

Case

E-6/16

Fjarskipti hf.



**The Icelandic Post and Telecom
Administration**

*(Provision of telecommunications services – Directive 2002/21/EC –
Electronic communications network – Electronic communications service –
Public communications network)*

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Report for the Hearing

Summary of the Judgment

- 1 For a system to fall under the definition of an electronic communications network in Article 2(a) of Directive 2002/21/EC, it must constitute a transmission system, switching or routing equipment or other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means. The Directive's objective of a technologically neutral regulatory framework, as well as the wording of Article 2(a) itself, speaks in favour of a broad interpretation of the word electronic communications network.
- 2 For a service to be considered an electronic communications service under Article 2(c) of the Directive, it must (i) normally be provided for remuneration, (ii) consist wholly or mainly in the conveyance of signals on electronic communications networks, and (iii) not entail providing or exercising editorial control over content.
- 3 For an electronic communications network to constitute a public communications network under Article 2(d) of the Directive, it must be used wholly or mainly for the provision of publicly available electronic communications services. A service must be considered publicly available when any part of the public may choose to make use of the service offered.

Judgment of the Court

22 December 2016¹

(Provision of telecommunications services – Directive 2002/21/EC – Electronic communications network – Electronic communications service – Public communications network)

In Case E-6/16,

REQUEST to the Court under 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

concerning the interpretation 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),

1 Language of the request: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

The Court

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Fjarskipti hf. (“the Plaintiff”), represented by Reimar Pétursson, Supreme Court Attorney, acting as Counsel;
- the Icelandic Post and Telecom Administration (*Póst- og fjarskiptastofnun*) (“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,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Reimar Pétursson; the Defendant, represented by Ragnar Tómas Árnason; ESA, represented by Clémence Perrin; and the Commission, represented by Gerald Braun, at the hearing on 18 October 2016,

gives the following

Judgment

I LEGAL BACKGROUND

EEA LAW

1 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”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement”) by Joint Committee Decision No 11/2004 of 6 February 2004 (OJ 2004 L 116, p. 60, and EEA Supplement 2004 No 20, p. 14), and is referred to at point 5cl of Annex XI to the Agreement.

2 Recital 5 in the preamble to the Directive reads:

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: Directive 2002/20/EC ... (Authorisation Directive), Directive 2002/19/EC ... (Access Directive), Directive 2002/22/EC ... (Universal Service Directive), Directive 97/66/EC ... [Directive on Privacy and Telecommunications] (hereinafter referred to as ‘the Specific Directives’). 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 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.

3 Recital 10 in the preamble to the Directive reads:

The definition of ‘information society service’ in Article 1 of Directive 98/34/EC ... spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.

4 Recital 18 in the preamble to the Directive reads:

The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.

5 Article 1(1) of the Directive reads:

This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

6 Article 2(a), (c) and (d) of the Directive reads:

- (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;*

7 Article 1(1) and Article 2(a) and (d) have been amended by Directive 2009/140/EC (OJ 2009 L 337, p. 37), which has not yet been incorporated into the EEA Agreement.

8 The second subparagraph of Article 8(1) of the Directive reads:

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

NATIONAL LAW

9 Article 2(2) of the Electronic Communications Act No 81 of 26 March 2003 (*lög nr. 81/2003 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.

10 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;*
- ...

II FACTS AND PROCEDURE

- 11 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 Short Message Service (“SMS”) messages, identified by the customer’s mobile telephone number to a recipient’s mobile telephone.
- 12 On My Pages the facility has existed since 2008 to send SMS 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.
- 13 The Plaintiff’s web domain was illegally accessed, that is hacked, on 30 November 2013. Information from thousands of My Pages’ users, including the content of SMS messages, user names and passwords, was stolen and published on the internet.

- 14 At the time of the hacking, the system was set up in a way that each individual subscriber could log in to the My Pages web server on the Plaintiff's web domain via an internet browser using an end device such as a computer or a smart device. The subscriber 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 signals to software also located on the Plaintiff's web domain. The software subsequently processed the signals from the message transmission and forwarded them to a 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 mobile telephone.
- 15 In December 2013, the Defendant wrote a letter requesting information from the Plaintiff regarding the hacking. In January 2014, the Plaintiff replied, stating that the Electronic Communications Act, and consequently the jurisdiction of the Defendant, did not extend to the Plaintiff's web domain.
- 16 In 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 access to the My Pages service using their mobile telephone numbers, 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, was 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.

- 17 The Plaintiff brought a complaint against the 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.
- 18 The Plaintiff subsequently brought an action before Reykjavík District Court, in which it seeks the annulment of the Rulings Committee's ruling. Its 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 applies to its web domain, which therefore remains outside the scope of the Defendant's jurisdiction.
- 19 By a letter dated 12 May 2016, registered at the Court as Case E-6/16 on 18 May 2016, Reykjavík District Court requested an Advisory Opinion from the Court. The following questions were submitted:
 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?*

20 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWERS OF THE COURT

INTRODUCTORY REMARKS

- 21 According to its Article 1, the Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the EEA. The Directive is a framework directive, supplemented by several specific directives, including 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).
- 22 The case before the national court concerns the question whether the Plaintiff's web domain, and the services provided on that domain, fall within the jurisdiction of the Defendant. It is not concerned with the actual storage and archiving of data and the request for an advisory opinion does not raise questions concerning the interpretation of Directive 2002/58/EC.

THE FIRST QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

- 23 The Plaintiff submits that the term "electronic communications network" does not extend to its My Pages service. This service cannot be considered a transmission system, switching or routing equipment or other resource which permits the conveyance of signals by wire, radio, optical or other electromagnetic means. There

is no switching or routing performed under the My Pages service and the conveyance of signals only takes place after an SMS submitted by a user has been received by the SMS server. The Plaintiff submits that a plain or narrow textual approach should inform the interpretation of the definitions given in the Directive, as an expansive reading is liable to create unreasonable burdens on telecommunications operators and restrict their operations contrary to the Directive's objective.

- 24 The Defendant, ESA and the Commission submit that the Plaintiff's web system is part of a transmission system that permits the conveyance of signals and therefore constitutes an electronic communications network.
- 25 The Defendant submits that the definition of electronic communications network should be interpreted broadly, taking into account its clear wording and the objective of the provision and the Directive as a whole. That objective is to ensure a common regulatory framework independent of transmission type. The definition is intended to cover any kind of conveyance of signals in a transmission system. It should not be interpreted so narrowly as to be limited to electronic communications services that were known when the Directive was adopted. The broad wording allows for this sector's continuous technical development to be taken into account.
- 26 In the view of the Defendant, the web system in question is part of the Plaintiff's electronic communications network. When a user sends an SMS message on My Pages, the receipt of those signals in the software on the Plaintiff's web domain and their processing in that domain must be considered a conveyance of signals. The software described is necessary to allow for the conveyance of signals, since without it an SMS message would never reach the recipient. The web system and its software simply consist of a new means of providing SMS services compared to the traditional method of sending SMS messages between mobile telephones. It would run

counter to the objective of ensuring a common framework if operators were allowed to circumvent the framework by using new technology unknown at the date of the Directive's adoption.

- 27 ESA submits that the definition of “electronic communications network” refers to transmission systems and, where applicable, equipment and other resources which permit conveyance of signals. An electronic communications network must therefore comprise the physical and/or logical networks and all other parts that are essential to the transmission of signals. In ESA's view, the transfer from the web server using the software to the SMS server is part of the Plaintiff's network since the transmission of such signals is an essential precondition for the transmission of the SMS messages.
- 28 The Commission submits that the software used by the Plaintiff 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 must be regarded as one of the “other resources” referred to in Article 2(a) of the Directive. The system at issue permits the conveyance of signals from the Plaintiff's web domain to an SMS server and from there onwards to the recipient, thus fulfilling the requirements to constitute an electronic communications network.

FINDINGS OF THE COURT

- 29 By its first question, the referring court asks, in essence, whether the term “electronic communications network” in Article 2(a) of the Directive encompasses a system allowing for the conveyance of signals written as an SMS message on a user's end device, connected through a web browser, via the internet, to a software on a telecommunications undertaking's web domain, which receives the

signals, processes them and conveys them in turn to an SMS server in the undertaking's communications system, which then conveys them over a network to the recipient telephone number.

- 30 For such a system to fall under the definition of an electronic communications network, it must constitute a transmission system, switching or routing equipment or other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means pursuant to Article 2(a) of the Directive.
- 31 Recital 5 in the preamble to the Directive and Article 1 thereof provide that the aim of the Directive is to ensure a single regulatory framework for all transmission networks and services. The exclusion of new technological developments would go against the objective of making the regulatory framework technologically neutral, as expressed in recital 18 and Article 8(1) of the Directive, and unreasonably limit the Directive's effect.
- 32 It follows that a broad reading may be justified for some of the Directive's terms. This applies in particular to the term "electronic communications network" in Article 2(a) of the Directive. In addition to arguments relating to the objective of achieving a technologically neutral regulatory framework, the wording of Article 2(a) itself speaks in favour of a broad interpretation. In this regard, the inclusion of the term "other resources" shows that the scope is not limited merely to transmission systems and switching or routing equipment, but also any alternative measure permitting the conveyance of signals by wire, radio, optical or other electromagnetic means. Finally, although the provision expressly mentions various types of systems that are considered to constitute electronic communications networks, the use of the word "including" entails that this list is not exhaustive.

- 33 In the case at hand, the traditional way of sending SMS messages between two mobile telephones has been replaced by the use of a modern alternative, that uses a software to convey signals from a web domain to the SMS server from which the messages are transmitted onwards through the mobile telephone network to the recipient end device. As argued by the Defendant, ESA and the Commission, software, such as that on the Plaintiff's web domain, is a necessary part of the transmission process. Without this software the SMS messages sent from the Plaintiff's My Pages service would not reach the mobile telephone network. As both the software on the Plaintiff's web domain and the Plaintiff's telephone network are essential for the conveyance of the signals, they appear to form part of a single electronic communications network.
- 34 The answer to the first question is therefore that the definition in Article 2(a) of the Directive of the term "electronic communications network" must be interpreted as encompassing a system allowing for the conveyance of signals written as an SMS message on a user's end device, connected through a web browser, via the internet, to a software on a telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn to an SMS server in the undertaking's communications system, which then conveys them over a network to the recipient telephone number.

THE SECOND QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

- 35 The Plaintiff puts forward three reasons why the service in question is not covered by the term "electronic communications service". First, the Directive only includes the service of conveying signals on an electronic communications network. It is not sufficient that signals are conveyed from a web page to an electronic communications network. Second, the definition excludes services

exercising editorial control over the content transmitted and therefore cannot cover the Plaintiff's service, as it offers its users full editorial control over the sending and saving of SMS messages. Third, the definition excludes "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, and EEA Supplement 2001 No 3, p. 87). In the view of the Plaintiff, its service is an information society service and consequently excluded from the scope of Article 2(c) of the Directive.

- 36 In the view of the Defendant, the conveyance of signals takes place on an electronic communications network as the signals are conveyed on the Plaintiff's web domain, which is essential to fulfil the user's request to send an SMS message and therefore forms part of the Plaintiff's network. The service does not entail editorial control over the content, as laid down in the definition, as that control must be exercised in the present case by the Plaintiff. The fact that users enjoy editorial control over the SMS messages is irrelevant to the assessment of which services fall within the definition. As for the Plaintiff's claim that the service is an information society service, the Defendant submits that information society services are excluded only insofar as they do not consist wholly or mainly in the conveyance of signals on electronic communications networks.
- 37 On the significance of whether or not a fee is collected for the SMS service, the Defendant contends that it is not decisive whether payment is collected for each individual SMS message sent through the Plaintiff's network. It is common for customers to pay a monthly fee that includes an unlimited number of telephone calls and SMS messages. If that form of payment was regarded not to fulfil the requirement that the service is "normally provided for

remuneration”, that would also exclude standard SMS messages and telephone calls. Such a conclusion would undermine the effectiveness and completely contradict the objectives of the Directive and of the overall legislative framework for telecommunication in the EEA with regard to consumer and personal data protection.

- 38 ESA and the Commission submit that there are three constitutive elements of an electronic communications service and that the Plaintiff’s service fulfils all three elements.
- 39 First, the service must normally be provided for remuneration. Such remuneration may be provided either directly by the person receiving the service or indirectly through advertisement or other means of financing (reference is made, *inter alia*, to the judgment in *Jundt*, C-281/06, EU:C:2007:816, paragraph 29). In the view of ESA, it appears beyond doubt that the My Pages SMS service was provided for remuneration as it was available to the Plaintiff’s subscribers only. The Commission also points to the possibility for the Plaintiff to recover the costs of the service from the tariffs charged to its subscribers. Both ESA and the Commission emphasise that such services are, however, normally provided for remuneration.
- 40 Second, the service must consist wholly or mainly in the conveyance of signals. Both ESA and the Commission submit that the Plaintiff is responsible vis-à-vis the end users for the transmission of signals and ensuring that the SMS message is transmitted correctly. The Plaintiff therefore has control over the conveyance of signals, which is the key factor in the assessment of this second criterion (reference is made to the judgment in *UPC DTH*, C-475/12, EU:C:2014:285, paragraphs 43 and 44).
- 41 Third, services providing or exercising editorial control over content are excluded. ESA and the Commission submit that the conveyance of signals is the main characteristic of the Plaintiff’s service, not the

provision of content or other ancillary or incidental service elements. The Plaintiff only makes available the means for transmitting the SMS message and does not have editorial control over the content.

FINDINGS OF THE COURT

- 42 By its second question, the referring court asks in essence, if the first question is answered in the affirmative, whether the term “electronic communications service” in Article 2(c) of the Directive covers the conveyance of signals on that network regardless of whether a fee is collected for the service.
- 43 Article 2(c) of the Directive includes three criteria for a service to be considered an electronic communications service: (i) the service is normally provided for remuneration, (ii) it consists wholly or mainly in the conveyance of signals on electronic communications networks, and (iii) it does not entail providing or exercising editorial control over content. In addition, 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, fall outside the scope of Article 2(c).
- 44 As regards the first criterion, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service (compare the judgment in *Jundt*, cited above, paragraph 29). In that regard, it is not necessary that the service is paid for by those for whom it is performed (compare the judgment in *Bond van Adverteerders*, 352/85, EU:C:1988:196, paragraph 16). Remuneration may therefore be provided indirectly through, *inter alia*, advertising offered on the web domain of a service provider.
- 45 The Defendant has pointed out that it is common in the electronic communications market for customers to pay a monthly fee that includes an unlimited number of telephone calls and SMS messages. In the context of the present case, the Defendant, ESA and the

Commission have argued that the service in question has only been offered to the Plaintiff's subscribers, from whom the Plaintiff receives payment in the form of a monthly fee. In their view, the costs for the service may be covered by these fees and hence it should not be decisive that a payment is not collected for each specific SMS message.

- 46 The case file does not include information concerning the tariffs applied to the Plaintiff's services or whether advertising on the web domain covers the costs. It is important to note, however, that Article 2(c) of the Directive only requires that the service in question is a service "normally" provided for remuneration. It falls to the referring court to determine whether that is the case in the present proceedings.
- 47 With regard to the second criterion, that is whether the service consists wholly or mainly in the conveyance of signals on electronic communications networks, Article 2(c) of the Directive contains an express exception for information society services, as defined in Article 1(2) of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. However, recital 10 in the preamble to the Directive makes clear that while the definition of "information society service" in Article 1 of Directive 98/34/EC spans a wide range of economic activities which take place online, a certain number of these activities are covered by the scope of the Directive because they consist wholly or mainly in the conveyance of signals on electronic communications networks. Therefore, a service considered an information society service may also be considered an electronic communications service under Article 2(c), provided it fulfils the criteria specified.

- 48 The main feature of the SMS service on the Plaintiff's My Pages web domain appears to be the conveyance of signals from the sender's end device to the end point in the Plaintiff's network. The other elements of the service appear ancillary and mere supplements to the essential element of facilitating the conveyance of SMS messages.
- 49 The third criterion, that is the exception for editorial control, is based on the need to separate the regulation of transmission from the regulation of content, as stated in recital 5 in the preamble to the Directive. The regulation of content is not covered by the Directive or by the specific supplementary directives that make up the overall regulatory framework for electronic communications network and services.
- 50 In the assessment of whether the Plaintiff's service falls under the exception, the relevant criterion is whether the Plaintiff provides, or exercises editorial control over, the content of the SMS messages sent from My Pages. It appears that the Plaintiff does not provide or control the content of those SMS messages. Conversely, the Plaintiff appears to provide merely the means for the transmission.
- 51 Accordingly, the answer to the second question is that the definition in Article 2(c) of the Directive of the term "electronic communications service" encompasses a service that consists in the conveyance of signals taking place on a communications network of the kind described in the first question, irrespective of whether a fee is collected for such a service, provided that the service is normally provided for remuneration.

THE THIRD QUESTION

OBSERVATIONS SUBMITTED TO THE COURT

- 52 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 service was publicly available as it was only offered to the Plaintiff’s customers.
- 53 The Defendant, ESA and the Commission submit that although the service was only available to the Plaintiff’s customers, this does not imply that it is not publicly available, since anyone could choose to become a customer and thereby obtain access to the service.

FINDINGS OF THE COURT

- 54 By its third question, the referring court in essence asks, if the second question is answered in the affirmative, whether the term “public communications network” in Article 2(d) of the Directive applies irrespective of whether the electronic communications service is available to the public or only available to all subscribers of a telecommunication undertaking.
- 55 Article 2(d) of the Directive lays down the criteria for an electronic communications network to constitute a public communications network. It must be used wholly or mainly for the provision of publicly available electronic communications services.
- 56 The Directive does not define publicly available electronic communications services. A service must be considered publicly available when any part of the public may choose to make use of the service offered. The Plaintiff has stated that its My Pages service is

available only to its subscribers. In response to this argument, the Court observes that if there is no limit placed on the number of potential subscribers, and nothing in the case file suggests otherwise, then any part of the public may, *de facto*, make use of the service by becoming a subscriber. If that proves to be the case, which is a matter for the referring court to determine, then the service must be considered publicly available.

- 57 As to the criterion that the network must be used wholly or mainly for the provision of publicly available services, the referring court needs to take into account the extent to which the electronic communications network is used for the provision of publicly available electronic communications services in contrast to other services. It is for the referring court to assess whether the Plaintiff's electronic communications network fulfils this criterion.
- 58 The answer to the third question is therefore that the definition in Article 2(d) of the Directive of the term "public communications network" must be interpreted as covering a network as described in the first question, used to provide services as described in the second question, irrespective of whether those services are made available only to the subscribers of the particular undertaking, provided that the network is used wholly or mainly for the provision of such publicly available services.

IV COSTS

- 59 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

The Court

in answer to the questions referred to it by Reykjavík District Court hereby gives the following Advisory Opinion:

- 1. The definition in Article 2(a) of Directive 2002/21/EC of the term “electronic communications network” must be interpreted as encompassing a system allowing for the conveyance of signals written as an SMS message on a user’s end device, connected through a web browser, via the internet, to the PHP script software on a telecommunications undertaking’s web domain, which receives the signals, processes them and conveys them in turn to an SMS server in the undertaking’s communications system, which then conveys them over a network to the recipient telephone number.**
- 2. The definition in Article 2(c) of Directive 2002/21/EC of the term “electronic communications service” encompasses a service that consists of the conveyance of signals which takes place on a communications network, as described in the first question, irrespective of whether a fee is collected for such a service, provided that the service is normally provided for remuneration.**

3. The definition in Article 2(d) of Directive 2002/21/EC of the term “public communications network” must be interpreted as covering a network as described in the first question, used to provide services as described in the second question, irrespective of whether those services are made available only to the subscribers of the particular undertaking, provided that the network is used wholly or mainly for the provision of such publicly available services.

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

*Delivered in open court in Luxembourg on
22 December 2016.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President

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.

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.

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).

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

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)).

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, 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.

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>).

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 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.

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.

- 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.

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.

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

- 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 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

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.

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.

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

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 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