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CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE
EIROPAS KOPIENU TIESA



3ENDRIJŲ TEISINGUMO TEISMAS
I KÖZÖSSÉGEK BÍRÓSÁGA
IL-QORTI TAL-GUSTIZZJA TAL-KOMUNITAJIET EWROPEJ
HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN
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Press and Information

PRESS RELEASE No 69/06

7 September 2006

Opinion of Advocate General Kokott in Cases C-284/04 and C-369/04

T-Mobile Austria GmbH and Others v Republic of Austria; Hutchison 3G UK Ltd v Commissioners of Customs and Excise

IN THE VIEW OF ADVOCATE GENERAL KOKOTT, THE STATE AUCTIONING OF 3G MOBILE TELEPHONE LICENCES IS NOT LIABLE TO VAT

Although the auctioning of such licences by the State is an economic activity within the meaning of the provisions of the common system of VAT,¹ there is no duty to pay tax as it is an activity within the scope of public powers

In 2000, the Radiocommunications Agency (United Kingdom) and the Austrian Telekom-Control-Kommission each issued a number of licences for the use of certain frequency blocks for the provision of mobile telephone services in accordance with the UMTS/IMT-2000 standard (also known as third generation – 3G -- mobile telephone services). Through such auctioning the United Kingdom made gains in the order of GBP 22.5 billion (EUR 38 billion), and Austria EUR 800 million. In Austria, frequencies had already been allocated in the same manner for the provision of second generation mobile telephone services (GSM-Standard) and for the TETRA trunked radio system.

In the main proceedings before the national courts, the telecommunications undertakings which had bought the right to use frequencies at auction argue that the allocation of the rights was a transaction subject to VAT, and that the payments made for using the frequencies had therefore contained VAT. They argue that the revenue authorities should issue invoices showing the alleged VAT, enabling it to be deducted as input tax. The referring national courts seek a preliminary ruling from the Court of Justice as to whether the Sixth VAT Directive imposes a duty to tax the auctioning of licences by the public authorities.

¹ Article 4(1) and (2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p.1) provide that transactions that a taxable person carries out in the course of his economic activity are subject to tax.

Advocate General Juliane Kokott recalls that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. Therefore, the fact that the auctioning pursued the goal of market regulation, and the question whether attainment of income was a motive for the form of the allocation procedure, are both irrelevant for classification purposes. Frequency allocation by auction also fulfilled the requirement of serving to secure long-term revenue, since, despite the one-off nature of the proceeding, it secured revenue for the State for the whole of the 20-year period of the licences' validity.

Despite classification as an economic activity, the Advocate General is of the opinion that there was no duty to charge VAT in this case. That is because, in issuing licences, the State and its institutions were carrying out an activity required of them as public authorities. Only the State regulatory authorities are authorised under Community legislation to issue individual licences for operating a telecommunications network. The decisive factor is that they were operating under a special legal regime applicable only to the State. The form of the transaction was irrelevant.

State institutions may count as taxable persons, even in respect of activities which they are obliged to perform as part of their public duty, if treatment as non-taxable persons would lead to significant distortions of competition. Ms Kokott considers, however, that no such risk exists, in principle, where at the time of the transactions by the State, private-sector suppliers are precluded by the overall legal regime from bringing supplies onto the market that are in competition with State supplies.

REMINDER: The Opinion of the Advocate General is not binding on the Court of Justice. The task of the Advocates General is to propose to the Court, entirely independently, a legal solution in the case submitted to them. The judges of the Court of Justice of the European Communities are now starting to deliberate in this case. The judgment will be delivered at a later date.

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The full text of the judgment is on the internet site of the Court of Justice

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-284/04>

It may normally be consulted from midday CET on the day of delivery.

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