OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 7 September 2006 [1]

I — Introduction

1. In November 2000 the Telekom-Control-Kommission, the Austrian regulatory authority, conducted an auction of several frequency blocks to provide mobile communications under the UMTS/IMT-2000 [2] standard (also called third generation mobile communications — 3 G) and then awarded corresponding frequency use rights to the successful bidders by a decision. Revenue totalling EUR 831 595 241.10 was received as a result. Frequencies for the supply of second-generation mobile communications (GSM Standard [3]) and for the TETRA trunked radio system [4] had already been awarded in a similar way.

2. 3G mobile devices have greater capacity to transfer data than mobile phones of previous generations. They enable the provision, in particular, of multimedia services such as video-conferencing, internet access and on-line entertainment. The introduction of UMTS mobile communications is considered an important technical advance opening up many new fields of activity to telecommunications organisations.

3. In the main proceedings the eight telecommunications organisations that acquired the frequency use rights (hereinafter: 'the Claimants') are claiming that the award of the rights was a transaction subject to value added tax and that the frequency use payments included VAT. They are therefore asking for invoices showing VAT to be issued. This is necessary in order to deduct the allegedly paid VAT as input tax.

1 — Original language: German.

2 — IMT-2000: International Mobile Telecommunications-2000 (standard developed by the International Telecommunication Union ('ITU')); UMTS: Universal Mobile Telecommunications System (standard developed in the context of the European Conference of Postal and Telecommunications Administrations ('CEPT') and the European Telecommunications Standards Institute ('ETSI'), which is part of the so-called IMT-2000 family).

3 — Global System for Mobile Communications.

4 — Terrestrial Trunked Radio. Further information on this digital radio standard can be found at the home page of TETRA MoU Association Ltd (www.tetramou.com).

4. According to Article 4(1) and (2) of the Sixth VAT Directive (hereinafter: 'the Sixth Directive') [5] only transactions that a taxable person carries out in the course of his economic activity are subject to tax. According to Article 4(5) of the Directive the State and its bodies are not, in principle, to be considered taxable persons where they exercise public authority. It is the interpretation of these provisions in the context of the auctioning of the frequency use rights that forms the cornerstone of these proceedings.

5. In a reference for a preliminary ruling made in parallel with this case and on which I am also delivering my Opinion today, [6] the VAT and Duties Tribunal London has asked similar questions on how to assess the auctioning of UMTS licences in the United Kingdom.

6. Other Member States also followed the British and Austrian example and received high licence fees as well. The present proceedings and the parallel proceedings in the United Kingdom are therefore of particular significance not only because of the enormous sums at stake but also because they will serve as an example for similar cases in other Member States.

5 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

6 — Case C-369/04 *Hutchison and Others*.

II — Legal framework

A — *VAT legislation*

1. Community law

7. Under Article 2(1) of the Sixth Directive the following are subject to value added tax:

'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such; ...'.

8. Article 4 of the Sixth Directive defines who is to be considered a 'taxable person' as follows:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

...'

9. In Annex D 'Telecommunications' are shown as item 1 on the list of activities referred to in the third subparagraph of Article 4(5) of the Sixth Directive.

2. National legislation

10. Under Paragraph 1(1), indent 1, of the UStG (Umsatzsteuergesetz, Law on turnover taxes) 1994, deliveries and other supplies which an operator makes for consideration within the country in the course of his business are subject to turnover tax. The charge to tax is not excluded because the transaction is effected on the basis of a legal or administrative act or is to be regarded under a legal provision as effected.

11. An operator within the meaning of Paragraph 2(1) of the UStG is a person who independently carries on a commercial or professional activity. Any activity pursued on a continuing basis for the purpose of obtaining income is a commercial or professional activity.

12. Under Paragraph 2(3) of the UStG, corporations governed by public law carry on commercial or professional activity only within their operations of a commercial nature (Paragraph 2 of the KStG (Körperschaftsteuergesetz, Law on corporation tax). Paragraph 2(1) of the KStG prescribes that an operation of a commercial nature of a corporation governed by public law is any installation which is economically independent and serves exclusively or predominantly for a private-economy activity of commercial significance pursued on a continuing basis for the purpose of obtaining income, or other economic advantages in the absence of participation in general economic activity, and not for agriculture or forestry.

13. Paragraph 2(5) of the KStG reads, in extract: 'There is no private-economy activity within the meaning of subparagraph 1 if the activity serves predominantly for the exercise of public powers (public-authority operation) ...'

14. The first and second sentences of Paragraph 11(1) of the UStG provide as follows: 'If the operator effects transactions within the meaning of Paragraph 1(1), indent 1, of the UStG, he is entitled to issue invoices. If he effects the transactions to another operator for the latter's undertaking or to a legal person where the latter is not an operator, he is obliged to issue invoices.' [7] These invoices must under Paragraph 11(1), indent 6, of the UStG include the amount of tax on the payment.

B — *Legal background to the award of UMTS frequencies*

15. Radio frequencies are scarce resources. A large part of the radio spectrum technically available for use has already been allocated to specific services and types of use. To avoid interference, separate sections (frequency bands) are made available for each particular kind of use. The international categorisation of frequencies is based on work undertaken by the International Telecommunications Union ('ITU'), an international organisation operating under the auspices of the United Nations.

7 — The defendant in the main proceedings pointed out that the provision was worded differently at the relevant time, namely: If an operator effects taxable transactions he is entitled, and if he effects the transactions to another operator for the latter's undertaking he is, on request, obliged to issue invoices in which the tax is shown separately.

16. The frequency bands opened up to the UMTS/IMT-2000 mobile system were determined in principle in 1992 by the World Radio Conference ('WRC 92') organised by the ITU. In Resolution 212 the World Administrative Radio Conference of 1997 assumes that IMT-2000 mobile communications systems will be introduced by about the year 2000.

17. The European Conference of Postal and Telecommunications Administrations ('CEPT') [8] carried out further preliminary work at European level on the introduction of third-generation mobile communications. The European Radiocommunications Committee ('ERC'), which forms part of that organisation, defined the frequency spectrum available in its Decision ERC/DEC (97)/07 of 30 June 1997. [9]

18. The part of the frequency spectrum reserved for third-generation mobile communications can be subdivided into other sections in which several suppliers can operate mobile systems in parallel. The form and number of frequency use rights granted for this purpose varies from one Member State to another. [10] Whilst Austria and Germany divided the spectrum amongst six suppliers, for example, in Belgium and France there were only three. Hence, there is a certain amount of latitude — subject to minimum technical requirements — when determining the ranges licensed for the operation of a network.

19. The categorisation of frequencies for second-generation mobile communication services is also based on CEPT guidelines.

1. Community law

20. Directive 97/13/EC [11] formed the Community law framework for the grant of general authorisations and individual licences in the field of telecommunications services during the period that is relevant to this case.

8 — CEPT is an international organisation whose membership is currently made up of postal and telecommunications regulatory authorities from 46 European countries. (For further details see the organisation's home page at: www.cept.org.)

9 — This identifies the following frequency bands: 1900-1980 MHz, 2010-2025 MHz and 2110-2170 MHz for terrestrial UMTS applications and 1980-2010 MHz and 2170-2200 MHz for satellite-based UMTS applications.

10 — See the information on the European Radiocommunications Office ('ERO') home page at: www.ero.dk/ecc.

11 — Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15), which was repealed with effect from 24 July 2003 by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

21. Under Article 3(3) of Directive 97/13 'Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III'.

22. Section III of the Directive (Articles 7 to 11) deals with individual licences. Article 10 provides that the Member States may limit the number of individual licences to the extent required to ensure the efficient use of radio frequencies. They must, in particular, give due weight to the need to maximise benefits for users and to facilitate the development of competition. Member States are to grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate.

23. Under Article 11(1) of Directive 97/13 fees may be imposed which seek to cover the costs incurred in the issue of licences. Paragraph 2 also permits the imposition of other charges:

'Notwithstanding paragraph 1, Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

24. Directive 97/13 was repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). [12] In contrast to Directive 97/13 it is now provided in Article 9(3) of Directive 2002/21 that Member States may make provision for undertakings to transfer rights to use radio frequencies to other undertakings.

25. Article 9(4) of Directive 2002/21 provides as follows in this context:

'Member States shall ensure that an undertaking's intention to transfer rights to use radio frequencies is notified to the national regulatory authority responsible for spectrum assignment and that any transfer takes place in accordance with procedures laid down by the national regulatory authority and is made public. National regulatory authorities shall ensure that competition is not distorted as a result of any such

12 — Cited in footnote 11.

transaction. Where radio frequency use has been harmonised through the application of Decision No 676/2002/EC (Radio Spectrum Decision) or other Community measures, any such transfer shall not result in change of use of that radio frequency.'

26. Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community[13] (the 'UMTS Decision') also has a bearing on this case. By that Decision the Parliament and Council virtually gave the starting signal for a European-wide introduction of UMTS mobile communications.

27. The recitals in the preamble to the UMTS Decision refer to international developments and guidelines for the third-generation mobile system. Article 3(1) of the UMTS Decision requires the Member States to establish an authorisation system for the introduction of UMTS services by 1 January 2000. Under Article 3(3) they are to 'ensure, in compliance with Community legislation, that the provision of UMTS is organised ... in frequency bands which are harmonised by CEPT ...'.

13 — OJ 1999 L 17, p. 1.

2. National legislation

28. Under Paragraph 14 of the Telekommunikationsgesetz, as amended on 1 June 2000 ('the TKG'), a licence is required to supply mobile voice telephony service and other public mobile communications services using directly operated mobile communications networks. A licence is to be awarded if, in the case of licences to supply public mobile communications services, the frequencies have been granted to the applicant or could be granted simultaneously with the licence (Paragraph 15(2)(3) of the TKG). Under Paragraph 16(1) of the TKG licences may be transferred with the consent of the regulatory authority. A fee is payable to cover the administrative costs incurred in awarding the licence (Paragraph 17 of the TKG).

29. Under Paragraph 21(1) of the TKG, in order to ensure the efficient use of the frequency spectrum, holders of a mobile communications licence also have to pay an additional one-off or annual frequency use fee on top of the frequency use payment. Paragraph 49(4) of the TKG provides that 'frequencies intended for the supply of public mobile communications services and for other public telecommunications services shall be awarded by the regulatory authority'.

30. The detailed allocation procedure is laid down in Paragraph 49a of the TKG, paragraph 1 of which reads: 'The regulatory authority shall allocate the frequencies afforded to it amongst those applicants who satisfy the general requirements in subparagraphs 1 and 2 of Paragraph 15(2) and guarantee the most efficient use of frequencies. This shall be established by the size of the frequency use payment that is bid.'

31. Further details were contained in a Code of Procedure brought in by the Telekom-Control-Kommission under Paragraph 49a(7) of the TKG and in the invitation to tender documentation of 10 July 2000 in the procedure for the allocation of frequencies for third-generation mobile communications systems (UMTS/IMT-2000). These provided inter alia for minimum bids of ATS 700 000 000 (EUR 50 870 983.92) for a frequency package of paired spectrum and ATS 350 000 000 (EUR 25 435 491.96) for a frequency package of unpaired spectrum.

32. Prior to 1 June 2000 the 1997 version of the TKG applied to the award of licences.

33. The TKG was amended in 2003. Paragraph 56(1) of the TKG 2003 now governs, in particular, the transfer of rights to use frequencies awarded by the regulatory authority. Transfers are only possible in certain specific circumstances and require the consent of the regulatory authority.

34. The structure and duties of the Telekom-Control-Kommission are laid down in Paragraphs 110 to 112 of the TKG. It is located at Telekom-Control GmbH, the sole shareholder of which is the State and which performs the duties of the regulatory authority not specifically assigned to the Telekom-Control-Kommission (Paragraphs 108 and 109 of the TKG). The Telekom-Control-Kommission's responsibilities include inter alia the allocation of frequencies under Paragraph 49(4) in conjunction with Paragraph 49a of the TKG (Paragraph 111(9) of the TKG).

III — Facts and questions referred to the Court for a preliminary ruling

35. By a decision of the Telekom-Control-Kommission of 20 November 2000 frequencies were allocated and licences granted for third generation mobile telecommunications systems (UMTS/IMT-2000). Before allocation the frequency packages were publicly offered and then auctioned in a simultaneous auction procedure with several steps. In the auction on 2 and 3 November 2000 a total of 12 frequency blocks of 5 MHz each were

auctioned in pairs and in another simultaneous auction 5 individual frequency blocks of 5 MHz were auctioned. On the basis of the results of the auction, the frequencies were allocated to the claimants by a decision. The frequency use payments were determined as follows:

T-Mobile Austria GmbH:	EUR 170 417 796.10
Mobilkom Austria AG & Co KG:	EUR 171 507 888.60
TRA-3G Mobilfunk GmbH:	EUR 113 151 602.70
ONE GmbH:	EUR 120 055 522.00
Hutchison 3G Austria GmbH:	EUR 139 023 131.70
3G Mobile Telecommunications GmbH:	EUR 117 439 300.00

36. The amounts stated were to be paid by the successful bidders in two instalments, the first instalment within seven days from notification of the decision of the Telekom-Control-Kommission, the second within six weeks. The licences and frequencies were awarded up to 31 December 2020.

37. By a decision of the Telekom-Control-Kommission of 3 May 1999 tele.ring Telekom Service GmbH & Co KG was allocated GSM frequency use rights (DCS-1800 channels) in return for a frequency use payment of EUR 98 108 326.00. By a decision of the Telekom-Control-Kommission of 7 February 2000 master-talk Austria Telekom Service GmbH und Co KG was allotted frequencies for the TETRA trunked radio system, with a frequency use payment of EUR 4 832 743.47 being set. Those decisions were also based on an auction procedure.

38. In the main proceedings the claimants are asking for invoices for the frequency use payments to be issued showing value added tax; they consider that this was included in the payments. In the course of these proceedings the Landesgericht für Zivilrechtssachen (Regional Civil Court) Wien (Austria) made an order of 7 June 2004 referring the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

'(1) Is the third subparagraph of Article 4(5) of, in conjunction with No 1 of Annex D

to, the Sixth Council Directive ... to be interpreted as meaning that the allocation of rights to use frequencies for mobile telecommunications systems in accordance with the UMTS/IMT-2000, GSM-DCS-1800 and TETRA standards ... by a Member State in return for a frequency use payment is a telecommunications activity?

(2) Is the third subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that a Member State whose national law does not provide for the criterion mentioned in the third subparagraph of Article 4(5) of the directive of the "non-negligible" extent of an activity (the de minimis rule) as a condition for having the status of taxable person must therefore be regarded as a taxable person for all telecommunications activities in every case regardless of whether the extent of those activities is negligible?

(3) Is the third subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that the allocation of frequency use rights for mobile telecommunications systems by a Member State in return for frequency use payments of a total of EUR 831 595 241.10 (UMTS/IMT 2000) or EUR 98 108 326.00 (DCS-1800 channels) or EUR 4 832 743.47 (TETRA) is to be regarded as an activity of non-negligible extent, so that the Member State is considered a taxable person in respect of that activity?

(4) Is the second subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that it would lead to significant distortions of competition if a Member State, when allocating frequency use rights for mobile telecommunications systems in return for payment of a total of EUR 831 595 241.10 (UMTS/IMT 2000) or EUR 98 108 326.00 (DCS-1800 channels) or EUR 4 832 743.47 (TETRA), does not subject those payments to turnover tax and private bidders for those frequencies must subject that activity to turnover tax?

(5) Is the first subparagraph of Article 4(5) of the Sixth Directive to be interpreted as meaning that an activity of a Member State which allocates frequency use rights for mobile telecommunications systems to mobile telecommunications

operators in such a way that a highest bid for the frequency use payment is first ascertained in an auction procedure and the frequencies are then allocated to the highest bidder does not take place in the exercise of public authority, so that the Member State is considered a taxable person in respect of that activity, regardless of the legal nature under the Member State's national law of the act which effects the allocation?

39. The undertakings mentioned in points 35 and 37, the Finanzprokuratur (Representative of the Federal Finance Ministry) for the Republic of Austria, as defendant, the Danish, German, Italian, Netherlands, Austrian, Polish and United Kingdom Governments and the Commission have filed observations in the proceedings before the Court of Justice.

IV — Legal appraisal

(6) Is Article 4(2) of the Sixth Directive to be interpreted as meaning that the allocation of frequency use rights for mobile telecommunications systems by a Member State described in Question 5 is to be regarded as an economic activity, so that the Member State is considered a taxable person in respect of that activity?

40. Under Article 4(1) of the Sixth Directive 'taxable person' means any person who independently carries out any economic activity, whatever the purpose or results of that activity. Article 4(2) of the Sixth Directive goes on to define 'economic activity' in more depth. The provision does not therefore just state who can be a taxable person but also provides for the circumstances in which a person's activity is subject to value added tax.

(7) Is the Sixth Directive to be interpreted as meaning that the frequency use payments determined for the allocation of frequency use rights for mobile telecommunications systems are gross payments (which already include value added tax) or net payments (to which value added tax may still be added)?'

41. Article 4(5) of the Sixth Directive contains different arrangements for when the State is to be considered a taxable person. [14] However, the application of these provisions

14 — See Advocate General Mischo, who pictures Article 4(5) as being built in 'tiers', so to speak, proceeding by exceptions and counter-exceptions (Opinion delivered in Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, point 8).

presupposes that there is an economic activity within the meaning of Article 4(2). It is therefore necessary to consider, first, the sixth question referred to the Court for a preliminary ruling, which asks for an interpretation of that provision.

A — *The sixth question: existence of an economic activity*

42. By its sixth question, the national court asks whether the award of frequency use rights for mobile communications systems by a Member State constitutes an economic activity for the purposes of Article 4(2) of the Sixth Directive.

43. Article 4(2) of the Sixth Directive contains a very wide-ranging enumeration of activities that are to be considered economic activities for the purposes of Article 4(1). In addition to all activities of producers, traders and persons supplying services, they comprise, in particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

44. The Court of Justice has concluded from this definition 'that the scope of the term economic activities is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results'. [15]

45. The subjective intentions with which the person concerned pursues the activity are therefore not relevant. Were it otherwise, the tax authorities would have to pursue investigations to establish those intentions, which would be contrary to the objectives of the common system of value added tax. The aim of that system is to ensure legal certainty and facilitate the application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question. [16]

46. I will first consider the objection that the existence of an economic activity is already precluded by the fact that the frequency use rights were auctioned in the interests of market regulation. I will go on to examine whether the procedure is to be classed as

15 — Judgments in Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraph 26, Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 41 and Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47; see also the judgment in Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 8, and in similar vein inter alia the judgments in Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19, and in Case C-497/01 *Zita Modes* [2003] ECR I-14393, paragraph 38.

16 — Judgments in Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 24, and in Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 45.

exploitation of intangible property for the purpose of obtaining income therefrom on a continuing basis, within the meaning of Article 4(2) of the Sixth Directive.

1. Does the objective of regulating the market preclude an economic activity?

47. The background to the auctioning of the frequency use rights is the fact that radio frequencies are scarce resources. The section of the electromagnetic spectrum that is available to mobile communications services is laid down by international agreements. Within that section only a limited number of mobile communications networks can be operated in parallel. Regulatory intervention by the State is unavoidable in order to ensure orderly use of frequencies without interference.

48. The UMTS Decision obliges the Member States to carry out the necessary administrative procedure for the introduction of UMTS services.

49. Directive 97/13 and the corresponding national legislation transposing it form the particular legal framework which is binding on the Member States when allocating frequency bands. Under Article 10 of Directive 97/13 they are obliged to grant individual licences on the basis of selection criteria which are objective, non-discriminatory, detailed, transparent and proportionate. Under Article 11(2) of Directive 97/13 they may impose charges in this connection which reflect the need to ensure the optimal use of these resources.

50. Austria decided to auction the frequency use rights. In accordance with Paragraph 49a of the TKG, the auction process was intended to ascertain the bidders that guaranteed that the most efficient use would be made of the frequencies. According to the Austrian Government, the point was not to obtain a great deal of revenue for the State.

51. The Member States that are parties to these proceedings and the Commission conclude from these facts that the award of the frequency use rights by the Telekom-Control-Kommission was not an economic activity within the meaning of Article 4(1) and (2) of the Sixth Directive but a measure to regulate the market.

52. This argument cannot be accepted.

53. The question of whether an activity constitutes an economic activity for the purposes of the law on value added tax depends upon its objective character, which is to be determined by reference to actual external events. The aim pursued by the activity, which was to regulate access to the mobile telecommunications market in conformity with Community law requirements and ascertain the most suitable mobile telecommunications bidders, is of no relevance as, under the case-law cited, no account is to be taken of such objectives when categorising an activity. [17]

54. The subject-matter of the auction was the right to use defined radio frequencies for the operation of a mobile communications network for a period of 20 years. That right, or an entitlement to the award thereof, was awarded under the auction to those undertakings that made the highest bids.

55. The question of how the award of frequency use rights by the State is to be classified in law — as an administrative authorisation or as a transaction under the civil law — is of just as little account when determining the objective nature of an activity as the title given to the undertaking's corresponding counter-consideration. The rights were, in any event, only awarded in consideration of payment of the sum of money determined by the auction so that the payment of money was directly connected to the award of the rights. Nor does the frequency use payment constitute a fee by which only the administrative costs of granting the frequencies are covered.

56. Nor is it crucial whether the attainment of income was a motive for the form of the allocation procedure for the frequency use rights. Objectively speaking, the Telekom-Control-Kommission awarded the rights in consideration of a monetary payment that was to reflect the commercial value of the rights and which was many times in excess of the amount spent on the award procedure. By providing under the rules of the auction for minimum bids of up to EUR 50 million, provision was also immediately made for a considerable amount of revenue to be achieved. When categorising the auction for value added tax purposes it cannot be relevant whether achieving that revenue was the State's motive or just an ancillary effect that necessarily followed from the form of the award procedure.

57. Nor is categorisation as an economic activity precluded by the fact that the allocation of frequency use rights ultimately fitted in with a Community-law-orientated regulatory framework. The fulfilment of these legal requirements also just constitutes a (mandatorily prescribed) purpose that

17 — See the judgments cited in footnote 16.

must be disregarded when assessing an action as an economic activity. [18]

58. It is apparent from point 7 in Annex D to the Sixth Directive that a regulatory activity can be subject to value added tax as an economic activity. Activities that are always to be considered State activities subject to value added tax under the third subparagraph of Article 4(5) of the Sixth Directive include the transactions of agricultural intervention agencies in respect of agricultural products carried out pursuant to regulations on the common organisation of the market in those products. Where an intervention agency sells products from its stock, therefore, value added tax will be payable even though such transactions are primarily intended to regulate the market and not to obtain income.

59. The result of concentrating on the objective external features of a transaction is to give the concept of economic activity a wide scope, which is in accordance with the view of the Court of Justice. [19] If, at this stage of appraisal, one were to have regard to the consideration that a public body was acting in the performance of its statutory regulatory duties, the scope of the Directive would immediately be considerably reduced. There would then, in particular, be very little scope for the application of Article 4(5) of the Sixth Directive, even though that provision contains specific rules governing public authorities.

60. The Court has admittedly ruled, particularly in the so-called 'Eurocontrol judgment', [20] to which some of the parties in this case have referred, that there is no economic activity for the purposes of the Treaty rules of competition where the powers of a public authority are exercised.

61. Competition law and the Sixth VAT Directive are, however, based on differing concepts of economic activity. Under competition law the exercise of public authority is considered to be the criterion precluding an activity from having relevance for competition purposes. No separate provision is made there, however, for the activities of a State when exercising public authority.

62. The concept of economic activity in Article 4(1) and (2) of the Sixth Directive is wider than its corresponding term under competition law. The exercise of public authority is not initially a factor here. That element is not taken into consideration until a later stage of appraisal, that is to say in the context of the special provision in Article 4(5). That provision would be virtually superfluous if, by analogy with competition law, there were to be no scope at all for the application of the Sixth VAT Directive in the case of acts by public authorities.

18 — See the judgments in *Commission* v *Netherlands* (cited in footnote 15, paragraph 10), *Commission* v *Greece* (cited in footnote 15, paragraph 28), and *Commission* v *United Kingdom* (cited in footnote 15, paragraph 43).

19 — See the case-law cited in footnote 15.

20 — Judgment in Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30; see also the judgments in Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraphs 22 and 23, and in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 57.

2. Exploitation of property for the purpose of obtaining income therefrom on a continuing basis

63. Article 4(2) of the Sixth Directive specifically provides that the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is to be considered an economic activity. Frequency use rights constitute intangible property.

64. It is established case-law that, in accordance with the requirements of the principle that the common system of value added tax should be neutral, the term 'exploitation' refers to all transactions, whatever may be their legal form. [21] The Court has therefore considered, for instance, that leasing constitutes exploitation of property which is to be classified as an economic activity within the meaning of Article 4(2) of the Sixth Directive. [22] The Telekom-Control-Kommission assigned frequency use rights to the claimants for a limited period of time on payment of a levy. That transaction, which is similar to a leasing or hiring transaction, is to be considered exploitation of intangible property for the purpose of obtaining income therefrom.

65. However, the Finanzprokuratur and the Danish, Netherlands and Austrian Governments argue that this does not constitute obtaining income *on a continuing basis* because the allocation of the frequencies was a one-off transaction.

66. Although the term '*nachhaltig*' used in the German version is not quite clear, it is apparent from reference to the other language versions that income must be obtained in the long term. [23] The purely occasional commercial exploitation of property does not therefore constitute an economic activity for the purposes of Article 4(1) and (2) of the Sixth Directive, as the Court ruled in *Enkler*. [24]

67. The award of frequency use rights under consideration in this case, however, does not constitute occasional use in that sense. A brief reminder of the circumstances of the *Enkler* case is called for by way of explanation. That case concerned the question of

21 — Judgments in Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 18, Case C-442/01 *KapHag* [2003] ECR I-6851, paragraph 37, Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 48, and Case C-8/03 *BBL* [2004] ECR I-10157, paragraph 36.

22 — Judgments in Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 22, Case C-23/98 *Heerma* [2000] ECR I-419, paragraph 19. See also the judgment in Case 268/83 *Rompelman* [1985] ECR 655, in which the Court classified as an economic activity the acquisition of a right to the future transfer of property rights in part of a building.

23 — See, for example, the English version: 'for the purpose of obtaining income therefrom on a continuing basis'; French: 'en vue d'en retirer des recettes ayant un caractère de permanence'; Italian: 'per ricavarne introiti aventi un certo carattere di stabilità'; Spanish: 'con el fin de obtener ingresos continuados en el tiempo'.

24 — *Enkler* judgment (cited in footnote 22, paragraph 20).

whether the occasional hiring out of a motor caravan that the owner mainly used for private purposes is still to be considered exploitation of property for the purpose of obtaining income therefrom on a continuing basis.

68. The Court took the nature of the property as the starting point for its appraisal. It said that the fact that property is suitable only for economic exploitation will normally be sufficient to find that its owner is exploiting it for the purposes of his economic activities and, consequently, for the purpose of obtaining income on a continuing basis. On the other hand, if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually used for the purpose of obtaining income on a regular basis. [25]

69. The right to use radio frequencies to supply UMTS and GSM mobile telecommunications can only be considered economic exploitation. Consequently, there is ab initio no question of distinguishing between the economic and private exploitation of property. Nor can there therefore be any question of a purely occasional economic activity, which is subsidiary to private exploitation.

70. The TETRA trunked radio system is also generally intended inter alia to be used for communications on the part of the security and regulatory agencies. If they were to transfer the operation of the network to a private-sector supplier this would also constitute economic exploitation of the frequencies concerned. In any event, in the case of the frequency use rights actually granted for the TETRA trunked radio system it is not apparent that these were only to be partially used for profit-making purposes.

71. Nor does the fact that the frequency use rights were awarded just once for a lengthy period of time make it occasional exploitation for economic purposes. It is of no relevance in this context how often a taxable person concludes comparable transactions; what is relevant is whether the particular property provides long-term revenue. There can be no doubt about this here. The right to use frequencies has been assigned for 20 years and provides the State with revenue over that whole period of time.

72. The fact that the frequency use payment only had to be made in two instalments as soon as the rights had been awarded and not as a periodical payment does not alter the fact that revenue is obtained on a continuing basis. The frequency use payment could also,

25 — *Enkler* judgment (cited in footnote 22, paragraph 27).

in theory, have been arranged in a different way. However, the application of the Sixth Directive cannot depend upon the modes of payment available to the parties.

73. Quite apart from this, however, the frequency use rights can be surrendered early, transferred or revoked, so that the right of use might not continue to be awarded on a one-off basis for 20 years.

74. The grant of a right of use for a limited period is ultimately not comparable with the sale of securities, which has been found by the Court not to be an economic activity for two reasons, unless undertaken in the course of commercial investment management. [26]

75. Firstly, income that is received from holding and selling securities — that is to say, dividends and profits made on the share price — is not the result of active exploitation of the securities but is the direct consequence of ownership thereof. In contrast to that situation, income received from the allocation of frequencies is not revenue accruing only from the right of disposal of the frequencies, such as dividends and profits on sale, but is income from the exploitation of that right.

76. Secondly, revenue from the sale of securities is only received once. Once the asset no longer forms part of the seller's property he can no longer use it to produce income. The State, however, is not awarding a final right of disposal of the frequencies. Indeed, that right reverts back to it again on the expiry of the period of allocation of the frequencies, when it can be granted anew.

77. The answer to the sixth question must therefore be that:

In the circumstances of the main proceedings the auctioning by a State body of the right to use defined parts of the electromagnetic spectrum to supply mobile telecommunications services for a specified period of time is to be considered exploitation of intangible property for the purpose of obtaining income therefrom on a continuing basis and is therefore to be considered an economic activity for the purposes of Article 4(1) and (2) of the Sixth Directive.

26 — Judgments in Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 32 et seq., and *EDM* (cited in footnote 21, paragraph 57 et seq.). See also with regard to the holding and acquisition of shares: the judgment in *KapHag* (cited in footnote 21, paragraph 38) and in Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 19 et seq.

B — *The first to fifth questions: circumstances in which public bodies act as taxable persons*

1. Preliminary remarks on the structure of Article 4(5) of the Sixth Directive

78. According to the basic rule contained in the first subparagraph of Article 4(5) of the Sixth Directive, States, regional and local government authorities and other bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities. The provision therefore exempts public authorities from general liability to tax even where they pursue an economic activity within the meaning of Article 4(1) and (2) of the Sixth Directive. The exercise of public authority is therefore equated with the act of a private-individual consumer.

79. Under the second subparagraph, however, notwithstanding the first subparagraph, the State is nevertheless to be deemed a taxable person where treatment as a non-taxable person would lead to significant distortions of competition. This provision is based on the idea that certain State bodies might enter into competition with private-sector competitors — even where those State bodies engage in transactions within the scope of their public authority. Its purpose is therefore to guarantee fiscal neutrality. [27]

80. Finally, under the third subparagraph, State bodies are always to be considered taxable persons in relation to certain sectors listed in Annex D provided that the activities are not carried out on such a small scale as to be negligible. Hence there is ultimately no need to decide whether, in the case of the activities catalogued, the State is pursuing those activities in the exercise of its public authority.

81. The sectors listed in Annex D — which include telecommunications — essentially relate to economic transactions [28] that often are or have been engaged in by the State in the exercise of its public authority just because of their significance to the public interest, but which can also be provided by private-sector undertakings. [29] Some of the economic sectors stated have now been liberalised. Private undertakings are here actually in competition with former monopoly suppliers, some of which have been

27 — Judgment in Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 22.

28 — See the Opinion delivered by Advocate General Alber in Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, point 69.

29 — Annex D lists a total of 13 activities including, as well as telecommunications, the supply of water, gas and electricity, the transport of goods and passenger transport, port and airport services, the running of trade fairs and exhibitions, publicity bodies and travel agencies, the running of staff shops, etc.

privatised and some of which are still State-owned. At the time that the Sixth VAT Directive was adopted in 1977 it clearly took such a development into account.

82. If the award of mobile communications frequencies should be classified as an activity in the telecommunications sector not carried out on such a small scale as to be negligible it would be subject to value added tax in any event irrespective of the exercise of public authority or of any actual distortion of competition.

83. In the light of the structure of the provision it would seem appropriate, in the context of appraising the first, second, and third questions, to answer the fifth question referred for a preliminary ruling first of all since its purpose is to interpret the first subparagraph of Article 4(5) of the Sixth Directive. It is only if the allocation of frequency use rights was effected in the exercise of public authority that it will then be necessary to determine whether the State body taking that action should be taxable under the second subparagraph of Article 4(5) because, were it otherwise, there would be a risk of significant distortions of competition.

2. The first question: does the term 'Telecommunications' in Annex D to the Sixth Directive also encompass the auctioning of frequency use rights?

84. The parties are essentially in disagreement as to whether the term 'Telecommunications' in point 1 of Annex D means just the supply of telecommunications services [30] per se — which is the view of the defendant, of the Governments involved and of the Commission — or whether it also includes other activities in connection with the allocation of frequency use rights, which is the view taken by the claimants.

85. The wording of Annex D does not provide any clarification of this disputed issue. No significance can be attributed to the fact that the German version uses the now outdated term *'Fernmeldewesen'* and not the term *'Telekommunikation'*. Other versions use the terms here that have always been customary in their languages (for instance *'telecommunications'* or *'télécommunications'*). What is more, the terms

30 — The United Kingdom Government refers in this context to the definition of telecommunications services in Article 2(4) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP) (OJ 1990 L 192, p. 1), which has since been repealed but according to which 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television.

'*Fernmeldewesen*' and '*Telekommunikation*' are virtually synonymous, as the German Government has correctly stated.

— Historical approach

86. Taking a historical approach, it could conceivably be argued that the award of mobile communications frequencies to private undertakings could not be covered by the term 'telecommunications' because on the date that the Directive was adopted in 1977 the State administrative postal authorities were providing all telecommunications services under their own direct management. The Community legislature probably did not therefore originally intend to adopt legislation in relation to the allocation of radio frequencies to private suppliers.

87. T-Mobile Austria does nevertheless suggest that in the context of a historical approach account might be taken of changes in factual circumstances (evolutive interpretation) so that it might be permissible to ask what, historically, the legislature might have wished to provide having regard to the present starting position. [31] If that approach is taken, the idea that the legislature might also have wished to include the allocation of frequencies in the term 'telecommunications' cannot be discounted out of hand.

88. However, the historical approach to interpretation is nevertheless of only subsidiary importance and is not decisive on its own. [32] The provisions of the Sixth VAT Directive should really also be interpreted systematically, with particular reference to its objective.

— Systematic approach

89. The definition of telecommunications services in the 10th indent of Article 9(2)(e) of the Sixth Directive [33] might initially play a part in such a systematic approach. This reads:

'Telecommunications services shall be deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the

31 — T-Mobile Austria refers, in relation to this method of interpretation, to K. Larenz, *Juristische Methodenlehre*, 6th edition, Munich 1991, pages 329 and 344.

32 — See in this context my Opinion delivered on 13 July 2006 in Case C-278/05 *Robins and Burnett*, not yet published in the ECR, points 80 and 81.

33 — The provision was inserted by Council Directive 1999/59/EC of 17 June 1999 amending Directive 77/388/EEC as regards the value added tax arrangements applicable to telecommunications services (OJ 1999 L 162, p. 63).

related transfer or assignment of the right to use capacity for such transmission, emission or reception ...'

90. Article 9 stipulates the location that is to be considered the place where a service is supplied. Article 9(2)(e) then states inter alia in respect of the telecommunications services described there that for cross-border services the place where the customer is established is to be deemed the place where the services are supplied.

91. In so far as certain Governments and the Commission have considered reference to that definition to be at all appropriate they have taken the view that it only encompasses telecommunications services in the narrower sense. The rights of use mentioned in that provision, namely 'the right to use capacity for such transmission, emission or reception', refer, in their opinion, to the infrastructure and not to frequency use rights.

92. Some of the claimants have come to the opposite conclusion from this passage, the English version of which reads 'including the related transfer or assignment of the right to use capacity for such transmission, emission or reception'. They argue that the term *capacity* is also being used in the sense of *frequency spectrum capacity*.

93. The English version does admittedly appear to allow of such an interpretation; however, other language versions support the interpretation put on it by the Governments concerned and by the Commission. [34] In the case of divergence between the language versions particular significance is to be attached to the meaning and purpose of a provision, [35] which also militates against including the award of frequencies here.

94. As the Netherlands Government has correctly argued, the legislation was intended to ensure that telecommunications services provided from outside the Community to customers in the Community were taxed in the Community. [36] This recital only relates to telecommunications services in the narrower sense as the frequency use rights are always awarded by the appropriate national authorities. What is more, most of the parties to whom they are awarded, who are the customers in this transaction, would also have their place of establishment in the State allocating the frequencies as it is hardly

34 — See, in addition to the German version cited, the Italian version in particular (ivi compresa la cessione e la concessione, ad esse connesse, di un diritto di utilizzazione a *infrastrutture* per la trasmissione, l'emissione o la ricezione), the Dutch version (met inbegrip van de daarmee samenhangende overdracht en verlening van rechten op het gebruik van *infrastructuur* voor de transmissie, uitzending of ontvangst) and the French version (y compris la cession et la concession y afférentes d'un droit d'utilisation de *moyens* pour une telle transmission, émission ou réception) — the emphasis is mine.

35 — See the judgments in Case C-372/88 *Cricket St. Thomas* [1990] ECR I-1345, paragraph 19, Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 22, and Case C-384/98 *D.* [2000] ECR I-6795, paragraph 16.

36 — See the fourth recital in the preamble to Directive 1999/59 (cited in footnote 33), which reads:
'Action should be taken to ensure, in particular, that telecommunications services used by customers established in the Community are taxed in the Community.'

conceivable that a UMTS mobile communications network would be set up and operated without having a place of establishment or a subsidiary in the State concerned.

95. Certain Governments and the Commission also refer to the definition of telecommunications services contained in the relevant internal market directives. It is certainly in accordance with the practice of the Court to also have regard, when interpreting the Sixth VAT Directive, to definitions in legal acts which relate to the sector concerned and do not pursue aims that diverge from VAT law. [37]

96. Article 2(4) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision [38] defines telecommunications services as 'services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television'. According to that definition the allocation of frequency use rights does not constitute a telecommunications service.

97. There is doubt, however, as to whether the definitions cited can be applied to Annex D without any proviso because they each refer to *telecommunications services*, whereas Annex D lists *telecommunications*. This term could be construed as a wider description of that sector of activity, including activities other than telecommunications services in the narrower sense.

— Teleological approach

98. What is decisive, however, is the spirit and purpose of the provision in the third subparagraph of Article 4(5) of the Sixth Directive in conjunction with Annex D. As Advocate General Alber has said, the activities catalogued in Annex D are activities where the economic connection is primary and clear. [39]

99. As those supplies are, or could be, *typically* offered by private-sector undertakings as well, there is a presumption of a

37 — See most recently the judgment in Case C-169/04 *Abbey National and Others* [2006] ECR I-4027, paragraph 61 et seq., and point 73 et seq. of my Opinion in that case, delivered on 8 September 2005.

38 — OJ 1990 L 192, p. 1. Directive 1990/387 has now been repealed by Directive 2002/21 (cited in footnote 11). The definition of electronic communications service contained in Article 2(c) of the new Framework Directive includes telecommunications and, like its predecessor directive, is geared towards the conveyance of signals on electronic communications networks.

39 — Opinion in *Fazenda Pública* (cited in footnote 28, point 69).

material effect on competition in general. The purpose of the legislation is to put the State in the same position in these circumstances as a private-sector taxable person. Under the second subparagraph of Article 4(5) other State transactions are made subject to value added tax only in particular cases where there is a risk of significant distortions of competition.

100. Equating the State with private-sector taxable persons is only appropriate in relation to telecommunications services in the narrower sense as both supplies can now also be offered by private-sector undertakings. As things stand at present, however, [40] the initial allocation of frequency use rights is a task that is reserved to the State. [41] Even if the allocation of frequency use rights might possibly in certain circumstances have to compete with the resale of such rights by private concerns, [42] it is not appropriate to equate the State in general with private-sector taxable persons in that sphere of activity. It is only necessary to examine whether the State transaction should be taxed under the second subparagraph of Article 4(5) of the Sixth Directive in order to protect competition.

101. The answer to the first question referred for a preliminary ruling must therefore be that, as things stand at present, the term 'telecommunications' in point 1 of Annex D to the Sixth Directive does not include the allocation by the State of frequency use rights to supply mobile communications services.

3. The second and third questions: the 'non-negligible' extent of an activity within the meaning of the third subparagraph of Article 4(5) of the Sixth Directive

102. Under the third subparagraph of Article 4(5) of the Sixth Directive two conditions must be fulfilled in order for bodies governed by public law to always be deemed taxable persons: they must pursue one of the activities listed in Annex D and the extent of their activities must not be negligible.

103. As already ascertained in the answer to the first question, the allocation of frequency use rights by the Telekom-Control-Kommission did not constitute a 'telecommunications service' within the meaning of point 1 of Annex D to the Sixth Directive.

40 — However, the Commission is considering introducing a more market-based approach to spectrum management (see the Communication from the Commission of 14 September 2005, A market-based approach to spectrum management in the European Union, COM(2005) 400 final).

41 — See point 102 et seq. below.

42 — See the observations on the fourth question (point 124 et seq. below).

104. Hence, there is no need to examine whether the extent of the activity was negligible even though the Member State received a considerable amount of revenue as a result of it, which is what the third question is aiming at. The consequences of national transposing legislation differing from the Directive on this point are also unimportant. The second question therefore, like the third one, does not require an answer.

4. The fifth question: the exercise of public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive

105. Under the first subparagraph of Article 4(5) of the Sixth Directive two conditions must be fulfilled in order for there to be no liability to tax: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. [43]

106. The Court has ruled with regard to the first condition that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. [44] There, however, the Court was particularly concerned with persons pursuing an independent economic activity who were not part of the public administration. [45]

107. The Telekom-Control-Kommission is located at Telekom-Control GmbH. Although its form is that of a company governed by private law none of the parties involved in this case have expressed any doubt as to whether the Telekom-Control-Kommission should be considered part of the public administration. It is for the national court to examine whether this categorisation is correct under national law.

108. The Court put the second condition in concrete terms in *Fazenda Pública* v *Câmara Municipal do Porto*: [46]

'As regards the latter condition, it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons ... [47].

43 — Judgments in Case C-202/90 *Ayuntamiento de Sevilla* [1991] ECR I-4247, paragraph 18, and in *Commission* v *Greece* (cited in footnote 15, paragraph 34) and *Commission* v *United Kingdom* (cited in footnote 15, paragraph 49).

44 — See the judgments in *Commission* v *Netherlands* (cited in footnote 15, paragraph 21), *Ayuntamiento de Sevilla* (cited in footnote 43, paragraph 19) and *Commission* v *Greece* (cited in footnote 15, paragraph 40).

45 — See the judgments in *Commission* v *Netherlands* (cited in footnote 15, paragraph 22) and *Ayuntamiento de Sevilla* (cited in footnote 43, paragraph 20).

46 — Judgment in Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraphs 16 and 17.

47 — The Court refers here to the judgments in *Comune di Carpaneto Piacentino*, cited in footnote 27, paragraph 15, and in Case C-4/89 *Comune di Carpaneto Piacentino and Others* [1990] ECR I-1869, paragraph 10.

It is thus clear from the settled case-law of the Court that activities pursued as public authorities within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators ... [48]'.

109. The Court has also stated that the subject-matter or purpose of the activity is not relevant to such a determination. [49]

110. The claimants take the view that when auctioning the frequency use rights the State was acting as a private economic operator. Its form was that of a body governed by private law and it received a large amount of revenue in consideration of the allocation of the frequencies.

111. The Member States concerned in these proceedings and the Commission, on the other hand, stress that under the relevant Community law and national legislation the allocation of the frequency use rights was reserved exclusively to the State, which has special obligations in that respect.

112. It should be noted that under Article 2(1)(a) of Directive 97/13 only a State regulatory authority is permitted to award individual licences to operate a telecommunications network. The authority must comply with the requirements set out in Articles 9 and 10 of the Directive. If a Member State only awards a limited number of individual licences it has to make its selection on the basis of criteria which are objective, non-discriminatory, detailed, transparent and proportionate (Article 10(3) of Directive 97/13). The provisions of Article 11(2) of Directive 97/13 apply to charges imposed in this connection.

113. Although final appraisal of the position under national law is reserved to the referring court there can be no doubt that the initial allocation of frequencies under the Telekommunikationsgesetz can be undertaken only by the Telekom-Control-Kommission. The obligations imposed upon it in that connection under national law are based on the requirements of Directive 97/13.

114. No party in the private sector can directly grant such rights. Parties in the private sector can at most transfer frequencies allocated by the State between them-

48 — The Court refers here to the judgments cited in footnote 15 in *Commission* v *United Kingdom* (paragraph 50) and *Commission* v *Greece* (paragraph 35) as well as other judgments in parallel proceedings.

49 — Judgment in Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others*, cited in footnote 27, paragraph 13, and the judgment in *Fazenda Pública* (cited in footnote 46, paragraph 19).

selves. A transfer is not comparable with an initial allocation, however, as it is based only on a secondary right of disposal whereas an initial allocation is an original State function. One would certainly not put the exchange of bank notes between private individuals on a par with the State's authority to issue them. This permits the conclusion that the auctioning of the frequency use rights was an activity which was the responsibility of a State body acting as a public authority.

115. This is not precluded by the fact that, when allocating the frequencies, the State had recourse to an auction, which is a procedure deriving from civil law and one which can therefore also be used by parties in the private sector.

116. There is no need to ascertain here what significance the auction procedure had in the context of the whole allocation process. Some of the claimants take the view that as a result of the auction a civil-law contract to grant the frequency use rights came into effect. Others concede that the true allocation did not occur until the subsequent administrative act took place. They argue that the auction just served to select the undertakings to which the rights were then assigned in administrative-law form.

117. The Court has considered the manner in which activities are carried out to be crucial, but it would not be enough to construe this as just meaning the manner in which the transaction is to be conducted, that is to say its form. It also depends primarily on whether private individuals can engage in any comparable activity at all on the basis of the relevant legislation. If that were to be the case the State would have to be treated as a taxable person so as not to jeopardise the neutrality of imposing value added tax. The fact that, when exercising the powers exclusively afforded to it, the State makes use of procedures available under the civil law does not, however, have any effect on fiscal neutrality.

118. The claimants' argument would mean that public authority would only be exercised where the State adopts an administrative act, that is to say exercises public authority in the strict sense of the term. However, the Court expressly declined to accept that interpretation in the 'Motorway toll' judgments.[50]

119. In *Fazenda Pública* v *Câmara Municipal do Porto*[51] the Court nevertheless concluded from the fact that the management of public car parks involved the exercise of public powers that the activity was subject to rules of public law. Acts of public authority where the State and citizens

50 — See the judgments in *Commission* v *United Kingdom* (cited in footnote 15, paragraph 51) and *Commission* v *Greece* (cited in footnote 15, paragraph 36).

51 — *Fazenda Pública* (cited in footnote 46, paragraph 22).

are in a relationship of superiority/subordination are considered by the Court to constitute an indication of the exercise of public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive but are not an essential prerequisite. [52]

120. The uniform application of the Sixth VAT Directive might also be jeopardised by concentrating on the legal framework of the form of a transaction, as one State's use of forms of transaction under private law might possibly be wider than another's. The manner in which forms of transaction under public law are distinguished from those under private law might also differ between the various national legal systems.

121. It should also be noted that the first subparagraph of Article 4(5) of the Sixth Directive only requires the transactions to be engaged in *as public authorities*. The auctioning of frequency use rights must not therefore be considered in isolation. [53] On the contrary, that activity comes within the overall framework of spectrum management and regulation of the telecommunications sector. The State essentially exercises public powers in this context, for instance, by transposing the provisions of the UMTS Decision or the internal market directives into national law.

122. It is not inconsistent for the wider legal context of an activity to be taken into account at this stage of appraisal, when only the external aspect of a transaction is considered relevant to its classification as an economic activity. It is indeed in conformity with the logic of Article 4 of the Sixth Directive to ensure a comprehensive application of the directive at the first stage by affording Article 4(1) and (2) a wide interpretation and to then have regard to the specific legal framework conditions for State actions when applying Article 4(5).

123. Finally, categorisation of the auctioning of the frequencies as an activity in the exercise of public authority is not precluded by the fact that as a result the State received a high amount of revenue. This can admittedly lead to the State action being attributed economic characteristics within the meaning of Article 4(2) of the Sixth Directive — as demonstrated. Nevertheless, the State will still be exercising public authority where it acts on the basis of a special legal regime applicable to it alone.

52 — See the judgment in Case C-4/89 *Comune di Carpaneto Piacentino*, cited in footnote 27, paragraph 11.

53 — In *Fazenda Pública* (cited in footnote 46, paragraph 22) the Court did not consider the letting of a parking space in isolation but had regard to the management of public car parks as a whole.

124. The answer to the fifth question must therefore be:

Activities pursued by bodies governed by public law under a special legal regime applicable to them are to be considered activities engaged in as public authorities within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive. The exercise of public authority is not precluded by the fact that, in fulfilling the responsibilities exclusively allocated to it, the State makes use of a procedure derived from civil law or receives a high amount of revenue from its activity.

5. The fourth question: Does treatment as a non-taxable person lead to significant distortions of competition?

125. Under the second subparagraph of Article 4(5) of the Sixth Directive State bodies are also to be considered taxable persons in respect of activities engaged in as a public authority if treatment as non-taxable persons would lead to significant distortions of competition.

126. The Court held in *Comune di Carpaneto Piacentino* that the Member States are required to 'ensure that bodies governed by public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which the treatment of those bodies as non-taxable persons could lead to significant distortions of competition ...'. [54]

127. It was for the State alone to initially award frequency use rights, so that there is no question of there being any competition between identical services supplied by the State and those provided by other suppliers at the time that the frequencies were auctioned. However, the claimants argue that the award of frequencies by the State without being subject to VAT could come into competition with any resale of frequency use rights by private-sector suppliers.

128. It should be noted, first, that capacity as a taxable person or non-taxable person has to be determined at the time of the transaction. [55] Consequently, the effect on competition must also, in principle, exist at that date.

54 — Judgment in *Comune di Carpaneto Piacentino and Others* (cited in footnote 27, paragraph 24). See also the judgment in Case C-430/04 *Feuerbestattungsverein Halle* [2006] ECR I-4999, paragraph 25.

55 — Judgment in Case C-378/02 *Waterschap Zeeuws Vlaanderen* [2005] ECR I-4685, paragraph 32.

129. This means that there must already have been a market for those rights of use at the time that the frequencies were allocated, that is to say, firstly, that there must have been comparable rights of use already in existence and, secondly, that those rights must have been transferable between parties in the private sector. Only in these circumstances can the allocation of frequencies by the State be in competition with the transfer of frequency use rights by parties in the private sector.

130. Admittedly, the Court ruled in *Taksatorringen*[56] that Article 13A(1)(f) of the Sixth Directive also covers distortions of competition to which the exemption might give rise in the future. However, the risk of distortions of competition must be real.[57]

131. The risk of distortions of competition can be real even if no competitor is at present offering competing supplies subject to value added tax. A disadvantageous starting point is in itself liable to dissuade potential competitors from becoming active in the market. A real risk of this happening is ruled out, however, where there are no potential competitors to offer supplies in competition with frequencies awarded by the State because of the legislative framework.

132. It should be noted with regard to the frequencies for UMTS mobile communications that, at the time that the auction took place in the year 2000, no comparable frequency use rights were available on the market. It is uncertain whether this also applies to the GSM-DCS-1800 frequency use rights that were allocated to tele.ring in 1999 or to the frequencies for the TETRA trunked radio system which master-talk received in February 2000.

133. If, according to the findings of the referring court, there were already comparable frequency use rights available at the relevant times it would then be necessary to ascertain whether these could have been transferred between parties in the private sector under the national law then in force. That transfer between parties in the private sector must also be subject to value added tax.

134. Spectrum trading in the narrower sense, provision for which was also made in Article 9(4) of Directive 2002/21, undoubtedly did not become possible until 2003, when the new Telekommunikationsgesetz entered into force. However, the transfer of frequency use rights that has been possible since then is of no significance to the competitive position at the time that the frequencies were allocated. These circumstances will nevertheless have to be taken

56 — Judgment in Case C-8/01 *Taksatorringen* [2003] ECR I-13711.

57 — *Taksatorringen* judgment (cited in footnote 56, paragraph 63).

into account if the State allocates frequencies once again. [58]

135. The parties are uncertain, however, whether the already existent possibility of transferring a licence, including its associated frequency use rights, constitutes a transaction that is in competition with the allocation of frequencies by the State. [59] Whether this is the case depends on an interpretation of national legislation, which is for the referring court to decide.

136. Even if there were already potential competition between the State allocation and a sale by parties in the private sector in relation to the TETRA and GSM frequencies the State transaction would only have to be subject to tax if, according to the findings of the referring court, treatment as a non-taxable person would lead to *significant* distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive.

137. This would be the case, for instance, if the State were to provide *final consumers* with the same supplies as those provided by private undertakings, so that in the former case customers would pay the charge without VAT and in the latter case plus VAT. [60] As final consumers are not entitled to deduct input tax the full amount of VAT would make the transaction with a private supplier that much more expensive.

138. If, on the other hand, a *taxable person* were to acquire frequency use rights from a party in the private sector this would only prove less attractive than acquiring it from the State in certain types of cases — and also only to a minimal extent — as the value added tax could either be deducted as input tax immediately or refunded within a short period. Admittedly, the associated funding costs could be large in absolute terms but in the context of the overall sums expended on acquiring the frequency use rights the extent of that expenditure would not, in general, be such as to give rise to significant distortions of competition.

58 — According to CEPT ECC Decision (02) 06 the frequency band 2500-2690 MHz is to be made available by 1 January 2008 for IMT-2000 UMTS mobile communications, in addition to the frequencies already licensed for the first 3G services.

59 — T-Mobile Austria argues that the transfer of a licence takes place in conjunction with the transfer of the whole undertaking. Whether there is a transaction subject to VAT in such a case depends on the transposition of Article 5(8) of the Sixth Directive.

60 — The hypothesis put forward by the claimants that a non-taxable person (such as a State body) who is not entitled to deduct input tax might acquire a frequency would seem very improbable. If a State body were to use a frequency in accordance with its provisions in order to supply telecommunications services for a fee it would be liable to tax under the third subparagraph of Article 4(5) of the Sixth Directive in conjunction with Annex D. The argument that deduction of input tax might be precluded if the licences were not used for activities liable to tax is also somewhat hypothetical.

139. Although trading in UMTS frequencies did not become possible until after they had been awarded and the framework terms and conditions for their transfer had been drawn up, the claimants consider that distortions of competition could also arise here if they were granted by the State free of VAT.

140. First, however, as already established, there must be a potentially competitive relationship in existence at the time of the transaction in question. The possibility of the necessary legal framework conditions being created later on is not sufficient because liability to tax cannot depend on prognoses that are to a greater or lesser extent uncertain. Second, the disadvantage to those parties who subsequently acquire UMTS frequency use rights from a private-sector supplier would only consist of any costs incurred in funding the input tax not immediately deductible, which would not amount to significant distortions of competition.

141. The longer the period that elapses between the allocation of frequencies and the introduction of spectrum trading, the more the whole market environment will change. Other factors, such as, for example, reassessment of the economic value of the use of frequencies in the light of the emergence of competing technology for UMTS mobile communications, will then have quite different prominence compared to any liquidity problems as a result of a temporary outlaying of input tax. This consideration also shows that a distortion of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive can only be established, in principle, if both transactions are available at the same time and the potential licensee has a choice between two comparable offers.

142. The answer to the fourth question must therefore be:

A significant distortion of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive only exists where there is a real risk that treatment of the State as a non-taxable person has a materially adverse effect on the competitive position of present or potential providers of competing supplies. No such risk exists, in principle, where at the time of the transactions by the State, private-sector suppliers are precluded by the legal framework conditions from bringing supplies onto the market that are in competition with State supplies.

C — *Seventh question: Is the frequency use payment to be considered a gross or net figure?*

143. By this question the referring court asks whether, under the Sixth Directive, the frequency use payments are to be construed

as gross or net payments — that is to say, whether the agreed payments already include value added tax or are payments to which value added tax may still be added.

144. As it has already been established that the allocation of frequencies is not a transaction subject to VAT there is no need to answer the seventh question referred to the Court.

145. Quite apart from this, the Sixth Directive does not contain any provisions on this point. Whether or not a payment includes VAT all depends on what the parties actually agreed. If this should not be clear the content of their agreement has to be ascertained according to the rules of interpretation applicable under national law, which it is for the courts of the Member States alone to determine.

V — Conclusion

146. In conclusion, I propose that the replies to the questions referred by the Landesgericht für Zivilrechtssachen Wien should be as follows:

(1) In the circumstances of the main proceedings the auctioning by a State of the right to use defined parts of the electromagnetic spectrum to supply mobile communications services for a specified period of time is to be considered exploitation of intangible property for the purpose of obtaining income therefrom on a continuing basis and is therefore to be considered an economic activity for the purposes of Article 4(1) and (2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment.

(2) As things stand at present, the term 'telecommunications' in point 1 of Annex D to the Sixth Directive does not include the allocation by the State of frequency use rights to supply mobile communications services.

(3) Activities pursued by bodies governed by public law under a special legal regime applicable to them are to be considered activities engaged in as public authorities within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive. The exercise of public authority is not precluded by the fact that, in fulfilling the responsibilities exclusively allocated to it, the State makes use of a procedure derived from civil law or receives a high amount of revenue from its activity.

(4) A significant distortion of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive only exists where there is a real risk that treatment of the State as a non-taxable person has a materially adverse effect on the competitive position of present or potential providers of competing supplies. No such risk exists, in principle, where at the time of the transactions by the State, private-sector suppliers are precluded by the overall legal regime from bringing supplies onto the market that are in competition with State supplies.