Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 9 June 2022 [1]

Case C-243/21

'TOYA' sp. z o.o.,
Polska Izba Informatyki i Telekomunikacji
v
Prezes Urzędu Komunikacji Elektronicznej,
joined party:
Polska Izba Komunikacji Elektronicznej

(Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland))

(Reference for a preliminary ruling – Telecommunications – Directive 2014/61/EU – Article 3 – Power of the national regulatory authority to impose conditions relating to access to physical infrastructure on an operator not having significant market power – Absence of a dispute relating to access – Article 1(3) – Minimum harmonisation)

I. Introduction

1. This request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) raises two issues about the interpretation of Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. [2] First, when read in the light of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) [3] and of Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [4] does Directive 2014/61 preclude a national regulatory authority from imposing conditions on an electronic communications network provider that does not have significant market power (SMP) on the relevant market? Second, does Directive 2014/61 preclude a national regulatory authority from imposing conditions on telecommunications operators to permit access to their physical infrastructure in the absence of a dispute about such access?

1 Original language: English.

2 Directive of the European Parliament and of the Council of 15 May 2014 (OJ 2014 L 155, p. 1).

3 Directive of the European Parliament and of the Council of 7 March 2002 (OJ 2002 L 108, p. 33), as amended ('the Framework Directive').

4 Directive of the European Parliament and of the Council of 7 March 2002 (OJ 2002 L 108, p. 7), as amended ('the Access Directive').

II. Legal context

A. European Union Law

1. The Framework Directive

2. The preamble of the Framework Directive sets out, inter alia, the following objectives:

'(25) There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. The definition of [SMP] in the 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) […] has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For that reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case-law of the Court of Justice and the [General Court] of the European Communities.

…

(27) It is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem. …'

3. Chapter III of the Framework Directive is entitled 'Tasks of national regulatory authorities'. Article 8 thereof sets out policy objectives and regulatory principles. Article 8(5)(f) provides that national regulatory authorities must impose *ex ante* regulatory obligations only where there is no effective and sustainable competition. Once that condition has been satisfied, they must relax or lift such obligations.

4. Chapter IV of the Framework Directive is headed 'General provisions'. Article 14 defines SMP. Article 16 describes the market analysis procedure that a national regulatory authority must conduct in order to determine whether a relevant market is effectively competitive: where a market is not effectively competitive, the national regulatory authority must identify undertakings with SMP on that market.

2. The Access Directive

5. Under Article 8(2) of the Access Directive:

'Where an operator is designated as having [SMP] on a specific market as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.'

6. The obligations laid down in Articles 9 to 13 of the Access Directive relate to: (i) transparency, including the requirement for an operator to publish a reference offer;[5] (ii) non-discrimination; (iii) accounting separation; (iv) access to, and use of, specific network facilities; and (v) price control and cost accounting.

7. Article 8(3) of the Access Directive provides that, without prejudice to Article 5(1) and Article 6 thereof, and Articles 12 and 13 of the Framework Directive, national regulatory authorities shall not impose the obligations described in Articles 9 to 13 of the Access Directive on operators that have not been designated as having SMP on a specific market.

3. Directive 2014/61

8. The directive's preamble explains its objectives as follows:

'(6) Taking into account the need for action at Union level to provide better broadband coverage, including by reducing the cost of high-speed broadband infrastructure as reflected by the Conclusions of the European Council of 13/14 December 2012, the Communication from the Commission entitled "Single Market Act II" stresses the need for additional efforts in order to achieve quickly the objectives laid down in the Digital Agenda by, inter alia, addressing the high-speed network investment challenge.

(7) The roll-out of high-speed fixed and wireless electronic communications networks across the Union requires substantial investments, a significant proportion of which is represented by the cost of civil engineering works. Limiting some of the cost-intensive civil engineering works would make broadband roll-out more effective.

(8) A major part of those costs can be attributed to inefficiencies in the roll-out process related to the use of existing passive infrastructure (such as ducts, conduits, manholes, cabinets, poles, masts, antenna installations, towers and other supporting constructions), bottlenecks related to coordination of civil works, burdensome administrative permit granting procedures, and bottlenecks concerning in-building deployment of networks, which lead to high financial barriers, in particular in rural areas.

(9) Measures aiming at increasing efficiency in the use of existing infrastructures and at reducing costs and obstacles in carrying out new civil engineering works should provide a substantial contribution to ensuring a fast and extensive deployment of high-speed electronic communications networks while maintaining effective competition, without adversely affecting the safety, security and smooth operation of the existing public infrastructure.

(10) Some Member States have adopted measures intended to reduce the costs of broadband roll-out. However those measures remain scarce and scattered. Scaling up those measures across the Union could significantly contribute to the establishment of a digital single market. Moreover differences in regulatory requirements sometimes prevent cooperation across utilities and may raise barriers to entry for new network operators and new business opportunities, hindering the development of an internal market for use and deployment of physical infrastructures for high-speed electronic communications networks. Finally, the

[5] Article 9(2) and (4) of the Access Directive.

initiatives at Member State level do not always seem to be holistic, whereas it is essential to take action across the whole roll-out process, and across sectors, in order to achieve a coherent and significant impact.

(11) This Directive aims at laying down some minimum rights and obligations applicable across the Union in order to facilitate the roll-out of high-speed electronic communications networks and cross-sector coordination. While ensuring a minimum level playing field, this should be without prejudice to existing best practices and measures adopted at national and local level entailing more detailed provisions and conditions as well as additional measures complementing those rights and obligations, in accordance with the subsidiarity principle.

…

(13) It can be significantly more efficient for electronic communications network operators, in particular new entrants, to re-use existing physical infrastructures, including those of other utilities, in order to roll out electronic communications networks, in particular in areas where no suitable electronic communications network is available or where it may not be economically feasible to build up a new physical infrastructure. Moreover, synergies across sectors may significantly reduce the need for civil works due to the deployment of electronic communications networks and therefore also the social and environmental costs linked to them, such as pollution, nuisances and traffic congestion. Therefore this Directive should apply not only to public communications network providers but to any owner or holder of rights to use, in the latter case without prejudice to any third party's property rights, extensive and ubiquitous physical infrastructures suitable to host electronic communications network elements, such as physical networks for the provision of electricity, gas, water and sewage and drainage systems, heating and transport services.

(14) With a view to improving the deployment of high-speed electronic communications networks in the internal market, this Directive should lay down rights for public communications network providers to access physical infrastructure irrespective of its location under fair and reasonable terms consistent with the normal exercise of property rights. The obligation to give access to the physical infrastructure should be without prejudice to the rights of the owner of the land or of the building in which the infrastructure is located.'

9. Article 1 of Directive 2014/61, entitled 'Subject matter and scope', states:

'1. This Directive aims to facilitate and incentivise the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost.

2. This Directive establishes minimum requirements relating to civil works and physical infrastructure, with a view to approximating certain aspects of the laws, regulations and administrative provisions of the Member States in those areas.

3. Member States may maintain or introduce measures in conformity with Union law which go beyond the minimum requirements established by this Directive with a view to better achieving the aim referred to in paragraph 1.

4. If any provision of this Directive conflicts with a provision of [the Framework Directive], [the Access Directive], Directive 2002/20/EC[6], Directive 2002/22/EC[7] or Directive 2002/77/EC[8], the relevant provision of those Directives shall prevail.'

10. Pursuant to Article 3 of Directive 2014/61:

'1. Member States shall ensure that every network operator has the right to offer to undertakings providing or authorised to provide electronic communications networks access to its physical infrastructure with a view to deploying elements of high-speed electronic communications networks. Reciprocally, Member States may provide for the right of public communications network operators to offer access to their physical infrastructure for the purpose of deploying networks other than electronic communications networks.

2. Member States shall ensure that, upon written request of an undertaking providing or authorised to provide public communications networks, any network operator has the obligation to meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks. Such written request shall specify the elements of the project for which the access is requested, including a specific time frame.

…

5. Member States shall require the national dispute settlement body referred to in paragraph 4 to issue, taking full account of the principle of proportionality, a binding decision to resolve the dispute initiated pursuant to paragraph 4, including the setting of fair and reasonable terms and conditions, including price where appropriate.

The national dispute settlement body shall resolve the dispute, within the shortest possible time frame and in any case within four months from the date of the receipt of the complete request except in exceptional circumstances, without prejudice to the possibility of any party to refer the case to a court.

Where the dispute relates to access to the infrastructure of an electronic communications network provider and the national dispute settlement body is the national regulatory authority, it shall, where appropriate, take into account the objectives set out in Article 8 of [the Framework Directive]. …

…'

11. Article 4(1) of Directive 2014/61 states that undertakings providing public communications networks have the right to access, upon request, minimum information concerning the existing physical infrastructure of any network operator.

[6] Directive 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)

[7] 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)

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

B. Polish law

12. Article 17(1) and (2) of the Ustawa o wspieraniu rozwoju usług i sieci telekomunikacyjnych (Law of 7 May 2010 on support for the development of telecommunications services and networks; 'the Law on support for development'), provides:

'1. The network operator shall provide telecommunications undertakings with access to the physical infrastructure, including the sharing thereof, in order to deploy a high-speed telecommunications network.

2. Access to the physical infrastructure shall be subject to payment, unless the parties to the contract agree otherwise.'

13. Article 18(1) to (3) and (6) to (8) of the Law on support for development provides:

'1. The conditions for access to the physical infrastructure, including the technical, operational and financial conditions of cooperation, shall be determined by the parties in a contract for access to the physical infrastructure, which must be concluded in writing, failing which it shall be null and void.

2. The OEC President[9] may request the network operator to provide information on the conditions for access to the physical infrastructure.

3. After the network operator has presented information on the conditions for access to the physical infrastructure, the OEC President, acting in accordance with the criteria set out in Article 22(1) to (3), may establish, by way of a decision, the conditions for providing access to the physical infrastructure. Article 22(4) shall apply *mutatis mutandis*.

…

6. A network operator to which a decision on the determination of the conditions for access to the physical infrastructure has been issued shall be required to conclude the contracts referred to in paragraph 1 on conditions that are no less favourable than those laid down in that decision.

7. A network operator to which a decision on the determination of the conditions for access to the physical infrastructure has been issued shall publish on its website the current conditions for the provision of that access.

8. A network operator to which a decision on the determination of the conditions of access to the physical infrastructure has been issued shall provide to the OEC President the information on its website address within seven days of the date of publication on the website of the conditions governing the provision of that access. The information relating to the website address shall be made available by the information point on telecommunications in the territory of the Republic of Poland, hereinafter "the information point on telecommunications" …'

[9] Defined in point 15 of the present Opinion.

14. Article 22(1) to (3) of the Law on support for development states:

'1. The OEC President shall issue a decision on access to the physical infrastructure within a period of 60 days from the date of submission of the request for such access, taking particular account of the need to ensure non-discriminatory and proportionate conditions for access.

2. The OEC President shall, when issuing a decision on access to the physical infrastructure of a telecommunications undertaking, ensure that the charges for such access allow for the reimbursement of the costs incurred by that undertaking, having regard, in particular, to the objectives set out in Article 8 of Directive 2002/21 and to the impact of access to the physical infrastructure on the business plan of that telecommunications undertaking, in particular on the investments which it has made in high-speed telecommunications networks.

3. Charges for access to the physical infrastructure of an entity carrying out tasks in the public interest shall be set at an amount that makes possible the reimbursement of part of the costs that the entity incurs in maintaining that infrastructure.'

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

15. Pursuant to Article 17 of the Law on support for development, on 10 May 2017 the Prezes Urzędu Komunikacji Elektronicznej (President of the Office of Electronic Communications, Poland; 'the OEC President') asked TOYA sp. z o.o., a telecommunications company and network operator, to provide information about the conditions for access to its physical infrastructure. On 6 December 2017, the OEC President opened an administrative procedure in order to define the conditions for access to TOYA's physical infrastructure. Between 8 March and 7 April 2018, and between 3 July and 2 August 2018, respectively, the OEC President conducted two separate consultations in the context of that procedure. On 11 September 2018, the OEC President took a decision, pursuant to the national legislation implementing Directive 2014/61, requiring TOYA to be ready to enter into contracts and to accept requests for access to its physical infrastructure ('the contested decision'). On that date, the OEC President adopted six similar decisions with respect to six other telecommunications operators.

16. The contested decision states that its legal basis is, inter alia, Article 18(3) of the Law on support for development, read in conjunction with Article 17 thereof. It defines the conditions for access to TOYA's physical infrastructure with respect to cable ducts (Annex 1) and with respect to telecommunications ducts in buildings (Annex 2). It requires TOYA to ensure that it is ready to conclude framework contracts and specific contracts and to accept enquiries regarding access to physical infrastructure in accordance with the aforementioned conditions for access.

17. The contested decision states that reliance upon Article 17(1) of the Law on support for development as its legal basis is justified to ensure that telecommunications undertakings have access to physical infrastructure, which includes sharing that infrastructure, in order to implement a high-speed telecommunications network. Under the heading of regulatory objectives, the contested decision states that the OEC President took account of a number of strategic documents, including the Digital Agenda referred to in point 34 of the present Opinion and the objectives laid down in Directive 2014/61, in particular those set out in recitals 4 to 9 thereof. The contested decision also states that it will contribute to the harmonisation of the time limits, procedures and market rates associated with making those cable ducts available.

18. The contested decision refers to an objection raised by the PIKE [10] to the effect that there had been a breach of the principle of proportionality in relation to entities with a small market share in respect of which market problems had not been identified. By way of response, the contested decision clarified that the proceedings before the OEC President concerned the resolution of disputes relating to access to cable ducts. As for the conditions under which the OEC President is entitled to issue decisions determining the conditions for access to physical infrastructure, the Law on support for development refers neither to the scale of the infrastructure owned, nor to the number of disputes.

19. The contested decision also refers to the requirements of Article 22(1) and (2) of the Law on support for development according to which the OEC President is to issue a decision with regard to access to physical infrastructure that takes into account the need to ensure that the conditions for access are non-discriminatory and proportionate and to set fees at a level that makes it possible for a telecommunications undertaking to recover the costs incurred in providing such access. This includes taking account of the objectives of Article 8 of the Framework Directive.

20. TOYA challenged the contested decision before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw). TOYA considers that, pursuant to Article 3(2) and (5) and Article 1(4) of Directive 2014/61, as well as recital 12 thereof, read in conjunction with Article 8(2) and (3) of the Access Directive and Article 8(5)(f) of the Framework Directive, a national regulatory authority can require only telecommunications operators with SMP to publish a reference offer within the meaning of Article 9 of the Access Directive. The contested decision is contrary to EU law because no market analysis was undertaken to establish that TOYA has SMP, nor is there any dispute about access to physical infrastructure within the meaning of Article 3(5) of Directive 2014/61.

21. The referring court has doubts about the compatibility with EU law of the provisions of national law upon which the contested decision is based and, in particular, about the interpretation of Directive 2014/61 in the light of the Access Directive. Furthermore, since that directive and the Framework Directive were repealed and replaced by Directive (EU) 2018/1972 establishing the European Electronic Communications Code, [11] the referring court inquires as to which EU directives apply. It therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 8(3) of [the Access Directive], read in conjunction with Article 3(5) and Article 1(3) and (4) of [Directive 2014/61] be interpreted as precluding a national regulatory authority from imposing on an operator which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but has not been designated as having [SMP], the obligation to apply the conditions for access to that operator’s physical infrastructure determined *ex ante* by that authority, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator’s physical infrastructure and the existence of effective competition in the market?

[10] The Polska Izba Komunikacji Elektronicznej w Warszawie (PIKE) (Polish Chamber of Electronic Communications (PIKE), Warsaw, Poland) made observations in the proceedings before the OEC President and supports TOYA in the proceedings before the referring court. The Polska Izba Informatyki i Telekomunikacji (PIIT) (Polish Chamber of Information Technology and Telecommunications (PIIT), Poland) also appealed against the contested decision. Whilst the referring court joined the two appeals, the grounds raised by the PIIT are not relevant to the present reference.

[11] Directive of the European Parliament and of the Council of 11 December 2018 (OJ 2018 L 321, p. 36).

Alternatively (version 2):

(2) Must Article 67(1) and (3) read in conjunction with Article 68(2) and (3) of [Directive 2018/1972], read in conjunction with Article 3(5) and Article 1(3) and (4) of [Directive 2014/61] be interpreted as precluding a national regulatory authority from imposing on an operator which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but has not been designated as having [SMP], the obligation to apply the conditions for access to that operator's physical infrastructure determined *ex ante* by that authority, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator's physical infrastructure and the existence of effective competition in the market?'

22. TOYA, the OEC President, the Greek and the Polish Governments, and the European Commission, filed written observations.

IV. Legal analysis

A. The scope of the reference

23. I have three preliminary observations to make as regards the scope of the reference, the first of which concerns the doubts the referring court entertains as to which of the EU directives applies *ratione temporis*.

24. The contested decision was adopted on 11 September 2018. As the referring court and TOYA point out, it continued to produce effects after Article 125 of Directive 2018/1972, on 21 December 2020, repealed both the Framework Directive and the Access Directive.

25. The Framework Directive and the Access Directive were in force at the time the contested decision was taken. They are therefore relevant in order to assess the compatibility with EU law of the national legal provisions upon which that decision is based. Directive 2018/1972 remains in force as at the date of the present Opinion, and there are no doubts as to its applicability.

26. It follows the Court should answer the first, and not the second, question asked by the referring court.

27. Second, the observations filed by TOYA, the OEC President and the Polish Government include detailed analyses of the contested decision and of its legal basis.[12] However, as TOYA itself recognises, in proceedings under Article 267 TFEU, based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and

[12] TOYA considers that the contested decision has all the hallmarks of a decision addressed to an operator with SMP but that it lacks the characteristics of a decision pertaining to the settlement of an access dispute pursuant to Article 3 of Directive 2014/61. The Polish Government and the OEC President disagree. They point to the fact that the Access Directive and Framework Directive, on the one hand, and Directive 2014/61 on the other, have been transposed into Polish law via two different laws, namely the Ustawa r. prawo telekomunikacyjne (Telecommunications Law of 16 July 2004) and the Law on support for development. There are significant differences under Polish law between reference offers published by operators with SMP pursuant to Article 42 of the Telecommunications Law of 16 July 2004 and decisions on access to physical infrastructure within the meaning of Articles 17 and 18 of the Law on support for development. They are of the view that the contested decision was made in the exercise of powers conferred on the OEC President by Articles 17 and 18 of the Law on support for development, which provisions implement Directive 2014/61.

assess the facts in the case before it and to interpret and to apply national law.[13] It is not for the Court to rule on the nature or characteristics of a national decision or the basis upon which it rests at national law.

28. Third, the Commission's observations explain that the powers of a national regulatory authority to impose *ex ante* conditions on the basis of Directive 2014/61 are subject to respect for certain principles and the observance of certain procedural requirements flowing from that directive, the Framework Directive, the Access Directive and the Charter of Fundamental Rights of the European Union. It does not appear from the order for reference that the referring court asks the Court of Justice to elucidate this issue. Nor have any of the other parties addressed it in their observations. For those reasons, these considerations need not concern the Court.

B. The first question

29. As the introduction indicates, the first question appears to consist of two elements. First, when read together with the Access Directive, does Directive 2014/61 preclude a national regulatory authority from imposing access conditions on an electronic communications network provider that does not have SMP? Second, does Directive 2014/61 preclude a national regulatory authority from imposing such conditions in the absence of a dispute about access to physical infrastructure?

30. TOYA considers that both of those elements ought to receive an affirmative answer.[14] The OEC President, the Greek and Polish Governments and the Commission disagree, but on different grounds. The Greek Government and the Commission rely on a textual and contextual interpretation of the relevant directives. The OEC President and the Polish Government focus their observations on the nature of the contested decision and the legal basis upon which it rests. They seek to rely upon the minimum harmonisation provision in Article 1(3) of Directive 2014/61 in order to justify the legality of the measures imposed on TOYA pursuant to national law.[15]

31. According to the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider the text of the relevant provision, together with its context and the objectives pursued by the rules of which it is part.[16] In this instance I propose to examine first the objectives and context of the three directives under discussion before considering the text of Directive 2014/61.

1. The objectives and context of the relevant directives

32. In 2002, a large number of directives and amending directives were consolidated with the aim of facilitating the development of competitive markets in the field of telecommunications. The Framework Directive made provision for national regulatory authorities to define relevant markets according to competition law principles and to identify operators with SMP upon which certain obligations could be imposed in order to facilitate the development of such competitive markets. Four specific directives were adopted, including the Access Directive regulating access to, and interconnection of, telecommunications networks. Legislation enacted in 2009

[13] Judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 46).

[14] See point 20 in the present Opinion.

[15] See point 23 in the present Opinion.

[16] Judgment of 17 September 2015, *KPN* (C-85/14, EU:C:2015:610, paragraph 33 and the case-law cited).

emphasised the need to encourage investment, innovation and next-generation networks whilst not altering the regulatory objectives and principles contained in the package of directives adopted in 2002.[17]

33. One of the main objectives of the 2002 and 2009 legislative packages was to improve competition by making it easier for national regulatory authorities to impose obligations on operators with SMP. Nevertheless, the Framework Directive and the Access Directive also envisaged the possibility that national regulatory authorities could impose obligations on operators that did not have SMP. Recital 23 of the Framework Directive refers to facility sharing for the benefit of town planning, public health or environmental reasons, if possible by way of voluntary agreements. Article 12 of the Framework Directive, as amended by Directive 2009/140/EC,[18] is entitled 'Co-location and sharing of network elements and associated facilities for providers of electronic communications networks'. It enabled national regulatory authorities to impose a requirement to share facilities, or take measures to coordinate public works, on objective, transparent and non-discriminatory terms, in certain circumstances and subject to conditions. Recourse to Article 12 of the Framework Directive did not require a national regulatory authority to make a prior finding that a telecommunications operator had SMP.[19] Article 5(1) of the Access Directive allowed national regulatory authorities to encourage and to ensure adequate access and interconnection subject to certain conditions, without prejudice to measures that might be taken with respect to undertakings with SMP.[20]

34. In May 2010, the Commission published the European Digital Agenda ('the Digital Agenda') with the aim of delivering sustainable economic and social benefits from a digital single market based on the availability of fast and ultra-fast internet.[21] It considered that, without intervention, there was a risk of a sub-optimal outcome, with fast broadband networks concentrated in a few high-density zones entailing significant entry costs and high prices. This led to the adoption of two initiatives that are relevant in the context of the present reference for preliminary ruling.

35. First, in September 2010, the Commission issued Recommendation 2010/572/EU[22] on regulated access to Next Generation Access Networks. That recommendation primarily covers the remedies imposed upon operators designated as having SMP by way of a market analysis procedure carried out under Article 16 of the Framework Directive. However, where it was justified on the ground that the duplication of infrastructure is economically inefficient or physically impracticable, Member States could also impose obligations to share facilities reciprocally on undertakings that operated an electronic communications network in accordance with Article 12 of the Framework Directive, as appropriate to overcome bottlenecks in the civil engineering infrastructure and terminating segments.

36. Separately, the Digital Agenda proposed that the competent authorities should ensure that public and private civil engineering works systematically provide for broadband networks and in-building wiring, the clearing of rights of way and the mapping of available passive

17 See, for example, Savin, A., *EU Telecommunications Law*, Elgar European Law Series, 2018, Chapters 1 and 2.

18 Directive of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37).

19 By Article 8(3) of the Access Directive, the requirement to impose the obligations set out in Articles 9 to 13 thereof only on those telecommunications operators designated as having SMP is stated to be without prejudice to Article 12 of the Framework Directive.

20 Article 8(3) of the Access Directive, which provides that the requirement to impose the obligations set out in Articles 9 to 13 thereof only on those telecommunications operators designated as having SMP, is also without prejudice to Article 5(1) thereof. See judgments of 12 November 2009, *TeliaSonera Finland* (C-192/08, EU:C:2009:696), and of 17 September 2015, *KPN* (C-85/14, EU:C:2015:610).

21 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, 19 May 2010 (COM(2010) 245 final).

22 OJ 2010 L 251, p. 35.

infrastructure suitable for cabling.[23] That initiative ultimately led to the adoption of Directive 2014/61, which aims to facilitate and incentivise the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost.[24]

2. The text of Directive 2014/61

37. The text of Directive 2014/61 makes it clear that its application is not limited to situations where operators are designated as having SMP or where markets are not effectively competitive. Articles 3 and 4 of Directive 2014/61 address access to and transparency concerning existing physical infrastructure. Energy, water, transport and other utilities network operators, as well as public communications network providers, have the right to offer access to physical infrastructure. There is an obligation, which applies to network operators generally and not just to those designated as having SMP, to meet all reasonable requests for access to physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks.[25] Where access is refused, or agreement cannot be reached on specific terms and conditions, Member States must ensure that either party is able to refer the issue to the competent national dispute settlement body.[26] That body must then take a binding decision to resolve the dispute, setting fair and reasonable terms and conditions for such access, including price where appropriate.[27]

38. Under recital 12 of Directive 2014/61, where more specific regulatory measures apply (*lex specialis*), they should prevail over the minimum rights and obligations for which that directive provides (*lex generalis*). Directive 2014/61 is thus stated to be without prejudice to the regulatory framework in the Framework Directive and in the Access Directive. Recital 17 of Directive 2014/61 states that physical infrastructure access obligations imposed on undertakings designated as having SMP are already covered by specific regulatory obligations and that those obligations are unaffected by Directive 2014/61. Recital 31 refers to the possibility that Member States may, on the basis of Article 12 of the Framework Directive, have already taken measures relating to the co-location and the sharing of network elements and associated facilities.[28]

39. It follows from the foregoing that the objective of Directive 2014/61 is to ensure the availability of high-speed electronic communications networks, considered as the digital infrastructure of tomorrow's society. Directive 2014/61 has cross-sectoral application and has recourse to regulatory mechanisms such as transparency, administrative supervision and dispute resolution for purposes other than the facilitation of competition per se. It establishes a broader right to request and to obtain access to physical infrastructure than exists with respect to operators designated as having SMP pursuant to the Framework Directive and the Access Directive. Since the Framework Directive and the Access Directive also envisage the possibility of imposing access obligations on providers not designated as having SMP, there is no conflict or contradiction between those directives and Directive 2014/61.

[23] See Section 2.4.1 of the Digital Agenda; point 9 of the priority actions set out in Single Market Act II, 'Together for new growth', published by the Commission in October 2012; and recitals 1 to 10 of Directive 2014/61.

[24] Article 1(1) of Directive 2014/61.

[25] Article 3(2) of Directive 2014/61.

[26] Article 3(4) of Directive 2014/61.

[27] Article 3(5) of Directive 2014/61.

[28] See point 33 of the present Opinion. A consideration of the text of Directive 2014/61 in a number of other languages, including Spanish, French, Italian, Dutch, Polish, and Portuguese, leads to the same conclusion.

40. The Access Directive therefore does not preclude a national regulatory authority from imposing conditions for access to physical infrastructure on operators not designated as having SMP. In other words, national regulatory authorities may impose conditions pursuant to Directive 2014/61 in the absence of any finding that the relevant market is not effectively competitive.

41. In addressing the second element of the first question, namely whether Directive 2014/61 precludes a national regulatory authority from imposing conditions in the absence of a dispute about access to physical infrastructure, it is relevant that, according to Article 1(2) thereof, it lays down minimum requirements. Article 1(3) of Directive 2014/61 provides that Member States may maintain or introduce measures in conformity with EU law that go beyond the minimum requirements established thereby with a view to better achieving the aims of facilitating and incentivising the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost. [29]

42. Whilst Directive 2014/61 thus provides that its objectives will be achieved by resolving disputes on the terms and conditions for access, including price, on an *ex post* basis, that is, after such disputes have arisen, national measures adopted with a view to better achieving those objectives, but that go further than those envisaged in Directive 2014/61, are permitted. [30]

43. The Commission considers that the *ex ante* approach envisaged by the national legislation is intended to facilitate the removal of significant barriers to accessing physical infrastructure. The Commission and the Polish Government point out that the *ex ante* and *ex post* approaches both serve to facilitate the achievement of the objectives of Directive 2014/61. In that context it is interesting to observe that, according to the summary report of the public consultation on the evaluation and review of Directive 2014/61, a majority of respondents are of the view that difficulties in agreeing terms and conditions for access with owners of physical infrastructure, and a slow or ineffective dispute resolution process (the *ex post* approach), lead to a more costly and/or lengthy deployment of networks. It is therefore not unreasonable to posit that the *ex ante* approach apparently facilitated by the relevant Polish legislation may, in terms of facilitating the achievement of its intended objectives, have certain advantages over the *ex post* approach described in Directive 2014/61.

44. In my view, if the national court finds that the *ex ante* approach envisaged in the national legislation shares the same objectives as that of the *ex post* approach contained in Directive 2014/61, that national legislation is in principle compatible with that directive.

V. Conclusion

45. I therefore propose that the Court reply as follows to the question posed by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland):

Article 8(3) 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 (Access Directive), read in conjunction with Article 3(5) and Article 1(3) and (4) of Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks,

[29] See, to similar effect, recital 11 of Directive 2014/61.

[30] Article 3(2) to (5) of Directive 2014/61.

does not preclude a national regulatory authority from imposing on an operator which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but has not been designated as having significant market power, the obligation to apply the conditions for access to that operator's physical infrastructure determined *ex ante* by that authority, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator's physical infrastructure and the existence of effective competition in the market.