



REPORT FOR THE HEARING

in Case E-6/16

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in a case pending before it between

Fjarskipti hf.

and

The Icelandic Post and Telecom Administration (*Póst- og fjarskiptastofnun*)

concerning the interpretation of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

I Introduction

1. By a letter of 12 May 2016, registered at the Court as Case E-6/16 on 18 May 2016, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) requested an advisory opinion in the case pending before it between Fjarskipti hf. (“the plaintiff”) and the Icelandic Post and Telecom Administration (*Póst- og fjarskiptastofnun*) (“the defendant”).

2. The plaintiff is an Icelandic telecommunications undertaking, offering telecom services under the Vodafone brand. The defendant is a public body entrusted with the task of supervising electronic communications in Iceland. At issue before the referring court is the question whether the defendant has jurisdiction to supervise the services provided by the plaintiff on the web domain *vodafone.is*. For that purpose, the District Court has requested an interpretation of the terms “electronic communications network”, “electronic communications service” and “public communications network” defined in points (a), (c) and (d) of Article 2 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, and EEA Supplement 2006 No 30, p. 256) (“the Directive”).

II Legal background

EEA law

3. EEA Joint Committee Decision No 11/2004 of 6 February 2004 (OJ 2004 L 116, p. 60, and EEA Supplement 2004 No 20, p. 14), which entered into force on 1 November 2004, inserted the Directive as point 5cl of Annex XI (Electronic Communication, Audiovisual Services and Information Society) to the EEA Agreement.

4. Points (a), (c) and (d) of Article 2 of the Directive read:

(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 exclude 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, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

(d) 'public communications network' means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;

5. Points (a) and (d) of Article 2 of the Directive have been amended by Directive 2009/140/EC.¹ However, that directive has not yet been incorporated into the EEA Agreement.

¹ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37).

National law

6. Article 2(2) of the Electronic Communications Act No 81 of 26 March 2003 (*Lög um fjarskipti*) entrusts the defendant with the task of supervising electronic communications within the jurisdiction of the Icelandic State and supervising the enforcement of the Act.

7. Article 3 of the Electronic Communications Act reads:

For the purposes of this Act the following definitions shall apply:

...

5. Public communications network: an electronic communications network which is used wholly or mainly for the provision of publicly available electronic communications services;

...

13. Electronic communications network: transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical signals, electricity distribution systems, high-voltage lines or other electromagnetic means, including networks for radio and television broadcasting and cable television networks;

...

15. Electronic communications service: a service provided wholly or partially by the conveyance of signals on electronic communications networks, including e-mail services and internet access;

...

III Facts and procedure

8. The plaintiff operates the web domain *vodafone.is*, where it advertises its services, goods for sale, and offers its customers access to a special service known as My Pages, which has been in place since 2004. My Pages includes the service WEB-SMS, according to which the customer may send SMS messages, that is text messages, identified with his telephone number to another telephone number.

9. Since 2008 it has been possible on My Pages to send messages to one or more recipients, store recipients' names in a directory and connect them in groups. From 2010 onwards subscribers have also had the option of storing their message history in My Pages.

10. Alongside the services on My Pages, which are available only to the plaintiff's subscribers, the plaintiff also offered a service known as FREE-SMS. This service allowed the general public to access the plaintiff's web page, enter a recipient's telephone number, write a message and send it. These messages could not be stored in a message archive. The plaintiff discontinued the FREE-SMS service in 2012.

11. The plaintiff's web domain was hacked on 30 November 2013. Information from thousands of users of My Pages, including content of SMS messages, user names and passwords, was stolen and published on the internet.

12. At the time of the hacking, the web system was set up in a way that each individual subscriber could log in to the web server My Pages on the plaintiff's web domain via an internet browser using his end device, either a computer or a smart device. He identified himself with a telephone number and a password to obtain access to his space on My Pages. Next, he chose the telephone number of the recipient and wrote the SMS message. As soon as a subscriber chose to send the SMS message, the web server conveyed the signals to the software PHP scripts, which was also located on the plaintiff's web domain. The PHP scripts then processed the signals from the message transmission and forwarded them to a MySQL database on the web domain for archiving, unless the user chose not to save them in his message history, and to an SMS server in the plaintiff's mobile telephone system. The SMS server then sent the signals over the mobile telephone network to the recipient's telephone number.

13. On 23 December 2013, the defendant wrote a letter requesting information from the plaintiff regarding the hacking. On 23 January 2014, the plaintiff replied by letter, stating that the Electronic Communications Act, and consequently the jurisdiction of the defendant, did not extend to the plaintiff's web domain.

14. On 24 March 2014, the defendant adopted a decision concluding that (a) the transmission system conveying signals from the plaintiff's web domain to the SMS server was an electronic communications network within the meaning of Article 3(13) of the Electronic Communications Act, (b) the service provided on the plaintiff's web domain involving the transmission of SMS messages from the internet to a mobile telephone was an electronic communications service within the meaning of Article 3(15) of the same Act, and (c) the part of the electronic communications network which conveyed signals from the plaintiff's web domain to the SMS server, granting the plaintiff's customers who logged into My Pages using their telephone numbers access to this service, was part of a public communications network within the meaning of Article 3(5) of the same Act. The plaintiff's web domain, and the services provided therein, were therefore deemed to be covered by the Electronic Communications Act and to fall within the defendant's jurisdiction. The decision was not concerned with the actual storage and archiving of the data in the plaintiff's web domain, as those issues were to be examined in the defendant's ongoing investigation.

15. The plaintiff brought a complaint against this decision before the Rulings Committee for Electronic Communications and Postal Affairs (*Úrskurðarnefnd fjarskipta- og póstmála*). On 11 October 2014, the Rulings Committee upheld the defendant's decision.

16. The plaintiff then brought an action before Reykjavík District Court, seeking the annulment of the decisions of the Rulings Committee and the defendant. The claim is based on the submission that both the defendant and the Rulings Committee have reached an incorrect interpretation of the terms "electronic communications network", "electronic communications service" and "public communications network". In the plaintiff's view, none of the terms apply to its web domain, which therefore remains outside the scope of the defendant's jurisdiction.

17. On 18 May 2016, the Court received a request from Reykjavík District Court for an advisory opinion.

IV Questions

18. The following questions have been referred to the Court:

1. **Can point (a) of Article 2 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) be interpreted in such a way that the term "electronic communications network" covers the conveyance of signals that are written as an SMS message on users' end device connected via a web browser to the "My Pages" web server in a telecommunications undertaking's web domain, via the public internet and to the PHP script software on the same telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn from the telecommunications undertaking's web domain to an SMS server (SMSC) in its communications system, which then sends them on over a telephone network to the recipient telephone number?**
2. **If the answer to Question 1 is in the affirmative, is point (c) of Article 2 of Directive 2002/21/EC to be interpreted in such a way that the term "electronic communications service" covers a service that consists of the conveyance of signals which takes place on a communications network as described in Question 1 when (i) a fee is collected for such a service, and (ii) when no fee is collected for such a service?**
3. **If the answer to Question 2 is in the affirmative, is point (d) of Article 2 of Directive 2002/21/EC to be interpreted in such a way that the term "public communications network" covers the**

electronic communications service described in Question 2, which is provided on an electronic communications network as described in Question 1, irrespective of whether that service is (i) available to the public, or (ii) available only to all subscribers of the telecommunication undertaking?

V Written observations

19. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Reimar Pétursson, Supreme Court Attorney, acting as Counsel;
- the defendant, represented by Ragnar Tómas Árnason, Supreme Court Attorney, acting as Counsel;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Maria Moustakali and Clémence Perrin, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Gerald Braun, its Legal Adviser, and Luminița Nicolae, member of its Legal Service, acting as Agents.

VI Summary of the arguments submitted and answers proposed

The plaintiff

20. The plaintiff submits that the terms electronic communications network, electronic communications service and public communications network do not extend to its My Pages service. The plaintiff therefore proposes that the Court should respond in the negative to all the questions referred.

The term “electronic communications network”

21. In the plaintiff’s view, the Directive’s structure and legislative context calls for significant caution when interpreting its terms. The definitions are at the heart of the single regulatory framework for transmission networks and services. Their interpretation may thus have an unforeseen impact on various rights and obligations, as provided for in the Directive and other directives within the regulatory framework. A plain or narrow textual approach should inform the interpretation, as an expansive reading is liable to create unreasonable burdens on telecommunications operators and restrict their economic freedoms.

22. The plaintiff argues that the disputed service cannot be considered a transmission system, a switching or routing equipment or other resource which permits the conveyance of signals by wire, radio, optical or other electromagnetic

means, as required under the definition of the term electronic communications network.

23. The plaintiff notes that anyone can incorporate software within its website and offer a similar service. This is also frequently done, for example, by banks, ticket services and airlines. Were the defendant's interpretation to be accepted, all such entities would be considered to operate an electronic communications network. In the plaintiff's view, this is liable to complicate the regulatory affairs of all such entities and make them subject to the oversight of national telecommunications regulators. Nothing indicates that this was the Directive's objective.

The term "electronic communications service"

24. The plaintiff puts forward three reasons why the disputed service is not covered by the term electronic communications service. First, the Directive includes only the service of conveying signals *on* electronic communications networks. It is not sufficient that signal is conveyed from a web page *to* the electronic communications network. The plaintiff argues that, since the disputed service does not form part of the electronic communications network, the service's conveyance of a signal to it does not constitute an electronic communications service.

25. Second, the Directive's definition of electronic communications services excludes services exercising editorial control over the content transmitted. The plaintiff contends that the disputed service offered its users a full measure of editorial control over the sending and saving of the messages, in much the same way as users exercise "editorial control" over messages on their mobile devices.

26. Third, the definition of electronic communications services does not include information society services as defined in Article 1 of Directive 98/34/EC,² that is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The reference in the definition to services provided by electronic means shows that any such service cannot *prima facie* be considered an electronic communications service. Services provided by electronic means such as by processing and storing of data simply lack the characteristics of electronic communications services.

27. The plaintiff refers to Annex V to Directive 98/34/EC, which states that voice telephony services and telefax/telex services are not considered to be provided via electronic processing systems. Hence, data transmitted during a telephone call etc., is not processed or stored on the electronic communications network. This is also in line with recital 10 in the preamble to the Directive,

² 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, and EEA Supplement 2001 No 3, p. 87 (Icelandic) and p. 189 (Norwegian)).

according to which the Directive does not cover the provision of web-based content.

28. The plaintiff submits that the users on My Pages enjoyed a measure of control over the content sent and saved and that the disputed service concerns the processing and storing of data. The service is therefore an information society service. Such services are only covered by the Directive if they consist wholly or mainly in the conveyance of signals on electronic communications networks. As it explained earlier, this is not the case.

The term “public communications network”

29. The plaintiff submits that the term public communications network does not apply since the service is neither an electronic communications service nor provided on an electronic communications network. Moreover, it may be doubted whether the disputed service was publicly available as it was only offered to the plaintiff’s customers.

The defendant

The term “electronic communications network”

30. The defendant contends that the definition of electronic communications network is intended to cover any kind of conveyance of signals in a transmission system. The definition should therefore be interpreted broadly with its clear wording in mind. In its view, this is also supported by the objective of the provision and the Directive as a whole. Reference is made to recital 5 in the preamble to the Directive, which emphasises the objective of ensuring a common regulatory framework independent of transmission type. The defendant also refers to the second subparagraph of Article 8(1) and Article 8(4)(b) of the Directive, which require national regulatory authorities to practise neutrality between varying media and to ensure a high level of protection for consumers. Personal data protection should also be taken into account, as expressed in recitals 20 and 24 in the preamble to Directive 2002/58/EC.³ Finally, the defendant refers to the principle of effectiveness, as illustrated by Article 3 EEA.

31. The defendant submits that the Directive should not be interpreted so narrowly that it is limited to electronic communications services that were known when the Directive was issued, such as the sending of traditional SMS messages between two mobile phones. On the contrary, the broad wording of the provision allows for the continuous technical development taking place in this field to be taken into account. This goes hand in hand with the objectives of consumer protection and technology neutrality.

³ 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 (OJ 2002 L 201, p. 37, and EEA Supplement 2005 No 27, p. 147 (Icelandic) and p. 235 (Norwegian)).

32. In the view of the defendant, the sending of messages through the PHP scripts on the plaintiff's web domain to its SMS server takes place through its electronic communications network, and the transmission system which conveys the signal through and from the web domain is part of that network. When a user sends a message on My Pages, the receipt of those signals in PHP scripts on the plaintiff's web domain and their processing there is considered to be conveyance of signals. The software described is necessary to allow for the conveyance of signals, since without it a message sent via My Pages would never reach the recipient. The defendant further submits that the disputed web system and its software are completely analogous to the service provided for sending SMS messages between mobile phones. In light of the above, the transmission system must be considered an electronic communications network.

33. The defendant considers there to be a fundamental difference between an electronic communications company offering its customers the possibility to send SMS messages through a closed web domain to a telephone and another company offering the possibility on its website to send SMS messages with specific material such as receipts, tickets and boarding cards. It argues, by way of example, that in the case of messages received from internet banks it is in reality the bank which is the customer of the electronic communications company, and which ultimately decides the content of the message. As regards various message systems offered through applications on the internet, such as Facebook Messenger, Skype, Whatsapp and Viber (also referred to as over-the-top services, "OTT"), the defendant contends that the use of such applications solely takes place on the internet, and is therefore independent of the telephone number and of the electronic communications services of the electronic communications company.

The term "electronic communications service"

34. The defendant submits that, since the transmission system described above is considered as a whole to be part of the plaintiff's electronic communications network, the service in question necessarily conveys signals through an electronic communications network and therefore constitutes an electronic communications service.

35. As regards the significance of whether or not a fee is collected for the service, the defendant points out that it is common in the electronic communications market for customers to pay a monthly fee which includes an unlimited amount of telephone calls and SMS messages. Payment is therefore not collected for each individual telephone call or SMS. Thus, it should not be decisive whether a payment is collected for each specific item of the service provided. Otherwise even traditional SMS messages and telephone calls would fall outside the scope of the provision. That would undermine the effectiveness and completely contradict the objectives of the Directive and the overall legislative framework for telecommunication in the EEA with regard to consumer and personal data protection.

The term “public communications network”

36. The defendant submits that the service provided was publicly available in that it was open to all parties that chose to be customers of the plaintiff for electronic communications services. Thus, the transmission system at issue is a public communications network, even if it is only available to the plaintiff’s subscribers.

ESA

37. ESA notes, as a preliminary point, that there are currently detailed discussions as to whether and how the regulatory framework might be adapted to reflect technological developments. A key consideration is whether or not differences in the regulatory treatment of new OTT services and traditional electronic communications services are justified.⁴ In light of this, ESA urges the Court to be particularly careful not to venture unnecessarily beyond the strict confines of the questions referred so as to avoid prejudging the ongoing policy debate. It notes further that the level of detail provided in the request from the national court does not appear to provide a basis for going into the wider policy ramifications.

The term “electronic communications network”

38. ESA notes that the definition of the term electronic communications network refers to a transmission system and, where applicable, equipment and other resources which permit the conveyance of signals. The electronic communications network must therefore comprise the physical and/or logical networks and all other parts that are essential to the transmission of signals. It must therefore be assessed whether the conveyance of signals from the sender’s end device connected to the plaintiff’s web domain to the end user’s mobile phone is an essential prerequisite for the transmission of signals.

39. ESA submits that the network allowing the SMS to be sent from the sender’s equipment via the plaintiff’s web domain to the receiver’s mobile device amounts to an electronic communications network. This includes the plaintiff’s mobile telephone network and also other resources which permit the conveyance of signals. The transfer from the web server My Pages using the software PHP

⁴ Reference is made to the Commission’s public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services, published 11 September 2015 (<https://ec.europa.eu/digital-single-market/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications>), Report on OTT services by the Body of European Regulators for Electronic Communications (BEREC) (BoR (16) 35) (http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services), and Decision of the Belgian Institute for Postal services and Telecommunications of 30 May 2016 imposing an administrative penalty upon Skype Communications SARL for failing to register itself as a provider of electronic communications services in respect of its “SkypeOut” service (<http://www.bipt.be/en/consumers/press-release/123-skype-fined-by-bipt-regarding-the-skypeout-telecom-service>).

scripts to the SMS server is part of that network since the transmission of such signals is an essential precondition for the transmission of the SMS.

The term “electronic communications service”

40. ESA submits that there are three constitutive elements of an electronic communications service. These are that (i) the provision of the service must be provided for remuneration, (ii) the service must consist wholly or mainly in the conveyance of signals, and (iii) services providing or exercising editorial control over content are excluded.

41. As regards the requirement that the service is normally provided for remuneration, ESA submits that the concept of remuneration includes any benefit that constitutes consideration for the service.⁵ It is not necessary that the service is paid for by those for whom it is performed.⁶ Thus, remuneration for an electronic communications service may be provided either directly by the person receiving the service or indirectly through advertisement or other means of financing.⁷ In the present case, it appears beyond doubt that the My Pages SMS service was provided for remuneration as it was available to the plaintiff’s subscribers only.

42. As regards the requirement that the service consists wholly or mainly in the conveyance of signals, ESA submits that, in the context of an electronic communications service, a signal generally consists in the conveyance of information by wire, radio, optical or other electromagnetic means, such as in the case at hand between the sender’s device connected to My Pages and the receiver’s mobile phone. ESA submits that the plaintiff is responsible vis-à-vis the end users for transmission of the signal and ensuring that the SMS is sent out correctly. The plaintiff therefore has control over the conveyance of signals, which is the key factor in the assessment of this second criterion.⁸ The fact that the plaintiff also owns the electronic communications network on which the service is provided reinforces this conclusion, although ownership of the network is not a necessary criterion for the operation of an electronic communications service.

43. Finally, as regards the nature of the service provided, ESA submits that the conveyance of signals on an electronic communications network is the main characteristic of the disputed service rather than the provision of content or other ancillary or incidental service elements. The service therefore amounts to an electronic communications service since the three constitutive elements are present.

⁵ Reference is made to the judgment in *Humbel and Edel*, 263/86, EU:C:1988:451, paragraphs 17 and 18.

⁶ Reference is made to the judgment in *Papasavvas*, C-291/13, EU:C:2014:2209, paragraphs 28 and 29 and case law cited.

⁷ Reference is made to the judgment in *Jundt*, C-281/06, EU:C:2007:816, paragraph 29.

⁸ Reference is made to the judgment in *UPC DTH*, C-475/12, EU:C:2014:285, paragraphs 43 and 44.

The term “public communications network”

44. ESA submits that the assessment whether a public communications network exists requires in essence a determination whether the electronic communications network is mainly used to provide publicly available electronic communications services to which a wide and potentially indeterminate range of users can connect.

45. In ESA’s opinion, making the disputed service available solely to the plaintiff’s customers does not imply that it is not publicly available, since anyone can become a customer. This must be distinguished from the concept of a closed group, which would apply, for example, to employees of a company or residents of a building. ESA therefore submits that a service such as the one at issue amounts to a public communications network notwithstanding the fact that it is available only to the plaintiff’s customers.

46. ESA therefore proposes that the Court should answer the questions referred as follows:

1. *Article 2(a) of Directive 2002/21/EC on a common regulatory framework for electronic communication networks and services is to be interpreted to the effect that the term “electronic communications network” covers the conveyance of signals such as for the My Pages SMS Service, that are written as an SMS message on a user’s end device connected via a web browser to a web server in a telecommunications undertaking’s web domain, via the public internet and to PHP script software on the same telecommunications undertaking’s web domain, which receives the signals, processes them and conveys them in turn from the telecommunications undertaking’s web domain to an SMS server in its communications system, which then sends them on over a telephone network to the recipient telephone number, provided that the equipment and software are essential for the purposes of conveying signals from the sender to the receiver’s device.*
2. *Article 2(c) of Directive 2002/21 is to be interpreted to the effect that the term “electronic communications service” covers a service such as the My Pages SMS Service, irrespective of whether a fee is collected for that service or not, to the extent it amounts to a service provided on a commercial basis consisting wholly or mainly in the conveyance of signals rather than content.*
3. *Article 2(d) of Directive 2002/21 is to be interpreted to the effect that the term “public communications network” covers an electronic communications network used for the provision of a service such as the My Pages SMS Service irrespective of whether it is available only to subscribers of a particular telecommunications undertaking, provided that the service amounts to a publicly available ECS to which a wide and potentially indeterminate range of users can connect.*

The Commission

47. The Commission notes that the terms at issue cover networks and services as such, and not the storage or archiving of information conveyed using those networks or services. The analysis presented by the Commission is without prejudice to the scope of Directive 2002/58/EC, in particular with regard to the obligations of undertakings in relation to storage or archiving of communications.

The term “electronic communications network”

48. The Commission notes that the definition of the term electronic communications network concerns primarily the transmission systems or other equipment which are used for the purposes of transmitting signals. The conveyance of signals, on the other hand, is the service provided over a network, not the network itself.

49. In the Commission’s view, the software used for the conveyance of signals should be considered as part of the electronic communications network. Such software could qualify as part of the “switching or routing equipment” of the network. Due to the evolution in technologies, switching no longer takes place manually but is controlled through software. Modern networks do not operate without software and the latter has become part of the network. Software may also be regarded as “other resources”. The Commission further observes that, pursuant to Article 12 of Directive 2002/19/EC,⁹ access to electronic communications networks may include “access to relevant software systems”.

50. The Commission contends that the system at issue permits the conveyance of signals for the origination and termination of an SMS, as well as for the communication with the server where the messages are stored. The transmission system under consideration therefore constitutes an electronic communications network.

The term “electronic communications service”

51. The Commission submits that the term electronic communications service is broadly defined and includes several elements. The first requirement is that the service is normally provided for remuneration. In general, the service described is provided for remuneration. Although the plaintiff did not charge its subscribers for sending messages from My Pages, that does not mean that the plaintiff was not remunerated. Remuneration may be provided indirectly, for example through advertising offered on the web domain.¹⁰ Moreover, the possibility cannot be

⁹ 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, and EEA Supplement 2006 No 30, p. 230).

¹⁰ Reference is made to the judgment in *Bond van Adverteerders*, 352/85, EU:C:1988:196, paragraph 16.

excluded that the provider recuperates the costs for the provision of the service from the tariffs applied for other services to its subscribers.

52. Second, as regards the requirement of conveying signals, the Commission contends that the service at issue involves the sending of an SMS from a computer through the web domain of the provider to a number from a national numbering plan. The service involves the transfer of information between two network termination points, ensuring a communication between the sender and the receiver. The provider of the service exercises control over the conveyance of the communication, as it is responsible for the transmission of the SMS to the destination. The provider has to procure transit/termination services at a wholesale level or provide such services on its own network in order to convey the SMS to its destination. Whether or not the service provider owns the network is, however, irrelevant when determining whether the service consists in the conveyance of signals.¹¹

53. Third, the Commission submits that the service at issue does not entail the provision of, or the exercise of editorial control over, content transmitted. The provider does not provide the content of the SMS, but makes available only the means for its transmission. The Commission therefore considers that the transmission of an SMS from a computer to a number from a national numbering plan constitutes an electronic communications service.

The term “public communications network”

54. In the Commission’s view, when assessing whether a public communications network exists, it has to be determined whether the electronic communications service provided is made available to the public or not. The Commission considers that the limitation of the service at issue only to existing subscribers does not change the fact that the service is made available to the public. The possibility to become a subscriber of the plaintiff and thereby gain access to the service is open to the public at any time. The electronic communications network should therefore be considered a public communications network.

55. The Commission therefore proposes that the Court should answer the questions referred as follows:

1. *Point (a) of Article 2 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) can be interpreted in such a way that the term “electronic communications network” covers the transmission systems and other equipment used for the conveyance of signals that are written as an SMS message on users’ end device connected via a web browser to the “My Pages” web server in a telecommunications undertaking’s*

¹¹ Reference is made to the judgment in *UPC DTH*, cited above, paragraph 43.

web domain, via the public internet and to the PHP script software on the same telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn from the telecommunications undertaking's web domain to an SMS server (SMSC) in its communications system, which then sends them on over a telephone network to the recipient telephone number.

- 2. Point (c) of Article 2 of Directive 2002/21/EC can be interpreted in such a way that the term "electronic communications service" covers a service that consists of the conveyance of signals which takes place on an electronic communications network as described in the reply to Question 1 when (i) a fee is collected for such a service, and (ii) when no fee is collected for such a service.*
- 3. Point (d) of Article 2 of Directive 2002/21/EC can be interpreted in such a way that the term "public communications network" covers the electronic communications service described in the reply to Question 2, which is provided on an electronic communications network as described in the reply to Question 1, irrespective of whether that service is (i) available to the public, or (ii) available only to all subscribers of the telecommunication undertaking.*

Per Christiansen
Judge-Rapporteur