JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
30 January 2002 *

In Case T-54/99,

max.mobil Telekommunikation Service GmbH, established in Vienna (Austria), represented by S. Köck, M. Pflügl, M. Esser-Wellié and M. Oder, lawyers, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: German.

supported by

Kingdom of the Netherlands, represented by M.A. Fierstra, J. van Bakel and H.G. Sevenster, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for partial annulment of Commission Decision No IV-C1/ROK D(98) of 11 December 1998 in so far as it rejects the applicant's complaint alleging that the Republic of Austria infringed Articles 86 and 90(1) of the EC Treaty (now Articles 82 EC and 86(1) EC) when determining the amount of the fee payable for the grant of a GSM concession,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: A.W.H. Meij, President, K. Lenaerts, M. Jaeger, J. Pirrung and N.J. Forwood, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 2 May 2001,

gives the following

Judgment

Background

1 The first GSM mobile phone 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 applicant, max.mobil Telekommunikation Service GmbH, a company incorporated under Austrian law, entered that market in October 1996 as the second GSM operator. A third operator, Connect Austria GmbH, which was a successful tenderer at the beginning of August 1997, then also entered the market. When the present action was brought, Connect Austria was operating solely in accordance with technical communications standard DCS 1800. Before the applicant entered the market, the Austrian postal and telegraph administration (Österreichische Post- und Telegraphenverwaltung) held a statutory monopoly over the entire mobile telephone sector and operated, among others, 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 PTA.

2 On 14 October 1997 the applicant lodged a complaint with the Commission (hereinafter 'the complaint') seeking among other things a finding that the Republic of Austria had infringed the combined provisions of Article 86 and Article 90(1) of the EC Treaty (now Article 82 EC and Article 86(1) EC, respectively). In essence, the complaint concerned the difference between the fees charged to the applicant and to Mobilkom, respectively.

3 In addition, the applicant complained that Community law had been infringed, first, because the Austrian authorities had attributed legal status to the advantages granted to Mobilkom when allocating frequencies and, second, because the PTA had supported its subsidiary Mobilkom in establishing and operating the latter's GSM network.

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

5 On 11 December 1998 the Commission sent the applicant the letter with which the present proceedings are concerned ('the contested measure'). That letter states, in particular:

'On 14 October 1997 you lodged a complaint against the Republic of Austria. That complaint related to:

(a) the concession fees paid by the first mobile radio telephony network operator [Mobilkom] and by your undertaking, and more particularly the fact that Mobilkom was not required to pay a fee higher than that paid by your undertaking;

(b) the conditions laid down by the Austrian Telekommunikationsgesetz (Law on telecommunications) regarding the allocation of DCS 1800 frequencies, and

(c) the conditions for using the infrastructure made available by [PTA] which were regarded as more favourable for Mobilkom than for your undertaking.

...

The purpose of this letter is to inform you of the Commission's intention to take action on your complaint regarding paragraphs (b) and (c).

As regards paragraph (a), concerning the amount of the concession fee, the Commission considers, on the other hand, 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)).

The Commission will, however, take action on the other two points raised and will inform you in due course of the progress of the procedure.'

Procedure and forms of order sought

6 By application lodged at the Registry of the Court of First Instance on 22 February 1999 the applicant commenced the present proceedings. The applicant seeks partial annulment of the contested measure in so far as its complaint was rejected.

7 By a 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 (Second Chamber) decided to reserve its decision for the final judgment.

8 On 15 July 1999 the Kingdom of the Netherlands sought leave to intervene in support of the Commission. By order of 17 September 1999 the President of the Second Chamber allowed the requested intervention.

9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, the Court called on the parties to give written replies to a number of questions.

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

11 The applicant claims that the Court of First Instance should:

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

— order the defendant to pay the costs.

12 The Commission contends that the Court of First Instance should:

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

— order the applicant to pay the costs.

13 The Kingdom of the Netherlands supports the form of order sought by the Commission.

Law

14 The Court considers it appropriate to start by setting out the parties' arguments concerning both admissibility and substance.

Arguments of the parties

Admissibility

15 The Commission contends, first, that the application is devoid of purpose in so far as it relates to its alleged refusal to find that the Republic of Austria infringed Articles 86 and 90 of the EC Treaty by giving preferential treatment to Connect Austria. The applicant characterises the treatment accorded to that operator not as an infringement in itself but as evidence that the applicant was a victim of discrimination by comparison with Mobilkom. It does not even allege that Connect Austria is an undertaking within the meaning of Article 90 of the EC Treaty.

16 Next, the Commission contends that the application is inadmissible. It considers, first, that an individual does not in principle have standing to bring proceedings against a decision by the Commission not to use its power under Article 90(3) of the EC Treaty (Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraphs 25 to 27, hereinafter 'the *Bilanzbuchhalter* judgment'). It observes that although that judgment indicated that the possibility that there might be exceptions to that rule in exceptional circumstances could not be ruled out, the Court of Justice nevertheless found that not to be the case in that instance. Moreover, when confronted with the same problem after the *Bilanzbuchhalter* judgment was delivered, the Court of Justice did not

depart from its view that such 'exceptional circumstances' may exist, albeit theoretically (order of the Court of Justice of 16 September 1997 in Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809, paragraphs 57 to 59). The Court of First Instance, in its judgment in Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 97, chose to take an approach similar to that of the Court of Justice.

17 The Commission goes on to say that Article 90(1) of the EC Treaty has direct effect in conjunction with Article 86 of the EC Treaty. Thus, the protection of individuals is guaranteed by the obligations imposed directly on the Member States by the Treaty.

18 The applicant's statement that it could not, in this case, contest the measures taken in favour of Mobilkom under Austrian law cannot, according to settled case-law, influence the conditions for the admissibility of proceedings before the Community judicature (order of the Court of Justice of 23 November 1995 in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 26, and Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-447, paragraph 50). Moreover, under Austrian law the applicant could have asked to be notified of the decision granting the concession to Mobilkom with a view to contesting it by legal proceedings. In this case, the applicant does not seem to have attempted to defend its rights by that means. At the hearing, the Commission also referred to the existence of a national judicial decision which granted *locus standi* to a telecommunications undertaking in a situation similar to that described in the applicant's complaint.

19 Moreover, unlike the procedural provisions concerning infringements of the competition rules, such as Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under

Articles 85 and 86 of the EC Treaty (OJ 1998 L 354, p. 18) and Article 93(2) of the EC Treaty (now Article 88(2) EC), Article 90(3) of the EC Treaty does not grant individuals any access to the administrative procedure associated with it.

20 Moreover, in view of the complexity of its supervisory duties, the Commission enjoys a broad discretion which, in the area concerned, is even broader because the Member States enjoy a similar discretion (Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, paragraphs 37 and 38).

21 The applicant's contention that the purpose of Article 90(3) of the EC Treaty is to protect individuals is therefore misconceived. That provision, like Article 169 of the EC Treaty (now Article 226 EC), is intended to serve the public interest. The parallel between Article 90(3) and Article 169 of the EC Treaty has also been emphasised, in particular in Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 75). The Commission is therefore entitled, in the context of Article 90(3) of the EC Treaty, freely to decide what action to take, without having regard to complaints or even the interests of private individuals (*Ladbroke* v *Commission*, cited above, paragraphs 37 and 38).

22 As regards, finally, the judgment of the Court of First Instance in Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757 (hereinafter 'the *TF1* judgment'), the Commission states, first, that it, like the French Republic, has brought an appeal, in which proceedings were still pending on the date of the hearing in this case, against that judgment (C-302/99 P and C-308/99 P). It takes exception, more particularly, to the grounds of that judgment according to which Article 90(3) of the EC Treaty is intended to protect the interests of individuals, and to those according to which the fact that TF1, from which the complaint emanated, is a competitor of the public undertaking with which the complaint is concerned constitutes an 'exceptional circumstance' within the meaning of the *Bilanzbuchhalter* judgment. The circumstances relied on in the TF1 judgment cannot therefore support the view that the present application is admissible.

23 The Commission also contends that the application is inadmissible because the applicant is not individually concerned. According to the Commission, the economic effects of the contested measure do not concern the applicant in the same way as the addressee, as held in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95) but concern it in the same way as they concern any other real or potential competitor on that market (*Ladbroke* v *Commission*, cited above, paragraphs 41 and 42). The Commission states that the applicant's status as complainant does not mean that the rejection of its complaint is of individual concern to it (*Ladbroke* v *Commission*, paragraph 43).

24 The Commission considers that neither the fact that the relevant market may be regarded as a natural oligopoly in which only a limited number of operators are active nor even the fact that the applicant was temporarily the only competitor of Mobilkom has any impact on the admissibility of the application since the contested measure indirectly affects the market concerned in its entirety (see, among others, Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraph 10).

25 The Kingdom of the Netherlands submits that an action by an individual against a decision adopted under Article 90(3) of the EC Treaty must be treated as admissible only in exceptional cases, even where the national measure at issue is not a measure of general application. In that context, it draws attention to the similarity between the procedure associated with that provision and that provided for in Article 93 of the EC Treaty (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719 and Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraphs 53 and 54).

26 The applicant submits that the contested measure constitutes a legal act which can be the subject of an action for annulment under the fourth paragraph of Article 230 EC.

27 In that connection it states, in particular, that in the *Bilanzbuchhalter* judgment the Court held, in paragraph 25, that in certain cases an individual had *locus standi* to bring proceedings against a refusal by the Commission to adopt a decision under Article 90(1) and (3) of the EC Treaty and that, in his Opinion in that case ([1997] ECR I-947, at I-949), Advocate General La Pergola also accepted the possibility that decisions of that kind could be the subject of judicial review. According to points 20 and 21 of that Opinion, lack of standing to bring proceedings cannot be based on an unlimited discretion of the Commission since that discretion is diminished by the fact that individuals are granted subjective rights for the infringement of which they must be able to seek a remedy before the Community judicature.

28 As regards the fact of being individually concerned, the applicant submits in particular that the Commission's argument is based on the incorrect premiss that the contested measure has equivalent effects on all Austrian GSM operators. However, because of the particular features of the regulated telecommunications market, which is a classic example of a natural oligopoly, the operators concerned are few in number. Moreover, the applicant is the only one required to pay a fee as high as that paid by Mobilkom. Finally, for a fairly long time after the award of the two licences at issue and the imposition of the fees for them, the applicant was Mobilkom's only competitor. All those considerations are sufficient to set it apart from all other undertakings for the purposes of Article 230 EC.

Substance

29 The applicant raises, in essence, two pleas in law. The first alleges infringement of Articles 86 and 90 of the EC Treaty and manifest errors in the assessment of the facts. The second alleges breach of the obligation to state reasons.

— The first plea: infringement of Articles 86 and 90 of the EC Treaty and manifest errors in the assessment of the facts

30 The applicant refers, first of all, to a number of factual and economic matters.

31 It claims that, when it lodged its complaint, its competitor, Mobilkom, had some 500 000 subscribers in the GSM sector alone. Moreover, Mobilkom already had, at that time, about 280 000 subscribers to the 'D-Netz' and 'C-Netz' networks. The applicant's competitive position further deteriorated to a considerable extent when, in 1996, Mobilkom was required to pay a fee of ATS 4 billion, a fee purporting to be equivalent to that charged to the applicant. Furthermore, Mobilkom then obtained a discount on its fee, allegedly as compensation for liberating frequencies in the 900 MHz band for the benefit of the applicant. In addition, Mobilkom was granted an extension until 20 March 1997 for payment of its fee at an advantageous rate.

32 The applicant also states that the third GSM concession was granted in August 1997 to Connect Austria in return for a fee of ATS 2.3 billion. The Austrian telecommunications authority's explanation for that difference between the fees was that the third concession was of a lower value than those granted to the other two operators because the new competitor was entering the market at a later stage.

33 In the light of those facts, the applicant considers, first, that, in the contested measure, the Commission appears not only to consider that Mobilkom enjoys a

dominant position on the Austrian market but also that the unfair conduct complained of is liable to affect trade between Member States.

34 It then states that, in the contested measure, the Commission claims that the applicant did not provide 'sufficient evidence of the existence of a State measure which induced Mobilkom to abuse its dominant position'. The applicant rejects that view. It was placed at a disadvantage when it had to pay a fee of the same level as that payable by Mobilkom whilst the concession which it received was of a substantially lower value. It is clear from two Commission decisions, Decision 95/489/EC of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy (OJ 1995 L 280, p. 49, paragraph 16, hereinafter 'the GSM Italy Decision') and Decision 97/181/EC of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain (OJ 1997 L 76, p. 19, paragraph 20, hereinafter 'the GSM Spain Decision'), that the fees in the area concerned should, following an economic analysis, be fixed by reference to the value of the concession in question. More particularly, the potential profits of GSM operators vary according to the date on which they enter the market. Formally equal treatment regarding the fees for the two concessions therefore amounts to extremely unequal treatment and, as a result, discrimination against the applicant.

35 Those practices constitute an infringement of the combined provisions of Articles 86 and 90 of the EC Treaty. A State measure concerning a public undertaking such as Mobilkom infringes Article 90(1) of the EC Treaty where that measure obliges, encourages or induces that undertaking to commit an infringement of, in particular, Article 6 of the EC Treaty (now, after amendment, Article 12 EC) or of the competition rules. In the light of the GSM Italy Decision (paragraph 17) and the GSM Spain Decision (paragraph 21), that principle should be construed as meaning that measures which improve the competitive position of the public undertaking and distort competition are caught by Article 90 of the EC Treaty, without its being necessary for such measures to display a direct link with unfair conduct decided upon by the public undertaking itself (Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 24).

36 Consequently, by stating in the contested measure that the applicant did not produce sufficient evidence of the existence of a State measure which induced Mobilkom to abuse its dominant position, the Commission, first, made a manifestly incorrect assessment of the extent of the discrimination suffered by the applicant and, second, infringed Article 90 of the EC Treaty.

37 The applicant submits, second, that, in the contested measure, the Commission stated, in essence, that its administrative practice was not to commence proceedings in such cases unless a Member State imposed a higher fee on an undertaking that was a new entrant to the market than on an undertaking already active there. The applicant observes, nevertheless, that in the GSM Italy and GSM Spain Decisions the Commission dealt with only one aspect of the equal treatment of GSM operators. The fact that the public undertaking is required to make a payment identical to that imposed on the second operator, without any account being taken of the economic value of the respective concessions, must be regarded as an inadequate criterion. In the contested measure, the Commission, in other words, failed to take account of the differences between the case before it and the situations which led to the GSM Italy and GSM Spain Decisions, relating in particular to the time factor. In any event, the Commission did not carry out the examination needed to determine whether the amount of the fee charged to Mobilkom was justified, even though the Commission had already indicated the applicable parameters, in particular in its GSM Italy Decision.

38 As regards the Commission's argument that it is entitled in any event, when examining cases referred to it, to establish priorities for the use of its limited resources, the applicant contends that the Commission did not rely on that ground, in the contested measure, to justify its failure to initiate a procedure.

39 Even if the contested measure were to be regarded as an instance of exercise of the right to establish priorities for the treatment of complaints, the Commission used

its discretion unlawfully by failing to take account of the fact that there were no adequate remedies under national law. Moreover, it did not even consider that absence of remedies, even though it was obliged to do so by virtue of its Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ 1997 C 313, p. 3, paragraphs 36 and 45).

40 The Commission takes the view that its decision not to intervene in this case was not in any way incorrect.

41 The Kingdom of the Netherlands submits that the Commission cannot be required to adjudicate on complaints concerning infringements allegedly committed by Member States where the subject-matter of such complaints does not fall within its exclusive competence. In the absence of such exclusive competence, the Commission is entitled to act according to priorities which it itself sets. Finally, it is doubtful whether a possible *ex post facto* increase of the GSM fee, as advocated by the applicant for Mobilkom, would be compatible with the principles of the protection of legitimate expectations, transparency and objectivity.

— The second plea: breach of the obligation to state reasons

42 The applicant claims, first, that whilst it is true that under Article 190 of the EC Treaty (now Article 253 EC) the Commission is not obliged to give a view on all the arguments put forward by complainants, it is none the less obliged to do so regarding those which appear to be of particular importance to the persons concerned.

43 In the contested measure, the Commission merely stated that the applicant's allegations were inadequate and referred to its administrative practice, using only two sentences to do so. However, according to the case-law, it is not sufficient that a person concerned by a decision is able to deduce the reasons for a decision by comparing it with earlier similar decisions (Case 294/81 *Control Data* v *Commission* [1983] ECR 911, paragraph 15). Finally, the applicant states that, in the contested measure, the Commission did not invite it to provide further information. Against that background, the contested measure must therefore be regarded as a final assessment of its complaint.

44 The applicant also claims that it was not in a position to determine how the Commission justified its measures in this case and that the Court is likewise not in a position to carry out its review. It therefore calls for evidence to be taken on that subject from members of the management of the company and from telecommunications experts.

45 In response to the Kingdom of the Netherlands's statement in intervention, the applicant states that, even if some degree of latitude should be available to the Commission for the treatment of complaints submitted to it, its discretion in that regard should not be unlimited. Moreover, adequate reasons should be given for the exercise of such discretion (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 47). In such circumstances, the Commission is not entitled to refer in the abstract to the lack of any Community interest in investigating a complaint.

46 The Commission, for its part, contends in particular that, according to settled case-law, the statement of reasons required by Article 190 of the EC Treaty must be appropriate, first, to the nature of the act at issue and, second, to the circumstances of the case, that is to say in particular to the content of the

measure, the nature of the reasons relied on and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see, among others, *Commission* v *Sytraval and Brink's France*, cited above, paragraph 63).

Findings of the Court

Preliminary observations

47 Before the pleas and arguments on both sides are considered, it is appropriate to define the framework within which the admissibility and the substance of this action should be appraised in relation to the application of Article 90(3) of the EC Treaty.

48 Since the present action is directed against a measure rejecting a complaint, it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. 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, hereinafter 'the Charter of Fundamental Rights') confirms that '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. It is appropriate to consider, first of all, the nature and scope both of that right and of the administration's concomitant obligations in the specific context of the application of Community competition law to an individual case, as called for in this instance by the applicant.

49 It should be pointed out, first, that the obligation to undertake a diligent and impartial examination has already being expressly imposed on the Commission by the case-law of the Court of First Instance relating to Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC), on the one hand, and in the context of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC), on the other (see, in particular, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 79, and Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 53). In its judgments in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 45, the Court of Justice likewise took the view that the Commission is required to examine all matters of fact and law brought to its attention by complainants. There is no specific written provision or anything else to support the view that the position is any different so far as concerns the discretion enjoyed by the Commission in respect of a complaint in which it is called on to take action under Article 90(3) of the EC Treaty.

50 It is true that the abovementioned judgments rely in particular on the existence of procedural rights expressly recognised by the Treaty or by provisions of secondary law in order to account for the Commission's obligation to undertake an examination, and that the Commission contends that no such rights have been formally granted to complainants in the context of Article 90 of the EC Treaty.

51 However, that provision of the Treaty always applies, as is clear in particular from the first paragraph thereof, in conjunction with other Treaty provisions, including those concerning competition, which, for their part, expressly grant procedural rights to complainants. In this case, in its complaint the applicant stated, in essence, that it was adversely affected by an Austrian State measure which enabled Mobilkom to abuse its dominant position on the relevant mobile telephony market, in breach of Article 86 of the Treaty. The applicant is therefore

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 is entitled to submit a complaint to the Commission.

52 Second, the existence of that obligation to undertake a diligent and impartial examination is also justified by the general duty of supervision to which the Commission is subject, even though the action taken by virtue of that duty is directed, under Article 90(3) of the EC Treaty, against Member States. The Court of First Instance has held that the extent of the Commission's obligations in matters of competition law must be considered in the light of Article 89(1) of the EC Treaty (now, after amendment, Article 85(1) EC) which constitutes, with regard to those matters, a specific expression of the general supervisory role conferred on the Commission by Article 155 of the EC Treaty (now Article 211 EC) (see, in particular, Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 63). However, Article 90 of the EC Treaty is, in the same way as Article 89 thereof, an embodiment of the general objective assigned by Article 3(g) of the EC Treaty (now, after amendment, Article 3(g) EC) to Community action, namely the institution of a system ensuring that competition in the common market is not distorted (see, to that effect, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

53 Against that background, it must be concluded that the Commission's general duty of supervision and its corollary, the obligation to undertake a diligent and impartial examination of complaints submitted to it, must apply, as a matter of principle, 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 to the persons concerned. Consequently, the Commission's argument, first, that Article 90(3) of the EC Treaty does not extend to individuals and, second, that the protection of individuals is ensured by the obligations directly imposed on the Member States, is irrelevant.

54 It does not avail the Commission to invoke a parallel between Articles 90(3) and 169 of the EC Treaty to show that it is not under any obligation to examine the complaint under the first-mentioned provision. It is certainly true that those provisions may both give rise to procedures involving the Commission and a Member State, in which the Commission performs its general duty of supervision under Article 155 of the EC Treaty. However, whilst under Article 169 of the EC Treaty the Commission 'may' commence Treaty-infringement proceedings against a Member State, Article 90(3) of the same Treaty provides, on the other hand, that the Commission is to adopt the appropriate measures 'where necessary'. Those words clarify the power granted to the Commission by Article 90(3) of the EC Treaty and thereby indicate that the Commission must be in a position to decide as to the 'necessity' of its intervention, which in turn implies that it has a duty to undertake a diligent and impartial examination of complaints, on completion of which it regains its discretion as to whether there are grounds for conducting an investigation and, if there are, for taking measures against the Member State or States concerned to the extent necessary. In contrast to the position regarding its decisions to commence Treaty-infringement proceedings under Article 169 of the EC Treaty, the Commission's power to apply Article 90(3) of the EC Treaty is thus not entirely discretionary (see, to that effect, 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, paragraph 96).

55 That obligation to undertake a diligent and impartial examination does not, however, imply that the Commission must pursue its examination to the point of adopting a final decision or a directive addressed to one or more Member States. Indeed, according to settled case-law, it is apparent from the wording of Article 90(3) of the EC Treaty and from the scheme of Article 90 as a whole that the Commission enjoys a wide discretion in exercising its power of supervision over Member States responsible for infringements of Treaty rules, particularly those relating to competition, 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 *Bilanzbuchhalter* judgment, paragraph 27, and *Vlaamse Televisie Maatschappij*, paragraph 75). The case-law also makes it clear that 'the exercise of the power to assess the compatibility of State measures with the Treaty rules, conferred by Article 90(3) of the Treaty, is not coupled with an obligation on the part of the Commission to take action which may be relied on

in seeking a declaration that the Commission has failed to act' (see in particular *Ladbroke*, paragraph 38). Whilst emphasising that the Commission has no obligation to take action against Member States, that case-law does not however imply that the Commission is not under an obligation to undertake a diligent and impartial examination of complaints.

56 It must next be observed that, in so far as the Commission is required to undertake such an examination, the fulfilment of that obligation must be amenable to judicial review. It is in the interests both of the sound administration of justice and of the proper application of the competition rules that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests. Moreover, the Court has applied that principle on numerous occasions in relation to infringements of Articles 85 and 86 of the EC Treaty (see, in particular, Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13). The same applies to infringements of Article 90(3) of the EC Treaty (see, to that effect, the Opinion of Advocate General Mischo in *Commission and France* v *TF1*, cited above, point 97).

57 Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

58 As emphasised above, since, first, under Article 90(3) of the EC Treaty, the Commission enjoys a broad discretion as to whether it is 'necessary' to take action against Member States and, second, the Commission is under a duty to undertake a diligent and impartial examination of complaints alleging infringement of Article 90(1) of the EC Treaty, where the measure objected to is a

Commission decision not to use the power conferred on it by Article 90(3) of the EC Treaty, the role of the Community judicature is limited to a circumscribed review in which it merely checks, first, that the contested measure includes a statement of reasons which is prima facie consistent and reflects due consideration of the relevant aspects of the case, second, that the facts relied on are materially accurate and, third, that the prima facie assessment of those facts is not vitiated by any manifest error.

59 In those circumstances, the review carried out by the Court of First Instance is therefore limited in scope and varies in depth. The material accuracy of the facts relied on must be thoroughly examined by the Court, whereas the prima facie appraisal of those facts and, more so, the decision whether it is necessary to take action are subject to limited review by the Court.

60 It is against that background that the admissibility and substance of the present action must be examined.

The Commission's argument that the application is in part devoid of purpose

61 In order to adjudicate on the Commission's argument, as set out in paragraph 15 above, that this application is in part devoid of purpose, it is necessary to examine the content of the complaint and of the applicant's additional submissions.

62 It is clear from an analysis of those documents that, although the part of the complaint concerning the alleged discrimination against the applicant related above all to Mobilkom, the fact nevertheless remains that that part of the complaint also explicitly related to Connect Austria, since the applicant took the view that in any event it had been discriminated against as compared with one of those two undertakings.

63 It must therefore be concluded that the Commission's contention that the application should be declared partially devoid of purpose must be rejected.

Admissibility

64 It must be borne in mind at the outset that, contrary to the Commission's contention, the fact that the Commission enjoys a broad discretion regarding the application of Article 90(3) of the EC Treaty does not in itself prevent an action being brought for annulment of a decision refusing to continue the examination of a complaint concerning the taking of action under that article of the Treaty (see, to that effect, the Opinion of Advocate General Mischo in *Commission and France* v *TF1*, paragraph 98), particularly where such a decision is addressed to the author of the complaint.

65 Next, it must be observed that, in contrast to the course of action followed for the examination of complaints alleging infringement of Article 92 of the EC Treaty in

relation to State aid (see, in particular, *Commission* v *Sytraval and Brink's France*, paragraphs 44 and 45) referred to by the intervener (see paragraph 25 of this judgment), it must be conceded that decisions exist rejecting complaints concerning the taking of action by the Commission under Article 90(3) of the EC Treaty.

66 In the sphere of State aid, the examination of a complaint in general gives rise to a decision addressed to the Member State concerned. The response to the complaint is then entirely subsumed in the decision addressed to that Member State. In those circumstances, according to settled case-law, it is inappropriate to acknowledge the existence of a decision rejecting a complaint distinct from the decision addressed to the Member State concerned (see, to that effect, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 13 to 15, and the Opinion of Advocate General Tesauro in that case at p. I-2502, point 32). However, a complaint calling on the Commission to take action on the basis of Article 90(3) of the EC Treaty does not always give rise to a decision addressed to the Member State concerned since it is only where it is 'necessary' to do so that the Commission addresses such a decision to it. Accordingly, with a view to ensuring sound administration of justice, as referred to in paragraph 56 of this judgment, it must be recognised that, as in this case, decisions rejecting complaints alleging infringement of Article 90(1) of the EC Treaty do exist.

67 It must also be observed that the fact that neither the Treaty nor secondary law provides expressly for the Commission to take a decision in a case such as the present one does not mean that such a decision rejecting a complaint cannot exist. It must be borne in mind, by way of example, that, in relation to complaints concerning infringement of Articles 85 and 86 of the EC Treaty, the case-law has recognised the existence of a decision to take no further action on a complaint, even though no such decision is provided for by the Treaty or by secondary law (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraphs 14 to 16, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 47).

68 It must further be observed that the present case is also to be distinguished from *Ladbroke*, likewise relied on by the Commission, in so far as the latter concerned an action for failure to act.

69 In any event, even if it were supposed — and that is not the case — that the contested measure, despite its form, its content and the status of its addressee (the applicant, a natural or legal person within the meaning of the fourth paragraph of Article 230 EC), should be classified not as a decision rejecting a complaint alleging infringement of Article 90(1) of the EC Treaty but rather as a measure finding that a national provision is not incompatible with the Treaty and of which the real addressee is a Member State, it could not necessarily be inferred that the applicant has no standing to bring an action for the annulment of that measure. The possibility cannot be excluded a priori that the applicant's legal position has been affected. It is therefore necessary to consider whether the contested measure is of direct and individual concern to the applicant.

70 In this case, the contested measure, as characterised above, is of direct and individual concern to the applicant. First, the contested measure constitutes a reaction by the Commission to a formal complaint from the applicant. Second, it is clear from the two sets of additional submissions (mentioned in paragraph 4 of this judgment) that the Commission held several meetings with the applicant to examine various matters raised in the complaint. Third, when the GSM licence was awarded to the applicant, the applicant had only one competitor, Mobilkom, which had benefited from the State measures objected to in the part of the complaint which the Commission considered, in the contested measure, not to require further investigation. Fourth, the applicant is the only one of Mobilkom's two competitors which was required to pay the same fee as Mobilkom, whilst the other competitor, Connect Austria, was required to pay a substantially lower fee than that imposed on Mobilkom or the applicant. Fifth, it is undisputed that the fee required of Mobilkom, with which the complaint and the contested measure are mainly concerned, was calculated automatically by reference to the amount of the fee proposed by the applicant in the tendering procedure for the second GSM licence in Austria. Sixth, and finally, it must be observed that the measure to which the complaint and the contested measure refer applies individually to

Mobilkom and does not constitute a measure of general application like the one at issue in the *Bilanzbuchhalter* case.

71 However, in this case, the Court of First Instance considers that the applicant's entitlement to bring proceedings derives from the fact that it is the addressee of the contested measure, by which the Commission decided not to take any action against the Republic of Austria under Article 90(3) of the EC Treaty regarding the amount of the fees for mobile radio-telephony concessions. In contrast to the approach described, for the sake of completeness, in paragraphs 69 and 70 above, it is not appropriate, in such circumstances, to consider whether the decision addressed to the applicant is of direct and individual concern to it, as the Commission appears to be advocating. Moreover, in so far as the Commission has raised the question whether the applicant has a legitimate interest in securing the measure which it is calling on the Commission to adopt under Article 90(3) of the EC Treaty, that is to say whether, in the absence of such a measure, the applicant's legal position would be affected, it must be observed that that is a matter to be dealt with first by the institution to which the complaint was addressed. If appropriate, the Community judicature may then consider whether the Commission examined that matter properly. However, that question has no bearing on the assessment of the admissibility of an action brought by a complainant — as in this case — against a decision rejecting its complaint.

72 In the light of those considerations, it must be concluded that the action is admissible.

Substance

73 It must be borne in mind that the review carried out by the Court of First Instance is limited to verification of the Commission's fulfilment of its duty to undertake a diligent and impartial examination of complaints, as made clear in paragraph 58 of this judgment. In view of the nature of that review, it is appropriate to consider

together the plea alleging breach of the obligation to state reasons and the plea alleging a manifest error of assessment as to whether or not Articles 86 and 90 of the EC Treaty have been infringed.

74 It must be borne in mind that, in the contested measure, the Commission bases its refusal to undertake further investigation of the complaint on two grounds, namely that the applicant did not provide 'sufficient evidence of the existence of a State measure which induced Mobilkom to abuse its dominant position' and that 'until now its administrative practice has been not to commence proceedings in such cases unless a Member State imposed a higher fee on an undertaking that was a new entrant to the market than on an undertaking already active there'.

75 It can be inferred from those two grounds that the Commission identified the central issue of the complaint, giving the impression that it took account of the relevant issues. Moreover, it is clear that the contested measure is based on facts whose materiality is not contested in so far as the parties agree that the fees paid by the applicant and by Mobilkom are of the same amount. Finally, it must be noted that the Commission, without committing any manifest error of assessment, concluded, on the basis of a prima facie examination of the file, that the imposition on Mobilkom of a fee identical to that paid by the applicant is not in itself sufficient to show that Mobilkom was induced to abuse its dominant position. That conclusion is consistent with the Commission's previous practice and, more particularly, with the GSM Italy and GSM Spain Decisions, in which the Commission concluded that the historical operator concerned had been encouraged to abuse its dominant position as a result of the payment by the new entrants to the market of a fee higher than that paid by the historical operator.

76 Thus, there is nothing in the file to show that the Commission committed a manifest error of assessment in concluding, after examining the complaint lodged by the applicant, that it was inappropriate to initiate proceedings against the

Republic of Austria under Article 90(3) of the EC Treaty for infringement of Articles 86 and 90(1) of that Treaty.

77 As regards the applicant's argument that the Commission did not take account of the absence of adequate national remedies, it need merely be pointed out that the applicant did not make further reference, in its complaint or its additional submissions, to the absence of such remedies. In those circumstances, it must be concluded that, by not expressly referring in the contested measure to the existence of adequate judicial or administrative remedies in Austria, the Commission did not manifestly fail in its obligation to undertake an examination in this case.

78 As regards the applicant's plea that no proper statement of reasons was given, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 190 of the EC Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the Community judicature to exercise its power of review (see, in particular, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15).

79 In the present case, it must be observed that the contested measure was adopted following a number of meetings between the applicant and the Commission and, thus, in a context with which the applicant was familiar, as is clear from the applicant's additional submissions to the Commission. To that extent, this case differs from *Control Data* v *Commission*, cited above (paragraph 15). It follows that the applicant was in a position to understand the Commission's reasons, as set out in the grounds of the contested measure, for not considering it appropriate to investigate its complaint further. Consequently, the applicant was able to defend its rights before the Court of First Instance and the latter was able to carry out its review within the limits defined in paragraph 58 of this judgment. In those circumstances, it must be concluded that the contested measure contained an adequate statement of reasons for the purposes of Article 190 of the EC Treaty.

80 In view of the nature of the review carried out by the Court of First Instance, as defined in paragraph 58 of this judgment, it is not appropriate to grant the applicant's request that aural testimony be taken from members of the applicant's management and from telecommunications experts.

81 The present action must, for the reasons given above, be dismissed in its entirety.

Costs

82 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

83 The Kingdom of the Netherlands, as intervener, should pay its own costs in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those of the Commission;**

3. **Orders the Kingdom of the Netherlands to pay its own costs.**

Meij Lenaerts Jaeger

Pirrung Forwood

Delivered in open court in Luxembourg on 30 January 2002.

H. Jung
Registrar

A.W.H. Meij
President