



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 June 2019\*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/21/EC — Article 2(c) — Concept of ‘electronic communications service’ — Conveyance of signals — Web-based email service — Gmail service)

In Case C-193/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia, Germany), made by decision of 26 February 2018, received at the Court on 19 March 2018, in the proceedings

**Google LLC**

v

**Bundesrepublik Deutschland**

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2019,

after considering the observations submitted on behalf of:

- Google LLC, by H. Neumann, B. Tavakoli and M. Wortmann, Rechtsanwälte,
- the Bundesrepublik Deutschland, by C. Mögelin and V. Janßen, acting as Agents,
- the German Government, by T. Henze and D. Klebs, acting as Agents,
- the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by G. Braun and L. Nicolae, acting as Agents,

\* Language of the case: German.

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

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation 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').
- 2 The request has been made in proceedings between Google LLC and the Bundesrepublik Deutschland (Federal Republic for Germany) concerning a decision of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks, Germany) ('the BNetzA') finding that Google's Gmail email service constitutes a telecommunications service and ordering it, as a consequence, to comply with its obligation to register, failure to do so would give rise to a penalty payment.

### **Legal context**

#### *European Union law*

- 3 Recital 10 of the Framework Directive states as follows:

'The definition of "information society service" in Article 1 of 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 and of rules of information society services [(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)] spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. 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.'

- 4 Article 2(c) of the Framework Directive provides as follows:

'For the purposes of this Directive:

...

- (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[s] 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], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks'.

- 5 Article 8 of the Framework Directive, entitled ‘Policy objectives and regulatory principles’, provides as follows:

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

Unless otherwise provided for in Article 9 regarding radio frequencies, Member States shall take the utmost account of the desirability of making regulations technologically neutral and shall ensure that, in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities do likewise.

...

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

...

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;

...

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

...

(b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

(c) contributing to ensuring a high level of protection of personal data and privacy;

...’

### ***German law***

- 6 Paragraph 3 of the Telekommunikationsgesetz (Law on Telecommunications) of 22 June 2004 (BGBl. 2004 I, p. 1190), in the version applicable to the case in the main proceedings (‘the TKG’), provides as follows:

‘For the purposes of this law, the following definitions shall apply:

...

17a “ telecommunications services accessible to the public” shall mean telecommunications services which are publicly available;

...

22. “telecommunication” shall mean the technical act of the sending, conveyance and receiving of signals by means of telecommunications equipment;
23. “telecommunications equipment” shall mean the facilities and technical systems capable of sending, transferring, conveying, receiving, directing or controlling electromagnetic or optical signals identifiable as messages;
24. “telecommunications services” shall mean the services normally provided for remuneration which consist wholly or mainly in the conveyance of signals on telecommunications networks, including transmission services in networks used for broadcasting;

...

27. “telecommunications network” shall mean all 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;

...’

- 7 Paragraph 6(1) of the TKG provides as follows:

‘Any person who commercially operates public telecommunications networks or telecommunications services accessible to the public shall be required to register without delay with the regulatory authority the initiation, alteration or cessation of his activity, and any modification in relation to his company. The registration shall be effected in writing.’

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

- 8 Google is a company with its seat in the United States of America which operates, inter alia, in addition to an internet search engine of the same name, an email service which functions by means of the internet, called Gmail, temporarily operated under the name ‘GoogleMail’ in Germany.
- 9 In Germany, Google also operates its own — internet-connected — network infrastructure, in particular several high-speed links between metropolitan areas.
- 10 Gmail is a service known as an ‘over-the-top’ (‘OTT’) service, that is to say, a service available on the internet without the participation of a traditional communications operator.
- 11 Gmail provides its users with a service enabling them, inter alia, to send and receive emails and data over the internet. To access that service, the user must first open an email account, after which he receives an address identifying him as the sender and recipient of emails. The user can access that service by logging in to his account, either directly on the website operated by Google (<https://mail.google.com>), in a web browser giving him access to an interface enabling him to use the email send and receive functions, as well as functions for the editing, storage or organisation of emails, or through an email program installed on his terminal device (an e-Mail client).
- 12 The referring court points out that, when transmitted via the Gmail service, emails and data remain unchanged, but are broken down into several separate data packets which are transmitted to the recipient by means of standardised email-service protocols, such as the *Transmission Control*

*Protocol* — *Internet Protocol* (TCP-IP) and the *Simple Mail Transfer Protocol* (SMTP). Technically, whether in his web browser or his e-Mail client program, the user creates the content of the email and determines the recipient or recipients, then transmits that email to Google by triggering the sending procedure.

- 13 To deliver that email to its recipient, Google uses email servers, which carry out the necessary electronic processing to identify the target server by means of the *Domain Name System* (DNS) and to send the data packets. The internet routing followed by those data packets through the various internet sub-networks operated by third parties is dynamic and subject to constant changes of which the party sending the data is unaware and over which it is unable to exercise any control. Upon reception, a target server stores the email and keeps it in an electronic mail box which the recipient can access by various means. Where emails are sent between users of the same services provider, the route taken by the emails on the internet may be shorter.
- 14 The BNetzA takes the view that Gmail constitutes a ‘telecommunications service’, within the meaning of Paragraph 6(1) of the TKG, read in conjunction with Paragraph 3(24) of the TKG, and that it is therefore subject to the obligation to register with the BNetzA.
- 15 By decision of 2 July 2012, the BNetzA thus made a formal determination, on the basis of Paragraph 126 of the TKG, that Gmail is a telecommunications service operated by Google and it ordered Google to comply with its obligation under the TKG to register, failure to do so would give rise to a penalty payment. The complaint lodged by Google against that decision was rejected as unfounded, by decision of the BNetzA dated 22 December 2014.
- 16 On 23 January 2015, Google brought an action before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany), seeking the annulment of that latter decision. That action was dismissed by judgment of 11 November 2015.
- 17 That court, in the case before it, held that Gmail constituted a ‘telecommunications service’ within the meaning of Paragraph 6(1) of the TKG, read in conjunction with Paragraph 3(24) of that Law, that is to say, a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks. According to that court, the key criterion of that definition, namely the ‘conveyance of signals’, has a close link with the concept of ‘telecommunication’, defined in Paragraph 3(22) of the TKG as the technical process of the sending, conveyance and receiving of signals by means of telecommunications equipment, such equipment being defined, in accordance with Paragraph 3(23) of the TKG, as the facilities and technical systems capable of sending, transferring, conveying, receiving, directing or controlling electromagnetic or optical signals identifiable as messages.
- 18 According to the Verwaltungsgericht Köln (Administrative Court, Cologne), Google enables users of the Gmail service to communicate by email over the internet thanks to a web interface or by means of an ‘e-Mail client’ program installed on their terminal device connected to the internet. The fact that the conveyance of signals occurs essentially over the open internet and thus that it is the internet access providers (‘IAPs’) which convey those signals and not Google itself does not preclude the classification of Gmail as a telecommunications service. The IAP’s signal conveyance service may be attributed to Google on the ground that it in fact appropriates the signal conveyance service for its own purposes and, in particular, on the ground that it makes an essential contribution to the functioning of the telecommunications process with its electronic processing services. That court takes the view that it is not appropriate to carry out a purely technical analysis in order to answer the question of whether a service consists wholly or mainly in the conveyance of signals. Gmail is primarily concerned with the conveyance of signals. In a qualitative assessment, communication across space with other users and, consequently, the process of telecommunication itself stands at the forefront, whereas the other, content-related aspects of the service are not important in themselves.

- 19 That court also considers that Google’s civil liability vis-à-vis users in respect of the IAP’s signal conveyance service is not decisive and observes that the Gmail service is provided for remuneration. Although the email services are offered free of charge to the user, at least in their basic version, they are nevertheless normally financed by advertising or other indirect revenue.
- 20 Google has brought an appeal against the judgment of the Verwaltungsgericht Köln (Administrative Court, Cologne) before the referring court, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia, Germany).
- 21 Before the referring court, Google submits that Gmail is not a telecommunications service since that service does not emit signals. Admittedly, as an email service, Gmail, like other OTT services such as, for example, online banking services, involves the conveyance of signals. However, the signals are not conveyed by Google itself but, in the case of both the transfer of data between Gmail users and Google’s email servers and the transfer of data between Google’s email servers and the email servers of other email service providers, by the IAPs. The signal conveyance service cannot be attributed to Google either, since that conveyance over the open internet operates according to the ‘best effort’ principle. Google is therefore unable to exercise either actual or legal control over the signal conveyance process.
- 22 Google also submits that the fact that it operates its own network infrastructure as part of the internet is factually and legally immaterial in this respect. That infrastructure was put in place essentially for the provision of data-intensive services such as ‘Google Search’ and ‘YouTube’, but is not essential to the operation of Gmail, even though it is also used for that purpose. It points out, lastly, that usually Gmail is not provided for remuneration, but made available to users free of charge and that it is funded only to a small extent by advertising on the Gmail website.
- 23 The BNetzA contends that, to be classified as a ‘telecommunications service’, the service provided must, from the point of view of its technical functionality, have as its primary purpose the conveyance of signals. Gmail fulfils that condition since the transmission of emails between sender and recipient is possible only by means of the conveyance of signals. The service provider does not have to convey the signals itself or at least exercise control over their conveyance by a third party. It is decisive only that signals should actually be conveyed as a technical component of the service.
- 24 It adds that, even if control over the conveyance of signals by third parties were required, that condition would be fulfilled because Google operates its own email servers. The email servers assign the physical *Internet Protocol* (IP) addresses to email addresses, Google authenticates the sender of an email and, in some cases, the recipient, too, by means of the password, email address or identifying number and, by means of the internet protocols used, directs the conveyance of signals to an extent sufficient to support the assumption of control. Lastly, Google itself operates its own — internet connected — network infrastructure, which is also used for the purposes of the conveyance of signals for Gmail.
- 25 In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Must the criterion of “a service ... which consists wholly or mainly in the conveyance of signals on electronic communications networks” in Article 2(c) of [the Framework Directive] be interpreted as meaning that it also includes, or may also include, web-based email services which are supplied over the open internet and do not themselves provide internet access?
- (a) Must that criterion be interpreted as meaning, in particular, that the electronic processing service which the provider of such an email service supplies via its email server, by assigning to the email addresses the IP addresses of the physical connections involved and uploading

the emails, broken down into data packets, to the open internet, or — conversely — receiving them from there, on the basis of various protocols in the internet protocol suite, is itself to be regarded as a “conveyance of signals”, or is it only the transmission of those data packets over the internet by [IAPs] which constitutes a “conveyance of signals”?

- (b) Must that criterion be interpreted as meaning, in particular, that the transmission of the email, broken down into data packets, over the open internet by [IAPs] is attributable to the provider of such an email service, with the result that, to this extent, the provider in question also supplies a service consisting in the “conveyance of signals”? If so, under what conditions may such transmission be so attributed?
  - (c) In the event that the provider of such an email service either conveys signals itself or the conveyance of signals by [IAPs] is in any event attributable to it, can that criterion be interpreted as meaning, in particular, that such an email service, irrespective of any additional functions of the service, such as the editing, storage and organisation of emails or the management of contact details, and irrespective of the technical effort expended by the provider in connection with individual functions, also consists “wholly or mainly” in the conveyance of signals, given that, if that service is considered in functional terms from the point of view of users, it is its communication function which stands at the forefront?
- (2) In the event that the criterion referred to in Question 1 [should] be interpreted as meaning that it does not, in principle, include web-based email services which are supplied over the open internet and do not themselves provide internet access, is that criterion nonetheless capable, exceptionally, of being fulfilled where the provider of such an email service simultaneously operates a number of its own internet-connected electronic communications networks which can in any event be used, inter alia, for the purposes of the email service? If so, under which conditions is this possible?
- (3) How is the criterion “normally provided for remuneration”, laid down in Article 2(c) of [the Framework Directive], to be interpreted?
- (a) In particular, does that criterion require the payment of a fee by users or can the remuneration also consist in the provision by users of another form of consideration in the financial interests of the service provider, as, for example, in the case where users actively make available personal or other data or where such data is otherwise captured by the service provider while the service is being used?
  - (b) In particular, does that criterion necessarily require the remuneration to be paid by the person to whom the service is also provided or may it also be sufficient for the service to be financed in part or in full by third parties, such as, for example, through advertising on the service provider’s website?
  - (c) In particular, does the word “normally” refer in this context to the circumstances in which the provider of a specific service supplies that service or to the circumstances in which identical or comparable services are generally supplied?

## Consideration of the questions referred

### *The first and second questions*

- <sup>26</sup> By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2 (c) of the Framework Directive must be interpreted as meaning that a web-based email service which does not itself provide internet access, such as the Gmail service provided by Google, constitutes a service which consists wholly or mainly in the conveyance of signals on electronic communications networks, having regard to the electronic processing which the provider of that service supplies via its email servers, on the one hand, by assigning to the email addresses the IP addresses of the corresponding terminal devices and, on the other hand, by uploading to or receiving from the open internet the data packets relating to the emails. In the event of an answer in the

negative, it also asks whether, and if so under which conditions, the provider of such a web-based email service can nevertheless be regarded as itself conveying signals, or whether the conveyance of signals can be attributed to it, where it moreover operates its own internet-connected electronic communications networks which can be used for the purposes of that service.

- 27 It must first be recalled that the concept of ‘electronic communications service’ is defined, in positive and negative terms, in Article 2(c) of the Framework Directive and that that definition is reproduced in equivalent terms in Article 1(3) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) (judgment of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraphs 36 and 37).
- 28 Article 2(c) of the Framework Directive defines, first, ‘electronic communications service’ as ‘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’.
- 29 The same provision specifies, secondly, that the concept of ‘electronic communications service’ excludes, on the one hand, ‘services providing, or exercising editorial control over, content transmitted using electronic communications networks and services’ and does not include, on the other hand, ‘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’.
- 30 In that connection, recital 5 of the Framework Directive states, inter alia, that the convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework and that, in setting up that framework, it is necessary to separate the regulation of transmission from the regulation of content.
- 31 As the Court has already pointed out, the various directives making up the new regulatory framework applicable to electronic communications services, in particular the Framework Directive and Directive 2002/77, thus 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, content and transmission being covered by different measures which pursue their own specific objectives (see, to that effect, judgments of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 41, and of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 36).
- 32 The Court has also held that, to fall within the scope of the concept of ‘electronic communications service’, a service must include the conveyance of signals, and the fact that the conveyance of signals is by means of an infrastructure that does not belong to the service provider is of no relevance to the classification of the nature of the service, since all that matters in that regard is that such a service provider is responsible vis-à-vis the end-users for conveyance of the signal which ensures that they are supplied with the service to which they have subscribed (judgment of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 43).
- 33 In the present case, it is apparent from the order for reference and the written observations submitted to the Court that Google provides, among other services, an email service (Gmail), enabling the holder of a Gmail account to send and receive emails either via a web browser application, by using the web interface put at his disposal for this purpose by Google, or via an ‘e-Mail client’ program. However, only the web-based email service is at issue in the case in the main proceedings.

- 34 It is common ground that the provider of a web-based email service, such as Gmail, conveys signals. Google thus confirmed, during the hearing before the Court, that, in providing its email service, it uploads to the open internet and receives from it, via its email servers, the data packets relating to the emails sent and received, respectively, by the holders of a Google email account.
- 35 Nonetheless, it cannot be thus concluded that the operations performed by Google to ensure the functioning of its web-based email service constitute an ‘electronic communications service’ within the meaning of Article 2(c) of the Framework Directive, since that service does not consist wholly or mainly in the conveyance of signals on electronic communications networks.
- 36 As the European Commission pointed out, inter alia, in its written observations, it is (a) the IAPs of the senders and recipients of the emails and, as the case may be, the web-based email service providers and (b) the operators of the various networks of which the open internet is constituted which, essentially, convey the signals necessary for the functioning of any web-based email service, and it is they who bear responsibility in accordance with the judgment of 30 April 2014, *UPC DTH* (C-475/12, EU:C:2014:285, paragraph 43).
- 37 The fact that the supplier of a web-based email service actively participates in the sending and receipt of messages, whether by assigning to the email addresses the IP addresses of the corresponding terminal devices or by splitting those messages into data packets and uploading them to, or receiving them from, the open internet for the purposes of transmitting them to their recipients, does not appear to be sufficient to enable that service, on the technical level, to be regarded as consisting ‘wholly or mainly in the conveyance of signals on electronic communications networks’ within the meaning of Article 2(c) of the Framework Directive.
- 38 Accordingly, given the absence of any other element such as to establish Google’s responsibility vis-à-vis those holding an email account with Gmail for the conveyance of signals necessary for that account’s functioning, which it is for the referring court to verify, the Gmail email service cannot be classified as an ‘electronic communications service’ within the meaning of Article 2(c) of the Framework Directive.
- 39 Lastly, the fact that Google also operates its own electronic communications networks in Germany is not such as to call in question that finding.
- 40 The fact that Google must be regarded as supplying electronic communications services as the operator of its own electronic communications networks and that it may, as such, be subject to the obligation to declare its activity under Article 3(2) and (3) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), as amended by Directive 2009/140, does not mean that all the web-based services which it supplies must also be treated as electronic communications services, even though they do not consist wholly or mainly in the conveyance of signals.
- 41 Having regard to the foregoing considerations, the answer to the first and second questions is that Article 2(c) of the Framework Directive must be interpreted as meaning that a web-based email service which does not itself provide internet access, such as the Gmail service provided by Google, does not consist wholly or mainly in the conveyance of signals on electronic communications networks and therefore does not constitute an ‘electronic communications service’ within the meaning of that provision.

### ***The third question***

- 42 Given the answer to the first and second questions, there is no need to answer the third question.

## Costs

- <sup>43</sup> 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:

**Article 2(c) 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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that a web-based email service which does not itself provide internet access, such as the Gmail service provided by Google LLC, does not consist wholly or mainly in the conveyance of signals on electronic communications networks and therefore does not constitute an ‘electronic communications service’ within the meaning of that provision.**

[Signatures]