court as follows:

Consideration of the questions submitted by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) has not disclosed any factor of such a kind as to affect the validity of Regulation (EC) No. 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC.