

JUDGMENT OF THE COURT (Third Chamber)

17 February 2011*

In Case C-16/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 15 December 2009, received at the Court on 11 January 2010, in the proceedings

The Number (UK) Ltd,

Conduit Enterprises Ltd

v

Office of Communications,

British Telecommunications plc,

* Language of the case: English.

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 December 2010,

after considering the observations submitted on behalf of:

- The Number (UK) Limited and Conduit Enterprises Limited, by D. Rose QC, and B. Kennelly, Barrister,
- British Telecommunications plc, by R. Thomson QC, J. O' Flaherty, Barrister, and S. Murray, Solicitor,
- the United Kingdom Government, by F. Penlington, acting as Agent, and C. Vajda QC,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the European Commission, by G. Braun and A. Nijenhuis, acting as Agents,

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

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), 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') and 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) in the versions applicable when the order for reference was made.

- 2 The reference was made in proceedings between The Number (UK) Ltd ('The Number') and Conduit Enterprises Ltd ('Conduit Enterprises'), two providers of directory enquiry services and directories in the United Kingdom, and British Telecommunications plc ('BT') concerning amounts charged by BT for providing information from

a database containing the details of subscribers to the telecommunications service which BT is required to maintain as a universal service provider.

Legal context

European Union law

3 Recital 7 in the preamble to the Universal Service Directive is worded as follows:

‘Member States should continue to ensure that the services set out in Chapter II are made available with the quality specified to all end-users in their territory, irrespective of their geographical location, and, in the light of specific national conditions, at an affordable price...’

4 Recital 11 in the preamble to the Universal Service Directive states as follows:

‘Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory

enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. ...'

5 Article 3(2) of the Universal Service Directive provides as follows:

'Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality. They shall seek to minimise market distortions, in particular the provision of services at prices or subject to other terms and conditions which depart from normal commercial conditions, whilst safeguarding the public interest.'

6 Article 4(1) of the Universal Service Directive is worded as follows:

'Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking.'

7 Article 5 of the Universal Service Directive, entitled ‘Directory enquiry services and directories’, is worded as follows:

‘1. Member States shall ensure that:

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.’

8 Article 8(1) of the Universal Service Directive is worded as follows:

‘Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory.’

9 Article 9 of the Universal Service Directive, entitled ‘Affordability of tariffs,’ provides as follows:

‘1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income.

2. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service.

...

4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps.

...'

¹⁰ Article 11 of the Universal Service Directive, entitled 'Quality of service of designated undertakings', provides as follows:

'1. National regulatory authorities shall ensure that all designated undertakings with obligations under Articles 4, 5, 6, 7 and 9(2) publish adequate and up-to-date information concerning their performance in the provision of universal service, based on the quality of service parameters, definitions and measurement methods set out in Annex III. The published information shall also be supplied to the national regulatory authority.

....

4. National regulatory authorities shall be able to set performance targets for those undertakings with universal service obligations at least under Article 4. In so doing, national regulatory authorities shall take account of views of interested parties, in particular as referred to in Article 33.

5. Member States shall ensure that national regulatory authorities are able to monitor compliance with these performance targets by designated undertakings.

...'

¹¹ Article 25(2) of the Universal Service Directive is worded as follows:

'Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.'

¹² Article 8 of the Framework Directive, entitled 'Policy objectives and regulatory principles', provides as follows:

'1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.'

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users ... derive maximum benefit in terms of choice, price, and quality;

...

3. The national regulatory authorities shall contribute to the development of the internal market ...

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia:

(a) ensuring all citizens have access to a universal service specified in the [Universal Service Directive];

...'

¹³ Article 3(2) of the Authorisation Directive is worded as follows:

‘The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.’

¹⁴ Article 6(2) of the Authorisation Directive provides as follows:

‘Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of Directive 2002/19/EC (Access Directive) and Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal

Service Directive) or on those designated to provide universal service under the said Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.’

National law

- 15 Universal Service Condition 7 (‘USC 7’), imposed on BT in connection with its designation as universal service provider under the Electronic Communications (Universal Service) Regulations 2003, is worded as follows:

‘7.1 BT shall maintain a database containing directory information for all subscribers who have been allocated telephone numbers by any [network or service] communication provider (“the database”). BT shall ensure that the database is updated on a regular basis.

7.2 BT shall, in accordance with paragraphs 7.3 and 7.4 below, and on request, make available:

- (a) to any [network or service] communications provider subject to paragraph 8.2 of general condition 8 for the purpose of allowing that [network or service] communications provider to comply with that paragraph, such directories as BT compiles which comply with the requirements of that general condition;

- (b) to any person seeking to provide publicly available directory enquiry facilities and/or directories, the contents of the database, in machine readable form.

7.3 BT shall supply the items in sub-paragraphs (a) and (b) of paragraph 7.2 above at the reasonable request of the person requesting such items. Without prejudice to the generality of the foregoing, BT may refuse to supply such items if:

- (a) the person requesting such items does not undertake to process the data or information contained in them in accordance with any relevant code of practice, and/or
or

- (b) BT has reasonable grounds to believe that the person requesting such items with not comply with relevant data protection legislation.

7.4 BT shall supply the items in sub-paragraphs (a) and (b) of paragraph 7.2 above on terms which are fair, objective, cost oriented and not unduly discriminatory, and in a format which is agreed between BT and the person requesting the information. Where no such agreement is reached, the Director may determine the format to be applied to the information in accordance with his dispute resolution functions.'

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

- 16 In the United Kingdom, with the exception of the area around the city of Hull, the universal service provider for telecommunications is BT.
- 17 The Office of Communications ('OFCOM') is the United Kingdom's national regulatory authority for telecommunications. In 2003, OFCOM replaced Oftel, the Office of Telecommunications.
- 18 USC 7, which was imposed by Oftel, requires BT to make available to other providers of directory enquiry services and directories which were not designated as providers of universal service, on terms which are fair, objective, cost-oriented and non-discriminatory and in an agreed format, its comprehensive telephone subscriber database, known as 'OSIS' which it compiles by collecting data from all operators providing fixed telephone services.
- 19 Thus, instead of imposing a user-driven universal service obligation, USC 7 imposes a wholesale obligation on BT, which means, in practice, that there are a number of competing providers of directory enquiry services and directories on the United Kingdom market which operate using the OSIS database.
- 20 In its judgment in Case C-109/03 *KPN Telecom* [2004] ECR I-11273, the Court held, inter alia, that the amounts charged by operators offering fixed telephone services for making available 'relevant information' on subscribers should not include the internal costs of assembling, compiling and updating the operator's own subscriber data. The

Number and Conduit Enterprises challenged the amounts charged by BT for use of its OSIS database, relying on that judgment in support of their action.

- 21 OFCOM, before which those disputes were brought in 2005, gave its decisions on 10 March 2008. In those decisions, OFCOM found, inter alia, that USC 7 was incompatible with European Union law as it did not transpose correctly the requirements of Article 5 of the Universal Service Directive. Thus, according to OFCOM, BT was not required to grant access to the OSIS database on regulated terms, except as regards its own subscriber data. It is in fact required to provide those latter data under another obligation, separate from that laid down in USC 7, which is not at issue in the main proceedings, is applicable to all electronic communications undertakings and transposes Article 25 of the Universal Service Directive.
- 22 By decision of 24 November 2008, the Competition Appeal Tribunal allowed the appeal against the determination of OFCOM. It thus considered that USC 7 correctly implemented the relevant provisions of the Universal Service Directive.
- 23 BT, supported by OFCOM, appealed against the decision of the Competition Appeal Tribunal before the Court of Appeal. While the Court of Appeal reached the preliminary conclusion that USC 7 was contrary to the Universal Service Directive, it considered it necessary to obtain a preliminary ruling from the Court of Justice before giving judgment, taking the view that ‘a consideration of the principles involved, differences between the authoritative texts and the points taken in argument’ demonstrated ‘that the point cannot be regarded as beyond doubt’.

24 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is the power afforded to Member States under Article 8(1) of [the Universal Service Directive], read together with Article 8 of [the Framework Directive], Articles 3(2) and 6(2) of [the Authorisation Directive], and Article 3(2) of the Universal Service Directive and other material provisions of EC law, to designate one or more undertakings to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4, 5, 6, 7 and 9(2) of the Universal Service Directive, to be interpreted as:

(a) permitting the Member State, where it decides to designate an undertaking pursuant to this provision, only to impose specific obligations on that undertaking which require the undertaking itself to provide to end-users the universal service or element thereof in respect of which it is designated; or

(b) permitting the Member State, when it decides to designate an undertaking under this provision, to place the designated undertaking under such specific obligations as the Member State considers to be most efficient, appropriate and proportionate for the purpose of guaranteeing the provision of the universal service or element thereof to end-users, whether or not those obligations require the designated undertaking itself to provide the universal service or element thereof to end-users?

2. Do the above provisions, when read also in the light of Article 3(2) of the Universal Service Directive, permit Member States, in circumstances where an undertaking is designated under Article 8(1) of the Universal Service Directive in

relation to Article 5(1)(b) of that directive (comprehensive telephone directory enquiry service) without being required to supply such a service directly to end-users, to impose specific obligations on that designated undertaking:

- (a) to maintain and update a comprehensive database of subscriber information;

- (b) to make available in machine readable form the contents of a comprehensive database of subscriber information, as updated on a regular basis, to any person seeking to provide publicly available directory enquiry services or directories (whether or not that person intends to provide a comprehensive directory enquiry service to end-users); and

- (c) to supply the database on terms which are fair, objective, cost oriented and non-discriminatory to such a person?’

The questions referred

Question 1

²⁵ By its first question, the Court of Appeal asks whether Article 8(1) of the Universal Service Directive permits Member States, when deciding to designate one or more

undertakings under that provision to guarantee the provision of universal service or different elements of universal service, as identified in Articles 4 to 7 and 9(2) of that directive, to impose on those undertakings only specific obligations as to the manner in which they are to provide the universal service to end-users in respect of which they have been designated or whether, on the contrary, Member States are entitled to impose on the designated undertakings such obligations as they consider most appropriate for the purpose of guaranteeing the provision of universal service, irrespective of whether those undertakings provide the service themselves.

- ²⁶ As a preliminary point, it should be noted that that question is raised in a dispute concerning, *inter alia*, the compatibility with European Union law of a wholesale obligation under the national universal service arrangements applicable to, *inter alia*, directory enquiry services and directories, which is imposed on a single operator, namely BT. That obligation requires BT to maintain and make available to other providers of directory enquiry services and directories, in an agreed format and on terms that are fair, objective, cost-oriented and non-discriminatory, its OSIS database, which it compiles by gathering data from all operators providing a fixed telephone service.
- ²⁷ That is the context in which the Court of Appeal seeks to ascertain whether the provisions of the Authorisation Directive, the Framework Directive and the Universal Service Directive, in particular Article 8(1) of the Universal Service Directive, permit Member States to impose such a wholesale obligation on a specific operator in designating that operator under that provision in order to achieve indirectly, by creating a suitable competitive environment, the universal service objective set out in recital 11 of the preamble to the Universal Service Directive and referred to in Article 5 thereof, which consists in making available to all end-users comprehensive directory enquiry services and directories.

- 28 In order to ascertain the meaning and scope of Article 8(1) of the Universal Service Directive, it must, first, be viewed against its legislative background (see, by analogy, Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 18 and the case-law cited). Next, it must be interpreted by having regard to its wording, the overall scheme of the directive and the objectives pursued by the legislator.
- 29 Article 3(2) of the Authorisation Directive provides that the provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) of that directive or rights of use for radio frequencies and numbers referred to in Article 5 thereof, only be subject to a general authorisation. The latter rights are not at issue in the case in the main proceedings.
- 30 Accordingly, Member States are entitled to impose specific obligations on one or more individual undertakings only in so far as such obligations fall within the cases contemplated in Article 6(2) of the Authorisation Directive. That provision refers *inter alia* to obligations imposed on undertakings designated to provide universal service under the Universal Service Directive. Those obligations include the provision of comprehensive directory enquiry services and directories referred to in Article 5 of that directive. It is Article 8(1) of the Universal Service Directive which provides for the designation of operators responsible for providing universal service or certain elements of universal service.
- 31 As an exception to the prohibition on imposing specific obligations on operators individually, the obligations which may be imposed under the Universal Service Directive on undertakings designated in accordance with Article 8(1) thereof to provide universal service are to be interpreted strictly.

- 32 While the wording of the first sentence of Article 8(1) of the Universal Service Directive provides for the designation of an undertaking 'to guarantee the provision' of universal service, the second sentence of that provision also states that 'Member States may designate different undertakings or sets of undertakings to provide different elements of universal service'. It therefore follows from the wording of that provision, taken as a whole, that a Member State can impose on a designated undertaking only the obligations specifically laid down by the provisions of the Universal Service Directive relating to the provision by that undertaking itself to end-users of one of the specific elements of universal service identified in Articles 4 to 7 and 9(2) of the directive.
- 33 It should be added that the fact that the undertaking itself is to provide universal service to users does not mean that it is not possible for that undertaking to subcontract the provision of the service to a third party, providing that it remains responsible to the competent authorities of the Member State for the manner in which the service is provided.
- 34 Moreover, that interpretation is supported by considerations relating to the general scheme of the Universal Service Directive and its objectives. The clear implication of the provisions of Articles 9 and 11 of that directive, which relate to the tariffs applied and monitoring by the national regulatory authorities of the performance of designated undertakings in the provision of universal service, respectively, is that it is necessarily those undertakings which are to provide that service themselves.
- 35 With regard, first, to Article 9 of the Universal Service Directive, it is apparent from recital 7 in the preamble to that directive that one of its main objectives is to ensure that of a minimum set of electronic communications services is provided to end-users at an affordable price. To that end, Article 9 of the Universal Service Directive,

in particular Article 9(1), (2) and (4), introduces a mechanism for the monitoring and regulation by the competent national authorities of the structure and level of tariffs applied by the undertaking designated to provide elements of universal service.

- ³⁶ On the other hand, Article 9 of the Universal Service Directive does not provide for any mechanism for regulating prices charged by undertakings other than the designated undertaking. Accordingly, even if such undertakings could have access, at tariffs set by the national regulator, to a comprehensive database of all telephone subscribers, such as BT's OSIS database, as a result of a specific national obligation such as USC 7, they would not be required to provide at an affordable price the element of universal service referred to in Article 5 of that directive consisting in making comprehensive directory enquiry services and directories available to all end-users. That being the case, an obligation such as that laid down by the national legislation at issue in the main proceedings does not, as such, guarantee that the element of universal service in question is made available to all end-users at an affordable price.
- ³⁷ Second, according to Article 11 of the Universal Service Directive, it is for the national regulatory authorities to monitor the provision of universal service by the designated undertakings and to ensure, where necessary, compliance with certain specific requirements relating to quality of service. That provision therefore starts from the premiss that the designated undertakings have at their disposal operational data on the provision of universal service and are in a position to directly influence the manner in which that service is provided, which presupposes that they provide the service themselves.
- ³⁸ It is true that, in accordance with Article 3(2) of the Universal Service Directive, it is for the Member States to determine 'the most efficient and appropriate approach for ensuring the implementation of universal service'. However, the discretion conferred

on Member States by that provision does not permit them to impose on individual undertakings specific obligations other than those falling within the cases contemplated in Article 6(2) of the Authorisation Directive. Thus, Article 3(2) of the Universal Service Directive cannot be interpreted in such a manner as to widen the scope of the designation permitted under Article 8(1) of that directive, so as to enable a Member State to impose on an undertaking thus designated obligations other than those provided for in that directive.

39 Lastly, as to any relevance Article 25(2) of the Universal Service Directive may have in that context, it need merely be observed that that provision simply requires Member States to ensure that ‘all undertakings which assign telephone numbers to subscribers’ meet all reasonable requests to make available data on their own subscribers for the purposes of the provision of directory enquiry services and directories. Thus, that provision, which imposes an obligation generally applicable to all operators, has no effect on the scope of the specific obligations which a Member State is entitled to impose on one or more individual undertakings which it designates to provide universal service in accordance with Article 8(1) of the Universal Service Directive.

40 In the light of the foregoing considerations, the answer to the first question referred is that Article 8(1) of the Universal Service Directive permits Member States, where they decide to designate one or more undertakings under that provision to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4 to 7 and 9(2) of that same directive, to impose on such undertakings only the specific obligations, provided for in the directive, which are associated with the provision of that service, or elements thereof, to end-users by the designated undertakings themselves.

Question 2

- 41 Having regard to the answer given to the first question, there is no need to reply to the second question referred. The second question is based on the assumption that a Member State has lawfully imposed a specific obligation on an undertaking designated under Article 8(1) of the Universal Service Directive without that undertaking's being required to provide that service directly to end-users and essentially asks whether such an obligation may encompass requirements to maintain a database and make it available to other operators at wholesale level. It is apparent from the answer given to the first question that no such obligation may be imposed under that provision.

Costs

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

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

Article 8(1) 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) permits Member States, where they decide to designate one or more undertakings under that provision to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4 to 7 and 9(2) of that same directive, to impose on such undertakings only the specific obligations, provided for in the directive, which are associated with the provision of that service, or elements thereof, to end-users by the designated undertakings themselves.

[Signatures]