JUDGMENT OF THE COURT (Fifth Chamber)
22 May 2003 *

In Case C-462/99,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Connect Austria Gesellschaft für Telekommunikation GmbH

and

Telekom-Control-Kommission,

intervener:

Mobilkom Austria AG,

on the interpretation of Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as

* Language of the case: German.

amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23); of Article 2(3) and (4) of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59); of Articles 9(2) and 11(2) 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); and of Articles 82 EC and 86(1) EC,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting for the President of the Fifth Chamber, A. La Pergola (Rapporteur) and P. Jann, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Connect Austria Gesellschaft für Telekommunikation GmbH, by P. Hoffmann, Rechtsanwalt,

— Telekom-Control-Kommission, by W. Schramm, its president,

— Mobilkom Austria AG, by P. Lewisch, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by B. Doherty and C. Schmidt, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Connect Austria Gesellschaft für Telekommunikation GmbH, represented by A. Foglar-Deinhardstein, Rechtsanwalt, and P. Hoffmann; of Telekom-Control-Kommission, represented by W. Schramm; of Mobilkom Austria AG, represented by P. Lewisch; of the Austrian Government, represented by T. Kramler, acting as Agent; and of the Commission, represented by C. Schmidt, at the hearing on 11 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

1 By order of 24 November 1999, received at the Court on 2 December 1999, the Verwaltungsgerichtshof (Administrative Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23) (hereinafter 'Directive 90/387'); of Article 2(3) and (4) of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ 1996 L 20, p. 59); of Articles 9(2) and 11(2) 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); and of Articles 82 EC and 86(1) EC.

2 Those questions were raised in the context of a dispute between Connect Austria Gesellschaft für Telekommunikation GmbH ('Connect Austria') and the Telekom-Control-Kommission ('the TCK') as regards the allocation to Mobilkom Austria ('Mobilkom'), which already holds a licence to provide digital mobile telecommunications services according to the GSM 900 standard (GSM — Global System for Mobile Communication) (hereinafter 'GSM 900 licence'), of additional frequencies in the frequency band reserved for the DCS 1800 standard (DCS — Digital Cellular System) without imposing a separate fee.

Legal framework

Community legislation

3 Directive 96/2 is intended to establish free competition in the mobile and personal communications market.

4 The eighth recital in the preamble to Directive 96/2 states that:

'Certain Member States have currently granted licences for digital mobile radio-based services making use of frequencies in the 1 700 to 1 900 MHz band, according to the DCS 1800 standard. The Commission communication of 23 November 1994 established that DCS 1800 is to be seen as part of the GSM system family.... Member States which have not yet established a procedure for granting such licences should do so within a reasonable time-frame. In this context, due account should be taken of the requirement to promote investments by new entrants in these areas. Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences for existing GSM or DCS 1800 operators may take place only under conditions ensuring effective competition.'

5 The 15th recital in the preamble to Directive 96/2 states:

'In the context of mobile and personal communications systems radiofrequencies are a crucial bottleneck resource.... The development of effective competition in the telecommunications sector may be an objective justification to refuse the allocation of frequencies to operators already dominant in the geographical market.

Member States should ensure that the procedure for allocation of radio-frequencies is based on objective criteria and without discriminatory effects.... Possible fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.'

6 Article 2(1) of Directive 96/2 provides that 'Member States shall not refuse to allocate licences for operating mobile systems according to the DCS 1800 standard at the latest after adoption of a decision of the European Radio-communications Committee on the allocation of DCS 1800 frequencies and in any case by 1 January 1998'.

7 According to Article 2(3) and (4) of Directive 96/2:

'3. Member States shall not restrict the combination of mobile technologies or systems, in particular where multistandard equipment is available. When extending existing licences to cover such combinations Member States shall ensure that such extension is justified in accordance with the provisions of paragraph 4.

4. Member States shall adopt, where required, measures to ensure the implementation of this article taking account of the requirement to ensure effective competition between operators competing in the relevant markets.'

8 Article 1(1) of Directive 97/13 concerns 'the procedures associated with the granting of authorisations and the conditions attached to such authorisations, for the purpose of providing telecommunications services, including authorisations for the establishment and/or operation of telecommunications networks required for the provision of such services'.

9 Article 2(1)(b) of Directive 97/13 defines the national regulatory authority as 'the body or bodies, legally distinct and functionally independent of the telecommunications organisations, charged by a Member State with the elaboration of, and supervision of compliance with, authorisations'.

10 The first indent of Article 9(2) provides:

'Where a Member State intends to grant individual licences:

— it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation.'

11 Pursuant to Article 11 of Directive 97/13:

'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.

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.'

12 In accordance with Article 5a(3) of Directive 90/387:

'Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved.'

National legislation

13 Article 130(1)(a) of the Bundes-Verfassungsgesetz (Federal Constitutional Law) (hereinafter 'the B-VG') states that '[t]he Verwaltungsgerichtshof shall rule on applications challenging the lawfulness of decisions by the administrative authorities, including independent administrative chambers... '.

14 Article 133 of the B-VG provides:

'Exclusions from the jurisdiction of the Verwaltungsgerichtshof:

1. Cases which are within the jurisdiction of the Verfassungsgerichtshof;

2. *Deleted*;

3. Cases concerning patents;

4. Cases decided at final instance by a collegiate authority if, according to the laws of the Federal State or the Länder laying down the structure of those authorities, its members include at least one judge, if the other members are no longer subject to instructions in the performance of their duties, if the decisions by that authority cannot be annulled or amended by superior administrative

bodies and if, notwithstanding the fact that all those conditions are met, the admissibility of an action before the Verwaltungsgerichtshof is not expressly stipulated.'

15 The order for reference indicates that, under Paragraph 49(12) of the Telekommunikationsgesetz (Law on Telecommunications, BGBl. I No 1997/100, hereinafter 'the TKG'), frequencies for public mobile telecommunications services are allocated by means of licences granted in accordance with the procedure laid down in Paragraph 22 et seq. of that law. Paragraph 22(1) of the TKG provides that the licence for mobile radio telephone services is granted by the national regulatory authority to the tenderer which, while satisfying the general conditions, guarantees the most efficient use of the frequencies, which is determined by the amount of the payment offered for that use. Under Paragraph 22(2) of the TKG, that allocation is made in accordance with an open, fair and non-discriminatory procedure, on the basis of a public invitation to tender.

16 In accordance with Paragraph 20(4) of the TKG, the allocation of additional frequencies to the holder of a licence for the same service constitutes an extension of the existing licence and takes effect pursuant to the provisions of the latter. If the licence contains no such provisions, the procedure to be applied is that laid down in paragraph 22 of the TKG.

17 Paragraph 125(3) of the TKG, a transitional provision with the same wording as Paragraph 20a(3b), added with effect from 1 March 1997 to the Fernmeldegesetz 1993 (1993 Telecommunications Law, BGBl. I No 1997/44), provides:

'The authority may, if necessary, allocate to existing holders of a licence for the provision of reserved mobile telecommunications services within the digital cellular mobile communications sector an additional 5 MHz from the frequency

band reserved for DCS 1800 if at least three years have elapsed since the entry into force of the decision granting the concession to the applicant for a licence for the DCS 1800 concession to be awarded for 1997. Prior to this date, additional frequencies from the frequency band reserved for DCS 1800 may be allocated to existing licence holders only if it is established that, although they have employed all commercially viable technical possibilities, their user capacity has been exhausted.'

The main proceedings and the questions referred for a preliminary ruling

18 It is clear from the order for reference that in Austria a GSM 900 licence for a frequency cluster of 2 × 8 MHz was allocated to Mobilkom, a company whose majority shareholder is the State, by a decision of 6 November 1996, amended by a decision of 23 July 1997. The company max.mobil Gesellschaft für Telekommunikation GmbH, formerly Ö CALL-MOBIL Telekommunikation Service GmbH (hereinafter 'max.mobil') is the holder of a similar licence, granted on 25 January 1996 and amended by a decision of 23 July 1997. The latter company had bid ATS 4 billion. A fee in the same amount had been imposed on 2 July 1996 on Post & Telekom Austria AG, the legal predecessor to Mobilkom.

19 On 19 August 1997, following a public invitation to tender, the first licence to provide digital mobile telecommunications services according to the DCS 1800 standard (hereinafter 'the DCS 1800 licence') was granted to Connect Austria for a fee of ATS 2.3 billion. Connect Austria was allocated a frequency cluster of 2 × 16.8 MHz, which was to be increased to 2 × 22.5 MHz if it achieved a user volume of 300 000 and a 75% cover rate.

20 By decision of 10 August 1998, on the basis of Paragraph 125(3) of the TKG (hereinafter 'the contested decision'), the TCK, acting in its role as national regulatory authority, granted to Mobilkom, as an extension to its GSM 900 licence, an additional frequency cluster of 2 × 5 MHz from the frequency band reserved for the DCS 1800 standard, in order to provide digital mobile telecommunications services using only base stations situated in the *Land* of Vienna.

21 Connect Austria appealed against the TCK's decision to the Verfassungsgerichtshof (Constitutional Court). By a decision of 24 February 1999, that court dismissed the appeal, finding that the contested decision had not harmed the applicant either through breach of a constitutionally guaranteed right or through application of an unlawful general rule.

22 In the grounds for its judgment, the Verfassungsgerichtshof nevertheless found that Article 5a(3) of Directive 90/387 is, in regard to the right to appeal against the decision of a national regulatory authority, sufficiently precise, in accordance with the settled case-law of the Court of Justice (Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357), to have direct effect since it provides for a right of appeal to an independent body. The Verfassungsgerichtshof also found that, taking into account its limited right of review, the action brought before it did not satisfy the requirements of that provision but that, by contrast, the power of review of administrative action enjoyed by the Verfassungsgerichtshof was likely to satisfy the requirements of Community law. Therefore, within the scope of Directive 90/387, the priority enjoyed by Community law must override Paragraph 133(4) of the B-VG, which precludes the Verwaltungsgerichtshof from hearing appeals against decisions taken by the TCK.

23 By order of 3 March 1999 the Verfassungsgerichtshof referred the appeal by Connect Austria against the contested decision to the Verwaltungsgerichtshof.

24 The Verwaltungsgerichtshof points out that the TCK is designated under the TKG as the national regulatory authority as regards, *inter alia*, the allocation, removal and revocation of licences and the approval of transfers of and amendments to licences. It explains that the TCK is an independent collegiate body consisting of three members, including a magistrate appointed by the federal Government, and that it takes its decisions at first and last instance.

25 According to the Verwaltungsgerichtshof, it follows from Article 144(1) of the B-VG that decisions by the TCK may be contested before the Verfassungsgerichtshof in so far as the applicant claims to have been injured by the infringement of a constitutionally guaranteed right or by the application of an unlawful regulation, an unconstitutional statute or an unlawful international treaty.

26 The referring order also indicates that under Article 133(4) of the B-VG, appeals to the Verwaltungsgerichtshof alleging the unlawfulness of decisions by the TCK are inadmissible because that provision does not provide for them to be admissible.

27 In that context, the Verwaltungsgerichtshof asks whether, in the light of Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 40 et seq., Article 5a(3) of Directive 90/387 has direct effect, so that it should set aside Article 133(4) of the B-VG and declare itself competent to hear the action brought by Connect Austria against the contested decision.

28 If the answer to the first question is in the affirmative, the Verwaltungsgerichtshof points out that under Paragraph 125(3) of the TKG, frequencies in the band reserved for DCS 1800 may be allocated to a public undertaking in a dominant market position in the digital mobile telecommunications sector according to the

GSM 900 standard, without the imposition of an additional fee. Such a rule could, first, by further reinforcing the undertaking's already dominant position, lead to a distortion of competition contrary to Articles 82 EC and 86(1) EC and Article 2(3) and (4) of Directive 96/2, at the expense of the holder of the DCS 1800 licence. Secondly, in the light of the latter's obligation to pay a fee for the use of DCS 1800 frequencies, that legislation could infringe the prohibition on discrimination laid down in Articles 9(2) and 11(2) of Directive 97/13.

29 In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On a proper construction of Article 5a(3) of Council Directive 90/387/EEC, as amended by Directive 97/51/EC of the European Parliament and of the Council, does that provision have direct effect so as to override a contrary domestic rule of jurisdiction and establish the jurisdiction of a particular "independent body" at national level to implement a "suitable mechanism" for dealing with an appeal brought by an aggrieved party against a decision taken by the national regulatory authority?

2. If the answer to the first question is in the affirmative: are Articles 82 EC and 86(1) EC, Article 2(3) and 4 of Commission Directive 96/2/EC, and Articles 9(2) and 11(2) of Directive 97/13/EC of the European Parliament and of the Council, or other provisions of Community law, to be construed as precluding a provision of national law under which existing holders of a

licence for the provision of reserved mobile telecommunications services within the digital cellular mobile communications sector may, prior to the expiry of three years from the entry into force of the decision granting the DCS 1800 licence in 1997 to an applicant, be granted additional frequencies from the frequency band reserved for DCS 1800 if it is established that, despite employing all commercially viable technical possibilities, their user capacity has been exhausted, where those additional frequencies may be allocated without a requirement that a separate fee for their use be paid and may also be allocated to a public undertaking holding a dominant market position within the 900 MHz sector?'

The first question

Observations submitted to the Court

30 Connect Austria states that, in accordance with the principle of the primacy of Community law over national law, Article 133(4) of the B-VG, which excludes the competence of the Verwaltungsgerichtshof, should be overridden. Therefore, the Verwaltungsgerichtshof should be considered competent to hear appeals against decisions of the TCK, provided that such a legal remedy satisfies the requirement for a suitable mechanism within the meaning of Article 5a(3) of Directive 90/387.

31 Relying on paragraph 25 et seq. of *Francovich*, cited above, the Austrian Government maintains that Article 5a(3) of Directive 90/387 does not have direct effect. That provision is unconditional only in so far as it confers on Member States the task of establishing suitable mechanisms at national level, thereby leaving them some latitude to set up such a mechanism in practice, in particular as regards the designation of the 'independent body'.

32 The Austrian Government states that in any event the right to challenge decisions of the TCK before the Verwaltungsgerichtshof under Article 144 of the B-VG complies with both the principle of equivalence and the principle of effectiveness (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; *Dorsch Consult*, cited above, paragraph 40; and Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 32) and the requirements of Article 5a(3) of Directive 90/387.

33 The Swedish Government points out that Article 5a(3) of Directive 90/387 does not state which body is competent to hear appeals but requires Member States to adopt additional measures to designate a competent body and the applicable rules of procedure. That provision therefore does not have direct effect. The Court's case-law (see *Dorsch Consult*) indicates that it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the exercise of individual rights based on Community law may give rise in the national judicial system.

34 The Commission states that Article 5a(3) of Directive 90/387 has the same wording as Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Both those provisions require Member States to establish bodies which are independent of the authorities vested with powers of decision, to which injured parties can appeal for the purpose of obtaining review of the decisions taken by those authorities. Therefore, the Commission proposes that the Court should rely on the case-law concerning review procedures for the award of public contracts (see *Dorsch Consult*; Case C-76/97 *Tögel* [1998] ECR I-5357; and Case C-111/97 *EvoBus Austria* [1998] ECR I-5411) in order to answer the first question referred for a preliminary ruling.

Findings of the Court

35 It must be recalled first that, according to settled case-law, it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see, in particular, Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301, paragraph 17, and Case C-258/97 *HI* [1999] ECR I-1405, paragraph 22).

36 In addition, whilst Article 5a(3) of Directive 90/387 requires Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to an independent body, it does not specify the national body in each Member State which is competent to hear and decide on such appeals.

37 It is clear that on 3 March 1999, when the Verfassungsgerichtshof referred the appeal by Connect Austria to the Verwaltungsgerichtshof, Article 5a(3) of Directive 90/387 had not been implemented in Austrian law. As the Verfassungsgerichtshof rightly observed, and contrary to what the Austrian Government claims, a right of appeal such as that available before the Verfassungsgerichtshof, limited to cases where the applicant claims to have been injured by the infringement of a constitutionally guaranteed right or by the application of an unlawful regulation, an unconstitutional statute or an unlawful international treaty, cannot be said to constitute a suitable mechanism within the meaning of Article 5a(3) of Directive 90/387 and therefore does not comply with the requirements of that article.

38 In those circumstances, it is appropriate to recall that the Court has consistently held that the obligation arising from a directive for the Member States to achieve the result envisaged therein and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure compliance with that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third subparagraph of Article 249 EC (Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26; *EvoBus Austria*, cited above, paragraph 18; *HI*, cited above, paragraph 25; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraphs 38 and 39).

39 That obligation requires the national court to determine whether domestic law establishes suitable mechanisms to recognise the right of individuals to appeal against decisions of the national regulatory authority. In circumstances such as those in the main proceedings, the national court is required in particular to determine whether that right of appeal may be exercised before the court or tribunal competent to review the lawfulness of actions taken by the public authorities (see, to that effect, *EvoBus Austria*, paragraph 19).

40 Where application of national law in accordance with the requirements of Article 5a(3) of Directive 90/387 is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would, in the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied (see, to that effect, *Engelbrecht*, paragraph 40).

41 It follows that a national court or tribunal which satisfies the requirements of Article 5a(3) of Directive 90/387 and which would be competent to hear appeals against the decisions of the national regulating authorities if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as Article 133(4) of the B-VG, has the obligation to disapply that provision.

42 Therefore, the answer to the first question referred for a preliminary ruling must be that in order to ensure that national law is interpreted in compliance with Directive 90/387 and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387. If national law cannot be applied so as to comply with the requirements of Article 5a(3) of Directive 90/387, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excluded its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision.

The second question

Observations submitted to the Court

43 Connect Austria claims that Mobilkom is a public undertaking within the meaning of Article 86(1) EC, which enjoys exclusive rights within the meaning of that provision in so far as it is the sole undertaking entitled to operate an analogue mobile telecommunications network, the 'D network'. Mobilkom did

not pay a separate fee for that licence, which is valid until 31 December 2007 and entitles it to use a frequency cluster of 2 × 11 MHz, which it alleges is justified by an operating requirement.

44 On the basis of its preponderant market share of some 70%, Mobilkom occupies a dominant position on the Austrian GSM market and therefore comes under Article 82 EC.

45 Connect Austria maintains that, in those circumstances, the allocation without charge of DC 1800 frequencies to Mobilkom, which would allow it to maintain and strengthen its dominant position, is contrary to Article 82 EC in conjunction with Article 86 EC. That allocation makes Mobilkom the sole operator able to offer the full range of technically available mobile telecommunications services (analogue as well as digital, according to the GSM 900 and DCS 1800 standards respectively). The considerable competitive advantage that Mobilkom already enjoys because of the monopoly situation which it has long enjoyed, and its dominant position on the market during many years, and which it continues to enjoy to the present, would be very significantly reinforced. That effect could only be compensated for by the obligation to pay an allowance for having obtained additional frequencies in the band reserved for the DCS 1800 standard.

46 Commission Decision 95/489/EC of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy (OJ 1995 L 280, p. 49) and Commission Decision 97/181/EC of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain (OJ 1997 L 76, p. 19) make it clear that the imposition of a fee only on new entrants to the GSM markets in Italy and in Spain allowed the existing public telephony undertakings, which enjoyed a monopoly, to reinforce their dominant position on those markets, in breach of part (b) of the second subparagraph of Article 82 EC and of Article 86 EC. That reasoning also applies in the main proceedings.

47 The favourable treatment accorded Mobilkom results from a legislative measure, namely Paragraph 125(3) of the TKG, as construed by the TCK.

48 Article 2(3) and (4) of Directive 96/2, read in the light of the eighth recital in the preamble to that directive, expressly provides for the possibility of excluding operators which already hold a GSM 900 licence from being allocated DCS 1800 licences, in particular where that would extend a dominant position. Connect Austria maintains that in the main case effective competition within the meaning of Directive 96/2 can be ensured only by excluding Mobilkom from DCS 1800 technology or, at the very least, by payment of a fee for the use of DCS 1800 frequencies. In that regard, Connect Austria refers to the several billion ATS in investment costs which it has had to pay since mid-1997.

49 With regard to Directive 97/13, Connect Austria maintains that an interpretation of Paragraph 125(3) of the TKG which excuses Mobilkom and max.mobil from the requirement to pay a fee for the use of additional frequencies, while all other applicants are subjected to the procedure laid down in Paragraph 22 et seq. of the TKG, constitutes discriminatory treatment of applicants under Article 9(2) of Directive 97/13.

50 The TCK contends that it is clear from the grounds for the draft text of Paragraph 20a(3b) of the Fernmeldegesetz 1993 that Paragraph 125(3) of the TKG is intended to help ensure effective competition in the mobile telecommunications services market, in compliance with Articles 82 EC and 86 EC, and Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10) and Directive 96/2.

51 The need for a transitional provision such as Paragraph 125(3) of the TKG, which lays down specific measures for existing holders of a GSM 900 licence as regards the allocation of frequencies, results from the amendment of the adjudication procedure for the granting of licences. Mobilkom and max.mobil obtained their licence at a time when, as a general rule, the allocation of additional frequencies did not require a call for tender or payment of a fee for the use of those frequencies.

52 That transitional provision also ensures for the successful tenderer for the allocation of the DCS 1800 licence, which was granted in 1997, planning certainty and a period during which it is protected from competition, which the Austrian legislature considered necessary so that existing operators of a GSM 900 licence could not 'undermine' the entry to the market of the new operator as a result of their initial advantage of an already developed network and thereby distort effective competition by also offering digital mobile telecommunications services according to the DCS 1800 standard.

53 Nevertheless, existing holders of a GSM 900 licence should be able to offer such services when the GSM 900 network capacity available to them has been exhausted, so that they are not prevented from acquiring new subscribers by insurmountable technical and economic limitations.

54 Paragraph 125(3) of the TKG does not seek to curtail the expansion of commercial activity but rather to ensure the effective use of frequencies.

55 As regards the application of Article 82 EC in conjunction with Article 86 EC, the TCK maintains that the frequencies in the band reserved for DCS 1800 do not

make it possible to offer services which could not equally be offered through the frequencies in the band reserved for GSM 900, since the two bands are operated by the same technical systems. Therefore, granting additional frequencies to Mobilkom does not provide it with a competitive advantage.

56 In the circumstances of the main case, by contrast, the refusal to grant additional frequencies to Mobilkom would have restricted competition in the mobile telecommunications services market, since in that case only two undertakings, max.mobil and Connect Austria, would in fact have been able to engage in competition, while Mobilkom would for technical reasons no longer have been able to provide services of equivalent quality.

57 In addition, the TCK considers that granting additional frequencies in accordance with Paragraph 125(3) of the TKG without imposing a separate fee does not give rise to any objection from the perspective of competition law. Account should be taken generally of both the fees paid for the granting of a licence or the use of frequencies and the size of the frequency allocation and the time of entry on the market.

58 Mobilkom and max.mobil each paid a fee of ATS 4 billion for the allocation of frequencies of 2 × 8 MHz in the band reserved for GSM 900. Connect Austria, for its part, paid a fee of ATS 2.3 billion for the allocation of frequencies of 2 × 16.8 MHz, which could subsequently be increased to 2 × 22.5 MHz without payment of an additional fee. The TCK granted an application to that end on 3 April 2000. Connect Austria therefore paid a fee which was well below that paid by its competitors and obtained a much better allocation of frequencies for that price.

59 As regards Article 2(3) and (4) of Directive 96/2, the TCK states that it follows from its preceding observations that it took the requirements of competition law into account when it adopted the contested decision.

60 As regards Articles 9(2) and 11(2) of Directive 97/13, the TCK contends that, since they allow Member States wide latitude by giving them the choice as to whether or not to impose fees, they do not have direct effect.

61 As regards Article 82 EC in conjunction with Article 86 EC, Mobilkom maintains that it is only one operator among others in the mobile telecommunications services sector, since it holds neither exclusive nor special rights. In addition, the allocation to it of additional frequencies cannot amount to an extension of a dominant position to a neighbouring market, since the two digital mobile telecommunications systems which comply with the GSM 900 standard and the DCS 1800 standard respectively fall within the same product market and are interchangeable as regards technical capacity and product characteristics.

62 As regards Directive 96/2, Mobilkom argues that the allocation to operators holding a GSM 900 licence of additional frequencies in the DCS 1800 band when the capacity of those operators has been exhausted, in order to allow them to continue competing, does not harm competition but rather encourages it. By contrast, competition would be harmed if Connect Austria was simply granted a monopoly on digital mobile telecommunications services according to the DCS 1800 standard.

63 As for Directive 97/13, Mobilkom points out that it is based on the principle that the allocation of frequencies takes place without the payment of fees and that it is only in certain specific cases that fees may be imposed. Article 11 of Directive

97/13 subjects Member States to restrictions as regards the imposition of fees but in no way obliges them to require such fees. Article 9 of that directive cannot lead to a different conclusion, since that article deals with the granting of individual licences and not the allocation of additional frequencies.

64 Finally, Mobilkom points out that Connect Austria was allocated a much larger frequency cluster, at a much better price, than were Mobilkom and max.mobil. The allocation of additional frequencies to Mobilkom and max.mobil without charge is therefore absolutely essential in order to compensate, at least partly, for that advantage.

65 The Austrian Government points out that Paragraph 125(3) of the TKG was adopted in order to allow the holder of the first DCS 1800 licence granted in Austria, which is also the third holder of a licence in the mobile telecommunications services sector, to make up for the competitive advantage of its two competitors which entered the market before it.

66 The Austrian Government also states that the fee initially paid by the first two licence holders in the mobile telecommunications services sector was set taking account of a possible subsequent allocation without charge of additional frequencies under Paragraph 125(3) of the TKG, were those two owners to need them. That was a legitimate expectation as the legal situation stood at that time.

67 As regards Article 82 EC in conjunction with Article 86 EC, the Austrian Government maintains that the allocation of additional frequencies pursuant to Paragraph 125(3) of the TGK is decided on the basis of objective criteria, which

depend on the commercial success of the mobile operator and the demand for mobile telecommunications services. In those circumstances, the possible allocation of additional frequencies to a public undertaking is not sufficient to constitute a breach of Article 82 EC in conjunction with Article 86 EC (see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91).

68 As regards Article 2(3) and (4) of Directive 96/2, the Austrian Government argues that the notion of 'effective competition' used therein should be interpreted in the light of the Court's case-law relating to Article 82 EC and in this respect refers, in particular, to paragraph 38 of *Hoffmann-La Roche* v *Commission*, cited above. However, given the figures available to it, the Austrian Government is of the opinion that none of the undertakings operating in the Austrian mobile telecommunications services market has a significant degree of autonomy in relation to its competitors, and thus the existence of effective competition which complies with the requirements of Community law is ensured.

69 In addition, Paragraph 125(3) of the TKG seeks to protect investments made by new entrants, as laid down in the eighth recital in the preamble to Directive 96/2.

70 Finally, as regards Articles 9(2) and 11(2) of Directive 97/13, the Austrian Government points out that Connect Austria paid ATS 2.3 billion for a frequency cluster of 2 × 22.5 MHz, while Mobilkom paid ATS 4 billion for a frequency cluster of 2 × 8 MHz.

Findings of the Court

71 First of all, as regards the interpretation of Paragraph 125(3) of the TKG, it is not for the Court of Justice to rule on the interpretation of provisions of national law, but it must take account, under the division of jurisdiction between the Community courts and the national courts, of the factual and legislative context in which the question put to it is set, as described in the order for reference (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10).

Interpretation of Articles 82 EC and 86(1) EC

72 It is appropriate to recall that, under Article 86(1) EC, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary to the rules contained in the EC Treaty, including those provided for in Article 82 EC.

73 Article 82 EC prohibits, in so far as it may affect trade between Member States, any abuse of a dominant position within the common market or in a substantial part thereof.

74 In that regard, it should first be observed that the order for reference makes clear that Mobilkom is a public undertaking which has a dominant position on the digital mobile telecommunications services market according to the GSM 900 standard.

75 In that context, although it is for the national court to define the market for the services at issue, it should nevertheless be recalled that, according to the Court's case-law, in order for a market to be held to be sufficiently homogeneous and distinct from others, the service must be able to be distinguished from other services by virtue of specific characteristics as a result of which it is scarcely interchangeable with those alternatives as far as the consumer is concerned and is affected only to an insignificant degree by competition from them (see, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 12, and Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 40). In that regard, the examination cannot be limited to the objective characteristics of the relevant services but must include the competitive conditions and the structure of supply and demand on the market (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37).

76 Therefore, it falls to the national court to determine, in the present case:

— whether there are three distinct markets, one for analogue mobile telecommunications services, one for digital mobile telecommunications services according to the GSM 900 standard and one for digital mobile telecommunications services according to the DCS 1800 standard, or

— whether there are two distinct markets, one for analogue mobile telecommunications services and one for digital mobile telecommunications services according to the GSM 900 and DCS 1800 standards, or

— whether there is only one market, that for mobile telecommunications services including both analogue mobile telecommunications services and digital mobile telecommunications services according to the GSM 900 and DCS 1800 standards.

77 To that end, the national court must consider *inter alia* whether digital mobile telecommunications services according to the GSM 900 standard and digital mobile telecommunications services according to the DCS 1800 standard are regarded by consumers as interchangeable and, in the context of that examination, determine the availability of dual-band mobile telephones able to function on both frequency bands. It must also consider the size of the analogue mobile telecommunications services market and whether there is competition among the three systems, in particular at the local level in large cities.

78 If the national court holds that the services market at issue is that for mobile telecommunications services as a whole, it is clear from the file that Mobilkom holds a dominant position on that market as well.

79 Since Mobilkom's dominant position extends over the territory of a Member State, it is capable of constituting a dominant position in a substantial part of the common market, in breach of Article 82 EC (see, to that effect, Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 43).

80 Secondly, it must be observed that the Court has consistently held that a Member State breaches the prohibitions laid down by Article 86(1) EC in conjunction with Article 82 EC if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights cannot avoid abusing its dominant position (see to that effect, in particular, Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraphs 33 and 34; and Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 61).

81 Practices by an undertaking in a dominant position which tend to strengthen that position by distorting competition amount to abuse of a dominant position within the meaning of Article 82 EC (see to that effect *Hoffmann-La Roche* v *Commission*, paragraph 90, and *Michelin* v *Commission*, paragraph 73).

82 The same is true when the conduct of an undertaking with a dominant position in a given market tends to extend that position to a neighbouring but separate market by distorting competition.

83 The Court has consistently ruled that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51, and *GB-Inno-BM*, cited above, paragraph 25).

84 If inequality of opportunity between economic operators, and therefore distorted competition, results from a State measure, such a measure constitutes an infringement of Article 86(1) EC in conjunction with Article 82 EC.

85 In that regard, the fact that, in the main case, a new entrant on the market at issue, namely the third national operator in the mobile telecommunications services sector, must pay a fee for its DCS 1800 licence whereas the first national operator, a public undertaking which has a dominant position, is allocated additional frequencies in the DCS 1800 band without having to pay a separate fee is liable to amount to a competitive advantage, allowing the latter either to extend its dominant position in the digital mobile telecommunications services market according to the DCS 1800 standard or to reinforce its dominant position in the digital mobile telecommunications services market or in the mobile

telecommunications services market, depending on how the market at issue is defined, by distorting competition, and therefore to infringe Article 82 EC.

86 As a result of the financial charge imposed on its competitor which obtained a DCS 1800 licence (Connect Austria), Mobilkom, a public undertaking in a dominant position and, as Connect Austria rightly points out, a former monopoly which already enjoys a number of advantages such as a presence on the markets for analogue mobile telecommunications services and digital mobile telecommunications services according to the GSM 900 standard and a sizeable number of existing clients, could find itself in a situation which would lead it, *inter alia*, to offer reduced rates, in particular to potential subscribers to the DCS 1800 system, and to carry out intensive publicity campaigns in conditions with which Connect Austria would find it difficult to compete.

87 Therefore, national legislation such as that at issue in the main proceedings, under which additional frequencies in the DCS 1800 band may be allocated to a public undertaking in a dominant position without the imposition of a separate fee whereas the new entrant to the market at issue has had to pay a fee for its DCS 1800 licence, is likely to lead the public undertaking in a dominant position to breach Article 82 EC by extending or strengthening its dominant position, depending on how the market at issue is defined, by distorting competition. Given that the distorted competition would therefore result from a State measure which creates a situation where equality of opportunity for the various economic operators concerned cannot be ensured, it may amount to a breach of Article 86(1) EC in conjunction with Article 82 EC.

88 Nevertheless, the order for reference makes clear that in the main case Mobilkom and max.mobil each paid ATS 4 billion for licences allocating each of them a frequency cluster of 2 × 8 MHz in the band reserved for GSM 900, while Connect

Austria paid a fee of ATS 2.3 billion for a licence allocating it a frequency cluster of 2 × 16.8 MHz, which could be increased to 2 × 22.5 MHz if it reached a user volume of 300 000, in the band reserved for DCS 1800.

89 In that regard, it is important to recall that national legislation such as that at issue in the main proceedings is not contrary to Articles 82 EC and 86(1) EC if, taking into account the fees imposed on the different operators involved for their respective licences, the allocation of additional frequencies in the DCS 1800 band, without the imposition of a separate fee, to a public undertaking in a dominant position must be considered to comply with the requirement to ensure equality of opportunity for different economic operators and therefore to guarantee undistorted competition.

90 If the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including subsequent allocation of additional frequencies in the DCS 1800 band without additional payment, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence, national legislation such as that at issue in the main proceedings must be deemed to ensure equality of opportunity for different economic operators and therefore guarantee undistorted competition.

91 It falls to the national court to determine if that is the situation in the case in the main proceedings.

92 In that regard, it should be pointed out that, since the setting of fee amounts involves complex economic assessments, the national authorities cannot be

required to comply with rigid criteria in that regard, provided that they remain within the limits resulting from Community law.

93 In the course of its examination, the national court must also determine the economic value of the licences concerned, taking account *inter alia* of the size of the different frequency clusters allocated, the time when each of the operators concerned entered the market and the importance of being able to present a full range of mobile telecommunications systems.

94 As regards the argument put forward by Connect Austria that Mobilkom did not pay a fee for its licence to provide analogue mobile telecommunications services, it is for the national court to determine whether that licence must be taken into account when it considers whether the Austrian authorities complied with the obligation to ensure equality of opportunity between different economic operators, particularly in the light of the date when that licence was granted, the law in force at the time, a possible operating requirement and, where relevant, the economic value of that licence, in particular as from the opening of the mobile telecommunications sector to competition.

95 It follows that Articles 82 EC and 86(1) EC in principle preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a GSM 900 licence without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee for its DCS 1800 licence. However, those provisions do not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

Infringement of Article 2(3) and (4) of Directive 96/2

96 It is appropriate to bear in mind that 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 (Joined Cases C-396/99 and C-397/99 *Commission* v *Greece* [2001] ECR I-7577, paragraph 25).

97 In accordance with that objective, Article 2(1) of Directive 96/2 requires Member States, from 1 January 1998, to refrain from refusing to allocate licences for operating mobile systems according to the DCS 1800 standard (see *Commission* v *Greece*, cited above, paragraph 26).

98 According to Article 2(3) and (4) of Directive 96/2, Member States are to extend existing licences to provide digital mobile telecommunications services to combined digital mobile telecommunications systems complying with the GSM 900 standard and the DCS 1800 standard respectively only where that extension is justified by the need to ensure effective competition between operators competing in the relevant markets.

99 In accordance with the eighth recital in the preamble to Directive 96/2, when a procedure for granting DCS 1800 licences is initiated, Member States should take due account of the requirement to promote investments by new entrants. They should be able to refrain from granting a licence to existing operators, for example to operators of GSM 900 systems already present on their territory, if it

can be shown that the grant would eliminate effective competition, in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences to existing GSM 900 or DCS 1800 operators may take place only under conditions ensuring effective competition.

100 In that regard, it must be held that if, by extending an existing GSM 900 licence granted to a public undertaking in a dominant position to include additional frequencies in the band reserved for DCS 1800, without imposing a separate fee, whereas a new entrant to the market at issue has had to pay a fee to obtain a DCS 1800 licence, equality of opportunity between different economic operators is no longer ensured and competition is thereby distorted, that extension cannot be considered to be justified under Article 2(4) of Directive 96/2.

101 Therefore, a national provision such as Paragraph 125(3) of the TKG, which allows such an extension, is liable to be in breach of Article 2(3) and (4) of Directive 96/2.

102 However, as observed in paragraph 90 of the present judgment, if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the DCS 1800 band, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence, national legislation such as that at issue in the main proceedings must be deemed to ensure equality of opportunity between different economic operators and thereby guarantee undistorted competition, and therefore, by ensuring effective competition between the operators of systems which compete in the market concerned, it appears to comply with Article 2(3) and (4) of Directive 96/2.

103 It is for the national court, on the basis of the guidance provided by the Court in paragraphs 92 to 94 of the present judgment, to determine whether such is the situation in the case in the main proceedings.

104 In that context, it should be pointed out that the 15th recital in the preamble to Directive 96/2 states that any fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.

105 It follows that Article 2(3) and (4) of Directive 96/2 in principle precludes national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a GSM 900 licence without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee to acquire a DCS 1800 licence. However, that provision does not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

106 However, Connect Austria also maintains that in the main case effective competition within the meaning of Directive 96/2 can be ensured only by completely excluding Mobilkom from the allocation of frequencies in the DCS 1800 band.

107 Pursuant to the first sentence of Paragraph 125(3) of the TKG, the authority may not allocate additional frequencies from the DCS 1800 band to existing holders of a GSM 900 licence unless at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence, and only up to an additional 5 MHz for

each of them. That provision takes due account of the requirement to promote investments by new entrants, as provided in the eighth recital in the preamble to Directive 96/2, and the concern expressed in the first subparagraph of the 15th recital of that same directive, according to which, since radiofrequencies are a crucial bottleneck resource, the development of effective competition in the telecommunications sector may be an objective justification for refusing the allocation of frequencies to operators already dominant in the geographical market.

108 None the less, it follows from the second sentence of Paragraph 125(3) of the TKG that additional frequencies in the DCS 1800 band may be allocated to existing holders of a GSM 900 licence if it is established that they have exhausted their user capacity although they have employed all commercially viable technical possibilities.

109 In that regard, it should be observed that DCS 1800 is a digital mobile telecommunications system which is based on the GSM international standard but uses a frequency band around 1800 MHz instead of 900 MHz. In principle, there are more frequencies available in the DCS 1800 band than in the GSM 900 band, which allows that system to take on more subscribers and to support more traffic simultaneously. Since higher frequencies have a more limited coverage, the cells of each DCS 1800 base station are smaller than those for the GSM 900 system, which implies a greater density of base stations and hence a network with greater capacity.

110 However, at the time Paragraph 20a(3b) of the Fernmeldegesetz 1993, which takes over Paragraph 125(3) of the TKG verbatim, was adopted, digital mobile telecommunications networks according to the GSM 900 standard were in danger of soon reaching saturation point during peak hours in the large cities of several Member States, as the result of very rapid growth in the number of

subscribers. Before the arrival of dual-use telephones, able to move from one system to the other, the installation of DCS 1800 base stations in large cities, in addition to GSM 900 base stations, made it possible for GSM 900 network operators to reduce saturation problems due to the growth in the number of subscribers.

111 In that situation, it appears that national legislation such as that at issue in the main proceedings, which allows a limited number of additional frequencies in the DCS 1800 band to be allocated to existing holders of a GSM 900 licence, including a public undertaking in a dominant position, after at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence, and allows such an allocation before that period has elapsed if it is established that their user capacity has been exhausted despite the use of all commercially viable technical possibilities, must be held to be justified by the need to ensure effective competition between operators competing in the relevant markets, within the meaning of Article 2(3) and (4) of Directive 96/2.

112 It follows that Article 2(3) and (4) of Directive 96/2 does not preclude national legislation such as that at issue in the main proceedings, under which a limited number of additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a GSM 900 licence, including a public undertaking in a dominant position, after at least three years have elapsed since the 1997 decision to grant the DCS 1800 licence. Nor does that provision preclude national legislation such as that at issue in the main proceedings, which allows such an allocation before that period has elapsed if it is established that the user capacity of those operators has been exhausted despite the use of all commercially viable technical possibilities.

Interpretation of Articles 9(2) and 11(2) of Directive 97/13

113 The national court asks whether the prohibition on discrimination laid down in Articles 9(2) and 11(2) of Directive 97/13 precludes national legislation such as that at issue in the main proceedings, under which additional frequencies in the DCS 1800 band may be allocated to existing holders of a GSM 900 licence without the imposition of a separate fee, whereas the holder of a DCS 1800 licence must pay a fee to obtain it.

114 In that regard, it should be observed that, contrary to what the TCK contends, Articles 9(2) and 11(2) of Directive 97/13 are, as regards their content, unconditional and sufficiently precise and may therefore, in accordance with settled case-law (see, *inter alia*, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 51), in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

115 It should also be recalled that it is settled case-law that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences (see, *inter alia*, Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325,

at 345, and Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 57).

116 Without it being necessary to rule on whether Article 9(2) of Directive 97/13 applies only to the granting of licences, or also to the allocation of additional frequencies, it must be observed that if the fee imposed on existing operators for their GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the DCS 1800 band, appears to be equivalent in economic terms to the fee imposed on the operator which was granted the DCS 1800 licence, that allocation does not amount to like cases being treated differently.

117 It is for the national court, on the basis of the guidance provided by the Court in paragraphs 92 to 94 of the present judgment, to determine whether such is the situation in the case in the main proceedings.

118 It follows that the prohibition on discrimination laid down in Articles 9(2) and 11(2) of Directive 97/13 does not preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a GSM 900 licence without the imposition of a separate fee, whereas the operator which was granted a DCS 1800 licence has had to pay a fee, if the fee charged to existing operators for their GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the operator which holds the DCS 1800 licence.

Costs

119 The costs incurred by the Austrian and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 24 November 1999, hereby rules:

1. In order to ensure that national law is interpreted in compliance with Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387, as amended by Directive 97/51. If national law cannot be applied so as to comply with the requirements of Article 5a(3) of that directive, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory

authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision.

2. Articles 82 EC and 86(1) EC in principle preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a licence to provide digital mobile telecommunications services according to the GSM 900 standard without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee to obtain a licence to provide digital mobile telecommunications services according to the DCS 1800 standard. However, those provisions do not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

3. Article 2(3) and (4) of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications in principle precludes national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to a public undertaking in a dominant position which already holds a licence to provide digital mobile telecommunications services according to the GSM 900 standard without the imposition of a separate fee, whereas a new entrant to the market at issue has had to pay a fee to obtain a licence to provide digital mobile telecommunications services according to the DCS 1800 standard. However, that provision does not preclude such national legislation if the fee imposed on the public undertaking in a dominant position for

its GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be equivalent in economic terms to the fee imposed on the competitor which was granted the DCS 1800 licence.

4. Article 2(3) and (4) of Directive 96/2 does not preclude national legislation such as that at issue in the main proceedings, under which a limited number of additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a licence to provide digital mobile telecommunications services according to the GSM 900 standard, including a public undertaking in a dominant position, after at least three years have elapsed since the 1997 decision to grant the licence to provide digital mobile telecommunications services according to the DCS 1800 standard. Nor does that provision preclude national legislation such as that at issue in the main proceedings, which allows such an allocation before that period has elapsed if it is established that the user capacity of those operators has been exhausted despite the use of all commercially viable technical possibilities.

5. The prohibition on discrimination laid down in Articles 9(2) and 11(2) 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 does not preclude national legislation such as that at issue in the main proceedings, under which additional frequencies in the frequency band reserved for the DCS 1800 standard may be allocated to existing holders of a licence to provide digital mobile telecommunications services according to the GSM 900 standard without the imposition of a separate fee, whereas the operator which was granted a licence to provide digital mobile telecommunications services according to the DCS 1800 standard has had to pay a fee, if the fee charged to existing operators for their GSM 900 licence, including the subsequent allocation without additional payment of additional frequencies in the frequency band reserved for the DCS 1800 standard, appears to be

equivalent in economic terms to the fee imposed on the operator which holds the DCS 1800 licence.

Edward La Pergola Jann

Delivered in open court in Luxembourg on 22 May 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber