Court of Justice of the European Communities: VAT on Payments Made for Mobile Telecommunications Licences

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In two separate judgments delivered on 26 June 2007 (C-284/04 and C-369/04), the European Court of Justice ruled that the award by national regulatory authorities of licences, such as third generation mobile telecommunications licences (known as 'UMTS' or '3G'), did not constitute an economic activity within the meaning of the Sixth Council Directive 77/388/EEC of 17 May 1977 (Sixth VAT Directive). The 3G technology allows the provision of Internet and multimedia services to mobile devices thanks to a greater capacity to transfer data.

These references for a preliminary ruling were made in the course of proceedings before the VAT and Duties Tribunal, London and the *Landesgericht für Zivilsachen* Wien (Regional Civil Court, Vienna). The plaintiffs in these cases were mobile phone firms who were awarded 3G licences in the UK and in Austria in 2000, for a total payment of GBP 22,477,400,000 and EUR 831,595,241 respectively. They had claimed that the sums that they paid must have included value added tax, as the award of these licences fell within the scope of the Sixth VAT Directive. This would have entitled them to a substantial VAT refund (estimated at GBP 3.3bn in the UK).

The Sixth VAT Directive, repealed and recast into Council Directive 2006/112/EC on 28 November 2006, defines a "taxable person" as any person who carries out an economic activity, including the exploitation of intangible property (Article 4(1) and (2)). As for public authorities, Article 4(5) provides that bodies governed by public law shall not be considered taxable persons in respect of the activities in which they engage as public authorities, even where they collect fees or payments. This exemption does not, however, apply to a certain number of activities listed under Annex D of the Directive, which includes telecommunications (as well as activities carried out by radio and television bodies).

According to the Court, the principal issue was whether the activity in question, i.e. the issuing of authorisations, which allow the economic operators who receive them to exploit the resulting frequency use rights, qualified as economic activity. It considered that this activity, while constituting a necessary precondition for the access of economic operators to the mobile communications market, did not

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amount to a participation in that market. The Court underlined that this was an activity that by definition cannot be carried out by economic operators.

Accordingly, the Court ruled that in granting the licences, the national authorities were not participating in the exploitation of property consisting in rights to use the radio-frequency spectrum, but only controlling and regulating the use of that electromagnetic spectrum. They had exercised that control in accordance with Community law, and in particular with the Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). As the activity does not fall within the meaning of Articles 4(1) and (2) of the Sixth VAT Directive, the Court considered an appraisal under Article 4(5) redundant.

Significantly, the Court decided not to follow the Opinion of Advocate General Kokott, who in both cases had argued that the activity in question *did* constitute an economic activity within the meaning of Article 4(1) and (2) of the Sixth VAT Directive, as a form of exploitation of intangible property. The Advocate General had, however, considered that the term 'telecommunications' in Annex D of the Sixth VAT Directive did not include the auctioning of 3G licences and that the awards of these licences therefore fell within the scope of the exemption under Article 4(5).

Judgment of the Court of Justice of the European Communities, 26 June 2007, case C-284/04, T-Mobile Austria GmbH and Others v. Republic of Austria

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Judgment of the Court of Justice of the European Communities, 26 June 2007, case C-369/04, Hutchison 3G UK Ltd and Others v. Commissioners of Customs & Excise

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