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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES  
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Press and Information

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Judgment of the Court of Justice in Case C-284/04 and Case C-369/04

*T-Mobile Austria GmbH and Others v Republik Österreich  
Hutchison 3G UK Ltd and Others v Commissioners of Customs & Excise*

**THE AWARD BY THE STATE OF 3G MOBILE TELECOMMUNICATIONS  
LICENCES BY AUCTION DOES NOT CONSTITUTE AN ECONOMIC ACTIVITY**

*Consequently that activity does not fall within the scope of the Sixth VAT Directive.*

In 2000, the Radiocommunications Agency (United Kingdom) and the Austrian Telekom-Control-Kommission (TCK) each issued 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 or '3G' mobile telephone services). The licences were allocated to a number of undertakings<sup>1</sup> for a total sum of GBP 22.5 billion (EUR 38 billion) in the United Kingdom and EUR 831.6 million in Austria. 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 companies concerned 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. The referring national courts ask the Court of Justice of the European Communities whether the Sixth VAT Directive<sup>2</sup> imposes a duty to tax the public auctioning of those licences by the public authorities.

First of all, the Court points out that only economic activity is subject to VAT. 'Economic activity' includes all activities of producers, traders and persons supplying services, inter alia the exploitation of property for the purpose of obtaining income therefrom on a continuing basis.

The Court states that the activity carried out by the TCK in Austria and the Radiocommunications Agency in the United Kingdom consists of allocating, by auction, rights to use certain frequencies in the electro-magnetic spectrum to economic operators. Those authorisations allow the economic operators to offer their services to the public on the mobile

<sup>1</sup> In Austria: T-Mobile Austria GmbH, 3G Mobile Telecommunications GmbH, mobilkom austria AG, Hutchison 3G Austria GmbH, ONE GmbH and TRA 3G Mobilfunk GmbH, which was succeeded by tele.ring Telekom Service GmbH. In the United Kingdom: Hutchison 3G UK Ltd, mmO<sub>2</sub> plc, Orange 3G Ltd, T-Mobile (UK) Ltd and Vodafone Group Services Ltd.

<sup>2</sup> 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)

telecommunications market in return for remuneration. That activity falls exclusively within the competence of the Member State concerned and constitutes the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other systems.

Thus, the Court holds that such an activity constitutes a necessary precondition for the access of economic operators to the mobile telecommunications market. That activity of the competent national authority cannot constitute participation in that market. On the contrary, what is at issue is the activity of controlling and regulating the use of the electro-magnetic spectrum which has been expressly delegated to that authority. Only the economic operators, who are the holders of the rights granted, operate on the market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis. Furthermore, the fact that the issuing of the frequency use rights at issue gives rise to a payment cannot affect the legal status of that activity.

Consequently, the Court holds that **the allocation, by auction by the national regulatory authority responsible for spectrum assignment, of rights to use frequencies in the electro-magnetic spectrum does not constitute an ‘economic activity’** within the meaning of the Sixth VAT Directive. Thus, that activity does not fall within the scope of the Sixth VAT Directive.

*Unofficial document for media use, not binding on the Court of Justice.*

*Languages available: BG CS DE EN ES FR HU IT PL PT RO SK SL*

*The full text of the judgments may be found on the Court's internet site*

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

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-369/04>

*It can usually be consulted after midday (CET) on the day judgment is delivered.*

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