Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 April 2016*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/22/EC — Article 28 — Non-geographic numbers — Access by end-users residing in the Member State for operators to services using non-geographic numbers — Directive 2002/19/EC — Articles 5, 8 and 13 — Powers and responsibilities of the national regulatory authorities with regard to access and interconnection — Imposition, amendment or withdrawal of obligations — Imposition of obligations on undertakings that control access to end-users — Price control — Undertaking not having significant market power on the market — Directive 2002/21/EC — Resolution of disputes between undertakings — Decision of the national regulatory authority laying down the conditions of cooperation and the pricing procedures for services between undertakings)

In Case C-397/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 15 May 2014, received at the Court on 20 August 2014, in the proceedings

Polkomtel sp. z o.o.

v

Prezes Urzędu Komunikacji Elektronicznej,

intervening parties:

Orange Polska S.A., formerly Telekomunikacja Polska S.A.,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Second Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Polkomtel sp. z o.o., by M. Bieniek and E. Barembruch, radcowie prawni,

* Language of the case: Polish.

— the Prezes Urzędu Komunikacji Elektronicznej, by S. Szabliński, radca prawny,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by J. Hottiaux and L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 28 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), and Articles 5(1) and 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) (OJ 2002 L 108, p. 7).

2 The reference has been made in proceedings between Polkomtel sp. z o.o. ('Polkomtel') and Prezes Urzędu Komunikacji Elektronicznej (President of the Office for Electronic Communications; 'the President of the UKE'), the other party to the proceedings being Orange Polska S.A., formerly Telekomunikacja Polska S.A. ('Orange Polska'), concerning a decision taken by the President of the UKE in proceedings between those undertakings on conditions of cooperation and pricing procedures for non-geographic number access services.

Legal context

European Union law

The new regulatory framework applicable to electronic communications services

3 The new regulatory framework applicable to electronic communications services comprises Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) and the accompanying Specific Directives: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), the Universal Service Directive and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1).

– The Framework Directive

4 Article 8 of the Framework Directive sets out the policy objectives and regulatory principles, observance of which is ensured by the national regulatory authorities ('NRAs'). Article 8(3) and (4) are worded as follows:

'3. The [NRAs] shall contribute to the development of the internal market by inter alia:

...

(b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;

...

4. The [NRAs] shall promote the interests of the citizens of the European Union by inter alia:

...

(b) ensuring a high level of protection for consumers in their dealings with suppliers ...;

...'

5 Article 20 of the Framework Directive, headed 'Dispute resolution between undertakings', provides in paragraph 3:

'In resolving a dispute, the [NRA] shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the [NRA] in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.'

– The Access Directive

6 Article 1 of the Access Directive, headed 'Scope and aim', provides:

'1. Within the framework set out in [the Framework 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.

2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for [NRAs] with regard to access and interconnection ...'

7 Article 5 of the Access Directive, headed 'Powers and responsibilities of the [NRAs] with regard to access and interconnection', provides:

'1. [NRAs] shall, acting in pursuit of the objectives set out in Article 8 of [the Framework Directive], 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, [NRAs] 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;

...

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 [the Framework Directive].

4. With regard to access and interconnection, Member States shall ensure that the [NRA] 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 [the Framework Directive], in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of [the Framework Directive].'

8 Article 8 of the Access Directive, headed 'Imposition, amendment or withdrawal of obligations', provides:

'1. Member States shall ensure that [NRAs] are empowered to impose the obligations identified in Articles 9 to 13.

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

3. Without prejudice to:

— ...

— the provisions of Articles 12 and 13 of [the Framework Directive], Condition 7 in Part B of the Annex to [the Authorisation Directive] as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of [the Universal Service Directive] … containing obligations on undertakings other than those designated as having significant market power …

...

[NRAs] shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2.

...

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of [the Framework Directive]. Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

...'

9 Paragraph 1 of Article 13 of the Access Directive, entitled 'Price control and cost accounting obligations', provides:

'[An NRA] may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. ...'

– The Universal Service Directive

10 The Universal Service Directive states in recital 38 thereof:

‘Access by end-users to all numbering resources in the [European Union] is a vital pre-condition for a single market. It should include freephone, premium rate, and other non-geographic numbers, except where the called subscriber has chosen, for commercial reasons, to limit access from certain geographical areas. ...’

11 Article 1 of that directive, headed ‘Scope and aims’, provides inter alia that its ‘aim is to ensure the availability throughout the [Union] of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market’.

12 Article 2, second paragraph, (f) of that directive contains the following definition:

‘“non-geographic numbers” means a number from the national numbering plan that is not a geographic number. It includes inter alia mobile, freephone and premium rate numbers.’

13 Article 28 of that directive, headed ‘Non-geographic numbers’, provides:

‘Member States shall ensure that end-users from other Member States are able to access non-geographic numbers within their territory where technically and economically feasible, except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas.’

Directive 2009/136/EC

14 Under the heading ‘Amendments to [the Universal Service Directive]’, Article 1 of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ 2009 L 337, p. 11) provides in point 19:

‘Article 28 shall be replaced by the following:

“Article 28

Access to numbers and services

1. Member States shall ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas, relevant national authorities take all necessary steps to ensure that end-users are able to:

(a) access and use services using non-geographic numbers within the [Union]; ...

...”’

15 Under the first subparagraph of Article 4(1) of Directive 2009/136, Member States were to adopt and publish by 25 May 2011 the laws, regulations and administrative provisions necessary to comply with that directive.

Polish law

16 Under Article 27(2) of the Law on telecommunications (ustawa Prawo telekomunikacyjne) of 16 July 2004 (Dz. U. No 171, position 1800), in the version thereof in force on the date of the decision of the President of the UKE of 6 May 2009 ('the Law on telecommunications'):

'If negotiations do not commence, if access to a telecommunications network is refused by the operator required to grant such access, or if the agreement is not concluded within the time limit referred to in paragraph 1, any party may request the President of the UKE to adopt a decision regarding the points in dispute or to define the terms of cooperation.'

17 Article 28(1) of the Law on telecommunications is worded as follows:

'The President of the UKE shall make his decision on the grant of access within 90 days of the date of the submission of the request referred to in Article 27(2), taking account of the following criteria:

(1) the interest of users of the telecommunications networks;

(2) the obligations imposed on telecommunications undertakings;

(3) the promotion of modern telecommunications services;

(4) the nature of existing matters of dispute and the possibility of implementing solutions for technical and economic aspects of telecommunications access, including both those proposed by telecommunications undertakings who are party to negotiations and those liable to be replacement solutions;

(5) the need to ensure:
   (a) the integrity of the network and interoperability of services,
   (b) non-discriminatory conditions of access to telecommunications,
   (c) the development of a competitive market for telecommunications services;

(6) the market power of telecommunications undertakings whose networks are interconnected;

...'

18 Article 79(1) of that law provides:

'The operator of the public telecommunications network shall ensure that end-users of its network and end-users from other Member States, where this is technically and economically feasible, are able to access non-geographic numbers within Polish territory, except where a called subscriber has placed restrictions on calls from end-users located in specific geographical areas.'

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

19 Polkomtel and Orange Polska provide electronic communications networks accessible to the public and electronic communications services to their subscribers. As Polkomtel and Orange Polska did not reach an agreement laying down the conditions for cooperation and rules on payments for services providing users of the network of Polkomtel with access to intelligent network services supplied via the network of Orange Polska on non-geographic numbers, the matter was brought before the President of the UKE for resolution.

20 By decision of 6 May 2009, the President of the UKE settled the dispute inter alia by ordering Polkomtel to ensure that its subscribers would have access to services using non-geographic numbers provided on the Orange Polska network in return for payment of compensation for that service by the latter.

21 In that decision, the President of the UKE also laid down the pricing procedures to be employed between the two undertakings for that access. Taking the view that the same network resources are employed in call origination on Polkomtel's network as in call termination on that same network, he inter alia fixed the charge for originating a call directed to the Orange Polska's network at a level determined by reference to the applicable rate for terminating a call on Polkomtel's network.

22 Polkomtel challenged the decision of the President of the UKE of 6 May 2009 before the Sąd Okręgowy (Regional Court). By judgment of 15 March 2012, that court dismissed the application for annulment of that decision. Polkomtel appealed against the judgment of the Sąd Okręgowy (Regional Court) before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which dismissed the appeal by judgment of 25 January 2013. Polkomtel lodged an appeal on a point of law against that judgment before the Sąd Najwyższy (Supreme Court).

23 The Sąd Najwyższy (Supreme Court) is uncertain, first of all, as to the temporal and material scope of EU law as it applies to the main proceedings. It observes that the decision of the President of the UKE of 6 May 2009 was adopted before the amendment to Article 28 of the Universal Service Directive by Directive 2009/136 and, therefore, the expiry of the time limit for implementing the latter directive in national law. It further observes that Article 28 of the Universal Service Directive, as originally worded, required Member States to ensure that end-users from other Member States were able to access non-geographic numbers on their territory. The national rules applicable to the facts of the main proceedings provided that the obligation to ensure that all end-users were able to access non-geographic numbers on Polish territory. The referring court's question is thus whether those rules could impose a broader obligation than that provided for in the aforesaid article.

24 Secondly, the referring court seeks to know whether an NRA is empowered under Article 5(1) of the Access Directive to impose obligations on operators aimed at implementing Article 28 of the Universal Service Directive. It has doubts in that regard, inter alia due to the obligation to take account of the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter') and whether there is in the present case a conflict between that freedom and the principle of consumer protection laid down in Article 38 of the Charter.

25 Thirdly, the referring court seeks to know whether an NRA is empowered, in circumstances such as those of the main proceedings, to lay down pricing procedures between operators on the basis of Article 8(3) of the Access Directive, read in conjunction with Article 5(1) thereof and Article 28 of the Universal Service Directive. It takes the view that the question arises as to what limits there are on the powers of NRAs to intervene in pricing matters as part of a dispute resolution process between undertakings which do not have significant market power. It is also uncertain as to whether such intervention in the freedom to conduct a business complies with Article 16 of the Charter and whether that intervention may yet be upheld by the objective of safeguarding consumer protection guaranteed by Article 38 of the Charter.

26 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 28 of [the Universal Service Directive], in its initial version, be interpreted as meaning that it is necessary to ensure that not only end-users from other Member States, but also end-users from the Member State of a particular public communications network operator, have access to

non-geographic numbers, with the result that the [NRA's] assessment of whether that obligation has been fulfilled is subject to the requirements arising from the principle of effectiveness of EU law and the principle of interpreting national law in conformity with EU law?

2. If the answer to Question 1 is in the affirmative, must Article 28 of [the Universal Service Directive], read in conjunction with Article 16 of the Charter of Fundamental Rights, be interpreted as meaning that, in order to fulfil the obligation referred to in the first of those provisions, it is possible to use the procedure laid down for national regulatory authorities in Article 5(1) of [the Access Directive]?

3. Must Article 8(3) of [the Access Directive], read in conjunction with Article 28 of [the Universal Service Directive] and Article 16 of the Charter of Fundamental Rights, or Article 8(3) of [the Access Directive], read in conjunction with Article 5(1) of [the Access Directive] and Article 16 of the [Charter], be interpreted as meaning that, in order to ensure that the end-users of a national public communications network operator have access to services using non-geographic numbers supplied on the network of another national operator, the [NRA] may lay down rules governing the payment of operators for call origination by having recourse to the call termination rates set in respect of one of those operators which are cost orientated pursuant to Article 13 of [the Access Directive], where the operator proposed that such a rate be applied during failed negotiations held to fulfil the obligation laid down in Article 4 of [the Access Directive]?'

The questions referred

The first question

27 By its first question, the referring court asks, in essence, whether Article 28 of the Universal Service Directive must be interpreted as meaning that a Member State may provide that an operator of a public electronic communications network must ensure that all end-users are able to access its network in that State and not only end-users of other Member States.

28 The referring court's question arises because, at the time of adoption of the President of the UKE's decision, Article 28 provided only for the obligation for Member States to ensure that end-users of other Member States were able to access non-geographic numbers on their territory, where technically and economically feasible, except where a called subscriber had chosen for commercial reasons to limit access by calling parties located in specific geographical areas, whereas Article 28 of that directive, as amended by Directive 2009/136, henceforth provides in paragraph (1)(a) that 'Member States shall ensure that, where technically and economically feasible … relevant national authorities take all necessary steps to ensure that end-users are able to … access and use services using non-geographic numbers within the [European Union]'.

29 In that connection it must be ascertained whether a national provision such as Article 79(1) of the Law on telecommunications, containing, in essence, a broader obligation than that provided for in Article 28 of the Universal Service Directive, does not undermine the objectives pursued by that directive.

30 It should be observed that recital 38 of that directive makes a general statement to the effect that access by end-users to all existing numbering resources in the European Union, including non-geographic numbers, is a vital pre-condition for a single market.

31 It is also apparent from Article 1 of the Universal Service Directive that, as part of the scheme of the Framework Directive, the Universal Service Directive covers the supply of networks and electronic communications services to end-users. Its aim is to ensure the availability throughout the European Union of good quality publicly available services through effective competition and choice.

32 As regards the objectives of the regulatory framework of which the Universal Service Directive forms a part, the Court observed, in paragraph 29 of the judgment in *Telekomunikacja Polska* (C-522/08, EU:C:2010:135), that although in carrying out their tasks, the NRAs are, in accordance with Article 8(4)(b) of the Framework Directive, required to promote the interests of citizens of the Union by ensuring a high level of protection for consumers, the fact remains that the Framework Directive and the Universal Service Directive do not provide for full harmonisation of consumer-protection aspects.

33 Moreover, guaranteeing users of a Member State access to non-geographic numbers, even in the context of a purely domestic situation, is liable to contribute to the achievement of the internal market, as end-users subscribing with an operator of another Member State have recourse to the call origination services on the network of an operator of that first Member State, in the course of their stay in the first Member State, by virtue of a roaming contract concluded by those operators.

34 It follows that Article 28 of the Universal Service Directive, interpreted in the light of its objectives, does not preclude national legislation, such as that at issue in the main proceedings, which provides for the obligation to ensure that all end-users are able to access non-geographic numbers on national territory.

35 In the light of all the foregoing considerations, the answer to the first question referred is that Article 28 of the Universal Service Directive must be interpreted as meaning that a Member State may provide that an operator of a public electronic communications network must ensure that all end-users are able to access non-geographic numbers on its network in that State and not only those of other Member States.

The second and third questions

Admissibility

36 Polkomtel submits that the third question is inadmissible on the ground that, in the course of its negotiations with Orange Polska, it never made the proposals mentioned by the referring court concerning pricing procedures for the call origination services considered. The third question thus contemplates circumstances which are unrelated to the facts of the main proceedings.

37 It should be borne in mind in that regard that, according to the Court's settled case-law, questions on the interpretation of European Union law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Maatschap T. van Oosterom en A. van Oosterom-Boelhouwer*, C-485/12, EU:C:2014:250, paragraph 31 and the case-law cited).

38 That presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depends (judgment in *Maatschap T. van Oosterom en A. van Oosterom-Boelhouwer*, C-485/12, EU:C:2014:250, paragraph 32 and the case-law cited).

39 In the present case, the question whether Polkomtel made proposals concerning the pricing procedures between it and Orange Polska for the call origination services considered is a question of fact which is not a matter for the Court to determine.

40 Therefore, the third question is admissible.

Substance

41 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 5(1) and 8(3) of the Access Directive, read in conjunction with Article 28 of the Universal Service Directive, must be interpreted as allowing an NRA, when resolving a dispute between two operators, to impose an obligation on one of them to ensure that end-users are able to access services using non-geographic numbers provided on the other's network and to set, on the basis of Article 13 of the Access Directive, pricing procedures between those operators for that access such as those at issue in the main proceedings.

42 In that regard, it must be remembered that, according to Article 1(1) and (2) thereof, the Access Directive fits into the framework set out in the Framework Directive, harmonising the way in which the Member States regulate access to electronic communications networks and associated resources as well as their interconnection. The aim of the Access Directive 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. The Access Directive defines, in particular, the objectives assigned to NRAs as regards access and interconnection.

43 Article 5 of the Access Directive addresses powers and responsibilities of the NRAs with regard to access and interconnection. Article 5(1) provides that, acting in pursuit of the objectives set out in Article 8 of the Framework Directive, NRAs are to encourage and where appropriate ensure, in accordance with the provisions of that 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.

44 The Court has already held in this regard that it follows from the wording of the first subparagraph of Article 5(1) of the Access Directive that the NRAs are responsible for ensuring adequate access and interconnection and also interoperability of services by means which are not exhaustively listed there (see, in relation to that directive, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37), judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 36 and the case-law cited).

45 In that context, in accordance with point (a) of the second subparagraph of Article 5(1) of the Access Directive, and without prejudice to the steps which may be taken with regard to undertakings having significant market power under Article 8 thereof, 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 (see, in relation to that directive, as amended by Directive 2009/140, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 37 and the case-law cited).

46 Article 5(4) of the Access Directive, for its part, provides that, when they intervene at the request of the parties concerned in order to guarantee observance of the objectives laid down in Article 8 of the Framework Directive, NRAs must comply with the provisions of the Access Directive and the procedures provided for in particular in Articles 6, 7 and 20 of the Framework Directive.

47 Moreover, according to Article 20(3) of the Framework Directive, in resolving a dispute, NRAs are to take decisions aimed at achieving the objectives set out in Article 8 thereof. Article 8(3)(b) provides that NRAs are to contribute to the development of the internal market inter alia by encouraging the interoperability of pan-European services, and end-to-end connectivity.

48 Thus, those provisions of the Framework Directive and the Access Directive allow NRAs, in disputes between operators, to adopt measures aimed at ensuring adequate access and interconnection as well as interoperability of services, including decisions requiring operators to ensure that end-users are able to access services using non-geographic numbers provided on another operator's network.

49 Regarding the question whether such measures, when adopted under Article 28 of the Universal Service Directive, may entail tariff obligations, it should be noted that, under Article 8(1) of the Access Directive, Member States must ensure that NRAs are empowered to impose the obligations identified in Articles 9 to 13 of that directive, including the obligations related to price control under Article 13 of that directive. Under Article 8(2) of that directive, where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive, NRAs are required to impose those obligations on that operator (see, in relation to the Universal Service Directive, as amended by Directive 2009/136, and in relation to the Framework Directive and the Access Directive, as amended by Directive 2009/140, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 40).

50 Under Article 8(3) of the Access Directive, without prejudice to certain provisions, including Article 28 of the Universal Service Directive, containing obligations on undertakings other than those designated as having significant market power, the NRAs may impose obligations relating to price control, as defined in particular in Article 13 of the Access Directive, only on operators designated as having significant power, in accordance with Article 8(2) of that directive (see, in relation to the Access Directive, as amended by Directive 2009/140, and the Universal Service Directive, as amended by Directive 2009/136, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 41).

51 Consequently, Article 8(3) of the Access Directive should be interpreted as meaning that, except under certain provisions, including in particular Article 28 of the Universal Service Directive, NRAs may not impose obligations related to price control such as those laid down in Article 13 of the Access Directive on operators which are not designated as having significant power on a given market. Accordingly, in the context of the application of Article 28 of the Universal Service Directive, Article 8(3) of the Access Directive does not preclude the imposition of obligations related to price controls, such as those referred to in Article 13(1) of that directive, on an operator which does not have significant market power on the relevant market under Article 28 of the Universal Service Directive, provided that the conditions for the application of that provision are met (see, to that effect, in relation to the Access Directive, as amended by Directive 2009/140, and the Universal Service Directive, as amended by Directive 2009/136, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 42).

52 It follows that NRAs may, under Article 28 of the Universal Service Directive, impose tariff obligations comparable to those referred to in Article 13(1) of the Access Directive on an operator which does not have significant market power but which controls access to end-users, if such an obligation constitutes a necessary and proportionate measure to ensure that end-users can access services using non-geographic numbers in the European Union (see, in relation to the Access Directive, as amended by Directive 2009/140, and the Universal Service Directive, as amended by Directive 2009/136, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 43).

53 Thus, in disputes between operators, NRAs may, inter alia, impose tariff obligations such as pricing procedures between those operators in order to ensure end-users' access to services using non-geographic numbers provided on the network of one of them, if such obligations are necessary and proportionate, this being a matter for the national court to determine.

54 Furthermore, Article 5(1) and (3) and Article 8(4) of the Access Directive set out the conditions which must be satisfied by the obligations imposed by NRAs on operators providing networks or electronic communication services in accordance with Articles 5(1) and 8 of that directive (see, in relation to that directive, as amended by Directive 2009/140, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 45).

55 Article 5(3) of the Access Directive provides that the obligations and conditions imposed under Article 5(1) must be objective, transparent, proportionate and non-discriminatory, and must be implemented in accordance with the procedures referred to in Articles 6 and 7 of the Framework Directive (see, in relation to the Access Directive and the Framework Directive, as amended by Directive 2009/140, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 46).

56 According to Article 8(4) of the Access Directive, obligations imposed in accordance with that article must be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive, and those obligations may be imposed only following consultation in accordance with Articles 6 and 7 of the Framework Directive (see, in relation to the Access Directive and the Framework Directive, as amended by Directive 2009/140, judgment in *KPN*, C-85/14, EU:C:2015:610, paragraph 47).

57 It is apparent from the foregoing that a measure such as that at issue in the main proceedings, adopted in accordance with Articles 5(1) and 8(3) of the Access Directive, read in conjunction with Article 28 of the Universal Service Directive, in order to ensure that end-users are able to access services using non-geographic numbers provided on another operator's network operator, must also fulfil the conditions referred to in paragraphs 52, 55 and 56 of this judgment.

58 As the referring court seeks to know whether an NRA, in dealing with a dispute between operators, may establish pricing procedures based on call termination rates fixed for one of them according to cost, it should be observed that Article 13 of the Access Directive does not regulate such detailed rules. It is therefore for the NRAs to set those detailed rules whilst ensuring that they fulfil the conditions laid down in Article 8(4) of that directive.

59 The referring court also seeks to know whether, in the light of the freedom to conduct a business guaranteed by Article 16 of the Charter, an NRA may adopt a decision, such as that at issue in the main proceedings, which would take the place of a contract concluded by the operators concerned. It should be observed that the Charter, which entered into force on 1 December 2009, does not apply ratione temporis to the situation at issue in the main proceedings, as the decision of the President of the UKE was adopted on 6 May 2009.

60 According to settled case-law, however, the freedom to pursue a trade or profession, and likewise the right to property, form part of the general principles of European Union law. Those principles are however not absolute, but must be viewed in relation to their societal function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, to that effect, judgment in *Di Lenardo and Dilexport*, C-37/02 and C-38/02, EU:C:2004:443, paragraph 82 and the case-law cited).

61 It is common ground that the decision of the President of the UKE of 6 May 2009 was adopted on the basis of national legislation transposing inter alia the Universal Service Directive and the Access Directive and is in line with an objective that is generally recognised by the European Union, namely access for EU end-users to services using non-geographic numbers. Accordingly, that decision does not disregard the freedom to conduct a business, provided that, as stated above in paragraphs 55 and 56 of this judgment, the obligations imposed in the course of resolving a dispute between the operators concerned were necessary and proportionate, which it is for the referring court to verify.

62 In the light of all the foregoing considerations, the answer to the second and third questions referred is that Articles 5(1) and 8(3) of the Access Directive, read in conjunction with Article 28 of the Universal Service Directive, must be interpreted as allowing an NRA, in resolving a dispute between two operators, to impose on one of them the obligation to ensure that end-users are able to access services using non-geographic numbers provided on the other's network and to set, on the basis of Article 13 of the Access Directive, pricing procedures for that access between those operators such as those at issue in the main proceedings, provided that those obligations are objective, transparent, proportionate, non-discriminatory, based on the nature of the problem identified and justified in the light of the objectives laid down in Article 8 of the Framework Directive, and the procedures provided for in Articles 6 and 7 of that directive have, where applicable, been observed, which it is for the national court to verify.

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 28 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) must be interpreted as meaning that a Member State may provide that an operator of a public electronic communications network must ensure that all end-users are able to access non-geographic numbers on its network in that State and not only those of other Member States.**

2. **Articles 5(1) and 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 28 of Directive 2002/22, must be interpreted as allowing a national regulatory authority, in resolving a dispute between two operators, to impose on one of them the obligation to ensure that end-users are able to access services using non-geographic numbers provided on the other's network and to set, on the basis of Article 13 of Directive 2002/19, pricing procedures for that access between those operators such as those at issue in the main proceedings, provided that those obligations are objective, transparent, proportionate, non-discriminatory, based on the nature of the problem identified and justified in the light of the objectives laid down 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 (Framework Directive), and the procedures provided for in Articles 6 and 7 of that directive have, where applicable, been observed, which it is for the national court to verify.**

[Signatures]