

JUDGMENT OF THE COURT (Third Chamber)

17 February 2005*

In Case C-134/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Giudice di pace di Genova-Voltri (Italy), by decision of 10 March 2003, received at the Court on 25 March 2003, in the proceedings between

Viacom Outdoor Srl

and

Giotto Immobilier SARL,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, A. Borg Barthet, J.-P. Puissochet, J. Malenovský and U. Löhmus, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2004,

after considering the observations submitted on behalf of:

- Viacom Outdoor Srl, by B. O'Connor, Solicitor, and F. Filpo, avvocato,

- by Giotto Immobiliere SARL, by G. Travaglino, avvocato,

- the Italian Republic, by I. M. Braguglia, acting as Agent, and O. Fiumara, avvocato dello Stato,

- the Commission of the European Communities, by P. Oliver and K. Banks, acting as Agents, and M. Bay, avvocato,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 49 EC, 82 EC, 86 EC, 87 EC and 88 EC.
- 2 The reference was made in the course of proceedings brought by Viacom Outdoor Srl ('Viacom'), established in Milan (Italy), against Giotto Immobilier SARL ('Giotto'), established in Menton (France).

The dispute in the main proceedings

- 3 The documents before the Court show that Giotto sells real property in France and that, by contract concluded on 9 September 2000, it instructed Viacom (formerly known as 'Società Manifesti Affissioni SpA') to carry out on its behalf advertising bill-posting services in the territory of the municipality of Genoa (Italy). The services forming the subject-matter of that contract were performed by Viacom during the month of October 2000.
- 4 The dispute between Viacom and Giotto concerns the latter's refusal to reimburse a sum of ITL 439 385, that is to say, EUR 226.92, paid to the municipality of Genoa by way of 'imposta comunale sulla pubblicità' (municipal advertising tax). According to the contract concluded between the parties, in addition to the price for the supply of services, Giotto undertook to pay to Viacom the 'specific documented charges'

incurred by Viacom in performing those services. However, before the Giudice di pace di Genova-Voltri (Italy), (Magistrate for Genoa-Voltri) hearing the action, Giotto maintains that the provisions of Italian law introducing and regulating the municipal advertising tax are contrary to Community law and, in particular, to the freedom to provide services under Article 49 EC and to the rules on competition laid down in Articles 82 EC, 86 EC, 87 EC and 88 EC.

The relevant provisions of national law

5 The municipal advertising tax and bill-posting duty are governed by Decreto legislativo No 507 — Revisione ed armonizzazione dell'imposta comunale sulla pubblicità e del diritto sulle pubbliche affissioni (Legislative Decree No 507 revising and harmonising municipal advertising tax and bill-posting duty) of 15 November 1993 (Ord. Supp. GURI No 288 of 9 December 1993, 'Legislative Decree No 507/93'), in the version applicable to the case in the main proceedings.

6 Article 1 of Legislative Decree No 507/93 provides:

'Outdoor advertising and public bill-posting shall be subject, in accordance with the provisions of the articles below, to a tax or a duty respectively payable to the municipality in the territory of which it is carried out.'

7 Article 3 of the Legislative Decree provides:

'1. Every municipality shall be required to adopt a regulation for the application of the advertising tax and for the supply of bill-posting services.'

2. In that regulation the municipality shall determine the manner in which advertising is to be carried out and may limit certain particular forms of advertising having regard to the public interest.

3. That regulation must in any event determine the type and quantity of advertising installations, the detailed rules for obtaining installation authorisation and the criteria for putting the general installation plan into effect. It must also provide for the division of the surface areas of public installations intended for bill-posting for institutional or social purposes or, in any case, for purposes with no economic relevance and those intended for bill-posting of a commercial kind, and also the area of the installations intended for bill-posting direct by individuals.

...'

8 Article 5(1) of the Legislative Decree defines the event giving rise to the advertising tax:

'The dissemination of advertising material using visual or acoustic means of communication, other than those subject to bill-posting duty, in public places or places open to the public or visible from those places shall be subject to the advertising tax provided for by this Decree.'

9 In accordance with Article 6(1) of Legislative Decree No 507/93, taxable persons are those 'who in any capacity whatsoever are provided with the means by which the

advertising material is disseminated'. According to Article 6(2), persons who produce or sell the goods or supply the service forming the subject-matter of the advertising are jointly and severally liable for payment of the tax.

- 10 Article 9 of the Legislative Decree regulates the payment of the tax. Article 9(7) is worded as follows:

'Where the medium used for advertising is installed on property belonging to the municipality or where the municipality has been given the right to use and enjoy that property, the application of the advertising tax does not exclude that application of the tax on the occupation of public spaces or the payment of rental or licence charges, the latter being proportionate to the actual occupation of public ground by the advertising medium'.

- 11 In addition, with regard to the public bill-posting service, Article 18 of Legislative Decree No 507/93 provides:

'1. The public bill-posting service provides for the posting, by the municipality, on installations designed for that purpose, of notices of all kinds, containing information for institutional or social purposes or in any case for purposes without economic relevance or, where appropriate and to the extent provided for in the regulatory provisions referred to in Article 3, messages disseminated in connection with economic activity.

2. This service must be provided in municipalities which, on 31 December of the penultimate year before the current year, have a resident population of more than 3 000 inhabitants; in other municipalities, the service shall be optional.

3. The surface area of the installations to be made over to public bill-posting shall be decided by municipal regulation, in proportion to the number of inhabitants and may in no circumstances be less than 18 square metres per thousand inhabitants in municipalities with a population greater than 30 000 or less than 12 square metres in other municipalities.'

- 12 Article 19(1) of the Legislative Decree provides for the payment of a bill-posting duty:

'In consideration of the service of public bill-posting, a duty is payable jointly and severally by the person requesting the service and the person on whose behalf the service is requested, inclusive of the advertising tax, to the municipality which performs that service'.

- 13 In the municipality of Genoa the provisions of Legislative Decree No 507/93 were implemented by the Nuovo Regolamento per l'applicazione dell'imposta sulla pubblicità e per l'effettuazione del servizio delle pubbliche affissioni (new regulation on the application of the advertising tax and on the performance of the public bill-posting service) adopted by municipal regulation of 21 December 1998. That regulation was amended in 1999 and 2000 and was subsequently replaced by a regulation adopted by municipal resolution of 26 March 2001.

Procedure before the reference for a preliminary ruling and questions asked of the Court

- 14 In the course of the dispute in the main proceedings, the Giudice di pace di Genova-Voltri, by decision of 9 April 2002, made a first reference to the Court for a

preliminary ruling on the interpretation of Articles 2 EC, 3(1)(a), (b) and (c) EC, 23 EC, 27(a), (b) and (d) EC, 31(1) and (3) CE, 49 EC, 50 EC, 81 EC, 82 EC, 86 EC and 87 EC.

- 15 The Court held that reference to be inadmissible by order of 8 October 2002 (Case C-190/02 *Viacom* [2002] ECR I-8287, '*Viacom I*'). First, it found in paragraphs 13 to 21 of its order that the decision making the reference did not contain sufficient information to enable the Court to arrive at an interpretation of Community law which would be helpful to the national court. The Court then stated that the questions referred by the Giudice di pace were manifestly inadmissible because, inter alia, in the order for reference itself the national court had not explained the factual and legal context of the dispute in the main proceedings, the reasons which led it to raise the issue of the interpretation of certain provisions of Community law in particular and the connection which it established between those provisions and the national law applicable to the case (order in *Viacom I*, paragraphs 24 and 26).
- 16 By decision of 18 December 2002 the Giudice di pace ordered the continuation of the case in the main proceedings. The parties having been heard, the court considered that certain of the grounds on which the previous reference to the Court for a preliminary ruling was based still subsisted, and that it was appropriate to make a new reference for a preliminary ruling, confined to the interpretation of the provisions of the EC Treaty concerning freedom to provide services and competition. It proposed to make good the lack of information supplied to the Court and to give a clearer account, in the new order for reference, of the matters of fact and law in the case in the main proceedings.
- 17 So far as the relevance of the questions raised in the new decision to the settlement of the dispute in the main proceedings is concerned, the Giudice di pace states that if the provisions of domestic law governing the advertising tax and the bill-posting duty should be found to be incompatible with the Treaty, the result would be that those provisions were unlawful or inapplicable and the claim for payment made by Viacom would be unfounded and would therefore have to be rejected.

18 At the end of his legal analysis the Giudice di pace summarises as follows the conclusions he has reached:

- ‘- pursuant to the rules laid down in Legislative Decree No 507/93, as subsequently amended, and to municipal implementing regulations, municipalities, which are local authorities, constitute public undertakings which, in the instant case, carry on an economic activity (bill-posting);

- the activity carried on (bill-posting) constitutes an economic activity pursued in competition with private persons and is liable to affect intra-Community trade;

- in the light of the foregoing, it may reasonably be thought that the duty and tax involved, collected by the municipalities in operating the service, amount to special rights within the meaning of Article 86 EC;

- serious doubts therefore arise as to whether the rules under consideration are compatible with Community law; if the rules at issue should be found to be incompatible the result would be that the relevant part of the claim for payment for the services performed by Viacom for Giotto would be unlawful, so that the applicant’s main claim, the subject-matter of this case, would be unfounded.’

19 Having regard to those considerations, the Giudice di pace di Genova-Voltri has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the entrusting to a public undertaking (municipalities) of the management of a tax and duties, such as those considered above, on a market which forms a substantial part of the common market and on which the public undertaking holds a dominant position contrary to:

(a) the application of Article 86 EC in conjunction with Article 82 EC;

(b) the application of Article 86 EC in conjunction with Article 49 EC?

(2) Is the payment to that undertaking of the revenue from the tax and duties in question contrary to:

(a) the application of Article 86 EC in conjunction with Article 82 EC;

(b) the application of Articles 87 EC and 88 EC, inasmuch as it constitutes unlawful State aid (not notified), incompatible with the common market?'

Concerning the admissibility of the questions referred

20 The Italian Government entertains doubts as to the admissibility of the reference for a preliminary ruling, being of the view that the factual context of the case in the main proceedings, in particular, is not sufficiently described in the order for reference. In its written observations the Commission of the European Communities has also argued that the reference for a preliminary ruling is inadmissible in its entirety, having regard to the various omissions, contradictions and ambiguities in that decision. The factual and legislative background set out in the decision is obscure to the extent that the Commission is unable to suggest any replies that the Court could give which would deal with the substance of the questions referred. However, at the hearing, the Commission considered that, in the light of certain explanations furnished by the parties to the main proceedings and by the Italian Government in their observations and in their answers to written questions put to them by the Court, it was now possible to give a helpful reply to the questions referred relating to the interpretation of Articles 49 EC and 87 EC.

21 It is first of all to be noted that it is not manifestly apparent from the order for reference, unlike the reference for a preliminary ruling that gave rise to the order in *Viacom I*, that the Giudice di pace has failed to supply the Court with sufficient information as to the reasons that prompted him to raise the issue of the interpretation of certain provisions of Community law and the connection which he established between those provisions and the national law applicable to the case. In its decision, the national court expressly indicates that it seems to it necessary that the Court should give an interpretation of the provisions of the Treaty relating to the freedom to provide services (Article 49 EC), the grant of special or exclusive rights (Articles 86 EC and 82 EC) and the grant of State aid (Articles 87 EC and 88 EC) inasmuch as, if the provisions of national law regulating the advertising tax and the bill-posting duty were to be considered to be incompatible with those provisions of Community law, the charges payable to the municipality of Genoa under the Italian legislation would have to be regarded as unlawful and, in consequence, Viacom's claim for payment would have no basis in law and would have to be rejected.

- 22 Nevertheless, according to case-law, if the Court is to be able to give helpful answers to the questions referred to it, it is necessary for the national court to define the factual and legislative context of the questions it asks or, at the very least, to explain the factual circumstances on which those questions are based (order in *Viacom I*, paragraph 15, and the decisions cited therein).
- 23 In order to ascertain whether the information supplied by the Giudice di pace satisfies those requirements, the nature and scope of the questions raised have to be taken into consideration. In so far as the need for precision with regard to the factual and legislative context applies especially in the area of competition, which is characterised by complex factual and legal situations (order in *Viacom I*, paragraph 22, and the decisions cited there), the first matter to be examined must be whether the order for reference supplies sufficient information to enable the Court to give a helpful reply to the questions concerning the interpretation of Articles 82 EC, 86 EC, 87 EC and 88 EC.
- 24 So far as the legislative background is concerned, it must be held that, despite ambiguous and contradictory references to the provisions implementing Legislative Decree No 507/93 adopted by the municipality of Genoa, the order for reference contains a sufficiently clear and full description of the provisions of national law relevant to examination of the questions referred for a preliminary ruling. As the Advocate General has observed in paragraph 39 of her Opinion, it is the provisions of Legislative Decree No 507/93, applicable at national level, that constitute the essential elements of the relevant legal context, the municipal regulations serving only to make some of those provisions more precise. The essential elements of the relevant legal context include, in particular, provisions relating to the levying of a municipal tax on advertising and/or bill-posting duty, fixing the objectives of the public bill-posting duty and giving municipalities the power to regulate the application of the advertising tax and the provision of the bill-posting service.

25 In contrast, with regard to the factual context, it must be stated that the order for reference does not provide the information necessary to enable the Court to give a helpful reply to the questions referred concerning the interpretation of Articles 86 EC and 82 EC.

26 It is to be borne in mind that those provisions of the Treaty prohibit, generally, the Member States from enacting or maintaining in force measures permitting public undertakings and those to which they grant special or exclusive rights to abuse a dominant position on the common market or a substantial part of it.

27 As the Advocate General has emphasised in paragraph 44 of her Opinion, the determination of the materially and geographically relevant market, and the calculation of the market shares held by the various undertakings operating on that market, constitute the starting-point of any appraisal of a situation in the light of competition law.

28 In the instant case, the *Giudice di pace* does no more than give some information about the bill-posting service or the service of making available advertising spaces provided by the municipalities and state that those services are fully interchangeable with those provided by private undertakings. However, it is not clear from that information that customers using the public bill-posting service are in fact comparable to those who turn to private undertakings, particularly in respect of whether the content of their advertising campaigns is commercial or not and of the budget they allocate to it. In addition, the order for reference contains no information about the number of operators providing the services in question, or about their respective market shares, even if it would seem that that decision indicates that the geographical area regarded as relevant is limited to the territory of the municipality of Genoa. However, that determination of the geographically relevant market appears unconvincing when in fact the *Giudice di pace* bases his

arguments concerning the effect on intra-Community trade on the fact that the rules introduced by Legislative Decree No 507/93 extend to all Italian municipalities. In any case, the factual matters mentioned in the order for reference appear too incomplete to support the conclusion that the municipality of Genoa holds a dominant position on the relevant market.

29 That being so, it is impossible to establish whether in circumstances such as those of the case in the main proceedings the levying of a municipal tax on advertising is contrary to Articles 86 EC and 82 EC. The questions relating to the interpretation of those articles are therefore inadmissible.

30 As regards Articles 87 EC and 88 EC, interpretation of which is also sought by the national court, it is pointed out that those provisions apply to aid granted by the States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

31 In this connection it has to be stated that the order for reference does not contain sufficient information about either the use to which the revenue from the municipal advertising tax is put or the actual procedures for the organisation of the public bill-posting service which must compulsorily be provided in Italian municipalities with more than 3 000 inhabitants, as provided for by Article 18(2) of Legislative Decree No 507/93. As a result, on the basis of the information supplied by the Giudice di pace, it is not possible to deduce what degree of legal and budgetary autonomy the municipality of Genoa and other Italian municipalities give to the technical and human resources that they allocate to the provision of that public service, and it is not possible either to conclude that the revenue from the tax at issue is used in whole or in part to fund the operating costs of that service. In contrast to the position taken by the Commission at the hearing, it therefore appears impossible to state with any certainty that the revenue in question is allocated exclusively to the

funding of the municipality's general budget and that it could in no circumstances be used to grant State aid within the meaning of Article 87 EC.

32 It follows that the question concerning the interpretation of Articles 87 EC and 88 EC is also inadmissible.

33 On the other hand, the information supplied by the order for reference is sufficient to make it possible to give a helpful reply to the question of whether the municipal advertising tax constitutes an impediment to freedom to provide services contrary to Article 49 EC.

Concerning the question relating to the interpretation of Article 49 EC

34 By his question the Giudice di pace in essence asks the Court whether Article 49 EC precludes the levying of a tax such as the municipal tax on advertising introduced by Legislative Decree No 507/93, which is imposed on inter alia bill-posting services of a cross-border nature on the basis of the place of establishment of either the provider or the recipient of the services.

35 According to the Court's case-law, Article 49 EC requires the elimination of any restriction of the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another

Member State where he lawfully provides similar services. (see to that effect Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 22, and Case C-429/02 *Bacardi* [2004] ECR I-6623, paragraph 31, and the decisions cited there).

- 36 Furthermore, it is to be borne in mind that the Court has recognised that a national tax measure restrictive of the freedom to provide services could constitute a prohibited measure, whether it is applied by the State itself or by a local authority (see, to that effect, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 26 et 27).
- 37 With regard to the question of whether the levying by municipal authorities of a tax such as the advertising tax constitutes an impediment incompatible with Article 49 EC, it must first of all be noted that such a tax is applicable without distinction to any provision of services entailing outdoor advertising and public bill-posting in the territory of the municipality concerned. The rules on the levying of this tax do not, therefore, draw any distinction based on the place of establishment of the provider or recipient of the bill-posting services or on the place of origin of the goods or services that form the subject-matter of the advertising messages disseminated.
- 38 Next, such a tax is applied only to outdoor advertising activities involving the use of public space administered by the municipal authorities and its amount is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it. In those circumstances, the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services.

- 39 It follows from the foregoing considerations that Article 49 EC must be interpreted as not precluding the levying of a tax such as the municipal tax on advertising imposed by Legislative Decree No 507/93.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

1. **The questions concerning the interpretation of Articles 82 EC, 86 EC, 87 EC and 88 EC are inadmissible.**
2. **Article 49 EC does not preclude the levying of a tax such as the municipal tax on advertising imposed by the Decreto legislativo No 507 — Revisione ed armonizzazione dell'imposta comunale sulla pubblicità e del diritto sulle pubbliche affissioni (Legislative Decree No 507 revising and harmonising municipal advertising tax and bill-posting duty) of 15 November 1993.**

[Signatures]