OPINION OF ADVOCATE GENERAL TRSTENJAK of 17 February 2011 [1]

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I — Introduction

1. In the present preliminary-ruling proceedings under Article 267 TFEU, the Bundesverwaltungsgericht (Federal Administrative Court) ('the referring court') has referred to the Court of Justice two questions on the interpretation 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 ('the Universal Service Directive') [2] and of 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 ('the Directive on privacy and electronic communications'). [3]

2. By those questions, the referring court seeks, in essence, to clarify the conditions governing and scope of the obligation which Article 25(2) of the Universal Service Directive imposes on undertakings which assign telephone numbers to subscribers ('telephone service undertakings') to make subscriber data available to providers of directories which are available to the public directly or through directory enquiry services.

3. These questions arise in the context of a dispute between Deutsche Telekom AG ('the appellant in the main proceedings') and the Federal Republic of Germany ('the respondent in the main proceedings'), represented by the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks) ('the Bundesnetzagentur'). This dispute concerns the legality of a decision of the Bundesnetzagentur, adopted in the context of a dispute settlement procedure, under conditions specified therein, requiring the appellant in the main proceedings also to make available, on request, for the purposes of the provision of publicly available directories, the data in its possession relating to their subscribers which they or their telephone service providers wish to see published only by one or more specific undertakings and the requesting undertaking is not one of those 'authorised' undertakings.

2 — OJ 2002 L 108, p. 51.
3 — OJ 2002 L 201, p. 37.

II — Legal context

A — *European Union law* [4]

1. Overview

4. Since the middle of the 1980s, the EU legislature has been advocating the opening up and liberalisation of national telecommunications markets. In an initial phase, which extended from the 1980s until 2002, the Council and the Commission adopted a series of directives. The (liberalisation) directives adopted by the Commission were aimed at opening up the markets. The (harmonisation) directives adopted by the European Parliament and the Council, [5] on the other hand, were intended to unify the disparate national provisions in the telecommunications sector.

5. In 2002, that legal framework for the electronic telecommunications sector was replaced by a new one consisting essentially of a framework directive, [6] four specific directives [7] of the European Parliament and the Council and a Commission (competition) directive. [8] The four specific directives of the European Parliament and the Council include the Universal Service Directive and the Directive on privacy and electronic communications, to which this reference for a preliminary ruling relates.

4 — In accordance with the terminology used in the TEU and the TFEU, the expression 'European Union law' will be used as a general term for Community law and European Union law. Any further references to individual items of primary law will use the names of the provisions applicable *ratione temporis*.

5 — See, inter alia, Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ 1997 L 199, p. 32), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1997 L 24, p. 1), Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ 1998 L 101, p. 24).

6 — 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).

7 — Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7). Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21). Universal Service Directive (cited in footnote 2 above), Directive on privacy and electronic communications (cited in footnote 3 above).

8 — Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21).

2. The directives

(a) Universal Service Directive

6. The Universal Service Directive replaced Directive 98/10 [9] and also part of Directive 97/33. [10]

7. Recital 11 in the preamble to the Universal Service Directive states that:

'Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion. Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector ensures the subscribers' right to privacy with regard to the inclusion of their personal information in a public directory.'

8. Recital 35 in the preamble to the Universal Service Directive states:

'The provision of directory enquiry services and directories is already open to competition. The provisions of this Directive complement the provisions of Directive 97/66/EC by giving subscribers a right to have their personal data included in a printed or electronic directory. All service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.'

9. Article 5 of the Universal Service Directive states, under the heading 'Directory enquiry services and directories':

'1. Member States shall ensure that:

(a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;

9 — Cited above in footnote 5.
10 — Cited above in footnote 5.

(b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.

2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.

3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.'

10. Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [11] amended Article 5(2) of the Universal Service Directive to the effect that the reference contained in it to Article 11 of Directive 97/66 was replaced by a reference to Article 12 of the Directive on privacy and electronic communications. That amendment was purely for clarification purposes since, under the second paragraph of Article 19 of the Directive on privacy and electronic communications, references to Directive 97/66 are to be construed as references to the Directive on privacy and electronic communications.

11. Article 25 of the Universal Service Directive states, under the heading 'Operator assistance and directory enquiry services':

'1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a).

2. Member States shall ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.

3. Member States shall ensure that all end-users provided with a connection to the public telephone network can access operator

11 — OJ 2009 L 337 p. 11. According to Article 5 of Directive 2009/136, it is to enter into force on the day following its publication in the Official Journal of the European Union. That directive duly entered into force on 19 December 2009. According to Article 4(1) of that directive, the Member States are to transpose the directive by 25 May 2011.

assistance services and directory enquiry services in accordance with Article 5(1)(b).

…

5. Paragraphs 1, 2, 3 and 4 shall apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 11 of Directive 97/66/EC.'

12. Directive 2009/136 amended Article 25(1), (3) and (5) of the Universal Service Directive as follows:

'1. Member States shall ensure that subscribers to publicly available telephone services have the right to have an entry in the publicly available directory referred to in Article 5(1)(a) and to have their information made available to providers of directory enquiry services and/or directories in accordance with paragraph 2.

…

3. Member States shall ensure that all end-users provided with a publicly available telephone service can access directory enquiry services. National regulatory authorities shall be able to impose obligations and conditions on undertakings that control access of end-users for the provision of directory enquiry services in accordance with the provisions of Article 5 of Directive 2002/19/EC (Access Directive). Such obligations and conditions shall be objective, equitable, non-discriminatory and transparent.

…

5. Paragraphs 1 to 4 shall apply subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications).'

13. Recital 38 in the preamble to Directive 2009/136 explains that amendment as follows:

'Directory enquiry services should be, and frequently are, provided under competitive market conditions, pursuant to Article 5 of Directive 2002/77. Wholesale measures ensuring the inclusion of end-user data (both fixed and mobile) in databases should comply with the safeguards for the protection

of personal data, including Article 12 of Directive 2002/58/EC (Directive on privacy and electronic communications). The cost-oriented supply of that data to service providers, with the possibility for Member States to establish a centralised mechanism for providing comprehensive aggregated information to directory providers, and the provision of network access under reasonable and transparent conditions, should be put in place in order to ensure that end-users benefit fully from competition, with the ultimate aim of enabling the removal of retail regulation from these services and the provision of offers of directory services under reasonable and transparent conditions'.

(b) Directive on privacy and electronic communications

14. The Directive on privacy and electronic communications replaced Directive 97/66. [12]

15. Recital 2 in the preamble to that directive reads as follows:

'This Directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter of fundamental rights of the European Union. In particular, this Directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter.'

16. Recitals 38 and 39 in the preamble to that directive read as follows:

'(38) Directories of subscribers to electronic communications services are widely distributed and public. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers are able to determine whether their personal data is published in a directory and if so, which. Providers of public directories should inform the subscribers to be included in such directories of the purposes of the directory and of any particular usage which may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.

(39) The obligation to inform subscribers of the purpose(s) of public directories in which

12 — Cited above in footnote 5.

their personal data is to be included should be imposed on the party collecting the data for such inclusion. Where the data may be passed on to one or more third parties, the subscriber should be informed of this possibility and of the recipient or the categories of possible recipients. Any passing on should be subject to the condition that the data may not be used for other purposes than those for which they were collected. If the party collecting the data from the subscriber or any third party to whom the data have been passed on wishes to use the data for an additional purpose, the renewed consent of the subscriber is to be obtained either by the initial party collecting the data or by the third party to whom the data have been passed on.'

17. Article 12 of that directive reads, under the heading 'Directories of subscribers':

'1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public directly or through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data is included in a public directory, and if so, which, to the extent that such data is relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.

3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.

4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.'

(c) Directive 2002/77

18. Article 5 of Directive 2002/77 reads, under the heading 'Directory services':

'Member States shall ensure that all exclusive and/or special rights with regard to the establishment and provision of directory services on their territory, including both the publication of directories and directory enquiry services, are abolished.'

B — *National law*

19. Paragraph 47 of the Telekommunikationsgesetz (German Law on telecommunications) ('TKG') reads, under the heading 'Provision of Subscriber Data':

'1. Any undertaking which provides publicly available telecommunications services and assigns telephone numbers to end-users shall be required to make available to any other undertaking, on request, subscriber data within the meaning of the fourth sentence of paragraph 2, for the purposes of the provision of publicly available directory enquiry services and directories. Such data shall be made available promptly and in a non-discriminatory manner.

2. Subscriber data shall include data published in directories in accordance with Paragraph 104 hereof. It shall include, in addition to the telephone number, the data to be published, the name, the address and any additional information in the undertaking's possession, such as occupation, sector, type of line and co-users. It also includes all information, links, assignments and classifications, processed in such a way that they can be used by customers, depending on the state of the art and in accordance with the applicable data protection provisions, which are necessary for the publication of such data in publicly available directory enquiry services and directories as referred to in the first sentence. The data must be fully processed from a substantive and technical point of view, so that it can be integrated without difficulty, depending on the state of the art, into a customer-friendly directory or similarly-designed directory enquiry service database.

3. In the event of a dispute arising between undertakings concerning the rights and obligations under subparagraphs 1 and 2, Paragraph 133 shall apply by analogy.

4. A fee may be charged for making subscriber data available, which shall generally

be settled subsequently in accordance with Paragraph 38(2) to (4). Such fees shall require approval under Paragraph 31 only where the undertaking has significant market power on the market in retail services to end users.'

20. Paragraph 104 of the TKG provides, under the heading 'Directories':

'Subscribers may have their name, address and additional information such as occupation, sector and type of line included in publicly available printed or electronic directories, if they so request. They may specify which data is to be published in the directories. At the subscriber's request, co-users may be entered, provided that they give their consent.'

21. Paragraph 105 of the TKG provides, under the heading 'Provision of information':

'1. Information on the telephone numbers contained in directories may be provided by directory enquiry services, subject to the restrictions set out in Paragraph 104 and in subparagraphs 2 and 3.

2. Information on the telephone numbers of subscribers may be provided by directory enquiry services only if they have been properly informed that they may object to the disclosure of their telephone number and have not exercised their right to do so. Information on data published under Paragraph 104 other than telephone numbers may be provided by directory enquiry services only if the subscriber has given his consent thereto by providing more detailed information.

3. Information on the name or name and address of a subscriber who is included in a telephone directory and about whom only the telephone number is known may be given, after his service provider has informed him of his right to object and he has not exercised his right to do so.

4. An objection under the first sentence of subparagraph 2, or subparagraph 3, or consent under the second sentence of subparagraph 2, must be promptly recorded in the customer data of the service provider or the provider as referred to in subparagraph 1, on which the directories are based. Other service providers must also take account thereof where they can reasonably be expected to know that the objection or consent has been recorded in the directories of the service provider and the provider as referred to in subparagraph 1.'

22. Paragraph 133(1) of the TKG reads, under the heading 'Other disputes between undertakings':

'In the event of a dispute in connection with obligations arising under or by virtue of this Law between undertakings operating public telecommunications networks or providing telecommunications services to the public, the Beschlusskammer [Ruling Chamber] (the Bundesnetzagentur) shall, unless otherwise provided for by law, at the request of either party and after hearing the parties concerned, adopt a binding decision. It shall rule on the dispute within a maximum of four months from the date when the dispute is brought before it by one of the parties to that dispute.'

III — Facts and reference for a preliminary ruling

23. The appellant in the main proceedings is a telecommunications undertaking that enables end-users to access the public telephone network and use it for voice telephony services by means of analogue or ISDN telephone connections. In its capacity as a network operator, it assigns telephone numbers to its subscribers. The appellant in the main proceedings also operates a nationwide telephone directory enquiry service and internet enquiry service. Through subsidiaries, it also publishes directories. It manages the data required for those purposes in a subscriber database. This contains not only data relating to its own customers but also data relating to subscribers of other telephone service providers, in particular those that do not publish directories themselves but have a contract with the appellant in the main proceedings to use its directories in order to fulfil the registration rights of their customers.

24. The subscriber database of the appellant in the main proceedings consists of a 'public' subdirectory and a 'non-public' subdirectory. The 'public' subdirectory consists of data in respect of which neither the subscriber concerned nor his telephone service provider has objected to publication in the directories of competing providers. The appellant in the main proceedings also makes that data available to other undertakings for the purposes of publication in their directories and as part of their directory enquiry services. Only the departments of the appellant in the main proceedings gather further data in the 'non-public' subdirectory. This contains the data which the subscriber concerned or his telephone service provider wishes to have published only by the appellant in the main proceedings, directory enquiry service data researched by the appellant in the main proceedings itself

and so-called publisher's data obtained by telephone directory publishers.

25. The undertakings to which the subscriber data contained in the public subdirectory is made available for a fee include GoYellow GmbH and Telix AG, interveners in the main proceedings ('the interveners in the main proceedings'), which operate an internet enquiry service and a telephone directory enquiry service respectively. Following discussions between those undertakings and the appellant in the main proceedings as to the range of the data which must be made available, the interveners in the main proceedings asked the Bundesnetzagentur to commence a dispute-settlement procedure with a view to having the appellant in the main proceedings required to make available to them, on a one-off basis, all existing subscriber data held by it which is eligible for publication as part of a directory enquiry service, and thereafter to allow them to update the data on each working day.

26. By decision of 11 September 2006, the Bundesnetzagentur ordered the appellant in the main proceedings also to make available to the interveners, under conditions specified therein, the subscriber data which subscribers or their telephone service providers wish to see published only by one or more specific undertakings. The basis for that decision was Paragraph 47 of the TKG. The Bundesnetzagentur rejected the interveners' other request on the ground that the appellant in the main proceedings did not appear to be systematically failing to fulfil its obligations in that regard.

27. The appellant in the main proceedings brought an action challenging the requirement that it make its data available in so far as that obligation concerned the passing on of data relating to the subscribers of other suppliers ('external data'). The Verwaltungsgericht (Administrative Court) dismissed that action. By its appeal on a point of law, for which leave was granted by the Verwaltungsgericht, the appellant in the main proceedings claims that the decision adopted by the Bundesnetzagentur on the basis of Paragraph 47 of the TKG is unlawful in so far as it extends to data relating to the subscribers of other telephone service providers. The appellant in the main proceedings therefore seeks to have the judgment under appeal varied in such a way as to set aside the decision of the Bundesnetzagentur of 11 September 2006 in so far as the obligation imposed on it extends to data relating to the subscribers of other publicly available voice communication service providers. The respondent and the interveners in the main proceedings contend that the appeal on a point of law should be dismissed.

28. The referring court considers the appeal on a point of law lodged by the appellant in the main proceedings to be unfounded under national law. Although the action against the decision of the Bundesnetzagentur is admissible, by the standards of national law it has no prospect of success on the merits. The referring court has doubts, however, as to

whether an obligation under Paragraph 47 of the TKG requiring the appellant in the main proceedings to pass on subscriber data to providers of directories and directory enquiry services, which extends to external data and is not conditional on the consent of, or lack of objection by, the subscriber or its telephone service provider, is compatible with European Union law.

29. In those circumstances, the referring court stayed the main proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 25(2) 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) be interpreted as meaning that Member States may require undertakings which assign telephone numbers to subscribers to make available data relating to subscribers to whom the undertaking in question has not itself assigned telephone numbers for the purpose of the provision of publicly available directory enquiry services and directories, in so far as that undertaking has such data in its possession?

2. If the answer to the previous question is in the affirmative:

Must Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) be interpreted as meaning that the imposition of the abovementioned obligation by the national legislature is conditional upon the consent of, or at least the lack of any objection by, the other telephone service provider or its subscribers to the passing on of the data?'

IV — Procedure before the Court of Justice

30. The order for reference of 28 October 2009 was lodged at the Registry of the Court of Justice on 22 December 2009. The appellant in the main proceedings, the respondent in the main proceedings, the interveners in the main proceedings, the United Kingdom and the Italian Governments and the European Commission submitted written observations. The representatives of the appellant in the main proceedings, the respondent in the main proceedings, the interveners in the main proceedings, the United Kingdom and the Commission attended the hearing of 2 December 2010.

V — Submissions of the parties

A — *The first question*

31. The *Commission* takes the view that the answer to the first question should be that Article 25(2) of the Universal Service Directive must be interpreted as not allowing the Member States to require undertakings which assign telephone numbers to subscribers to make available, for the purposes of the provision of publicly available directory enquiry services and directories, data relating to subscribers to whom that undertaking has not itself assigned telephone numbers even if it has such data in its possession.

32. In its view, it is decisive that the obligation to pass on data laid down in Article 25(2) of the Universal Service Directive is directed only at undertakings which assign telephone numbers. Consequently, the 'relevant information' to be passed on includes only data relating to the assignment of telephone numbers by the undertaking concerned. The wording and purpose of that provision do not lead to the conclusion that there is a more extensive obligation requiring telephone service undertakings to pass on their entire stock of data, including information on the subscribers of other telephone service undertakings. Nor is there any other discernible provision in the regulatory framework which might serve as a legal basis for such an extensive obligation.

33. Similarly, *the United Kingdom Government* argues that a broad interpretation of Article 25(2) of the Universal Service Directive runs counter to the wording, scheme and purpose of that directive. The obligation to pass on data which it lays down therefore covers only relevant information on the subscribers of the undertakings which assign telephone numbers. The Member States are not free to impose a broader obligation to pass on data on telephone service undertakings in that regard.

34. The *appellant in the main* proceedings also points out, first, that Article 25(2) of the Universal Service Directive does not require the Member States to impose an obligation to pass on external data. However, that conclusion does not yet in itself address the question whether European Union law allows the Member States to introduce such a provision. The first question thus seeks to clarify whether Article 25(2) limits the powers of the Member States to impose additional obligations on telecommunications undertakings. In the light, in particular, of the case-law of the Court of Justice on Directives 98/10, 2002/19 and 2002/22, as well as of the wording, aims and regulatory structure

of Directives 2002/21 and 2002/22, that question must ultimately be answered in the affirmative.

35. The *respondent in the main proceedings* concludes that, on the other hand, on the basis of a grammatical, historical, systematic and teleological interpretation of Article 25(2) of the Universal Service Directive, in principle, the obligation to pass on data which it lays down covers or may cover the external data at issue here. The *Italian Government* also takes the view that the first question must be answered in the affirmative, taking into account the wording and scheme of the Universal Service Directive.

36. The same conclusion is reached by the *interveners in the main proceedings*, who consider that Article 25(2) of the Universal Service Directive must be interpreted as allowing the Member States to require undertakings to make available all subscriber data in their possession for the purposes of the provision of publicly available directory enquiry services and directories.

B — *The second question*

37. The *Commission* takes the view that Article 12 of the Directive on privacy and electronic communications must be interpreted as meaning that the national legislature may impose an obligation on telephone service undertakings to pass on external data only if the subscribers concerned have been informed of the possibility that their data may be passed on in this way. It may not do so if the subscribers have expressly objected thereto. The *United Kingdom Government* considers that any publication of a subscriber's data in an additional directory requires the consent of the persons concerned.

38. The *respondent in the main proceedings* submits, on the other hand, on the basis of a grammatical, historical, systematic and teleological interpretation of Article 12 of the Directive on privacy and electronic communications, that the passing on of external data by telephone service undertakings is not conditional upon the prior consent of, or lack of objection by, the subscriber concerned or the telephone service undertaking required to pass on that data.

39. The *interveners in the main* proceedings also take the view that telephone service providers and their subscribers are not entitled to object to the passing on of their data which is published in a telephone directory to third parties for the purposes of providing a directory enquiry or directory service or to restrict the publication of their data to a specific directory or specific directory enquiry service.

40. The same view is taken by the *Italian Government*, which submits that Article 12 of the Directive on privacy and electronic communications must be interpreted as meaning

that the imposition by a national legislature of an obligation on telephone service undertakings to pass on external data is not conditional upon the subscriber's consenting to, or in any event not objecting to, the passing on of that data, in so far as the directory or directory enquiry service which is to be set up pursues the same objectives as those in respect of which the subscriber has given his consent to the inclusion of his own data in the directory published by his service provider.

VI — Legal analysis

A — *First question*

1. Subject-matter of the obligation to pass on data under Article 25(2) of the Universal Service Directive

41. By its first question, the referring court seeks, in essence, to ascertain whether Article 25(2) of the Universal Service Directive precludes national legislation requiring telephone service undertakings to make available not only the data relating to their own customers for the purposes of the provision of publicly available directory enquiry services and directories, but also the external data in their possession.

42. In order to answer that question, it must, as a first step, be examined whether the obligation to pass on data incumbent on telephone service undertakings under Article 25(2) of the Universal Service Directive extends to the external data in their possession. Since, to my mind, that question must ultimately be answered in the negative, it must then, as a second step, be considered whether Article 25(2) of the Universal Service Directive governs comprehensively the obligation to pass on data incumbent on telephone service undertakings and, if not, whether other provisions of the legal framework applicable to electronic communications might prohibit the Member States from imposing an obligation on telephone service undertakings to pass on external data.

(a) Literal interpretation of Article 25(2) of the Universal Service Directive

43. According to the wording of Article 25(2) of the Universal Service Directive, Mem-

ber States must ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the 'relevant information' in a suitable form.

44. The sentence structure indicates that the 'relevant information' required to be passed on relates to the subscribers to whom the undertakings obliged to pass on the data assign telephone numbers. Article 2(k) of Directive 2002/21 states that a 'subscriber' means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services. Accordingly, the 'relevant information' required to be passed on relates to the natural persons or legal entities who or which are contractually linked to the telephone service undertakings obliged to pass on the data.

45. An interpretation of Article 25(2) on the basis of its wording and sentence structure thus indicates that the obligation to pass on data incumbent on telephone service undertakings relates to the data concerning their own subscribers to whom they have assigned telephone numbers.

(b) Systematic interpretation of Article 25(2) of the Universal Service Directive

46. The outcome of the literal interpretation of Article 25(2) of the Universal Service Directive is confirmed by a systematic interpretation thereof.

47. In the context of the legal framework applicable to electronic communications, the Universal Service Directive is concerned primarily with the relationship between the network or electronic communications and service providers and subscribers. It pursues three main objectives in that regard, each of which is dealt with in a separate chapter.

48. First, the Universal Service Directive pursues the objective of ensuring that end-users enjoy, at an affordable price, in each Member State and nationwide, a minimum set of communications services meeting specific qualitative requirements. That minimum set of services, described as a 'universal service',[13] is regulated in Chapter 2 of the Universal Service Directive (Articles 3 to 15) and covers the provision, as provided for in Article 5, of at least one comprehensive telephone directory and at least one comprehensive directory enquiry service. *Secondly*, the Universal Service Directive pursues the objective of ensuring,

13 — See in that regard the definition of the term 'universal service' in Article 2(j) of Directive 2002/21.

under certain conditions, that there is some measure of competition on retail markets where no competition exists because of the presence of a provider with significant market power. To that end, Chapter 3 of the Universal Service Directive (Articles 16 to 19) contains a number of rules for the adoption of regulatory measures by the national regulatory authorities. *Thirdly*, consumer protection is an integral part of the Universal Service Directive. To that end, Chapter 4 (Articles 20 to 31) contains a series of provisions on the protection of end users' rights and interests.

49. From a systematic point of view, Article 25 is in Chapter 4 and is therefore located in the chapter of the Universal Service Directive which focuses on end-users' interests. Accordingly, the starting point for Article 25(1) is the legal position of subscribers of publicly available telephone services, who must have the right to have an entry in a comprehensive telephone directory. Article 25(3) and (4) are also drafted with the position of end-users in mind, as they must have access to directory enquiry services (paragraph 3) and must be able to access directory enquiry services in the other Member States (paragraph 4).

50. Although Article 25(2) of the Universal Service Directive does not refer directly to subscribers, but appears *prima facie* to regulate only the obligation to pass on data incumbent on telephone service undertakings, its position in the structure of the directive shows that that paragraph is also concerned primarily with the subscriber's legal position in relation to the telephone service undertaking to which that subscriber is contractually linked. From that point of view, Member States are obliged under Article 25(2) of the Universal Service Directive to ensure that telephone service undertakings make relevant information about their subscribers available on request for the purposes of the provision of publicly available directory enquiry services and directories.

51. The amendment of Article 25(1) of the Universal Service Directive by Directive 2009/136 tends to support that systematic analysis. In the new version, in addition to providing for the right of subscribers of publicly available telephone services to an entry in a directory, Article 25(1) now further states that they are also entitled to have their data made available to providers of directory enquiry services and/or directories in accordance with Article 25(2). The obligation imposed on telephone service undertakings in Article 25(2) of the Universal Service Directive to pass on data relating to their own subscribers to providers of directory enquiry

services and/or directories is thus reformulated as a right on the part of subscribers and is therefore expressly confirmed.

(c) Teleological interpretation of Article 25(2) of the Universal Service Directive

52. The recitals in the preamble to the Universal Service Directive give little indication of the objectives pursued by the obligation to pass on data laid down in Article 25(2). Recital 35 merely states that all service providers which assign telephone numbers to their subscribers are obliged to make relevant information available in a fair, cost-oriented and non-discriminatory manner.

53. An examination of the Universal Service Directive as a whole indicates that the legislature pursued two main objectives in laying down the obligation to pass on data in Article 25(2).

54. First, it is intended to ensure that the minimum set of services required by Article 5(1) as a universal service on the market in publicly available directories can also be provided in practice. Imposing an obligation on telephone service undertakings to pass on relevant data about their subscribers on request ensures that at least one comprehensive subscriber directory can be produced. [14]

55. Secondly, the obligation to pass on data guarantees observance of the right of subscribers, now expressly conferred in Article 25(1) of the Universal Service Directive, to have their data passed on to the providers of public directory enquiry services and/or directories so that the databases necessary for that purpose can be established.

56. Those two main objectives require that telephone service undertakings pass on the relevant information on their own subscribers on request for the purposes of the provision of publicly available directory enquiry services and directories, in accordance with Article 25(2) of the Universal Service Directive. However, it is not necessary in order to achieve those objectives for telephone service undertakings also to be required to pass on external data in their possession on

14 — This objective was expressed particularly clearly in the predecessor to the current provision, Article 6(3) of Directive 98/10, which made clear that the obligation to pass on data incumbent on telephone service undertakings in that provision was intended, inter alia, to ensure that comprehensive directories could be published. See on this point Case C-109/03 *KPN Telecom* [2004] ECR I-11273, paragraph 20.

request for the purposes of the provision of subscriber directories.

57. The respondent in the main proceedings takes the view that, through Article 25(2) of the Universal Service Directive, the legislature also sought to introduce effective competition on the market for providers of telephone directories and directory enquiry services. In its view, that objective requires that the obligation to pass on data incumbent on telephone service undertakings be interpreted, under Article 25(2) of the Universal Service Directive, as extending to external data in those undertakings' possession. After all, workable competitive structures can be achieved in this sector only if the providers of such services are able to obtain data simply, effectively and comprehensively. A one-off acquisition of subscriber data by individual telephone service undertakings does not satisfy those requirements.

58. That line of argument, put forward by the respondent in the main proceedings, cannot succeed.

59. Although it is indisputable that a further objective of the legal framework applicable to electronic communications, taken as a whole, is that end-users may enjoy the full benefit of competition on the market in directory enquiry services, that general objective does not justify the interpretation of Article 25(2) of the Universal Service Directive proposed by the respondent in the main proceedings, since Article 25(2) of the Universal Service Directive is not one of those provisions which, in the context of the general legal framework applicable to electronic communications as a whole, are specifically aimed at promoting and ensuring workable competitive structures on the market in directory enquiry services.

60. It is true that the obligation to pass on data — confined to an undertaking's own subscribers — may also, under Article 25(2) of the Universal Service Directive, have a positive impact on competition on the market for the provision of directory enquiry services because it gives all providers of directory enquiry services and directories the opportunity to compile comprehensive databases. However, that function of promoting competition must be regarded as merely incidental — albeit, in principle, positively so — which, in the context of a teleological interpretation of Article 25(2) of the Universal Service Directive, must give way to the two main objectives referred to above.

61. It follows that a teleological interpretation of Article 25(2) of the Universal Service Directive also confirms that only data relating to a telephone service undertaking's own subscribers should be considered to be data to be passed on for the purposes of that provision.

(d) Conclusion

62. A literal, systematic and teleological interpretation of Article 25(2) of the Universal Service Directive leads me to conclude that the obligation to pass on data which it imposes on telephone service undertakings for the purposes of that provision extends only to the relevant information on the subscribers to whom those undertakings have assigned telephone numbers.

2. Article 25(2) of the Universal Service Directive does not fully harmonise the obligation to pass on data

63. It follows from my previous considerations that there is, in principle, no obligation under Article 25(2) of the Universal Service Directive for telephone service undertakings to pass on external data in their possession. In order to answer the question whether, because of that provision, Member States are prohibited from imposing a statutory obligation to pass on such external data, it is necessary to clarify what degree of harmonisation the legislature sought to achieve through Article 25(2) of the Universal Service Directive. If that provision were intended to harmonise fully the obligation to pass on data incumbent on telephone service undertakings, the Member States would be prohibited from introducing or maintaining in force a statutory obligation to pass on external data going beyond the requirements laid down in the directive.

64. In my view, Article 25(2) of the Universal Service Directive is not intended to harmonise fully the obligation to pass on data incumbent on telephone service undertakings. [15]

15 — In regard to the earlier provision, Article 6(3) of Directive 98/10, the Court has already held, in *KPN Telecom* (cited above in footnote 14, paragraph 35), that the legislature did not seek complete harmonisation of the data to be passed on for the purposes of that provision, with the result that the Member States still had the power to determine whether, in the national context, certain additional data was to be passed on. In Case C-522/08 *Telekomunikacja Polska* [2011] ECR I-2079, paragraph 29, the Court further held generally that the Framework Directive and the Universal Service Directive do not provide for full harmonisation of consumer-protection aspects.

65. As I have already stated, one of the main objectives of the obligation to pass on data under Article 25(2) of the Universal Service Directive is to ensure that the minimum offer required by Article 5(1) as a universal service on the market for publicly available directories can also be provided in practice.

66. Under Article 5(1) of the Universal Service Directive, the Member States are to ensure that *at least* one comprehensive directory and *at least* one comprehensive telephone directory enquiry service are made available to end-users. It follows directly from the wording of that provision that this is a minimum requirement which the Member States must satisfy. They are therefore, in principle, free to adopt more stringent provisions in order to ensure that a number of comprehensive directories or directory enquiry services are on the relevant retail markets.

67. Given, especially, the systematic connection between Article 5(1) and Article 25(2) of the Universal Service Directive, the classification of Article 5(1) as a minimum harmonisation provision necessarily has a bearing on the answer to the question whether Article 25(2) effects a full harmonisation of the obligation to pass on data incumbent on telephone service undertakings.

68. Since Article 5(1) of the Universal Service Directive allows the Member States to establish the framework conditions aimed at offering end-users a number of comprehensive directories and directory enquiry services from various providers, a systematic and teleological interpretation of the Universal Service Directive leads to the conclusion that, in principle, the Member States may go beyond the requirements laid down in Article 25(2) for this purpose as well.

69. By imposing that obligation on telephone service undertakings to pass on external data, at issue in the main proceedings, the Federal Republic of Germany has exercised that very discretion. For, by introducing that obligation, it sought, in the light of the particular features of the German retail market in directories, to create a market environment which would favour, in a sustainable manner, there being a number of providers of telephone directories available to the public directly or through directory enquiry services. [16]

70. In the light of all the foregoing, I conclude that Article 25(2) of the Universal Service Directive does not effect a full harmonisation of the obligation to pass on data incumbent on telephone service undertakings.

16 — See point 83 et seq. of this Opinion.

3. The obligation of Member States to respect the powers of the national regulatory authorities

71. Since the obligation to pass on data incumbent on telephone service undertakings under Article 25(2) of the Universal Service Directive may be regarded as a minimum harmonisation provision, the Member States are, in principle, entitled to adopt more stringent measures. Where the Member States exercise that discretion, they are, however, still required to comply with the other stipulations and provisions contained in the Universal Service Directive and the other directives forming part of the legal framework applicable to electronic communications.

72. In that regard, the stipulations of Article 3(2) in particular must be observed. It requires the Member States to observe the principles of objectivity, transparency, non-discrimination and proportionality when they adopt provisions aimed at ensuring universal service. According to the wording, the Member States must also seek to minimise market distortions whilst safeguarding the public interest. In the present proceedings, however, no arguments have been put forward which might indicate that there was a failure to comply with those stipulations when the obligation to pass on external data was laid down in Paragraph 47 of the TKG.

73. If a national obligation to pass on external data such as that laid down in Paragraph 47 of the TKG were to be introduced at national level, the question arises whether — in the light of the facts giving rise to the main proceedings — in adopting that measure, the national legislature acted in a manner contrary to the directives and encroached on the powers conferred on the national regulatory authorities within the legal framework applicable to electronic communications on the retail market in telephone directories available to the public directly or through directory enquiry services. [17]

74. In order to answer that question, I shall first outline the duties and powers of the national regulatory authorities on the retail market in question before addressing the issue of how the introduction of a statutory obligation to pass on external data, such as that laid down in Paragraph 47 of the TKG, has on those powers. I shall then turn to the question of the conditions under which the

17 — At the hearing, the respondent in the main proceedings also argued that the introduction of an obligation to pass on external data such as that laid down in Paragraph 47 of the TKG constituted an unlawful interference with the fundamental rights of entrepreneurial freedom and property now expressly enshrined in the Charter of Fundamental Rights. The information contained in the case-file contains no evidence of the existence of such unlawful interference, however. Moreover, the referring court expressly stated in that regard in its order for reference (paragraph 23 et seq.) that the fundamental freedoms enjoyed by the appellant in the main proceedings under Paragraph 14(1), Paragraph 12(1) and Paragraph 2(1) of the German Grundgesetz (Basic Law) have not been adversely affected to a disproportionate extent by the obligation to pass on all data in its possession, including external data relating to the subscribers of other providers. Nor, in the view of the referring court, has there been any infringement of the principle of equality laid down in Paragraph 3(1) of the German Basic Law.

Member States may take action in the sphere of powers of the national regulatory authorities and the question whether, in introducing the obligation to pass on external data laid down in Paragraph 47 of the TKG, the Federal Republic of Germany infringed the prevailing relevant provisions of European Union law.

(a) Powers of the national regulatory authorities on the market in directories which are available to the public directly or through directory enquiry services

75. With respect to the duties and powers of the national regulatory authorities in the context of the legal framework governing electronic communications, the Court held in its judgment of 3 December 2009 in *Commission* v *Germany* [18] that the Framework Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and services and lays down the tasks of national regulatory authorities.

76. In that regard, the provision of publicly available directory enquiry services and directories must be classified as an 'associated service' within the meaning of the Framework Directive, [19] the regulation of which falls to the national regulatory authorities in the exercise of the powers established in the Framework Directive and the Universal Directive.

77. The powers of the regulatory authorities in relation to regulatory measures on retail markets in directory enquiry services and directories are essentially laid down in Article 17 of the Universal Service Directive. [20]

78. Under Article 17(1), the national regulatory authority is to impose appropriate regulatory obligations on undertakings classified as having significant market power on a given

18 — Case C-424/07 *Commission* v *Germany* [2009] ECR I-11431, paragraph 53.

19 — According to Article 2(ea) of the Framework Directive as amended by 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), 'associated services' means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, other services such as identity, location and presence service. That legal definition was introduced by Directive 2009/140, which, according to recital 12 in its preamble, was intended to clarify certain definitions in order to eliminate ambiguities.

20 — In the original version of Directive 2002/22, Article 18 assigned certain tasks to the national regulatory authorities in relation to the minimum set of leased lines. Article 19 contained provisions on the implementation of free carrier selection and carrier pre-selection by end-users. Those two provisions were deleted by Directive 2009/136. For an explanation of the background to those changes, see recitals 19 and 20 in the preamble to Directive 2009/136.

retail market — within the meaning of Article 15 of the Framework Directive — in accordance with Article 14 of the Framework Directive, where it establishes as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive that the market is not effectively competitive and where it concludes that the obligations under Directive 2002/19/EC would not result in the achievement of the objectives set out in Article 8 of Directive 2002/21/EC.

79. Article 17(2) of the Universal Service Directive provides inter alia in that regard that obligations imposed under paragraph 1 of that article are to be based on the nature of the problem identified and be proportionate and reasonable in the light of the objectives laid down in Article 8 of the Framework Directive.

80. It follows from those considerations that national regulatory authorities which have established, in accordance with the relevant provisions of the directives, that a retail market in directories and directory enquiry services is not effectively competitive are to impose or must be able to impose appropriate regulatory obligations on undertakings which have significant market power on that market.

(b) The obligation to pass on external data under Paragraph 47 of the TKG as a national measure which affects the sphere of powers of the national regulatory authorities

81. In my view, it cannot seriously be disputed that the adoption of a statutory obligation to pass on external data such as that laid down in Paragraph 47 of the TKG affects the sphere of powers of the national regulatory authorities.

82. In its analysis of the drafting history and systematic position of Paragraph 47 of the TKG, the referring court points out in that regard that, when the legislature introduced the obligation to pass on external data, it clearly envisaged the model for the appellant in the main proceedings as a vertically integrated undertaking which produces data itself by assigning telephone numbers to its own customers and at the same time publishes directories and provides directory enquiry services. [21]

83. The referring court takes the view that the objective of Paragraph 47 of the TKG must also be understood as meaning that the obligation to pass on data which it lays down is not intended merely to meet the minimum requirements for ensuring universal service.

21 — Order for reference, paragraph 16.

The legislature's motives in laying down the obligation to pass on data under Paragraph 47 of the TKG indicate that the intention was to make it possible to provide a set of directory enquiry services and directories covering all networks and services. That obligation was intended to achieve not only the objectives of the provisions on universal service but also the regulatory objectives of Paragraph 2(2) of the TKG, [22] including guaranteeing fair competition and promoting sustainable competitive telecommunications markets in the area of telecommunications services and networks together with associated facilities and services in both rural and urban areas. [23]

84. Against that background, the referring court concludes, in its teleological interpretation of Paragraph 47 of the TKG, that the obligation to pass on data under Paragraph 47 of the TKG is an instrument for actively promoting competition and is therefore more than just a means of controlling anti-competitive conduct. The legislature sought to eliminate obstacles to competition not only to the extent absolutely necessary but in so far as it possibly could. [24]

85. It is immediately clear from the referring court's foregoing considerations that the obligation to pass on data under Paragraph 47 of the TKG must be regarded as a structural intervention on the retail markets in directories and directory enquiry services which is designed to create workable competitive structures on those markets. In so far as that objective is achieved, the conditions laid down in Article 17 of the Universal Service Directive for any subsequent intervention by the national regulatory authorities on that market no longer apply, since they include the lack of any effective competition on the relevant retail market. [25] In that sense, in introducing the statutory obligation to pass on external data, the German legislature actively intervened in the sphere of powers of the national regulatory authorities.

(c) Assessment of the conformity with the directive of national measures which affect the sphere of powers of the national regulatory authorities

86. In the light of my foregoing observations, it must be assumed that the introduction of an obligation to pass on external data such as that provided for in Paragraph 47 of the TKG

22 — Order for reference, paragraph 15.

23 — Paragraph 2(2), No 2, of the TKG, to which the referring court expressly refers in paragraph 19 of the order for reference.

24 — Order for reference, paragraph 22.

25 — See in that regard Article 17(5) of the Universal Service Directive.

affects the sphere of powers of the national regulatory authorities.

87. Although there is in principle nothing to preclude a national legislature from itself acting as the national regulatory authority, [26] there is nothing in the case-file before the Court to indicate that, in the context of the enactment of Paragraph 47 of the TKG, the German legislature acted as the national regulatory authority.

88. Consequently, it must now be determined whether and, if so, under what conditions, a national legislature may, in the context of the common regulatory framework applicable to electronic communications, adopt legislative measures which affect the sphere of powers of the national regulatory authorities.

89. In my view, the judgments already delivered by the Court of Justice in this area must be interpreted as meaning that the Member States are prohibited from *directly* exercising or limiting the powers to be conferred on the regulatory authorities in accordance with the directives in the common regulatory framework applicable to electronic communications. However, this does not mean that the Member States can no longer exercise their remaining powers where the national measures adopted in the exercise of those powers may *indirectly* affect the powers of the national regulatory authorities. [27]

90. An example of how the directives in the common regulatory framework applicable to electronic communications do not allow for any direct intervention by the Member States with the powers to be conferred on the national regulatory authorities is provided by the judgment of 3 December 2009 in *Commission* v *Germany*. [28] In those proceedings for failure to fulfil obligations, the Court had to decide on the compatibility with European Union law of a national provision which, in principle, exempted certain markets from any regulation by a national regulatory authority, thereby limiting the discretion of the national regulatory authority in the exercise of its remaining regulatory powers on those markets. Because that legislation ultimately had the effect of limiting the powers to be conferred on the national regulatory authorities in accordance with Directives 2002/19, 2002/21 and 2002/22 in a manner incompatible with

26 — Case C-389/08 *Base and Others* [2010] ECR I-9073, paragraph 30.

27 — See also on this point the Opinion of Advocate General Cruz Villalón in Case C-389/08 (cited above in footnote 26), point 46, in which he argues in a similar way that, although it is possible for the national legislature to adopt decisions which directly affect the functions of national regulatory bodies, it may adopt such decisions only if it does not thereby usurp the role of the national regulatory authorities and in so far as those decisions do not limit or abolish tasks which have been expressly assigned to the national regulatory authorities by the directives.

28 — Cited above in footnote 18.

those directives, the Court held that the relevant provisions of those directives had been infringed.

91. The judgment of 6 October 2010 in *Commission* v *Belgium* [29] also illustrates definitively how direct intervention by the Member States in the powers to be conferred on the national regulatory authorities is not permitted. In those proceedings for failure to fulfil obligations, the Court had to decide on the compatibility with a directive of a statutory provision which provided inter alia that any loss-making situation suffered by an undertaking as a result of providing a specific universal service was to be classified as an 'unfair burden' within the meaning of Article 12 of the Universal Service Directive, thereby giving rise to a right to compensation on the part of the undertaking required to ensure universal service. That legislation was particularly problematic under Articles 12 and 13 of the Universal Service Directive, which confer extensive powers on the national regulatory authorities for the calculation and financing of 'unfair burdens' borne by undertakings subject to universal service obligations.

92. Against the background of a detailed analysis of the national provisions at issue, the Court pointed out, first, that, in Article 12 of the Universal Service Directive, the legislature had not intended to prescribe the conditions under which the national regulatory authorities are to find that the provision of a universal service may represent an unfair burden. Accordingly, it is for the national legislature to lay down the criteria by reference to which the national regulatory authorities are to determine whether a specific burden is unfair within the meaning of Article 12 of the Universal Service Directive. [30] Those conditions must, however, on the one hand, satisfy the mandatory provisions of the Universal Service Directive. [31] On the other hand, the national legislature must not go so far as to determine wholesale which burdens constitute an unfair burden giving rise to a right to compensation, in the place of the national regulatory authority and without applying the methods laid down in the Universal Service Directive. [32] As the Belgian legislature had not complied with those requirements, the Court ultimately held that there had been an infringement of the Universal Service Directive.

93. Although the Court held in that judgment that it is in principle compatible with the Universal Service Directive for the national legislature to prescribe the criteria to be observed by the national regulatory authorities in determining an 'unfair burden' within the meaning of Article 12 of the Universal Service Directive, it did so on the basic

29 — Case C-222/08 *Commission* v *Belgium* [2010] ECR I-9017.

30 — Ibid., paragraphs 44 et seq. and 55 et seq.

31 — Ibid., paragraph 84.

32 — Ibid., paragraph 57 et seq.

assumption that the Member States thereby exercise powers conferred on them by the Universal Service Directive. The Court thus effectively confirms in *Commission* v *Belgium* that the national legislature may exercise its remaining powers to define the concept of 'unfair burden' within the meaning of Article 12 of the Universal Service Directive, provided that it observes the limits laid down by that directive, without however exercising the powers of the national regulatory authority directly. As the Belgian legislature had not complied with those requirements, the Court accordingly held that the directive had been infringed.

94. In that regard, the Court's case-law states that the Member States must further ensure that the national regulatory authorities are organisationally and functionally able to fulfil the tasks incumbent on them under the Framework Directive and the Universal Service Directive. [33]

95. However, the prohibition of any direct intervention in the powers of the national regulatory authorities does not mean that the Member States cannot adopt any measures capable of influencing the work of the regulatory authorities or the exercise of their powers over the markets under their supervision. It must rather be assumed that national measures which only *indirectly* affect the powers of the national regulatory authorities are permissible. After all, in the overall structure of the common regulatory framework for electronic communications and in the interplay between European Union law and national law, the powers of the Member States and those of the national regulatory authorities affect each other in many areas, [34] with the result that, in the context of the common regulatory framework for electronic communications, indirect intervention by the Member States with the powers of the national regulatory authorities are not only permissible but positively routine.

96. That analysis is confirmed by the judgment in *Telekomunikacja Polska*. [35] In that judgment on a reference for a preliminary ruling, the Court had to determine whether the directives in the common regulatory framework applicable to electronic communications precluded a national statutory provision under which the conclusion of a contract for the supply of publicly available telecommunications services (including the supply of a

33 — *Base and Others* (cited above in footnote 26, paragraph 27 et seq.).

34 — This juxtaposition of the powers of the Member States and those of the national regulatory authorities arises at many points in the Universal Service Directive, for example in Article 25(3) in the version amended by Directive 2009/136.

35 — *Telekomunikacja Polska* (cited above in footnote 15).

connection to the public telecommunications network) could not be made contingent on the conclusion by the subscriber of a contract for the provision of other services. At issue, in particular, was the question whether the legislature had thereby unlawfully interfered with the powers of the national regulatory authorities, inasmuch as that legislation prohibited a specific practice of telecommunications undertakings, even though the national regulatory authority could itself have adopted regulatory measures to counter that practice — provided that all the conditions laid down in Article 15 et seq. of the Framework Directive and Article 17 of the Universal Service Directive had been satisfied.

97. The Court held that the national measure in question did not affect the powers conferred on the national regulatory authorities in a manner contrary to the directives. It held in that regard, on the one hand, that the powers of the regulatory authorities had not been directly affected. [36] On the other hand, it pointed out that the national measure at issue sought to enhance protection for consumers in their relations with operators of telecommunications services, adding that the Framework Directive and the Universal Service Directive did not provide for full harmonisation of consumer-protection aspects. [37]

98. Further support for the lawfulness under European Union law of indirect State intervention in the sphere of powers of the national regulatory authorities can be found in the recitals in the preamble to Directive 2009/136, which amended inter alia Article 25 of the Universal Service Directive. On the subject of the provision of directory enquiry services, recital 38 expressly states that the cost-oriented supply of end-user data (both fixed and mobile) to service providers, with the possibility for Member States to establish a centralised mechanism for providing comprehensive aggregated information to directory providers, and the provision of network access under reasonable and transparent conditions, should be put in place in order to ensure that end-users benefit fully from competition, with the ultimate aim of

36 — Ibid., paragraph 28.

37 — Ibid., paragraph 29. The Court referred in that regard to Article 20(1) of the Universal Service Directive, which states that paragraphs 2, 3 and 4 are to apply without prejudice to Community rules on consumer protection, in particular Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), and national rules in conformity with European Union law. That provision was removed from Article 20 as part of the amendment of the Universal Service Directive by Directive 2009/136. At the same time, a new paragraph 4 was inserted into Article 1 of the Universal Service Directive which provides that the provisions of the directive concerning end-users' rights are to apply without prejudice to Community rules on consumer protection, in particular Directives 93/13 and 97/7, and national rules in conformity with Community law.

enabling the removal of retail regulation from these services and the provision of offers of directory services under reasonable and transparent conditions.

99. Recital 38 therefore clearly expresses the legislature's vision that, within the scope of the Universal Service Directive, the Member States should be able to adopt national measures to facilitate the supply of subscriber data to providers of directory enquiry services in order thereby *indirectly* to enable the removal of retail regulation from those services.

100. I therefore conclude that the directives in the common regulatory framework applicable to electronic communications prohibit direct intervention by the Member States in the sphere of powers of the national regulatory authorities. On the other hand, indirect forms of intervention by the Member States in those spheres of power are permitted.

101. In the light of the foregoing considerations, the answer to the question whether the obligation to pass on external data laid down in Paragraph 47 of the TKG, at issue in the main proceedings, is compatible with the Universal Service Directive depends ultimately on whether the introduction of that obligation by the national legislature may be categorised as a direct intervention in the sphere of powers of the national regulatory authorities, which, in turn, depends on the objectives pursued in imposing the obligation to pass on external data under Paragraph 47 of the TKG and on its features in the context of the national retail market in directories and directory enquiry services.

102. If, by imposing the obligation to pass on external data under Paragraph 47 of the TKG, the German legislature sought to adopt a measure directed against one or more undertakings active on the retail market in directories and directory enquiry services on the ground that there was no effective competition on that market and those undertakings had significant market power, thereby making it difficult for new players to enter the market, that national measure must be classified as a direct and therefore unlawful intervention in the sphere of powers of the national regulatory authorities. In that event, in introducing the contested obligation to pass on external data, the German legislature directly exercised the powers conferred on the national regulatory authorities under Article 17 of the

Universal Service Directive, subject to the conditions laid down therein being satisfied.

103. If, on the other hand, the Federal Republic of Germany, in laying down the obligation to pass on external data under Paragraph 47 of the TKG, simply adopted in an objective and general manner the framework conditions in order to facilitate further the provision of subscriber data to providers of telephone directories and directory enquiry services, its action constitutes an indirect and therefore lawful intervention in the sphere of powers of the national regulatory authorities.

104. In that regard, it is a matter for the referring court to determine the objectives of the obligation to pass on external data under Paragraph 47 of the TKG and to assess the features of that obligation in the context of the national retail market in directory and directory enquiry services.

(d) Conclusion

105. I accordingly propose that the answer to the first question should be that Article 25(2) of the Universal Service Directive does not preclude national legislation, such as that laid down in Paragraph 47 of the TKG, under which undertakings which assign telephone numbers to subscribers are required to make available, for the purposes of the provision of publicly available directory enquiry services and directories, data in their possession relating to subscribers to whom those undertakings have not themselves assigned telephone numbers.

106. However, the adoption of such legislation by a national legislature constitutes an encroachment, contrary to the directives, on the powers to be conferred on the national regulatory authorities in accordance with the Universal Service Directive, where that obligation was adopted especially in respect of one or more undertakings present on the retail market for directories and directory enquiry services, on the ground that that undertaking or those undertakings have significant market power, thereby making it difficult for new players to enter the market, and there is no effective competition on that market. It is for the referring court to determine whether those are the purpose and features of the national legislation.

B — *Second question*

107. By its second question, the referring court asks whether a national provision is compatible with Article 12 of the Directive on privacy and electronic communications

where, under that national provision, telephone service undertakings which are asked to pass on data in their possession relating to subscribers of other telephone service undertakings for the purposes of the provision of publicly available directory enquiry services and directories are required to pass on that data even where the subscribers in question or the telephone service undertakings which have assigned the telephone numbers have not consented to or have even objected to the passing on of such data.

108. The referring court thus wishes to ascertain, first, whether, in the context of the legal framework applicable to electronic communications, subscribers are entitled to consent or object to the passing on of their personal data for the purposes of the provision of publicly available directory enquiry services and directories. The referring court also asks whether undertakings which have assigned telephone numbers to subscribers may refuse to pass on that data for the purposes of inclusion in directories which are available to the public directly or through directory enquiry services.

109. The starting point for answering the second question is Article 5(2) of the Universal Service Directive. According to that provision, directories which are available to the public directly or through directory enquiry services are to comprise all subscribers of publicly available telephone services, subject to the provisions of Article 12 of the Directive on privacy and electronic communications. [38]

110. That reference to Article 12 of the Directive on privacy and electronic communications confirms that data-protection issues associated with the production of directories which are available to the public directly or through directory enquiry services must be assessed primarily on the basis of that directive and not on the basis of the 'general' data protection directive, Directive 95/46. [39] In relation to that 'general' data protection directive, the Directive on privacy and electronic communications is to be regarded as a *lex specialis* which takes precedence over the general directive in those areas expressly regulated by it. [40]

38 — The original version of Article 5(2) of the Universal Service Directive contains a reference to Article 11 of Directive 97/66. That directive was repealed by the Directive on privacy and electronic communications with effect from 31 October 2003 (Article 19(1)). According to Article 19(2) of the Directive on privacy and electronic communications, references to Directive 97/66 are to be construed as references to that directive. Directive 2009/136 brought the wording of Article 5(2) of the Universal Service Directive into line with that new legal position.

39 — Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

40 — This follows directly from Article 1(1) and (2) of the Directive on privacy and electronic communications and from recital 10 in the preamble to that directive.

111. Under Article 12(1) of the Directive on privacy and electronic communications, Member States are to ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public directly or through directory enquiry services in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

112. According to Article 12(2) of that directive, Member States are to ensure that subscribers are given the opportunity to determine whether their personal data is included in a public directory, and if so, which, to the extent that such data is relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it is to be free of charge.

113. Under Article 12(4), paragraphs 1 and 2 of that article are to apply to subscribers who are natural persons. Member States must also ensure, in the framework of European Union law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

114. It therefore follows from Article 5(2) of the Universal Service Directive, read in conjunction with Article 12 of the Directive on privacy and electronic communications, first, that subscribers who are natural persons may always decide themselves to have their data included in a public directory. For that purpose, they must first be informed of the purpose of the directory in question and of the available search functions. Following the inclusion of that data in a public directory, subscribers are also free to decide to have their data withdrawn.

115. Secondly, it follows from Article 5(2) of the Universal Service Directive, read in conjunction with Article 12 of the Directive on privacy and electronic communications, that undertakings which have assigned telephone numbers to subscribers may exert no influence in this regard over the decision as to whether and, if so, to what extent the personal data of their subscribers are included in directories which are available to the public directly or through directory enquiry services.

116. Those undertakings are, in principle, required to respect the decisions to be made by their subscribers with regard to the publication of their data in publicly available directories. Given, especially, the systematic connection between Article 5 and Article 25 of the Universal Service Directive, it must be assumed that the obligation to pass on data incumbent on telephone service undertakings under Article 25(2) of the Universal Service Directive is also subject to the data-protection requirements laid down in Article 12 of the Directive on privacy and electronic communications, as expressly confirmed in Article 25(5) of the Universal Service Directive. [41] The same rule must apply to a national obligation to pass on external data, such as that contained in Paragraph 47 of the TKG, which goes beyond the obligation to pass on data laid down in Article 25(2) of the Universal Service Directive, since such an obligation also serves to ensure the provision of comprehensive directory enquiry services and directories within the meaning of Article 5 of the Universal Service Directive and must therefore be assessed by reference to the requirements of Article 12 of the Directive on privacy and electronic communications.

117. It follows from the foregoing considerations that a telephone service undertaking which is asked, pursuant to Article 25(2) of the Universal Service Directive and/or Paragraph 47 of the TKG, to pass on the subscriber data in its possession so that that data can be published in a publicly available directory, must always comply with the data-protection requirements contained in Article 12 of the Directive on privacy and electronic communications. It follows that those telephone service undertakings may accede to a request to pass on data only where they have the informed consent of the subscribers in question to the publication of their data in that public directory.

118. In the light of the facts giving rise to the main proceedings, it must be clarified in particular in that regard whether subscribers may limit their consent to the inclusion of their personal data in a directory available to the public directly or through directory enquiry services to a specific provider of such directories or whether the consent to have their data included in a specific public

41 — See also in this regard Article 20(1)(c) of the Universal Service Directive as amended by Directive 2009/136, which provides that the written contract that must be concluded between the telephone service undertakings and their subscribers must contain the subscriber's express options as to whether or not to include his or her personal data in a directory and if so, which. Similarly, under Article 21(3) of the Universal Service Directive, as amended by Directive 2009/136, Member States are to ensure that national regulatory authorities are able to oblige those telephone service undertakings to inform subscribers of their right to determine whether or not to include their personal data in a directory, and of the types of data concerned.

directory must, under certain conditions, extend to other public directories of a similar nature.

119. No clear conclusions can be drawn in that regard from the wording of Article 12 of the Directive on privacy and electronic communications. However, recitals 38 and 39 in the preamble to that directive contain clear indications as to the limits on subscribers' freedom to choose a publication medium in which they wish to have their data included in a publicly available directory, in accordance with Article 12 of the Directive on privacy and electronic communications.

120. Recital 38 states that subscribers may determine whether their personal data is to be published in a directory. Recital 39 makes it clear that undertakings which gather subscriber data for the purposes of publication in a publicly available directory must inform subscribers of the purpose(s) of that directory. According to that recital, such subscriber data can be passed on to third parties only if the subscriber has been informed of the possibility of such passing on and of the recipient or categories of possible recipients and only if the data is not used for purposes other than those for which they were collected. That recital also states that, if the party collecting the data from the subscriber or any third party to whom the data have been passed on wishes to use the data for an additional purpose, the renewed consent of the subscriber is to be obtained.

121. Those recitals state, in essence, that it is for subscribers to decide whether their data is to be published in a public directory and that they must be informed beforehand of the purpose(s) of that directory. Where the providers of such directories or the undertakings which gather that data are liable to pass on the data thus gathered, for the same purposes as those for which it was gathered, to third parties, the subscribers must be informed of the possibility of such passing on and of the recipient or categories of recipients. No mention is made in those recitals of any right on the part of the subscriber to object to such passing on. It is only if the data is to be passed on for other purposes that renewed consent must be obtained.

122. It therefore follows from those recitals that, according to the will of the legislature, it is in principle for the subscriber to decide whether his data is to be published for a specific purpose in a public directory. In that regard, however, the consent relates primarily to the purpose of the publication of that data in a public directory, not to the provider of such a directory, which explains why,

according to the wording of recital 39, the subscriber need only be informed where his data may be passed on to a third party for an identical purpose and renewed consent must be obtained only if the recipient of the data wishes to use the data for another purpose.

123. The vision expressed in those recitals therefore suggests that Article 12 of the Directive on privacy and electronic communications is to be interpreted as meaning that, while it is in principle for subscribers to decide whether their personal data is to be included in a public directory, that consent may not be limited arbitrarily to a specific provider. Thus, where there are a number of equivalent providers of public directories on a market and those directories serve identical purposes and have comparable search functions, subscribers are not free to limit arbitrarily their consent to publication to one of those providers.

124. This interpretation is supported by a systematic and teleological analysis of Article 12 of the Directive on privacy and electronic communications in the overall context of the legal framework applicable to electronic communications.

125. The objective of Article 12 of the Directive on privacy and electronic communications is to protect the privacy of natural persons and the legitimate interests of legal entities in the publication of their data in public directories. That objective must be reconciled with the task, provided for in Article 5 of the Universal Service Directive, of providing at least one comprehensive telephone directory and at least one comprehensive directory enquiry service, and with the obligation to pass on data imposed on telephone service undertakings for that purpose in Article 25(2) of that directive.

126. If the freedom to be conferred on subscribers to decide on the publication of their data went so far as to allow them to consent to the publication of their data in the publicly available directory of a specific provider whilst not allowing further publication in an equivalent competitor's directory serving an identical purpose and having comparable search functions, the achievement of the objective, set out in Article 5 of the Universal Service Directive, of providing at least one comprehensive directory which is available to the public directly or through directory enquiry services would be severely compromised. If a number of providers of public directories were active on the market in a particular Member State and subscribers were free to decide to have their data published in only one directory, irrespective of the identical purpose of those directories and the

equivalence of their providers, none of those providers would then be able to guarantee the provision of a comprehensive directory.

127. In the light of those considerations, I conclude that Article 12 of the Directive on privacy and electronic communications must be interpreted as meaning that the consent given by subscribers to the inclusion of their personal data in a directory of a specific provider which is available to the public directly or through directory enquiry services necessarily also implies consent to the inclusion of that data in directories of equivalent providers which serve identical purposes and are equipped with similar search functions, in so far as the subscribers have been informed of the existence of those providers and of the possibility that their data may be published in those additional directories.

128. That interpretation of Article 12 of the Directive on privacy and electronic communications is also consistent with the principles laid down in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, to which that directive is intended to give effect. [42] After all, as the Court of Justice most recently confirmed in *Volker and Markus Scheke*, [43] the fundamental right to the protection of personal data established in Article 8(1) of the Charter, which is closely connected with the right to respect of private life enshrined in Article 7 of the Charter, is not an absolute prerogative. Rather, it must be considered, and hence also interpreted, in relation to its function in society.

129. To sum up, I therefore conclude that telephone service undertakings which are

42 — See on this point recital 2 in the preamble to the Directive on privacy and electronic communications.

43 — Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke* [2010] ECR I-11063, paragraph 47 et seq.

requested, pursuant to Article 25(2) of the Universal Service Directive or Paragraph 47 of the TKG, to pass on the subscriber data in their possession, are required to comply with the data-protection requirements laid down in Article 12 of the Directive on privacy and electronic communications. Under that provision, it is for subscribers to decide whether their data is to be included in a directory which is available to the public directly or through directory enquiry services. Where, however, a subscriber decides to have his data published in such a public directory, he has no right under Article 12 of the Directive on privacy and electronic communications to consent or object to the passing on of that data to equivalent providers of public directories or directory enquiry services serving an identical purpose and equipped with comparable search functions, in so far as he has been informed of the possibility of such passing on and of the recipient or categories of possible recipients [44] and in so far as that data is not used by the recipient for purposes other than those for which the subscriber gave consent for publication.

130. In the light of all the foregoing, I propose that the answer to the second question should be that national legislation under which undertakings which assign telephone numbers to subscribers are required to make available, on request, for the purposes of the provision of publicly available directory enquiry services and directories, data relating to subscribers to whom those undertakings have not themselves assigned telephone numbers is compatible with Article 12 of the Directive on privacy and electronic communications, provided that it is ensured that the subscribers have been informed not only of that obligation to pass on data to providers of publicly available directories, but also of the various providers of such directories and of the content, purpose and search functions of those directories and have consented to publication of their data in such directories. Where there are a number of equivalent providers of such publicly available directories on a market and those directories serve an identical purpose and have comparable search functions, subscribers are not free to limit arbitrarily their consent to publication to one of those providers.

44 — Because telephone service undertakings which are subject to an obligation under Article 25(2) of the Universal Service Directive and/or Paragraph 47 of the TKG to pass on subscriber data to providers of public directories may fulfil that obligation only with the consent of the subscribers concerned, they are, in principle, required to inform subscribers, or have them informed, of that obligation to pass on data or external data and to determine in this connection whether those subscribers consent to the passing on of their data for the purposes of publication in a publicly available directory; see Article 20(1)(c) of the Universal Service Directive as amended by Directive 2009/136.

VII — Conclusion

131. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Bundesverwaltungsgericht as follows:

'(1) Article 25(2) 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 does not preclude national legislation, such as that laid down in Paragraph 47 of the Telekommunikationsgesetz, under which undertakings which assign telephone numbers to subscribers are required to make available, for the purposes of the provision of publicly available directory enquiry services and directories, data in their possession relating to subscribers to whom those undertakings have not themselves assigned telephone numbers.

However, the adoption of such legislation by a national legislature constitutes an encroachment, contrary to the directives, on the powers to be conferred on the national regulatory authorities in accordance with Directive 2002/22, where that obligation was adopted especially in respect of one or more undertakings present on the retail market for directories and directory enquiry services, on the ground that that undertaking or those undertakings have significant market power, thereby making it difficult for new players to enter the market, and there is no effective competition on that market. It is for the referring court to determine whether those are the purpose and features of the national legislation.

(2) National legislation under which undertakings which assign telephone numbers to subscribers are required to make available, on request, for the purposes of the provision of publicly available directory enquiry services and directories, data relating to subscribers to whom those undertakings have not themselves assigned telephone numbers is compatible with Article 12 of 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, provided that it is ensured that the subscribers have been informed not only of that obligation to pass on data to providers of publicly available directories, but also of the various providers of such directories and of the content, purpose and search functions of those directories and have consented to publication of their data in such directories. Where there are a number of equivalent providers of such publicly available directories on a market and those directories serve an identical purpose and have comparable search functions, subscribers are not free to limit arbitrarily their consent to publication to one of those providers.'