JUDGMENT OF THE COURT Grand Chamber

26 June 2007 *

In Case C-284/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht für Zivilrechtssachen Wien (Austria), made by decision of 7 June 2004, received at the Court on 1 July 2004, in the proceedings

T-Mobile Austria GmbH,

3G Mobile Telecommunications GmbH,

mobilkom austria AG, formerly mobilkom austria AG & Co. KG,

master-talk Austria Telekom Service GmbH & Co. KG,

ONE GmbH,

Hutchison 3G Austria GmbH,

tele.ring Telekom Service GmbH,

* Language of the case: German.

tele.ring Telekom Service GmbH, successor to **TRA 3G Mobilfunk GmbH,**

v

Republik Österreich,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, P. Kūris, E. Juhász and J. Klučka, Presidents of Chambers, K. Schiemann, J. Makarczyk (Rapporteur) and U. Lõhmus, Judges,

Advocate General: J. Kokott,
Registrars: B. Fülöp and K. Sztranc-Sławiczek, Administrators,

having regard to the written procedure and further to the hearing on 7 February 2006,

after considering the observations submitted on behalf of:

— T-Mobile Austria GmbH, by F. Heidinger and W. Punz, Rechtsanwälte,

— 3G Mobile Telecommunications GmbH and mobilkom austria AG, by P. Huber, Rechtsanwalt,

— master-talk Austria Telekom Service GmbH & Co. KG, ONE GmbH and Hutchison 3G Austria GmbH, by E. Lichtenberger and K. Retter, Rechtsanwälte,

— tele.ring Telekom Service GmbH, by T. Kustor and B. Polster, Rechtsanwälte, and C. Staringer, university professor,

— Republik Österreich, by U. Weiler, acting as Agent,

— the Austrian Government, by H. Dossi, J. Bauer and C. Knecht, acting as Agents,

— the Danish Government, by J. Molde, acting as Agent, and by K. Hagel-Sørensen, advokat,

— the German Government, by M. Lumma, C.-D. Quassowski and C. Schulze-Bahr, acting as Agents, assisted by K. Stopp and B. Burgmaier, Rechtsanwälte,

— the Spanish Government, by J. Rodríguez Cárcamo, acting as Agent,

— Ireland, by A. Aston, SC, and G. Clohessy, BL,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the Netherlands Government, by H. Sevenster and M. de Grave, acting as Agents,

— the Polish Government, by J. Pietras, acting as Agent,

— the United Kingdom Government, by M. Bethell and R. Caudwell, acting as Agents, K. Parker QC, C. Vajda QC, and G. Peretz, Barrister,

— the Commission of the European Communities, by K. Gross, R. Lyal, M. Shotter and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the

Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), and Article 4 of that directive in particular.

2 The reference was made in the course of joined main proceedings brought by T-Mobile Austria GmbH, 3G Mobile Telecommunications GmbH, mobilkom austria AG, formerly mobilkom austria AG & Co. KG, master-talk Austria Telekom Service GmbH & Co. KG, ONE GmbH, Hutchison 3G Austria GmbH, tele.ring Telekom Service GmbH and TRA 3G Mobilfunk GmbH, predecessor to tele.ring Telekom Service GmbH, against Republik Österreich seeking to obtain from the Republik Österreich, for the purposes of the deduction of value added tax ('VAT') on inputs, the issuing of invoices in respect of payments made when the applicants in the main proceedings were granted rights to use frequencies in the electromagnetic spectrum with a view to supplying mobile telecommunications services to the public ('the frequency use rights at issue in the main proceedings').

Legal context

Provisions relating to VAT

Community legislation

3 Under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to value added tax.

4 Article 4 of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

...'

5 Article 17 of the Sixth Directive provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

6 Item 1 of Annex D to the Sixth Directive refers to telecommunications.

National legislation

7 Under Paragraph 1(1), indent 1, of the Law on turnover taxes 1994 (Umsatzsteuergesetz 1994, BGBl. 663/1994, 'the UStG 1994'), deliveries and other supplies which an operator makes for consideration within the country in the course of his business are subject to turnover tax. The same provision states that the charge to tax is not excluded because the transaction is effected on the basis of a legal or administrative act or is to be regarded under a legal provision as effected.

8 According to Paragraph 2(1) of the UStG 1994, an operator is a person who independently carries on a commercial or professional activity, that is to say, any activity pursued on a continuing basis for the purpose of obtaining income. Under Paragraph 2(3) of the UStG 1994, corporations governed by public law carry on commercial or professional activity in principle only within their operations of a commercial nature.

9 The first and second sentences of Paragraph 11(1) of the UStG 1994 provide that if the operator effects transactions within the meaning of Paragraph 1(1), indent 1, of the UStG 1994, he is entitled to issue invoices. Furthermore, if he effects the transactions to another operator for the latter's undertaking or to a legal person where the latter is not an operator, he is obliged to issue invoices.

10 Those invoices must under Paragraph 11(1), indent 6, of the UStG 1994 state the amount of VAT charged on the transactions.

11 It is apparent from Paragraph 2(1) of the Law on corporation tax (Körperschaftsteuergesetz, BGBl. 401/1988, 'the KStG') that an operation of a commercial nature of a corporation governed by public law is any installation which is economically independent and serves exclusively or predominantly for a private-economy activity of commercial significance pursued on a continuing basis for the purpose of obtaining income, or other economic advantages in the absence of participation in general economic activity, and not for agriculture or forestry.

12 Paragraph 2(5) of the KStG however provides that there is no private-economy activity within the meaning of subparagraph 1 if the activity serves predominantly for the exercise of public powers.

Provisions relating to the allocation of the frequency use rights at issue in the main proceedings

Community legislation

13 Directive 97/13/EC 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) was in force until 25 July 2003.

14 Article 2(1) of Directive 97/13 provides:

'1. For the purposes of this Directive,

...

(d) "essential requirements" means the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security on network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives, as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems. ...'

15 As set out in the second sentence of Article 3(3) of Directive 97/13:

'Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III.'

16 Article 4(1) of Directive 97/13 explains the conditions attached to general authorisations as follows:

'Where Member States subject the provision of telecommunications services to general authorisations, the conditions which, where justified, may be attached to such authorisations are set out in points 2 and 3 of the Annex. Such authorisations shall entail the least onerous system possible consistent with enforcing the relevant essential requirements and relevant other public interest requirements set out in points 2 and 3 of the Annex.'

17 Section III of Directive 97/13, which covers Articles 7 to 11, governs individual licences where circumstances justify the grant of such licences. The first subparagraph of Article 8(1) of that directive provides that '[t]he conditions which, in addition to those set out for general authorisations, may, where justified, be attached to individual licences are set out in points 2 and 4 of the Annex'. In accordance with points 2.1 and 4.2 of that annex, this includes inter alia the conditions intended to ensure compliance with relevant essential requirements and specific conditions linked to the effective use and efficient management of radio frequencies.

18 Pursuant to Article 10(1) of Directive 97/13, Member States may limit the number of individual licences to the extent required to ensure the efficient use of radio frequencies. Under Article 10(2), first indent, of that directive, they must, in this respect, give due weight to the need to maximise benefits for users and to facilitate the development of competition. The first subparagraph of Article 10(3) of Directive 97/13 requires that Member States grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate.

19 It is apparent from Article 11(1) of Directive 97/13 that the grant of licences may give rise to the collection of fees which 'seek only to cover the administrative costs incurred in the issue, management, control and enforcement of the applicable individual licences'. Furthermore, Article 11(2) provides:

'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.'

20 Directive 97/13 was repealed and replaced as of 25 July 2003 by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

21 Article 9 of Directive 2002/21 provides:

'...

3. Member States may make provision for undertakings to transfer rights to use radio frequencies [to] other undertakings.

4. Member States shall ensure that an undertaking's intention to transfer rights to use radio frequencies is notified to the national regulatory authority responsible for spectrum assignment and that any transfer takes place in accordance with procedures laid down by the national regulatory authority and is made public. National regulatory authorities shall ensure that competition is not distorted as a result of any such transaction. Where radio frequency use has been harmonised through the application of Decision No 676/2002/EC [of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) (OJ 2002 L 108, p. 1)] or other Community measures, any such transfer shall not result in change of use of that radio frequency.'

National legislation

22 Under Paragraph 14 of the Law on telecommunications (Telekommunikationsgesetz, BGBl. I, 100/1997, 'the TKG'), in the version applicable at the material time in the main proceedings, a licence is required to supply mobile voice telephony service and other public mobile telecommunications services using directly operated mobile telecommunications networks.

23 Under Paragraph 15(2)(3) of the TKG, in the case of licences to supply public mobile telecommunications services, such a licence is to be awarded if the frequencies have been granted to the applicant or could be granted simultaneously with the licence.

24 Under Paragraph 21(1) of the TKG, in order to ensure the efficient use of the frequencies awarded, holders of a mobile telecommunications licence have to make a one-off or annual frequency use payment in addition to paying the frequency use fee.

25 Paragraph 49(4) of the TKG read in conjunction with Paragraph 111 thereof provides that the allocation of frequencies intended for the supply of public mobile communications services and for other public telecommunications services falls within the competence of the Telekom-Control-Kommission (Telecommunications Control Commission, 'the TCK').

26 The allocation procedure is governed by Paragraph 49a(1) of the TKG, which provides:

'The regulatory authority shall allocate the frequencies afforded to it amongst those applicants who satisfy the general requirements in subparagraphs 1 and 2 of Paragraph 15(2) and guarantee the most efficient use of frequencies. This shall be established by the size of the frequency use payment that is bid.'

27 In accordance with Paragraphs 108 and 109 of the TKG, the TCK takes the form of a company, Telekom-Control GmbH, the sole shareholder in which is the Austrian State.

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

28 On 3 May 1999 the TCK allocated, by auction, the frequency use rights at issue in the main proceedings for the frequencies known as 'GSM' (standard DCS-1800) to tele.ring Telekom Service GmbH in consideration of a total payment of EUR 98 108 326 and, on 7 February 2000, the frequency use rights at issue in the main proceedings relating to the frequencies for the European radiocommunications system TETRA to master-talk Austria Telekom Service GmbH & Co. KG for the sum of EUR 4 832 743.47.

29 On 20 November 2000, the TCK allocated the frequency use rights at issue in the main proceedings for the frequencies relating to the mobile telephony systems known as 'UMTS' (standard IMT-2000). The procedure, which also took the form of an auction, resulted in the award of those rights to T-Mobile Austria GmbH, 3G Mobile Telecommunications GmbH, mobilkom austria AG & Co. KG, Hutchison 3G Austria GmbH, ONE GmbH and TRA 3G Mobilfunk GmbH for a total payment of EUR 831 595 241.10.

30 By their action, the applicants in the main proceedings seek to obtain the issuing by the Republik Österreich of invoices relating to the allocation of the frequency use rights at issue in the main proceedings in so far as, under the national legislation which transposed Article 17 of the Sixth Directive, those invoices are necessary for the purposes of deducting input VAT.

31 In those circumstances, the Landesgericht für Zivilsachen Wien (Regional Civil Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the third subparagraph of Article 4(5) of, in conjunction with No 1 of Annex D to, the Sixth Directive ... to be interpreted as meaning that the allocation of rights to use frequencies for mobile telecommunications systems in accordance with the UMTS/IMT-2000, GSM/DCS-1800 and TETRA standards ("frequency use rights for mobile telecommunications systems") by a Member State in return for a frequency use payment is a telecommunications activity?

(2) Is the third subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that a Member State whose national law does not provide for the criterion mentioned in [that provision] of the "[non]-negligible" extent of an activity (the de minimis rule) as a condition for having the status of taxable person must therefore be regarded as a taxable person for all telecommunications activities in every case regardless of whether the extent of those activities is negligible?

(3) Is the third subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that the allocation of frequency use rights for mobile telecommunications systems by a Member State in return for frequency use payments [corresponding to total amounts] of EUR 831 595 241.10 (UMTS/IMT 2000) or

EUR 98 108 326.00 (GSM/DCS-1800 channels) or EUR 4 832 743.47 (TETRA) is to be regarded as an activity of non-negligible extent, so that the Member State is considered a taxable person in respect of that activity?

(4) Is the second subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that it would lead to significant distortions of competition if a Member State, when allocating frequency use rights for mobile telecommunications systems in return for [frequency use payments corresponding to total amounts] of EUR 831 595 241.10 (UMTS IMT-2000) or EUR 98 108 326.00 (GSM/DCS-1800 channels) or EUR 4 832 743.47 (TETRA), does not subject those payments to turnover tax and private bidders for those frequencies must subject that activity to [that] tax?

(5) Is the first subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that an activity of a Member State which allocates frequency use rights for mobile telecommunications systems to mobile telecommunications operators in such a way that a highest bid for the frequency use payment is first ascertained in an auction procedure and the frequencies are then allocated to the highest bidder does not take place in the exercise of public authority [by that State], so that the State is considered a taxable person in respect of that activity, regardless of the legal nature under the State's national law of the act which effects the allocation?

(6) Is Article 4(2) of the Sixth Directive to be interpreted as meaning that the allocation of frequency use rights for mobile telecommunications systems by a Member State described in Question 5 is to be regarded as an economic activity, so that the Member State is considered a taxable person in respect of that activity?

(7) Is the Sixth Directive to be interpreted as meaning that the frequency use payments determined for the allocation of frequency use rights for mobile telecommunications systems are gross payments (which already include VAT) or net payments (to which VAT may still be added)?'

The questions referred for a preliminary ruling

The sixth question

32 By that question, which must be examined first, the national court is essentially asking whether the allocation by way of an auction by a Member State of rights such as the frequency use rights at issue in the main proceedings constitutes an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive.

33 Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out in any place any economic activity specified in paragraph 2 thereof, whatever the purpose or results of that activity. 'Economic activity' is defined in Article 4(2) as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

34 In that regard, it must be pointed out that, although Article 4 of the Sixth Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that provision (see, to that effect, Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 15; Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 47; and Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 18).

35 It is also apparent from settled case-law that an analysis of the definitions of 'taxable person' and 'economic activities' shows that the scope of the term 'economic activities' is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see, inter alia, Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47 and the case-law cited).

36 According to the order for reference, in the main proceedings the activity carried out by the TCK consisted of allocating, by auction, rights to use certain frequencies in the electromagnetic spectrum to economic operators for a specified period. At the end of the awards procedure, those operators were issued with the authorisation to exploit the rights thus acquired to set up telecommunications equipment operating in defined parts of the electromagnetic spectrum.

37 Therefore, it has to be established whether the issuing of such an authorisation is to be regarded, by its very nature, as the 'exploitation of ... property' within the meaning of Article 4(2) of the Sixth Directive.

38 At the outset, it is important to point out that, in accordance with the requirements of the principle of neutrality of the common system of value added tax, the term 'exploitation' refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis (see, to that effect, Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 18; *EDM*, paragraph 48; and Case C-8/03 *BBL* [2004] ECR I-10157, paragraph 36).

39 In that regard, it must be noted that the activity at issue in the main proceedings consists of the issuing of authorisations which allow the economic operators who receive them to exploit the resulting frequency use rights by offering their services to the public on the mobile telecommunications market in return for remuneration.

40 Such an activity constitutes the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems, as is apparent from Article 2(1)(d) of Directive 97/13 read in conjunction with Articles 4(1) and 8(1) thereof.

41 Furthermore, it should also be pointed out that, under both Directive 97/13 and the TKG, the issuing of such authorisations falls exclusively within the competence of the Member State concerned.

42 Thus, an activity such as that at issue in the main proceedings constitutes a necessary precondition for the access of economic operators such as the applicants in the main proceedings to the mobile telecommunications market. It cannot constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis.

43 In those circumstances, an activity such as that at issue in the main proceedings cannot, by its very nature, be carried out by economic operators. In that regard, it should be pointed out that it is irrelevant that those operators thereafter have the

right to transfer their rights to use radio frequencies. Such a transfer, apart from remaining subject to the control of the national regulatory authority responsible for spectrum assignment, in accordance with Article 9(4) of Directive 2002/21, cannot be compared to the issuing of an authorisation by the State.

44 Therefore, in granting such an authorisation, the competent national authority is not participating in the exploitation of property, consisting in rights to use the radio-frequency spectrum for the purpose of obtaining income therefrom on a continuing basis. By means of that allocation procedure, that authority exclusively carries out the activity of controlling and regulating the use of the electromagnetic spectrum which has been expressly delegated to it.

45 Furthermore, the fact that the grant of rights such as the frequency use rights at issue in the main proceedings gives rise to a payment cannot affect the legal status of that activity (see, to that effect, Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraph 24 and the case-law cited).

46 Consequently, that grant cannot constitute an 'economic activity' within the meaning of Article 4(2) of the Sixth Directive.

47 That finding is not called into question by the argument that, having regard to Article 4(5) of the Sixth Directive, it is not inconceivable that a regulatory activity carried out by a body governed by public law may constitute an economic activity within the meaning of Article 4(2) of that directive, so that that body would have to be considered a taxable person in respect of that activity.

48 Even if such a regulatory activity could be classified as an economic activity, the fact still remains that the application of Article 4(5) of the Sixth Directive implies a prior finding that the activity considered is of an economic nature. It is apparent from the answer given in paragraph 46 of this judgment that that is not the case.

49 In the light of the foregoing, the answer to the sixth question must be that Article 4(2) of the Sixth Directive is to be interpreted as meaning that the allocation, by auction by the national regulatory authority responsible for spectrum assignment, of rights such as the frequency use rights at issue in the main proceedings does not constitute an economic activity within the meaning of that provision and, consequently, does not fall within the scope of that directive.

The other questions

50 In view of the answer given to the sixth question, there is no need to answer the other questions asked by the national court.

Costs

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

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

Article 4(2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, is to be interpreted as meaning that the allocation, by auction by the national regulatory authority responsible for spectrum assignment, of rights such as rights to use frequencies in the electromagnetic spectrum with the aim of providing the public with mobile telecommunications services does not constitute an economic activity within the meaning of that provision and, consequently, does not fall within the scope of that directive.

[Signatures]