Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 16 April 2015 [1]

Case C-85/14

KPN BV
v
Autoriteit Consument en Markt (ACM)(Request for a preliminary ruling

from the College van Beroep voor het Bedrijfsleven (Netherlands))

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Article 28 — Interests and rights of end-users — Access to non-geographic numbers and to services using those numbers — National legislation requiring providers of telephone call transit services not to charge higher tariffs for calls to non-geographic numbers than for calls to geographic numbers — Situation with respect to cross-border access — Review by the national courts of the proportionality of the necessary step — Definition of 'relevant national authorities')

1. In the field of electronic communications, the existence of a single European market means, inter alia, that, as a rule, all natural persons must be able to access all geographic and non-geographic numbers within the European Union as well as the services offered through non-geographic numbers.

2. Within the new regulatory framework applicable to electronic communications services ('the NRF'), [2] Article 28 of the Universal Service Directive seeks to ensure such access to those numbers and services.

3. Article 28, which appears in Chapter IV of the Universal Service Directive, [3] provides, in paragraph 1, that Member States are to ensure that relevant national authorities take all necessary steps to ensure that end-users [4] have access to services using non-geographic numbers within the European Union and to all numbers provided in the European Union.

1 — Original language: French.

2 — The NRF consists of 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), 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) ('the Framework Directive'), and the four specific directives accompanying it, namely 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 (Access Directive) (OJ 2002 L 108, p. 7), as amended by Directive 2009/140 ('the Access Directive'); 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), as amended by Directive 2009/140 ('the Authorisation Directive'); 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), 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) ('the Universal Service Directive'); and 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 (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136 ('Directive 2002/58').

3 — The Universal Service Directive consists of three very different pillars, namely, Chapter II relating to the organisation of the universal service, Chapter III concerning the obligations that may be imposed on operators with significant market power in retail markets, and Chapter IV on the enhanced protection of end-users, regulating their rights and interests.

4 — Pursuant to Article 2(h) of the Framework Directive, a 'user' is 'a legal entity or natural person using or requesting a publicly available electronic communications service'. 'End-user' is defined in Article 2(n) thereof as 'a user not providing public communications networks or publicly available electronic communications services'.

4. Under Article 2(d) and (f) of the Universal Service Directive, a non-geographic number, which is defined as the opposite of a geographic number,[5] is a number from the national telephone numbering plan where the digit structure does not contain any geographic significance used for routing calls to the physical location of the network termination point. The term covers, inter alia, mobile, freephone and premium rate numbers.

5. By this request for a preliminary ruling, the Court is invited for the first time to define the scope and extent of Article 28 of the Universal Service Directive.

6. This request has been made in the course of proceedings between KPN BV ('KPN'), the incumbent telecom operator in the Netherlands, and the Autoriteit Consument en Markt (ACM) (Authority for Consumers and Markets), acting as the national regulatory authority ('NRA'), concerning KPN's infringement of the national law transposing Article 28 of the Universal Service Directive.

7. The Kingdom of the Netherlands transposed Article 28 into domestic law by means of Article 6.5 of the Law on telecommunications (Telecommunicatiewet), which provides that, by or pursuant to a general administrative order,[6] detailed rules may be laid down to safeguard access to geographic and non-geographic numbers and to services using those numbers.

8. The Netherlands Government availed itself of that possibility by adopting Article 5 of the Decree concerning the rules on the interoperability of public electronic communications services, access to the European Telephone Numbering Space and cross-border access to non-geographic numbers (Besluit houdende regels met betrekking tot interoperabiliteit van openbare elektronische communicatiediensten, toegang tot de Europese telefoonnummeringsruimte en landsgrensoverschrijdende toegang tot niet-geografische nummers — Besluit Interoperabiliteit; 'the national tariff-related measure'). Following its amendment on 1 July 2013, this measure seeks to ensure access to services using non-geographic numbers by prohibiting providers of publicly available electronic communications services or networks from charging higher tariffs for calls to non-geographic numbers than those charged for calls to geographic numbers.

9. It is apparent from the documents before the Court that the national tariff-related measure applies to all providers involved in calls to non-geographic numbers, including providers of call transit services,[7] such as KPN in the Netherlands.

10. Does Article 28 of the Universal Service Directive allow such a measure to be taken against providers of call transit services? That, in essence, is the main question to which the Court is asked to reply.

11. According to KPN and the European Commission, this question should be answered in the negative for three main reasons. First, Article 28 of the Universal Service Directive cannot govern relations between providers (wholesale market). It applies only to relations between suppliers and individuals (retail market). Second, the NRF allows a tariff-related measure to be taken only after an analysis of the market carried out by the NRA against an operator with significant power in the market in question, and not, as in the present case, against a group of providers. Third, an NRA alone, and not the Netherlands Government, is the relevant national authority with power to impose such a measure.

5 — In accordance with Article 2(d) of the Universal Service Directive, a 'geographic number' is 'a number from the national telephone numbering plan where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point'.

6 — It is apparent from KPN's written observations that a general administrative order is a decision adopted by the government consisting of a binding general order that does not require parliamentary approval. As a rule, a general administrative order must be based on a power conferred in a specific field. That is the case with regard to the general administrative order at issue in the main proceedings.

7 — Call transit services consist of the conveyance by an operator over its network of calls that neither originate nor terminate on its network.

12. In this Opinion, I shall explain why, in my view, that question should, on the contrary, be answered in the affirmative. I consider that Article 28 of the Universal Service Directive must be interpreted as not precluding an authority other than an NRA from enacting a tariff-related measure such as that at issue in the main proceedings, without a market analysis having indicated that an operator has significant market power, provided that that measure is necessary to safeguard the rights of end-users under Article 28, this being a matter for the national court to determine.

I – **Legal framework**

A – *EU legislation*

1. The Access Directive

13. According to Article 8 of the Access Directive:

‘1. Member States shall ensure that [NRAs] are empowered to impose the obligations identified in Articles 9 to 13a.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], [NRAs] shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

3. Without prejudice to

— the provisions of Articles 5(1) and 6,

— the provisions of Articles 12 and 13 of [the Framework Directive], Condition 7 in Part B of the Annex to [the Authorisation Directive] as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of [the Universal Service Directive] and the relevant provisions of [Directive 2002/58] containing obligations on undertakings other than those designated as having significant market power, or

— the need to comply with international commitments,

[NRAs] shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2.

…’

14. Article 13(1) of the Access Directive provides as follows:

‘A [NRA] may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. …’

2. The Universal Service Directive

15. Article 17(1) of the Universal Service Directive provides as follows:

‘Member States shall ensure that [NRAs] impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market in accordance with Article 14 of [the Framework Directive] where:

(a) as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], a [NRA] determines that a given retail market identified in accordance with Article 15 of that Directive is not effectively competitive; and

(b) the [NRA] concludes that obligations imposed under Articles 9 to 13 of [the Access Directive] would not result in the achievement of the objectives set out in Article 8 of [the Framework Directive].’

16. Article 28(1)(a) of the Universal Service Directive provides:

‘Member States shall ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas, relevant national authorities take all necessary steps to ensure that end-users are able to:

(a) access and use services using non-geographic numbers within the Community; …’

B – *Netherlands law*

17. Article 28 of the Universal Service Directive, as explained above, was transposed into Netherlands law by Article 6.5 of the Law on telecommunications. That article states:

‘1. Providers of public electronic communications networks or publicly available electronic communications services which also control access to end-users shall ensure that end-users in the European Union are able to access all:

(a) numbers from a national numbering plan allocated in the European Union,

(b) numbers from the European Telephony Numbering Space, and

(c) numbers allocated by the [International Telecommunication Union],

and are able to use services using the numbers referred to in paragraphs (a) to (c), except where this is not technically and economically feasible, or where a called subscriber has chosen to limit access by calling parties located within specific geographical areas.

2. By or pursuant to a general administrative order, detailed rules may be laid down to safeguard the obligation referred to in the first paragraph. Those rules may relate to, inter alia, the fees payable for access to the numbers referred to in the first paragraph.

3. The rules laid down in the second paragraph may be different for categories, to be determined by those rules, of providers, as referred to in the first paragraph. Those rules may transfer duties and allocate powers to the [ACM].’

18. Use was made of the possibility of laying down more detailed rules through the adoption of the national tariff-related measure, which provides, as from 1 July 2013:

‘1. Providers of public telephone services or associated providers of public electronic communications networks which also control access to end-users shall guarantee that end-users are able to use services using non-geographic numbers within the European Union.

2. The obligation referred to in paragraph 1 in any case means that, in respect of calls to numbers from the sequences 0800, 084, 085, 087, 088, 0900, 0906, 0909, 116, 14 or 18, the providers of public telephone services and of public electronic communications networks referred to in paragraph 1 must apply tariffs or other charges which are comparable to the tariffs or other charges levied by those providers for calls to geographic numbers, and that they may levy a different tariff or different charge only if that is necessary in order to cover the additional costs related to the calls to those non-geographic numbers. …

…’

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

19. It is apparent from the decision making the reference that KPN provides call transit services to non-geographic numbers in the Netherlands.

20. The ACM found that KPN, in breach of the national tariff-related measure, was charging higher tariffs for call transit services to non-geographic numbers than for the same services to geographic numbers and that this difference was not justified by additional costs. Therefore, by decision of 18 October 2013, it ordered KPN to adjust its tariffs on pain of imposition of a per diem penalty of EUR 25 000, up to a maximum of EUR 5 million.

21. KPN lodged an appeal against that order before the College van Beroep voor het Bedrijfsleven (Netherlands Administrative Court for Trade and Industry).

22. During the appeal proceedings, KPN, inter alia, submitted that the national tariff-related measure was not consistent with the NRF and, in particular, with Article 28 of the Universal Service Directive.

23. Within the context of the action brought before it, the referring court thus raised the question of the scope and extent of Article 28 of the Universal Service Directive. The College van Beroep voor het Bedrijfsleven, being uncertain as to the correct interpretation of that provision, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 28 of the Universal Service Directive permit the imposition of tariff regulation, without a market analysis having indicated that an operator has significant market power in regard to the regulated service, although the cross-border selectability of non-geographic telephone numbers is entirely possible from a technical point of view and the only obstacle to access to those numbers lies in the fact that the tariffs charged mean that a call to a non-geographic number is more expensive than a call to a geographic number?

(2) If Question 1 is answered in the affirmative, the following two questions arise for the referring court:

(a) Does the power to regulate tariffs also apply in the case where the effect of higher tariffs on the call volume to non-geographic numbers is merely limited?

(b) To what extent do the national courts still have scope to assess whether a tariff-related measure required under Article 28 of the Universal Service Directive is not unreasonably onerous for the transit provider, given the objectives which it seeks to attain?

(3) Does Article 28(1) of the Universal Service Directive leave open the possibility that the measures referred to in that provision may be taken by an authority other than the [NRA] which exercises the powers referred to in Article 13(1) of the Access Directive, with the result that the latter authority would merely have enforcement powers?'

III – **Analysis**

A – *Question 1*

24. By its first question, the referring court essentially asks the Court whether Article 28 of the Universal Service Directive provides a legal basis for adopting a tariff obligation such as that at issue in the main proceedings, without an analysis of the market in question having indicated that an operator has significant market power and where the obstacle to access to non-geographic numbers and to services using those numbers is non-technical, that is to say, of a tariff-related nature. [8]

25. The referring court is also unsure whether Article 28 of the Universal Service Directive covers solely cross-border access situations and technical obstacles.

26. First of all, I shall set out the reasons why, in my view, Article 28 of the Universal Service Directive permits the adoption of a tariff obligation such as that at issue in the main proceedings, before demonstrating that Article 28 is not restricted to cross-border access situations and applies to technical and non-technical obstacles.

1. The possibility of adopting a tariff obligation under Article 28 of the Universal Service Directive

27. In its written observations, KPN submits that the NRF permits the adoption of a tariff-related measure only following a market analysis carried out by the NRA indicating that an operator has significant power in the market at issue in the main proceedings.

28. The Commission, for its part, submits in its written observations that the NRF draws a deliberate and express distinction between the rules on the relevant aspects at retail market level and the rules at wholesale market level. Whereas the first set of rules comes under the Universal Service Directive, the second set is governed by the Access Directive. Thus, in the Commission's opinion, Article 28 of the Universal Service Directive cannot serve as the legal basis for adopting a tariff-related measure against providers of call transit services operating in the wholesale market.

29. I cannot agree with that line of argument as, in my view, it misconstrues the NRF.

30. According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objectives pursued by the rules of which it is part. [9]

8 — It is apparent from the decision to refer that this obstacle consists of the charging of higher tariffs for call transit services to non-geographic numbers than for call transit services to geographic numbers.

9 — See *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 41 and the case-law cited, and *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraph 32 and the case-law cited.

31. In the main proceedings, such a review entails taking account of the general scheme and objective not only of the Universal Service Directive but also of the other directives which, together with it, comprise the NRF, including the Access Directive.

32. I note, first of all, that the wording of Article 28 of the Universal Service Directive does not provide any clear indication as to the scope of that article.

33. It should be recalled that, pursuant to Article 28, Member States are to ensure that relevant national authorities take 'all necessary steps' to ensure that end-users are able to, inter alia, access services using non-geographic numbers within the European Union.

34. In view of the extremely broad scope of the wording used, namely 'all necessary steps', I am of the opinion that Article 28 does not in principle preclude the imposition of a tariff obligation such as that at issue in the main proceedings in so far as that obligation ensures that end-users have access to non-geographic numbers and to the services offered through those numbers.

35. This approach is borne out by a review of the Access Directive and, more specifically, of Article 8 thereof, concerning the imposition, amendment or withdrawal of obligations.

36. It is apparent from the wording of Article 8(2) and (3) of the Access Directive that, as a rule, a tariff obligation such as that at issue in the main proceedings may not be adopted against operators that have not been designated as having significant power in the market concerned, [10] 'except in certain cases' which are exhaustively listed therein and which include Article 28 of the Universal Service Directive.

37. I will examine these two paragraphs in turn, which will allow me to demonstrate that a tariff obligation such as that at issue in the main proceedings is capable of coming within the scope of Article 28 of the Universal Service Directive.

38. In accordance with Article 8(2) of the Access Directive, the tariff obligations laid down in Article 13 thereof [11] must be adopted by NRAs only when there is a lack of effective competition, that is to say, in markets where there are one or more operators with significant market power. [12] The imposition of such obligations seeks to prevent powerful operators from sustaining prices at an excessively high level or applying a price squeeze, to the detriment of end-users, [13] and thereby enables effective competition to be restored on a specific market.

39. It is apparent from the documents before the Court that, in this case, the ACM had found that the market for call transit services at issue in the main proceedings was effectively competitive and that no operators had significant power in that market. [14] Moreover, that finding was confirmed by the College van Beroep voor het Bedrijfsleven. [15]

10 — According to the first subparagraph of Article 14(2) of the Framework Directive '[a]n undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.

11 — Under Article 13(1) of the Access Directive, '[an NRA] may … impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access'.

12 — See recital 27 in the preamble to the Framework Directive.

13 — See Article 13 of the Access Directive.

14 — Also see the Commission's comments of 30 October 2008 addressed to the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) under Article 7(3) of the Framework Directive in response to its draft decision concerning the market for transit services in the public telephone network in the Netherlands (Case NL/2008/0800). These comments are available online at https://circabc.europa.eu/sd/a/df6e1540-38c6-4595-a101-265a5cc500a7/NL-2008-0800%20Acte_en%20CORR.pdf.

15 — See the judgment of 1 February 2012 (ECLI:NL:CBB:2012:BV2285).

40. In addition, I note that, since 2007, the market for call transit services in the fixed public telephone network has not been included in the markets listed by the Commission in the Annex to its Recommendation on relevant markets,[16] the characteristics of which could warrant the application of an *ex ante* regulatory obligation against operators identified as having significant power in that market.

41. In the absence of a relevant market listed by the Commission in that recommendation, and since there were no operators with significant power in the market for call transit services at issue in the main proceedings, the ACM had no power in this case to impose a tariff obligation such as that at issue in the main proceedings under Article 13 of the Access Directive.[17]

42. I am of the view that the same conclusion can be drawn with respect to Article 17 of the Universal Service Directive, entitled 'Regulatory controls on retail services'.[18]

43. It is apparent from Article 17 of the Universal Service Directive that, like Article 13 of the Access Directive, tariff obligations[19] can be imposed only when the retail market in question is not effectively competitive.

44. In KPN's view, ACM was not entitled, in such circumstances, to impose a tariff obligation such as that at issue in the main proceedings on providers operating in the market for call transit services.

45. I cannot endorse that view, which disregards Article 8(3) of the Access Directive.

46. This provision states that, 'without prejudice' to the provisions of Articles 27, 28 and 30 of the Universal Service Directive, which impose obligations on 'undertakings other than those designated as having significant market power', NRAs are not to impose the obligations set out in Articles 9 to 13 of the Access Directive on operators that have not been designated in accordance with Article 8(2) of that directive.

47. In my opinion, Article 8(3) of the Access Directive should be interpreted as meaning that, 'except' under certain provisions, including Article 28 of the Universal Service Directive, NRAs may not impose tariff obligations which are comparable to those laid down in Article 13 of the Access Directive on operators that do not have significant power in a given market. Put another way, Article 28 of the Universal Service Directive allows tariff obligations which are comparable to those laid down in Article 13 of the Access Directive to be imposed on operators that do not have significant power in the same market.

16 — Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21 (OJ 2007 L 344, p. 65).

17 — In accordance with paragraph 17 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ 2002 C 165, p. 6; 'the Commission guidelines'), '[the] regulatory obligations should only be imposed on those electronic communications markets whose characteristics may be such as to justify sector-specific regulation and in which the relevant NRA has determined that one or more operators have [significant market power]' (also see the first subparagraph of Article 15(1) of the Framework Directive).

18 — I note that Article 17 concerns retail services, whereas the call transit services to non-geographic numbers at issue in the main proceedings occur in the wholesale market, rendering Article 17 inapplicable in this case.

19 — Under Article 17(2) of the Universal Service Directive, '[t]he obligations … may include requirements that the identified undertakings do not charge excessive prices [or] inhibit market entry'. Furthermore, this same paragraph provides that '[NRAs] may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition'.

48. This analysis is supported by the Commission guidelines, paragraph 111 of which provides that '[u]nder the [NRF], [the] obligations [laid down in Articles 9 to 13 of the Access Directive and Article 17 of the Universal Service Directive] should only be imposed on undertakings which have been designated as having [significant market power] in a relevant market, *except in certain defined cases, listed in Section 4.3*'. [20]

49. Section 4.3 of the Commission guidelines refers to the cases mentioned in Article 8(3) of the Access Directive. As stated above, those cases include Article 28 of the Universal Service Directive.

50. It follows from the foregoing that a tariff obligation such as that at issue in the main proceedings is capable of constituting a 'step' which can be taken against a group of operators that do not have significant power in the market concerned, pursuant to Article 28 of the Universal Service Directive.

51. In my opinion, that conclusion reflects the intention of the EU legislature to safeguard the rights and interests of end-users in all events, including where, despite the existence of effective competition in a given market, it is not possible to ensure that users' rights deriving from an integrated and competitive electronic communications market will be safeguarded. [21]

52. Article 28 of the Universal Service Directive, as part of Chapter IV thereof entitled 'End-user interests and rights', clearly pursues the objective of safeguarding the rights and interests of end-users deriving from an integrated and competitive electronic communications market. Thus, I consider Article 28 to be an appropriate legal basis on which to adopt a tariff obligation such as that at issue in the main proceedings.

53. That measure must still be 'necessary' to safeguard the rights of end-users under Article 28, that is to say, access to non-geographic numbers and to services offered through those numbers. In my view, the necessary nature of the national measure also means that there can be no other less onerous measure for the operators concerned which safeguards those rights.

54. In this respect, the written observations of the Netherlands Government suggest that the national tariff-related measure was adopted to bring an end to a range of commercial practices which were contrary to the objective of Article 28 of the Universal Service Directive. [22] On account of these practices, tariffs for end-users were high and were not transparent, and some non-geographic numbers could no longer be called for large groups of end-users. In practice, access to non-geographic numbers was limited and access to some services was, therefore, impeded.

55. Likewise, the ACM found that the charging of high tariffs impeded access to the numbers and services safeguarded by Article 28 of the Universal Service Directive.

56. For its part, KPN concedes that the tariffs may be set at a level that is so high as to render access to non-geographic numbers de facto impossible. However, in its view, that was not the case in the Netherlands.

20 — Emphasis added.

21 — See p. 86 of the Commission Staff Working Document, available in English (SEC(2007) 1472), in the introductory remarks to Part IV, entitled 'Connecting with citizens'.

22 — The undesirable commercial practices referred to by the Netherlands Government include the following: calls from mobile telephones to 0900 numbers which were subject to a standard increment of EUR 0.25 to 0.35 per minute on the conveying (transit) tariff; mobile telephone operators that charged EUR 0.25 per minute for calls to 0800 numbers, even though these information services are offered free of charge, with the result that some providers of services linked to 0800 numbers ensured that those numbers could no longer be called from mobile networks; or, as regards 14 (services of a social nature), 088 (business numbers) and 116 (European harmonised services of a social nature) numbers, the fact that, as a general rule, the imposition by end-users of divergent traffic tariffs for these non-geographic numbers on the party linked to the number is used by providers to charge high increments on traffic tariffs.

57. In the light of all of the foregoing considerations, I am of the opinion that Article 28 of the Universal Service Directive permits the adoption of a tariff obligation such as that at issue in the main proceedings, in so far as that obligation is 'necessary' to safeguard access to non-geographic numbers and to services using those numbers. Since the above assessment is a question of fact, it will, in my view, be for the national court to conduct that review in this case.

58. Lastly, unlike the Commission, I consider that the fact that the national tariff-related measure seeks to regulate a relationship at wholesale market level has no bearing on the possibility of applying Article 28 of the Universal Service Directive in the case where that relationship is de facto capable of obstructing end-users' access to services using non-geographic numbers, as safeguarded by Article 28.

59. In this respect, I note that both the written observations of the Netherlands Government and the details which it provided at the hearing suggest that the high tariffs charged by the providers of electronic communications networks and services between them were ultimately passed on to end-users.

60. According to the Netherlands Government, when calls are made to non-geographic numbers, a chain of providers are involved which work together so that the telephone conversation can take place. In that chain, each provider, including the provider of call transit services, passes on the tariff charged for its service to another provider. The high tariffs of one or more providers in the chain are then passed on to the end-user.

61. This information provided by the Netherlands Government, on which the Commission also relied at the hearing, demonstrates that the practices engaged in by the providers between themselves at the wholesale market level had an impact on end-users located at retail market level. According to the Netherlands Government, it is these practices that had restricted access to non-geographic numbers and to services using those numbers.

62. Accordingly, like the Netherlands Government, I am of the opinion that those practices — which providers of electronic communications networks and services engaged in at the wholesale market level — are liable to obstruct end-users' access to services using non-geographic numbers, as safeguarded by Article 28 of the Universal Service Directive.

63. For all of these reasons, I consider that Article 28 of the Universal Service Directive must be interpreted as not precluding the adoption of a tariff obligation such as that at issue in the main proceedings, without a market analysis having indicated that an operator has significant power in that market, provided that the tariff obligation is necessary to ensure that end-users have access to services using non-geographic numbers, this being a matter for the national court to determine.

2. Cross-border access situations and the nature of the obstacles

64. In its first question, the referring court also asks whether Article 28 of the Universal Service Directive is to be interpreted as meaning that a tariff obligation can be adopted only where there is a 'technical obstacle' to 'cross-border access' to services using non-geographic numbers.

65. In the first place, concerning the question of cross-border access, it is apparent from the decision making the reference that, in the opinion of the referring court, recital 46 in the preamble to Directive 2009/136 suggests that Article 28 of the Universal Service Directive is aimed solely at taking all necessary steps to safeguard 'cross-border' telephone traffic between the Member States.

66. In my view, the wording and origin of Article 28 of the Universal Service Directive show that this provision must be interpreted as now covering, in general, the single European market in electronic communications and that its application is not restricted to situations involving cross-border access.

67. I note, first of all, that the cross-border dimension was clearly apparent from Article 28 of the Universal Service Directive, as originally worded.

68. Indeed, the original version of Article 28 provided that 'Member States shall ensure that end-users *from other Member States* are able to access non-geographic numbers within their territory where technically and economically feasible'.[23]

69. Following its amendment by Directive 2009/136, Article 28(1) of the Universal Service Directive now provides that Member States are to ensure that, where technically and economically feasible, relevant national authorities take all necessary steps to ensure that end-users are able to access and use services using non-geographic numbers within the European Union.

70. Thus, the restriction 'from other Member States' no longer features in that provision, which now gives all end-users access to numbers and services 'within the [European Union]'.

71. Since end-users — and no longer end-users from other Member States, as was previously the case — must have access to services using non-geographic numbers within the European Union, such access should, in my opinion, be safeguarded by the relevant national authorities for all end-users, regardless of where those end-users are located from a geographic perspective. Consequently, access should also be safeguarded for end-users established in the Member State of the operator of the electronic communications network and/or service.

72. In my view, that amendment is in line with the objective of completing the single European market in electronic communications. Indeed, in accordance with recital 38 in the preamble to the Universal Service Directive, '[a]ccess by end-users to all numbering resources in the Community is a vital pre-condition for a single market. It should include freephone, premium rate, and other non-geographic numbers'.

73. Furthermore, I take the view that it would be paradoxical to consider that Article 28 of the Universal Service Directive safeguarded end-users' access to services using non-geographic numbers in other Member States, but did not safeguard access by those end-users to non-geographic numbers and to services offered in their own Member State.

74. In the second place, as regards the question relating to the nature of the obstacle, I consider that it is by no means apparent from the wording of Article 28 of the Universal Service Directive that technical obstacles alone enable the relevant national authorities to take a necessary step.

75. In my view, all obstacles to access to non-geographic numbers and to services using those numbers which prevent end-users from enjoying the rights to which they are entitled under Article 28 of the Universal Service Directive are capable of forming the basis for the adoption of a necessary tariff obligation, except in those cases where the obstacle is justified by objective reasons.

76. Recital 46 in the preamble to Directive 2009/136 supports my analysis.

77. Pursuant to that recital 46, '[c]ross-border access to numbering resources and associated services *should not be prevented, except in objectively justified cases*, for example to combat fraud or abuse …, when the number is defined as having a national scope only … or when it is technically or economically unfeasible'.[24]

23 — Emphasis added.

24 — Emphasis added.

78. It is evident from the decision making the reference that it was technically possible to call non-geographic numbers and that no objective grounds of justification were relied on. In the absence of an objective ground of justification for the tariff-related obstacle, that obstacle must then be regarded as unlawful in terms of Article 28 of the Universal Service Directive.

79. I therefore consider that Article 28 of the Universal Service Directive must be interpreted as not precluding the adoption of a tariff obligation such as that at issue in the main proceedings, without a market analysis having indicated that an operator has significant market power and where the obstacle to access to non-geographic numbers is of a non-technical nature, provided that the tariff obligation is necessary to ensure that end-users have access to services using those numbers, this being a matter for the national court to determine.

B – *Question 2, concerning obstacles with limited effect and the review of proportionality of the necessary steps by the national court*

80. Question 2 is divided into two parts.

81. First, the referring court asks the Court whether Article 28 of the Universal Service Directive must be interpreted as precluding the adoption of a tariff-related measure, such as that at issue in the main proceedings, where the effect of higher tariffs on the call volume to non-geographic numbers is merely limited.

82. Second, the referring court is unsure as to the scope which the national courts have to determine whether a tariff-related measure required under Article 28 of the Universal Service Directive is not unreasonably onerous for providers, given the objectives which it seeks to attain.

83. As regards the first part of Question 2, I note — along with the Netherlands Government — that Article 28 of the Universal Service Directive does not lay down any exceptions for de minimis obstacles.

84. Quite on the contrary, and as stated above, access to services using non-geographic numbers should not, as a rule, be prevented under Article 28 of the Universal Service Directive. [25]

85. It should also be borne in mind that end-users' access to all numbering resources in the European Union is a vital pre-condition for a single market and should include freephone, premium rate and other non-geographic numbers. [26]

86. In my opinion, it is apparent from the foregoing that any obstacle, including an obstacle limited to access to services using non-geographic numbers, is at odds with the objectives pursued by the EU legislature, namely the completion of a single European market and, in consequence, the safeguarding of the rights of end-users deriving therefrom, and should therefore be regarded as prohibited. Any other interpretation would, in my view, undermine the effectiveness of Article 28 of the Universal Service Directive.

87. As regards the second part of Question 2, I share the view of KPN and the Netherlands Government that the national courts have jurisdiction to determine whether the application of a tariff-related obligation is, in a given situation, unreasonably onerous for the operator concerned. Indeed, this examination is, to my mind, an integral part of the national courts' review of the proportionality of such an obligation.

25 — See recital 46 in the preamble to Directive 2009/136.

26 — See recital 38 in the preamble to the Universal Service Directive.

88. The national courts should therefore examine whether the objectives pursued by the tariff-related measure of the relevant national authorities are consistent with the objective set out in Article 28 of the Universal Service Directive, namely access to services using non-geographic numbers and the use of those services.

89. If those objectives are consistent with the objective set out in EU law, the next step will be for the national courts to assess whether the measure is suitable, necessary and proportionate in the strict sense. First, the national courts will assess whether the measure adopted is objectively suitable to achieve the objectives pursued. Second, they will determine whether those objectives could be achieved by means which are less restrictive for the operator concerned. Third, proportionality, in the strict sense of the term, calls for a weighing-up of the rights and interests involved. [27]

90. It is in the course of this review of proportionality that the national courts must determine whether the relevant national authorities have properly weighed the burden imposed by the tariff-related measure, for the operator concerned, against the benefits obtained from it for end-users in order to decide whether the measure is unreasonably onerous for the operator concerned. [28]

91. Consequently, I take the view that Article 28 of the Universal Service Directive must be interpreted as not precluding the adoption of a tariff-related measure such as that at issue in the main proceedings, where the effect of higher tariffs on the call volume to non-geographic numbers is merely limited. It will be for the national court to determine, in the course of the review of proportionality of the necessary step under Article 28 of the Universal Service Directive, whether the imposition of a tariff-related measure such as that at issue in the main proceedings is unreasonably onerous for the operator concerned.

C – Question 3, concerning the interpretation of the term 'relevant national authorities' referred to in Article 28 of the Universal Service Directive

92. By its third question, the referring court essentially asks the Court whether Article 28 of the Universal Service Directive must be interpreted as meaning that the necessary steps referred to in Article 28 may be taken by an authority other than the NRA exercising the power laid down in Article 13(1) of the Access Directive.

93. In its written observations, KPN submits that, on the basis of the NRF and, more specifically, Article 13 of the Access Directive, only an NRA has the power to impose a tariff-related measure such as that at issue in the main proceedings. According to KPN, the Netherlands Government cannot be regarded as an NRA because, first, that function was never assigned to it and, second, it does not satisfy the requirements concerning independence referred to in recital 11 in the preamble to the Framework Directive [29] and also does not enjoy the discretionary power held by NRAs under Article 13 of the Access Directive to adopt rules following a market analysis.

94. By contrast to KPN, the Netherlands and Italian Governments, as well as the Commission, propose the answer that Article 28 of the Universal Service Directive permits the adoption of the necessary steps referred to in that article by an authority other than the NRA.

95. Before I examine Question 3, I think it necessary to make two preliminary remarks.

27 — See, to that effect, the Opinion of Advocate General Cruz Villalón in *TDC*, C-556/12, EU:C:2014:17, points 41 and 42.

28 — Ibidem, points 43 and 44.

29 — Recital 11 provides that '[i]n accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the [NRA] or [NRAs] with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States'.

96. First, it is apparent from the decision making the reference that the Netherlands Government, in its capacity as a legislative body, had adopted the tariff-related national measure, following which the ACM, as NRA, applied it by issuing an injunction against KPN.

97. Accordingly, in the light of that situation, I understand that the referring court essentially wishes to ascertain whether Article 28 of the Universal Service Directive must be interpreted as not precluding the adoption of a tariff-related measure such as that at issue in the main proceedings by the Netherlands Government, as an authority 'other' than the NRA.

98. Second, as stated above in the examination of Question 1, I take the view that, under certain circumstances, a tariff obligation comparable to the obligation that may be imposed by an NRA under Article 13 of the Access Directive may be imposed under Article 28 of the Universal Service Directive.

99. In this respect, I recall that the regulatory tasks of NRAs based on Article 13 of the Access Directive are subject to the condition that there must be one or more operators with significant power in the market concerned. The intervention of NRAs is indeed necessary to ensure that one or more of these operators cannot use their market power to restrict or distort competition in the relevant market or from leveraging such power onto adjacent markets. Consequently, these are *ex ante* rules adopted by an NRA against one or more operators with significant power in the market concerned.

100. The tariff obligations that may be adopted by relevant national authorities under Article 28 of the Universal Service Directive are not dependent on the existence of a market analysis indicating that one or more operators have significant power in the market concerned. These obligations must be necessary in order to safeguard the rights of end-users deriving from the single European market, particularly their right of access to services using non-geographic numbers. These are tariff obligations adopted by the relevant national authorities against a group of operators that do not have significant market power.

101. Accordingly, even though they may be imposed on the basis of Article 13 of the Access Directive and of Articles 17 and 28 of the Universal Service Directive, the comparable tariff obligations pursue different objectives and are directed against different categories of operators. [30]

102. I will examine the third question in the light of these considerations.

103. In order to provide a useful answer to the third question, it is necessary to interpret the term 'relevant national authorities', as referred to in Article 28 of the Universal Service Directive. Should this term be interpreted as covering only NRAs, to the exclusion of all other national authorities?

104. I note, first of all, that the term is not defined in the NRF, unlike NRAs, which are defined in Article 2(g) of the Framework Directive. Pursuant to that article, an NRA is the body or bodies charged by a Member State with any of the regulatory tasks assigned in the Framework Directive and the specific directives. This definition, be it noted, applies for the purposes of the specific directives, including the Universal Service Directive. [31]

105. It follows from that definition that an NRA is a relevant national authority. However, I take the view that the relevant national authorities referred to in Article 28 of the Universal Service Directive cannot be restricted to NRAs alone, for several reasons.

30 — Recital 5 in the preamble to the Universal Service Directive draws attention to this distinction between two categories of operators. It states that '[i]n a competitive market, certain obligations should apply to all undertakings providing publicly available telephone services at fixed locations and others should apply only to undertakings enjoying significant market power or which have been designated as a universal service operator'.

31 — The first paragraph of Article 2 of the Universal Service Directive provides that '[f]or the purposes of this Directive, the definitions set out in Article 2 of [the Framework Directive] shall apply'.

106. In the first place, I note that the EU legislature appears to have specifically chosen the term 'relevant national authorities' instead of 'NRAs'. Indeed, it was only in the course of the legislative procedure leading to the amendment of the regulatory framework in 2009 that this wording was adopted.

107. Accordingly, both the Commission's proposal for a directive [32] and the position of the European Parliament adopted at first reading [33] continued to refer to 'NRAs'. The fact that the final wording confers an express power on 'relevant national authorities' demonstrates a priori that the EU legislature deliberately chose not to cover NRAs alone, but opted for a broader definition.

108. In the second place, it follows from the wording of Article 28 of the Universal Service Directive that this term cannot be restricted to NRAs alone. Article 28 does not confer any special power and does not impose any specific obligation on NRAs, unlike other provisions of that directive. It imposes obligations on Member States, as such, and on 'relevant national authorities'.

109. In the third place, I observe that the Court has already ruled on whether a national authority other than an NRA could intervene as NRA or alongside an NRA in order to carry out tasks that the NRF had expressly conferred on the NRA.

110. Thus, in its judgment in *Base and Others*, [34] the Court held that '[the Universal Service Directive] does not in principle preclude, by itself, the national legislature from acting as [NRA] within the meaning of the Framework Directive provided that, in the exercise of that function, it meets the requirements of competence, independence, impartiality and transparency laid down by those directives and that its decisions in the exercise of that function can be made the object of an effective appeal to a body independent of the parties involved'. [35]

111. Similarly, the Court has found that the Framework Directive does not preclude a Member State from allocating to different bodies, in the case concerned the NRA and ministerial authorities, functions that the directive confers on NRAs, provided that the Member State guarantees the functional independence of these regulatory authorities in relation to the operators providing electronic communications networks and services and publishes, in an easily accessible form, the tasks to be undertaken by the regulatory authorities and notifies them to the Commission without delay. [36]

112. Lastly, I note that, in its judgment in *Commission* v *Germany*, [37] the Court stated that for this intervention to be compatible with the directives, the conduct of the legislative body may not limit or abolish tasks which have been expressly assigned to the NRA by the directives. [38] The national legislature may not exclude NRAs from the definition and analysis of new markets, as to do so would deprive those bodies of the powers expressly conferred on them by the directives. [39] Accordingly, as is also apparent from recent case-law, national legislation may not encroach upon the powers which the NRAs derive directly from the provisions of the NRF. [40]

32 — See p. 32 of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22, Directive 2002/58 and Regulation (EC) No 2006/2004 on consumer protection cooperation (COM(2007) 698 final).

33 — See p. 46 of the Position of the European Parliament adopted at first reading on 24 September 2008 with a view to the adoption of Directive 2008/…/EC of the European Parliament and of the Council amending Directive 2002/22, Directive 2002/58 and Regulation (EC) No 2006/2004 on consumer protection cooperation (document P6_TC1-COD(2007) 248, OJ 2010 C 8E, p. 360).

34 — C-389/08, EU:C:2010:584.

35 — Paragraph 30.

36 — See *Comisión del Mercado de las Telecomunicaciones*, C-82/07, EU:C:2008:143, paragraphs 24 to 26.

37 — C-424/07, EU:C:2009:749.

38 — See the Opinion of Advocate General Cruz Villalón in *Base and Others*, C-389/08, EU:C:2010:360, point 46.

39 — Ibidem, point 41. Also see *Commission* v *Germany*, C-424/07, EU:C:2009:749, paragraphs 74 to 78.

40 — See *Deutsche Telekom*, C-543/09, EU:C:2011:279, paragraph 43 and the case-law cited.

113. As regards the case under consideration in the main proceedings, two lessons can be drawn from the above case-law approaches.

114. First, I note that the Court does not rule out the possibility that, in certain circumstances, an authority other than the NRA, namely a legislative body or a ministerial authority, may intervene as NRA or alongside an NRA in accordance with the NRF.

115. In so far as those national authorities, acting as an NRA, are liable to carry out, in compliance with the abovementioned requirements, tasks that the NRF has assigned to an NRA, I take the view that, *a fortiori*, such national authorities should be able to intervene in the case where the NRF assigns a regulatory function expressly to 'relevant national authorities'.

116. Second, I consider, however, that if the relevant national authorities referred to in Article 28 of the Universal Service Directive imposed a tariff obligation comparable to the obligation that NRAs may adopt, under Article 13(1) of the Access Directive and Article 17(1) of the Universal Service Directive, despite the fact that such an obligation pursues different objectives, the relevant national authorities would have to comply with the same requirements as those applying to NRAs under the NRF, particularly the requirement of functional independence in relation to operators. [41] Similarly, decisions taken by the relevant national authorities would have to be amenable to an effective appeal to a body independent of the parties involved. [42]

117. It follows that although, in those circumstances, the Member States enjoy institutional autonomy as regards the organisation and the structuring of their relevant national authorities within the meaning of Article 28 of the Universal Service Directive, that autonomy may be exercised only in accordance with the objectives and obligations laid down in the NRF. [43]

118. In the main proceedings, it will therefore be for the referring court to assess whether in this case the Netherlands Government, having acted as a relevant national authority under Article 28 of the Universal Service Directive, satisfies the requirements of competence, independence, impartiality and transparency laid down by the NRF.

119. In this respect, I note that, during the hearing, the Netherlands Government explained that, at the time of the facts giving rise to the dispute in the main proceedings, the Kingdom of the Netherlands had privatised KPN. Although this information tends to show that the Netherlands Government may be regarded as legally and functionally independent of that company, it is, in my view, insufficient to support the conclusion that the abovementioned requirements were satisfied by that relevant national authority. It will be for the referring court, having regard to all of the information in its possession in this case, to carry out such an assessment.

120. Furthermore, in order to complete my analysis, I consider that it will also be for the referring court to determine whether the ACM, as the NRA ensuring the application of the national tariff-related measure adopted by the Netherlands Government, has, for its part, complied with the abovementioned requirements as laid down by the NRF. Such a review entails, this time, determining whether, in particular, the NRA was protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. [44]

41 — See recital 11 in the preamble to, and Article 3(2) of, the Framework Directive.

42 — See Article 4(1) of the Framework Directive.

43 — See, to that effect, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 26 and the case-law cited.

44 — See recital 13 in the preamble to Directive 2009/140 and, also to that effect, Article 3a of the Framework Directive.

121. In the light of all of these considerations, I am of the opinion that the Netherlands Government was entitled to adopt a tariff-related measure such as that at issue in the main proceedings, provided that this intervention is intended to secure the objective pursued by Article 28 of the Universal Service Directive and that the requirements of competence, independence, impartiality and transparency have been satisfied, this being a matter for the national court to assess.

122. Consequently, Article 28 of the Universal Service Directive should be interpreted as meaning that a tariff-related measure such as that at issue in the main proceedings may be adopted by an authority other than the NRA exercising the power referred to in Article 13(1) of the Access Directive, provided that the requirements of competence, independence, impartiality and transparency have been satisfied, this being a matter for the national court to determine.

IV – **Conclusion**

123. In the light of the foregoing considerations, I propose that the Court reply to the College van Beroep voor het Bedrijfsleven as follows:

(1) Article 28 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), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as not precluding the adoption of a tariff obligation such as that at issue in the main proceedings, without a market analysis having indicated that an operator has significant power in that market and where the obstacle to access to non-geographic numbers is of a non-technical nature, provided that the tariff obligation is necessary to ensure that end-users have access to services using those numbers, this being a matter for the national court to determine.

(2) (a) Article 28 of Directive 2002/22, as amended by Directive 2009/136, must be interpreted as not precluding the adoption of a tariff-related measure such as that at issue in the main proceedings in the case where the effect of higher tariffs on the call volume to non-geographic numbers is merely limited.

(b) It will be for the national court to determine, in the course of the review of proportionality of the necessary step under Article 28 of Directive 2002/22, as amended by Directive 2009/136, whether the imposition of a tariff-related measure such as that at issue in the main proceedings is unreasonably onerous for the operator concerned.

(3) Article 28 of Directive 2002/22, as amended by Directive 2009/136, must be interpreted as meaning that a tariff-related measure such as that at issue in the main proceedings may be adopted by an authority other than the national regulatory authority exercising the power referred to in Article 13(1) of 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 (Access Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, provided that the requirements of competence, independence, impartiality and transparency have been satisfied, this being a matter for the national court to determine.