Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

15 April 2021 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Determination of the place of supply of telecommunications services – Roaming of third-country nationals on mobile communications networks within the European Union – Point (b) of the first paragraph of Article 59a – Option for Member States to transfer the place of supply of telecommunications services to their territory)

In Case C?593/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 29 July 2019, received at the Court on 5 August 2019, in the proceedings

SK Telecom Co. Ltd

v

Finanzamt Graz-Stadt,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, M. Ileši?, E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SK Telecom Co. Ltd, by J. Fischer, tax adviser,

– the Austrian Government, by F. Koppensteiner, acting as Agent,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the European Commission, by J. Jokubauskait? and L. Mantl, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (b) of the first

paragraph of Article 59a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended, from 1 January 2010, by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11) ('the VAT Directive').

2 The request has been made in proceedings between SK Telecom Co. Ltd and the Finanzamt Graz-Stadt (Tax Office of the City of Graz, Austria) ('the Tax Office') concerning the refund of input value added tax (VAT) paid by SK Telecom in relation to a supply of telecommunications services for the 2011 tax year.

Legal context

European Union law

3 Under recital 22 of the VAT Directive:

'All telecommunications services consumed within the [European Union] should be taxed to prevent distortion of competition in that field. To that end, telecommunications services supplied to taxable persons established in the [European Union] or to customers established in third countries should, in principle, be taxed at the place where the customer for the services is established. In order to ensure uniform taxation of telecommunications services which are supplied by taxable persons established in third territories or third countries to non-taxable persons established in the [European Union] and which are effectively used and enjoyed in the [European Union], Member States should, however, provide for the place of supply to be within the [European Union].'

4 Title I of that directive, which defines the subject matter and scope of the directive, contains Article 1(2) which provides:

'The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

5 Chapter 3, entitled 'Supply of services', of Title IV, entitled 'Taxable transactions', of that directive includes Article 24 which provides, in paragraph 2:

'"Telecommunications services" shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks.'

6 Title V of that directive, entitled 'Place of taxable transactions', contains Chapter 3 relating to the place of supply of services, which includes Section 3, entitled 'Particular provisions'. That section includes Subsection 9, entitled 'Supply of services to non-taxable persons outside the [European Union]', Article 59 of which stated:

'The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the [European Union], shall be the place where that

person is established, has his permanent address or usually resides:

…

(i) telecommunications services;

…’

7 In that Section 3, Subsection 10, entitled ‘Prevention of double taxation or non-taxation’, contained Articles 59a and 59b of the VAT Directive.

8 Article 59a of that directive was worded as follows:

‘In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56 and 59:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the [European Union] if the effective use and enjoyment of the services takes place outside the [European Union];

(b) consider the place of supply of any or all of those services, if situated outside the [European Union], as being situated within their territory if the effective use and enjoyment of the services takes place within their territory.

…’

9 Article 59b of that directive stated:

‘Member States shall apply [point (b) of the first paragraph of] Article 59a to telecommunications services and radio and television broadcasting services, as referred to in point (j) of the first paragraph of Article 59, supplied to non-taxable persons who are established in a Member State, or who have their permanent address or usually reside in a Member State, by a taxable person who has established his business outside the [European Union] or has a fixed establishment there from which the services are supplied, or who, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the [European Union].’

10 Title XIV of the VAT Directive, entitled ‘Miscellaneous’, contains Chapter 2, Article 398 – the sole article contained therein – of which refers to an advisory committee called ‘the VAT Committee’.

Austrian law

The UStG

11 Paragraph 3a of the Umsatzsteuergesetz (Law on turnover tax) of 23 August 1994 (BGBl. 663/1994; ‘the UStG 1994’), in the version applicable to the dispute in the main proceedings (‘the UStG 2010’), is worded as follows:

‘Other services

Paragraph 3a. (1) Services which do not constitute supplies [of goods] shall be regarded as other services. Other services may also consist in refraining from an act, or tolerating an act or situation.

…

Place of supply of other services

…

(5) For the purposes of subparagraphs 6 to 16 and Article 3a [of the annex (relating to the internal market) to the UStG 2010], the following shall apply:

1. an entrepreneur shall be any entrepreneur within the meaning of Paragraph 2; an entrepreneur who carries out also non-taxable transactions shall be considered to be an entrepreneur in respect of all other services supplied to him or her;

2. any legal person carrying on non-entrepreneurial activities who has a VAT identification number shall be considered to be an entrepreneur;

3. any person or association of persons that does not fall within the scope of points 1 and 2 shall be considered to be a non-entrepreneur.

(6) Without prejudice to subparagraphs 8 to 16 and Article 3a [of the annex (relating to the internal market) to the UStG 2010], other services supplied to an entrepreneur within the meaning of points 1 and 2 of subparagraph 5 shall be deemed to be effected at the place from which the customer carries on his or her business. If other services are supplied to an entrepreneur's permanent establishment, the place of that permanent establishment shall instead be decisive.

(7) Without prejudice to subparagraphs 8 to 16 and Article 3a [of the annex (relating to the internal market) to the UStG 2010], other services supplied to a non-entrepreneur within the meaning of point 3 of subparagraph 5 shall be deemed to be effected at the place from which the entrepreneur carries on his or her business. If other services are supplied by a permanent establishment, the permanent establishment shall be deemed to be the place of supply of the other services.

…

(13) The other services described in subparagraph 14 shall be deemed to be effected as follows:

(a) where the customer is a non-entrepreneur within the meaning of point 3 of subparagraph 5 and does not have his or her permanent address or seat or does not usually reside within the territory of the [European Union], the other services shall be deemed to be effected at his or her permanent address or seat or where he or she usually resides within the territory of the third country;

…

(14) The following services shall be other services within the meaning of subparagraph 13:

…

12. telecommunications services;

…

(16) In order to prevent double taxation, non-taxation or distortion of competition, the

[Bundesminister für Finanzen (Federal Minister for Finance)] may, by regulation, provide that, in the case of other services the place of supply of which is determined in accordance with subparagraphs 6, 7, 12 or subparagraph 13(a), the place of supply of other services shall be deemed to be where the other services are used or enjoyed. Consequently, the place of supply of other services may be treated as being:

1. within the territory of the third country rather than the national territory; and

2. within the national territory rather than the territory of the third country. This shall not apply to services within the meaning of point 14 of subparagraph 14, where the customer is a non-entrepreneur within the meaning of point 3 of subparagraph 5 and does not have his or her permanent address or seat or does not usually reside within the territory of the [European Union].'

The Transfer Regulation

12 Under the Verordnung des Bundesministers für Finanzen über die Verlagerung des Ortes der sonstigen Leistung bei Telekommunikationsdiensten sowie Rundfunk- und Fernsehdienstleistungen (Regulation of the Federal Minister for Finance on the transfer of the place of supply of other telecommunications, broadcasting and television services) (BGBl. II, 383/2003), in the version applicable to the main proceedings ('the Transfer Regulation'):

'Pursuant to points 13 and 14 of subparagraph 10 of Paragraph 3a and subparagraph 13 of Paragraph 3a of the UStG 1994, as amended by the [Bundesgesetz (Federal law) (BGBl. I, 71/2003)], the following is hereby adopted:

1. Where the place of supply of a service described in points 12 and 13 of subparagraph 14 of Paragraph 3a of the [UStG 1994], as amended by the [Bundesgesetz (Federal law) (BGBl. I, 52/2009)], is outside the territory of the [European Union] pursuant to Paragraph 3a of the UStG 1994, the service shall be deemed to be effected within the national territory if it is used or enjoyed there.

2. Telecommunications services shall mean services relating to the transmission, emission and reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems; this includes the transfer and assignment of the right to use capacity for such transmission, emission or reception.'

The Refund Regulation

13 The Verordnung des Bundesministers für Finanzen, mit der ein eigenes Verfahren für die Erstattung der abziehbaren Vorsteuern an ausländische Unternehmer geschaffen wird (Regulation of the Federal Minister for Finance introducing a separate procedure for the refund of deductible input VAT to foreign entrepreneurs) (BGBl. 279/1995), in the version applicable to the main proceedings ('the Refund Regulation'), provides for a simplified refund procedure, in accordance with Article I, which states:

'Paragraph 1(1) By way of derogation from Paragraph 20 and subparagraphs 1 to 5 of Paragraph 21 of the UStG 1994, the refund of deductible input VAT to entrepreneurs who are not established within the national territory, which are those that have neither their seat nor a permanent establishment within the national territory, shall be carried out in accordance with Paragraphs 2, 3 and 3a, where during the period relevant to the refund, the entrepreneur:

1. did not carry out any transactions within the meaning of points 1 and 2 of subparagraph 1 of Paragraph 1 and Article 1 of [the annex (relating to the internal market) to the UStG 1994] or

2. carried out only non-taxable transactions within the meaning of point 3 of subparagraph 1 of Paragraph 6 of the UStG 1994 or

3. carried out only transactions in respect of which the tax debt is on the customer (second indent of subparagraph 1 of Paragraph 19 of the UStG 1994);

4. carried out only transactions within the meaning of point (b) of subparagraph 13 of Paragraph 3a of the UStG 1994 and has relied on the provision of Paragraph 25a of the UStG 1994 or, in another Member State, on the provisions of Articles 357 to 369 of the [VAT] Directive.

(2) Subparagraph 1 does not apply to input VAT attributable to transactions within the national territory other than those referred to in subparagraph 1.'

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

14 SK Telecom is a company established in South Korea, which, in 2011, supplied mobile phone services to its customers, who were also established, had their permanent address or usually resided in South Korea, by way of roaming services allowing the use of the Austrian mobile communications network.

15 To that end, an Austrian mobile communications network operator made its network available to SK Telecom in exchange for the payment of a user fee plus Austrian VAT which amounts to 20%. SK Telecom, for its part, invoiced its customers roaming charges for using the Austrian mobile communications network during their temporary stays on Austrian territory.

16 SK Telecom applied to the Tax Office for a refund of the VAT invoiced to it by the Austrian mobile communications network operator for 2011, pursuant to the simplified refund procedure provided for by Article I of the Refund Regulation.

17 The Tax Office rejected that application on the ground that the roaming charges invoiced to customers of SK Telecom were taxable in Austria, pursuant to the Transfer Regulation, which is based on Article 59a of the VAT Directive, since the telecommunications services supplied were not subject, in the third country, to a tax which is comparable to the turnover tax provided for by the national law. Thus, according to the Tax Office, in so far as SK Telecom had carried out taxable transactions in Austria, the VAT it had paid could not be refunded in the context of that procedure.

18 The action brought by SK Telecom against the decision of the Tax Office was dismissed by that office, and was subsequently heard by the Bundesfinanzgericht (Federal Finance Court, Austria), which granted SK Telecom's request for a refund of the VAT on the ground that the Transfer Regulation has a very broad scope. In that court's view, it follows from Articles 59a and 59b of the VAT Directive that Member States may consider the place of supply of telecommunications services to be situated within their territory only as regards those services which are supplied to non-taxable persons who are established, have their permanent address or usually reside within the European Union. Thus, the Bundesfinanzgericht (Federal Finance Court) concluded that the Transfer Regulation is incompatible with EU law; nevertheless, that conclusion was not based on SK Telecom's argument that the income from roaming services supplied to its customers was subject to a tax in the third country, at a rate of 10%, which is comparable to the VAT.

19 The Bundesfinanzgericht (Federal Finance Court) therefore considered that, during the period covered by the request for a refund of the VAT, the fact that SK Telecom allowed its customers established in a third country to make phone calls in Austria by using the Austrian mobile communications network did not constitute a taxable transaction within the national territory, since the place of supply of the services concerned was situated within the third country in question. In that court's view, SK Telecom is therefore entitled to a refund of the input VAT paid to the Austrian mobile communications network operator in the context of the simplified refund procedure provided for in Article I of the Refund Regulation.

20 Following an ordinary appeal on a point of law (*Revision*) lodged by the Tax Office, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), by judgment of 13 September 2018, set aside the decision of the Bundesfinanzgericht (Federal Finance Court).

21 In essence, the Verwaltungsgerichtshof (Supreme Administrative Court) stated that Articles 59a and 59b of the VAT Directive have the objective of preventing double taxation, non-taxation or distortion of competition. That court stated that, in particular, the first of those provisions provides for a general option for Member States to transfer the place of supply of certain services for the purpose of charging VAT. Pursuant to the second of those provisions, Member States are under an obligation to transfer the place of supply where an undertaking established in a third country supplies telecommunications services to non-taxable persons who are established, have their permanent address or usually reside in a Member State.

22 In the view of that court, by adopting the Transfer Regulation, the Austrian legislature therefore made use of the option provided for by Article 59a of that directive in the situations not referred to by Article 59b of that directive. Thus, where a person who is not an entrepreneur and who is established, has his or her permanent address or usually resides outside the European Union uses, on Austrian territory, telecommunications services supplied by a company established in a third country, the place of supply of those services is transferred to Austria, pursuant to the Transfer Regulation.

23 The Verwaltungsgerichtshof (Supreme Administrative Court) referred the case back to the Bundesfinanzgericht (Federal Finance Court); the latter court remains unsure about the compatibility with EU law of a national provision under which roaming services, such as those at issue the main proceedings, are 'effectively used and enjoyed' within the territory of the Member State, for the purposes of Article 59a of the VAT Directive, which allows the place of supply of those services to be considered to be situated within the territory of that Member State, even though those services are supplied to non-taxable customers who are staying only temporarily in the territory of that Member State.

24 In addition, the referring court is of the view that, while point (b) of the first paragraph of Article 59a of that directive should be interpreted as meaning that roaming services, such as those at issue in the main proceedings, are ‘effectively used and enjoyed’ within the territory of the Member State, for the purposes of that provision, it is appropriate to clarify the objective consisting in preventing non-taxation which is pursued by means of the option of transferring the place of supply of services provided for in that provision.

25 In the view of that court, it is necessary, in particular, to clarify whether the concept of ‘non-taxation’, within the meaning of that provision, must be interpreted as meaning that the existence in the third country of a tax that is comparable to the VAT provided for by EU law is decisive for a Member State to be able to consider the place of supply of the services concerned to be situated within its territory.

26 In those circumstances, the Bundesfinanzgericht (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is [point (b) of the first paragraph] of Article 59a of [the VAT Directive] to be interpreted as meaning that the use of roaming services in a Member State in the form of access to the national mobile telephone network for the purpose of establishing incoming and outgoing connections by a “non-taxable end customer” temporarily staying in that Member State constitutes “use and enjoyment” in that Member State which justifies the transfer of the place of supply from the third country to that Member State, even though neither the mobile telephone operator providing the services nor the end customer are established in [EU] territory and the end customer neither has his or her permanent address nor usually resides within the territory of the [European Union]?

(2) Is [point (b) of the first paragraph] of Article 59a of [the VAT Directive] to be interpreted as meaning that the place of supply of telecommunications services as described in Question 1, which are outside the [European Union] according to Article 59 of [that directive], may be transferred to the territory of a Member State even though neither the mobile telephone operator providing the services nor the end customer are established in [EU] territory and the end customer neither has his or her permanent address nor usually resides within the territory of the [European Union], simply because the telecommunications services in the third country are not subject to a tax comparable to VAT under EU law?’

Consideration of the questions referred

27 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether point (b) of the first paragraph of Article 59a of the VAT Directive must be interpreted as meaning that roaming services supplied by a mobile phone operator established in a third country to its customers who are also established, have their permanent address or usually reside in that third country, allowing them to use the national mobile communications network of the Member State in which they are temporarily staying, must be considered to be ‘effectively used and enjoyed’ within the territory of that Member State, for the purposes of that provision, so that that Member State may consider the place of supply of those roaming services to be situated within its territory when those services are not subject to a tax treatment, in that third country, that is comparable to the charging of VAT.

28 It must be recalled that the underlying logic of the provisions of the VAT Directive concerning the place where a service is deemed to be supplied is that services should be taxed as far as possible at the place of consumption (see, to that effect, judgment of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 29 and the case-law cited).

29 In that regard, pursuant to point (i) of the first paragraph of Article 59 of that directive, the place of supply of roaming services, such as those at issue in the main proceedings in respect of which it is common ground that they are telecommunications services within the meaning of Article 24(2) of that directive, since the services are supplied to non-taxable persons who are established, have their permanent address or usually reside outside the European Union, is to be the place where those persons are established, have their permanent address or usually reside.

30 Nevertheless, by way of derogation, point (b) of the first paragraph of Article 59a of the VAT Directive allows Member States, with regard to services the place of supply of which is governed inter alia by Article 59 of that directive, to consider that place, which is in principle situated outside the European Union, to be situated within their territory if the effective use and enjoyment of those services takes place within their territory.

31 On that basis, it is appropriate to note that Article 59b of that directive required Member States to apply point (b) of the first paragraph of Article 59a of that directive to telecommunications services which are supplied to non-taxable persons who are established, have their permanent address or usually reside in a Member State by a taxable person, such as the mobile phone operator in the main proceedings, that has established its business outside the European Union.

32 Nonetheless, the obligation provided for in Article 59b of that directive cannot have the effect of limiting, in circumstances other than those referred to in that provision, the discretion of Member States to make use, as regards telecommunications services, of the general option they have under point (b) of the first paragraph of Article 59a of that directive.

33 In that regard, it must be noted that point (b) of the first paragraph of Article 59a does not lay down any condition relating to the length of stay in the territory of Member States of persons who are established, have their permanent address or usually reside in a third country, in particular in the light of the fact that that stay is only temporary.

34 Therefore, for the purpose of exercising the option provided for by that provision, it must be assessed whether roaming services, such as those at issue in the main proceedings, are effectively used and enjoyed within the territory of the Member State which seeks to transfer the place of supply of those services to itself.

35 In essence, a roaming service consists in the service supplied by a mobile communications service provider to its customers, allowing them to use their mobile device on a mobile communications network other than that of that provider, as a result of agreements concluded between the operators of those networks. In the present case, the purpose of the roaming services at issue in the main proceedings is to allow customers of SK Telecom, where they are outside the reach of the mobile communications network operated by SK Telecom, to use mobile phone services via the mobile communications network of an Austrian operator.

36 In that regard, it must be recalled that it is apparent from settled case-law that, first, it follows from the second subparagraph of Article 1(2) of the VAT Directive that every transaction must normally be regarded as distinct and independent and, second, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (judgment of 4 September 2019, *KPC Herning*, C?71/18, EU:C:2019:660, paragraph 36 and the case-law cited).

37 As noted by the Advocate General in point 44 of his Opinion, roaming services, such as those at issue in the main proceedings, provided to persons who are temporarily staying in the territory of a Member State, are distinct and independent from other mobile communications

services received by those persons.

38 Moreover, as is apparent from both the information provided by the referring court and the written observations submitted to the Court, those roaming services are distinctly identified by SK Telecom and are subject to separate fees, namely roaming charges, which are invoiced to the customers supplied with those services.

39 It thus follows from the very nature of roaming services that the effective use and enjoyment of those services necessarily takes place within the territory of the Member State concerned during SK Telecom's customers' temporary stays in that territory.

40 Nonetheless, even where, in circumstances such as those in the main proceedings, the condition relating to the effective use and enjoyment of the services concerned within the territory of a Member State is met, that Member State can make use of the option provided under point (b) of the first paragraph of Article 59a of the VAT Directive to regard the place of supply of services situated outside the European Union as if situated within its territory only in so far as that use has the effect of preventing double taxation, non-taxation or distortion of competition.

41 In that regard, in the first place, it is true that, as noted by the referring court, it is apparent from recital 22 of that directive that the taxation of all telecommunications services consumed within the European Union reflects the intention of the EU legislature to prevent distortion of competition.

42 That being said, it should be recalled that the objective of the provisions of the VAT Directive determining the place where supplies of services are taxed is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, second, non-taxation (see, to that effect, judgments of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 41, and of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraph 28 and the case-law cited).

43 In the light of the wording of point (b) of the first paragraph of Article 59a of that directive and the fact that it is found in Subsection 10, entitled 'Prevention of double taxation or non-taxation', of Section 3 of Chapter 3 of Title V of that directive, it is appropriate to consider that the option provided by that provision is not only to be seen in the context of the prevention of distortion of competition but also seeks to prevent double taxation or non-taxation.

44 It follows that it is open to Member States to make use of the option provided under point (b) of the first paragraph of Article 59a of that directive where that use has the sole effect of remedying a situation of non-taxation within the European Union, which, according to the information available to the Court, was the case with the roaming services at issue in the main proceedings.

45 In the second place, as noted by the Advocate General in point 88 of his Opinion, it must be added that, for the purpose of applying that provision, the possible cases of double taxation, non-taxation or distortion of competition are to be assessed by reference to the tax treatment of the services concerned in the Member States, without it being necessary to take account of the tax regime to which those services are subject in the third country concerned.

46 It is true that an international agreement concluded with that third country in that respect could provide otherwise. Nevertheless, the request for a preliminary ruling and the observations submitted to the Court do not refer to any such agreement.

47 A solution contrary to the one set out in paragraphs 44 and 45 of the present judgment would have the effect of rendering the application of the EU VAT rules dependent on the third

country’s domestic tax law. In the absence of any indication to that effect, it cannot be presumed that that was the intention of the EU legislature.

48 An interpretation according to which Member States may make use of the option provided under point (b) of the first paragraph of Article 59a of the VAT Directive without in principle having to take account of the taxation of those services under the domestic tax law of the third country concerned is, moreover, corroborated by the approach adopted by the VAT committee, which is an advisory committee established by Article 398 of that directive, whose guidelines, while not binding, nevertheless constitute an aid in interpreting the VAT Directive (see, to that effect, order of 8 October 2020, *Weindel Logistik Service*, C?621/19, not published, EU:C:2020:814, paragraph 48).

49 It follows from the guidelines of that committee [89th meeting of 30 September 2009, Document B – taxud.d.1(2010)176579 – 645] that that committee unanimously agreed that the Member States exercising the option provided for in point (b) of the first paragraph of Article 59a of that directive to tax services effectively used and enjoyed on their territory does not depend on the tax treatment to which those services are subject outside the European Union. In particular, the fact that a service may be taxed in a third country under the national rules of that country does not prevent a Member State from taxing that service if it is effectively used and enjoyed on its territory.

50 In the light of all the foregoing considerations, the answer to the questions referred is that point (b) of the first paragraph of Article 59a of the VAT Directive must be interpreted as meaning that roaming services supplied by a mobile phone operator established in a third country to its customers who are also established, have their permanent address or usually reside in that third country, allowing them to use the national mobile communications network of the Member State in which they are temporarily staying, must be considered to be ‘effectively used and enjoyed’ within the territory of that Member State, for the purposes of that provision, so that that Member State may consider the place of supply of those roaming services to be situated within its territory where, regardless of the tax treatment to which those services are subject under the domestic tax law of that third country, the exercise of such an option has the effect of preventing the non-taxation of those services within the European Union.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Point (b) of the first paragraph of Article 59a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended, from 1 January 2010, by Council Directive 2008/8/EC of 12 February 2008, must be interpreted as meaning that roaming services supplied by a mobile phone operator established in a third country to its customers who are also established, have their permanent address or usually reside in that third country, allowing them to use the national mobile communications network of the Member State in which they are temporarily staying, must be considered to be 'effectively used and enjoyed' within the territory of that Member State, for the purposes of that provision, so that that Member State may consider the place of supply of those roaming services to be situated within its territory where, regardless of the tax treatment to which those services are subject under the domestic tax law of that third country, the exercise of such an option has the effect of preventing the non-taxation of those services within the European Union.

[Signatures]

* Language of the case: German.