

JUDGMENT OF THE COURT (Second Chamber)

11 September 2008*

In Case C-274/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 June 2007,

Commission of the European Communities, represented by G. Braun and A. Steiblytė, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Lithuania, represented by D. Kriauciūnas, acting as Agent,

defendant,

* Language of the case: Lithuanian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Küris and C. Toader (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its action the Commission of the European Communities asks the Court to declare that, by not ensuring in practice that authorities handling emergencies are, to the extent technically feasible, given caller location information for all callers to the single European emergency call number '112' when public telephone networks are used, the Republic of Lithuania has failed to fulfil its obligations under Article 26(3) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March

2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service' Directive) (OJ 2002 L 108, p. 51) (the 'Universal Service Directive').

Legal background

Community law

2 The 36th recital in the preamble to the Universal Service Directive states that:

'It is important that users should be able to call the single European emergency number "112", and any other national emergency telephone numbers, free of charge, from any telephone, including public pay telephones, without the use of any means of payment. ... Caller location information, to be made available to the emergency services, will improve the level of protection and the security of users of "112" services and assist the emergency services, to the extent technically feasible, in the discharge of their duties, provided that the transfer of calls and associated data to the emergency services concerned is guaranteed....'

3 Article 26(3) of the Universal Service Directive provides:

'Member States shall ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergen-

cies, to the extent technically feasible, for all calls to the single European emergency call number “112”.’

- 4 According to Article 38(1) of the Universal Service Directive, Member States are to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive by 24 July 2003 at the latest and they are to immediately inform the Commission thereof. They are to apply those provisions from 25 July 2003.

- 5 In accordance with Article 2, read in combination with Article 54 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) (the ‘Act of Accession’), the Republic of Lithuania was to comply with the Universal Service Directive from the date of its accession to the European Union, on 1 May 2004.

- 6 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) (the ‘Framework Directive’) provides in Article 19(1):

‘Where the Commission, acting in accordance with the procedure referred to in Article 22(2), issues recommendations to Member States on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8, Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission giving the reasoning for its position.’

- 7 The 10th recital in the preamble to Commission Recommendation 2003/558/EC of 25 July 2003 on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services (OJ 2003 L 189, p. 49) is worded as follows:

‘The effective implementation of location-enhanced emergency call services requires that the caller’s location as determined by the provider of the public telephone network or service is transmitted automatically to any appropriate public safety answering point that can receive and use the location data provided.’

- 8 Points 4 and 13 of Recommendation 2003/558 state:

‘4. For every emergency call made to the European emergency call number 112, public telephone network operators should, initiated by the network, forward (push) to public safety answering points the best information available as to the location of the caller, to the extent technically feasible. For the intermediate period up to the conclusion of the review as referred to in point 13 below, it is acceptable that operators make available location information on request only (pull).

...

13. Member States should require their national authorities to report to the Commission on the situation of E112 implementation by the end of 2004 so that the Commission can undertake a review taking into account the emerging requirements from public safety answering points and emergency services and the evolutions and availability of technological capabilities for location determination.’

National law

- ⁹ Article 26(3) of the Universal Service Directive, which was transposed into Lithuanian law by Article 65(4) of Law No IX-2135 on electronic communications (Elektroninių ryšių įstatymas Nr. IX-2135), of 15 April 2004 (Žin., 2004, Nr. 69-2382) ('Law on electronic communications'), and entered into force on 1 May 2004, provides:

'Providers of public communications networks and electronic communications services accessible to the public shall supply, without the consent of subscribers or users of electronic communications services, information on location (together with flow data) to bodies responsible for processing emergency calls, in particular to the judicial authorities, the ambulance service, the fire service and other emergency services in order for those bodies to answer calls from subscribers and users of electronic communications services and respond appropriately ...'

- ¹⁰ On 1 September 2007, Law No X-1092 of 12 April 2007 (Žin., 2007, Nr. 46-1723), amending Article 65 of the Law on electronic communications, entered into force. As amended, Article 65(4) states that providers of public communications networks and electronic communications services accessible to the public are required to provide caller location information free of charge to the Joint Emergency Services Centre and that the costs of acquisition, installation (adaptation), refurbishment and operation of the equipment necessary for that purpose shall be reimbursed out of public funds.

11 In addition to the Law on electronic communications, the Republic of Lithuania adopted a number of other acts intended to implement Article 26(3) of the Universal Service Directive. They include:

- Law No IX-2246 on the Joint Emergency Services Centre (Bendrojo pagalbos centro įstatymas Nr. IX-2246), of 25 May 2004 (Žin., 2004, Nr. 90-3306);

- Resolution No 1500 of the Government of the Republic of Lithuania on the establishment of the Joint Emergency Services Centre, the strategy for the introduction of the single European emergency call number, and the approval of its implementation plan (Lietuvos Respublikos Vyriausybės nutarimas Nr. 1500 dėl Bendrojo pagalbos centro įsteigimo ir vieno skubaus iškvietimo telefono numerio 112 įvedimo strategijos, jos įgyvendinimo plano patvirtinimo), of 25 September 2002 (Žin., 2002, Nr. 95-4114), and

- Decree No 1V-389 of the Director of the Communications Regulatory Authority approving the procedure and the mode of transmission of calls from subscribers and/or users of communications services to the numbers of the Joint Emergency Services Centre and/or the emergency services (Ryšių reguliavimo tarnybos direktoriaus įsakymas Nr. 1V-389 dėl abonentų ir(ar) paslaugų gavėjų skambučių siuntimo į Bendrojo pagalbos centro ir(ar) pagalbos tarnybų numerius tvarkos ir sąlygų aprašo patvirtinimo) of 21 April 2005 (Žin., 2005, Nr. 55-1918).

Pre-litigation procedure

12 By letter of formal notice of 10 April 2006, the Commission informed the Republic of Lithuania of its concerns regarding the incorrect application of Article 26(3) of

the Universal Service Directive. Those concerns arose from the fact that when emergency calls to the single European emergency number '112' come from a mobile telephone, caller location information is not provided to the emergency services.

- 13 In their response sent on 11 July 2006, the Lithuanian authorities confirmed that fact, explaining that not all the operators of public communications networks and electronic communications services accessible to the public had the technical equipment necessary for that purpose and that the authorities had not reached an agreement with the operators concerning the responsibility for costs related to locating callers. On 25 September 2006, the Lithuanian Government sent to the Commission the most recent information, setting out the measures envisaged in order to implement Article 26(3) of the Universal Service Directive.
- 14 On 18 October 2006, the Commission issued a reasoned opinion in which it stated that the Republic of Lithuania was unable to ensure in practice that caller location information is made available where emergency calls to the '112' number are made from a mobile telephone, thereby failing to fulfil its obligations under Article 26(3) of the Universal Service Directive. At the same time, it called on that Member State to take the measures necessary in order to comply with that opinion within two months of its notification.
- 15 In its reply of 12 January 2007, the Lithuanian Government indicated that a draft law amending Article 65 of the Law on electronic communications had been put before the Lithuanian Parliament, providing that the costs relating to the caller location information transmission service borne by the providers of public mobile telephone networks were to be financed from the national budget. Appended to that letter was an agreement concluded on 4 December 2006 between the Joint Emergency Services Centre and the mobile telephone operators relating to caller location services.

- 16 Taking the view, however, that the situation remained unsatisfactory, the Commission brought the present action.

The action

Admissibility

Arguments of the parties

- 17 The Lithuanian Republic submits that the action should be dismissed as inadmissible on the ground that the complaints set out in the reasoned opinion differed in their content from those raised in the application. Whereas the statement of reasons in the reasoned opinion emphasised the fact that in Lithuania, as regards calls to the '112' number from a mobile telephone, caller location information is not provided according to the 'pull' method, the application sets out an obligation to apply the 'push' method.
- 18 The Commission replies that the reasoned opinion and the application mention both 'push' and 'pull' methods, set out in Recommendation No 2003/558, and leave the Republic of Lithuania the choice as to which of those methods to apply in order to implement Article 26(3) of the Universal Service Directive.
- 19 In its rejoinder, the Republic of Lithuania submits that it is only at the stage of the reply that the Commission clarified its new position, according to which the Member

States not only may but must take the simplest technical measures to localise the caller, that is to say apply the ‘pull’ method. Since the Commission’s position therefore remained unclear until that stage the complaints that it made did not comply with the requirement to precisely formulate the subject-matter of an action for failure to fulfil obligations.

Findings of the Court

- 20 First of all, it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law, on the one hand, and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, in particular, Case C-484/04 *Commission v United Kingdom* [2006] ECR I-7471, paragraph 24, and the case-law cited).
- 21 The proper conduct of that procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, Case C-34/04 *Commission v Netherlands* [2007] ECR I-1387, paragraph 49, and the case-law cited).
- 22 It follows, first, that the subject-matter of the proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision. Accordingly, the application must be based on the same grounds and pleas as the reasoned opinion (see, Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 18, and Case C-305/03 *Commission v United Kingdom* [2006] ECR I-1213, paragraph 22).

- 23 Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned has failed to fulfil one of its obligations under Community law (see, *Commission v Germany*, cited above, paragraph 19, and *Commission v United Kingdom*, cited above, paragraph 26).
- 24 In this case, it must be stated first of all that the complaint made against the Republic of Lithuania remained unchanged throughout the pre-litigation and contentious procedures. Both during the pre-litigation procedure and before the Court, the Commission complained that that Member State had failed to fulfil its obligations under Article 26(3) of the Universal Service Directive by failing to ensure in practice that, to the extent technically feasible, authorities handling emergencies are given caller location information for all callers to the single European emergency call number '112'.
- 25 As regards the specific content and the reasoning of that complaint, the Commission relied, in the letter of formal notice and the reasoned opinion, on the fact that it was technically feasible for fixed and mobile telephone operators operating in Lithuania to provide that information at least according to the 'pull' method referred to in Recommendation 2003/558. However, in so doing it had in no way imposed that method on the Republic of Lithuania, but merely stated that in its view the obligation laid down in Article 26(3) of the Universal Service Directive is in fact applicable in this case, since the condition of technical feasibility to which Article 26(3) subjects that obligation is satisfied.
- 26 Contrary to the Republic of Lithuania's submissions, the Commission did not assert, during the proceedings before the Court, that Member States have an obligation to implement a specific method in order to comply with Article 26(3) of the Universal Service Directive. The application and the reply, like the letter of formal notice and the reasoned opinion before them, simply refer to point 4 of Recommendation 2003/558, without requiring one or other method mentioned in that paragraph to be implemented.

27 Thus, the Commission submitted — in particular in its reply — not that the Republic of Lithuania must use the ‘pull’ method, but that that Member State is required to implement at least the most simple technical measures in order to ensure that, from the date laid down in the Act of Accession, the relevant information is actually transmitted. That position corresponds exactly to the view expressed by the Commission during the pre-litigation procedure.

28 It is clear from the foregoing that the plea of inadmissibility raised by the Republic of Lithuania must be dismissed.

Substance

Arguments of the parties

29 The Commission takes the view that it is technically feasible for Lithuanian operators of public mobile telephone networks to provide caller location information when the caller dials the ‘112’ number from a mobile telephone. Therefore, it follows from the information provided by the defendant itself that the mobile telephone networks in Lithuania do not have specific characteristics which, from a technical point of view, prevent the transmission of that information.

30 In particular, the agreement concluded on 4 December 2006 between the Joint Emergency Services Centre and the providers of public mobile telephone network services

states that it is technically possible to transmit the information, but that that might require additional investment. The lack of investment and the delays in acquiring the technical equipment necessary for that purpose cannot be regarded as a lack of technical feasibility within the meaning of Article 26(3) of the Universal Service Directive.

31 In its reply, the Commission states that point 4 of Recommendation 2003/558, to which it referred in its application, cannot, having regard to the non-binding nature of that recommendation, require the Member States to apply the 'push' method rather than the 'pull' method in order to transmit caller location information. Although the Republic of Lithuania is therefore free as to the choice of method it must, however, in accordance with Article 26(3) of the Universal Service Directive, implement at least the most simple technical measures in order to ensure that the operators of fixed and mobile public telephone networks provide that information from the date set in the Act of Accession.

32 The Republic of Lithuania contends that the complaint made by the Commission is unfounded solely because it is not formulated in an appropriate manner. Since that Member State has adopted all the legal, technical and organisational measures possible in order to fulfil the obligations laid down by Article 26(3) of the Universal Service Directive, the Commission's head of claim should have been formulated so as to seek a declaration that the Republic of Lithuania has failed to fulfil its obligations by not ensuring that the undertakings which operate public telephone networks make the relevant information available to the authorities handling emergencies.

33 As regards technical feasibility, the Republic of Lithuania explains that the Joint Emergency Services Centre has the technical means to receive the location information on a person calling the '112' number. However, the operators of public mobile telephone networks active in Lithuania do not always have the technical means to provide that information.

34 That Member State points out that the adaptation of the ‘pull’ method, used by certain operators for commercial purposes, would have been far simpler than the transition to a system based on the ‘push’ method. However, at the same time as a decision was taken to use the latter, more modern method, the extra investment to adapt the ‘pull’ method to the needs of the location of calls to the ‘112’ number was refused.

35 In that context, it states that the technical means necessary to transmit the information concerned differ radically according to whether the ‘pull’ or ‘push’ method is used and that the two systems require investment and a certain amount of preparation time. The factor of technical feasibility should be taken into consideration when examining the reasons why Lithuanian mobile telephone operators are not ready to transmit information to the emergency services.

36 In addition, account should be taken of the uncertainty raised by Recommendation 2003/558 as to the manner in which the obligations arising from Article 26(3) of the Universal Service Directive are to be implemented and the time-limit to be respected in that regard. There would be a failure to fulfil obligations only if it were known from the outset which method may and must be applied and from which date. According to the Republic of Lithuania, if it had been clearly established that Member States are free to apply the ‘pull’ method which is simpler from a technical point of view, it could have made use of that option, which would have saved a considerable amount of time.

37 Furthermore, points 4 and 13 of Recommendation 2003/558 should be interpreted as meaning that the aims of the Universal Service Directive are not achieved in an effective manner by employing the ‘pull’ method and therefore it is necessary to introduce the ‘push’ method as widely as possible. Since extra time was necessary in order to implement this method, the Commission provided for an additional period in the recommendation.

Findings of the Court

- 38 It must be recalled that, under Article 26(3) of the Universal Service Directive, Member States are to ensure that undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls to the single European emergency call number '112'.
- 39 As is clear from the 36th recital in the preamble to the Universal Service Directive, that provision aims to improve the level of protection and the security of users of '112' services and assist the emergency services in the discharge of their duties.
- 40 It follows from the wording and the aim of the provision that it imposes on Member States, subject to technical feasibility, an obligation to achieve a result which is not limited to putting in place an appropriate regulatory framework, but which requires that the location information for all callers to the '112' be actually transmitted to the emergency services.
- 41 In this case, the Republic of Lithuania does not deny that when the period prescribed in the reasoned opinion expired, that information was not transmitted in cases where the call came from a mobile telephone.
- 42 First, the Republic of Lithuania's argument that the Commission's complaint is not formulated in an appropriate manner since it has adopted all the legal, technical and organisational measures necessary to transpose Article 26(3) of the Universal Service Directive, cannot be accepted. It is clear from the formulation and the reasoning of that complaint that the Commission does not criticise the Republic of Lithuania for

having incorrectly or insufficiently transposed that provision, but for not being able to ensure in practice that the information at issue is actually made available to the emergency services.

43 Second, as regards the requirement of technical feasibility which accompanies the obligation imposed on the Member States by Article 26(3) of the Universal Service Directive, it must be held that, according to the information provided by the Republic of Lithuania, the failure to transmit information on the location of calls from the public mobile telephone networks is due to the fact that the operators of those networks do not have the necessary technical equipment, which would require substantial investment.

44 It has been explained in that regard that after an initial disagreement between the operators and the Lithuanian authorities concerning the financing of the costs of such investment the legislature amended Article 65(4) of the Law on electronic communications with effect from 1 September 2007, so as to provide that from now on operators are to provide the information at issue free of charge to the Joint Emergency Services Centre and that the costs of acquiring, installing, adapting, refurbishing and operating the equipment necessary for that purpose are to be reimbursed from public funds.

45 It follows from that evidence, without there being any need to examine the agreement concluded on 4 December 2006 between the Joint Emergency Services Centre and the providers of public mobile telephone network services, the interpretation of which is a matter of dispute between the parties, that the reason for the failure to transmit information on the location of calls from those networks does not arise from technical characteristics of those networks, which would prevent the transmission of that information, but from the lack of the investment required in order to acquire or adapt the equipment so as to allow that transmission.

- 46 As the Commission rightly stated, the failure to acquire or adapt the equipment necessary cannot be regarded as a lack of technical feasibility within the meaning of Article 26(3) of the Universal Service Directive.
- 47 Lastly, as regards the arguments put forward by the Republic of Lithuania regarding the method to be employed in order to transmit location information on callers to the '112' number, it must be held, first of all, that Article 26(3) of the Universal Service Directive does not contain any information in that regard and therefore leaves the Member States to decide the manner in which they wish to actually ensure that that information is transmitted.
- 48 In point 4, Recommendation 2003/558 mentions two methods. The first method, called the 'push' method consists in the automatic transmission of that information by the operators of telephone networks, while according to the second method, the 'pull' method, that information is provided solely at the request of public safety answering points.
- 49 Although it follows from the wording of point 4 and the 10th recital in the preamble to Recommendation 2003/558 that the Commission regards the application of the first method to be the most effective and recommends that the Member States impose it, at least after an intermediate period, on public telephone networks operating on their territory, it is equally clear that that recommendation, in the light of its non-binding nature, cannot require the Member States to use a specific method in order to implement Article 26(3) of the Universal Service Directive.
- 50 Not only is the non-binding nature of Recommendation 2003/558 clear from the fifth paragraph of Article 249 EC, but it is also explicitly confirmed by Article 19 of the Framework Directive on the basis of which the recommendation was adopted. It is clear from Article 19(1) that the national regulatory authorities may choose not to follow a recommendation adopted by the Commission on the basis of the latter

provision, on condition that they inform the Commission thereof and communicate to the Commission the reasoning for their position.

51 Although the Member States are therefore free to choose the method to be used by the operators of public telephone networks in order to transmit the location information of callers to the '112' number, they are however bound by the clear and precise obligation to achieve a result laid down in Article 26(3) of the Universal Service Directive, which requires them to ensure that that information is made available to the emergency services.

52 In particular, a Member State cannot justify any delay in the implementation of that obligation by the fact that it has decided to put in place the 'push' method based on the automatic transmission of location information.

53 In that connection it must be held that, contrary to the Republic of Lithuania's assertions, Recommendation 2003/558 does not give extra time to Member States which have opted for the 'push' method. Not only does the Commission lack powers to legitimately extend the binding time-limit allowed to Member States for compliance with Article 26(3) of the Universal Service Directive, but it also follows from the wording of point 4 of that recommendation that it by no means intends to provide for exemption from compliance with that time-limit. Although point 4 mentions the possibility of implementing the 'push' method only after an intermediate period, it explains at the same time that during that period the information on location must at least be provided at the request of the emergency services, that is according to the 'pull' method.

54 Lastly, as to the alleged uncertainties concerning the method and the period in which to implement the obligation laid down in Article 26(3) of the Universal Service Directive, it must be held that that provision and Recommendation 2003/558 do not

give rise to any objective doubt in that respect. In those circumstances, and taking account of the fact in particular that the Republic of Lithuania itself explained in its defence that Recommendation 2003/558 is not binding on the Member States, it cannot reasonably argue that its delay in effectively implementing Article 26(3) of the Universal Service Directive is justified by a misunderstanding as to its obligations.

⁵⁵ In light of the foregoing, it must be held that, by not ensuring in practice that authorities handling emergencies are, to the extent technically feasible, given caller location information for all callers to the single European emergency call number '112' when public telephone networks are used, the Republic of Lithuania has failed to fulfil its obligations under Article 26(3) of the Universal Services Directive.

Costs

⁵⁶ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Republic of Lithuania and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that, by not ensuring in practice that authorities handling emergencies are, to the extent technically feasible, given caller location information for all callers to the single European emergency call number '112' when**

public telephone networks are used, the Republic of Lithuania has failed to fulfil its obligations under Article 26(3) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services;

2. Orders the Republic of Lithuania to pay the costs.

[Signatures]