



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

11 December 2019*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/21/EC (Framework Directive) — Article 2(m) — Provision of an electronic communications network — Concept — Directive 2002/22/EC (Universal Service Directive) — Article 31(1) — ‘Must carry’ obligation to broadcast specified radio and television channels — Operator offering a package of channels via satellite — Reasonable ‘must carry’ obligations — Conditions — Article 56 TFEU — Proportionality)

In Case C-87/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 23 January 2019, received at the Court on 7 February 2019, in the proceedings

TV Play Baltic AS

v

Lietuvos radijo ir televizijos komisija,

intervening parties:

Lietuvos nacionalinis radijas ir televizija VŠĮ,

THE COURT (Ninth Chamber),

composed of M. Vilaras (Rapporteur), President of the Fourth Chamber, acting as President of the Ninth Chamber, K. Jürimäe and N. Piçarra, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- TV Play Baltic AS, by L. Darulienė, advokatė, and by R. Gediminskaitė and I. Barauskienė,
- the Lithuanian Government, by R. Dzikovič, K. Dieninis and K. Juodelytė, acting as Agents,
- the French Government, by A.-L. Desjonquères and R. Coesme, acting as Agents,

* Language of the case: Lithuanian.

– the European Commission, by S.L. Kalēda and L. Nicolae, acting as Agents,
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 primarily concerns the interpretation of Article 2(m) 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) ('the Framework Directive') and 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 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ 2009 L 337, p. 11) ('the Universal Service Directive').
- 2 The request has been made in proceedings between TV Play Baltic AS (formerly Viasat AS) and the Lietuvos radijo ir televizijos komisija (Radio and Television Commission of Lithuania) ('the LRTK') concerning the rejection, by the latter, of Viasat's application to be exempted from the obligation to rebroadcast the television channel LRT Kultūra.

Legal context

European Union law

- 3 Article 2 of the Framework Directive, entitled 'Definitions', provides, in paragraph (m) thereof:

"provision of an electronic communications network" means the establishment, operation, control or making available of such a network.'
- 4 Recitals 43 to 45 of the Universal Service Directive state:

'(43) Currently, Member States impose certain "must carry" obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with [Union] law and should be proportionate, transparent and subject to periodical review. "Must carry" obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such "must carry" obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.

- (44) Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.
- (45) 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 [Union] law, in respect of such services.’
- 5 Article 31 of the Universal Service Directive, entitled “‘Must carry’ obligations’, is worded as follows:
- ‘1. Member States may impose reasonable “must carry” obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. 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.
- ...’

Lithuanian law

- 6 Article 33(5) to (7) of the Lietuvos Respublikos visuomenės informavimo įstatymas (Lithuanian Law on the provision of information to the public) (‘the Law on information’), as amended by Law No XII-1731 of 21 May 2015, provides:
- ‘5. Operators providing in Lithuania retransmission of television programmes, and other persons providing internet distribution of television channels and/or programmes to Lithuanian consumers, shall be obliged to rebroadcast and/or distribute via the internet all the unencrypted national television channels of Lietuvos nacionalinis radijas ir televizija.
6. The Lietuvos radijo ir televizijos komisija [Radio and Television Commission of Lithuania] may decide to exempt the unencrypted national television channels of Lietuvos nacionalinis radijas ir televizija from the obligation to rebroadcast and/or distribute via the internet if that decision does not restrict the consumer’s opportunities to watch channels solely with the technical means at their disposal.
7. The obligatory retransmission and/or distribution online of television programmes shall not give rise to any payment between broadcasters, retransmission operators and other operators providing internet distribution of television channels and/or programmes to Lithuanian consumers.’

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

- 7 TV Play Baltic is a company established in Estonia, which broadcasts packages of pay television channels in Lithuania by means of a satellite network owned by a third party for which it pays it remuneration.

- 8 Since the amendment, in 2015, of the Law on information, the activities of the applicant in the main proceedings have been regarded as the retransmission of television programmes and, in accordance with Article 33(5) of that law, it is subject to the obligation to rebroadcast the channels of Lietuvos nacionalinis radijas ir televizija VŠĮ ('LRT'), which include the channel LRT Kultūra.
- 9 The applicant in the main proceedings submitted to the LRTK an application to be exempted from the obligation to rebroadcast that channel.
- 10 Since that application for exemption was refused, the applicant in the main proceedings brought an action for the annulment of the decision rejecting its application before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania).
- 11 By decision of 4 January 2017, that court, in particular, confirmed the obligation imposed on the applicant in the main proceedings to rebroadcast that channel.
- 12 Ruling on appeal, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) has doubts as to the interpretation of EU law, in particular of Article 56 TFEU, the Framework Directive and the Universal Service Directive.
- 13 At the outset, the referring court points out that the obligation to rebroadcast, provided for in Article 33(5) of the Law on information, as amended by Law No XII-1731 of 21 May 2015, is not subject to any conditions and that that provision constitutes the transposition, into Lithuanian law, of Article 31 of the Universal Service Directive.
- 14 In the first place, that court questions whether the activities of the applicant in the main proceedings must be regarded as the 'provision of an electronic communications network', for the purposes of Article 2(m) of the Framework Directive and Article 31 of the Universal Service Directive. It concludes, in that regard, that that applicant rebroadcasts television channels by using, in exchange for payment, a communication infrastructure belonging to other economic operators.
- 15 That court notes, nevertheless, that certain facilities of that infrastructure are thus used exclusively for the transmission of signals by the applicant in the main proceedings and that the latter could be regarded as a network operator, for the purposes 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) (OJ 2002 L 108, p. 7), 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).
- 16 In the second place, the referring court considers that, if the activities of the applicant in the main proceedings are not covered by the concept of provision of an electronic communications network, it is necessary to determine whether a Member State may impose 'must carry' obligations on economic operators other than those referred to in Article 31 of the Universal Service Directive. It is of the opinion that the activities of the applicant in the main proceedings can be regarded as electronic communications services within the scopes of application of the Framework Directive and the Universal Service Directive. However, it does not exclude that those activities could be regarded as a service for the supply of content, to which the universal service obligations provided for by the latter directive do not apply.
- 17 In the third place, the referring court questions the interpretation to be given to the requirement in Article 31(1) of the Universal Service Directive, according to which a 'must carry' obligation may be imposed only where a significant number of end users of such networks use them as their principal means to receive radio and television channels. It notes that, although that requirement does not apply to undertakings not covered by the scope of application of that provision, the Lithuanian legislature ensures uniform treatment of all re-transmitters with respect to that obligation.

- 18 In the fourth place, the referring court considers that the ‘must carry’ obligation restricts the freedom to provide services, referred to in Article 56 TFEU. It considers that, although such a restriction may be justified for overriding reasons in the public interest relating to cultural policy, that obligation must be proportionate and necessary for the achievement of the objectives pursued. It questions whether the possibility, for LRT, to itself broadcast LRT Kultūra on the same satellite network as that used by the customers of the applicant in the main proceedings is relevant in that regard, since LRT broadcasts another free channel on the same satellite as that used by the applicant. It likewise has doubts relating to the fact that that channel is broadcast via the terrestrial broadcasting network and that part of its content is freely available online.
- 19 In those circumstances, the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 2(m) of the [Framework Directive] to be interpreted as meaning that the “provision of an electronic communications network” does not cover activities of television rebroadcasting over satellite networks owned by third parties, such as those carried out by the applicant [in the main proceedings]?
- (2) Is Article 31(1) of the [Universal Service Directive] to be interpreted as precluding Member States from imposing a “must carry” obligation (to broadcast a television channel over satellite networks owned by third parties and to provide access for end users to that broadcast) on economic operators, such as the applicant [in the main proceedings], which (1) broadcast a television channel protected by a conditional access system over satellite networks owned by third parties, to that end receiving signals of television programmes (channels) broadcast at that time, converting them, encrypting them and transmitting them to an artificial earth satellite from which they are uninterruptedly transmitted back to earth, and (2) offer television channel packages to customers, to that end providing access to that protected television broadcast (or part thereof) by conditional access devices in return for remuneration?
- (3) Is Article 31(1) of the [Universal Service Directive] to be interpreted as meaning that, for the purposes of the application of that provision, a significant number of end users are not considered to use electronic communications networks (in the present case, a satellite broadcasting network) as their principal source (means) to receive television broadcasts where those networks are used as that principal source (means) by only approximately 6% of all end users (in the present case, households)?
- (4) When assessing whether application of Article 31(1) of the [Universal Service Directive] is justified, is regard to be had to the internet users who may, free of charge, view the television programmes in question (or part thereof) live online?
- (5) Is Article 56 [TFEU] to be interpreted as precluding Member States from imposing a mandatory obligation on economic operators, such as the applicant [in the main proceedings], to rebroadcast a television channel over electronic communications networks free of charge where the broadcaster for whose benefit that obligation is laid down is fully capable of broadcasting those television channels itself over the same network with its own funds?
- (6) Is Article 56 [TFEU] to be interpreted as precluding Member States from imposing a mandatory obligation on economic operators, such as the applicant [in the main proceedings], to rebroadcast a television channel over electronic communications networks free of charge where that obligation would cover only approximately 6% of all households and those households have the possibility of viewing that television channel by means of the terrestrial broadcasting network or the internet?’

Consideration of the questions referred

The first question

- 20 By its first question, the referring court asks whether activities of television rebroadcasting over satellite networks owned by third parties are covered by the concept of ‘provision of an electronic communications network’, for the purposes of Article 2(m) of the Framework Directive.
- 21 It should be noted that the Court has held that an undertaking which limits itself to offering 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 (see, to that effect, judgment of 13 December 2018, *France Télévisions*, C-298/17, EU:C:2018:1017, paragraphs 18 and 19).
- 22 The situation of an undertaking which, like the applicant in the main proceedings, rebroadcasts television channels via satellite is not different from that of an undertaking which broadcasts such channels online, in so far as, like the latter, it offers access to the contents of audiovisual services provided on an electronic communication network, in this case a satellite network.
- 23 Although the referring court has doubts, nevertheless, concerning the possibility of regarding the activities at issue in the main proceedings as consisting in the provision of electronic communications networks, on the ground that certain facilities of satellite infrastructure are used exclusively for the transmission of signals by the applicant in the main proceedings, it is not disputed that the latter does not perform any of the tasks undertaken by the provider of an electronic communications network, for the purposes of Article 2(m) of the Framework Directive, namely responsibility for the establishment, operation, control or making available of such a network.
- 24 In the light of all of the foregoing considerations, the answer to the first question is that Article 2(m) of the Framework Directive must be interpreted as meaning that activities of television rebroadcasting over satellite networks owned by third parties are not covered by the concept of ‘provision of an electronic communications network’, for the purposes of that provision.

The second question

- 25 By its second question, the referring court asks, in essence, whether Article 31(1) of the Universal Service Directive precludes Member States from imposing a ‘must carry’ obligation to broadcast a television programme on undertakings which rebroadcast, by means of satellite networks owned by third parties, television channels protected by a conditional access system and offer their customers television programme packages.
- 26 It should be noted that the Court has held that the directives which form part of the common regulatory framework, including the Framework Directive and the Universal Service Directive, 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, since that common framework does not apply to the content of services delivered over electronic communications networks (see, to that effect, judgment of 13 December 2018, *France Télévisions*, C-298/17, EU:C:2018:1017, paragraphs 25 and 26).

- 27 As a result, the Court has held that 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 (judgment of 13 December 2018, *France Télévisions*, C-298/17, EU:C:2018:1017, paragraph 27).
- 28 Like the activities at issue in the case giving rise to that judgment, rebroadcasting activities, via satellite, of television channels protected by a conditional access system consist in the provision of television content.
- 29 It is not apparent from any evidence in the case file before the Court that it is necessary to assess activities of broadcasting television content, in the light of Article 31(1) of the Universal Service Directive, differently depending on whether they are provided via satellite or online.
- 30 Consequently, the answer to the second question is that Article 31(1) of the Universal Service Directive must be interpreted as not precluding Member States from imposing a ‘must carry’ obligation to broadcast a television programme on undertakings which rebroadcast, by means of satellite networks owned by third parties, television channels protected by a conditional access system and offer their customers television programme packages.

The third and fourth questions

- 31 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

The fifth and sixth questions

- 32 By its fifth and sixth questions, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding the Member States from imposing a ‘must carry’ obligation to broadcast a television channel free of charge on undertakings which rebroadcast, by means of satellite networks owned by third parties, television programmes protected by a conditional access system and offer their customers television programme packages, although, first, the broadcaster for whose benefit that obligation is laid down is fully capable of broadcasting those television channels itself over the same network with its own funds and, secondly, that obligation would cover only approximately 6% of all households and those households have the possibility of viewing that television channel by means of the terrestrial broadcasting network or online.
- 33 First of all, it must be noted that EU law has not been fully harmonised in the electronic communications services sector and, accordingly, the national legislation at issue in the main proceedings must be considered in the light of Article 56 TFEU so far as concerns those aspects that are not covered in particular by the Framework Directive and the Universal Service Directive (see, to that effect, judgment of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 70).
- 34 According to settled case-law, the transmission of television signals, including the transmission of such signals by cable television, constitutes, as such, a supply of services for the purposes of Article 56 TFEU (judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 28 and the case-law cited).
- 35 As regards the question whether national legislation, such as that at issue in the main proceedings, gives rise to a restriction which is prohibited by Article 56 TFEU, it should be noted that, according to the case-law, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State,

but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services (judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 29 and the case-law cited).

- 36 It must be noted that, by imposing a ‘must carry’ obligation to broadcast certain television programmes of LRT on undertakings which, whatever their place of establishment, rebroadcast television programmes via satellite, aimed at Lithuanian television viewers, the national legislation at issue in the main proceedings creates a restriction on the freedom to provide services, for the purposes of Article 56 TFEU.
- 37 According to the case-law, such a restriction of a fundamental freedom guaranteed by the FEU Treaty may be justified where it serves overriding requirements in the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 39 and the case-law cited).
- 38 In that regard, it should be noted that, according to the Court’s settled case-law, a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction of the freedom to provide services. The maintenance of the pluralism which that policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which freedom is one of the fundamental rights guaranteed by the EU legal order and, in particular, by Article 11 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others*, C-250/06, EU:C:2007:783, paragraph 41 and the case-law cited).
- 39 In the present case, the Lithuanian Government noted that the ‘must carry’ obligation to broadcast the television channel LRT Kultūra, imposed on undertakings such as the applicant in the main proceedings, pursues an aim in the public interest connected with cultural policy, in the light of the significant social and cultural value of that channel for Lithuanian television viewers.
- 40 Such a cultural policy objective may be capable of justifying the existence of a restriction of the freedom to provide services.
- 41 However, the national legislation which establishes such a restriction must be suitable for ensuring the achievement of the objective pursued. On that point, subject to verifications to be carried out by the referring court, the ‘must carry’ obligation to broadcast certain television programmes may allow the cultural policy objective it pursues to be achieved, in so far as it is apt to ensure that Lithuanian television viewers, who do not have access to television via satellite, have the possibility to watch programmes of the LRT Kultūra channel, to which they would not otherwise have access.
- 42 As regards the proportionality of the measure at issue in the main proceedings, which is, more particularly, the subject of the fifth and sixth questions, although it is for the referring court to rule in that regard, in the light of evidence brought to its attention in the context of the main proceedings, the Court may provide it with indications as to the parameters to take into consideration during that examination.
- 43 Therefore, it is necessary, as the European Commission pointed out in its observations, that the referring court take account of the number or percentage of end users who actually make use of the means of broadcasting television channels, in order to assess the proportionality of the ‘must carry’ obligation at issue in the main proceedings.

- 44 Moreover, in order to assess whether the ‘must carry’ obligation at issue in the main proceedings is proportionate, the referring court should also take into consideration, after having verified them, elements such as the geographical distribution of the end users of the services supplied by the applicant in the main proceedings, the fact that the latter rebroadcasts the LRT Kultūra channel unencrypted and the fact that that channel, or a large number of its programmes, is freely available online and via the terrestrial broadcasting network.
- 45 In the light of those considerations, the answer to the fifth and sixth questions is that Article 56 TFEU must be interpreted as not precluding the Member States from imposing a ‘must carry’ obligation to broadcast a television channel free of charge on undertakings which rebroadcast, by means of satellite networks owned by third parties, television programmes protected by a conditional access system and offer their customers television programme packages, provided, first, that that obligation to broadcast allows a significant number or percentage of end users of all of the means of broadcasting television programmes to access the channel benefiting from that obligation and, secondly, that account is taken of the geographical distribution of the end users of the services supplied by the operator on whom that ‘must carry’ obligation is imposed, of the fact that the latter rebroadcasts that channel unencrypted and of the fact that that channel is freely available online and via the terrestrial broadcasting network, which it is for the referring court to verify.

Costs

- 46 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 (Ninth Chamber) hereby rules:

- 1. Article 2(m) 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) must be interpreted as meaning that activities of television rebroadcasting over satellite networks owned by third parties are not covered by the concept of ‘provision of an electronic communications network’, for the purposes of that provision.**
- 2. 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) must be interpreted as not precluding Member States from imposing a ‘must carry’ obligation to broadcast a television programme on undertakings which rebroadcast, by means of satellite networks owned by third parties, television channels protected by a conditional access system and offer their customers television programme packages.**
- 3. Article 56 TFEU must be interpreted as not precluding the Member States from imposing a ‘must carry’ obligation to broadcast a television channel free of charge on undertakings which rebroadcast, by means of satellite networks owned by third parties, television programmes protected by a conditional access system and offer their customers television programme packages, provided, first, that that obligation to broadcast allows a significant number or percentage of end users of all of the means of broadcasting television programmes to access the channel benefiting from that obligation and, secondly, that account is taken of the geographical distribution of the end users of the services supplied by the operator on whom that ‘must carry’ obligation is imposed, of the fact that the latter rebroadcasts that channel unencrypted and of the fact that that channel is freely available online and via the terrestrial broadcasting network, which it is for the referring court to verify.**

[Signatures]