OPINION OF ADVOCATE GENERAL LÉGER delivered on 7 April 2005 [1]

1. In these cases, the Conseil d'État (Belgium) asks the Court of Justice to interpret Article 49 EC and Article 3c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, [2] as amended by Directive 96/2/EC [3] (hereinafter 'the Directive'). It asks whether those provisions preclude municipal legislation imposing an annual tax on transmission antennae, masts and pylons for GSM ('Global system for mobile communications').

I — The relevant national legislation and the main proceedings

2. Two regulations are at issue in the main actions. The first was adopted by the conseil communal de Schaerbeek at its sitting of 8 October 1997. It imposed, for the financial years 1997 to 1999, an annual tax on 'external antennae', that is to say, satellite dishes and GSM relay antennae. The amount of the tax, which is payable by the owner of the antenna, is fixed at BEF 100 000 (EUR 2 478.94) for GSM relay antennae and BEF 5 000 (EUR 123.95) for satellite dishes.

3. The second regulation was adopted by the conseil communal de Fléron on 27 January 1998. It imposes, with effect from 1 January 1998 and for a period of three years, an annual tax on transmission pylons, masts and antennae for GSM. The amount of the tax, which is also payable by the owner of the antenna, is, in this case too, BEF 100 000 (EUR 2 478.94) per antenna.

4. Those two regulations are the subject-matter of actions brought before the Consel d'État by mobile telephony operators, established in Belgium, in this case Mobistar SA (hereinafter 'Mobistar') and Belgacom Mobile SA (hereinafter 'Belgacom Mobile'). Both operators seek the annulment of the taxes at issue, claiming, inter alia, that they

1 — Original language: French.

2 — OJ 1990 L 192, p. 10.

3 — 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).

are contrary to Article 49 EC and Article 3c of the Directive, since they constitute unlawful restrictions on the development of their telecommunications network and on the freedom to provide mobile telephony services.

II — Community legislation

5. The aim of the Directive is to liberalise the telecommunications sector. Based on Article 90(3) of the EC Treaty (now Article 86(3) EC), it initially required the withdrawal of exclusive or special rights to supply telecommunications services other than satellite communications, mobile telephony and voice telephony.

6. It was subsequently amended several times in order to extend its scope to satellite communications, in 1994, [4] mobile and personal communications services and systems, in 1996, [5] and then, also in 1996, all voice telephony and telecommunications services, including the establishment and the provision of the networks required for the provision of such services. [6]

7. With regard more specifically to mobile telephony, the first amendment introduced in 1996 was designed to enable operators to operate and develop their telephony networks for those activities which are allowed by the licences or authorisations, including the free choice of underlying facilities. [7] Such a step was seen as essential in order to overcome current distortions of fair competition and, in particular, to allow operators control over their cost base. [8] Thus, Article 3c of the Directive, inserted by Directive 96/2, provided:

'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.'

4 — Commission Directive 94/46/EC of 13 October 1994 (OJ 1994 L 268, p. 15).

5 — Directive 96/2.

6 — Commission Directive 96/19/EC of 13 March 1996, with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13). Directive 90/388 was also subject to other amendments, introduced by Commission Directive 95/51/EC of 18 October 1995 with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (OJ 1995 L 256, p. 49), and by Commission Directive 1999/64/EC of 23 June 1999 in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities (OJ 1999 L 175, p. 39).

7 — First recital in the preamble to Directive 96/2.

8 — Ibid.

8. Part of the legislative framework established by those provisions was subsequently amended and replaced by Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.[9] However, this directive is not applicable to the present case *rationae temporis*.

III — The references for a preliminary ruling

9. The Conseil d'État, before which the actions have been brought by Belgacom Mobile and Mobistar, states that the question whether the contested regulations are compatible with Directive 96/2, in so far as that directive prohibits restrictions on the development of mobile communications networks, calls for an interpretation of the term 'restriction'.

10. It explains that, while this term is not defined in either Article 1 or in Article 3c of the Directive, the recitals in the preamble to Directive 96/2 appear to suggest that the restrictions in question are only of a technical nature, as they refer, for example, to 'removing restrictions on the free choice of underlying facilities used by operators of mobile networks for the operation and development of their networks' (first recital) and to the fact that 'the number of licences granted is still ... subject to technical restrictions such as a ban on using infrastructure other than those provided by the telecommunications organisation' (fourth recital).

11. The Conseil d'État states that it would be wrong, however, to conclude that the restrictions to be lifted by Member States are exclusively of a technical nature, or that the list of technical restrictions in the preamble to Directive 96/2 is exhaustive: Article 3c of the Directive expressly refers to 'all' restrictions on infrastructure, so that a reasonable doubt exists as to whether Article 3c may also cover taxation measures which apply to mobile communication infrastructures.

12. The Conseil d'État adds that the matter of whether the contested taxes are compatible with primary Community law, in this case Article 49 EC, is also in issue.

13. In those circumstances, it decided to stay proceedings and to refer the following two questions to the Court of Justice for a preliminary ruling:

'1. Must Article 49 [EC] be interpreted as precluding the introduction, by legislation of a national or local authority, of a

9 — OJ 2002 L 249, p. 21.

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?'

IV — Analysis

14. Although the two questions referred by the Conseil d'État relate exclusively to Article 49 EC and Article 3c of the Directive, I agree with what was stated during the hearing before the Court, that the main action must be decided taking account also of other legislation applicable to this case, namely 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. [10]

15. It is apparent from the preamble thereto [11] that this directive forms part of the measures adopted by the legislature to ensure the complete liberalisation of telecommunications services and infrastructures from 1 January 1998. To that end, Directive 97/13 establishes a common framework for the regimes of general authorisations and individual licences granted by Member States in the field of telecommunications services: in order significantly to facilitate the entry of new operators into the market, [12] it required the regimes to be based on objective, transparent, non-discriminatory and proportionate criteria. [13] From that point of view, Directive 97/13 lays down tax provisions which seek to promote competition and to restrict the financial charges which Member States may impose on undertakings in the telecommunications sector.

10 — OJ 1997 L 117, p. 15. Under Article 25 of Directive 97/13, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive and publish the conditions and procedures attached to authorisations 'as soon as possible and, in any event, not later than 31 December 1997'. In respect of the period between the date on which that directive came into force, 27 May 1997, and the time-limit for transposing it, 31 December 1997, it need only be noted that, according to the case-law, the Member States were required, during that period, to 'refrain from taking any measures liable seriously to compromise the result prescribed' (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45).

11 — First, third and fifth recitals.

12 — Fifth recital.

13 — Second and third recitals.

16. It follows that, where Member States decide, as in this case, to impose fiscal charges on mobile telephony operators holding an authorisation or individual licence, [14] they are required to comply with the provisions of Directive 97/13. That directive is therefore relevant in order to resolve the disputes in the main actions because it might, on its own, lead the Conseil d'État to rule out application of the contested municipal regulations. I therefore suggest, in accordance with the case-law of the Court, [15] that the Court provide the Conseil d'État with any necessary ruling on the interpretation of that directive.

A — *Directive 97/13*

17. The relevant provisions of Directive 97/13 are contained in Articles 6 and 11.

18. Article 6 is entitled 'Fees and charges for general authorisations procedures'. It provides:

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

19. Article 11 of Directive 97/13 is entitled 'Fees and charges for individual licences'. It is worded as follows:

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

14 — It is apparent from the documents before the Court that Mobistar and Belgacom Mobile were authorised to set up and operate a GSM network in Belgium under an individual authorisation issued by the Minister for Telecommunications, on 27 November 1995 for Mobistar (see Mobistar's written observations, point 3) and on 2 July 1996 for Belgacom Mobile (see Belgacom Mobile's written observations, point 1, and the Royal Decree of 2 July 1996 granting Belgacom Mobile an authorisation to operate a GSM mobile telephony network, attached to Annex 1 of those observations).

15 — It is settled case-law of the Court that, in order to provide a helpful answer to the national court which has referred a question to it for a preliminary ruling, the Court may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (see inter alia the judgments in Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39; Case C-265/01 *Pansard and Others* [2003] ECR I-683, paragraph 19; and Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 27.

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

20. The content and scope of those provisions was clarified by the Court in its judgment of 18 September 2003 in *Albacom and Infostrada*. [16]

21. Those cases involved an Italian law [17] introducing a charge for the installation and provision of telecommunications networks, the provision of telephony and mobile and personal communications services. The charge was to be paid by the holders of concessions for telecommunications services or of individual licences. It was calculated as a percentage of turnover of the services provided in the previous year, that is, 3% for 1999, 2.7% for 2000, 2.5% for 2001, 2% for 2002 and 1.5% for 2003.

22. The companies Albacom and Infostrada, which both held individual licences, challenged the charge at issue on the ground that it was contrary to Article 11 of Directive 97/13.

23. When the case was referred for a preliminary ruling, the Court found that the contested charge did not come under any of the cases mentioned in Articles 6 and 11 of Directive 97/13: it did not seek to cover the administrative costs relating to the authorisation procedure or to ensure the use of scarce resources or to finance the provision of universal service within the meaning of those provisions. [18]

24. The Italian Government maintained that the contested charge was therefore not prohibited. Since Article 11(2) of Directive 97/13 allowed Member States to impose additional charges in the case of scarce resources, it had also to be possible for them to impose additional charges which, as in the present case, were intended to contribute to investments made by the State in order to liberalise the telecommunications sector. [19]

16 — Joined Cases C-292/01 and C-293/01 [2003] ECR I-9449.

17 — Article 20(2) of Law No 448 of 23 December 1998, introducing public finance measures for stabilisation and development (budget law 1999) (GURI No 302 of 29 December 1998, ordinary supplement, p. 5).

18 — *Albacom and Infostrada*, cited above, paragraphs 24 to 28.

19 — Ibid., paragraphs 31 and 32.

25. The Court rejected that argument for two reasons. First, it held that the wording of Article 11 of Directive 97/13 called for a restrictive interpretation. [20] Article 11(1) expressly provides that Member States are to ensure that any fees imposed on undertakings as part of authorisation procedures seek only to cover the administrative costs incurred by the licensing system and, in relation to that general provision, Article 11 (2) inserts a reservation which is strictly limited to the case of 'scarce resources'.

26. The Court also considered that, if Member States were free to establish the financial charges to be borne by telecommunications undertakings in respect of authorisation procedures, the common framework established by Directive 97/13 would be rendered redundant. [21] The aim of the framework is to harmonise the nature and scope of the financial charges, related to authorisation procedures, which Member States may impose on undertakings in the sector, with the aim of removing obstacles to the freedom to provide telecommunications services and to make a significant contribution to the entry of new operators into the market. [22] The Court therefore considered that, if the Italian Republic were allowed to maintain the contested charge, that would effectively reintroduce a significant obstacle to the liberalisation process and would therefore be contrary to the aims of Directive 97/13.

27. It follows that the list of financial charges which Member States may impose on telecommunications undertakings in respect of authorisation procedures or the authorisations themselves is exhaustive: if the charge in question does not fall into one of the categories established by Directive 97/13, it is prohibited.

28. In the present case, the parties agree that the contested taxes do not come under any of the cases expressly mentioned in Articles 6 and 11 of Directive 97/13.

29. In their observations, the communes of Schaerbeek and Fléron stated that the contested regulations pursued two objec-

20 — Ibid., paragraphs 33 and 34.

21 — Ibid., paragraph 38. Also see, on this point, the Opinion of Advocate General Ruiz-Jarabo Colomer in that case (point 52).

22 — *Albacom and Infostrada*, cited above, paragraphs 35 to 37.

tives, one more important than the other. [23] The first, and principal, objective is purely fiscal: for the communes, it is a question of obtaining enough revenue to cover all the costs engendered by their activities. The commune of Fléron even stated that, in that regard, the contested taxes had the same characteristics as any other tax, in that they are imposed on the taxpayer merely because he exercises a certain profession or activity. The second objective of the contested regulations, which is secondary, is environmental: the communes wish to avoid a proliferation of external antennae on their territory and to obtain compensation for the aesthetic harm caused by the presence of those antennae.

30. It is therefore apparent that the contested charges do not fall into any of the three categories mentioned in Articles 6 and 11 of Directive 97/13: they do not seek to cover the administrative costs relating to the procedure to authorise or grant the licences, or to finance the provision of universal service, or to ensure the use of 'scarce resources' within the meaning of Article 11 (2) of Directive 97/13.

31. The file also shows that those three categories of costs are covered by other levies, introduced by the Royal Decree of 7 March 1995 on the establishment and operation of GSM mobile telephony networks, [24] as amended. [25] Accordingly, Article 15(1) of that decree provides that operators holding an authorisation are to pay an annual charge of BEF 10 000 000 (EUR 247 893.52) to cover the 'administration costs of the authorisation' and an annual charge of BEF 1 000 000 (EUR 24 789.35) for the 'costs of providing the frequencies'. In addition, Article 15a of the Royal Decree provides that operators holding an authorisation are required to make a financial contribution to a Fund for the universal telecommunications service, in accordance with the laws and regulations in force.

32. It follows that the contested taxes do not fall into the categories of financial charges authorised by Directive 97/13.

33. However, at the hearing, the Commission of the European Communities maintained that the contested taxes could be regarded as charges designed to ensure optimum use of 'scarce resources' within the meaning of Article 11(2) of that directive;

23 — See the written observations of the commune of Schaerbeek (pp. 14 to 17) and the written observations of the commune of Fléron (p. 8).

24 — *Monteur belge* of 8 April 1995, hereinafter 'the Royal Decree'.

25 — See Annex 2 to the written observations of Belgacom Mobile

in the present case, those resources would be the transmission antennae for GSM.

34. I do not believe this argument can be upheld. Irrespective of the fact that, in Directive 97/13, the term 'scarce resources' covers primarily other aspects, such as the numbers available or, as in the Royal Decree, the radio frequencies,[26] the parties agree that, in this case, the contested taxes were not adopted in order to ensure that the transmission antennae for GSM were shared between the various mobile telephony operators. We have seen that the taxes were introduced mainly with the aim of obtaining tax revenue and, secondarily, to compensate for the aesthetic and environmental disadvantages caused by the presence of those antennae.

35. At the hearing the Commission also submitted that the judgment in *Albacom and Infostrada* cannot be applied to this case. It pointed out that Articles 6 and 11 of Directive 97/13 applied only to charges imposed 'as part of the authorisation procedures' and that, in that judgment, there was a direct link between the holding of the licence and the contested charge: the charge in question was imposed on telecommunications undertakings simply because they held a licence. According to the Commission, there is no such link in the present case, since the contested charge is not payable by the holder of the licence but by the owner of the antenna.

36. I agree with Mobistar that this argument is excessively formalistic. It is clear that, in practice, the persons who are owners of transmission antennae for GSM also hold a licence or authorisation within the meaning of Directive 97/13. Furthermore, the Commission has not cited any example of cases in which mobile telephony infrastructure is in the possession of a person other than the person authorised to set up and operate a mobile telephony network under an authorisation or licence.

37. In those circumstances, I consider that the provisions of Directive 97/13 preclude the maintenance of the contested taxes.

B — *Article 49 EC and Article 3c of the Directive*

38. Having regard to those factors, the questions referred by the Conseil d'État regarding the interpretation of Article 49 EC and Article 3c of the Directive have become devoid of purpose.

26 — See to that effect points 29 to 32 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-327/03 and C-328/03 *ISIS Multimedia Net and Firma 02*, pending before the Court.

V — Conclusion

39. In the light of the foregoing considerations, I therefore propose that the Court give the following reply to the questions referred for a preliminary ruling by the Conseil d'État:

Directive 97/13/EC 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, and in particular Article 11, must be interpreted as precluding municipal legislation introducing an annual tax on mobile and personal communications infrastructures where the owner of the infrastructure holds a licence within the meaning of those provisions.