



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

7 November 2013*

(Electronic communications networks and services — Directives 97/66/EC, 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC — Scope *ratione materiae* — Provision of a basic package of radio and television programmes via cable — Sale by a municipality of its cable network to a private undertaking — Contractual clause concerning the tariff — Powers of the national regulatory authorities — Principle of sincere cooperation)

In Case C-518/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Gerechtshof te Amsterdam* (Netherlands), made by decision of 4 October 2011, received at the Court on 10 October 2011, in the proceedings

UPC Nederland BV

v

Gemeente Hilversum,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2012,

after considering the observations submitted on behalf of:

- UPC Nederland BV, by P. Glazener and E. Besselink, advocaten,
- the Gemeente Hilversum, by J. Doeleman and G. van der Wal, advocaten,
- the Netherlands Government, by C. Wissels initially, and subsequently by M. Bulterman and B. Koopman, acting as Agents,
- the European Commission, by A. Nijenhuis, P. Van Nuffel and L. Nicolae, acting as Agents,
- the EFTA Surveillance Authority, by X. Lewis and M. Moustakali, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 30 April 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU, 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’), 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), 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), 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), and 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).
- 2 The request has been made in the course of proceedings between UPC Nederland BV (‘UPC’) and the Gemeente Hilversum (municipality of Hilversum, ‘Hilversum’) concerning a contract relating to the sale by that municipality of the cable television undertaking owned by it.

Legal context

European Union law

The new regulatory framework applicable to electronic communications services

- 3 The new regulatory framework applicable to electronic communications services (‘the NRF’) is composed of the Framework Directive and the four specific directives accompanying it, namely Directive 97/66, the Access Directive, the Authorisation Directive and the Universal Service Directive (the latter four directives together, ‘the Specific Directives’).
- 4 The Authorisation, Access and Universal Service Directives, and the Framework Directive were amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37). However, in view of the date of the material facts in the main proceedings, the present dispute remains governed by those four directives in their original version.

– The Framework Directive

- 5 Recital 5 in the preamble to the Framework Directive provides 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: [the Authorisation] Directive ..., [the Access] Directive ..., [the Universal Service] Directive ... [and] Directive [97/66] 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), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60)]. 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.’

6 Article 2(a) and (c) of that directive is worded as follows:

‘For the purpose of this Directive:

(a) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by 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;

...

(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 exclud[ing] services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC [of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18)], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.’

7 Article 3 of that directive provides as follows:

‘1. Member States shall ensure that each of the tasks assigned to national regulatory authorities [the “NRAs”] in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of [NRAs] by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. ...

...

6. Member States shall notify to the [European] Commission all [NRAs] assigned tasks under this Directive and the Specific Directives, and their respective responsibilities.’

8 Article 8 of that directive is worded as follows:

‘1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the [NRAs] 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.

...

2. The [NRAs] shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(d) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

...

3. The [NRAs] shall contribute to the development of the internal market by inter alia:

(a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

...

(d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

...’

9 Articles 9 to 13 of the Framework Directive add that the tasks to be performed by NRAs also concern management of radio frequencies for electronic communications services, numbering, naming and addressing, rights of way, co-location and facility sharing, accounting separation and financial reports.

– The Access Directive

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

‘A [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, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. [NRAs] shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.’

– Directive 2009/140

11 Recital 5 in the preamble to Directive 2009/140 states as follows:

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

The other relevant directives

12 Pursuant to recital 7 in the preamble to 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, ‘the Competition Directive’):

‘This Directive makes reference to “electronic communications services” and “electronic communications networks” rather than the previously used terms “telecommunications services” and “telecommunications networks”. These new definitions are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service and networks used for such transmission and broadcasting should likewise be recognised as electronic communications networks. Furthermore, it should be made clear that the new definition of electronic communications networks also covers fibre networks which enable third parties, using their own switching or routing equipment, to convey signals.’

13 Article 1(3) of the Competition Directive is worded as follows:

‘For the purposes of this Directive the following definitions shall apply:

...

(3) “electronic communications services” shall mean 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 exclud[ing] 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.’

- 14 Article 1(1)(a)(i) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1) provides as follows:

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

(a) “audiovisual media service” means:

- (i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of [the Framework Directive]. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph’.

Netherlands law

- 15 The Kingdom of the Netherlands implemented the NRF in national law by an amendment of the Law on Telecommunications (Telecommunicatiewet, Stb. 2004, No 189), which entered into force on 19 May 2004 (Stb. 2004, No 207).

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

- 16 Like other municipalities in the Netherlands, Hilversum entrusted to a cable operator which it owned the installation, maintenance and operation of a cable television network on its territory. That venture was considered to be a service of public interest since one of the tasks of the municipalities is to supply to their citizens as many television programmes as possible, of optimal reception quality and at the lowest possible price, while taking into account the costs of the undertaking.
- 17 As a result of the influence of European Union developments, many municipalities decided to sell their cable television undertakings. Pursuant to sale contracts concluded for that purpose, the municipalities reserved to themselves powers with regard to the composition and pricing of the basic package of radio and television programmes accessible via cable (‘the basic cable package’) offered to households connected to the network.
- 18 Thus, by agreement of 1 July 1996 relating to the future operation of the cable television network in Hilversum (‘the agreement’), the municipality sold the cable television company, including the cable network which that municipality had had installed, to UPC’s predecessor in law.
- 19 Hilversum undertook, pursuant to that agreement, to cooperate in enabling the purchaser to obtain authorisation to install, maintain and operate a cable broadcasting facility on the territory of that municipality.
- 20 UPC undertook, for its part, to make the investments necessary for the provision of a cable network capable of offering an improved service to the average subscriber in Hilversum and to make available to such subscribers, in addition to radio and television programmes, an attractive package of telecommunications services for private individuals and businesses.

- 21 In addition, the agreement contained a clause stipulating that UPC would provide a basic cable package the composition and pricing of which would be as set out in the agreement ('the tariff clause'). That agreement indicated in this respect that the monthly tariff for the basic cable package would be adjusted annually in accordance with the consumer price index on the basis of a formula set out in the annex to the agreement. It also stated that external cost increases would be proportionately reflected in the tariff where the adjustment provided for in that clause was insufficient to cover those increases.
- 22 Likewise, the agreement excluded its total or partial termination without the written consent of all the parties and stated that it could be amended only with the written consent of all the parties, it being understood that those parties would consult each other in any event again regarding the content of the agreement after 10 years.
- 23 By letter of 28 November 2003, UPC informed Hilversum that the tariff for the basic cable package for all households in Hilversum would be increased from 1 January 2004 from EUR 10.28 [value added tax ('VAT') included] per month to EUR 13.32 per month (VAT included); on the other hand, UPC charged EUR 16 for its basic cable package in the other municipalities.
- 24 Hilversum brought an application seeking to prohibit UPC from proceeding with the planned tariff increase. By judgment of 23 December 2003, the Rechtbank te Amsterdam (District Court, Amsterdam) granted that application. That judgment was confirmed on appeal by judgment of the Gerechtshof te Amsterdam (Amsterdam Court of Appeal) of 12 August 2004. UPC's appeal on a point of law against that judgment was dismissed by judgment of the Hoge Raad der Nederlanden (Supreme Court) of 8 July 2005.
- 25 Furthermore, in 2003, following complaints concerning the tariff increases announced by UPC, the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority, 'the NMa') initiated an investigation to determine whether, by charging excessive subscription tariffs, UPC had committed an abuse of a dominant position, for the purpose of Article 24 of the Law on Competition [Wet houdende nieuwe regels omtrent de economische mededinging (Mededingingswet)], of 22 May 1997.
- 26 By decision of 27 September 2005, the NMa concluded that the tariffs applied by UPC were not excessive and that that undertaking had not committed an abuse of a dominant position for the purposes of Article 24 of the Law on Competition.
- 27 On 28 September 2005, the Onafhankelijke Post en Telecommunicatie Autoriteit (Independent Post and Telecommunications Authority, 'the OPTA') adopted a draft decision concerning the market for the transmission and servicing of broadcasting signals in UPC's service area, in which that authority expressed the view that UPC had, in its service area, significant power on the market for the provision of basic cable packages and imposed on it obligations relating to the calculation of its tariffs.
- 28 On 3 November 2005, the Commission, to which that draft decision had been submitted by the OPTA in accordance with the procedure provided for in the Framework Directive, stated that it had doubts as to the compatibility of that draft with the Framework Directive, read in conjunction with Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21 (OJ 2003 L 114, p. 45). In its final decision of 17 March 2006, the OPTA ultimately abandoned the proposed price control.
- 29 On 15 May 2005, UPC brought an action before the Rechtbank te Amsterdam against Hilversum seeking a declaration that the tariff clause was null and void and an injunction requiring Hilversum to authorise the tariff increases. In that connection, UPC claimed that that clause is incompatible with European Union law.

30 That action having been dismissed, UPC brought an appeal before the referring court, requesting that court, first, to annul the tariff clause or, in the alternative, to declare it non-applicable, and, secondly, to declare Hilversum liable for the loss which UPC considered itself to have suffered on account of its not being able to apply to its subscribers established in Hilversum the common tariff which it applied at national level.

31 In the order for reference, the Gerechtshof te Amsterdam states, in the first place, that the parties to the main proceedings are divided on the issue as to whether the service proposed by UPC, namely the supply of a basic cable package, falls within the substantive scope of the NRF.

32 In the second place, it raises the issue, in the event that the service supplied by UPC falls within the scope of the NRF, of the consequences of the application of that framework in so far as concerns the tariff clause. In that context, according to the referring court, the question arises as to whether Hilversum still has the power to protect the public interest and to intervene in the fixing of tariffs, which in turn raises the issue of whether the purpose of the NRF is to carry out a full harmonisation and whether further intervention on the part of the public authorities is still possible. Were the authorities to be precluded from intervening, it would then be necessary to inquire whether the public authority is not bound by a duty of sincere cooperation within the meaning of European Union law.

33 In the third place, the referring court raises the question of whether the effects of the potential invalidity of the tariff clause are established by European Union law and, specifically, by the penalty of invalidity contained in Article 101(2) TFEU.

34 In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘1. Does a service consisting of the supply of [a basic cable package], for the delivery of which both transmission costs and an amount relating to (charges for) payments made to broadcasters and copyright collecting societies in connection with the transmission of programme content are charged, fall within the scope of the new regulatory framework?

2.

(a) Does the Municipality [of Hilversum], against the background of the liberalisation of the telecommunications sector and the objectives of the new regulatory framework, including a strict coordination and consultation process before a [NRA] acquires (exclusive) competence to intervene in retail tariffs by means of a measure such as price control, still have the power (task) to protect the public interest of its inhabitants by intervening in retail tariffs by means of a [tariff] clause?

(b) If not, does the new regulatory framework preclude the Municipality from applying a [tariff] clause agreed in the context of the sale of its cable network operation?

If Questions 2(a) and (b) are answered in the negative...:

3. Is a public authority, such as the Municipality, in a situation such as that at issue here, (still) bound by loyalty to the European Union (“Union loyalty”) if, in entering into and then applying the [tariff] clause, it is not performing a public duty but is acting in the context of a private-law competence (see also Question 6(a))?

4. If the new regulatory framework is applicable and the Municipality is bound by Union loyalty:
 - (a) Does the obligation of Union loyalty in conjunction with (the objectives of) the new regulatory framework, including a strict coordination and consultation process before a [NRA] can intervene in retail tariffs by means of a measure such as price control, preclude the Municipality from applying the [tariff] clause?
 - (b) If not, is the answer to Question 4(a) different with regard to the period after the Commission, in its “letter of serious doubt”, expressed serious doubts about the compatibility of the price control proposed by ... OPTA with the objectives of the new regulatory framework as set out in Article 8 of the Framework Directive, and OPTA consequently abandoned that measure?

5.
 - (a) Is Article 101 TFEU a provision relating to public policy, which means that the national court must apply that provision of its own motion beyond the ambit of the dispute within the meaning of Articles 24 and 25 of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) (“Rv”)?
 - (b) If so, which of the facts that came to light during the proceedings would justify the national court proceeding of its own motion to examine the applicability of Article 101 TFEU? Is the national court bound to do so also if that examination might lead to the supplementation of facts within the meaning of Article 149 Rv, once the parties have been given an opportunity to comment?

6. If Article 101 TFEU must be applied beyond the ambit of the dispute between the parties and having regard to (the objectives of) the new regulatory framework, the application thereof by OPTA and the European Commission and the alignment of concepts used in the new regulatory framework, such as significant market power and definition of the relevant markets, with similar concepts in European competition law, the following questions arise from the facts that have come to light during the proceedings:
 - (a) Is the Municipality, in its sale of its cable network operation and its agreement to the [tariff] clause in that context, to be regarded as an undertaking within the meaning of Article 101 TFEU (see also Question 3)?
 - (b) Is the [tariff] clause to be regarded as a hardcore restriction for the purposes of Article 101(1)(a) TFEU and as defined in Commission Notice 2001/C 368/07 on agreements of minor importance which do not appreciably restrict competition [under Article 81(1) of the Treaty establishing the European Community] (de minimis) (OJ 2001 C 368, p. 13) (point 11)? If so, is there thus an appreciable restriction of competition within the meaning of Article 101(1) TFEU? If not, is the answer affected by the circumstances mentioned in Question 6(d) ...?
 - (c) If the [tariff] clause is not a hardcore restriction, does it have an effect which restricts competition (purely) because:
 - the [NMa] has ruled that UPC has not abused its dominant position by virtue of the (higher) tariffs it charged for performing the same services as the supply of the [basic cable package], in the same market;

- the Commission, in its letter of serious doubt, expressed serious doubts about the compatibility with the objectives set out in Article 8 of the Framework Directive of intervening (*ex ante* by means of price control) in retail tariffs for services such as UPC's supply of [a basic cable package]? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?
- (d) Does the Agreement [on the future operation of the Hilversum cable network] containing the [tariff] clause appreciably restrict competition within the meaning of Article 101(1) TFEU (also) taking into account that:
- under the new regulatory framework, UPC is considered to be an undertaking with significant market power (Commission Notice 2001/C 368/07, point 7);
 - virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the [basic cable package] (Commission Notice 2001/C 368/07, point 8)?
- (e) Must the Agreement containing the [tariff] clause be regarded as (being capable of) having an appreciable effect on inter-State trade within the meaning of Article 101(1) TFEU and as further defined in the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (O) 2004 C 101, p. 81), given that:
- under the new regulatory framework, UPC is considered to be an undertaking with significant market power;
 - OPTA has followed the European consultation procedure in order to take a price control measure in respect of services such as the supply of [a basic cable package] by cable operators with significant market power such as UPC, a procedure which, under the new regulatory framework, must be followed if a proposed measure would affect trade between Member States;
 - the Agreement at that time represented a value of NLG 51 million (over EUR 23 million);
 - virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the [basic cable package]?
7. Does the national court still have the power under Article 101(3) TFEU to declare a prohibition under Article 101(1) TFEU inapplicable in respect of the [tariff] clause, in the light of the new regulatory framework and the Commission's serious doubts in its letter of serious doubt about the compatibility with the objectives of competition law of (*ex ante*) intervention in retail tariffs? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?
8. Does the European penalty of invalidity under Article 101(2) TFEU allow for some latitude in respect of its effects in terms of time having regard to the circumstances at the time of the conclusion of the Agreement (the beginning of the liberalisation of the telecommunications sector) and later developments in the telecommunications sector, including the entry into force of the new regulatory framework and the consequent serious objections expressed by the Commission against the introduction of price control?'

Consideration of the questions referred

Question 1

- 35 By question 1, the national court asks, in essence, whether Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of a basic cable package, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content falls within the definition of an ‘electronic communications service’ and, consequently, within the substantive scope both of that directive and of the Specific Directives constituting the NRF applicable to electronic communications services.
- 36 In this connection, it must be observed that, under Article 2(a) and (c) of the Framework Directive, ‘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 excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks, including cable television networks, and services. That article of the Framework Directive also specifies that the concept of ‘electronic communications service’ 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.
- 37 That definition of electronic communications services was reproduced in equivalent terms in Article 1(3) of the Competition Directive.
- 38 As is apparent from recital 5 in the preamble to the Framework Directive, 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 in the establishment of that framework, it is necessary to separate the regulation of transmission from the regulation of content. According to that same recital, the NRF does not 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 European Union or national level in respect of such services, in compliance with European Union law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism.
- 39 Likewise, recital 7 in the preamble to the Competition Directive, which states that the terms ‘electronic communications services’ and ‘electronic communications networks’ have been used in preference to ‘telecommunications services’ and ‘telecommunications networks’ in order, specifically, to take account of the convergence phenomenon, indicates that those definitions bring together all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means, in order to cover fixed, wireless, cable television or satellite networks. That same recital states that the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service.
- 40 Furthermore, Article 1(1)(a)(i) of the Audiovisual Media Services Directive states that an ‘audiovisual media service’ means a service as defined by Articles 56 TFEU and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of the Framework Directive.

- 41 It follows from the foregoing that, as the Advocate General observed in point 33 of his Opinion, the relevant directives, in particular the Framework Directive, the Competition Directive and the Audiovisual Media Services Directive, 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 are covered by different measures which pursue their own specific objectives, without referring to customers of the services supplied or to the structure of the transmission costs charged to them.
- 42 In the present case, it is apparent from the order for reference and the written and oral submissions made before the Court that UPC's principal business is the transmission of radio and television programmes via cable to its subscriber customers. UPC confirmed at the hearing before the Court that it does not produce those programmes itself and that it does not exercise any editorial responsibility over their content.
- 43 Although UPC's customers take out a subscription for the purposes of gaining access to the basic cable package offered by that company, that does not mean that UPC's business, which consists in broadcasting programmes produced by the content editors (in this case radio and television channels) by transmitting those programmes to the connection point of its cable network in its subscribers' homes, must be excluded from the definition of 'electronic communications service' within the meaning of Article 2(c) of the Framework Directive and, consequently, from the scope of the NRF.
- 44 On the contrary, it follows from the observations made in paragraphs 36 to 41 above that the provision of a basic cable package falls within the definition of electronic communications service and, therefore, the substantive scope of the NRF, in so far as that service includes the conveyance of signals on the cable network.
- 45 Any other interpretation would considerably reduce the scope of the NRF, undermine the effectiveness of its provisions and therefore compromise the achievement of the objectives pursued by that framework. Since the purpose of the NRF, as is apparent from recital 5 in the preamble to Directive 2009/140, is to establish a genuine internal market for electronic communications, in which those communications must, eventually, be governed solely by competition law, the exclusion of the activities of an undertaking such as UPC from its scope, on the pretext that it does not restrict itself to conveying signals, would deprive the NRF of all meaning.
- 46 On the same grounds, the fact that the transmission costs charged to subscribers incorporate the payments made to broadcasting channels and the royalties paid to copyright collecting societies in connection with the transmission of programme content cannot preclude the service supplied by UPC from being characterised as an 'electronic communications service' for the purposes of the NRF.
- 47 Having regard to all of those considerations, the answer to question 1 is that Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of a basic cable package, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an 'electronic communications service' and, consequently, within the substantive scope both of that directive and of the specific directives constituting the NRF applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer.

Question 2(a)

- 48 By Question 2(a), the national court asks, in essence, whether the Directives which make up the NRF must be interpreted as precluding, from the expiry of the deadline for their implementation, an entity such as that at issue in the main proceedings from intervening in the setting of retail tariffs in respect of the supply of a basic cable package.
- 49 It must be observed at the outset that the approach adopted in the NRF may be distinguished from that which prevailed in the regulatory framework previously in force. In the earlier regulatory framework, the rules applicable on a specific market were defined by the regulatory framework itself, whereas in the NRF, it is the NRAs which have power to define the relevant market for the purposes of the application of the rules and instruments of regulatory intervention provided for by the NRF. To that end, the NRAs are responsible for carrying out market analysis and, in particular, where they find that undertakings have significant power on that market, they may impose on them certain obligations, including tariff obligations.
- 50 The regulatory tasks of the NRAs are defined in Article 8 to 13 of the Framework Directive. Specifically, Article 8 of that directive places on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic telecommunications sector and removing remaining obstacles to the provision of those services at European Union level (see, to that effect, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 81, and Case C-227/07 *Commission v Poland* [2008] ECR I-8403, paragraphs 62 and 63).
- 51 Those measures, which must, in certain cases, be notified beforehand to the Commission, include measures linked to cost recovery and price controls, including obligations as to the orientation of prices in light of costs, inter alia on the basis of Article 13 of the Access Directive.
- 52 According to Article 3 of the Framework Directive, the Member States must, inter alia, ensure that the tasks assigned to the NRAs are undertaken by competent and independent bodies. Furthermore, the Member States must notify to the Commission the names of the NRAs and their respective responsibilities.
- 53 The file submitted to the Court clearly shows that Hilversum is not a NRA. It is sufficient to observe, in that regard, that the Kingdom of the Netherlands did not notify the Commission of any decision or intention to designate that municipality a NRA, that Member State having, on the contrary, designated the OPTA. Hilversum's situation, moreover, may not in any way be equated with that of a national legislature, such as that referred to by the Court in paragraph 30 of the judgment in Case C-389/08 *Base and Others* [2010] ECR I-9073.
- 54 It follows that Hilversum does not, in principle, have power to intervene directly in the retail tariffs in respect of services falling within the NRF. As is apparent from the answer to the first question referred, those services include the supply of a basic cable package. In any event, Hilversum can request the NRA, in this case the OPTA, to adopt adequate measures.
- 55 Having regard to all the foregoing considerations, the answer to Question 2(a) is that the directives which make up the NRF must be interpreted as precluding, from the expiry of the deadline for their implementation, an entity such as that at issue in the main proceedings, which is not a NRA, from intervening directly in retail tariffs in respect of the supply of a basic cable package.

Question 2(b) and Question 4(a)

- 56 By Question 2(b) and Question 4(a), which it is appropriate to examine together, the national court asks, in essence, whether the directives comprising the NRF must be interpreted as precluding, in circumstances such as those in the main proceedings and having regard to the principle of sincere cooperation, an entity which is not a NRA from relying on, as against a supplier of basic cable packages, a clause stipulated in an agreement concluded prior to the adoption of the NRF which restricts that supplier's freedom to set tariffs.
- 57 The tariff clause at issue in the main proceedings was set out in the agreement of 1 July 1996 by which Hilversum sold to UPC's legal predecessor the cable television company which it had controlled until that point. Neither the referring court nor any of the parties which submitted observations to the Court has called into question the validity of that clause at the time it was concluded or the fact that it was freely negotiated and concluded between Hilversum and UPC's legal predecessor; that is nevertheless a matter for the national court to verify in the light of the facts and national law. Subject to that verification, Question 2(b) and Question 4(a) must be construed as concerning a validly concluded agreement.
- 58 Although, as Hilversum has observed, nothing in the directives comprising the NRF suggests that their effect is automatically to render null and void a tariff clause validly concluded prior to the adoption of those directives, that finding does not constitute an adequate response to the questions referred. Such a response should enable the referring court to rule not only on UPC's application to annul that tariff clause but also on UPC's application in the alternative seeking a declaration that, on account of the NRF, Hilversum may no longer rely on that clause.
- 59 It is important to note that, in the fields covered by European Union law, including that of electronic communications services, the public authorities of the Member States are bound by a duty of sincere cooperation. Under that principle, they must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union and refrain from any measure which could jeopardise the attainment of the European Union's objectives (see, to that effect, inter alia, *Case 85/85 Commission v Belgium* [1986] ECR 1149, paragraph 22; *Case C-344/01 Germany v Commission* [2004] ECR I-2081, paragraph 79; and *Case C-61/11 PPU El Dridi* [2011] ECR I-3015, paragraph 56).
- 60 It is therefore for Hilversum, in its pursuit of the interests of the consumers residing on its territory, to cooperate in ensuring that the regime established by the NRF is effective and to avoid any measure contrary to it.
- 61 In the present case, it is common ground that the agreement stipulated that the parties would consult with each other regarding its content after 10 years. At the hearing, Hilversum confirmed that it had refused any amendment of that clause on the expiry of that 10-year period, in view of its aim of retaining for its inhabitants the tariffs which were applicable under the agreement's tariff clause.
- 62 That clause fixed the monthly tariff for the basic cable package at NLG 13.65 excluding VAT and allowed UPC to adjust that tariff only in line with the consumer price index and 'external cost increases'. By insisting on the continuous and unaltered application of that restriction on UPC's freedom to set tariffs, even though the agreement provided for consultation in order to evaluate that clause in the light of the developments which had taken place between 1996 and 2006, Hilversum contributed to an infringement, within that municipality, of the rules of the NRF, which do not impose such a restriction on suppliers of electronic communications services but, on the contrary, stress the freedom to set tariffs, subject to specific restrictions which may, on the basis of market analysis and under precisely determined procedures, be set by NRAs.

63 Having regard to all the foregoing considerations, the answer to Question 2(b) and Question 4(a) is that the directives comprising the NRF must be interpreted as precluding, in circumstances such as those in the main proceedings and having regard to the principle of sincere cooperation, an entity which is not a NRA from relying on, as against a supplier of basic cable packages, a clause stipulated in an agreement concluded prior to the adoption of the NRF applicable to electronic communications services which restricts that supplier's freedom to set tariffs.

Question 3, Question 4(b) and Questions 5 to 8

64 Having regard to the answers given to Question 1, Question 2(a) and (b) and Question 4(a), it is not necessary to answer Question 3, Question 4(b) or Questions 5 to 8.

Costs

65 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 (Third Chamber) hereby rules:

1. **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) must be interpreted as meaning that a service consisting in the supply of a basic package of radio and television programmes via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an 'electronic communications service' and, consequently, within the substantive scope both of that 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, 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), 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) and 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), constituting the new regulatory framework applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer.**
2. **Those directives must be interpreted as meaning that, from the expiry of the deadline for their implementation, they preclude an entity such as that at issue in the main proceedings, which is not a national regulatory authority, from intervening directly in retail tariffs in respect of the supply of a basic package of radio and television programmes via cable.**
3. **The same directives must be interpreted as precluding, in circumstances such as those in the main proceedings and having regard to the principle of sincere cooperation, an entity which is not a national regulatory authority from relying on, as against a supplier of basic packages of radio and television programmes via cable, a clause stipulated in an agreement concluded prior to the adoption of the new regulatory framework applicable to electronic communications services which restricts that supplier's freedom to set tariffs.**

[Signatures]