Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 9 November 2016[1]

Case C-536/15

Tele2 (Netherlands) BV,
Ziggo BV,
Vodafone Libertel BV
v
Autoriteit Consument en Markt (ACM)(Request for a preliminary ruling from the

College van Beroep voor het Bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands)

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Article 25(2) — Telephone directory and telephone directory enquiry services — Directive 2002/58/EC — Article 12 — Supply of subscribers' personal data for publication in a telephone directory or for use by a telephone directory enquiry service — Form of and conditions for subscribers' consent — Distinction on the basis of the Member State in which the telephone directory service and/or telephone directory enquiry service is provided — Principle of non-discrimination)

I – **Introduction**

1. By this reference for a preliminary ruling, the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) once again invites the Court to clarify the circumstances in which undertakings that assign telephone numbers to subscribers must make available their subscribers' personal data to providers of telephone directory services and/or telephone directory enquiry services.

2. In particular, the national court asks the Court whether the principle of non-discrimination referred to in Article 25(2) of Directive 2002/22/EC[2] prevents those undertakings, when obtaining subscribers' consent for the purpose of the publication of their data in a telephone directory or the use of such data by a telephone directory enquiry service, from drawing a distinction on the basis of the Member State in which the telephone directory service and/or telephone directory enquiry service is provided.

3. At the origin of this reference for a preliminary ruling is a request by the Belgian company European Directory Assistance ('EDA'), which provides telephone directory services and telephone directory enquiry services accessible from Belgian territory, for Tele2 (Netherlands) BV ('Tele2'), Ziggo BV ('Ziggo') and Vodafone Libertel BV ('Vodafone'), three undertakings that assign telephone numbers

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

in the Netherlands, to make information available. When they refused to make data relating to their subscribers available to EDA, the latter submitted a request to the Autoriteit Consument en Markt (Authority for Consumers and Markets; 'the ACM'), as national regulatory authority, for resolution of the dispute.

4. After consulting the Body of European Regulators for Electronic Communications (BEREC), the ACM, in particular, ordered Tele2, Ziggo and Vodafone to make basic data relating to their subscribers (name, address, post code, town, telephone number) available to EDA on fair, objective, cost oriented and non-discriminatory terms, provided that EDA undertook to use that data to place a standard telephone directory enquiry service on the market.

5. The ACM also found that the principle of non-discrimination did not, in contrast to the opinion issued by the Dutch data protection authority, allow a distinction to be drawn between data supply requests made by Dutch providers and those made by providers established in another Member State. It therefore dismissed the idea that the specific consent of Dutch subscribers had to be sought for the inclusion of their data in foreign standard telephone directories.

6. Tele2, Ziggo and Vodafone therefore brought an action against the ACM's decisions before the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry).

7. That court raises the question, inter alia, whether Article 25(2) of the Universal Service Directive and, in particular, the principle of non-discrimination referred to in that provision, allows, in the request for consent, requests for data to be made available made by Dutch providers to be distinguished from those made by providers established in other Member States of the European Union.

8. The College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 25(2) of [the Universal Service] Directive … be interpreted as meaning that requests should be understood to include a request by a company established in another Member State, which requests information for the purposes of publicly available telephone directory enquiry services and telephone directories provided in that Member State and/or in other Member States?

(2) If question 1 is answered in the affirmative: does the principle of non-discrimination permit a provider, who makes telephone numbers available and is obliged under national legislation to request a subscriber's consent to his inclusion in standard telephone directories and standard directory enquiry services, to draw a distinction in the request for consent according to the Member State in which the company requesting the information as referred to in Article 25(2) of the "Universal Service" Directive … provides the telephone directory and directory enquiry service?'

9. I shall limit my analysis in this Opinion to the second question. Only the second question raises a legal difficulty requiring close examination, since the answer to the first question can be found in the wording of Article 5 and Article 25(2) of the 'Universal Service' Directive.

10. Accordingly, in my analysis I shall explain why, in my view, it is in principle contrary to Article 25(2) of the 'Universal Service' Directive and Article 12 of Directive 2002/58/EC,[3] to which reference must necessarily be made, for an undertaking that has received a request to make available its subscribers' personal data to draw a distinction, when obtaining its subscribers' consent, on the basis of the Member State in which the telephone directory services and/or telephone directory enquiry services are offered.

II – **Legal framework**

A – *EU law*

1. The 'Universal Service' Directive

11. Recital 11 of the 'Universal Service' Directive provides:

'(11) 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 …. 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.'

12. Article 25 of the 'Universal Service' Directive, entitled 'Telephone directory enquiry services', provides:

'…

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.

…

4. Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State by voice call or SMS, and shall take measures to ensure such access in accordance with Article 28.

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 [the Directive on privacy and electronic communications].'

3 — Directive 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) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136 of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

2. The Directive on privacy and electronic communications

13. Recitals 38 and 39 of the Directive on privacy and electronic communications state:

‘(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 their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted 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 transmission 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 transmitted 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 transmitted.’

14. Article 12 of that directive, entitled ‘Directories of subscribers’, provides:

‘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 or obtainable 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 are included in a public directory, and if so, which, to the extent that such data are 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.

…’

B – *The Netherlands legislation*

15. Under Article 1.1(e) of the Decree on universal service provision and end-user interests (Besluit universele dienstverlening en eindgebruikersbelangen), in the version applicable to the facts in the main proceedings: [4]

4 — *Staatsblad* 2004, No 203; ‘the Bude’.

‘A standard directory enquiry service means a publicly available directory enquiry service by means of which telephone numbers can be requested only on the basis of data relating to the name in conjunction with data relating to the address and house number, post code or town of the subscriber.’

16. Article 3.1 of the Bude, which transposes Article 25(2) of the Universal Service Directive, provides:

‘Any provider which assigns telephone numbers shall meet all reasonable requests to make available, for the purposes of the provision of publicly available telephone directories and publicly available directory enquiry services, the relevant information in an agreed format on terms which are fair, objective, cost oriented and non-discriminatory.’

17. Under Article 3.2 of the Bude:

‘1. Any provider of a publicly available telephone service which, before or when concluding a contract with a user, requests the latter’s name and address (street name and house number, post code and town), shall also seek his consent to that kind of personal data and the telephone numbers it has assigned appearing in any standard telephone directory and any directory of subscribers which is used for a standard directory enquiry service. The consent referred to in the preceding sentence shall be sought individually for every kind of personal data.

2. The consent given shall constitute relevant information within the meaning of Article 3.1.

3. Any provider of a publicly available telephone service which also seeks consent for inclusion in a telephone directory other than the standard telephone directory or in a directory of subscribers not exclusively used for a standard directory enquiry service shall ensure that the manner and form in which the consent referred to in paragraph 1 is sought is at least equivalent to the manner and form in which the original consent referred to in this paragraph is sought.’

III – **Assessment**

18. By its second question, the national court essentially asks the Court whether it is contrary to Article 25(2) of the Universal Service Directive and, in particular, the principle of non-discrimination to which the latter refers, for an undertaking that has received a request to make available its subscribers’ personal data to draw a distinction, when obtaining its subscribers’ consent, based on the Member State in which the telephone directory service and/or telephone directory enquiry service is provided.

19. In other words, if the request for information to be made available referred to in Article 25(2) of the Universal Service Directive is made by a telephone directory enquiry operator and/or a telephone directory operator providing its services in a Member State other than the subscriber’s Member State of residence, may that request be made to depend on the granting of specific consent by the subscriber?

20. In order to answer that question, it is necessary to assess not only the wording of Article 25(2) of the Universal Service Directive, but also the wording of Article 12(2) of the Directive on privacy and electronic communications.

21. Although the national court does not mention the latter provision in the question referred for a preliminary ruling, it is essential to refer to it, not only in order to provide the national court with a helpful answer, but also because Article 25(5) of the Universal Service Directive provides that paragraph 2 of that article applies ‘subject to the requirements of Community legislation on the protection of personal data and privacy and, in particular, Article 12 of [the Directive on privacy and electronic communications]’.

22. First, I recall that according to Article 25(2) of the Universal Service Directive, Member States must ensure that all undertakings which assign telephone numbers to subscribers meet all reasonable requests for information to be made available, for the purposes of the provision of telephone directory enquiry services and telephone directories, on terms that must be fair, objective, cost oriented and non-discriminatory.

23. The fact remains that the EU legislature draws no distinction according to whether the request for data to be made available is made by an operator established in national territory or in another Member State, undertakings that assign telephone numbers being obliged to meet '*all* reasonable requests to make [data] available'.[5]

24. Furthermore, the legislature makes a point of stating expressly that the conditions on which those requests are to be met must be 'fair' and 'non-discriminatory', which necessarily implies that there must be no difference in treatment depending on whether the request is made by a national operator or by a foreign operator, unless, of course, the request is not duly substantiated.

25. Secondly, reference must be made to the wording of Article 12 of the Directive on privacy and electronic communications, which expressly mentions the conditions on which and the detailed rules according to which subscribers' personal data, collected by the undertaking that assigns telephone numbers, may be disclosed for the purpose of publication in a public directory.

26. The Court interpreted this provision in its judgment of 5 May 2011, *Deutsche Telekom*,[6] an interpretation which, in my view, provides the answer to be given to the national court.

27. In that case, the Court was asked to what extent Deutsche Telekom, responsible for the universal service in Germany, was bound, in creating a public directory, to pass data relating to subscribers of third-party undertakings to two competing companies on the German market for directory enquiry services, GoYellow GmbH and Telix AG. In the case in point the regulatory authority obliged Deutsche Telekom to pass on such information, including data which subscribers or their suppliers had agreed could be published by Deutsche Telekom alone.

28. One of the questions put to the Court was whether that passing of information had to be conditional on renewed consent from the subscribers.

29. The Court replied to that question in the negative, ruling that undertakings which assign telephone numbers are not required to obtain renewed or specific consent from a subscriber when the latter's data are passed to a competing telephone directory supplier for the purpose of publication in a *similar* directory. The Court thus based its analysis on the fact that the consent of the subscriber related to the purpose of the publication of personal data and not to the identity of the provider.

30. It is useful to restate the Court's reasoning here.

31. First of all, the Court based that finding on the wording and purpose of Article 12(2) of the Directive on privacy and electronic communications.[7] Following a contextual and systematic interpretation of that provision, the Court held that the subscribers' consent relates not to the identity of any particular directory provider, but *to the purpose of the publication of personal data in a public directory*. The Court thus rejected the interpretation that subscribers had a 'selective right to decide' in favour of certain providers of telephone directory enquiry services and/or telephone directory services.

5 — Emphasis added.

6 — C-543/09, EU:C:2011:279.

7 — Judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279, paragraphs 61 and 62).

32. In paragraphs 65 and 66 of its judgment, the Court held as follows:

'65. … where a subscriber has been informed by the undertaking which assigned him a telephone number of the possibility that his personal data may be passed to a third-party undertaking, such as Deutsche Telekom, with a view to being published in a public directory, and where he has consented to the publication of those data in such a directory (in the present case, Deutsche Telekom's directory), renewed consent is not needed from the subscriber for the passing of those same data to another undertaking which intends to publish a printed or electronic public directory, or to make such directories available for consultation through directory enquiry services, if it is guaranteed that the data in question will not be used for purposes other than those for which the data were collected with a view to their first publication. *The consent given under Article 12(2) of the Directive on privacy and electronic communications, by a subscriber who has been duly informed, to the publication of his personal data in a public directory relates to the purpose of that publication and thus extends to any subsequent processing of those data by third-party undertakings active in the market for publicly available directory enquiry services and directories, provided that such processing pursues that same purpose.* [8]

66. Moreover, where a subscriber has consented to the passing of his personal data to a given undertaking with a view to their publication in a public directory of that undertaking, the passing of the same data to another undertaking intending to publish a public directory without renewed consent having been obtained from that subscriber is not capable of substantively impairing the right to protection of personal data, as recognised in Article 8 of the Charter [of Fundamental Rights of the European Union].'

33. In the second place, the Court referred to the extremely clear wording of recital 39 of the Directive on privacy and electronic communications. [9]

34. I recall that the EU legislature had the following to say in that recital:

'The obligation to inform subscribers of the purpose(s) of public directories in which their personal data are to be included should be imposed on the party collecting the data for such inclusion. Where the data may be transmitted 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 transmission 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 transmitted 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 transmitted.*' [10]

35. In paragraph 63 of its judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279, the Court found, therefore, that the passing of personal data to third parties is 'subject to the condition that the data may not be used for other purposes than those for which they were collected'.

36. In the third place, the Court referred to the exception to that principle, specifically laid down in Article 12(3) of the Directive on privacy and electronic communications.

37. Under that provision, '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'.

8 — Emphasis added.

9 — Judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279, paragraph 63).

10 — Emphasis added.

38. According to the Court, the obtaining of the subscriber's renewed consent is therefore envisaged 'if the party collecting the data from the subscriber or any third party to whom the data have been transmitted wishes to use the data for an additional purpose'. [11]

39. Although the judgment in *Deutsche Telekom* concerned a purely domestic situation, I take the view that the Court's approach in that judgment must be transposed by analogy to a cross-border situation such as that at issue here.

40. To my mind, there is no particular reason justifying a difference in treatment according to whether an operator is established in national territory or in another Member State, when that operator collects subscribers' personal data for purposes absolutely identical to those for which the data were collected with a view to their first publication. Whatever the place in which it is established in the European Union, the operator provides its telephone directory service and/or telephone directory enquiry service within a highly harmonised regulatory framework that makes it possible to ensure observance of the requirements relating to the protection of subscribers' personal data, as is clearly apparent, in particular, from Article 25(5) of the Universal Service Directive and Article 12 of the Directive on privacy and electronic communications.

41. Failing any justification on grounds of protection of subscribers' personal data, such a difference in treatment would directly discriminate between operators pursuing business in the same sector on the basis of their nationality. That would constitute a serious infringement of a general principle of EU law [12] and an impediment to the principle of freedom to provide services [13] guaranteed in Article 56 TFEU as well. [14]

42. In addition, the purpose here is to ensure the full attainment of the objectives pursued in the Universal Service Directive. In Article 25 of that directive, the EU legislature makes no secret of its ambition of managing to guarantee a telephone directory enquiry service that is not only national but also genuinely cross-border in scope, in order to ensure, in accordance with Article 28(1)(b) thereof, that all end-users may have access to all numbers provided in the European Union.

43. While Article 25(2) of the Universal Service Directive should ensure that operators of telephone directory enquiry services have access to foreign subscribers' personal data, Article 25(4) thereof should ensure that end-users have access to telephone directory enquiry services in another Member State. Thus, together these provisions should ensure that all end-users have genuine access to all numbers within the European Union.

44. In the light of the foregoing, I am therefore persuaded, on the one hand, that treating a request differently, when it is made by an operator established in a Member State other than the subscriber's Member State of residence, is incompatible with the wording of Article 25(2) of the Universal Service Directive and of Article 12(2) of the Directive on privacy and electronic communications, when the operator collects subscribers' personal data for purposes absolutely identical to those for which the data was collected with a view to its first publication.

45. In those circumstances, an undertaking such as Tele2, when it has received a request for data to be made available, may not, therefore, require its subscribers' separate specific consent, nor may it tailor, as Vodafone suggests, that consent to the different Member States of the European Union.

11 — Judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279, paragraph 64).

12 — The principle of non-discrimination appears in Article 21(2) of the Charter of Fundamental Rights, which provides that within the scope of application of the Treaties any discrimination on grounds of nationality is prohibited.

13 — In contrast to Vodafone's contentions, the provision of a telephone directory service and/or a telephone directory enquiry service clearly falls within the scope of the Treaty provisions safeguarding the freedom to provide services.

14 — It is settled case-law of the Court that Article 56 TFEU requires the elimination of all discrimination against providers of services on grounds of nationality (judgment of 17 December 2015, *X-Steuerberatungsgesellschaft* (C-342/14, EU:C:2015:827, paragraph 48 and the case-law cited).

46. However, when the subscription contract is signed, that undertaking must ensure, in accordance with the provisions of Article 12(1) of the Directive on privacy and electronic communications, read in the light of recitals 38 and 39 thereof, that subscribers receive clear and precise information on the purpose and different aspects of the processing of their personal data and, in particular, on the possibility of such data being made available to a supplier of telephone directories and/or telephone directory enquiries providing its services in a Member State other than the subscriber's Member State of residence.

47. On the other hand, it is clear in the light of, in particular, the Court's interpretation of those provisions in its judgment of 5 May 2011, *Deutsche Telekom* (C-543/09, EU:C:2011:279), that treating a request differently depending on whether it is made by a national operator or a foreign operator can be justified only if the data concerned is intended to be used for other purposes, for example, where the operator offers a reverse search service allowing the subscriber's identity to be ascertained on the basis of a telephone number.

48. In the present case, having regard to the information appearing on EDA's website, EDA seems to offer such a service. In those circumstances, where the data concerned is indeed intended to be used for purposes other than those for which it was collected with a view to its first publication, Tele2 may, in my opinion, quite legitimately request subscribers' specific consent to such processing of their data.

49. In view of all the considerations set out above, I am therefore of the opinion that, on a proper construction of Article 25(2) of the Universal Service Directive and Article 12 of the Directive on privacy and electronic communications, it is contrary to those provisions for an undertaking that has received a request for its subscribers' personal data to be made available to draw a distinction, when obtaining its subscribers' consent, according to the Member State in which the telephone directory service and/or telephone directory enquiry service is offered, provided, however, that such data is intended to be used for purposes identical to those for which it was collected with a view to its first publication.

50. That undertaking must therefore ensure that, when the subscription contract is signed, subscribers receive clear, precise information on the different aspects of the processing of their data and, in particular, on the supply of such data for the purpose of its publication in a telephone directory or of its use by a telephone directory enquiries service in a Member State other than the subscriber's Member State of residence.

IV – **Conclusion**

51. In the light of the foregoing, I therefore propose that the Court give the following answer to the second question submitted by the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry):

On a proper construction of 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), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, and 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), as amended by Directive 2009/136, it is contrary to those provisions for an undertaking that has received a request for its subscribers' personal data to be made available to draw a distinction, when obtaining its subscribers' consent,

according to the Member State in which the telephone directory service and/or telephone directory enquiry service is offered, provided, however, that such data is intended to be used for purposes identical to those for which it was collected with a view to its first publication.

That undertaking must therefore ensure that, when the subscription contract is signed, subscribers receive clear, precise information on the different aspects of the processing of their data and, in particular, on the supply of such data for the purpose of its publication in a telephone directory or of its use by a telephone directory enquiries service in a Member State other than the subscriber's Member State of residence.