European Court of Justice: Decision in max.mobil Case

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The European Court of Justice, ruling on an appeal, has confirmed the general principle that a refusal by the European Commission to bring proceedings against a Member State cannot be legally challenged.

The background to the decision lies in the transfer of radio frequencies to Mobilkom Austria, which formerly had a monopoly on mobile telephony in Austria, when it was privatised in 1996. Austria's second GSM network operator, max.mobil (currently trading as T-Mobile Austria GmbH) had lodged a complaint with the Commission in 1997 asking for the allocation of frequencies to be reviewed. Max.mobil argued that the Republic of Austria had breached EC regulations by unlawfully giving preference to its competitor Mobilkom. For example, no distinction had been drawn between the amount of the concession fee charged to max.mobil and that charged to Mobilkom. Max.mobil contended that Austria had, inter alia, infringed the provisions of the EC Treaty on state measures favouring public undertakings or undertakings to which special or exclusive rights had been granted.

The Commission rejected the complaint. Max.mobil thereupon brought an action before the Court of First Instance (CFI) of the European Communities seeking to have the rejection set aside. The Court of First Instance found that the appeal was admissible but rejected it on its substance.

Although this decision was in its favour, the Commission appealed against the ruling on admissibility, taking the view that its decision not to proceed against Austria was not open to legal challenge. The Commission argued that the CFI ought to have rejected max.mobil's appeal as inadmissible.

That view has now been upheld by the Court of Justice. In its ruling the Court referred to the Commission's functions in relation to competition law. The Commission is empowered to decide that specific measures taken by Member States infringe Community law. It may also decide what measures a Member State needs to take in order to rectify such an infringement. It does not follow, however, that an individual can require the Commission to take a position one way or another. A refusal by the Commission to bring proceedings has no binding legal effect and thus cannot be the subject of an action for annulment. The ECJ therefore set aside the CFI's judgment.

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Urteil des Europäischen Gerichtshofs vom 22.Februar 2005, Rechtssache C-141/02 P

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0141:de:PDF

Judgment of the European Court of Justice of 22 February 2005, case C-141/02 P

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