JUDGMENT OF THE COURT

22 December 2016*

(Provision of telecommunications services – Directive 2002/21/EC – Electronic communications network – Electronic communications service – Public communications network)

In Case E-6/16,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Reykjavík District Court (*Héraðsdómur Reykjavíkur*), in a case pending before it between

Fjarskipti hf.

and

The Icelandic Post and Telecom Administration

concerning the interpretation of Article 2 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),

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Fjarskipti hf. ("the Plaintiff"), represented by Reimar Pétursson, Supreme Court Attorney, acting as Counsel;

* Language of the request: Icelandic. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Icelandic Post and Telecom Administration (*Póst- og fjarskiptastofnun*) ("the Defendant"), represented by Ragnar Tómas Árnason, Supreme Court Attorney, acting as Counsel;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler, Maria Moustakali and Clémence Perrin, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Gerald Braun, its Legal Adviser, and Luminiţa Nicolae, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Reimar Pétursson; the Defendant, represented by Ragnar Tómas Árnason; ESA, represented by Clémence Perrin; and the Commission, represented by Gerald Braun, at the hearing on 18 October 2016,

gives the following

Judgment

I Legal background

EEA law

1 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 EEA Supplement 2006 No 30, p. 256) ("the Directive") was incorporated into the Agreement on the European Economic Area ("the EEA Agreement") by Joint Committee Decision No 11/2004 of 6 February 2004 (OJ 2004 L 116, p. 60, and EEA Supplement 2004 No 20, p. 14), and is referred to at point 5cl of Annex XI to the Agreement.

2 Recital 5 in the preamble to the Directive reads:

> *The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: Directive 2002/20/EC ... (Authorisation Directive), Directive 2002/19/EC ... (Access Directive), Directive 2002/22/EC ... (Universal Service Directive), Directive 97/66/EC ... [Directive on Privacy and Telecommunications] (hereinafter referred to as 'the Specific Directives'). It is necessary to separate the regulation of transmission from the regulation of content. This*

framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. … The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.

3 Recital 10 in the preamble to the Directive reads:

The definition of 'information society service' in Article 1 of Directive 98/34/EC … spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.

4 Recital 18 in the preamble to the Directive reads:

The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.

5 Article 1(1) of the Directive reads:

This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

6 Article 2(a), (c) and (d) of the Directive reads:

(a) 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources

which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

(c) 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

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

7 Article 1(1) and Article 2(a) and (d) have been amended by Directive 2009/140/EC (OJ 2009 L 337, p. 37), which has not yet been incorporated into the EEA Agreement.

8 The second subparagraph of Article 8(1) of the Directive reads:

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

National law

9 Article 2(2) of the Electronic Communications Act No 81 of 26 March 2003 (*lög nr. 81/2003 um fjarskipti*) entrusts the Defendant with the task of supervising electronic communications within the jurisdiction of the Icelandic State and supervising the enforcement of the Act.

10 Article 3 of the Electronic Communications Act reads:

For the purposes of this Act the following definitions shall apply:

...

5. Public communications network: an electronic communications network which is used wholly or mainly for the provision of publicly available electronic communications services;

…

13. Electronic communications network: transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical signals, electricity distribution systems, high-voltage lines or other electromagnetic means, including networks for radio and television broadcasting and cable television networks;

...

15. Electronic communications service: a service provided wholly or partially by the conveyance of signals on electronic communications networks, including e-mail services and internet access;

…

II Facts and procedure

11 The Plaintiff operates the web domain vodafone.is, where it advertises its services, goods for sale, and offers its customers access to a special service known as "My Pages," which has been in place since 2004. My Pages includes the service WEB-SMS, according to which the customer may send Short Message Service ("SMS") messages, identified by the customer's mobile telephone number to a recipient's mobile telephone.

12 On My Pages the facility has existed since 2008 to send SMS messages to one or more recipients, store recipients' names in a directory and connect them in groups. From 2010 onwards subscribers have also had the option of storing their message history in My Pages.

13 The Plaintiff's web domain was illegally accessed, that is hacked, on 30 November 2013. Information from thousands of My Pages' users, including the content of SMS messages, user names and passwords, was stolen and published on the internet.

14 At the time of the hacking, the system was set up in a way that each individual subscriber could log in to the My Pages web server on the Plaintiff's web domain via an internet browser using an end device such as a computer or a smart device. The subscriber identified himself with a telephone number and a password to obtain access to his space on My Pages. Next, he chose the telephone number of the recipient and wrote the SMS message. As soon as a subscriber chose to send the SMS message, the web server conveyed signals to software also located on the Plaintiff's web domain. The software subsequently processed the signals from the

message transmission and forwarded them to a database on the web domain for archiving, unless the user chose not to save them in his message history, and to an SMS server in the Plaintiff's mobile telephone system. The SMS server then sent the signals over the mobile telephone network to the recipient's mobile telephone.

15 In December 2013, the Defendant wrote a letter requesting information from the Plaintiff regarding the hacking. In January 2014, the Plaintiff replied, stating that the Electronic Communications Act, and consequently the jurisdiction of the Defendant, did not extend to the Plaintiff's web domain.

16 In March 2014, the Defendant adopted a decision concluding that (a) the transmission system conveying signals from the Plaintiff's web domain to the SMS server was an electronic communications network within the meaning of Article 3(13) of the Electronic Communications Act; (b) the service provided on the Plaintiff's web domain involving the transmission of SMS messages from the Internet to a mobile telephone was an electronic communications service within the meaning of Article 3(15) of the same Act; and (c) the part of the electronic communications network which conveyed signals from the Plaintiff's web domain to the SMS server, granting the Plaintiff's customers access to the My Pages service using their mobile telephone numbers, was part of a public communications network within the meaning of Article 3(5) of the same Act. The Plaintiff's web domain, and the services provided therein, was therefore deemed to be covered by the Electronic Communications Act and to fall within the Defendant's jurisdiction. The decision was not concerned with the actual storage and archiving of the data in the Plaintiff's web domain, as those issues were to be examined in the Defendant's ongoing investigation.

17 The Plaintiff brought a complaint against the decision before the Rulings Committee for Electronic Communications and Postal Affairs (*Úrskurðarnefnd fjarskipta- og póstmála*). On 11 October 2014, the Rulings Committee upheld the Defendant's decision.

18 The Plaintiff subsequently brought an action before Reykjavík District Court, in which it seeks the annulment of the Rulings Committee's ruling. Its claim is based on the submission that both the Defendant and the Rulings Committee have reached an incorrect interpretation of the terms "electronic communications network", "electronic communications service" and "public communications network". In the Plaintiff's view, none of the terms applies to its web domain, which therefore remains outside the scope of the Defendant's jurisdiction.

19 By a letter dated 12 May 2016, registered at the Court as Case E-6/16 on 18 May 2016, Reykjavík District Court requested an Advisory Opinion from the Court. The following questions were submitted:

> 1. *Can point (a) of Article 2 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) be interpreted in such a way that the term*

"electronic communications network" covers the conveyance of signals that are written as an SMS message on users' end device connected via a web browser to the "My Pages" web server in a telecommunications undertaking's web domain, via the public internet and to the PHP script software on the same telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn from the telecommunications undertaking's web domain to an SMS server (SMSC) in its communications system, which then sends them on over a telephone network to the recipient telephone number?

2. *If the answer to Question 1 is in the affirmative, is point (c) of Article 2 of Directive 2002/21/EC to be interpreted in such a way that the term "electronic communications service" covers a service that consists of the conveyance of signals which takes place on a communications network as described in Question 1 when (i) a fee is collected for such a service, and (ii) when no fee is collected for such a service?*

3. *If the answer to Question 2 is in the affirmative, is point (d) of Article 2 of Directive 2002/21/EC to be interpreted in such a way that the term "public communications network" covers the electronic communications service described in Question 2, which is provided on an electronic communications network as described in Question 1, irrespective of whether that service is (i) available to the public, or (ii) available only to all subscribers of the telecommunication undertaking?*

20 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

Introductory remarks

21 According to its Article 1, the Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the EEA. The Directive is a framework directive, supplemented by several specific directives, including 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 (OJ 2002 L 201, p. 37, and EEA Supplement 2005 No 27, p. 147).

22 The case before the national court concerns the question whether the Plaintiff's web domain, and the services provided on that domain, fall within the jurisdiction of the Defendant. It is not concerned with the actual storage and archiving of data

and the request for an advisory opinion does not raise questions concerning the interpretation of Directive 2002/58/EC.

The first question

Observations submitted to the Court

23 The Plaintiff submits that the term "electronic communications network" does not extend to its My Pages service. This service cannot be considered a transmission system, switching or routing equipment or other resource which permits the conveyance of signals by wire, radio, optical or other electromagnetic means. There is no switching or routing performed under the My Pages service and the conveyance of signals only takes place after an SMS submitted by a user has been received by the SMS server. The Plaintiff submits that a plain or narrow textual approach should inform the interpretation of the definitions given in the Directive, as an expansive reading is liable to create unreasonable burdens on telecommunications operators and restrict their operations contrary to the Directive's objective.

24 The Defendant, ESA and the Commission submit that the Plaintiff's web system is part of a transmission system that permits the conveyance of signals and therefore constitutes an electronic communications network.

25 The Defendant submits that the definition of electronic communications network should be interpreted broadly, taking into account its clear wording and the objective of the provision and the Directive as a whole. That objective is to ensure a common regulatory framework independent of transmission type. The definition is intended to cover any kind of conveyance of signals in a transmission system. It should not be interpreted so narrowly as to be limited to electronic communications services that were known when the Directive was adopted. The broad wording allows for this sector's continuous technical development to be taken into account.

26 In the view of the Defendant, the web system in question is part of the Plaintiff's electronic communications network. When a user sends an SMS message on My Pages, the receipt of those signals in the software on the Plaintiff's web domain and their processing in that domain must be considered a conveyance of signals. The software described is necessary to allow for the conveyance of signals, since without it an SMS message would never reach the recipient. The web system and its software simply consist of a new means of providing SMS services compared to the traditional method of sending SMS messages between mobile telephones. It would run counter to the objective of ensuring a common framework if operators were allowed to circumvent the framework by using new technology unknown at the date of the Directive's adoption.

27 ESA submits that the definition of "electronic communications network" refers to transmission systems and, where applicable, equipment and other resources which permit conveyance of signals. An electronic communications network must therefore comprise the physical and/or logical networks and all other parts that are

essential to the transmission of signals. In ESA's view, the transfer from the web server using the software to the SMS server is part of the Plaintiff's network since the transmission of such signals is an essential precondition for the transmission of the SMS messages.

28 The Commission submits that the software used by the Plaintiff could qualify as part of the "switching or routing equipment" of the network. Due to the evolution in technologies, switching no longer takes place manually, but is controlled through software. Modern networks do not operate without software and the latter has become part of the network. Software must be regarded as one of the "other resources" referred to in Article 2(a) of the Directive. The system at issue permits the conveyance of signals from the Plaintiff's web domain to an SMS server and from there onwards to the recipient, thus fulfilling the requirements to constitute an electronic communications network.

Findings of the Court

29 By its first question, the referring court asks, in essence, whether the term "electronic communications network" in Article 2(a) of the Directive encompasses a system allowing for the conveyance of signals written as an SMS message on a user's end device, connected through a web browser, via the internet, to a software on a telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn to an SMS server in the undertaking's communications system, which then conveys them over a network to the recipient telephone number.

30 For such a system to fall under the definition of an electronic communications network, it must constitute a transmission system, switching or routing equipment or other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means pursuant to Article 2(a) of the Directive.

31 Recital 5 in the preamble to the Directive and Article 1 thereof provide that the aim of the Directive is to ensure a single regulatory framework for all transmission networks and services. The exclusion of new technological developments would go against the objective of making the regulatory framework technologically neutral, as expressed in recital 18 and Article 8(1) of the Directive, and unreasonably limit the Directive's effect.

32 It follows that a broad reading may be justified for some of the Directive's terms. This applies in particular to the term "electronic communications network" in Article 2(a) of the Directive. In addition to arguments relating to the objective of achieving a technologically neutral regulatory framework, the wording of Article 2(a) itself speaks in favour of a broad interpretation. In this regard, the inclusion of the term "other resources" shows that the scope is not limited merely to transmission systems and switching or routing equipment, but also any alternative measure permitting the conveyance of signals by wire, radio, optical or other electromagnetic means. Finally, although the provision expressly mentions various

types of systems that are considered to constitute electronic communications networks, the use of the word "including" entails that this list is not exhaustive.

33 In the case at hand, the traditional way of sending SMS messages between two mobile telephones has been replaced by the use of a modern alternative, that uses a software to convey signals from a web domain to the SMS server from which the messages are transmitted onwards through the mobile telephone network to the recipient end device. As argued by the Defendant, ESA and the Commission, software, such as that on the Plaintiff's web domain, is a necessary part of the transmission process. Without this software the SMS messages sent from the Plaintiff's My Pages service would not reach the mobile telephone network. As both the software on the Plaintiff's web domain and the Plaintiff's telephone network are essential for the conveyance of the signals, they appear to form part of a single electronic communications network.

34 The answer to the first question is therefore that the definition in Article 2(a) of the Directive of the term "electronic communications network" must be interpreted as encompassing a system allowing for the conveyance of signals written as an SMS message on a user's end device, connected through a web browser, via the internet, to a software on a telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn to an SMS server in the undertaking's communications system, which then conveys them over a network to the recipient telephone number.

The second question

Observations submitted to the Court

35 The Plaintiff puts forward three reasons why the service in question is not covered by the term "electronic communications service". First, the Directive only includes the service of conveying signals on an electronic communications network. It is not sufficient that signals are conveyed from a web page to an electronic communications network. Second, the definition excludes services exercising editorial control over the content transmitted and therefore cannot cover the Plaintiff's service, as it offers its users full editorial control over the sending and saving of SMS messages. Third, the definition excludes "information society services," as defined in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37, and EEA Supplement 2001 No 3, p. 87). In the view of the Plaintiff, its service is an information society service and consequently excluded from the scope of Article 2(c) of the Directive.

36 In the view of the Defendant, the conveyance of signals takes place on an electronic communications network as the signals are conveyed on the Plaintiff's web domain, which is essential to fulfil the user's request to send an SMS message and therefore forms part of the Plaintiff's network. The service does not entail editorial control over the content, as laid down in the definition, as that control must be

exercised in the present case by the Plaintiff. The fact that users enjoy editorial control over the SMS messages is irrelevant to the assessment of which services fall within the definition. As for the Plaintiff's claim that the service is an information society service, the Defendant submits that information society services are excluded only insofar as they do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

37 On the significance of whether or not a fee is collected for the SMS service, the Defendant contends that it is not decisive whether payment is collected for each individual SMS message sent through the Plaintiff's network. It is common for customers to pay a monthly fee that includes an unlimited number of telephone calls and SMS messages. If that form of payment was regarded not to fulfil the requirement that the service is "normally provided for remuneration", that would also exclude standard SMS messages and telephone calls. Such a conclusion would undermine the effectiveness and completely contradict the objectives of the Directive and of the overall legislative framework for telecommunication in the EEA with regard to consumer and personal data protection.

38 ESA and the Commission submit that there are three constitutive elements of an electronic communications service and that the Plaintiff's service fulfils all three elements.

39 First, the service must normally be provided for remuneration. Such remuneration may be provided either directly by the person receiving the service or indirectly through advertisement or other means of financing (reference is made, *inter alia*, to the judgment in *Jundt*, C-281/06, EU:C:2007:816, paragraph 29). In the view of ESA, it appears beyond doubt that the My Pages SMS service was provided for remuneration as it was available to the Plaintiff's subscribers only. The Commission also points to the possibility for the Plaintiff to recover the costs of the service from the tariffs charged to its subscribers. Both ESA and the Commission emphasise that such services are, however, normally provided for remuneration.

40 Second, the service must consist wholly or mainly in the conveyance of signals. Both ESA and the Commission submit that the Plaintiff is responsible vis-à-vis the end users for the transmission of signals and ensuring that the SMS message is transmitted correctly. The Plaintiff therefore has control over the conveyance of signals, which is the key factor in the assessment of this second criterion (reference is made to the judgment in *UPC DTH*, C-475/12, EU:C:2014:285, paragraphs 43 and 44).

41 Third, services providing or exercising editorial control over content are excluded. ESA and the Commission submit that the conveyance of signals is the main characteristic of the Plaintiff's service, not the provision of content or other ancillary or incidental service elements. The Plaintiff only makes available the means for transmitting the SMS message and does not have editorial control over the content.

Findings of the Court

42 By its second question, the referring court asks in essence, if the first question is answered in the affirmative, whether the term "electronic communications service" in Article 2(c) of the Directive covers the conveyance of signals on that network regardless of whether a fee is collected for the service.

43 Article 2(c) of the Directive includes three criteria for a service to be considered an electronic communications service: (i) the service is normally provided for remuneration, (ii) it consists wholly or mainly in the conveyance of signals on electronic communications networks, and (iii) it does not entail providing or exercising editorial control over content. In addition, information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks, fall outside the scope of Article 2(c).

44 As regards the first criterion, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service (compare the judgment in *Jundt*, cited above, paragraph 29). In that regard, it is not necessary that the service is paid for by those for whom it is performed (compare the judgment in *Bond van Adverteerders*, 352/85, EU:C:1988:196, paragraph 16). Remuneration may therefore be provided indirectly through, *inter alia*, advertising offered on the web domain of a service provider.

45 The Defendant has pointed out that it is common in the electronic communications market for customers to pay a monthly fee that includes an unlimited number of telephone calls and SMS messages. In the context of the present case, the Defendant, ESA and the Commission have argued that the service in question has only been offered to the Plaintiff's subscribers, from whom the Plaintiff receives payment in the form of a monthly fee. In their view, the costs for the service may be covered by these fees and hence it should not be decisive that a payment is not collected for each specific SMS message.

46 The case file does not include information concerning the tariffs applied to the Plaintiff's services or whether advertising on the web domain covers the costs. It is important to note, however, that Article 2(c) of the Directive only requires that the service in question is a service "normally" provided for remuneration. It falls to the referring court to determine whether that is the case in the present proceedings.

47 With regard to the second criterion, that is whether the service consists wholly or mainly in the conveyance of signals on electronic communications networks, Article 2(c) of the Directive contains an express exception for information society services, as defined in Article 1(2) of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. However, recital 10 in the preamble to the Directive makes clear that while the definition of "information society service" in Article 1 of Directive 98/34/EC spans a wide range of economic activities which take place online, a

certain number of these activities are covered by the scope of the Directive because they consist wholly or mainly in the conveyance of signals on electronic communications networks. Therefore, a service considered an information society service may also be considered an electronic communications service under Article 2(c), provided it fulfils the criteria specified.

48 The main feature of the SMS service on the Plaintiff's My Pages web domain appears to be the conveyance of signals from the sender's end device to the end point in the Plaintiff's network. The other elements of the service appear ancillary and mere supplements to the essential element of facilitating the conveyance of SMS messages.

49 The third criterion, that is the exception for editorial control, is based on the need to separate the regulation of transmission from the regulation of content, as stated in recital 5 in the preamble to the Directive. The regulation of content is not covered by the Directive or by the specific supplementary directives that make up the overall regulatory framework for electronic communications network and services.

50 In the assessment of whether the Plaintiff's service falls under the exception, the relevant criterion is whether the Plaintiff provides, or exercises editorial control over, the content of the SMS messages sent from My Pages. It appears that the Plaintiff does not provide or control the content of those SMS messages. Conversely, the Plaintiff appears to provide merely the means for the transmission.

51 Accordingly, the answer to the second question is that the definition in Article 2(c) of the Directive of the term "electronic communications service" encompasses a service that consists in the conveyance of signals taking place on a communications network of the kind described in the first question, irrespective of whether a fee is collected for such a service, provided that the service is normally provided for remuneration.

The third question

Observations submitted to the Court

52 The Plaintiff submits that the term "public communications network" does not apply since the service is neither an electronic communications service nor provided on an electronic communications network. Moreover, it may be doubted whether the service was publicly available as it was only offered to the Plaintiff's customers.

53 The Defendant, ESA and the Commission submit that although the service was only available to the Plaintiff's customers, this does not imply that it is not publicly available, since anyone could choose to become a customer and thereby obtain access to the service.

Findings of the Court

54 By its third question, the referring court in essence asks, if the second question is answered in the affirmative, whether the term "public communications network" in Article 2(d) of the Directive applies irrespective of whether the electronic communications service is available to the public or only available to all subscribers of a telecommunication undertaking.

55 Article 2(d) of the Directive lays down the criteria for an electronic communications network to constitute a public communications network. It must be used wholly or mainly for the provision of publicly available electronic communications services.

56 The Directive does not define publicly available electronic communications services. A service must be considered publicly available when any part of the public may choose to make use of the service offered. The Plaintiff has stated that its My Pages service is available only to its subscribers. In response to this argument, the Court observes that if there is no limit placed on the number of potential subscribers, and nothing in the case file suggests otherwise, then any part of the public may, *de facto*, make use of the service by becoming a subscriber. If that proves to be the case, which is a matter for the referring court to determine, then the service must be considered publicly available.

57 As to the criterion that the network must be used wholly or mainly for the provision of publicly available services, the referring court needs to take into account the extent to which the electronic communications network is used for the provision of publicly available electronic communications services in contrast to other services. It is for the referring court to assess whether the Plaintiff's electronic communications network fulfils this criterion.

58 The answer to the third question is therefore that the definition in Article 2(d) of the Directive of the term "public communications network" must be interpreted as covering a network as described in the first question, used to provide services as described in the second question, irrespective of whether those services are made available only to the subscribers of the particular undertaking, provided that the network is used wholly or mainly for the provision of such publicly available services.

IV Costs

59 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Reykjavík District Court hereby gives the following Advisory Opinion:

1. **The definition in Article 2(a) of Directive 2002/21/EC of the term "electronic communications network" must be interpreted as encompassing a system allowing for the conveyance of signals written as an SMS message on a user's end device, connected through a web browser, via the internet, to the PHP script software on a telecommunications undertaking's web domain, which receives the signals, processes them and conveys them in turn to an SMS server in the undertaking's communications system, which then conveys them over a network to the recipient telephone number.**

2. **The definition in Article 2(c) of Directive 2002/21/EC of the term "electronic communications service" encompasses a service that consists of the conveyance of signals which takes place on a communications network, as described in the first question, irrespective of whether a fee is collected for such a service, provided that the service is normally provided for remuneration.**

3. **The definition in Article 2(d) of Directive 2002/21/EC of the term "public communications network" must be interpreted as covering a network as described in the first question, used to provide services as described in the second question, irrespective of whether those services are made available only to the subscribers of the particular undertaking, provided that the network is used wholly or mainly for the provision of such publicly available services.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 December 2016.

Gunnar Selvik
Registrar

Carl Baudenbacher
President