JUDGMENT OF THE COURT (Grand Chamber)

22 February 2005 *

In Case C-141/02 P,

APPEAL under Article 49 of the EC Statute of the Court of Justice, brought on 15 April 2002

Commission of the European Communities, represented by W. Mölls and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

appellant,

supported by:

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

* Language of the case: German.

the other parties to the proceedings being:

T-Mobile Austria GmbH, formerly max.mobil Telekommunikation Service GmbH, established in Vienna (Austria), represented by A. Reidlinger, M. Esser-Wellié and T. Lübbig, Rechtsanwälte, with an address for service in Luxembourg,

applicant at first instance,

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and A. Borg Barthet, Presidents of Chambers, J.-P. Puissochet (Rapporteur), R. Schintgen, N. Colneric, S. von Bahr, M. Ilešič, J. Malenovský, J. Klučka and U. Lõhmus, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and following the hearing on 7 September 2004,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2004,

gives the following

Judgment

1 By its appeal the Commission of the European Communities is seeking annulment of the judgment delivered by the Court of First Instance on 30 January 2002 in Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313 ('the judgment under appeal'), by which the Court of First Instance declared admissible the application brought by the company max.mobil Telekommunikation Service GmbH, which has since become T-Mobile Austria GmbH ('max.mobil' or 'the max.mobil company'), for annulment of the Commission's letter of 11 December 1998 by which the latter refused to institute Treaty-infringement proceedings against the Republic of Austria ('the contested measure').

The facts underlying the dispute

2 The first GSM mobile telephony network operator to appear on the Austrian market was Mobilkom Austria AG ('Mobilkom'), whose shares are still held in part by the Austrian State through the company Post und Telekom Austria AG ('PTA'). The max.mobil company, which was the applicant at first instance and was incorporated under Austrian law, entered that market in October 1996 as the second GSM

operator. A third operator, Connect Austria GmbH ('Connect Austria') was successful in a tendering procedure at the beginning of August 1997 and also entered that market.

3 Before max.mobil entered the market for the operation of mobile telephony networks, the Österreichische Post- und Telegraphenverwaltung (the Austrian postal and telegraph administration) held a statutory monopoly over the entire mobile telephony sector and operated, inter alia, the analogue mobile telephony networks 'C-Netz' and 'D-Netz' and the 'A1' GSM network. On 1 June 1996 that monopoly was entrusted to Mobilkom, a newly created subsidiary of the PTA.

4 On 14 October 1997 max.mobil lodged a complaint with the Commission seeking, among other things, a finding that the Republic of Austria had infringed the combined provisions of Articles 86 and 90(1) of the EC Treaty (now Articles 82 EC and 86(1) EC). That complaint related essentially to the lack of any distinction between the fee charged to max.mobil and that charged to Mobilkom and to the fee payment advantages enjoyed by Mobilkom.

5 It was also alleged by max.mobil in that complaint that Community law had been infringed, first, in so far as the Austrian authorities had attributed legal status to the advantages granted to Mobilkom in the allocation of frequencies and, second, because the PTA had supported its subsidiary Mobilkom in establishing and operating the latter's GSM network.

6 On 22 April 1998 max.mobil made further submissions to the Commission in which it provided details of certain factual and legal aspects of the situation to which it objected. Following a meeting with the Commission on 14 July 1998, max.mobil lodged a second set of additional submissions on 27 July 1998.

7 On 11 December 1998 the Commission informed max.mobil, by way of the letter which formed the subject-matter of the dispute before the Court of First Instance, that it was rejecting in part its complaint of 14 October 1997. In that regard, the Commission informed max.mobil in particular as follows:

'As regards [the fact that a higher fee was not charged to Mobilkom than was charged to max.mobil], the Commission considers ... that you have not produced sufficient evidence of the existence of a State measure which induced Mobilkom to abuse its dominant position. In accordance with the policy which it has followed to date, the Commission has not commenced Treaty-infringement proceedings in such cases unless a Member State has imposed a higher fee on a new entrant to the market than on an undertaking already active there (see the Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy (OJ L 280 of 23 November 1995)).'

Procedure before the Court of First Instance

8 By application lodged at the Registry of the Court of First Instance on 22 February 1999, max.mobil brought an action in which it sought partial annulment of the contested measure in so far as that measure rejected its complaint.

9 By a separate document lodged at the Registry of the Court of First Instance on 31 March 1999, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. By order of 17 September 1999, the Court of First Instance decided to reserve its decision on that objection for the final judgment.

10 On 15 July 1999 the Kingdom of the Netherlands sought leave to intervene in support of the form of order sought by the Commission. By order of 17 September 1999, the President of the Second Chamber of the Court of First Instance granted that leave to intervene.

11 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. By way of measures of organisation of procedure, the Court called on the parties to provide written replies to a number of questions.

12 The parties presented oral argument and answered questions put to them by the Court of First Instance at the hearing on 2 May 2001.

13 The max.mobil company claimed that the Court of First Instance should:

— annul the contested measure to the extent to which it rejected its complaint;

— order the Commission to pay the costs.

14 The Commission, supported by the Kingdom of the Netherlands, contended that the Court of First Instance should:

— dismiss the action as inadmissible and, in the alternative, as unfounded;

— order max.mobil to pay the costs.

The judgment under appeal

15 In the judgment under appeal, the Court of First Instance, after setting out in its opening observations the context of its decision and, in particular, the scope of Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, dealt in turn with the issues of whether the application was admissible and whether it was well founded.

Opening observations of the Court of First Instance

16 The Court of First Instance first pointed out, in paragraph 48 of the judgment under appeal, that the diligent and impartial treatment of a complaint is justified by the right to sound administration of individual situations, which is one of the general principles that are common to the constitutional traditions of the Member States and which is set out in Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1) ('the Charter of Fundamental Rights').

17 The Court of First Instance went on, in paragraphs 49 and 51 of the judgment under appeal, to state that the obligation to undertake a diligent and impartial examination of a complaint has been imposed on the Commission in the areas coming under Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC), in addition to those coming under Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC). The Court of First Instance took the view that Article 90 of the Treaty had to be interpreted in the same way as the Treaty provisions on competition, which expressly grant procedural rights to complainants. It took the view that max.mobil was in a situation comparable to that referred to in Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87), by virtue of which it was entitled to submit a complaint to the Commission.

18 The Court of First Instance concluded by pointing out, in paragraphs 52 and 53 of the judgment under appeal, that the existence of an obligation to undertake a diligent and impartial examination was justified by the general duty of supervision to which the Commission is subject. That had to apply without distinction in the context of Articles 85, 86, 90, 92 and 93 of the EC Treaty, even though the precise manner in which such obligations are discharged varies according to the specific areas to which they apply and, in particular, to the procedural rights expressly conferred by the Treaty or by secondary Community law in those areas on the persons concerned. Consequently, the Commission's argument, first, that Article 90 (3) of the Treaty did not extend to individuals and, second, that the protection of individuals was ensured by the obligations directly imposed on Member States was irrelevant.

19 In paragraph 54 of the judgment under appeal, the Court of First Instance drew a distinction between the procedures set out in Article 90(3) of the Treaty and in Article 169 of the EC Treaty (now Article 226 EC). According to that Court, whereas under Article 169 of the Treaty the Commission 'may' commence Treaty-infringement proceedings against a Member State, Article 90(3) of the same Treaty provides, by contrast, that the Commission is to adopt the appropriate measures 'where necessary'. Those words indicate that the Commission must undertake a diligent and impartial examination of complaints, on completion of which it exercises its discretion as to whether there are grounds for conducting an

investigation and, if there are, to decide whether to take measures against the Member State or States concerned. In contrast to the position regarding its decisions to commence Treaty-infringement proceedings under Article 169 of the Treaty, the Commission's power to act on a complaint pursuant to Article 90(3) of that Treaty, although discretionary, is none the less subject to judicial review (see, to that effect, point 96 of the Opinion of Advocate General Mischo in Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603).

20 While the Commission enjoys a wide discretion both in relation to the action which it considers necessary to be taken and in relation to the means appropriate for that purpose (see, in particular, the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*, cited above, paragraph 27), the Court of First Instance pointed out, in paragraphs 55 to 57 of the judgment under appeal, that, in so far as the Commission is required to undertake a diligent and impartial examination of a complaint, compliance with that obligation does not, however, mean that its decision on whether or not to take action pursuant to that complaint can avoid being amenable to the same judicial review as that in cases where infringements have been established in the areas covered by Articles 85 and 86 of the Treaty (see, in particular, Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13). The Court of First Instance also cited point 97 of the Opinion of Advocate General Mischo in *Commission and France* v *TF1*, cited above, to the effect that the same must apply in regard to infringements of Article 90(3) of the Treaty. The Court of First Instance stated further that such judicial review is also one of the general principles that are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights.

21 In order to respect the discretion of the Commission in a case where the contested measure is a Commission decision not to use the power conferred on it by Article 90 (3) of the Treaty, the role of the Community judicature must, in the view of the Court of First Instance, be limited to a circumscribed review in which it checks that the contested measure includes a statement of reasons which reflects due consideration of the relevant aspects of the case, that the facts are materially accurate, and that the assessment of those facts is not vitiated by any manifest error.

The admissibility of the application at first instance

22 In view of its preliminary observations, the Court of First Instance upheld the admissibility of the action brought by max.mobil, setting out the grounds of its judgment as follows.

23 First, in paragraph 65 of the judgment under appeal, it classified the Commission's letter of 11 December 1998, in which the latter informed max.mobil that it did not intend to act on its complaint under Article 90 of the Treaty, as a decision which could be the subject of an application for annulment.

24 Next, the Court of First Instance ruled in paragraphs 70 and 71 of that judgment that that decision was addressed to max.mobil and pointed out that that company was, for several reasons, individually concerned by that decision.

25 The Court first pointed out that the contested measure constituted a reaction by the Commission to a formal complaint made by max.mobil.

26 Second, the Court stated that the Commission had held several meetings with max.mobil for the purpose of examining various matters raised in the complaint.

27 Third, according to the Court of First Instance, when the GSM licence was awarded to max.mobil, it had only one competitor, Mobilkom, which had benefited from the State measures objected to in that part of the complaint which the Commission had considered, in the contested measure, not to require further investigation.

28 Fourth, the Court of First Instance noted that max.mobil was the only one of Mobilkom's two competitors which was required to pay the same fee as Mobilkom, whereas the other competitor, Connect Austria, was required to pay a substantially lower fee than that imposed on Mobilkom or max.mobil.

29 Fifth, it was not disputed, according to the Court of First Instance, that the amount of the fee imposed on Mobilkom, with which the complaint and the contested measure were mainly concerned, was calculated automatically by reference to the amount of the fee proposed by max.mobil in the tendering procedure for the second GSM licence in Austria.

30 Sixth, the Court of First Instance pointed out that the measure to which the complaint and the contested measure referred applied individually to Mobilkom and did not constitute a measure of general application such as that in the case of *Bundesverband der Bilanzbuchhalter* v *Commission.*

The substance of the application at first instance

31 After pointing out, in paragraphs 73 and 75 of the judgment under appeal, that the review which it carries out is limited to verification of the Commission's compliance with its duty to undertake a diligent and impartial examination of complaints and that the contested measure was based on facts the materiality of which was not contested, the Court of First Instance took the view that the Commission was able, without committing any manifest error of assessment, to conclude that the imposition on Mobilkom of a fee identical to that paid by max.mobil was not in itself sufficient to show that Mobilkom had been induced to abuse its dominant position. That conclusion was, moreover, consistent with the Commission's previous practice.

32 The Court of First Instance also pointed out that the contested measure had been adopted following a number of meetings between max.mobil and the Commission in a context with which max.mobil was familiar and which allowed it to understand the reasons set out in the grounds of the contested measure. It was therefore not possible to hold that there was an absence or insufficiency of reasoning, as was the position in the judgment in Case 294/81 *Control Data* v *Commission* [1983] ECR 911, at paragraph 15. The Court of First Instance accordingly concluded that the contested measure did contain an adequate statement of reasons for the purposes of Article 190 of the EC Treaty (now Article 253 EC).

Procedure before the Court

33 The Commission of the European Communities lodged an appeal with the Court of Justice on 12 April 2002.

34 On 1 August 2002 the French Republic sought leave to intervene in support of the form of order sought by the Commission. The President of the Court granted that request by order of 24 October 2002.

35 The max.mobil company lodged a cross-appeal in its response of 9 August 2002. The Commission replied to this by a statement in reply of 15 November 2002. A rejoinder was lodged by max.mobil on 25 February 2003.

Forms of order sought in the appeal and in the cross-appeal

36 The Commission claims that the Court should:

— set aside the judgment under appeal so far as it declares admissible the action for annulment brought by max.mobil against the Commission's letter of 11 December 1998;

— dismiss as inadmissible the action for annulment brought by max.mobil against the contested measure;

— dismiss the cross-appeal brought by max.mobil;

— order max.mobil to pay the costs.

37 The max.mobil company contends that the Court should:

— primarily, dismiss the Commission's appeal as being inadmissible or, in the alternative, as unfounded;

and by way of the cross-appeal:

— set aside the judgment under appeal to the extent to which it dismissed max.mobil's action for annulment as being unfounded;

— annul the contested measure;

— order the Commission to pay the costs.

38 In its statement in intervention, the French Republic claims that the Court should:

— set aside the judgment under appeal in so far as it declares the application for annulment brought by max.mobil to be admissible under Article 90 of the Treaty;

— order max.mobil to pay the costs of the proceedings.

The appeal

The admissibility of the main appeal

Arguments of the parties

39 The Commission contends that the appeal is admissible, basing its arguments on two points.

40 First, it submits that the appeal is admissible under the first paragraph of Article 49 of the EC Statute of the Court of Justice (now the first paragraph of Article 56 of the Statute of the Court of Justice) in so far as the judgment under appeal disposes of a procedural issue concerning admissibility by declaring the action admissible. The judgment under appeal thus adversely affects the Commission in its capacity as defendant before the Court of First Instance on this point. The fact that, on the substance, the Court of First Instance declared the action to be unfounded has no bearing on the admissibility of the Commission's appeal seeking annulment of the judgment under appeal, which held that the contested measure could be the subject of judicial proceedings (judgment in Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 50 and 52).

41 Second, the Commission contends that the appeal is admissible under the third paragraph of Article 49 of the EC Statute of the Court of Justice. The Commission is one of the parties which can appeal against a contested judgment independently of the findings on the merits, as the Court implicitly acknowledged in its judgment in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185, or even without having to show an interest, as the Court stressed in its judgment in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 171.

42 The max.mobil company takes the view that, as the Commission has been successful, the second paragraph of Article 49 of the EC Statute of the Court of Justice applies and precludes the admissibility of the Commission's appeal. Furthermore, in this case, the issue of admissibility was not dealt with as a procedural issue but in the context of the examination of the substantive issues. The judgment under appeal deals with the action in its totality, a position which is confirmed by Article 114(4) of the Rules of Procedure of the Court of First Instance.

43 The Commission's interpretation of the third paragraph of Article 49 of the EC Statute of the Court of Justice is also challenged by max.mobil. Community institutions, it argues, cannot benefit from a position different from that of other parties. They cannot bring an appeal solely for the purpose of having the Court clarify one of the legal issues dealt with in one judgment, and consequently not independent, as is clear from the judgment in *Council* v *Boehringer*, cited above, paragraph 51, confirmed by the judgment in *Commission and France* v *TF1*, cited above.

44 The max.mobil company concludes by noting that the context of the judgment in *France* v *Comafrica and Others*, cited above, was different. In that case the Court was faced with a bundle of decisions by the Court of First Instance, with the result that reference to that judgment is inappropriate.

Findings of the Court

45 It is first of all necessary to reject the reasoning developed by max.mobil with reference to the judgment in *Commission and France* v *TF1*. In that judgment the Court, confirming the decision delivered at first instance by the Court of First Instance that it was unnecessary to give a ruling in the case, held that the Court of

First Instance could reach a decision without having to rule on the admissibility of the action brought before it in view of the order in which the questions were examined (*Commission and France* v *TF1*, paragraphs 25 to 28).

46 In the present case, by contrast, the Court of First Instance formally ruled on the admissibility of the action before it dealt with the case on its merits.

47 The first paragraph of Article 49 of the EC Statute of the Court of Justice provides:

'An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the Court of First Instance and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.'

48 Under the third paragraph of Article 49 of that Statute, the Community institutions do not have to show any interest in order to bring an appeal against a judgment of the Court of First Instance (*Commission* v *Anic Partecipazioni*, cited above, paragraph 171).

49 In the present case, the Commission's appeal requests the Court to set aside that part of the judgment under appeal, that is to say, paragraphs 65 to 72, in which the Court of First Instance expressly rejected the plea of inadmissibility raised by the Commission, on the ground that that part constitutes a decision disposing of a procedural issue within the terms of the first paragraph of Article 49 of the EC Statute of the Court of Justice.

50 Decisions which dispose of a procedural issue concerning a plea of inadmissibility, within the terms of that provision, are decisions which adversely affect one of the parties by upholding or rejecting that plea of inadmissibility. The Court thus allowed an appeal against a judgment of the Court of First Instance in so far as the latter had rejected a plea of inadmissibility raised by one party against an action, even though the Court of First Instance had subsequently, in the remainder of the same judgment, dismissed that action as being unfounded (see *France* v *Comafrica and Others* and *Council* v *Boehringer*, paragraph 50).

51 In the present case, given that, as has just been seen, the Court of First Instance intended to rule by decision on the admissibility of the action brought by max.mobil before dismissing it on the merits, the appeal by the Commission against that decision adversely affecting it must be treated as being admissible.

52 The objection of inadmissibility raised by max.mobil against the appeal must therefore be rejected.

The admissibility of the action before the Court of First Instance

Arguments of the parties

53 While the Commission acknowledges that it is under an obligation to carry out a diligent examination of complaints which it receives in the area covered by Article

90 of the Treaty, it considers, as does the French Government, that the Court of First Instance erred in law in forming the view that the Commission's decision as to whether to pursue the infringement of the competition rules was amenable to judicial review.

54 The Commission submits that the Court of First Instance misconstrued the scope of the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission* in forming the view that the solution upheld in that case, namely that the Commission has a discretionary power in regard to pursuing infringements, is merely an exception to the general right to have complaints examined. The Commission submits that the Court, by contrast, ruled in paragraph 25 of that judgment that standing to bring proceedings against a refusal by the Commission to act under Article 90(3) of the Treaty can, at most, exist only in exceptional situations.

55 In the present case, the Commission argues, as does the French Government, that max.mobil is not in an exceptional situation within the meaning of that case-law.

56 The Commission, supported by the French Government, also challenges the classification by the Court of First Instance, at paragraphs 64 to 68 and 71 of the judgment under appeal, of the Commission's letter of 11 December 1998 as a 'decision'. Its letters, the Commission contends, should be regarded as being merely informative.

57 The Commission submits that the procedural rights, including the right to obtain a Commission decision, which are recognised by Regulation No 17 are not applicable in the context of Article 90(3) of the Treaty.

58 The Commission accordingly argues that the Court of First Instance could not refer to the case-law precedents concerning the rights derived from application of Articles 85 and 86 of the Treaty.

59 Finally, the Commission expresses the view that the principle of the proper administration of individual situations, hitherto unknown in the case-law of the Court but on which the Court of First Instance bases its reasoning, is too general to constitute a basis to support procedural rights for the benefit of individuals, *a fortiori* as the Charter of Fundamental Rights invoked in support of that principle is not applicable. The third indent of Article 41(2) of that Charter, moreover, merely repeats the obligation to state reasons set out in Article 190 of the Treaty. Article 41 (4) of that Charter reflects the third paragraph of Article 21 EC, as it results from the Treaty of Amsterdam, which was not yet in force on 11 December 1998, the date of the contested measure, construed as a decision challenged at first instance.

60 The max.mobil company submits essentially that it does have *locus standi.* Drawing support from points 99, 100, 103 and 107 of the Opinion of Advocate General Mischo in *Commission and France* v *TF1*, the judgment in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25, and from the Opinion of Advocate General La Pergola in *Bundesverband der Bilanzbuchhalter* v *Commission*, max.mobil argues that, in the judgment in the latter case, the inadmissibility which the Court upheld was based, not on the broad discretion claimed by the Commission, but on the fact that the complaint related to a measure of general scope against which a challenge by an individual was itself inadmissible.

61 As the Court of First Instance acknowledged in the judgment under appeal, for the reasons set out in paragraphs 24 to 30 of the present judgment, max.mobil claims that it was individually concerned by the Commission's decision not to act on its complaint.

62 Thus, max.mobil submits, the conferral on the Commission of a broad discretion does not automatically mean that actions brought against decisions taken pursuant to that discretion are inadmissible.

63 The possibility of judicial review of Commission decisions refusing to examine complaints brought by individuals, irrespective of the nature of the measures under challenge, cannot therefore be discounted. The max.mobil company relies in this regard on paragraphs 24 and 25 of the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*.

64 The max.mobil company also takes the view that it is in an exceptional situation within the terms of that judgment and of that in Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757. In that latter judgment, it argues, the Court of First Instance derived the exceptional nature of the situation in issue from the special competitive position which the applicant held vis-à-vis the other television networks and from the fact that the action was directed at an individual decision and not a measure of general scope, in contrast to the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*.

65 Finally, max.mobil submits that the Commission's reasoning that the Charter of Fundamental Rights has no force in law is mistaken inasmuch as that document reproduces and confirms the fundamental rights of the European Union. Article 41 (2) of that Charter establishes clearly the right to proper administration of individual situations. It also claims that the express grant of procedural rights cannot constitute a condition for the respect of a person's rights of defence (Case C-301/87 *France* v *Commission* [1990] ECR I-307 (*'Boussac Saint Frères'*)).

Findings of the Court

66 Article 90(3) of the Treaty requires the Commission to ensure that the Member States comply with the obligations imposed on them, in regard to the undertakings covered by Article 90(1) of that Treaty, and expressly confers on it the power to take action for that purpose by way of directives and decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (*Bundesverband der Bilanzbuchhalter* v *Commission*, paragraph 23).

67 In the present case, max.mobil, the applicant at first instance, had requested the Commission to find that the Republic of Austria had infringed the combined provisions of Articles 86 and 90(1) of the Treaty. It alleged in its complaint that, by not drawing a distinction between the fee charged to max.mobil and that charged to its competitor, Mobilkom, even though the latter company, in its capacity as a subsidiary, received the support of the PTA for the establishment and operation of its GSM network, the Austrian authorities had unlawfully conferred advantages on Mobilkom in the allocation of frequencies.

68 It follows from paragraph 24 of the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission* that individuals may, in certain circumstances, be entitled to bring an action for annulment against a decision which the Commission addresses to a Member State on the basis of Article 90(3) of the Treaty if the conditions laid down in the fourth paragraph of Article 173 of the EC Treaty (now, following amendment, the fourth paragraph of Article 230 EC) are satisfied.

69 It follows, however, from the wording of Article 90(3) of the Treaty and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense.

70 The fact that max.mobil has a direct and individual interest in annulment of the Commission's decision to refuse to act on its complaint is not such as to confer on it a right to challenge that decision. The letter by which the Commission informed max.mobil that it was not intending to bring proceedings against the Republic of Austria cannot be regarded as producing binding legal effects, with the result that it is not a challengeable measure that is capable of being the subject of an action for annulment.

71 Nor can max.mobil claim a right to bring an action pursuant to Regulation No 17, which is not applicable to Article 90 of the Treaty.

72 That finding is not at variance with the principle of sound administration or with any other general principle of Community law. No general principle of Community law requires that an undertaking be recognised as having standing before the Community judicature to challenge a refusal by the Commission to bring proceedings against a Member State on the basis of Article 90(3) of the Treaty.

73 The max.mobil company did not therefore have standing to bring an action before the Court of First Instance challenging the Commission's decision to refuse to pursue and sanction an alleged infringement of the rules on competition resulting from the decision by the Austrian Government not to draw a distinction between the amount of the fee charged to max.mobil and that charged to its competitor, Mobilkom, for the operation of their mobile telephony networks.

74 It must accordingly be held that the Court of First Instance erred in declaring the action brought by max.mobil against the contested measure to be admissible.

75 It follows, without its being necessary to examine the other pleas in law of the Commission and the form of order sought in the cross-appeal, that the judgment of the Court of First Instance must be set aside and that the action brought by max.mobil against the contested measure must be dismissed.

Costs

76 Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for max.mobil to be ordered to pay the costs, and as the latter has been unsuccessful, max.mobil must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of 30 January 2002 of the Court of First Instance of the European Communities in Case T-54/99 *max.mobil* v *Commission*;**

2. **Dismisses the action brought by max.mobil Telekommunikation Service GmbH before the Court of First Instance of the European Communities;**

3. **Orders T-Mobile Austria GmbH to pay the costs.**

[Signatures]