JUDGMENT OF THE COURT (First Chamber)

8 September 2005 *

In Joined Cases C-544/03 and C-545/03,

REFERENCES for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decisions of 8 December 2003, received at the Court on 23 December 2003, in the proceedings

Mobistar SA (C-544/03)

v

Commune de Fléron,

and

Belgacom Mobile SA (C-545/03)

v

Commune de Schaerbeek,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, N. Colneric (Rapporteur), E. Juhász and M. Ilešič, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 January 2005,

after considering the observations submitted on behalf of:

— Mobistar SA, by Y. van Gerven, A. Vallery and A. Desmedt, avocats,

— Belgacom Mobile SA, by H. De Bauw, advocaat, and P. Carreau, avocat,

— the commune de Fléron, by M. Vankan, avocat,

— the commune de Schaerbeeck, by J. Bourtembourg, avocat,

— the Belgian Government, by A. Goldman and E. Dominkovits, acting as Agents,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by J.-P. Keppenne, M. Shotter and L. Ström van Lier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 3c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), as amended, with regard to the implementation of full competition in telecommunications markets, by Commission Directive 96/19/EC of 13 March 1996 (OJ 1996 L 74, p. 13; 'Directive 90/388').

2 Those references were submitted in the context of actions brought by Mobistar SA ('Mobistar') and Belgacom Mobile SA ('Belgacom Mobile'), mobile telephony operators established in Belgium. Those two operators seek annulment of the taxes adopted by the commune of Fléron (Belgium) on transmission pylons, masts and antennae for GSM and the commune of Schaerbeek (Belgium) on external antennae.

3 By order of the President of the Court of 4 March 2004, the cases were joined for the purposes of the written and oral procedures and of the judgment.

Relevant provisions

4 The first paragraph of Article 59 of the Treaty states:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

5 The first paragraph of Article 86 of the EC Treaty (now the first paragraph of Article 82 EC) provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

6 Article 90 of the EC Treaty (now Article 86 EC) reads as follows:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States.'

7 Under Article 3a of Directive 90/388:

'In addition to the requirements set out in the second paragraph of Article 2, Member States shall, in attaching conditions to licences or general authorisations for mobile and personal communications systems, ensure the following:

(i) licensing conditions must not contain conditions other than those justified on the grounds of the essential requirements and, in the case of systems for use by the general public, public service requirements in the form of trade regulation within the meaning of Article 3;

(ii) licensing conditions for mobile network operators must ensure transparent and non-discriminatory behaviour between fixed and mobile network operators in common ownership;

(iii) licensing conditions should not include unjustified technical restrictions. Member States may not, in particular, prevent combination of licences or restrict the offer of different technologies making use of distinct frequencies, where multistandard equipment is available.

...'

8 Article 3c of Directive 90/388 provides:

'Member States shall ensure that all restrictions on operators of mobile and personal communications systems with regard to the establishment of their own infrastructure, the use of infrastructures provided by third [parties] and the sharing of infrastructure, other facilities and sites, subject to limiting the use of such infrastructures to those activities provided for in their licence or authorisation, are lifted.'

9 Articles 3a and 3c of Directive 90/388 were inserted by Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388 with regard to mobile and personal communications (OJ 1996 L 20, p. 59). The first recital in the preamble to Directive 96/2 states:

'In its communication on the consultation on the Green Paper on mobile and personal communications of 23 November 1994, the Commission set out the major actions required for the future regulatory environment necessary to exploit the potential of this means of communication. It emphasised the need for the abolition, as soon as possible, of all remaining exclusive and special rights in the sector through full application of Community ... competition rules and with the amendment of ... Directive 90/388 ..., as last amended by Directive 95/51/EC, where required. Moreover, the communication considered removing restrictions on the free choice of underlying facilities used by mobile network operators for the operation and development of their networks for those activities which are allowed by the licences or authorisations. Such a step was seen as essential in order to overcome current distortions of fair competition and, in particular, to allow such operators control over their cost base.'

10 As set out in the fourth recital in the preamble to that directive:

'Several Member States have already opened up certain mobile communications services to competition and introduced licensing schemes for such services. Nevertheless, the number of licences granted is still restricted in many Member States on the basis of discretion or, in the case of operators competing with telecommunications organisations, subject to technical restrictions such as a ban on using infrastructure other than those provided by the telecommunications organisation. ...'

11 The 16th recital in the preamble to the directive states:

'... In addition, restrictions on the self-provision of infrastructure and the use of third party infrastructure is slowing down the development of mobile services, in particular because effective pan-European roaming for GSM relies on the widespread availability of addressed signalling systems, a technology which is not yet universally offered by telecommunications organisations throughout the Community;

Such restrictions on the provision and use of infrastructures constrain the provision of mobile and personal communications services by operators from other Member States and are thus incompatible with Article 90 in conjunction with Article 59 of the Treaty. To the extent that the competitive provision of mobile voice services is prevented because the telecommunications organisation is unable to meet the mobile operator's demand for infrastructures or will only do so on the basis of tariffs which are not oriented towards the costs of the leased line capacity concerned, these restrictions inevitably favour the telecommunications organisation's offering of fixed telephony services, for which most Member States still maintain exclusive rights. The restriction on the provision and use of infrastructure thus infringes Article 90, in conjunction with Article 86 of the Treaty. Accordingly, Member States must lift these restrictions and grant, if requested, the relevant mobile operators on a non-discriminatory basis access to the necessary scarce resources to set up their own infrastructure including radiofrequencies.'

12 Article 11(1) of 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), entitled 'Fees and charges for individual licences', reads as follows:

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

13 Directives 90/388 and 97/13 were repealed with effect as of 25 July 2003 by Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) and 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) respectively, which are however subsequent to the main proceedings.

The main proceedings and the questions referred for a preliminary ruling

Case C-544/03

14 At its sitting of 27 January 1998, the conseil communal de Fléron (Fléron municipal council) adopted a regulation imposing a tax on transmission pylons, masts and antennae for GSM. The tax was imposed with effect from 1 January 1998 and was effective for a period of three years expiring on 31 December 2000. The tax was set at a rate of BEF 100 000 per pylon, mast or antenna, and was payable by their owner.

15 On 12 April 1999 Mobistar applied to the Conseil d'État for annulment of that tax regulation.

16 Amongst the pleas for annulment submitted in support of its action Mobistar claims that the contested regulation restricts the development of its mobile telephony network, a restriction which is prohibited by Article 3c of Directive 90/388.

17 The Conseil d'État found, first, that it was not in a position to rule on the validity of that plea without applying a measure of Community law which raises a problem of interpretation and, second, that an issue also arises as to whether the contested tax is compatible with Article 49 EC, and decided to stay the proceedings and to refer the following questions to the Court:

'(1) Must Article 49 [EC] be interpreted as precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations?

(2) Given that Article 3c of ... Directive 90/388 ... refers to the lifting of "all restrictions", does that article preclude the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations?'

Case C-545/03

18 At its sitting of 8 October 1997, the conseil communal de Schaerbeek (Schaerbeek municipal council) adopted a regulation concerning the tax on external antennae and amending a regulation imposing a tax on satellite dishes, previously adopted by that council. An annual tax on external antennae was imposed for the financial years 1997 to 1999. The expression 'external antennae' covered not only satellite dishes but also GSM relay antennae or other antennae. The tax was set at a rate of BEF 100 000 per GSM relay antenna and at BEF 5 000 per satellite dish or other antenna.

19 On 19 December 1997 Belgacom Mobile applied to the Conseil d'État for annulment of that tax regulation.

20 One of the pleas submitted in support of the application alleges infringement of the Community provisions relating to the establishment of a high quality, unrestricted, mobile telephony network, in particular Article 3c of Directive 90/388.

21 The Conseil d'État also found that it was not in a position to rule on the validity of that plea without applying a measure of Community law which raises a problem of interpretation, and decided that it was appropriate, pursuant to Article 234 EC, to refer for a preliminary ruling two questions which are identical to those referred in Case C-544/03.

Application to reopen the oral procedure

22 By document lodged at the Court Registry on 2 May 2005, the Netherlands Government requested the Court to order the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure.

23 In support of its request that government essentially submits that, in his Opinion, the Advocate General proposed basing the answer on foundations different from those referred to by the national court, namely Directive 97/13, which was not discussed in any depth between all the parties either in their written observations or in those put forward at the hearing. That government wishes to make observations on that subject.

24 It is appropriate to recall that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and the judgments in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42, and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 35).

25 In the present case, however, the Court, after hearing the Advocate General, considers that it is in possession of all the information necessary for it to answer the questions referred and that that information has been the subject of argument presented before it. The application for the oral procedure to be reopened must therefore be dismissed.

The first question

26 By its first question the referring court is seeking to ascertain whether Article 59 of the Treaty must be interpreted as precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations.

27 Although, as Community law stands at present, direct taxation does not as such fall within the scope of the Community's competence, Member States must nevertheless exercise their retained powers consistently with Community law (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 32, and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 44).

28 In the field of freedom to provide services the Court has already recognised that a national tax measure restricting that freedom may constitute a prohibited measure, whether it was adopted by the State itself or by a local authority (see, to that effect, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 26 and 27).

29 According to the Court's case-law, Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality, against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and

to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14, and *De Coster*, cited above, paragraph 29).

30 Furthermore, the Court has already held that Article 59 precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*De Coster*, cited above, paragraph 30 and the case-law cited, and paragraph 39).

31 By contrast, measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 59 of the Treaty.

32 As regards the question whether the levy by municipal authorities of taxes such as those in question in the main proceedings amounts to a restriction incompatible with Article 59, it is necessary to point out that such taxes apply without distinction to all owners of mobile telephone installations within the commune in question, and that foreign operators are not, either in fact or in law, more adversely affected by those measures than national operators.

33 Nor do the tax measures in question make cross-border service provision more difficult than national service provision. Admittedly, introducing a tax on pylons, masts and antennae can make tariffs for mobile telephone communications to Belgium from abroad and vice versa more expensive. However, national telephone service provision is, to the same extent, subject to the risk that the tax will have an impact on tariffs.

34 It is appropriate to add that there is nothing in the file to suggest that the cumulative effect of the local taxes compromises freedom to provide mobile telephony services between other Member States and the Kingdom of Belgium.

35 The answer to the first question must therefore be that Article 59 of the Treaty must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations, which applies without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.

The second question

36 By its second question the referring court essentially seeks to ascertain whether tax measures applying to mobile communications infrastructures are covered by Article 3c of Directive 90/388.

37 It is necessary to point out at the outset that the event which gives rise to the taxes on communications infrastructures is not the issue of a licence. Therefore, Directive 97/13, which was relied on by Mobistar at the hearing, is not applicable to the facts of the case.

38 As regards Directive 90/388 it is first of all appropriate to note that the wording of Article 3c thereof, in that it requires the lifting of 'all restrictions' on operators of mobile and personal communications systems with regard to infrastructure, does not prevent the aforementioned restrictions from also referring to tax measures applying to mobile communications infrastructures.

39 According to the Court's settled case-law, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see, in particular, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St. Nikolaus Brennerei* [1984] ECR 1051, paragraph 10, and Case C-17/03 *Vereinigung voor Energie, Milieu en Water and Others* [2005] ECR I-4989, paragraph 41).

40 In its original version Directive 90/388 provided for the withdrawal of exclusive or special rights granted by Member States to supply telecommunications services but did not include mobile communications services in its field of application. In order to extend its scope to mobile and personal communications it was amended by Directive 96/2.

41 Directive 96/2 is intended to establish a legislative framework enabling the potential of mobile and personal communications to be exploited by abolishing, as soon as possible, all exclusive and special rights, by removing, for operators of mobile networks, both restrictions on the freedom to operate and develop those networks for the purpose of carrying out the activities authorised by their licences or authorisations and distortions of competition and by allowing those operators control over their costs (see Joined Cases C-396/99 and C-397/99 *Commission* v *Greece* [2001] ECR I-7577, paragraph 25, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 96).

42 Directive 96/2 is based on Article 90(3) of the EC Treaty. It follows that Article 3c of Directive 90/388 is applicable only to restrictions which are incompatible with Article 90 of the Treaty.

43 According to the 16th recital in the preamble to Directive 96/2, that directive was adopted for the purpose of a situation where the competitive provision of mobile

voice services was prevented because the telecommunications organisations were unable to meet the mobile operator's demand for infrastructures and most Member States maintained exclusive rights in favour of those organisations. On the basis of the finding that the restriction on the provision and use of infrastructure infringes Article 90 of the Treaty in conjunction with Article 86 of the Treaty, the Commission concluded that the Member States must lift those restrictions and grant the relevant mobile operators, if requested, access on a non-discriminatory basis to the necessary scarce resources to set up their own infrastructure.

44 It follows from this that the restrictions referred to in Article 3c of Directive 90/388 are characterised, first, by their link with the exclusive and special rights of the traditional operators and, second, by the fact that the situation can be remedied by access on a non-discriminatory basis to the necessary scarce resources.

45 Thus, restrictions such as those mentioned by way of example in the fourth recital in the preamble to Directive 96/2 are covered, namely the restriction of the number of licences granted on the basis of discretion or, in the case of operators competing with telecommunications organisations, making the grant of licences subject to technical restrictions such as a ban on using infrastructure other than those provided by those organisations.

46 In addition, only measures which appreciably affect the competitive situation fall within the notion of restriction within the precise meaning of Article 3c of Directive 90/388.

47 By contrast, national measures which are applicable to all mobile telephony operators without distinction and do not favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators

placed in competition with them do not fall within the scope of Article 3c of Directive 90/388.

48 It is for the national court to make sure that those conditions are met in the main proceedings.

49 In the context of its examination the national court will have to assess the effects of the taxes bearing in mind, in particular, the point at which each of the operators concerned entered the market. It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators.

50 It follows from all the foregoing that the answer to the second question must be that tax measures applying to mobile communications infrastructures are not covered by Article 3c of Directive 90/388, except where those measures favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators and appreciably affect the competitive situation.

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 (First Chamber) hereby rules:

1. **Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations, which applies without distinction to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.**

2. **Tax measures applying to mobile communications infrastructures are not covered by Article 3c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as amended, with regard to the implementation of full competition in telecommunications markets, by Commission Directive 96/19/EC of 13 March 1996, except where those measures favour, directly or indirectly, operators which have or have had exclusive or special rights to the detriment of new operators and appreciably affect the competitive situation.**

[Signatures]