



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 December 2018*

(Reference for a preliminary ruling — Directive 2002/22/EC — Electronic communications networks and services — Universal service and users' rights — Undertaking providing an electronic communications network used for the distribution of radio or television broadcasts to the public — Undertaking offering the live streaming of television programmes online — 'Must carry' obligation)

In Case C-298/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 10 May 2017, received at the Court on 23 May 2017, in the proceedings

France Télévisions SA

v

Playmédia,

Conseil supérieur de l'audiovisuel (CSA),

intervener:

Ministry of Culture and Communication,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 30 May 2018,

after considering the observations submitted on behalf of:

- France Télévisions SA, by E. Piwnica, avocat,
- Playmédia, by T. Haas, avocat,
- the French Government, by R. Coesme, D. Colas and D. Segoin, acting as Agents,

* Language of the case: French.

- the Lithuanian Government, by R. Krasuckaitė and by D. Kriauciūnas and R. Dzikovič, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by G. Braun, L. Nicolae and J. Hottiaux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2018,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive') (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').
- 2 The request has been made in proceedings between France Télévisions SA and the Conseil supérieur de l'audiovisuel (CSA) concerning Decision No 2015-232 of 27 May 2015, by which the CSA gave formal notice to France Télévisions that it should comply, in the future, with Article 34-2 of Law No 86-1067 of 30 September 1986 on Freedom of Communication ('Law on Freedom of communication'), by not opposing the live streaming by Playmédia, on its website, of programmes produced by France Télévisions.

Legal context

European Union law

The Framework Directive

- 3 Recital 5 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'), is worded as follows:

“The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [(OJ 2002 L 108, p. 21)], Directive 2002/19/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)], the ['Universal Service' Directive] and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [(OJ 1998 L 24, p. 1)], (hereinafter referred to as “the Specific Directives”). It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting

content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [(OJ 1989 L 298, p. 23)]. The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.’

- 4 Article 1 of the Framework Directive, entitled ‘Subject matter and scope’, provides, in paragraphs 2 and 3:

‘2. This Directive as well as the Specific Directives are without prejudice to obligations imposed by national law in accordance with Community law or by Community law in respect of services provided using electronic communications networks and services.

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.’

- 5 Article 2 of the Framework Directive, entitled ‘Definitions’, provides:

‘For the purposes of this Directive:

(a) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, 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;

...

(m) “provision of an electronic communications network” means the establishment, operation, control or making available of such a network;

...’

The Universal Service Directive

- 6 Recital 45 of the Universal Service Directive reads:

‘Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services.’

7 Article 2 of that directive, entitled ‘Definitions’, states:

‘For the purposes of this Directive the definitions set out in Article 2 of [the Framework Directive] shall apply.

...’

8 Article 31 of the Universal Service Directive, entitled “‘Must carry” obligations’, provides, in paragraph 1:

‘Member States may impose reasonable “must carry” obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011, except where Member States have carried out such a review within the previous two years.

Member States shall review “must carry” obligations on a regular basis.’

French law

9 Article 2-1 of the Law on Freedom of Communication provides:

‘For the purposes of this Law, “service distributor” means any person who enters into a contractual relationship with a service provider with a view to making audiovisual communication services available to the public through an electronic communications network within the meaning of Article L. 32-2 of the Postal and Electronic Communications Code. Any person who makes such services available by entering into a contractual relationship with other distributors shall also be considered to be a service distributor.’

10 According to Article 34-2(I) of that law:

‘In metropolitan France, service distributors on a network not using terrestrial frequencies allocated by the CSA must make available to subscribers, free of charge, the services of the undertakings referred to in Article 44-1, the channel Arte, broadcast via a land radio relay channel in analogue mode, the Channel TV5, and television services broadcast via a land radio relay channel in digital mode and intended to improve awareness of French overseas departments, specifically intended for the general public of metropolitan France and produced by the undertaking referred to in Article 44-1, except where the providers of those services consider the provision of those services to be manifestly incompatible with observance of their public service responsibilities. Where they offer digital broadcast services, such distributors must also make available to subscribers, free of charge, the services of those undertakings broadcast via a land radio relay channel in digital mode.

...’

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

- 11 Playmédia offers live streaming of television programmes on its website mainly paid for by the advertisements screened before and during those broadcasts. In its capacity as services distributor within the meaning of Article 2-1 of the Law on Freedom of Communication, Playmédia considers that Article 34-2 of that law confers on it the right to distribute programmes produced by France Télévisions. It follows from the order for reference that France Télévisions also offers live streaming of those programmes on a website available to the general public.
- 12 By decision of 27 May 2015, the CSA gave France Télévisions formal notice to comply with Article 34-2 of the Law on Freedom of Communication by not opposing the online streaming of its programmes by Playmédia on Playmédia’s website.
- 13 By a summary application lodged on 6 July 2015 at the secretariat of the judicial section of the Conseil d’État (Council of State, France), France Télévisions requested the annulment of that formal notice, claiming that Playmédia cannot benefit from the obligation provided in Article 34-2 of that law. France Télévisions argued, in that regard, that the conditions provided in Article 31(1) of the Universal Service Directive are not satisfied when, in particular, it is impossible to assert that a significant number of end-users use the network as their principal means to receive television broadcasts.
- 14 In those circumstances, the Conseil d’État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘(1) Must an undertaking that offers live streaming of television programmes online be regarded, on the basis of that fact alone, as an undertaking providing an electronic communications network used for the distribution of radio or television broadcasts to the public within the meaning of Article 31(1) of the [Universal Service Directive]?’
 - (2) If the answer to the first question is in the negative, can a Member State, without infringing that Directive or other provisions of EU law, impose an obligation for the distribution of radio and television services on both undertakings providing electronic communications networks and on undertakings which, without providing such networks, offer live streaming of television programmes online?
 - (3) If the answer to the second question is in the affirmative, is it open to the Member States not to make the “must carry” obligation, on the part of service distributors not providing electronic communications networks, subject to all the conditions laid down in Article 31(1) of the [Universal Service] Directive, even though the fulfilment of those conditions is required on the part of network operators under that Directive?
 - (4) Can a Member State imposing a “must carry” obligation for the transmission of certain radio or television services on certain networks impose, without infringing that directive, an acceptance requirement for the distribution of those services on those networks, including distribution online, where the service in question already distributes its own programmes online?
 - (5) With regard to distribution online, must the condition requiring a significant number of end-users of networks subject to the “must carry” obligation to use them as their principal means of receiving radio and television broadcasts, set out in Article 31(1) of the [Universal Service] Directive, be assessed in relation to all users viewing television programmes streamed live online, or only in relation to users of the site subject to the “must carry” obligation?’

Consideration of the questions referred

The first question

- 15 By its first question the national court asks, in essence, if Article 31(1) of the Universal Service Directive must be interpreted as meaning that an undertaking which offers the possibility to live stream television programmes online must, based on that fact alone, be regarded as an undertaking which provides an electronic communications network used for the distribution of radio and television channels to the public.
- 16 In that regard, it must be noted that, under Article 31(1) of the Universal Service Directive, the Member States may, under certain conditions, impose ‘must carry’ obligations on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public.
- 17 The ‘provision of an electronic communications network’ is defined in Article 2(m) of the Framework Directive as ‘the establishment, operation, control or making available of such a network’. That definition is applicable in the context of the Universal Service Directive pursuant to Article 2 of that directive.
- 18 The activity which consists in offering live streaming of television programmes online does not come under that definition. The mere fact that an undertaking, in order to offer those services, is a user of an electronic communications network as defined in Article 2(a) of the Framework Directive, namely, the Internet, does not demonstrate that it is, itself, a provider of such a network.
- 19 In this instance, an undertaking, such as Playmédia, which limits itself to offering the live streaming of television programmes online does not provide an electronic communications network, but offers, in contrast, access to the contents of audiovisual services provided on the electronic communication networks, as noted by the Advocate General in point 23 of his Opinion.
- 20 It clearly follows from recital 5 of the Framework Directive that it is necessary to separate the regulation of transmission from the regulation of content, and that the common regulatory framework, of which the Universal Service Directive is part, does not cover the content of services delivered over electronic communications networks using electronic communications services (see, to that effect, judgment of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 38).
- 21 Furthermore, pursuant to recital 45 of the Universal Service Directive, the services providing content are not covered by the common regulatory framework for electronic communication networks and services and those services are not concerned by the universal service obligations for those activities. It follows that an undertaking which limits itself to offering, by means of a website, access to content provided on the Internet does not come under Article 31(1) of the Universal Service Directive.
- 22 In those circumstances, the answer to the first question is that Article 31(1) of the Universal Service Directive must be interpreted as meaning that an undertaking which offers the live streaming of television programmes online must not, based on that fact alone, be regarded as an undertaking which provides an electronic communications network used for the distribution of radio or television channels to the public.

The second to fourth questions

- 23 By the second to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of the Universal Service Directive or other EU law rules must be interpreted as precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, ‘must carry’ obligations on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.
- 24 The relevance of those questions is attributable to the fact that, in the case in the main proceedings, it appears that the ‘must carry’ obligations were imposed, under national law, on undertakings not covered by Article 31(1) of the Universal Service Directive. As evidenced by the order for reference, the scope of the ‘must carry’ obligation referred to in Articles 2-1 and 34-2 of the Law of Freedom of Communication is different from that which is provided for in Article 31(1) of the Universal Service Directive. In the context of the dispute in the main proceedings, it is for the referring court to establish if ‘must carry’ obligations have in fact been imposed on undertakings such as Playmédia.
- 25 In that regard, it must be noted that, pursuant to Article 1(3) of the Framework Directive, the directives which form part of the common regulatory framework are without prejudice to measures taken at national level, in compliance with EU law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.
- 26 Furthermore, it is apparent from recital 5 of the Framework Directive that the common regulatory framework, of which the Universal Service Directive forms part, does not cover the content of services delivered over electronic communications networks using electronic communications services and therefore does not prejudice the measures relating to those services taken at European Union or national level, in compliance with EU law, in order to promote cultural and linguistic diversity and to ensure the protection of media pluralism.
- 27 Therefore, the Universal Service Directive leaves the Member States free to impose ‘must carry’ obligations, outside of those covered by Article 31(1) of that directive, in particular on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.
- 28 To the extent that the referring court cites ‘other rules of EU law’, it must be noted that the request for a preliminary ruling does not serve to identify more precisely the provisions of EU law of which the referring court seeks interpretation.
- 29 Admittedly, by imposing ‘must carry’ obligations on undertakings which are not covered by Article 31(1) of the Universal Service Directive, Member States must comply with EU law, namely the rules relating to the freedom to provide services enshrined in Article 56 TFEU.
- 30 Assuming that the mention of ‘other rules of European Union law’ found in the order for reference must be understood as relating to Article 31(1) of the Universal Service Directive, it must be borne in mind, however, that the provisions of the FEU Treaty on the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case law cited).
- 31 In this case, the elements of the dispute in the main proceedings all seem to be confined within the French territory. In those proceedings, a French undertaking and the CSA are in dispute over the undertaking’s opposition to the streaming, by another French undertaking, of programmes which it has produced.

- 32 In paragraphs 50 to 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), the Court referred to the four situations in which it could, nevertheless, be necessary for the resolution of the disputes in the main proceedings to interpret the provisions of the Treaties relating to fundamental freedoms, even though the disputes in the main proceedings were confined in all respects within a single Member State (judgment of 20 September 2018, *Fremoluc*, C-343/17, EU:C:2018:754, paragraph 20).
- 33 Nonetheless, the Court of Justice has held that, in a situation such as that at issue in the main proceedings, which is confined in all respects within a single Member State, it is for the referring court to indicate to the Court of Justice, in accordance with the requirements of Article 94 of the Rules of Procedure of the Court, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 55).
- 34 In this case, the referring court has not indicated in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the freedom to provide services that makes the interpretation of Article 56 TFEU necessary for it to give judgment on that dispute.
- 35 In those circumstances, it must be declared that the second to fourth questions are inadmissible, inasmuch as they concern ‘other rules of EU law’.
- 36 In those circumstances, the answer to the second to fourth questions is that the provisions of the Universal Service Directive must be interpreted as not precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, a ‘must carry’ obligation on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.

The fifth question

- 37 By its fifth question, the referring court asks, in essence, whether, in a case such as that in the main proceedings, the condition under which a significant number of final users of the networks subject to the ‘must carry’ obligation must use those networks as their principal means to receive television channels, referred to in Article 31(1) of the Universal Service Directive, must be assessed in the light of the users who view television programmes online as a whole, or solely of the users of the website who belong to the undertaking subject to that obligation.
- 38 In this case, as evidenced by paragraphs 19 and 21 of the present judgment, an undertaking such as Playmédia does not come under Article 31(1) of the Universal Service Directive. As regards undertakings which do not come under that article, EU law does not impose compliance with the condition under which a significant number of final users of the networks subject to the ‘must carry’ obligation must use those networks as their principal means to receive television channels.
- 39 In those circumstances, there is no need to reply to the fifth question.

Costs

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

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

- 1. Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that an undertaking which offers the live streaming of television programmes online must not, based on that fact alone, be regarded as an undertaking which provides an electronic communications network used for the distribution of radio or television channels to the public.**
- 2. The provisions of Directive 2002/22, as amended by Directive 2009/136, must be interpreted as not precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, a 'must carry' obligation on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.**

[Signatures]