



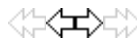
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Lingua del documento :

JUDGMENT OF THE COURT (Third Chamber)

11 June 2015 (*)

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Articles 4, 9, 13 and 32 — Universal service obligations and social obligations — Provision of access at a fixed location and provision of telephone services — Affordability of tariffs — Special tariff options — Financing of the universal service obligations — Additional mandatory services — Mobile communication services and/or internet subscription services)

In Case C-1/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Belgium), made by decision of 19 December 2013, received at the Court on 2 January 2014, in the proceedings

Base Company NV, formerly KPN Group Belgium NV,

Mobistar NV

v

Ministerraad,

intervener:

Belgacom NV,

THE COURT (Third Chamber),

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

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 November 2014,

after considering the observations submitted on behalf of:

- Base Company NV and Mobistar NV, by T. De Cordier and E. Taelman, advocaten,
- the Belgian Government, by J. Van Holm and M. Jacobs, acting as Agents, and S. Depré and D. Schrijvers, advocaten,
- the European Parliament, by R. van de Westelaken and J. Rodrigues, acting as Agents,
- the Council of the European Union, by I. Šulce, K. Michoel and J. Herrmann, acting as Agents,
- the European Commission, by L. Nicolae, G. Braun, F. Wilman and P.-J. Loewenthal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 9 and 32 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('the Universal Service Directive'), and the

validity of the Universal Service Directive in the light of the principle of equality as provided for in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, Base Company NV ('Base Company') and Mobistar NV ('Mobistar') and the Ministerraad (Council of Ministers) concerning an action for the annulment of national-law provisions requiring operators providing consumers with mobile communication services and/or internet subscription services to contribute to the financing of the net cost of those services.

Legal context

European Union law

3 Recitals 4, 8, 25 and 46 in the preamble to the Universal Service Directive state:

'(4) Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions ...

...

(8) A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price. ...

...

(25) ... Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of universal service obligations. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.

...

(46) Where a Member State seeks to ensure the provision of other specific services throughout its national territory, such obligations should be implemented on a cost efficient basis and outside the scope of universal service obligations. ...'

4 Article 1(2) of that directive provides:

'This Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of

open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. This Directive also sets out obligations with regard to the provision of certain mandatory services.’

5 Articles 3 to 9 of the Universal Service Directive — which appear under Chapter II of that directive entitled ‘Universal service obligations including social obligations’ — concern respectively (i) the availability of universal service (Article 3), (ii) provision of access at a fixed location and the provision of telephone services (Article 4), (iii) directory enquiry services and directories (Article 5), (iv) public pay telephones (Article 6), (v) special measures for disabled users (Article 7), (vi) the detailed rules for the designation of the undertakings having universal service obligations (Article 8) and (vii) the possibility of requiring that designated undertakings provide special tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the services referred to in Chapter II of that directive (Article 9).

6 Article 3 of the Universal Service Directive, entitled ‘Availability of universal service’, provides at paragraph 1:

‘Member States shall ensure that the services set out in this Chapter are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.’

7 Article 4 of that directive, entitled ‘Provision of access at a fixed location and provision of telephone services’, provides:

‘1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.

2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.

3. Member States shall ensure that all reasonable requests for the provision of a publicly available telephone service over the network connection referred to in paragraph 1 that allows for originating and receiving national and international calls are met by at least one undertaking.’

8 Article 9 of the Universal Service Directive, entitled ‘Affordability of tariffs’, provides at paragraphs 1 to 3:

‘1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4 to 7 as falling under the universal service

obligations and either provided by designated undertakings or available on the market, if no undertakings are designated in relation to those services, in particular in relation to national consumer prices and income.

2. Member States may, in the light of national conditions, require that designated undertakings provide to consumers tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the network referred to in Article 4(1) or from using the services identified in Article 4(3) and Articles 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings.

3. Member States may, besides any provision for designated undertakings to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, ensure that support is provided to consumers identified as having low incomes or special social needs.’

9 Article 12 of that directive lays down the detailed rules relating to the calculation of universal service obligations that the national regulatory authorities must determine where they consider that the provision of universal service represents an unfair burden on undertakings designated to provide it.

10 Article 13 of the Universal Service Directive, entitled ‘Financing of universal service obligations’, provides at paragraph 1:

‘ Where, on the basis of the net cost calculation referred to in Article 12, national regulatory authorities find that an undertaking is subject to an unfair burden, Member States shall, upon request from a designated undertaking, decide:

...

(b) to share the net cost of universal service obligations between providers of electronic communications networks and services.’

11 Article 32 of that directive, entitled ‘Additional mandatory services’, provides:

‘Member States may decide to make additional services, apart from services within the universal service obligations as defined in Chapter II, publicly available in its own territory but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.’

12 Under Article 2(j) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) (‘the Framework Directive’):

“universal service” means the minimum set of services, defined in [the Universal Service Directive], of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price.’

Belgian Law

13 Article 74 of the Law of 13 June 2005 on electronic communications (Wet van 13 juni 2005 betreffende de elektronische communicatie, *Belgisch Staatsblad*, 20 June 2005, p. 28070) (‘the Law of 13 June 2005’), as amended by Article 50 of the Law of 10 July 2012 concerning various provisions regarding electronic communications (Wet van 10 juli 2012 houdende diverse bepalingen inzake elektronische communicatie, *Belgisch Staatsblad*, 25 July 2012, p. 40969) (‘the Law of 10 July 2012’), is worded as follows:

‘1. The social component of universal service shall consist in the provision, by the operators listed in paragraphs 2 and 3 who offer consumers a publicly available electronic communications service, of special tariff conditions for certain categories of beneficiary.

...

2. All operators offering consumers a publicly available electronic communications service and whose turnover with regard to publicly available electronic communications services exceeds fifty million euros shall provide the social component of universal service referred to in the first paragraph.

...

3. All operators offering consumers a publicly available electronic communications service and whose turnover with regard to publicly available electronic communications services is less than or equal to fifty million euros, and who have declared to the [Belgisch Instituut voor postdiensten en telecommunicatie (the Belgian Institute for Postal Services and Telecommunications) (“the Institute”)] their intention of providing the social component of universal service referred to in paragraph 1 on a fixed or mobile terrestrial network, or both, shall provide that component for a period of five years.

...’

14 Article 74/1 of the Law of 13 June 2005, as inserted by Article 51 of the Law of 10 July 2012, is worded as follows:

‘1. When the Institute is of the view that the delivery of the social component may represent an unfair burden for a provider, it shall ask each provider of social tariffs to supply the information referred to in paragraph 2 and it shall compile a calculation of the net costs.

2. Each provider of social tariffs shall notify the Institute, according to the detailed rules established in accordance with Article 137(2), at the latest by 1 August of the calendar year following the year under review, of the indexed amount of the cost assessment for the year under review, calculated according to the calculation method set out in the Annex.

...

3. The Institute shall determine, for each provider concerned, that an unfair burden exists if the provision of the social component of universal service is excessive in relation to its capacity to pay, taking into account all its own characteristics, in particular the quality of its equipment, its economic and financial situation and its share of the market for publicly available electronic communications services.

4. A fund shall be created for universal service provision in respect of social tariffs, aimed at compensating each provider of social tariffs for whom the provision of the social component of universal service represents an unfair burden and who has submitted a request to the Institute in that regard. The compensation shall correspond to the net cost borne by the operator for whom the provision of the social component of universal service represents an unfair burden. That fund shall have legal personality and shall be administered by the Institute.

The fund shall be financed by contributions from the operators who provide the social component of universal service.

Their contributions shall be determined in proportion to their turnover with regard to publicly available electronic communications services.

The turnover which is taken into account shall correspond to the turnover achieved before tax with regard to the provision of publicly available electronic communications services within the national territory, in accordance with Article 95(2).

The administrative costs of the fund shall comprise all the costs connected with the operation of the fund, including the costs inherent in the definition of a cost model based on an efficient theoretical operator according to the type of electronic communications network through which the social component of universal service is provided. The King shall determine the maximum amount of the administrative costs of the fund by decree, after deliberation in the Ministerraad (Council of Ministers).

The administrative costs of the fund shall be financed by the operators referred to in the second paragraph, in proportion to their turnover referred to in the third paragraph.

5. The King shall determine the detailed rules for the operation of that mechanism by decree, after deliberation in the Ministerraad, and following advice from the Institute.'

15 Pursuant to Article 146(2) of the Law of 10 July 2012, Article 51 of the Law of 13 June 2005 takes effect ‘as of 30 June 2005’.

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

16 It is apparent from the decision to refer that the Belgian legislature, in response in particular to the judgments in *Commission v Belgium* (C-222/08, EU:C:2010:583) and *Base and Others* (C-389/08, EU:C:2010:584), adopted the Law of 10 July 2012 in order to amend the mechanism for financing the provision of universal service, in particular as regards the social telephone tariffs set out in the Law of 25 April 2007 on miscellaneous provisions (IV) (*Belgisch Staatsblad* of 8 May 2007, p. 25103), which had amended and interpreted the Law of 13 June 2005.

17 On 28 January 2013, Base Company and Mobistar, two operators providing electronic communications services in Belgium, brought an action before the referring court for the annulment of Articles 50, 51 and 146 of the Law of 10 July 2012 which established a sectoral financing mechanism — requiring payment of a contribution by operators whose turnover reaches or exceeds the thresholds laid down by that Law — for the net cost of providing mobile communication services and/or internet subscription services as components of ‘the social component of the universal service’. That social component consists, within the meaning of that Law, in the provision of specific tariff conditions to certain categories of beneficiary.

18 In support of their action, Base Company and Mobistar submit in particular that those provisions do not comply with Articles 10 and 11 of the Belgian Constitution, in conjunction with Articles 170 and 172 thereof, nor with Articles 9 and 32 of the Universal Service Directive.

19 Base Company and Mobistar submit that the obligation to contribute to the financing of the net costs arising from the provision of mobile communication services and/or internet subscriptions, incumbent on them since the amendments made by the Law of 10 July 2012, is contrary to EU law. Those undertakings submit that they are discriminated against compared with taxpayers who are not subject to taxes based on national-law provisions contrary to EU law.

20 The referring court states that Article 74/1 of the Law of 13 June 2005, as inserted by Article 51 of the Law of 10 July 2012, created a ‘fund for universal service provision in respect of social tariffs’, aimed at compensating each provider of social tariffs for whom the provision of the social component of universal service represents an unfair burden. The fund is financed by the operators providing the social component and by those providing mobile communication services and/or internet subscriptions. The referring court states that, in establishing that financing mechanism, the Belgian legislature made use of the option provided for by Article 13(1)(b) of the Universal Service Directive.

21 The referring court is uncertain as to whether the provisions of the Law of 10 July 2012 comply with the Universal Service Directive, given that it appears to that court, in particular, from Article 9 of that directive that the ‘voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access’, referred to in Article 4(2) of that directive, are excluded from the social component of the universal service. The referring court notes that Article 32 of that directive provides that Member States may decide to make additional mandatory services, apart from services within the universal service obligations, publicly available but, in such circumstances, no compensation mechanism involving specific undertakings may be imposed.

22 In addition, the referring court states that, in the context of the proceedings before it, the Ministerraad clarified that all the universal services established by the Law of 10 July 2012 were drafted on the basis of the view that Article 9(3) of the Universal Service Directive makes it possible to provide support to consumers for services other than those which are set out in Articles 4 to 7 of the directive, including mobile communication services and/or internet subscription services.

23 In those circumstances the Grondwettelijk Hof (the Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should the Universal Service Directive, and in particular Articles 9 and 32 thereof, be interpreted as meaning that the social tariff for universal service as well as the compensation mechanism provided for in Article 13(1)(b) of the Universal Service Directive are not only applicable to electronic communications by means of a telephone connection at a fixed location to a public communications network but also to ... mobile communication services and/or internet subscriptions?’

(2) Should Article 9(3) of the Universal Service Directive be interpreted as allowing Member States to add special tariff options to the universal service for services other than those defined in Article 9(2) of [that directive]?’

(3) If the answers to the first and second questions are in the negative, are the relevant provisions of the Universal Service Directive compatible with the principle of equality, as set out inter alia in Article 20 of the [Charter]?’

Consideration of the questions referred

The first and second questions

24 By its first and second questions, which must be examined together, the referring court asks, in essence, whether the Universal Service Directive must be interpreted as meaning that the special tariffs and the financing mechanism provided for in Articles 9 and 13(1)(b) of that directive respectively apply to mobile communication services and/or internet subscription services.

25 The Court notes that, according to Article 1(2) of the Universal Service Directive, the purpose of that directive is to define, as provided for in Article 2(j) of the Framework Directive, the minimum set of services of specified quality which is available to all users, at an affordable price in the light of specific national conditions, without distorting competition. That minimum set of universal services is defined in Chapter II of the Universal Service Directive.

26 Under Article 3(1) of the Universal Service Directive, Member States must ensure that the services set out in Chapter II are made available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.

27 Recital 4 of that directive states that ensuring universal service may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions.

28 Consequently, in accordance with Article 9(1) and (2) of the Universal Service Directive, Member States may require that undertakings designated to provide universal service provide to consumers tariff options and packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing the minimum set of universal services defined in Articles 4 to 7 of that directive.

29 It follows from Article 9(3) of the Universal Service Directive that, in addition to any provision for undertakings designated to provide universal service to provide special tariff options or to comply with price caps or geographical averaging or other similar schemes, the Member States may ensure that support is provided to consumers identified as having low incomes or special social needs.

30 Article 13(1)(b) of the Universal Service Directive provides that where, on the basis of the net cost calculation referred to in Article 12 of that directive, national regulatory authorities find that undertakings designated to assume universal service obligations, such as those listed in Articles 3 to 10 of the directive, are subject to an unfair burden, Member States must, upon request from one of those undertakings, decide to share the net cost of those obligations between providers of electronic communications networks and services.

31 It follows from all those provisions that the special tariffs and the financing mechanism provided for in Articles 9 and 13(1)(b) of the Universal Service Directive apply only to the universal services listed in Chapter II of that directive.

32 In those circumstances, it must be ascertained whether the mobile communication services and/or internet subscription services are part of the universal service obligations referred to in that chapter.

33 In that regard, it must be recalled that Article 4 of the Universal Service Directive, entitled ‘Provision of access at a fixed location and provision of telephone services’, provides at paragraphs 1 and 2 that a connection at a fixed location to a public communications network must support voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access. Article 4(3) states that Member States must ensure that all reasonable requests for the provision of a publicly available telephone service over a connection at a fixed location to a public communications network that allows for originating and receiving national and international calls are met by at least one undertaking.

34 Therefore, both the title and wording of Article 4 of the Universal Service Directive expressly impose an obligation on the Member States to ensure the connection at a fixed location to a public communications network.

35 That obligation is also apparent from recital 8 of that directive which states that a fundamental requirement of universal service is to provide end-users on request with a connection to the public telephone network at a fixed location, at an affordable price.

36 It must, however, be noted that the term ‘at a fixed location’ means the opposite of the term ‘mobile’.

37 Therefore it must be held that mobile communication services are, by definition, as the Advocate General observed in point 46 of his Opinion, excluded from the minimum set of universal services defined in Chapter II of the Universal Service Directive, because their provision does not presuppose access and a connection at a fixed location to a public communications network. Similarly, it must be found that internet subscription services provided by means of mobile communication services do not come within that minimum set. On the other hand, internet subscription services are included in that set if in order for them to be provided there must be a connection to the internet at a fixed location.

38 In addition, it must be noted that, in accordance with Article 32 of the Universal Service Directive, Member States may decide to make additional services, over and above services within the universal service obligations as defined in Chapter II of that directive, publicly available in its own territory.

39 In that regard, recitals 25 and 46 of the Universal Service Directive state that Member States remain free to impose special measures which should be implemented on a cost efficient basis and outside the scope of universal service obligations.

40 Consequently, Member States are free to consider mobile communication services, including internet subscription services provided by means of mobile communication services, as additional mandatory services, for the purposes of Article 32 of the Universal Service Directive.

41 However, under Article 32, when Member States decide to make additional mandatory services publicly available in their own territory, a financing mechanism for

those services involving specific undertakings cannot be imposed. Consequently, the financing mechanism provided for in Article 13(1)(b) of the Universal Service Directive cannot be extended to such services.

42 As recital 25 of the Universal Service Directive states, Member States are not permitted to impose on market players financial contributions which relate to measures which are not part of the universal service obligations. Therefore, while individual Member States remain free to finance special measures in conformity with EU law, they may not do so by means of contributions from market players.

43 In the light of all the foregoing considerations, the answer to the first and second questions is that the Universal Service Directive must be interpreted as meaning that the special tariffs and the financing mechanism provided for in Articles 9 and 13(1)(b) of that directive respectively apply to internet subscription services requiring a connection to the internet at a fixed location, but not to mobile communication services, including internet subscription services provided by means of those mobile communication services. If those services are made publicly available within the national territory as ‘additional mandatory services’ for the purposes of Article 32 of the Universal Service Directive, they cannot be financed, under national law, by a mechanism involving specific undertakings.

The third question

44 By its third question, the referring court asks in essence whether, if the answers to the first and second questions are in the negative, Articles 9 and 13(1)(b) of the Universal Service Directive are valid in the light of the principle of equality, as set out in Article 20 of the Charter.

45 It must be borne in mind that when a question on the validity of a measure adopted by the EU institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. Accordingly, where the national court’s questions relate to the validity of a rule of EU law, the Court is obliged in principle to give a ruling (order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 16 and the case-law cited).

46 However, it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that the national court must set out in its order for reference the precise reasons why it considers that an answer to its questions concerning the interpretation or validity of certain provisions of EU law is necessary in order to determine the outcome of the case before it (order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 21 and the case-law cited).

47 In that context, it is important that the national court should set out, in particular, the precise reasons which led it to question the validity of certain EU law provisions and set out the grounds of invalidity which, consequently, appear to it capable of being

upheld (order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 22 and the case-law cited).

48 Further, it is clear from the settled case-law of the Court that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that Governments of the Member States and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case-file that may be sent to the Court by the national court (order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 24 and the case-law cited).

49 In that regard, it must be found that the referring court has not provided, in its decision to refer, any information or explanation which could establish that there has been a failure to observe the principle of equality, as set out in Article 20 of the Charter, or the reasons which led it to question the validity of Articles 9 and 13(1)(b) of the Universal Service Directive.

50 In those circumstances, the Court does not have before it the factual and legal material necessary to give a useful answer to the question referred to it.

51 It follows that the third question is inadmissible.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that the special tariffs and the financing mechanism provided for in Articles 9 and 13(1)(b) of that directive respectively apply to internet subscription services requiring a connection to the internet at a fixed location, but not to mobile communication services, including internet subscription services provided by means of those mobile communication services. If those services are made publicly available within the national territory as 'additional mandatory services' for the purposes of Article 32 of Directive 2002/22, as amended by

Directive 2009/136, they cannot be financed, under national law, by a mechanism involving specific undertakings.

[Signatures]

* Language of the case: Dutch.
