



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 30 January 2014<sup>1</sup>

**Case C-475/12**

**UPC DTH Sàrl**

**v**

**Nemzeti Média- és Hírközlési Hatóság Elnökhelyettese**

(Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary))

(Common regulatory framework for electronic communications networks and services — Freedom to provide services — Competence for surveillance of cross-border services — Registration — Requirement of establishment)

### **I – Introduction**

1. Following a business reorganisation of an international group of companies, the Hungarian subsidiary no longer provides Hungarian viewers with access to certain satellite television services, which are instead provided by the Luxembourg subsidiary. On the basis of complaints by Hungarian subscribers, the Hungarian regulatory authority for electronic communications is in dispute with the Luxembourg company as to whether, notwithstanding the restructuring, the Hungarian authority remains entitled to take certain monitoring measures.

2. The Hungarian regulatory authority would be competent in particular if the Luxembourg company were providing an electronic communications service within the meaning of the new regulatory framework for electronic communications ('NRF'). However, the primary purpose of the NRF is not to ensure consumer protection (which is the subject of the main proceedings) but to allocate scarce resources, for example frequencies, and to provide for the administration of networks, in particular from the point of view of competition law. Therefore, it is also necessary to assess any monitoring by reference to the principle of the freedom to provide services, which presupposes, however, that that freedom is clearly distinguished from the provisions of the NRF.

<sup>1</sup> — Original language: German.

## II – Legal framework

3. In addition to the Framework Directive,<sup>2</sup> the NRF consists of the Authorisation Directive,<sup>3</sup> the Access Directive,<sup>4</sup> the Universal Service Directive<sup>5</sup> and the Directive on privacy and electronic communications.<sup>6</sup> The latter is irrelevant to the present case, however.

### A – *The Framework Directive*

4. Recital 10 in the preamble to the Framework Directive makes it clear that regulated and unregulated services may be provided together:

‘The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.’

5. The regulatory purpose of the Framework Directive and of the NRF is set out in Article 1 of the Framework Directive:

‘1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services ... It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

2. ...

3. This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.’

6. Article 2 of the Framework Directive defines in particular electronic communications networks and services and conditional access systems:

‘For the purposes of this Directive:

- (a) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources ... which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

2 — 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 (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37).

3 — 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 (OJ 2002 L 108, p. 21), as amended by Directive 2009/140.

4 — Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ 2002 L 108, p. 7), as amended by Directive 2009/140.

5 — 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 (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

6 — Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37), as amended by Directive 2009/136.

...

- (c) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC,<sup>7</sup> which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

...

- (ea) “associated services” means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service;
- (f) “conditional access system” means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation’.

## B – *The Authorisation Directive*

7. Recital 20 in the preamble to the Authorisation Directive clarifies the position where a single undertaking carries on a number of different business activities:

‘The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on this undertaking in relation to its activity as a content provider or distributor, according to provisions other than those of this Directive, without prejudice to the list of conditions laid [down] in the Annex to this Directive.’

8. Article 3 of the Authorisation Directive sets out the requirements for the provision of electronic communications networks or services:

‘1. ...

2. 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.

<sup>7</sup> — Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

Undertakings providing cross-border electronic communications services to undertakings located in several Member States shall not be required to submit more than one notification per Member State concerned.

3. The notification referred to in paragraph 2 shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity.'

9. Article 6 provides that the general authorisation referred to in Article 3 of the Authorisation Directive may be subject to the conditions listed in the Annex. Point 8 of the Annex refers specifically to consumer protection rules specific to the electronic communications sector.

### *C – The Universal Service Directive*

10. Article 1(4) of the Universal Service Directive makes it clear that it is without prejudice to other consumer protection provisions: 'The provisions of this Directive concerning end-users' rights shall apply without prejudice to Community rules on consumer protection, in particular Directives 93/13/EEC and 97/7/EC, and national rules in conformity with Community law.'

### *D – Directive 2009/140*

11. Recital 5 in the preamble to amending Directive 2009/140 summarises the objectives of the NRF:

'The aim is progressively to reduce *ex-ante* sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex-ante* regulatory obligations only be imposed where there is no effective and sustainable competition.'

## **III – Facts and request for a preliminary ruling**

12. UPC DTH is a commercial company registered in Luxembourg engaged in the marketing of packages of programmes comprising radio and audio-visual broadcast services. In this connection it supplies services from Luxembourg to subscribers resident in other Member States of the European Union, including, in particular, Hungary.

13. Programmes produced by third parties are broadcast by satellite. It appears from the submissions of the parties that UPC DTH does not own the satellite infrastructure, but uses the services of third parties. Moreover, UPC DTH is not required to exercise any editorial control over programmes. The consideration paid for the service covers not only broadcasting costs but also fees paid to radio stations and collecting societies in connection with the publication of their content.

14. Initially, from 2000 onwards, a local sister company of UPC DTH offered this service in Hungary. In 2010, the service was transferred to UPC DTH and has, since then, together with corresponding services for the Czech Republic and the Slovak Republic, been provided by this company.

15. UPC DTH is in dispute with the Deputy Chairman of the National Media and Communications Authority (Nemzeti Média- és Hírközlési Hatóság Elnökhelyettese) as to whether, within the framework of market surveillance proceedings, it is obliged to make available documents and other information contained in its register concerning its contractual relationship with a particular subscriber.

16. UPC DTH relies on the fact that the competent Luxembourg authority, namely the Institut Luxembourgeois de Régulation ('ILR' — the Luxembourg Regulatory Institute) has issued an official opinion according to which the services supplied by the applicant fall within the jurisdiction of Luxembourg and, according to Luxembourg law, the service supplied by the applicant does not constitute an electronic communications service.

17. The proceedings are currently pending before the Fővárosi Törvényszék, the Budapest Municipal Court, which has referred six questions to the Court of Justice for a preliminary ruling:

- (1) May Article 2(c) of the Framework Directive be interpreted as meaning that a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite is to be classified as an electronic communications service?
- (2) May the Treaty on the Functioning of the European Union be interpreted as meaning that the principle of the free movement of services is applicable to the service described in the first question, in the case of a service supplied from Luxembourg to Hungary?
- (3) May the Treaty on the Functioning of the European Union be interpreted as meaning that, in the case of the service described in the first question, the country of destination, to which the service is sent, is entitled to limit the supply of that type of services by requiring that the [supplier of the] service has to be registered in that Member State and has to be established as a branch or separate legal entity, and allowing this type of services to be supplied only through the establishment of a branch or separate legal entity?
- (4) May the Treaty on the Functioning of the European Union be interpreted as meaning that administrative proceedings relating to the services described in the first question, regardless of the Member State in which the undertaking supplying that service operates or is registered, will be subject to the administrative authority of the Member State which has jurisdiction on the basis of the place in which the service is supplied?
- (5) May Article 2(c) of the Framework Directive be interpreted as meaning that the service described in the first question must be classified as an electronic communications service, or must such a service be classified as a conditional access service supplied using the conditional access system defined in Article 2(f) of the Framework Directive?
- (6) On the basis of all the foregoing, may the relevant provisions be interpreted as meaning that the service provider described in the first question must be classified as a provider of electronic communications services pursuant to European Community law?

18. UPC DTH, the Hungarian National Media and Communications Authority ('the Hungarian regulatory authority') together with Hungary, and the Kingdom of Belgium, the Czech Republic, the Republic of Lithuania, the Kingdom of the Netherlands, Romania, the Slovak Republic and the European Commission submitted written observations. UPC DTH, the Hungarian regulatory authority, Hungary, the Czech Republic and the Commission took part in the oral hearing on 20 November 2013.



#### IV – Legal assessment

19. The request for a preliminary ruling is intended to clarify whether the Hungarian regulatory authority may oversee the activity of UPC DTH. On this basis, the questions referred can be divided into two themes: questions 1, 5 and 6 of the national court concern essentially the question whether the activity of UPC DTH is an ‘electronic communications service’ that falls within the scope of application of the NRF, that is within the new regulatory framework for electronic communications (see A below). Questions 2, 3 and 4, on the other hand, concern the issue whether the freedom to provide services under Article 56 TFEU precludes the Hungarian authorities from exercising oversight over UPC DTH (see B below).

20. There may be some doubt as to whether it is necessary to answer both sets of questions. Given that the NRF exhaustively harmonises certain issues, the application of the principle of the freedom to provide services is precluded.<sup>8</sup> However, this does not necessarily apply as regards the definition of an electronic communications network. Specifically, if a Member State defines the competence of a regulatory authority by reference to this definition but confers monitoring powers in respect of the services covered that go beyond the regulation provided for by the NRF, then, notwithstanding the NRF, the freedom to provide services may be relevant in relation to these more extensive powers.

21. The present case concerns such measures. It is apparent from the request for a preliminary ruling that the Hungarian regulatory authority wishes to investigate in particular the relationship between UPC DTH and its subscribers, and thus consumer protection issues. Consumer protection is not exhaustively harmonised by the NRF.<sup>9</sup> Nevertheless, in each case, the issue as to whether the particular question raised is not already covered by the NRF requires careful consideration.

##### A – *The law relating to electronic communications services*

22. According to the NRF, the law relating to electronic communications services concerns, in essence, the transmission of electronic signals. Such transmission services having for a long time been reserved to state monopolies, the purpose of the NRF, according to recital [5] in the preamble to Directive 2009/140, is progressively to reduce *ex-ante* rules as competition in these markets develops and, ultimately, for electronic communications to be governed by competition law only.

23. The Authorisation Directive pursues the aim of reducing *ex-ante* rules by subjecting service providers to relatively minor authorisation conditions. However, it is not necessarily the case that an authorisation will be valid throughout the European Union. Rather, each Member State in which a service is provided is entitled to issue its own authorisation, pursuant to Article 3(2).

24. In addition, the Authorisation Directive contains provisions concerning rights of use for radio frequencies, the administration of which is also regulated by the Framework Directive.

25. Furthermore, the Access Directive provides that particular obligations may be imposed on undertakings with significant market power, in order that other undertakings may also have access to the markets concerned. These provisions are based on the ‘essential facilities doctrine’, which is discussed in connection with the prohibition contained in Article 102 TFEU of abuse of a dominant position.<sup>10</sup>

8 — Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraphs 73 and 77.

9 — Case C-522/08 *Telekomunikacja Polska* [2010] ECR I-2079, paragraph 29.

10 — Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, paragraph 52 et seq.; Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 37 et seq.; and Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, paragraph 60 et seq.

26. Finally, the Universal Service Directive is intended to ensure that all end customers have access to specific minimum services. And the Directive on privacy and electronic communications, albeit less important in the present proceedings, concerns particular data protection requirements in this area.

1. Whether the services at issue fall within the NRF for electronic communications

27. The first and sixth questions seek clarification as to whether UPC DTH provides an electronic communications service, within the meaning of Article 2(c) of the Framework Directive, that is subject to the NRF.

28. The definition encompasses services normally provided for remuneration which consist wholly or mainly in the conveyance of signals on electronic communications networks, including transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services. It also excludes information society services, as defined in Article 1 of Directive 98/34, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

a) Conveyance of signals

29. The service in question includes the conveyance of signals on electronic communications networks, specifically conveyance by satellite. Transmission systems and other resources which permit the conveyance of signals by satellite networks are, according to Article 2(a) of the Framework Directive, ‘electronic communications networks’. The definition expressly refers to networks used for radio and television broadcasting.

30. Contrary to UPC DTH’s submission, the fact that the satellite transmission is carried out by third parties does not call into question the conclusion that the service is to be classified in this way. This is because UPC DTH does not simply enable access to its own service via a network that exists independently of this service (for example, the internet or the telephone network) but first brings about the conveyance of signals and then enables access by subscribers in Hungary.

31. This access by subscribers in Hungary is decisive as regards the question whether the NRF requires this service to be regulated at all in that Member State. In Member States in which the satellite transmission is received but, owing to the lack of any service provided by UPC DTH, cannot be decoded, there is of course no need for any regulation. Accordingly, it is not the satellite operator but, at most, UPC DTH that is the correct addressee for regulatory measures under the NRF.

b) Provision of content

32. It is, moreover, undisputed that no editorial control is exercised over the programmes broadcast in the context of the service UPC DTH provides for remuneration.

33. On the other hand, at first glance the service provided by UPC DTH appears to consist of the provision of content. If that is the case, it would not be an electronic communications service within the meaning of Article 2(c) of the Framework Directive.

34. In a recent case concerning the transmission of packages of programmes over a cable network the Court discussed this question in relation to a similar service provided by UPC DTH's Netherlands sister company. According to that judgment, the relevant directives, in particular the Framework Directive and the Audiovisual Media Services Directive<sup>11</sup> (which concerns content), make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility, whereby content and transmission are covered by different measures which pursue their own specific objectives, without referring to customers of the services supplied or to the structure of the transmission costs charged to them.<sup>12</sup>

35. Thus, whether a service is excluded from the definition of electronic communications services does not depend on whether it consists of the provision of content but on whether it includes the *production* of content and/or editorial responsibility. The service in the present case does not.

c) The key function of the service

36. The service could, however, be one that is excluded from the scope of the NRF because it does not consist *wholly or mainly* in the conveyance of signals. As UPC DTH submits, the conveyance of signals is only one of a number of elements which characterise this service.

37. However, that point too was discussed in the judgment mentioned above concerning UPC DTH's Netherlands sister company. According to that judgment, the fact that customers take out a subscription for the purposes of gaining access to defined content is irrelevant,<sup>13</sup> that is they are not motivated by access to a particular transmission system. Instead, such a service must fall within the NRF in so far, at least, as it includes the conveyance of signals.<sup>14</sup>

38. The Court justified this conclusion in particular on the basis that any other interpretation would considerably reduce the scope of the NRF, undermine the effectiveness of its provisions and therefore compromise the achievement of the objectives pursued by that framework. Since the purpose of the NRF is to establish a genuine internal market for electronic communications, in which, as is apparent from recital 27 in the preamble to the Framework Directive and recital 5 in the preamble to Directive 2009/140, those communications must, eventually, be governed solely by competition law, the exclusion of the provision of a package of programmes via a cable network from its scope, on the pretext that it does not restrict itself to conveying signals, would deprive the NRF of all meaning.<sup>15</sup>

39. However, the fact that various services are combined does not mean that *all* elements of the services are subject to regulation by the NRF. As recital 20 in the preamble to the Authorisation Directive sets out, additional obligations can be imposed on a content provider or distributor, according to other provisions, without prejudice to the conditions laid down by the NRF.<sup>16</sup>

11 — Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1).

12 — Case C-518/11 *UPC Nederland* [2013] ECR, paragraph 41.

13 — *UPC Nederland* (cited in footnote 12 above), paragraph 43.

14 — *UPC Nederland* (cited in footnote 12 above), paragraph 44.

15 — *UPC Nederland* (cited in footnote 12 above), paragraph 45.

16 — See also recital 10 in the preamble to the Framework Directive.



40. It follows that the answer to the first and sixth questions is that a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite is to be classified as an electronic communications service within the meaning of Article 2(c) of the Framework Directive in so far as it involves the conveyance of signals over electronic communications networks. The providers of these services are therefore to be classified as providers of electronic communications services.

## 2. Classification as a conditional access system

41. The fifth question concerns the issue whether a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite is to be classified as an electronic communications service or as a conditional access service for the purposes of Article 2(f) of the Framework Directive.

42. It is obvious that the service provided by UPC DTH includes a conditional access *system*. Article 2(f) of the Framework Directive defines such a system as any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation. This is precisely how access to the encoded programme packages offered by UPC DTH is set up.

43. However, the question appears to be based on the premiss that an electronic communications service and a conditional access system are mutually exclusive. On that basis, if the service were a conditional access system, the provisions concerning electronic communications services would not be applicable.

44. That premiss is false, however. It is true that there are specific rules on conditional access systems. In addition to the directive on the legal protection of services based on, or consisting of, conditional access,<sup>17</sup> mention should also be made of Article 6 of the Access Directive and Annex I thereto. If a conditional access system is provided separately from a communications service, it is subject only to those provisions.

45. However, according to the definition in Article 2(ea) of the Framework Directive, the purpose of such separate provision would be that the recipient, who in turn would provide a communications service, should use the system as an *associated service*. It is therefore a service associated with an electronic communications service which enables and/or supports the provision of services via that service or has the potential to do so.

46. Combining an electronic communications service with a conditional access system does not prevent it from being regulated. The fact that a service is supported and enabled by another service does not mean that the former is to be classified in the same way as the latter. On the contrary, the latter is an element of the former.

47. Accordingly, the answer to the fifth question is that a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite may include a conditional access system within the meaning of Article 2(ea) and (f) of the Framework Directive, but is not for that reason to be regarded as a whole as such a system.

<sup>17</sup> — Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 (OJ 1998 L 320, p. 54).

## B – *The freedom to provide services*

48. The second, third and fourth questions concern the application of the principle of the freedom to provide services. Clarification is first required as to whether the service at issue falls within the scope of application of the principle of the freedom to provide services, to the extent that it is provided in Hungary from Luxembourg (see 1 below). Consideration must then be given as to whether it is compatible with that freedom for the authorities of the recipient State to conduct administrative proceedings in relation to that service (see 2 below), and as to whether that State can require registration (see 3(b) below) and/or the establishment of a branch within its territory (see 3(c) below).

### 1. Applicability of the freedom to provide services

49. The transmission, and broadcasting, of television signals comes within the rules of the TFEU relating to the provision of services.<sup>18</sup> In addition, it is clear that the main proceedings concern the provision of the service to persons in Hungary by an undertaking established in Luxembourg.

50. The fact that UPC DTH does not provide any comparable services in the Member State in which it is established does not preclude the application of the freedom to provide services enshrined in Article 56 TFEU. The right of an economic operator established in a Member State to provide services in another Member State, which that provision lays down, is not subject to the condition that that operator also provides such services in the Member State in which he is established. In that regard Article 56 TFEU requires only that the provider be established in a Member State other than that of the recipient.<sup>19</sup>

51. However, harmonisation by the NRF could preclude any assessment by reference to the freedom to provide services (see (a) below). In addition, it is submitted that reliance on the principle of the freedom to provide services constitutes an abuse (see (b) below).

#### a) Harmonisation

52. It is settled case-law that a national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty.<sup>20</sup>

53. Accordingly, the Court proceeds on the basis that the NRF transposes the principle of freedom to provide services in the sphere of electronic communications networks and services,<sup>21</sup> so that only the provisions of the NRF are applicable.<sup>22</sup> This applies in the area of television broadcasting, for example as regards the grant of broadcasting authorisations and the grant of broadcasting radio frequencies.<sup>23</sup> However, the objective of the NRF is not the exhaustive harmonisation of *all* provisions concerning electronic communications services. Instead, Article 1(3) of the Framework Directive provides that the directive is without prejudice to measures taken at national level in compliance with EU law to pursue general interest objectives.

18 — Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 28; and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 28.

19 — Case C-56/96 *VT4* [1997] ECR I-3143, paragraph 22, and Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, paragraph 43.

20 — Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64; and Case C-265/12 *Citroën Belux* [2013] ECR, paragraph 31.

21 — *Centro Europa 7* (cited in footnote 8 above), paragraphs 76 and 80.

22 — *Centro Europa 7* (cited in footnote 8 above), paragraphs 73 and 77.

23 — *Centro Europa 7* (cited in footnote 8 above), paragraph 85.

54. Although the request for a preliminary ruling contains only indications in that respect, the submissions of the Hungarian regulatory authority in particular show that the main proceedings concern primarily the relationship between UPC DTH and its subscribers, in other words consumer protection.

55. The Framework Directive and the Universal Service Directive do not, however, provide for full harmonisation of consumer-protection aspects. Article 20 of the Universal Service Directive, which relates to contracts concluded between consumers and providers of electronic communications services, applies, in accordance with Article 1(4) of this Directive, without prejudice to EU rules on consumer protection and national rules in conformity with EU law.<sup>24</sup>

56. Nor is that affected by the fact that the general authorisation under the Authorisation Directive for the provision of electronic communications networks or services may, pursuant to Article 6(1) of that directive and point 8 of the Annex thereto, be granted subject, *inter alia*, to consumer protection requirements which are specific to the electronic communications sector. This is because it is for the Member States to determine the content of those specific consumer protection requirements, in conformity with the general provisions of EU law.

57. It follows that it is not (only) the provisions of the NRF that are applicable in the main proceedings. If national courts do not conclude that other provisions of secondary law apply, such as the Unfair Commercial Practices Directive,<sup>25</sup> which likewise exhaustively regulates certain questions,<sup>26</sup> it follows that the principle of the freedom to provide services is applicable.

b) Wrongful reliance on the principle of the freedom to provide services

58. The Czech Republic submits, however, that UPC DTH is not entitled to rely on the freedom to provide services because it was established in Luxembourg only in order to provide services in other Member States. Therefore, its reliance on the principle of the freedom to provide services constitutes an abuse.

59. In respect of this submission it must be conceded that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. Individuals may also be prevented from improperly or fraudulently taking advantage of provisions of EU law.<sup>27</sup>

60. However, exercising a fundamental freedom for the purpose of benefiting from the more favourable legislation of a different Member State does not in itself suffice to constitute abuse of that freedom.<sup>28</sup>

24 — *Telekomunikacja Polska* (cited in footnote 9 above), paragraph 29.

25 — Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22). On this point see *Telekomunikacja Polska* (cited in footnote 9 above), paragraphs 31 and 32, and Case C-388/13 *UPC Magyarország*, currently pending before the Court.

26 — Joined Cases C-261/07 and C-299/07 *VTB-VAB v Total Belgium and Galatea* [2009] ECR I-2949, paragraph 52; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraph 41; and *Citroën Belux* (cited in footnote 20 above), paragraph 20.

27 — Case 33/74 *van Binsbergen* [1974] ECR 1299, paragraph 13; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 20; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24; and Joined Cases C-151/04 and C-152/04 *Nadin and Nadin-Lux* [2005] ECR I-11203, paragraph 45.

28 — *TV10* (cited in footnote 27 above), paragraph 15; *Centros* (cited in footnote 27 above), paragraph 27; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 37.

61. Even if it could be established that the transfer of the service at issue from a Hungarian company to UPC DTH was motivated solely by an intention to remove that service — wrongfully — from the scope of application of Hungarian law, this could not exclude the application of the principle of the freedom to provide services. The question of its applicability is different from the question whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade legislation by having recourse to the possibilities offered by the Treaty.<sup>29</sup>

62. Thus, there is no basis for excluding the application of the principle of the freedom to provide services on account of an abuse. Instead, any measures intended to combat abuse should be assessed by reference to whether they constitute restrictions on the freedom to provide services and, if they do, whether they are justified.

### c) Interim conclusion

63. National rules which concern services that are provided in Hungary from Luxembourg and by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite are consequently subject to the principle of the freedom to provide services under Article 56 TFEU in so far as neither the NRF nor other provisions of secondary legislation exhaustively harmonise their subject-matter.

## 2. Monitoring powers of the Hungarian authorities

64. The question as to the competence of the Hungarian authorities is intended to establish whether the freedom to provide services permits the monitoring of services by the authorities in the recipient State. Accordingly, it is necessary first to consider whether such monitoring is a restriction on the freedom to provide services and, if it is, whether such restriction is justified.

65. In that regard also it must be recalled that where secondary law has exhaustively harmonised a particular area, the competence of national authorities is not to be assessed in the light of the freedom to provide services.<sup>30</sup> Although the substantive consumer protection requirements in the area of electronic communications are not regulated by the NRF, under Article 6 of the Authorisation Directive and point 8 of the Annex thereto the Member States are entitled to grant a general authorisation for such services subject to consumer protection requirements specific to the electronic communications sector. Under Article 10 of that directive the monitoring of those requirements is a matter for the national regulatory authorities.

66. Thus, the freedom to provide services is applicable only in so far as monitoring powers are not conferred by the NRF or other provisions of secondary law. It is for the national courts to determine the extent to which this is the case.

67. Where competence in respect of the monitoring in question is not conferred by secondary EU law, Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services.<sup>31</sup>

29 — *TV10* (cited in footnote 27 above), paragraph 15; *Centros* (cited in footnote 27 above), paragraph 18; and Case C-123/11 *A* [2013] ECR, paragraphs 26 and 27.

30 — See paragraph 52 above.

31 — See, for example, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited; Joined Cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921, paragraph 32; and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 85.

68. It is true that any monitoring of services is liable to impede or render less advantageous the activities of a service provider. However, in the present case no similar services are provided in the State in which the service provider is established, as UPC DTH does not offer access to any packages of programmes in Luxembourg.

69. None the less, it is clear that even in such situations restrictions on the freedom to provide services have to be justified.<sup>32</sup> In assessing such justification, the absence of any domestic activity may indeed be important. Thus, the notion that it is normally unnecessary for the monitoring which has been carried out in the State of establishment to be repeated in the recipient State<sup>33</sup> applies only if monitoring actually takes place in the State of establishment.

70. However, this does not affect the concept of a restriction, which encompasses all measures that are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State even if the service provider does not provide any similar services in the State in which it is established. It follows that the monitoring of UPC DTH's services by the Hungarian authorities constitutes a restriction.

71. Such a restriction of the freedom to provide services may, however, where it is applicable to all individuals or undertakings carrying on business in the territory of the host Member State, be justified by an overriding reason in the public interest to the extent that it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it, and in so far as that interest is not safeguarded by the rules to which such a service provider is subject in the Member State of establishment.<sup>34</sup>

72. In the present case there is no basis for requiring UPC DTH to be subject to any monitoring other than that to which domestic service providers are subject.

73. In so far as the monitoring is intended to ensure consumer protection, it must be pointed out that this is an objective which may be regarded as an overriding requirement relating to the public interest capable of justifying a restriction on freedom to provide services.<sup>35</sup>

74. Whereas certain types of monitoring can be disproportionate, it is not apparent that this is so in relation to the mere competence of the authorities in the host State in respect of the monitoring of the service at issue in the present case. Such competence is liable primarily to support consumer protection. Since there does not appear to be any similar monitoring in the State of establishment, it can also be regarded as necessary within the margin of discretion afforded to the host Member State. Nor can it be assumed that the effect of this competence is disproportionate to the disadvantages associated with it.

75. Furthermore, this conclusion corresponds to the EU legislature's assessment in adopting the Authorisation Directive, which confers such monitoring powers on the recipient State as regards the conditions associated with a general authorisation, even if the directive is not applicable to the actual monitoring.

32 — See *Carmen Media Group* (cited in footnote 19 above), paragraph 55 et seq., and *TV10* (cited in footnote 27 above), paragraph 17 et seq.

33 — See Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraphs 35 to 38; Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 60; and Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] ECR I-1785, paragraph 54.

34 — *Peñarroja Fa* (cited in footnote 33 above) and the case-law cited.

35 — Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 20; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 64; and Case C-475/11 *Konstantinides* [2013] ECR, paragraph 51.



76. Furthermore, it has been confirmed by the Court that a Member State may regard as a domestic broadcaster a radio and television organisation which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organisations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law.<sup>36</sup>

77. In so far as secondary EU law does not already govern competence, Article 56 TFEU thus does not prevent national authorities from taking administrative proceedings in relation to services provided from another Member State by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services.

### 3. Necessity of registration and establishment in Hungary

78. By its third question the national court asks whether requiring the service to be registered in Hungary (see (b) below) or indeed the establishment of a branch (see (c) below) is compatible with the freedom to provide services. However, certain doubts as to the admissibility of this question (see (a) below) must first be addressed.

#### a) Admissibility of the third question

79. Hungary and the Hungarian regulatory authority doubt that this question is admissible, as the main proceedings do not concern either the question of registration or the question of establishment. It therefore appears that this question is not relevant.

80. The question of registration, at least, appears to be at issue in another case which has resulted in another request for a preliminary ruling with identical questions.<sup>37</sup>

81. However, it should be recalled that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.<sup>38</sup>

82. In addition, in response to a request by the Court for clarification pursuant to Article 101 of the Rules of Procedure, the national court explained that an answer to this question could be important for its decision in the main proceedings.

83. As the Court cannot, with any certainty, exclude the possibility that the national court might also decide those aspects of the dispute between UPC DTH and the regulatory authority in the main proceedings, it is not possible to find that it is quite *obvious* that this question bears no relation to the actual facts of the main action or its purpose, or is hypothetical. It therefore requires to be answered. Moreover, it is possible that an answer in the present proceedings may make it easier to determine the second request for a preliminary ruling, referred to above.

36 — *TV10* (cited in footnote 27 above), paragraph 21.

37 — Case C-563/13 *UPC DTH (II)*.

38 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133, paragraph 20; and Case C-651/11 *X* [2013] ECR, paragraphs 20 and 21.

## b) Registration obligation

84. As regards registration of the disputed services in the recipient Member State, it is clear from Article 3(2) and (3) of the Authorisation Directive alone that providers of electronic communications services may be required to notify certain information to the regulatory authority of the Member State concerned prior to beginning their activities.

85. Article 3(3) of the Authorisation Directive provides that that information must be sufficient to enable a register to be kept, but the second sentence of Article 3(2) provides that the undertaking concerned 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. The third sentence makes it clear that upon notification, when required, an undertaking may begin activity.

86. Article 3 of the Authorisation Directive thus in itself precludes any more extensive requirements being imposed on providers of electronic communications services in relation to registration. It follows that they cannot be assessed by reference to the principle of the freedom to provide services.

87. It follows that national rules which require an undertaking established in another Member State to register with a domestic authority if it provides electronic communications services to domestic consumers are to be assessed exclusively by reference to Article 3 of the Authorisation Directive.

## c) Establishment requirement

88. A requirement that an undertaking create a permanent establishment or branch in the Member State in which the services are provided runs directly counter to the freedom to provide services, since it renders impossible the provision of services, in that Member State, by undertakings established in other Member States.<sup>39</sup> Accordingly, this too constitutes a restriction on the freedom to provide services.

89. It is, however, capable of facilitating effective monitoring.<sup>40</sup> Specifically, domestic establishment enables the competent authorities to obtain access to information, persons, and assets of the undertaking providing the service.

90. On the other hand, a requirement of establishment is a particularly severe restriction on the freedom to provide services. To a certain extent it negates it<sup>41</sup> and renders its exercise practically impossible. For that reason, according to the Court, it is normally unnecessary. On the one hand, the host Member State must take into account equivalent requirements imposed in the State of establishment,<sup>42</sup> and on the other it can require the service provider to provide proof that it fulfils, in the State of establishment, the relevant conditions for provision of the service in question in the host State.<sup>43</sup>

91. In the present case it is not apparent that the more extensive monitoring opportunities that would be opened up by a local branch or a local subsidiary are necessary. On the contrary, the legislation concerning the monitoring of the content of television broadcasts — the Audiovisual Media Services Directive — assumes that no such establishment is required for television broadcasters at any

39 — Case C-546/07 *Commission v Germany* [2010] ECR I-439, paragraph 39.

40 — See Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 35.

41 — See Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 52, and Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 31. See also *van Binsbergen* (cited in footnote 27 above), paragraph 11.

42 — *Commission v Germany* (cited in footnote 41 above), paragraph 47, and Case C-496/01 *Commission v France* [2004] ECR I-2351, paragraph 71.

43 — *Commission v France* (cited in footnote 42 above), paragraphs 70 and 72 et seq.

rate.<sup>44</sup> With all respect to the importance of consumer protection, undertakings which merely convey this content should not be subject to stricter requirements. Moreover, an establishment requirement would, at the very least, be contrary to the objectives of the simplified authorisation of electronic communications services under the NRF.

92. Thus, Article 56 TFEU precludes a requirement that a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite may be supplied only through a branch established in the Member State in which that service is received or a separate legal entity established in that State.

## V – Conclusion

93. I therefore propose that the Court answer the questions referred for a preliminary ruling as follows:

- (1) A service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite is to be classified as an electronic communications service within the meaning of Article 2(c) of the Framework Directive in so far as it involves the conveyance of signals over electronic communications networks. The providers of these services are therefore to be classified as providers of electronic communications services.
- (2) A service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite may include a conditional access system within the meaning of Article 2(ea) and (f) of the Framework Directive, but is not for that reason to be regarded as a whole as such a system.
- (3) National rules which concern services that are provided in Hungary from Luxembourg and by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite are subject to the principle of the freedom to provide services under Article 56 TFEU in so far as neither the NRF nor other provisions of secondary legislation exhaustively harmonise their subject-matter.
- (4) In so far as secondary EU law does not already govern competence, Article 56 TFEU does not prevent national authorities from taking administrative proceedings in relation to services provided from another Member State by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services.
- (5) National rules which require an undertaking established in another Member State to register with a domestic authority if it provides electronic communications services to domestic consumers are to be assessed exclusively by reference to Article 3 of the Authorisation Directive.
- (6) Article 56 TFEU precludes a requirement that a service by which a service provider supplies, for consideration, conditional access to a package of programmes which contains radio and television broadcast services and is retransmitted by satellite may be supplied only through a branch established in the Member State in which that service is received or a separate legal entity established in that State.

<sup>44</sup> — See Article 3 of the Audiovisual Media Services Directive, and Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV* [2011] ECR I-8777, paragraphs 35 and 36.