

JUDGMENT OF THE COURT (Grand Chamber)

8 June 2010 *

In Case C-58/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queens's Bench Division, (Administrative Court) (United Kingdom), made by decision of 18 December 2007, received at the Court on 13 February 2008, in the proceedings

The Queen on the application of

Vodafone Ltd,

Telefónica O2 Europe plc,

T-Mobile International AG,

Orange Personal Communications Services Ltd

* Language of the case: English.

V

Secretary of State for Business, Enterprise and Regulatory Reform,

interested parties:

Office of Communications,

Hutchison 3G UK Ltd,

GSM Association,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, P. Lindh and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, P. Küris, T. von Danwitz (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 28 April 2009,

after considering the observations submitted on behalf of:

- Vodafone Ltd, by D. Pannick QC and R. Kreisberger, Barrister,
- Telefónica O2 Europe plc, T-Mobile International AG and Orange Personal Communications Services Ltd, by D. Anderson QC, I. Ross, M. Lemanski, Solicitors, and D. Scannell, Barrister,
- Hutchison 3G UK Ltd, by F. Richmond, Solicitor, and B. Kennelly, Barrister,
- GSM Association, by B. Amory and S. Clerckx, *avocats*, and M. Chamberlain, Barrister,
- the United Kingdom Government, by I. Rao, acting as Agent, and J. Turner QC, and T. Ward, Barrister,
- the Netherlands Government, by C.M. Wissels and Y. de Vries, acting as Agents,

- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the European Parliament, by E. Perillo, J. Rodrigues and L. Visaggio, acting as Agents,
- the Council of the European Union, by D. Canga Fano and G. Kimberley, acting as Agents,
- the Commission of the European Communities, by F. Benyon and A. Nijenhuis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2009,

gives the following

Judgment

¹ This reference for a preliminary ruling concerns the validity of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ 2007 L 171, p. 32).

- 2 The reference has been made in proceedings between Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG and Orange Personal Communications Services Ltd, operators of public mobile telephone networks in the United Kingdom, the European Union and other international markets, and the Secretary of State for Business, Enterprise and Regulatory Reform concerning the validity of provisions for the implementation of Regulation No 717/2007 adopted by the United Kingdom of Great Britain and Northern Ireland.

Legal context

The regulatory framework for electronic communications networks and services

- 3 In 2002, the Community legislature adopted, on the basis of Article 95 EC, a regulatory framework for electronic communications networks and services ('the Regulatory Framework') so that all transmission networks and associated services would be subject to the same regulatory framework, which consists, in particular, of 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 ('the Framework Directive') (OJ 2002 L 108, p. 33), as well as specific directives. That framework established a mechanism allowing national regulatory authorities ('NRAs'), where there is no effective competition on a relevant market, to impose ex ante regulatory obligations on undertakings in the electronic communications sector designated as having significant market power following an analysis of the market concerned.

Decision 2002/627/EC

- 4 Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services (OJ 2002 L 200, p. 38) created an advisory group of the NRAs on electronic communications networks and services. Pursuant to the first paragraph of Article 3 of that decision, the role of that group (the European Regulators Group, 'ERG') is to advise and assist the European Commission in consolidating the internal market for electronic communications networks and services.

Regulation No 717/2007

- 5 Following a public consultation of interested parties, on 12 July 2006 the Commission presented an impact assessment of policy options in relation to a Commission proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community (SEC(2006) 925, 'the impact assessment'). That assessment provided the basis for a proposal for a regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21 (COM(2006) 382 final, 'the proposal for a regulation'), presented the same day, which led to the adoption of Regulation No 717/2007 on the basis of Article 95 EC.
- 6 That regulation caps the wholesale and retail charges terrestrial mobile operators may charge for the provision of roaming services on public mobile networks for voice calls between Member States ('Community-wide roaming services').

The functioning of roaming services

- 7 The functioning of roaming services may be described as follows, in particular in the light of the definitions in Article 2 of Regulation No 717/2007.
- 8 Roaming services offered by mobile operators consist in offering customers travelling abroad continuity of service, allowing them to make or receive calls on networks in other Member States.
- 9 In order to be able to provide roaming services, the operator of a home network enters into specific wholesale agreements with operators on networks located in other Member States. The local operator of the Member State visited by a home network customer, with which the operator of the home network has entered into such an agreement, delivers the call to the customer. The service provided by the visited network to the home network constitutes 'the wholesale roaming service'.
- 10 The home provider is an undertaking which provides a roaming customer with terrestrial public mobile telephony services, either via its own network or as a mobile virtual network operator or reseller of mobile voice telephony services. The service provided by such a provider to roaming customers is 'the retail roaming service'.
- 11 Retail roaming services form part of the mobile telephony agreement or contract entered into between the customer and the home provider and are charged for like other services falling under that agreement or contract. Thus, the conditions under which retail roaming services are provided depend on the agreement or contract that has been concluded as well as the specific obligations that may be imposed by the NRA which regulates the home provider.

The content of Regulation No 717/2007

- 12 As regards the prices payable by users of public mobile telephone networks for retail roaming services, recital 1 in the preamble to Regulation No 717/2007 states that '[t]he high level of the prices payable ... is a matter of concern for [NRAs], as well as for consumers and the Community institutions. The excessive retail charges are resulting from high wholesale charges levied by the foreign host network operator and also, in many cases, from high retail mark-ups charged by the customers' own network operator. Reductions in wholesale charges are often not passed on to the retail customer. Although some operators have recently introduced tariff schemes that offer customers more favourable conditions and lower prices, there is still evidence that the relationship between costs and prices is not such as would prevail in fully competitive markets'.
- 13 Recital 4 in the preamble to Regulation No 717/2007 indicates that the regulation complements and supports, insofar as Community-wide roaming is concerned, the regulatory framework, which had not provided NRAs with sufficient tools to take effective and decisive action with regard to the pricing of Community-wide roaming services.
- 14 In this respect, recital 6 in the preamble to the regulation states:
- '... the work undertaken by the [NRAs] (both individually and within the [ERG]) in analysing the wholesale national markets for international roaming has demonstrated that it has not yet been possible for [an NRA] to address effectively the high level of wholesale Community-wide roaming charges because of the difficulty in identifying undertakings with significant market power in view of the specific circumstances of international roaming, including its cross-border nature.'

15 Recitals 8 and 9 in the preamble to Regulation No 717/2007 state:

‘(8) In addition, the [NRA] responsible for safeguarding and promoting the interests of mobile customers normally resident within their territory are not able to control the behaviour of the operators of the visited network, situated in other Member States, on whom those customers depend when using international roaming services. This obstacle could also diminish the effectiveness of measures taken by Member States based on their residual competence to adopt consumer protection rules.

(9) Accordingly, there is pressure for Member States to take measures to address the level of international roaming charges, but the mechanism for ex ante regulatory intervention by [NRAs] provided by the ... regulatory framework ... has not proved sufficient to enable those authorities to act decisively in the consumers’ interest in this specific area.’

16 Recitals 12 and 13 in the preamble to the regulation indicate that the regulation takes into account the unique characteristics of the roaming markets, which justify exceptional measures which go beyond the mechanisms laid down in the regulatory framework.

17 As regards the objectives of Regulation No 717/2007, recital 14 in the preamble thereto states that ‘[r]egulatory obligations should be imposed at both retail and wholesale level to protect the interests of roaming customers, since experience has shown that reductions in wholesale prices for Community-wide roaming services may not be reflected in lower retail prices for roaming owing to the absence of incentives for this to happen. On the other hand, action to reduce the level of retail prices without addressing the level of the wholesale costs associated with the provision of these services could risk disrupting the orderly functioning of the Community-wide roaming market.’

- 18 According to recital 16 in its preamble, the regulation introduces '[a] common approach ... for ensuring that users of terrestrial public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls ... In view of the cross-border nature of the services concerned, this common approach is needed so that mobile operators can operate within a single coherent regulatory framework based on objectively established criteria.'
- 19 Recital 19 in the preamble to Regulation No 717/2007 states that 'this regulatory approach should ensure that retail charges for Community-wide roaming provide a more reasonable reflection of the underlying costs involved in the provision of the service than has been the case.'
- 20 In this respect, according to recital 38 in the preamble to the regulation, since those objectives 'cannot be sufficiently achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the [EC] Treaty'.
- 21 As regards the subject-matter of Regulation No 717/2007, Article 1(1) thereof states:

'This Regulation introduces a common approach ... thereby contributing to the smooth functioning of the internal market while achieving a high level of consumer protection, safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice ...'

- ²² According to Article 2(2)(a) of Regulation No 717/2007, ‘Eurotariff’ means ‘any tariff not exceeding the maximum charge, provided for in Article 4, which a home provider may levy for the provision of regulated roaming calls in compliance with that Article’.
- ²³ Article 3(1) of the regulation establishes the maximum average wholesale charge that the operator of a visited network may levy from the operator of a roaming customer’s home network for the provision of a regulated roaming call originating on that visited network. That charge, inclusive inter alia of origination, transit and termination costs, is set initially at EUR 0.30 per minute, then EUR 0.28 euro per minute from 30 August 2008 and at EUR 0.26 per minute from 30 August 2009.
- ²⁴ As regards retail charges, Article 4(1) and (2) of Regulation No 717/2007 requires home providers to offer all existing roaming customers a Eurotariff for the provision of a regulated roaming call which must not exceed a price ceiling fixed, to begin with, at EUR 0.49 per minute for any call made and EUR 0.24 per minute for any call received. The price ceiling per minute for calls made is subsequently to decrease to EUR 0.46, and then EUR 0.43, and the price ceiling per minute for calls received to EUR 0.22, then EUR 0.19, on 30 August 2008 and 30 August 2009, respectively. Pursuant to Article 4(3), all existing roaming customers are to be given the opportunity by 30 July 2007 to opt deliberately for a Eurotariff or any other roaming tariff, and are to be allowed a period of two months within which to make their choice known to their home provider.
- ²⁵ According to Article 6 of the regulation, the home provider is required to provide all its roaming customers with information and there must be transparency regarding retail prices.

²⁶ Articles 1(3) and 10 of the regulation define the relationship between Regulation No 717/2007 and the regulatory framework. Article 1(3) provides:

‘This Regulation constitutes a specific measure within the meaning of Article 1(5) of the Framework Directive.’

²⁷ According to Article 10 of Regulation No 717/2007:

‘The following paragraph shall be added to Article 1 of Directive 2002/21/EC (Framework Directive):

“5. This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile telephone networks within the Community.”

²⁸ Further, in Article 11(1), Regulation No 717/2007 provides that the Commission is to review the functioning of the regulation and report to the European Parliament and the Council of the European Union no later than 30 December 2008. Pursuant to Article 13, the regulation expires on 30 June 2010.

The procedure in the main proceedings and the questions referred for a preliminary ruling

²⁹ The claimants brought judicial review proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), challenging the Mobile Roaming (European Communities) Regulations 2007, which gives effect to certain provisions of Regulation No 717/2007 in the United Kingdom. As a matter of substance, they sought to challenge the validity of Regulation No 717/2007 on three grounds, namely that its legal basis is inadequate, it is disproportionate and it offends against the principle of subsidiarity.

³⁰ The defendant in the main proceedings, the Secretary of State for Business, Enterprise and Regulatory Reform, took the view that the arguments put forward by the claimants in the main proceedings and by GSM Association were inadmissible, and that the challenge to the validity of the regulation was ill-founded.

³¹ The referring court granted the claimants in the main proceedings permission to apply for judicial review and decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Regulation (EC) No 717/2007 invalid, in whole or part, by reason of the inadequacy of Article 95 EC as a legal basis?

(2) Is Article 4 of Regulation (EC) No 717/2007 (together with Articles 2[2](a) and 6(3) insofar as they refer to the Eurotariff and obligations relating to the Eurotariff) invalid on the grounds that the imposition of a price ceiling in respect of retail roaming charges infringes the principle of proportionality and/or subsidiarity?’

The questions referred for a preliminary ruling

The first question

³² According to consistent case-law the object of measures adopted on the basis of Article 95(1) EC must genuinely be to improve the conditions for the establishment and functioning of the internal market (Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60, and Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771, paragraph 42). While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 37 and the case-law cited) or to cause significant distortions of competition (Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraphs 84 and 106).

³³ Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (*Germany v Parliament and Council*, paragraph 38 and the case-law cited, and Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593, paragraph 64; see also, to that effect, *United Kingdom v Parliament and Council*, paragraphs 60 to 64).

- ³⁴ Where an act based on Article 95 EC has already removed any obstacle to trade in the area that it harmonises, the Community legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty (see, to that effect, *British American Tobacco (Investments) and Imperial Tobacco*, paragraphs 77 and 78).
- ³⁵ In that respect, the Court held, in paragraph 43 of *United Kingdom v Parliament and Council*, that by using the expression ‘measures for the approximation’ in Article 95 EC the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.
- ³⁶ Moreover, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that consumer protection is a decisive factor in the choices to be made (see, regarding public health protection, *Germany v Parliament and Council*, paragraph 88; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 30).
- ³⁷ It is in the light of all of the above considerations that the question of whether the conditions governing recourse to Article 95 EC as the legal basis for Regulation No 717/2007 have been met must be examined.

- 38 According to Article 1 of Regulation No 717/2007 and recitals 16 and 38 in the preamble thereto, the regulation introduces a common approach so that users of terrestrial public mobile telephone networks do not pay excessive prices for Community-wide roaming services and so that mobile operators can operate within a single coherent regulatory framework based on objectively established criteria. It thus aims to contribute to the smooth functioning of the internal market in order to achieve a high level of consumer protection and maintain competition among operators of mobile telephone networks.
- 39 As is clear, in particular, from recital 1 in the preamble to Regulation No 717/2007 and point 1 of the explanatory memorandum to the proposal for a regulation, the level of retail charges for international roaming services, at the time of adoption of that regulation, was high and the relationship between costs and prices was not such as would prevail in fully competitive markets. Thus, the excessive retail charges resulted both from wholesale charges levied by the foreign host network operator and, in many cases, from high retail mark-ups charged by the home provider.
- 40 It is also evident that the high level of retail charges had been regarded as a persistent problem by NRAs, public authorities and consumer protection associations throughout the Community and that attempts to solve the problem using the existing legal framework had not had the effect of lowering charges.
- 41 In particular, the regulatory framework resulting from the rules applicable at the time Regulation No 717/2007 was adopted had not, as recitals 6 and 8 in the preamble to that regulation indicate, provided NRAs with sufficient tools to take effective and decisive action with regard, in particular, to the high level of wholesale prices for the services concerned, on which retail charges depend, because of the special circumstances of the wholesale market for roaming services and the cross-border nature of those services. In that respect, the Community legislature found that, on the one hand, NRAs had difficulty in identifying undertakings with significant market power

and, on the other hand, they could not control the behaviour of visited network operators in other Member States, on whom customers depend when they use Community-wide roaming services.

42 It was in that context that the Community legislature considered it necessary, as indicated in recitals 4 and 12 in the preamble to Regulation No 717/2007, to complement and support the provisions of the regulatory framework by adopting, on the basis of a different conceptual approach, that regulation as a specific *ex ante* regulatory measure taking into account the unique characteristics of the roaming markets in order to correct the inadequacy of that framework. The legislature stated in recital 4 that that framework had not provided NRAs with sufficient tools to take effective and decisive action with regard to the pricing of Community-wide roaming services and thus failed to ensure the smooth functioning of the internal market for those services. The legislature concluded that the said regulation was an appropriate means of correcting that situation.

43 In that same context, the Community legislature referred, in recital 8 in the preamble to Regulation No 717/2007, and in accordance with what had already been mentioned in point 1 of the explanatory memorandum to the proposal for a regulation, to the residual competence of the Member States to adopt consumer protection rules and took the view that the special circumstances of that context could diminish the effectiveness of measures taken by Member States based on that residual competence.

44 The Community legislature concluded from that, in recital 9 of the preamble to the regulation, that there was pressure for Member States to take measures to address the problem of the high level of retail charges for Community-wide roaming services, which was moreover confirmed by the Commission at the hearing.

- ⁴⁵ It follows that the Community legislature was actually confronted with a situation in which it appeared likely that national measures would be adopted aiming to address the problem of the high level of retail charges for Community-wide roaming services through rules fixing the rate of retail charges. As point 1 of the explanatory memorandum to the proposal for a regulation and point 2.4 of the impact assessment indicate, such measures would have been likely to lead to a divergent development of national laws.
- ⁴⁶ It was in the light of those circumstances that the Community legislature, in an effort to maintain competition among operators of mobile networks, as stated previously in paragraph 38 of this judgment, chose to act in order to forestall measures which would probably have been taken by the Member States based on their residual competence as regards consumer protection rules.
- ⁴⁷ As regards the functioning of the roaming market, as described in paragraphs 7 to 11 of this judgment, and taking into consideration the considerable interdependence of retail and wholesale charges for roaming services, it is clear that a divergent development of national laws seeking to lower retail charges only, without affecting the level of costs for the wholesale provision of Community-wide roaming services, would have been liable to cause significant distortions of competition and to disrupt the orderly functioning of the Community-wide roaming market, as is clear from recital 14 in the preamble to Regulation No 717/2007. Such a situation justified the Community legislature's seeking to protect the proper functioning of the internal market, as stated in paragraph 38 of this judgment.
- ⁴⁸ It follows from the foregoing that the object of Regulation No 717/2007 is indeed to improve the conditions for the functioning of the internal market and that it could be adopted on the basis of Article 95 EC.

- 49 Therefore, the answer to the first question referred for a preliminary ruling is that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulation No 717/2007.

The second question

- 50 By the second question, the referring court asks whether Regulation No 717/2007 infringes the principles of proportionality and subsidiarity by reason of the fact that it imposes not only a ceiling for wholesale charges per minute, but also for retail charges, and that it imposes an obligation to provide information about those charges to roaming customers.

Infringement of the principle of proportionality

- 51 According to settled case-law, the principle of proportionality is one of the general principles of Community law and requires that measures implemented through Community law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 68 and the case-law cited).
- 52 With regard to judicial review of compliance with those conditions the Court has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure

adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraphs 82 and 83; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123; *Alliance for Natural Health and Others*, paragraph 52; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 42).

- 53 However, even though it has a broad discretion, the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (see, to that effect, Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 48; Case C-86/03 *Greece v Commission* [2005] ECR I-10979, paragraph 96; and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 37).
- 54 The Court must therefore examine, on the basis of the abovementioned criteria, whether, as the claimants in the main proceedings argue inter alia, Regulation No 717/2007 infringes the principle of proportionality by reason of the fact that it does not confine itself to imposing ceilings for the wholesale charge, but also lays down ceilings for retail charges as well as an obligation to provide information about those charges to roaming customers.
- 55 In this respect, it must be recalled, first, that, before it drafted the proposal for the regulation, the Commission carried out an exhaustive study, the result of which is summarised in the impact assessment mentioned in paragraph 5 of this judgment. It follows that the Commission examined various options including, inter alia, the option of regulating retail charges only, or wholesale charges only, or both, and that it assessed the economic impact of those various types of regulation and the effects of different charging structures.

- 56 The fixing of ceilings on charges for the provision of retail roaming services through the Eurotariff provided for in Article 4(2) of Regulation No 717/2007 is aimed, *inter alia*, as is clear, in particular, from Article 1 and recitals 14 and 16 in the preamble to that regulation, at reducing the level of the charges that users of public mobile telephone networks have to pay for those services, in order to protect consumers.
- 57 Furthermore, it follows, in particular, from recital 19 in the preamble to Regulation No 717/2007 that the introduction of the Eurotariff ought to ensure that retail charges for Community-wide roaming services provide a more reasonable reflection of the underlying costs involved in the provision of those services than has been the case.
- 58 As is stated in paragraph 39 of this judgment, the average level of retail charges for a roaming call in the Community at the time of adoption of Regulation No 717/2007 was high and the relationship between costs and prices was not such as should have prevailed in fully competitive markets. Thus, the average retail charge for a roaming call was at that time EUR 1.15 per minute, or, in other words, as explained in the summary of the impact assessment, more than five times higher than the actual cost of providing the wholesale service.
- 59 The Eurotariff provided for in Article 4(2) of Regulation No 717/2007 has been set at a level that is significantly below that average charge. Furthermore, the ceilings on charges introduced in that article are set, as is clear from point 3 of the explanatory memorandum to the proposal for a regulation, in relation to the ceilings for the corresponding wholesale charges, so that the retail charges reflect more accurately the costs incurred by providers.
- 60 In those circumstances, the introduction by that provision of ceilings for retail charges must be considered to be appropriate for the purpose of protecting consumers against high levels of charges.

- 61 As to whether the measure at issue was necessary, it is argued that the said measure goes beyond what is necessary to achieve the objective pursued, given the competitive nature of retail markets. A less intrusive and more proportionate approach would have been to regulate wholesale charges only, while allowing competition in retail markets to bring retail prices down in the normal way, according to the rules of supply and demand, and leaving the NRAs free to intervene in cases where the markets were not functioning properly, on the basis of well-established regulatory criteria.
- 62 In this regard, it is apparent, in particular, from recital 14 in the preamble to Regulation No 717/2007 that the Community legislature proceeded on the basis that reductions in wholesale prices might not be reflected in lower retail prices for roaming owing to the absence of incentives for that to happen.
- 63 Referring to the explanatory memorandum to the proposal for a regulation, which served as the basis for the Community legislature when it adopted Regulation No 717/2007, the Parliament and the Commission submit, *inter alia*, that regulation of the wholesale market for Community-wide roaming services alone would not have ensured that the reduction in wholesale charges would be reflected in retail charges, given that there was no competitive pressure on operators to pass on that reduction. Experience had shown that a reduction in wholesale charges did not necessarily lead to a reduction in retail charges.
- 64 In this respect, the Council stated that the legislature considered retail controls to be necessary, in particular because, in that specific area, competition at retail level took place mainly in terms of the complete retail package and, for the majority of consumers, roaming was only a small part of that package and accordingly not a critical consideration when they choose or change their provider.

- ⁶⁵ The institutions that submitted observations to the Court also referred to the impact assessment, which shows that the dynamics of the roaming markets were considered to be complex and in the process of changing, so that there was a risk that a reduction in wholesale charges would not be reflected in retail charges. The impact assessment also shows that it would therefore be more prudent to regulate retail charges at the same time. Such a risk was moreover acknowledged by the ERG in paragraph 3.12 of its response of 22 March 2006, submitted during the public consultation that preceded the impact assessment, especially in respect of Member States with less competitive markets.
- ⁶⁶ In addition, it is clear that regulation of wholesale charges alone would not have had a direct and immediate effect for consumers. By contrast, only the regulation of retail charges could improve the situation of consumers directly.
- ⁶⁷ Further, it must be recalled that, as indicated in recital 13 in the preamble to Regulation No 717/2007, the Community legislature recognised that the measures adopted were exceptional and justified by the unique characteristics of the roaming markets.
- ⁶⁸ In those circumstances, and particularly in the light of the broad discretion which the Community legislature has in the area at issue, which involves choices to be made of an economic nature, requiring complex assessments and evaluations, it could legitimately take the view that regulation of the wholesale market alone would not achieve the same result as regulation such as that at issue, which covers at the same time the wholesale market and the retail market, and that the latter was therefore necessary.

- ⁶⁹ Finally, in the light of the importance of the objective of consumer protection within the context of Article 95(3) EC, intervention that is limited in time in a market that is subject to competition, which makes it possible, in the immediate future, to protect consumers against excessive prices, such as that at issue, even if it might have negative economic consequences for certain operators, is proportionate to the aim pursued.
- ⁷⁰ Therefore, by adopting, in Article 4 of Regulation No 717/2007, ceilings for retail charges in addition to ceilings for wholesale charges, the Community legislature did not exceed the limits of the discretion it is recognised as having. The same is true of the obligation to provide information laid down in Article 6(3) of that same regulation, given that that provision reinforces the effectiveness of the regulation of retail charges and is therefore justified by the objective of consumer protection.
- ⁷¹ It follows that Articles 4 and 6(3) of Regulation No 717/2007 do not infringe the principle of proportionality.

Infringement of the principle of subsidiarity

- ⁷² It is appropriate to recall that the principle of subsidiarity is referred to in the second paragraph of Article 5 EC – and given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty –, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. That protocol, in paragraph 5, also lays down guidelines for the purposes of determining whether those conditions are met.

- ⁷³ As regards legislative acts, the protocol states, in paragraphs 6 and 7, that the Community is to legislate only to the extent necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty.
- ⁷⁴ In addition, it states in its paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.
- ⁷⁵ As regards Article 95 EC, the Court has held that the principle of subsidiarity applies where the Community legislature uses it as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 179).
- ⁷⁶ In this respect, it must be pointed out that the Community legislature, wishing to maintain competition among mobile telephone network operators, has, in adopting Regulation No 717/2007, introduced a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework.
- ⁷⁷ As is clear from recital 14 in the preamble to the regulation, the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and retail charges, in order to contribute to the smooth functioning of the internal market in those services.

- ⁷⁸ That interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 717/2007, the objective pursued by that regulation could best be achieved at Community level.
- ⁷⁹ Therefore, the provisions of Articles 4 and 6(3) of Regulation No 717/2007 are not invalidated by any infringement of the principle of subsidiarity.
- ⁸⁰ In the light of all the foregoing considerations, the answer to the second question referred is that consideration of that question has disclosed no factor of such a kind as to affect the validity of Articles 4 and 6(3) of Regulation No 717/2007.

Costs

- ⁸¹ Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC.

[Signatures]