JUDGMENT OF THE COURT (Second Chamber)

12 November 2009 *

In Case C-192/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 8 May 2008, received at the Court on the same day, in the proceedings

TeliaSonera Finland Oyj,

intervening parties:

iMEZ Ab,

THE COURT (Second Chamber),

composed of, J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

* Language of the case: Finnish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 2 April 2009,

after considering the observations submitted on behalf of:

— TeliaSonera Finland Oyj, by K. Mattila, oikeustieteen kandidaatti,

— iMEZ Ab, by S. Aalto, asianajaja,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Italian Government, by I. Bruni, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Lithuanian Government, by I. Jarukaitis, acting as Agent,

— the Netherlands Government, by C. Wissels and M. de Mol, acting as Agents,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Romanian Government, by A. Ciobanu-Dordea, acting as Agent, and E. Gane and L. Nicolae, consilieri,

— the Commission of the European Communities, by I. Koskinen and A. Nijenhuis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4(1), 5 and 8 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive') (OJ 2002 L 108, p. 7).

2 The reference was made in the course of proceedings brought by TeliaSonera Finland Oyj ('TeliaSonera'), successor in law to Sonera Mobile Networks Oy, against the Viestintävirasto (Finnish Communications Regulatory Authority, 'the CRA') and iMEZ Ab ('iMEZ') concerning a decision adopted on 11 December 2006 by the CRA with respect to TeliaSonera.

Legal context

Community legislation

3 Recitals 5, 6, 8 and 19 in the preamble to the 'Access' Directive state:

'(5) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the [EC] Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.

(6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the

interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users; …

…

(8) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. The existing rights and obligations to negotiate interconnection should therefore be maintained. …

…

(19) Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services. Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. …'

4 Under Article 1(1) of the Access Directive:

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

5 Article 2 of that directive includes the following definitions:

'…

(a) "access" means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;

(b) “interconnection” means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

(c) “operator” means an undertaking providing or authorised to provide a public communications network or an associated facility;

…’

6 According to Article 3(1) of the Access Directive:

‘Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.’

7 Article 4 of the Access Directive, entitled 'Rights and obligations for undertakings', is worded as follows:

'Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.

…'

8 Article 5 of the Access Directive, entitled 'Powers and responsibilities of the national regulatory authorities with regard to access and interconnection', provides:

'1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("the Framework Directive") (OJ 2002 L 108, p. 33)], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.

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

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

…

2. When imposing obligations on an operator to provide access in accordance with Article 12, national regulatory authorities may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access, in accordance with Community law, where necessary to ensure normal operation of the network. Conditions that refer to implementation of specific technical standards or specifications shall respect Article 17 of Directive 2002/21/EC ("Framework Directive").

3. Obligations and conditions imposed in accordance with paragraphs 1 and 2 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC ("Framework Directive").

4. With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of Directive 2002/21/EC ("Framework Directive"), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC ("Framework Directive").'

9 Articles 6 to 13 of the Access Directive define the obligations imposed on operators and the market review procedures.

10 In particular, Articles 8 to 12 of that directive define the obligations and the procedures applicable to operators designated as having significant market power.

11 Under Article 12, entitled 'Obligations of access to, and use of, specific network facilities':

'1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Operators may be required inter alia:

(a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;

(b) to negotiate in good faith with undertakings requesting access;

…

(g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;

…

(i) to interconnect networks or network facilities.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.

…'

12 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 ('Authorisa-

tion Directive') (OJ 2002 L 108, p. 21), contains in Article 2(2)(a) the following definition:

'"general authorisation" means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive.'

13 Article 4 of that directive, entitled 'Minimum list of rights derived from the general authorisation' is worded as follows:

'1. Undertakings [so] authorised pursuant to Article 3, shall have the right to:

(a) provide electronic communications networks and services;

…

2. When such undertakings provide electronic communications networks or services to the public the general authorisation shall also give them the right to:

(a) negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community under the conditions of and in accordance with Directive 2002/19/EC ("Access Directive");

…'

14 Article 6 of the Authorisation Directive provides:

'1. The general authorisation for the provision of electronic communications networks or services … may be subject only to the conditions listed respectively in part … A … of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of [the Access Directive] … shall be legally separate from the rights and obligations under the general authorisation.
…

…'

15 According to Part A of the Annex to the Authorisation Directive, one of the conditions which may be attached to a general authorisation is to ensure the interoperability of services and interconnection of networks in conformity with the Access Directive.

16 As to the Framework Directive, Article 2 contains, inter alia, the following definitions:

'…

(c) "communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC [of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37)], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

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

…'

17 Articles 8 to 13 of the Framework Directive define the tasks which the national regulatory authorities must accomplish in order to secure the objectives of competition, the development of the internal market and the promotion of the interests of the citizens of the European Union.

National law

18 Paragraph 2 of the Communications Market Law (Viestintämarkkinalaki (393/2003)) of 23 May 2003, entitled 'Definitions', provides as follows:

'For the purposes of this Law

…

(13)"interconnection" means the physical and functional connection of different communication networks and communications services in order to ensure users can access the communication network and communication services of other telecommunications undertakings;

…

(17)"network operator" means an undertaking that provides a communications network in its ownership or for other reasons in its possession for the purposes of transmitting, distributing or providing messages;

…

(19)"service operator" means an undertaking that transmits messages over a communications network in its possession or obtained for use from a network operator or distributes or provides messages in a mass communications network;

…

(21)"telecommunications operator" means any network operator or any service operator;

…'

19 In accordance with Paragraph 39 of the Communications Market Law, entitled 'Interconnection obligations of a telecommunications operator', a telecommunications operator has an obligation to negotiate on interconnection with another telecommunications operator. Under subparagraph 2 thereof, the CRA may, by decision, impose an obligation on an undertaking with significant market power to connect a communications network or communications service to the communications network or communications service of another telecommunications operator.

Paragraph 39(3) also authorises the CRA to impose an identical obligation on undertakings which do not have significant market power provided that the telecommunications undertakings concerned control user connections to the communications network and that that obligation is necessary to ensure the interconnection of communications networks.

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

20 It is apparent from the order for reference that, on 10 May 2006, iMEZ requested the CRA, the Finnish national regulatory authority, to take the measures necessary in order to secure the conclusion of an interconnection agreement with TeliaSonera concerning the transmission of text messages ('SMS messages') and multimedia messages ('MMS messages').

21 On 18 May 2006, the CRA referred the case to arbitration, at the end of which it was held that negotiations had failed.

22 On 7 August 2006, iMEZ, which is established in Sweden, asked the CRA to compel TeliaSonera to negotiate the interconnection in good faith by offering it a reciprocal agreement on reasonable conditions. In the alternative and if this were not achieved, iMEZ asked the CRA to impose an interconnection obligation on TeliaSonera with respect to SMS and MMS messages and to require it to price the forwarding of those two types of messages on the basis of the costs incurred and in a non-discriminatory manner. In the further alternative, iMEZ asked the CRA for a declaration that the forwarding of SMS and MMS messages to the specific mobile network was the relevant communications market, and that TeliaSonera was an undertaking having significant market power, thus enabling iMEZ to obtain the interconnection.

23 By decision of 11 December 2006, the CRA found that TeliaSonera had not fulfilled its obligation to negotiate pursuant to Paragraph 39 of the Communications Market Law and ordered it to negotiate in good faith the interconnection of the SMS and MMS message services with iMEZ. In accordance with that decision, the negotiations were to take account of the objectives which interconnection sought to achieve and to start from the premiss that the proper functioning of SMS and MMS message services between the systems could be ensured on reasonable terms so that users would be able to use messaging services between the undertakings concerned.

24 TeliaSonera appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court), arguing that the CRA was not empowered to impose substantive conditions concerning the terms of an agreement to be negotiated with respect to the interconnection of SMS and MMS services. In that appeal, TeliaSonera seeks, first, a declaration that it has complied with the obligation to negotiate laid down in Paragraph 39 of the Communications Market Law and, second, the annulment of the CRA's decision of 11 December 2006.

25 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 4(1) of Directive 2002/19/EC of the … Access Directive, when read in conjunction with recitals 5, 6 and 8 in the preamble to that directive and with Article 5 and Article 8 thereof, to be interpreted as meaning that:

(a) national legislation may provide, as in Paragraph 39(1) of the … [Communications Market Law], that any telecommunications operator has an obligation to negotiate on interconnection with another telecommunications operator and, if so,

(b) a national regulatory authority can take the view that the obligation to negotiate has not been complied with where a telecommunications operator which does not have significant market power has offered another undertaking interconnection under conditions which the authority regards as wholly unilateral and likely to hinder the emergence of a competitive market at the retail level, where they have hindered in practice the second undertaking from offering its customers the opportunity to transmit [MMS] messages to end-users subscribed to the telecommunications operator's network and, if so,

(c) the national regulatory authority can in its decision require the aforementioned telecommunications operator, which therefore does not have significant market power, to negotiate in good faith on the interconnection of [SMS] and [MMS] communications services between [the] systems [of the two undertakings concerned] in such a way that, in commercial negotiations, regard must be had to the objectives which interconnection seeks to achieve and negotiations must be based on the premiss that the operation of SMS and MMS services between undertakings' systems can be made subject to reasonable conditions so that users have the possibility of using telecommunications operators' communications services?

2. Do the nature of [iMEZ's] network or whether iMEZ … should be regarded as an operator of public electronic communications networks have any bearing on the assessment of the questions set out above?'

The questions referred

The first part of the first question and the second question

26 By the first part of the first question, the national court asks essentially whether Article 4(1) of the Access Directive, read in conjunction with recitals 5, 6 and 8 in its preamble and with Articles 5 and 8 thereof, preclude national legislation, such as that at issue in the main proceedings, which does not limit the possibility of relying on the obligation to negotiate with respect to interconnection solely to operators of public communications networks. By its second question, which it is appropriate to examine at the same time, the national court also asks whether, as a consequence, the status and nature of the network of an undertaking relying on the obligation to negotiate has an effect on the relations with the other undertaking concerned.

27 As a preliminary point, it should be stated that, in view of the definitions given in Paragraph 2 of the Communications Market Law, as set out in paragraph 18 of this judgment, the first question referred asks in fact whether the obligation to negotiate provided for in Article 4(1) of the Access Directive may be relied on by service providers in order to ensure the interoperability of communications services.

28 It is clear from the wording of Article 4(1) that the obligation to negotiate an interconnection applies to all operators of public communications networks when requested to do so by another authorised undertaking.

29 As regards the authorisation, it should be noted that Article 2(2)(a) of the Authorisation Directive defines 'general authorisation' issued to operators pursuant to Article 3(2) of

that directive as 'a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services'.

30 That authorisation thus also concerns service operators.

31 However, Article 4(2)(a) of the Authorisation Directive states that undertakings authorised to provide electronic communications networks or services to the public have the right to negotiate interconnection with other providers of communications networks or services in accordance with the Access Directive.

32 Article 2(b) of the Access Directive defines 'interconnection' as 'the physical and logical linking of public communications networks', and points out that it 'is a specific type of access implemented between public network operators'.

33 Furthermore, the reciprocity of the interconnection, provided for in Article 4(1) of the Access Directive, implies that the two parties to the negotiations are public network operators.

34 Therefore, the obligation to negotiate laid down in Article 4(1) concerns only the interconnection of networks, to the exclusion of other forms of network access (see, to

that effect, Case C-227/07 *Commission* v *Poland* [2008] ECR I-8403, paragraph 36), and applies only to operators of public communications networks with respect to other operators of public communications networks.

35 Consequently, as electronic communications services providers do not fall within the category of 'operators of public communications networks', they cannot rely on the obligation to negotiate laid down in Article 4(1) of the Access Directive.

36 In any event, it must be held that that obligation to negotiate is independent of whether the undertaking concerned has significant market power, and does not entail the obligation to conclude an interconnection agreement, but merely an obligation to negotiate such an agreement.

37 Therefore, it is appropriate to consider whether, as the Netherlands Government submits, Member States may provide by general legislation, such as the Communications Market Law at issue in the main proceedings, for the possibility for telecommunications services providers to rely on the obligation to negotiate that applies to operators of public communications networks.

38 In that connection it should be observed, first of all, that the new regulatory framework implemented in 2002 in the telecommunications sector, consisting of the Framework Directive and specific directives, including the Authorisation and Access Directives, aims to establish a harmonised framework for the regulation of electronic

communications services, electronic communications networks, associated facilities together with resources and associated services in an environment of effective competition.

39 Secondly, both recital 5 in the preamble and Article 3(1) of the Access Directive establish a freedom for undertakings to negotiate and to conclude agreements. That freedom forms part of the objective of the Access Directive, defined in Article 1(1) thereof, namely to establish 'a regulatory framework … that will result in sustainable competition, interoperability of electronic communications services and consumer benefits'.

40 It follows that, as the Romanian Government submits, an obligation to negotiate such as that provided for in Article 4(1) of the Access Directive is an exception and must therefore be interpreted strictly.

41 Thirdly, Articles 5 to 8 of the Access Directive clearly set out the obligations of the Member States as regards the determination of the powers and responsibilities of the national regulatory authorities.

42 Therefore, the power of the national legislature is duly defined.

43 Fourthly, as the Advocate General notes, in paragraphs 64 et seq. of his Opinion, and contrary to the Netherlands Government's submissions, Article 6(1) of the Authorisa-

tion Directive cannot provide the basis for national legislation such as that at issue in the main proceedings.

44 Article 6(1) of the Authorisation Directive provides only for a general authorisation subject to the conditions set out in Part A of the Annex to that directive, which refers in point 3 to the Access Directive.

45 It follows that the Access Directive establishes the framework in which negotiations take place or obligations to be imposed on communications undertakings are determined.

46 Having regard to the foregoing, it must be held that the nature of the network of an undertaking relying on the obligation to negotiate, laid down in Article 4(1) of the Access Directive, and the question whether that undertaking is an operator of public communications networks, affect the relationship with the other undertaking concerned in so far as the Member States may not impose that obligation on operators other than operators of public communications networks.

47 It is for the national court, taking into account the definitions given in Article 2 of the Access Directive and the Framework Directive, to determine whether, having regard to the status and the nature of the operators concerned in the main proceedings, they may be classified as operators of public communications networks.

48 It follows from the foregoing that the answer to the first part of the first question and to the second question is that Article 4(1) of the Access Directive, read in conjunction with recitals 5, 6, 8 and 19 in its preamble and with Articles 5 and 8 thereof, preclude national legislation such as the Communications Market Law, in so far as it does not restrict the possibility of relying on the obligation to negotiate on the interconnection of networks solely to operators of public communications networks. It is for the national court to determine whether, having regard to the status and the nature of the operators concerned in the main proceedings, they may be classified as operators of public communications networks.

The second part of the first question

49 By the second part of the first question, the national court asks whether a national regulatory authority may take the view that the obligation to negotiate an interconnection, provided for under Article 4(1) of the Access Directive, has been breached where an undertaking which does not have significant market power offers another undertaking interconnection under unilateral conditions which are likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the other undertaking from benefiting from its services.

50 It should be observed, first of all, that the Court has held that the regulatory tasks of a national regulatory authority are set out in Articles 8 to 13 of the Framework Directive. Furthermore, the Court has interpreted Article 8 as placing on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures aimed at promoting competition in the provision of electronic communica-

tions services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (*Commission* v *Poland*, paragraphs 62 and 63, and the case-law cited).

51 Second, recital 5 in the preamble to the Access Directive states that undertakings which receive requests for access or interconnection should, in principle, conclude such agreements on a commercial basis and negotiate in good faith.

52 In that connection, Article 5(4) of that directive enables the national regulatory authorities to intervene in the absence of agreement in order to secure the objectives laid down in Article 8 of the Framework Directive.

53 Third, as the Advocate General observed in point 103 of his Opinion, in order to give practical effect to Article 4(1) of the Access Directive, which provides for an obligation to negotiate under the conditions set out in paragraphs 28 to 36 of this judgment, it must be accepted that the negotiations are to be carried out in good faith.

54 Fourth, contrary to the Finnish Government's submission, Article 12(1) of the Access Directive cannot serve as a basis for an appraisal such as that referred to by the national

court unless the operator to which the interconnection request is addressed has not been designated as having significant power on the market concerned in accordance with Article 8(2) of that directive.

55 It is clear from the foregoing that the answer to the second part of the first question referred is that a national regulatory authority may take the view that the obligation to negotiate an interconnection has been breached where an undertaking which does not have significant market power proposes interconnection to another undertaking under unilateral conditions likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services.

The third part of the first question

56 By the third part of its first question, the national court asks essentially whether a national regulatory authority may require an undertaking which does not have significant market power to negotiate in good faith with another undertaking on the interconnection of SMS and MMS message services between the systems of those two undertakings.

57 As a preliminary point, it must be stated that the necessary premiss for the answer to that part of the first question is either that Article 4(1) of the Access Directive applies to the case in the main proceedings since the two operators concerned are operators of public communications networks but the obligations imposed by that article have not been complied with by the operator requested to negotiate an interconnection, or that the situation at issue in the main proceedings falls outside the scope of that article since one of the operators concerned cannot be classified as an operator of public communications networks.

58 It must be observed, first, that it follows from the wording of the first subparagraph of Article 5(1) of the Access Directive that the national regulatory authorities are responsible for ensuring adequate access and interconnection and also interoperability of services by means which are not exhaustively listed there.

59 In that context, in accordance with point (a) of the second subparagraph of Article 5(1), those authorities must be able to impose 'obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks' solely in order to ensure end-to-end connectivity.

60 Second, Article 5(4) of the Access Directive also concerns access and interconnection and requires that national regulatory authorities be empowered to intervene, since it provides that those authorities may intervene at their own initiative in order to secure the objectives of Article 8 of the Framework Directive, but without defining or limiting the detailed rules for that intervention.

61 Thus it is apparent that the relevant provisions of the Framework Directive and the Access Directive enable a national regulatory authority to take a decision ordering an undertaking which does not have significant market power but which controls access to end-users to negotiate either an interconnection of the two networks concerned if the undertaking requesting such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if the undertaking which makes the request is not covered by that classification.

62 It follows from the foregoing that the answer to the third part of the first question referred is that a national regulatory authority may require an undertaking which does not have significant market power but which controls access to end-users to negotiate in good faith with another undertaking for either interconnection of the two networks concerned if the undertaking which requests such access must be classified as an

operator of public communications networks, or interoperability of SMS and MMS message services if that undertaking is not covered by that classification.

Costs

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

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

1. **Article 4(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the 'Access Directive'), read in conjunction with recitals 5, 6, 8 and 19 in its preamble and with Articles 5 and 8 thereof, precludes national legislation such as the Communications Market Law (Viestintämarkkinalaki) of 23 May 2003 in so far as it does not restrict the possibility of relying on the obligation to negotiate on the interconnection of networks solely to operators of public communications networks. It is for the national court to determine whether, having regard to the status and the nature of the operators concerned in the main proceedings, they may be classified as operators of public communications networks.**

2. **A national regulatory authority may take the view that the obligation to negotiate an interconnection has been breached where an undertaking which does not have significant market power proposes interconnection to another undertaking under unilateral conditions likely to hinder the emergence of a**

competitive market at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services.

3. A national regulatory authority may require an undertaking which does not have significant market power but which controls access to end-users to negotiate in good faith with another undertaking for either interconnection of the two networks concerned if the undertaking which requests such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if that undertaking is not covered by that classification.

[Signatures]