Provisional text

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 22 October 2020 (1)

Case C?593/19

SK Telecom Co. Ltd.

v

Finanzamt Graz-Stadt

(Request for a preliminary ruling from the Bundesfinanzgericht (Federal Finance Court, Austria))

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112 – Measures to avoid double taxation and non-taxation – Article 59a – Telecommunications sector – Mobile telephony – Roaming Services – Third-country nationals temporarily resident in the territory of a Member State – Place of supply – Option of relocating the place of supply to the territory of the Member State concerned – Requirement of effective use and enjoyment within the territory of the Member State – Double taxation, non-taxation or distortion of competition – Irrelevance of the tax treatment in the third country)

I. Introduction

1. By decision of 29 July 2019, received at the Court on 5 August 2019, the Bundesfinanzgericht (Federal Finance Court, Austria) submitted to the Court a request for a preliminary ruling on the interpretation of point (b) of the first paragraph of Article 59a of Directive 2006/112. (2)

2. The request was made in proceedings between SK Telecom Co. Ltd, a company established in South Korea, and the Finanzamt Graz-Stadt (tax office in the city of Graz, Austria) (‘the Finanzamt’) regarding the tax treatment of roaming services provided by that company to users residing in South Korea but staying temporarily in Austria, consisting in giving them access to a mobile telephone network in that Member State.

3. The questions referred seek, in essence, to determine whether the aforementioned provision enables the Republic of Austria to transfer the place of such supply of roaming services to its territory, with the result that they will be subject to Austrian value added tax (VAT).

4. In the remainder of my Opinion, I will propose that the Court answers these questions in the

affirmative.

II. **Legal context**

A. **European Union law**

5. Since the services at issue in the main proceedings were provided during 2011, the version of Directive 2006/112 applicable to the main proceedings is that resulting from the last amendments made by Directive 2010/88, the transposition deadline for which expired on 1 January 2011 under Article 2 of the latter directive. (3)

6. Directive 2006/112 includes a Title V entitled ‘Place of taxable transactions’. Within Title V, Chapter 3 is devoted to ‘Place of supply of services’. It includes a section 3 dedicated to ‘Particular provisions’. Articles 59, 59a and 59b of Directive 2006/112 fall within Section 3. (4)

7. Article 59 of that directive, which falls under sub-section 9, entitled ‘Supply of services to non-taxable persons outside [the EU]’, states:

‘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 EU], shall be the place where that person is established, has his permanent address or usually resides:

…

(i) telecommunication services;

…’

8. Articles 59(a) and 59(b) of Directive 2006/112 are in subsection 10 entitled ‘Prevention of double taxation or non-taxation’.

9. Article 59a of that directive is 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 [EU] if the effective use and enjoyment of the services takes place outside the [EU];

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

However, this provision shall not apply to electronically supplied services where those services are rendered to non-taxable persons not established within the [EU].’

10. Article 59b of that directive provides:

‘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 [EU] 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 [EU].'

B. **Austrian law**

11. Article 3(a) of the Umsatzsteuergesetz (Law on Turnover Tax) of 1994 (BGB1. 663/1994, 'the UStG 1994'), in the version applicable to the dispute in the main proceedings (BGB1. 34/2010) provides:

'…

(13) Other services within the meaning of paragraph (14) are considered to be located:

(a) where the customer is not a contractor within the meaning of paragraph (5), point 3 and does not have his permanent address or business or habitual residence within the [EU], the other service is considered to be at the permanent address, business or habitual residence of the customer within the territory of the third country;

…

(14) The following services are considered to be other services within the meaning of paragraph 13:

…

12. telecommunication services;

…

(16) To prevent cases of double taxation, non-taxation or distortion of competition, the Bundesminister für Finanzen (Federal Minister for Finance) may, by regulation, provide that other services, the place of supply of which is determined in accordance with paragraphs 6, 7, 12 or 13(a), are considered to be at the place where those other services are used or enjoyed. Consequently, the place of supply of the other service may be considered to be:

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

2. in the national territory instead of the territory of the third country. This provision does not apply to services within the meaning of paragraph 14, point 14, where the customer is not a contractor within the meaning of paragraph 5, point 3 and does not have his permanent residence, business or usual residence within the [EU].'

12. Under the Regulation of the Federal Minister for Finance on the transfer of the place of supply of the other telecommunications, broadcasting and television services (BGB1. II 383/2003), in the version applicable to the main proceedings (BGB1. II 221/2009):

'In accordance with points 13 and 14 of paragraph 10 of Article 3a and paragraph 13 of Article 3(a) of the UStG 1994, in the version in Federal Law BGB1. I 71/2003, we hereby adopt the following:

Article 1. Where the place of supply referred to in points 12 and 13 of paragraph 14 of Article 3a of the UStG 1994, BGB1. 663, in the version of Federal Law BGB1. I 52/2009, is outside the territory of the [EU], in accordance with Article 3a of the UStG 1994, the supply is made on the national territory if it is used or enjoyed there.

Article 2. 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 related transfer or assignment of the right to use capacity for such transmission, emission or reception.'

III. **The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

13. SK Telecom is a mobile phone undertaking established in South Korea.

14. In 2011, SK Telecom provided mobile phone services to some of its customers, also based in South Korea, who were temporarily staying in Austria.

15. In order to enable those persons to use their mobile phones during their stay in Austria, an Austrian network operator made its network available to SK Telecom in exchange for the payment of a user fee plus Austrian VAT (20%).

16. SK Telecom, for its part, charged its customers roaming fees for use of the Austrian network.

17. SK Telecom subsequently applied for reimbursement of the VAT invoiced to it by the Austrian network operator.

18. The Finanzamt refused the application for reimbursement. That refusal was based, in essence, on the requirement to subject to Austrian VAT the roaming fees charged by SK Telecom to its customers, in accordance with the Austrian Regulation on the transfer of the place of supply, since those telecommunications services were not subject to a tax in South Korea which was comparable to Austrian VAT. Since SK Telecom had carried out taxable transactions in Austria, it could not benefit from a refund of VAT under the simplified refund procedure.

19. Its appeal before the Finanzamt having been dismissed, SK Telecom brought a further appeal before the Bundesfinanzgericht (Federal Finance Court).

20. The Bundesfinanzgericht (Federal Finance Court), the referring court in the present case, upheld SK Telecom's appeal. That court points out that it did not base its decision on any comparable taxation in the third country, but on the incompatibility with EU law of the Austrian Regulation on relocation of the place of supply, pursuant to which the place of supply of the roaming services provided by SK Telecom is within the territory of Austria.

21. According to that court, it follows from Articles 59a and 59b of Directive 2006/112 that a Member State may transfer the place of supply of a service to its territory only for telecommunications services provided to non-taxable persons established within the EU.

22. In practice, that interpretation implies that the supply of services provided by SK Telecom, consisting in enabling its customers established in South Korea to use their mobile telephone subscription in Austria, using the Austrian mobile telephone network, does not constitute a taxable transaction within the territory of Austria. Consequently, SK Telecom is entitled to obtain, under the simplified refund procedure, reimbursement of the Austrian VAT paid to the Austrian network operator.

23. Following an ordinary appeal on a point of law brought by the Finanzamt, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) set aside the decision of the Bundesfinanzgericht (Federal Finance Court) by judgment of 13 September 2018.

24. According to the Verwaltungsgerichtshof (Supreme Administrative Court), while Article 59b of Directive 2006/112 lays down an *obligation* to relocate the place of supply where an undertaking

established in a third country supplies telecommunications services to non-taxable persons established in a Member State, Article 59a of that directive provides for an *option* to relocate the place of supply in cases not referred to in Article 59b of that directive.

25. According to that court, and contrary to the view expressed by the Bundesfinanzgericht (Federal Finance Court), the Austrian legislature legitimately made use of the option provided for in Article 59a of Directive 2006/112 by adopting the Austrian regulation on relocation of the place of supply.

26. The case having been referred back to it by the Verwaltungsgerichtshof (Supreme Administrative Court), the Bundesfinanzgericht (Federal Finance Court) still has doubts about the compatibility of that national regime with Article 59a of Directive 2006/112.

27. 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 Directive [2006/112] 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 resident 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 does not have his permanent address and does not usually reside in the [EU]?

(2). Is [point (b) of the first paragraph] of Article 59a of Directive [2006/112] to be interpreted as meaning that the place of supply of telecommunications services as described in Question 1, which are outside the [EU] 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 does not have his permanent address and does not usually reside in the [EU], simply because the telecommunications services in the third country are not subject to a tax comparable to [VAT] under EU law?’

28. The request for a preliminary ruling was registered at the Court Registry on 5 August 2019.

29. SK Telecom, the Austrian and Spanish Governments, and the European Commission submitted written observations.

IV. **Analysis**

30. By its questions, the referring court seeks to ascertain, in essence, whether point (b) of the first paragraph of Article 59a of Directive 2006/112 is to be interpreted as meaning that a Member State may transfer to its territory the place of roaming services allowing the use of a mobile telephone network located in that Member State, it being understood that those services are provided by a mobile telephone operator established in a third country to users having their permanent address or usually residing in that third country but temporarily staying in that Member State.

31. After presenting the practical issues in this case as well as the relationship between Articles 59, 59a and 59b of Directive 2006/112, I will set out the reasons why I consider that the referring court’s questions should be answered in the affirmative.

A. **On the practical issues of this case**

32. Before examining these two questions, I wish to dispel any doubt that may remain as to the practical issues in this case.

33. A mobile telephone roaming service, such as that at issue in the main proceedings, involves the supply of two services for the purposes of VAT.

34. The first supply of services concerns only telecommunications undertakings, not telephone users (‘*business-to-business*’ or ‘B2B’ relationship). A network operator who operates in the country of roaming (Austria) opens its network to a mobile phone operator established in the country of origin (SK Telecom, established in Korea) for payment of a fee.

35. The second supply of services connects the mobile telephone operator of the country of origin (SK Telecom) and the telephone users who have subscribed to its services (‘*business-to-consumer*’ or ‘B2C’ relationship). That operator ‘sublets’, as it were, to users in the country of roaming (Austria) access to the network which it has previously obtained as part of the first service.

36. While the questions referred to the Court relate solely to the *second* supply of services (between SK Telecom and its subscribers), and more specifically to the place of that supply, those questions arose in connection with an application for a refund submitted by SK Telecom in respect of the *first* supply (between SK Telecom and the Austrian network operator).

37. The Austrian network operator applied Austrian VAT when supplying the first service. SK Telecom applied for a reimbursement of the amount of that Austrian VAT. The Finanzamt refused that reimbursement, arguing that the second supply of services was also subject to Austrian VAT.

38. Thus, depending on the Court’s answers to the questions referred, two solutions to the main proceedings are possible, as the Commission rightly pointed out:

– either the place of the second supply of services is in Austria: in that case, SK Telecom is liable to pay Austrian VAT on the amounts invoiced to its subscribers, while being entitled to deduct the Austrian VAT it paid up-front on the first supply;

– or the place of the second supply of services is in South Korea: in that event, Austrian VAT is not due on that supply and SK Telecom is entitled to a refund of the VAT paid up-front on the first supply.

39. The Commission has expressed certain reservations about making the first supply of services subject to Austrian VAT. It stated that, according to the general rule laid down in Article 44 of Directive 2006/112, the place of supply of services between taxable persons (‘B2B’ relationship) is the place where the customer has established his business, which in the case of SK Telecom is South Korea. (5)

40. It does not seem to me to be appropriate for the Court to examine this issue given that, first, the Court has not been asked about the first supply of services and second, the request for a preliminary ruling does not contain any explanation on this matter.

41. In any event, this uncertainty relating to the taxation of the first supply of services in Austria does not call into question the relevance of the questions asked by the referring court, since the issue of the second supply of services being subject to Austrian VAT depends on the answers that the Court will provide to these questions.

42. Finally, SK Telecom argued that it would be ‘artificial’, within the meaning of the Court’s case-law, (6) to split different communications from the same SIM card. In SK Telecom’s opinion, the roaming services at issue in the main proceedings form part of a single supply of mobile telephone services provided to its users. That supply is located in South Korea and is exempt from VAT in the EU.

43. I am not convinced by that argument. I would point out that, for VAT purposes, every supply must normally be regarded as distinct and independent .(7) Thus, it is only where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, that they must be regarded as a single supply for VAT purposes. (8)

44. Roaming services such as those at issue in the main proceedings, which consist in offering access to a mobile telephone network in a country other than the country of origin, are objectively separable from mobile telephone services provided in the country of origin.

45. As the Spanish Government has rightly pointed out, in practice, bills sent to users usually identify roaming services as being distinct from access to the local network. These bills indicate, in particular, the number of incoming and outgoing calls, as well as the data used, courtesy of the roaming services, on the network of the State visited. Thus, although the customer must have a contract with the operator of his country of origin in order to access it, roaming services constitute a different service and not one which is incidental to that which the operator provides to its customers to access the local network.

B. **The relationship between Articles 59, 59a and 59b of Directive 2006/112**

46. Articles 59, 59a and 59b of Directive 2006/112 lay down specific and connected criteria regarding the place of supply of certain services. (9)

47. As a preliminary point, I note that the referring court correctly relied on the premiss that the roaming services at issue in the main proceedings constitute ‘telecommunication services’ within the meaning of Article 24(2) of Directive 2006/112. (10) This premiss was not disputed by any of the parties who submitted observations to the Court.

48. In the absence of a derogation under national law pursuant to Article 59a of Directive 2006/112, it follows from Article 59(i) of that directive that the place of supply of telecommunications services, supplied to a non-taxable person who is established or has his permanent address or usually resides outside the EU, is the place where that person is established or has his permanent address or usually resides, that is to say, *outside the EU*.

49. To put it more simply, that provision provides that telecommunications services supplied to non-taxable persons having their permanent address or habitually residing outside the EU *are not subject to VAT*.

50. However, Article 59a of Directive 2006/112 gives Member States the option to derogate from that principle in certain circumstances, by relocating the place of supply of services to their territory.

51. It is clear from the request for a preliminary ruling, as well as from the observations of the Austrian Government and the Commission, that the Republic of Austria exercised that option by adopting the Regulation of the Federal Ministry of Finance on the transfer of the place of supply of the other telecommunications, broadcasting and television services, in the version applicable to

the dispute in the main proceedings. (11)

52. I would point out that Article 59b of Directive 2006/112 makes the relocation of the place of supply of telecommunication services *obligatory* where they are provided to persons who are non-taxable persons but who have their permanent address or reside habitually *within the EU*. The latter condition is not satisfied with regard to the services at issue in the main proceedings, those services having admittedly been provided to non-taxable persons but those persons have their permanent address or habitually reside *outside the EU*, namely in South Korea. That provision is therefore irrelevant for the answer to the referring court's questions, as the Spanish Government and the Commission rightly pointed out.

53. I would also point out that the scope of the *option* in Article 59a of Directive 2006/112 is broader than the scope of *the obligation imposed* by Article 59b of that directive, as rightly pointed out by the Commission. In other words, and as follows from the wording of those two provisions, the option offered to States by Article 59a of that directive is not restricted to the cases referred to in Article 59b of that directive.

54. That being said, it is necessary, in order to answer the questions referred by the national court, to examine the conditions to which the implementation by a Member State of the option offered by point (b) of the first paragraph of Article 59a of Directive 2006/112 of relocating the place of supply of certain services, in particular telecommunications services, to its territory, are subject.

55. Two conditions must be distinguished in that regard.

56. First, the 'effective use or enjoyment' of the services must take place within the territory of the Member State concerned. That condition is the subject of the first question asked by the referring court.

57. Secondly, Member States may make use of that option 'to avoid double taxation, non-taxation or distortion of competition'. That condition is the subject of the second question.

C. **The requirement of effective use or enjoyment of the services in the territory of the Member State concerned (first question)**

58. By its first question, the referring court seeks to ascertain, in essence, whether point (b) of the first paragraph of Article 59a of Directive 2006/112 is to be interpreted as meaning that roaming services enabling use to be made of a mobile telephone network situated in a Member State, which are provided by a mobile telephone operator established in a third country to users having their permanent address or habitually residing in that third country but temporarily staying in the territory of that Member State, must be regarded as being the subject of 'effective use or enjoyment' in the territory of that Member State.

59. Unlike SK Telecom, the Austrian and Spanish Governments and the Commission propose that this question be answered in the affirmative.

60. Before answering this question, I regret to point out the existence of somewhat surprising inconsistencies, also noted by SK Telecom, between the language versions of the expression 'effective use or enjoyment' in the first paragraph of Article 59a of Directive 2006/112. Depending on the language versions consulted, this expression takes the form of 'effective use *or* enjoyment' or 'effective use *and* enjoyment'.

61. That expression finds its origin in former Article 9(3) of Sixth Directive 77/388/EEC. (12)

However, there was already a disparity between the language versions using the conjunction ‘or’ and those using the conjunction ‘and’ as regards that provision. (13) I would point out that that provision was interpreted by the Court in the judgment *Athesia Druck* which concerned advertising services, without, however, settling the problem of the disparity between language versions. (14)

62. In its proposal to recast Sixth Directive 77/388, which would lead to the adoption of Directive 2006/112, the Commission appears to me to have proposed harmonisation of all the language versions by advocating use of the conjunction ‘or’. (15)

63. Strangely, when Directive 2006/112 was adopted, the ‘or’ camp admittedly won many members, in accordance with that proposal, but did not have a total victory. Indeed, the English, Dutch and Swedish versions of Article 58 (future Article 59a) of that directive, in its initial version, remained faithful to the ‘and’ camp. (16)

64. To further complicate matters, the adoption of Directive 2008/08 has shifted a number of the language versions – in particular the Italian and Portuguese versions – into the ‘and’ camp. Thus, the language versions of Article 59a of Directive 2006/112, former Article 58 of that directive, are now shared between the ‘or’ camp and the ‘and’ camp. (17)

65. I would stress that this disparity still exists today, in the version of the directive resulting from the amendments made by Directive (EU) 2020/285. (18)

66. In my opinion, the need for legal certainty requires that this disparity between the language versions of Article 59a of Directive 2006/112 be resolved.

67. According to the Court’s settled case-law, in particular in matters of VAT legislation, the provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (19)

68. In the application of this case-law, there are, in my opinion, four reasons why Article 59a of Directive 2006/112 should be interpreted as requiring the effective use *or* enjoyment of the services concerned in the Member State.

69. In the first place, that interpretation is in accordance with the express desire of the Commission at the time of its proposal for a recast of Sixth Directive 77/388, to harmonise all the language versions in favour of the expression ‘effective use *or* enjoyment’, as I indicated in point 62 of this Opinion. That desire does not seem to me to have been contested by the EU legislature, namely, the Council of the European Union and the European Parliament, as regards that directive, so that the continued disparity between the language versions could be the result of somewhat unfortunate translations of this expression.

70. In the second place, that interpretation is consistent with the intention of the EU legislature to define the place of supply of services as being, as a general rule, the place of their actual consumption. (20) Moreover, that desire is in accordance with the opinion expressed by the VAT Committee on this subject, (21) as the Austrian Government has rightly noted: ‘The VAT Committee almost unanimously agrees that the place of the effective use or enjoyment of telecommunication services, radio and television broadcasting services and electronic services is deemed to be where the lessee is effectively able to use the service provided to him. Under normal circumstances, this will be the physical location where the service is rendered.’

71. In the third place, this interpretation is necessary from a semantic point of view, because of

the relationship between the terms ‘use’ and ‘enjoyment’. The Académie française (French Academy) defines enjoyment as ‘the action of enjoying an asset, of making it worthwhile, of managing it, with a view to benefiting from it’. In accordance with this usual definition, it does not seem possible to me to enjoy goods *without using* them. In other words, any enjoyment presupposes use, the latter expression having a more general meaning.

72. The word ‘use’ would therefore have no useful effect in the expression ‘effective use *and* enjoyment’ (which would always require an enjoyment), but not in the expression ‘effective use *or* enjoyment’ (which would refer either to simple use or to enjoyment).

73. Finally, in the fourth place, the interpretation which favours the expression ‘use *or* enjoyment’ follows from the context in which Article 59a of Directive 2006/112 sits. The term ‘enjoyment’ has an economic connotation, as shown by the definition given by the French Academy, cited above. However, pursuant to Article 9(1) of that directive, all economic activities involve, save for some exceptions, a liability to pay VAT. The expression ‘effective use *and* enjoyment’ would therefore tend to exclude those services provided to non-taxable persons from the scope of Article 59a of that directive, since they do not ‘enjoy’ the services in question.

74. Such an interpretation would be incompatible with the regulatory context in which this provision sits, for at least two reasons. First, the second paragraph of Article 59a of Directive 2006/112 specifically excludes certain services supplied to non-taxable persons from its scope, which logically implies that such services are, in principle, covered by that provision. Second, Article 59a allows Member States to derogate from Article 59 of that directive, which relates exclusively to services supplied to non-taxable persons.

75. Thus, to summarise, it is not disputed that the first paragraph of Article 59a of Directive 2006/112 covers services supplied to non-taxable persons. However, non-taxable persons do not ‘enjoy’ the services provided to them, which would imply an economic activity, but merely ‘use’ them. Consequently, this provision must necessarily be interpreted as requiring the ‘effective use *or* enjoyment’ of services in the territory of the Member State concerned.

76. It follows from the foregoing that point (b) of the first paragraph of Article 59(a) of Directive 2006/112 must be interpreted as requiring effective use *or* enjoyment of the services in the Member State concerned.

77. In my view, however, there is little doubt that roaming services, such as those at issue in the main proceedings, are in fact effectively *used* in the territory of the Member State concerned.

78. I would point out that such roaming services are intended solely for the use of a mobile telephone network located in the Member State concerned by users temporarily staying in that Member State, namely Austria in the main proceedings, and exclude that part of the telecommunication services involving use of a mobile telephone network in the third country of origin, namely South Korea in the main proceedings. (22)

79. There are three factors which seem to me to tip the balance heavily in favour of the effective use of roaming services in the Member State concerned.

80. First, the mobile telephone network used is located in that Member State. Second, the users who are granted access to this network are temporarily staying in that Member State. Third, and as the Spanish Government has pointed out, such roaming services can only be used in the territory of that Member State. Indeed, in the context of the main proceedings, their presence in Austria is the only reason why users from South Korea request access to an Austrian mobile telephone network.

81. In addition, and as the Commission has rightly pointed out, the access by Korean customers to the Austrian mobile telephone network occurs in exactly the same way as the access enjoyed by an Austrian customer to the same network, which is a clear indication of effective use in Austria.

82. I am therefore satisfied that the services at issue in the main proceedings are effectively used in Austrian territory.

83. In the light of the above, I propose that the Court reply to the first question as follows. Point (b) of the first paragraph of Article 59a of Directive 2006/112 must be interpreted as meaning that roaming services allowing the use of a mobile telephone network in a Member State, which are provided by a mobile telephone network operator established in a third country to users who have their permanent address or usually reside in that third country but are temporarily staying in the territory of that Member State, must be considered as being the subject of 'effective use' in that Member State.

D. **The requirement to avoid double taxation, non-taxation or distortion of competition (second question)**

84. By its second question, the referring court asks, in essence, whether point (b) of the first paragraph of Article 59a of Directive 2006/112 must be interpreted as meaning that the requirement to avoid 'double taxation, non-taxation or distortion of competition' is satisfied when roaming services such as those described in the first question, are not subject to a tax, comparable to VAT, in the third country concerned.

85. As with the arguments put forward by the referring court itself and the Spanish Government and the Commission, I consider that any taxation in the third country concerned, namely, South Korea in the main proceedings, is irrelevant for the purposes of the application of that provision.

86. Indeed, any other interpretation would result in the application of harmonised tax rules at EU level being subject to the tax treatment applied in a third country. While such a scenario is not, in itself, inconceivable, it must, in my opinion, be the subject of an express and unequivocal choice by the Union legislature. However, that is not the case with Article 59a of Directive 2006/112 which does not mention third countries.

87. That interpretation is supported by the opinion expressed by the VAT Committee (23) on this subject: 'The VAT Committee unanimously agrees that the exercise of the option given by Member States to tax services effectively used and enjoyed on their territory does not depend on the tax treatment that the services are subject to outside the Community. In particular, the fact that a service may be taxed in a third country under the national rules of that country shall not prevent a Member State from taxing that service if it is effectively used and enjoyed on the territory of that Member State.'

88. In reality, the expression 'double-taxation, non-taxation or distortion of competition' refers to tax treatment *at EU level*. In other words, use by a Member State of the options offered by Article

59a of Directive 2006/112 is subject to the existence of a case of double-taxation, non-taxation or distortion of competition *at EU level*.

89. As regards, more specifically, point (b) of the first paragraph of Article 59a of Directive 2006/112, it is clear that the use of that provision cannot be justified by the desire to avoid double taxation, because it results, in practice, in taxation of the supply of services in question in the Member State concerned.

90. In contrast, the use of that option may be justified by the desire to avoid non-taxation or distortion of competition within the EU.

91. In the main proceedings, it is not disputed that the roaming services at issue are not subject to VAT in another Member State. Therefore, the Republic of Austria's use of point (b) of the first paragraph of Article 59a of Directive 2006/112, with a view to relocating the place of supply of such services to its territory, with the result that they will be subject to Austrian VAT, is justified by the desire to avoid non-taxation within the EU.

92. Consequently, I propose that the Court respond to the second question as follows. Point (b) of the first paragraph of Article 59a of Directive 2006/112 must be interpreted as meaning that the requirement to avoid 'double taxation, non-taxation or distortion of competition' is satisfied where roaming services such as those described in the first question are not subject to VAT within the EU, which constitutes a case of non-taxation within the meaning of that provision. In contrast, the tax treatment in a third country is irrelevant for the purposes of the application of that provision.

V. **Conclusion**

93. Having regard to all of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesfinanzgericht (Federal Finance Court, Austria) as follows:

1. 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 by Council Directive 2010/88/EU of 7 December 2010 must be interpreted as meaning that roaming services allowing the use of a mobile telephone network located in a Member State, which are provided by a mobile telephone operator established in a third country to users having their permanent address or usually residing in that third country but temporarily staying in the territory of that Member State, must be considered as being the subject of 'effective use' on the territory of that Member State.

2. Point (b) of the first paragraph of Article 59a of Directive 2006/112, as amended by Council Directive 2010/88, must also be interpreted as meaning that the requirement of avoiding 'double taxation, non-taxation or distortion of competition' is satisfied where roaming services such as those described in the first question are not subject to VAT within the Union, which constitutes a case of 'non-taxation' within the meaning of that provision. The tax treatment in a third country is irrelevant for the purposes of the application of that provision.

1 Original language: French.

2 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 by Council Directive 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1, 'Directive 2006/112)'.

3 Council Directive 2010/88/EU of 7 December 2010 amending Directive 2006/112 (OJ 2010 L 326, p. 1). I would also point out that the provisions the interpretation of which is required in order

to answer the questions referred for a preliminary ruling, and, in particular, Article 59a of Directive 2006/112, were last amended by Article 2 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112 (OJ 2008 L 44, p. 11).

4 I would point out that these provisions have been subject to substantial amendment since 1 January 2015 by virtue of Article 5 of Directive 2008/8, involving in particular the deletion of point (i) of the first paragraph of Article 59, the second paragraph of Article 59a, and Article 59b of Directive 2006/112.

5 If, as the Commission suggests, Austrian VAT was levied *in error* on the first supply of services, it is clear that SK Telecom has the right to a refund of that incorrectly levied tax. I would point out that this case differs from the VAT 'refund' procedure referred to in point 38 of this Opinion, the latter procedure concerning VAT which would have been duly levied but which SK Telecom could claim back if it has not carried out taxable transactions in Austria.

6 See, inter alia, judgments of 25 February 1999, *CPP* (C?349/96, EU:C:1999:93, paragraphs 26 to 32); of 27 September 2012, *Field Fisher Waterhouse* (C?392/11, EU:C:2012:597, paragraphs 13 to 28); and of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland* (C?155/12, EU:C:2013:434, paragraphs 19 to 26).

7 See, inter alia, judgment of 27 September 2012, *Field Fisher Waterhouse* (C?392/11, EU:C:2012:597, paragraph 14 and the case-law cited).

8 See, inter alia, judgment of 27 June 2013, *RR Donnelley Global Turnkey Solutions Poland* (C?155/12, EU:C:2013:434, paragraph 21 and the case-law cited).

9 According to settled case-law, Articles 44 and 45 of Directive 2006/112 contain a general rule for determining the place where services are supplied for tax purposes, while Articles 46 to 59a of that directive provide a number of specific instances of such places. There is no pre-eminence of Articles 44 and 45 of Directive 2006/112 over Articles 46 to 59a thereof. It is necessary to consider in each situation whether it corresponds to one of the cases referred to in Articles 46 to 59a of that directive. If not, it falls within the scope of Articles 44 to 45 of Directive 2006/112 (see, inter alia, judgments of 8 December 2016, *A and B*, C?453/15, EU:C:2016:933, paragraph 18; of 13 March 2019, *Srf konsulterna*, C?647/17, EU:C:2019:195, paragraphs 20 and 21, and of 2 July 2020, *Veronsaajien oikeudenvalvontayksikkö (Computing centre services)*, C?215/19, EU:C:2020:518, paragraphs 51 and 54).

10 Under that provision telecommunication services 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 network'.

11 See point 12 of this Opinion.

12 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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).

13 The following language versions use the conjunction 'and': see in particular the versions in French ('l'utilisation et l'exploitation effectives'), English ('effective use and enjoyment'), Italian ('l'effettiva utilizzazione e l'effettivo impiego'), Spanish ('la utilización y la explotación efectivas'), Dutch ('het werkelijke gebruik en de werkelijke exploitatie'), Portuguese ('a utilização e a

exploração efectivas') and Swedish ('den egentliga användningen och utnyttjandet'). The following language versions use the conjunction 'or': see in particular the versions in German ('tatsächliche Nutzung oder Auswertung') and Danish ('faktiske benyttelse eller udnyttelse').

14 Judgment of 19 February 2009 (C?1/08, EU:C:2009:108, paragraphs 28 to 33).

15 Proposal for a Council Directive on the common system of value added tax, COM(2004) 246 final, 15 April 2004, Article 58. See in particular the versions in English ('effective use or enjoyment'), German ('tatsächliche Nutzung oder Auswertung'), Danish ('faktiske benyttelse eller udnyttelse'), French ('l'utilisation ou l'exploitation effectives'), Italian ('l'effettiva utilizzazione o l'effettivo impiego'), Spanish ('la utilización o la explotación efectivas'), Dutch ('het werkelijke gebruik of de werkelijke exploitatie'), Portuguese ('a utilização ou a exploração efectivas') and Swedish ('den egentliga användningen eller det egentliga utnyttjandet').

16 Language versions using the conjunction 'and': see in particular the versions in English ('effective use and enjoyment'), Dutch ('het werkelijke gebruik en de werkelijke exploitatie') and Swedish ('den faktiska användningen och det faktiska utnyttjandet'). Language versions using the conjunction 'or': see in particular the versions in German ('tatsächliche Nutzung oder Auswertung'), Danish ('faktiske benyttelse eller udnyttelse'), French ('l'utilisation ou l'exploitation effectives'), Italian (l'effettiva utilizzazione o l'effettivo impiego), Spanish (la utilización o la explotación efectivas) and Portuguese ('a utilização ou a exploração efectivas').

17 Language versions using the conjunction 'and': see in particular the versions in English ('effective use and enjoyment'), Italian ('l'effettiva utilizzazione e l'effettiva fruizione'), Dutch ('het werkelijke gebruik en de werkelijke exploitatie'), Portuguese ('a utilização e a exploração efectivas') and Swedish ('den faktiska användningen och det faktiska utnyttjandet'). Language versions using the conjunction 'or': see in particular the versions in German ('tatsächliche Nutzung oder Auswertung'), Danish ('faktiske benyttelse eller udnyttelse'), French ('l'utilisation ou l'exploitation effectives') and Spanish ('la utilización o la explotación efectivas').

18 Council Directive of 18 February 2020 amending Directive 2006/112 (OJ 2020 L 62, p .13). That directive applies from 1 January 2025 by virtue of Article 3(1) thereof.

19 See, inter alia, judgments of 26 September 2013, *Commission* v *Finland* (C?309/11, not published, EU:C:2013:610, paragraph 49), and of 12 October 2017, *Lombard Ingatlan Lízing* (C?404/16, EU:C:2017:759, paragraph 21).

20 See, in this regard, recital 3 of Directive 2008/8: 'For all supplies of services, the place of taxation should, in principle, be the place where the actual consumption takes place. …'. See also judgment of 13 March 2019, *Srf konsulterna* (C?647/17, EU:C:2019:195, paragraph 29). I would point out again, for the sake of completeness, that Directive 2008/8 significantly amended the regime resulting from Council Directive 1999/59/EC of 17 June 1999 amending Sixth Directive 77/388 (OJ 1999 L 162, p. 63). Consequently, the arguments put forward by SK Telecom and taken from the recitals to Directive 1999/59 are irrelevant in the present case.

21 VAT Committee, Guidelines resulting from the 89th meeting of 30 September 2009, Document B, Taxud.D.1(2010)176579, No. 645, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines-vat-committee-meetings_en.pdf.

22 See point 35 of this Opinion.

23 VAT Committee, Guidelines resulting from the 89th meeting of 30 September 2009,

Document B, Taxud.D.1(2010)176579, No. 645, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines-vat-committee-meetings_en.pdf.