



## Reports of Cases

### JUDGMENT OF THE COURT (Third Chamber)

17 September 2015\*

(Reference for a preliminary ruling — Electronic communications networks and services — Universal service and users' rights — Directive 2002/22/EC — Article 28 — Access to numbers and to services — Non-geographic numbers — Directive 2002/19/EC — Articles 5, 8 and 13 — Powers of the national regulatory authorities — Price control — Call transit services — National legislation requiring providers of telephone call transit services not to charge higher tariffs for calls to non-geographic numbers than for calls to geographic numbers — Undertaking without significant market power — Relevant national authority)

In Case C-85/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 12 February 2014, received at the Court on 18 February 2014, in the proceedings

**KPN BV**

v

**Autoriteit Consument en Markt (ACM),**

THE COURT (Third Chamber),

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

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2015,

after considering the observations submitted on behalf of:

- KPN BV, by L. Mensink, T. van der Vijver and C. Schillemans, advocaten,
- the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by A. De Stefano, avvocato dello Stato,
- the European Commission, by F. Wilman, G. Braun and L. Nicolae, acting as Agents,

\* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 16 April 2015,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 28(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), ('the Universal Service Directive').
- 2 The request has been made in proceedings between KPN BV ('KPN') and the Autoriteit Consument en Markt (Authority for Consumers and Markets; 'the ACM') concerning an injunction, together with a financial penalty, requiring KPN to lower its tariffs for call transit services to non-geographic numbers.

### **Legal context**

#### *EU law*

The new regulatory framework applicable to electronic communications services

- 3 The new regulatory framework applicable to electronic communications services ('the NRF') consists of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37), ('the Framework Directive'), and specific directives accompanying it, namely Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), the Universal Service Directive and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

– The Framework Directive

- 4 Article 2 of the Framework Directive provides:

'For the purposes of this Directive:

...

- (g) "national regulatory authority" means the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives;

...

(l) “Specific Directives” means [the Authorisation Directive], [the Access Directive], [the Universal Service Directive] and Directive 2002/58 ...

...’

- 5 Article 6 of the Framework Directive, entitled ‘Consultation and transparency mechanism’, provides for the implementation of national consultation procedures between the national regulatory authorities (‘the NRAs’) and the interested parties in cases where the NRAs intend to take measures, in accordance with that directive or the specific directives, which have a significant impact on the relevant market.
- 6 Article 7 of the Framework Directive, entitled ‘Consolidating the internal market for electronic communications’, provides for, inter alia, the obligation on the NRA of a Member State to make the draft measure which it intends to take accessible to the European Commission and the NRAs in other Member States in the cases provided for in Article 7(3). Article 7a of that directive lays down the procedure for the consistent application of remedies concerning, inter alia, the imposition, amendment or withdrawal of various obligations on operators.
- 7 Article 8 of the Framework Directive defines the policy objectives and regulatory principles which the NRAs must ensure are observed when carrying out their regulatory tasks specified in that directive and in the specific directives.
- 8 Article 16 of that directive lays down the rules on the implementation of the market analysis procedure.

– The Universal Service Directive

- 9 Under Article 2(d) and (f) of the Universal Service Directive:

‘(d) “geographic number” means a number from the national numbering plan where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point (NTP);

...

(f) “non-geographic number” means a number from the national numbering plan that is not a geographic number. It includes, inter alia, mobile, freephone and premium rate numbers.’

- 10 Paragraph 1 of Article 28 of the Universal Service Directive, entitled ‘Access to numbers and services’, provides:

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

- (a) access and use services using non-geographic numbers within the [European Union]; and
- (b) access all numbers provided in the [European Union], regardless of the technology and devices used by the operator, including those in the national numbering plans of Member States, those from the [European Telephony Numbering Space; ‘the ETNS’] and Universal International Freephone Numbers (UIFN).

...'

– The Access Directive

- 11 Article 1 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), as amended by Directive 2009/140, ('the Access Directive') provides:

'1. Within the framework set out in [the Framework Directive], this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for [NRAs] with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by [NRAs] are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.'

- 12 Article 5 of the Access Directive, entitled 'Powers and responsibilities of the [NRAs] with regard to access and interconnection', reads as follows:

'1. [NRAs] shall, acting in pursuit of the objectives set out in Article 8 of [the Framework Directive], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, [NRAs] shall be able to impose:

- (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
- (ab) in justified cases and to the extent that is necessary, obligations on undertakings that control access to end-users to make their services interoperable;

...

2. Obligations and conditions imposed in accordance with paragraph 1 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of [the Framework Directive].

3. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the [NRA] is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of [the Framework Directive], in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of [the Framework Directive].'

13 Article 8 of the Access Directive, entitled ‘Imposition, amendment or withdrawal of obligations’, provides:

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

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

3. Without prejudice to:

— ...

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

— ...

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

...

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of [the Framework Directive]. Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

...’

14 Paragraph 1 of Article 13 of the Access Directive, entitled ‘Price control and cost accounting obligations’, provides:

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

Directive 2009/136

15 Under recital 46 in the preamble to Directive 2009/136:

‘A single market implies that end-users are able to access all numbers included in the national numbering plans of other Member States and to access services using non-geographic numbers within the Community, including, among others, freephone and premium rate numbers. ... Cross-border access to numbering resources and associated services should not be prevented, except in objectively justified cases, for example to combat fraud or abuse ... when the number is defined as having a national scope only ... or when it is technically or economically unfeasible. ...’

*Netherlands law*

- 16 Article 6.5 of the Law on telecommunications (Telecommunicatiewet; ‘the Tw’), which transposed Article 28 of the Universal Service Directive into national law, provides as follows:

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

- (a) numbers from a national numbering plan allocated in the European Union,
- (b) numbers from the [ETNS], and
- (c) numbers allocated by the [International Telecommunication Union (ITU)],

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

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

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

- 17 The decree on interoperability (Besluit Interoperabiliteit; ‘the BI’) was adopted on the basis of the Tw. Article 5 of the BI, in the version in force as from 1 July 2013, reads as follows:

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

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

3. More detailed rules concerning the obligation referred to in paragraph 1 may be laid down by ministerial decree.’

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

- 18 KPN provides call transit services to non-geographic numbers in the Netherlands, which represent approximately 20% of its traffic to those numbers.



- 19 Having found that KPN, contrary to Article 5 of the BI, was charging higher tariffs for call transit services to non-geographic numbers than for the same services to geographic numbers and that this difference was not justified on grounds of additional costs, the ACM, acting in its capacity as the NRA, by decision of 18 October 2013, ordered KPN to adjust its tariffs on pain of a *per diem* penalty of EUR 25 000, up to a maximum of EUR 5 million.
- 20 KPN lodged an appeal against that decision before the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry).
- 21 In support of its action, KPN argues, inter alia, that Article 5 of the BI does not comply with the NRF, which allows price controls only in respect of operators which have significant market power and after a market analysis has been completed. KPN also submits that, as a provider of call transit services, it does not fall under Article 5 of the BI. However, that company claims that the ACM's decision is disproportionate and based on inadequate reasoning in so far as the ACM took the view, incorrectly, that Article 5 of the BI must be interpreted as meaning that the additional costs relating to the provision of call transit services could not be higher than those based on a strict cost orientation. In that regard, KPN asserts that the tariff for call transit services which it provides has little effect on the overall tariff and that the price of call transit services to non-geographic numbers is reasonable.
- 22 The ACM justifies the validity of its decision by contending that the rule of the equivalence of prices for call transit services is based on Article 28 of the Universal Service Directive, which requires Member States to take all necessary steps to ensure that end-users are able freely to access services using non-geographic numbers and which thus helps to counteract obstacles to such access resulting from the application of excessively high prices.
- 23 The referring court is uncertain whether Article 5 of the BI complies with EU law, given that Article 5 is based on Article 6.5 of the Tw, which implements Article 28 of the Universal Service Directive. That court asks, in this regard, whether the fact that Article 5 of the BI does not provide for a market study to be completed prior to the adoption of tariff regulation is in accordance with Article 28 of the Universal Service Directive.
- 24 The referring court takes the view that the words 'all necessary steps' contained in Article 28 of the Universal Service Directive indicate that the adoption of tariff regulation is, in principle, permitted. Noting that recital 46 in the preamble to Directive 2009/136 suggests that Article 28 of the Universal Service Directive refers only to necessary steps to safeguard cross-border telephone traffic between the Member States, it takes the view that the question arises as to whether that article may be interpreted as meaning that, since non-geographic numbers may technically be called across borders, it is possible for the relevant national authorities to take steps to remove obstacles represented by the tariffs.
- 25 The referring court considers that the fact that tariffs are regarded as an obstacle to accessing services using non-geographic numbers may depend on the extent to which those tariffs exceed those charged to reach geographic numbers.
- 26 That court states, in this regard, first, that the tariffs for call transit services to non-geographic numbers can be so high that end-users are compelled to abandon those services. Second, it can, in that court's view, be assumed that every price increase for call transit services to non-geographic numbers will result in some drop in demand for such services. However, according to that court, charging higher tariffs for access to call transit services to non-geographic numbers than to geographic numbers may have a marginal effect. The referring court is unsure whether, in the latter case, it can be said that end-users will not be able to access services using non-geographic numbers. It also notes that the ACM's decision concerns only tariffs levied by KPN in respect of call transit services to non-geographic numbers which it provides and which represent approximately 20% of its traffic to those numbers.

- 27 Furthermore, the referring court expresses uncertainty as to whether Article 28(1) of the Universal Service Directive authorises tariff regulation to be enacted by an authority other than the NRA which exercises the power referred to in Article 13(1) of the Access Directive, with that latter authority merely having powers of enforcement.
- 28 In those circumstances, the College van Beroep voor het bedrijfsleven decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does Article 28 of the Universal Service Directive permit the imposition of tariff regulation, without a market analysis having indicated that an operator has significant market power in regard to the regulated service, although the cross-border selectability of non-geographic telephone numbers is entirely possible from a technical point of view and the only obstacle to access to those numbers lies in the fact that the tariffs charged mean that a call to a non-geographic number is more expensive than a call to a geographic number?
- (2) If Question 1 is answered in the affirmative, the following two questions arise ...:
- (a) Does the power to regulate tariffs also apply in the case where the effect of higher tariffs on the call volume to non-geographic numbers is merely limited?
- (b) To what extent do the national courts still have scope to assess whether a tariff-related measure required under Article 28 of the Universal Service Directive is not unreasonably onerous for the transit provider, given the objectives which it seeks to attain?
- (3) Does Article 28(1) of the Universal Service Directive leave open the possibility that the measures referred to in that provision may be taken by an authority other than the [NRA] which exercises the powers referred to in Article 13(1) of the Access Directive, with the result that the latter authority would merely have enforcement powers?’

### **Consideration of the questions referred**

#### *The first and second questions*

- 29 By its first and second questions, which should be considered together, the referring court asks, in essence, whether EU law must be interpreted as allowing a relevant national authority to impose a tariff obligation, such as that at issue in the main proceedings, under Article 28 of the Universal Service Directive, to remove an obstacle to calling non-geographic numbers within the European Union which is not technical in nature, but which results from the tariffs applied, without a market analysis having been carried out showing that the undertaking concerned has significant market power. If the answer is ‘yes’, the referring court then asks whether such an obligation may be imposed where the effect of the tariffs on the volume of calls to non-geographic numbers is limited and whether the national court has scope to assess whether such an obligation is not unreasonably onerous for the provider of the call transit services.
- 30 It is apparent from the order for reference that the tariff obligation at issue in the main proceedings was imposed on KPN, which provides call transit services to non-geographic numbers. Those services route calls from the network of an electronic communications service provider to the network of another provider through an intermediate network of the company providing those transit services. That obligation was imposed in order to ensure equivalence of prices for call transit services to non-geographic numbers and of prices for the same services to geographic numbers and to attain the objective referred to in Article 28 of the Universal Service Directive.



- 31 In that regard, Article 28 of the Universal Service Directive provides that Member States are to ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit the access of callers located in specific geographical areas, relevant national authorities take all necessary steps to ensure, in particular, that end-users are able to access and use services using non-geographic numbers within the European Union.
- 32 Neither Article 28(1)(a) of the Universal Service Directive nor any other provision of that directive specifies (i) what is meant by ‘all necessary steps’, (ii) the nature of those steps, or (iii) whether the NRAs have the powers to take such steps, with the result that the question arises as to whether a tariff obligation such as that at issue in the main proceedings can be imposed for the purposes of attaining the objective referred to in Article 28. In those circumstances, it is necessary to examine whether the Framework Directive and the other specific directives, which form a harmonised framework for the regulation of networks and services, contain information which makes it possible to answer that question.
- 33 According to settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision, but also its context and the objectives pursued by the rules of which it is part (judgment in *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraph 32).
- 34 In that regard, according to its Article 1(1) and (2), the Access Directive fits into the framework set out in the Framework Directive harmonising the way in which the Member States regulate access to electronic communications networks and associated resources as well as their interconnection. The aim of that directive is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that results in sustainable competition, interoperability of electronic communications services and consumer benefits. The Access Directive defines, in particular, the objectives assigned to NRAs as regards access and interconnection.
- 35 The first subparagraph of Article 5(1) of the Access Directive refers to the powers and responsibilities of the NRAs in respect of access and interconnection. That provision provides that, acting in pursuit of the objectives set out in Article 8 of the Framework Directive, those authorities are to encourage and where appropriate ensure, in accordance with the provisions of that directive, adequate access and interconnection, and interoperability of services, while promoting efficiency, sustainable competition, encouraging effective investments and innovation and giving the maximum benefit to end-users (see, to that effect, judgment in *Commission v Poland*, C-227/07, EU:C:2008:620, paragraph 64).
- 36 It must be borne in mind that the Court has already held in this regard that it follows from the wording of the first subparagraph of Article 5(1) of the Access Directive that the NRAs are responsible for ensuring adequate access and interconnection and also interoperability of services by means which are not exhaustively listed there (see, to that effect, judgment in *TeliaSonera Finland*, C-192/08, EU:C:2009:696, paragraph 58).
- 37 In that context, in accordance with point (a) of the second subparagraph of Article 5(1) of that directive, and without prejudice to the steps which may be taken with regard to undertakings having significant market power under Article 8 thereof, those authorities must be able to impose ‘obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks’ solely in order to ensure end-to-end connectivity (see, to that effect, judgment in *TeliaSonera Finland*, C-192/08, EU:C:2009:696, paragraph 59).
- 38 Article 5(3) of the Access Directive also concerns access and interconnection and requires that NRAs be empowered to intervene autonomously by providing that those authorities may, inter alia, intervene on their own initiative to ensure compliance with the objectives set out in Article 8 of the Framework Directive, in accordance with the provisions of the Access Directive and the procedures referred to in particular in Articles 6 and 7 of the Framework Directive.

- 39 Accordingly, those provisions of the Framework Directive and the Access Directive allow NRAs to take steps with regard to an undertaking which does not have significant market power but which controls access to end-users (see, to that effect, judgment in *TeliaSonera Finland*, C-192/08, EU:C:2009:696, paragraph 62).
- 40 According to Article 8(1) of the Access Directive, Member States must ensure that NRAs are empowered to impose the obligations identified in Articles 9 to 13a of that directive, including the obligations related to price control under Article 13 of that directive. Under Article 8(2) of that directive, where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive, NRAs are required to impose those obligations on that operator.
- 41 In accordance with Article 8(3) of the Access Directive, without prejudice to certain provisions, including Article 28 of the Universal Service Directive, containing obligations on undertakings other than those designated as having significant market power, the NRAs may impose obligations relating to price control, as defined in particular in Article 13 of the Access Directive, only on operators designated as having significant power, in accordance with Article 8(2) of that directive.
- 42 Consequently, as the Advocate General stated in point 47 of his Opinion, Article 8(3) of the Access Directive should be interpreted as meaning that, except under certain provisions, including in particular Article 28 of the Universal Service Directive, NRAs may not impose obligations related to price control such as those laid down in Article 13 of the Access Directive on operators which do not have significant power on a given market. Accordingly, Article 8(3) of the Access Directive does not preclude the imposition of obligations related to price controls, such as those referred to in Article 13(1) of that directive, on an operator which does not have significant market power on the relevant market under Article 28 of the Universal Service Directive, provided that the conditions for the application of that provision are met.
- 43 It follows that NRAs may, under Article 28 of the Universal Service Directive, impose tariff obligations comparable to those referred to in Article 13(1) of the Access Directive on an operator which does not have significant market power but which controls access to end-users, if such an obligation constitutes a necessary and proportionate measure to ensure that end-users can access services using non-geographic numbers in the European Union, this being a matter for the national court to determine, having regard to all relevant circumstances, including the effect of the tariffs at issue on end-users' access to such services.
- 44 Such an interpretation is, moreover, consistent with the objective pursued by Article 28 of the Universal Service Directive, which is, inter alia, to ensure that end-users have access to services using non-geographic numbers within the European Union, as well as the objective of the Universal Service Directive, which seeks to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that promotes sustainable competition, interoperability of electronic communications services and consumer benefits.
- 45 Furthermore, Article 5(1) and (2) and Article 8(4) of the Access Directive set out the conditions which must be satisfied by the obligations imposed by NRAs on operators providing networks or electronic communication services in accordance with Article 5(1) and Article 8 of that directive.
- 46 Accordingly, Article 5(2) of the Access Directive provides that the obligations and conditions imposed under Article 5(1) must be objective, transparent, proportionate and non-discriminatory, and must be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of the Framework Directive.

- 47 According to Article 8(4) of the Access Directive, obligations imposed in accordance with that article must be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive, and those obligations may be imposed only following consultation in accordance with Articles 6 and 7 of the Framework Directive.
- 48 It follows from all of those factors that a tariff obligation such as that at issue in the main proceedings, adopted under Article 28 of the Universal Service Directive, must also satisfy the conditions referred to in paragraphs 43, 46 and 47 of the present judgment, this being a matter for the referring court to determine.
- 49 In the light of all the foregoing considerations, the answer to the first and second questions referred is that EU law must be interpreted as allowing a relevant national authority to impose a tariff obligation, such as that at issue in the main proceedings, under Article 28 of the Universal Service Directive, to remove an obstacle to calling non-geographic numbers within the European Union which is not technical in nature, but which results from the tariffs applied, without a market analysis having been carried out showing that the undertaking concerned has significant market power, if such an obligation constitutes a necessary step to ensure that end-users are able to access services using non-geographic numbers within the European Union. It is for the national court to determine whether that condition is satisfied and whether the tariff obligation is objective, transparent, proportionate, non-discriminatory, based on the nature of the problem identified and justified in the light of the objectives laid down in Article 8 of the Framework Directive and whether the procedures laid down in Articles 6, 7 and 7a of the Framework Directive have been followed.

### *The third question*

- 50 By its third question, the referring court asks, in essence, whether EU law must be interpreted as meaning that a Member State may provide that a tariff obligation under Article 28 of the Universal Service Directive, such as that at issue in the main proceedings, is to be imposed by a national authority other than the NRA usually responsible for applying the NRF.
- 51 Article 28 of the Universal Service Directive provides that the steps which it covers are to be taken by 'relevant national authorities'. The concept of the 'relevant national authority' is, however, defined neither in the Framework Directive nor in the Universal Service Directive.
- 52 It should, however, be recalled in this regard that Article 2(g) of the Framework Directive defines a NRA as the body or bodies charged by a Member State with any of the regulatory tasks assigned in that directive and in the specific directives referred to in Article 2(l) thereof. That definition applies, by virtue of the first paragraph of Article 2 of the Universal Service Directive, for the purposes of the latter directive, which is one of the specific directives referred to in Article 2(l) of the Framework Directive.
- 53 According to the case-law of the Court, although the Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs within the meaning of Article 2(g) of the Framework Directive, that autonomy may be exercised only in full compliance with the objectives and obligations laid down in that directive (see judgments in *Comisión del Mercado de las Telecomunicaciones*, C-82/07, EU:C:2008:143, paragraph 24, and in *Base and Others*, C-389/08, EU:C:2010:584, paragraph 26).
- 54 In addition, the Court has already held that, under Article 3 of the Framework Directive, Member States must, in particular, ensure that each of the tasks assigned to NRAs be undertaken by a competent body, that the independence of those authorities be guaranteed by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services and that they exercise their powers impartially and

transparently at the appropriate time. In addition, under Article 4 of the Framework Directive, decisions of those authorities must be made subject to an effective right of appeal to a body independent of the parties involved (see judgment in *Base and Others*, C-389/08, EU:C:2010:584, paragraph 29).

- 55 In accordance with Article 3(2), (4) and (6) of the Framework Directive, the Member States must not only 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, but must also publish, in an easily accessible form, the tasks to be undertaken in accordance with the NRF by those authorities, in particular where the tasks are granted to several bodies, and notify to the Commission the names of the authorities entrusted with carrying out those tasks, and their respective responsibilities (see, to that effect, judgments in *Comisión del Mercado de las Telecomunicaciones*, C-82/07, EU:C:2008:143, paragraph 25, and in *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 52).
- 56 As a consequence, where those functions are to be discharged, even partially, by a national authority other than the NRA usually responsible for applying the NRF, each Member State must ensure that that other authority is neither directly nor indirectly involved in ‘operational functions’ within the meaning of the Framework Directive (see, to that effect, judgment in *Comisión del Mercado de las Telecomunicaciones*, C-82/07, EU:C:2008:143, paragraph 26).
- 57 It follows that EU law authorises a Member State to assign tasks resulting from the application of the NRF to several bodies, provided that, in carrying out their functions, each of those bodies satisfies the conditions of competence, independence, impartiality and transparency required by the Framework Directive and that decisions which each of those bodies takes in the context of those functions can form the subject of an effective appeal to a body independent of the interested parties. It is for the referring court to determine whether the national authority which has imposed the tariff obligation at issue in the main proceedings meets all of those conditions.
- 58 In the light of the foregoing, the answer to the third question is that EU law must be interpreted as meaning that a Member State may provide that a tariff obligation under Article 28 of the Universal Service Directive, such as that at issue in the main proceedings, be imposed by a national authority other than the NRA usually responsible for applying the NRF, provided that that authority satisfies the conditions of competence, independence, impartiality and transparency required by the Framework Directive and that the decisions which it takes can form the subject of an effective appeal to a body independent of the interested parties, this being a matter for the referring court to determine.

## Costs

- 59 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. EU law must be interpreted as allowing a relevant national authority to impose a tariff obligation, such as that at issue in the main proceedings, under Article 28 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, to remove an obstacle to calling non-geographic numbers within the European Union which is not technical in nature, but**

**which results from the tariffs applied, without a market analysis having been carried out showing that the undertaking concerned has significant market power, if such an obligation constitutes a necessary and proportionate step to ensure that end-users are able to access services using non-geographic numbers within the European Union.**

**It is for the national court to determine whether that condition is satisfied and whether the tariff obligation is objective, transparent, proportionate, non-discriminatory, based on the nature of the problem identified and justified in the light of the objectives laid down in Article 8 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, and whether the procedures laid down in Articles 6, 7 and 7a of Directive 2002/21, as amended by Directive 2009/140, have been followed.**

- 2. EU law must be interpreted as meaning that a Member State may provide that a tariff obligation under Article 28 of Directive 2002/22, as amended by Directive 2009/136, such as that at issue in the main proceedings, be imposed by a national authority other than the national regulatory authority usually responsible for applying the European Union's new regulatory framework for electronic communications networks and services, provided that that authority satisfies the conditions of competence, independence, impartiality and transparency required by Directive 2002/21, as amended by Directive 2009/140, and that the decisions which it takes can form the subject of an effective appeal to a body independent of the interested parties, this being a matter for the referring court to determine.**

[Signatures]