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PROFESSOR A.A. DASHWOOD

SUPPLEMENTARY OPINION

RE:

TWO FURTHER QUESTIONS CONCERNING THE IMPLICATIONS IN EU LAW OF THE POSSIBLE ADOPTION OF THE "BaK" CHARGING MODEL FOR VOICE CALL TERMINATING SERVICES

Introduction

1. In an earlier Opinion dated 26 February 2010,[1] I advised on certain issues of EU telecommunications law that might arise, were the current charging model in the European Union for voice call terminating services at the wholesale level, which is known as "Calling Party Network Pays" (***CPNP***), to be replaced by a mandated version of the model known as "Bill and Keep" (***BaK***). I am now instructed on behalf of Tele2 AB to consider two additional questions, which I am told have surfaced as a result of a meeting that has taken place with a representative of the European Commission's DG Infosoc.[2]

2. The questions, reformulated to take account of the entry into force of the Treaty of Lisbon, are these:

   (1) Could Bill and Keep be mandated as an obligation under Article 5 of the Access Directive? Put differently, can an obligation according to that Article be mandated even though it will be in conflict with Article 13?

   (2) Could Bill and Keep be mandated in a new directive or regulation according to the Treaty on the Functioning of the European Union (***TFEU***), and in particular Article 114 thereof (ex Article 95 EC) (*cf.* the Roaming Regulation[3]), even though that would also be in conflict with Article 13 of the Access Directive?

The First Question

3. The first question invites me, in effect, to consider whether NRAs would have power to mandate BaK, as the (non-)charging model for voice call terminating services at the

[1] Referred to hereinafter as "my Initial Opinion".

[2] The various acronyms and abbreviations that were adopted for convenience in my Initial Opinion will be used in the paragraphs that follow, without repeating the full citation. I shall not, either, provide OJ references for EU instruments previously cited in that Opinion.

[3] Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming and public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ 2007 L 171/32.

wholesale level, on the basis of Article 5 of the Access Directive, even if this solution would be in conflict with the provisions of Article 13 of the Directive (which I indicated in my answers to the first two questions addressed in my Initial Opinion that it very probably would be).

4. Article 5 is found among the "General Provisions" in Chapter II of the Access Directive. The Article has the heading, "Powers and responsibilities of the national regulatory authorities with regard to access and interconnection". It comprises four paragraphs:

   - Paragraph (1) provides:

     "[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.*[4]

     In particular, without prejudice to measures that may be taken regarding undertakings with [SMP] in accordance with Article 8, NRAs shall be able to impose:

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

     (b) to the extent that it is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member States, obligations to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms".[5]

   - Paragraph (2) specifies that, when imposing obligations on an operator to provide access in accordance with Article 12 of the Directive, NRAs "may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access, in accordance with [EU] law, where necessary to ensure normal operation of the network". Article 17 of the Framework Directive (on standardisation) must be complied with.

[4] Emphasis added.
[5] Namely, application programme interfaces and electronic programme guides.

- Paragraph (3) requires that obligations and conditions imposed pursuant to the two preceding paragraphs be objective, transparent, proportionate and non-discriminatory, and that they be implemented in accordance with the procedures referred to in Articles 6 and 7 of the Framework Directive (on consultation of interested parties and cooperation with the Commission and with other NRAs).

- Paragraph (4) provides:

  *"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 laid down by...[the Framework Directive].*

5. In contrast to Article 13 of the Access Directive, which was the main focus of my Initial Opinion, Article 5 has been directly in issue in cases recently decided by the Court of Justice. It seems likely to me that the first of the questions I am asked to address may have been prompted by misunderstanding within the Commission of the implications of the rulings in those cases.

6. In Case C-227/07 the Commission brought infringement proceedings against Poland under Article 226 EC (post-Lisbon, Article 258 TFEU), claiming that certain elements of the Polish Law on Telecommunications of 2004 were incompatible with Article 4 (1) and Article 5 (1) of the Access Directive.[6] The thrust of the Commission's complaint, so far as concerned the latter provision, was that *all* operators of public communications networks were required under the Polish legislation to negotiate access to their networks, if so requested by another telecommunications undertaking, and that the President of the NRA was empowered to fix a time-limit for such negotiations and, if the parties failed to reach an agreement, to adopt a decision setting the terms of access; this meant that obligations could be imposed by the NRA irrespective of whether the network operator concerned enjoyed SMP.[7] The Second Chamber of the Court of Justice held that the Commission had failed to establish any infringement of Article 5 (1).[8] The Court recalled that Member States are required by Article 8 (1) of the

[6] Case C-227/07, *Commision* v *Poland*, judgment of 13 November 2008.
[7] See the summary of the Commission's complaint in para. 50 of the judgment.
[8] The Court upheld the Commission's first complaint, relating to Article 4 (1) of the Access Directive, on the ground that the obligation to negotiate pursuant to that provision only concerned interconnection, defined by Article 2 (b) of the Directive as "a specific type of access implemented between public network operators"; the Polish legislation went too far, by extending the obligation to requests for other forms of access to networks (see judgment, paras 35 and 36). Moreover, the imposition of a general obligation to negotiate access agreements denied the NRA the opportunity to differentiate between the treatment of operators having SMP

Framework Directive to ensure that, in carrying out their regulatory tasks, NRAs take all reasonable measures which are aimed at achieving the objectives set out in paragraphs (2) to (4) of that Article.[9] The first subparagraph of Article 5 (1) of the Access Directive, the Court said, was "limited to providing for a *general* power for the [NRAs] for the purpose of achieving the objectives of Article 8 of the Framework Directive *in the specific context of access and interconnection*".[10] The "wide powers of intervention" afforded the NRA by the Polish legislation[11] were evidently considered by the Court to be compatible with that "general power". In similar vein, Advocate General Colomer noted: that Article 5 (1) "imposes on regulatory authorities the continuing obligation to analyse the market in order to encourage and ensure adequate access and interconnection, and interoperability of services";[12] that the obligations provided for "in particular" in the second subparagraph of Article 5 (1) "are not laid down in a restrictive manner but rather in a way which allows [NRAs] sufficient latitude to impose them in conditions of efficiency, sustainable competition, and maximum benefit to end-users";[13] that those factors demonstrated that "the powers of the regulatory authorities are not clearly defined";[14] and that, accordingly, "the aims laid down in general terms in Community law" were reflected in the relevant provisions of the Polish legislation.[15]

7. Case C-192/08 was a reference for a preliminary ruling on similar points that had arisen in proceedings relating to action taken by the NRA of Finland under that country's Communications Market Law of 2003.[16] The applicant in the main proceedings, TeliaSonera Finland, a mobile telephone company recognised as not possessing SMP, sought the annulment of a decision by the NRA ordering it to negotiate in good faith an interconnection agreement with the respondent company, iMEZ, a provider of text and multimedia messaging services. It was contended by TeliaSonera that the powers under which the NRA had acted were incompatible with Article 4 (1) of the Access Directive read together with certain recitals in the preamble to the Directive and with its Articles 5 and 8. In the part of the judgment relevant to Article 5 of the Directive,[17] the Second Chamber of the Court of Justice[18] held that an NRA "may require an undertaking which does not have SMP *but which controls access to end users*" to negotiate with an undertaking seeking either interconnection or interoperability of services.[19] The Court

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and other operators, as the second sentence of Article 4 (1) indicated it should be able to do (see judgment, paras 37 to 46).

[9] Judgment, para. 62.

[10] Judgment, para. 65. Emphasis added.

[11] Judgment, para. 66.

[12] Opinion, para. 78.

[13] Opinion, para. 80.

[14] Opinion, para. 83; cited by the Court in the paragraph referred to in footnote 11.

[15] Opinion, para. 85.

[16] Case C-192/08, *TeliaSonera Finland Oyj*, judgment of 12 November 2009.

[17] The bulk of the judgment was concerned with the interpretation of Article 4 (1) of the Access Directive.

[18] Not identically constituted, though again assisted by Advocate General Colomer.

[19] Judgment, para. 62.

observed that it followed from the wording of the first subparagraph of Article 5 (1) that the NRAs "are responsible for ensuring adequate access and interconnection and also interoperability of services *by means which are not exhaustively listed there*".[20] It was emphasised that, "in accordance with point (a) of the second subparagraph of Article 5 (1), [NRAS] 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".[21] The Court noted further that Article 5 (4) of the Access Directive requires that NRAs be empowered to intervene at their own initiative in order to secure the objectives of Article 8 of the Framework Directive, "but without defining or limiting the detailed rules for their intervention".

8. The main lesson to be drawn from those cases concerns the generality of the responsibilities that are imposed on NRAs, and of the corresponding powers that must be conferred upon them by the Member States (respectively, under paragraph (1) and paragraph (4) of the Access Directive) for the purpose of pursuing the objectives of Article 8 of the Framework Directive with regard to access, interconnection and interoperability of services. NRAs' powers of intervention need not, and indeed must not, be confined to controlling the behaviour of undertakings having SMP. They must be exercisable, for example, in a situation like that of Case C-192/08, where the necessity of ensuring end-to-end connectivity, as envisaged under point (a) of the second subparagraph of Article 5 (1), was found to justify imposing an obligation on an undertaking that lacked SMP, while controlling access to end-users. Similarly, it was stressed by the Court and the Advocate General in both cases that the means available to an NRA in reacting appropriately to given circumstances are left undefined by the Article.

9. In my opinion, that lesson is perfectly consistent with the interpretation of Article 5 that results from consideration of its express terms and of its aims, understood in the context of the Access Directive as a whole, including the preamble, and in the wider context of the NRF, in particular that provided by the Framework Directive.[22]

10. As its position in Chapter II of the Access Directive, and its own title, would indicate, Article 5 comprises a general exposition of the supervisory role that NRAs must be equipped to assume and actively pursue, in order to ensure adequate access and interconnection, and interoperability of services. However, in fulfilling that role, NRAs are bound by all the requirements laid down by the Article,[23] in particular the following:

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[20] Judgment, para. 58. Emphasis added.

[21] Judgment, para. 59.

[22] This is the interpretative approach customarily adopted by the Court of Justice and which was applied to the analysis of Article 13 of the Access Directive in my Initial Opinion: see paras 15 to 28.

[23] As recalled by Advocate General Colomer in Case C-192/08: Opinion, para. 113, *in fine*.

- Any intervention must further the policy objectives set out in Article 8 of the Framework Directive (Article 5 (1) an (4).[24]

- Such intervention must be made "in accordance with the provisions of [the Access Directive]".[25]

- It must be made "in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end users".[26]

- It must be "objective, transparent, proportionate and non-discriminatory".[27]

11. Whether those conditions will ever be fulfilled, so as justify an NRA in imposing obligations on an undertaking lacking SMP, other than in one of the instances referred to in the second subparagraph of Article 5 (1), where access to end-users is liable to be impeded, must remain for the time being a matter for speculation. That such an outcome is likely to be rare would seem to be indicated by the "philosophy" that *ex ante* regulation ought, in principle, to be limited to preventing the misuse of SMP,[28] which permeates the Access Directive no less than other elements of the NRF.

12. So far as concerns interventions against undertakings having SMP, the general provisions of Article 5, and the much more detailed, and (for the undertakings concerned) potentially more constraining, provisions of Articles 8 to 13 of the Access Directive, should be read together. That follows from the express requirement found in both paragraph (1) and paragraph (4) of Article 5 that NRAs must exercise their responsibilities and powers "in accordance with the provisions of this Directive"; and further confirmation is provided by the reference in paragraph (2) to obligations as to access imposed pursuant to Article 12 of the Directive. Thus Articles 9 to 13 complement Article 5 by spelling out the means available to NRAs for dealing with undertakings having SMP; with respect to such undertakings, the broad criteria of Article 5 itself are not redundant, however, since they provide guidance as to when and how those means should be deployed in concrete situations. Whether there are measures not provided for by Articles 9 to 13 that could perhaps be invoked against undertakings having SMP on the basis of Article 5 alone is another question that remains speculative. What seems incontrovertible is that measures cannot be taken under Article 5 as an alternative to, or in substitution for, the implementation of the obligations defined by Articles 9 to 13, in circumstances where the latter apply. Nor

[24] See paras (1) and (4).
[25] *Ibid.*
[26] See para. (1).
[27] See para. (3).
[28] See Initial Opinion, para. 19.

does the reasoning of the Court of Justice or of its Advocate General in the two cases considered above provide any warrant for such measures.

13. In the result, I am satisfied that, if I was right in the answers given to the first two questions in my Initial Opinion, that the imposition of a BaK regime in substitution for CPNP would be incompatible with Article 13 of the Access Directive, it would not be legally permissible for BaK to be mandated as an obligation under Article 5 of the Directive.

14. As a footnote, it may be useful briefly to consider the possible implications for this Opinion of a judgment that was rendered by the Third Chamber of the Court of Justice as recently as 11 March 2010. Case C-522/08 was a reference for a preliminary ruling that arose out of an attempt by a network operator to make the conclusion of a contract for the provision of broadband internet access services contingent upon the conclusion by the end-user of a contract for telephone services. This was found by the President of the Polish NRA to be in breach of a provision (of the same Law on Telecommunications that was in issue in Case C-277/07) imposing a general prohibition against the linking of a contract for the provision of telecommunications services to the purchase of other services. The issue for the Court of Justice was whether a prohibition which applied irrespective of the service provider's competitive position was compatible with the provisions of the Framework Directive on market definition and analysis,[29] and with a provision of the Universal Service Directive[30] on the power of NRAs to impose a requirement that undertakings designated as having SMP do not, among other things, "unreasonably bundle services".[31] The Court held that there was no incompatibility, for two reasons: first, because the generality of a provision like the one in issue would not prevent the NRA from carrying out an analysis of the relevant market and going on to impose, pursuant to Article 17 of the Universal Service Directive, regulatory obligations *ex ante* upon undertakings found to possess SMP;[32] and, secondly, because "[a]lthough, 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]

15. I am not certain how easily that ruling can be reconciled with the "philosophy" underlying the NRF, recalled in paragraph 11, above, which would tend to militate

[29] Articles 16 and 17.
[30] Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ 2002 L 108/51.
[31] *Ibid.*, Article 17 (2).
[32] Judgment, para. 28.
[33] Judgment, para. 29. Emphasis added.

against intervention by an NRA in circumstances where it has not been found that the discipline of effective competition on the relevant market is insufficient. Nor is the Court's understanding of the scope of the Member States' residual powers in the area of telecommunications law at all clear. Was it, for instance, crucial that the national provision in issue in Case C-522/08 was a consumer-protection measure, specifically designed for the benefit of end-users? The trouble with that possible explanation is the imprecision of the notion of protecting consumers, since end-users may be seen as indirect beneficiaries of measures operative at the wholesale stage (such as price control termination charges).

16. At all events, I do not regard the decision in Case C-522/08 as opening up the possibility for a Member State to mandate BaK under national powers. The Court found expressly in that case that the powers exercisable by NRAs, pursuant to the Framework Directive and the Universal Service Directive, in relation to undertakings having SMP, were unaffected by the disputed Polish provision. On the other hand, mandated Bak would be incompatible with NRAs' powers under Article 13 of the Access Directive (assuming, once again, that my understanding of that Article is correct).

The Second Question

17. The second question asks whether BaK could be mandated in a new directive or regulation based on Article 114 TFEU (ex Article 95 EC), even though this would also be in conflict with Article 13 of the Access Directive, taking the Roaming Regulation as a possible model.

18. I wrote in my Initial Opinion that it could not seriously be contended that mandating BaK would infringe the terminating operator's fundamental right to the use and enjoyment of his property, or his right freely to pursue trade or professional activities, especially if there were ways of recouping termination costs otherwise than by a charge imposed on the originating operator,[34] and that remains my clear view. Private economic rights are never absolute. There is ample authority that such rights are liable to be outweighed by important public interest objectives;[35] such as the advantage BaK might bring, if what is claimed by the ERG were true, that it would eliminate the competition problems associated with the so-called "termination bottleneck", while reducing regulatory costs and uncertainty.[36] I do not, therefore, believe that a fundamental rights objection could successfully be mounted against a proposal for a directive (or regulation) on the compulsory introduction of BaK.

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[34] Initial opinion, para. 18.
[35] The leading case is *Hauer*, cited in footnote 27 of my Initial Opinion.
[36] ERG Draft, para. 5.1.3, pp. 29 to 30.

19. I also consider that it would be possible, using arguments similar to those in the ERG Draft, to justify the choice of Article 114 TFEU as the legal basis for a measure that could plausibly be presented as contributing to the establishment of a competitive telecommunications market.

20. It would be immaterial that such a measure was in conflict with Article 13 of the Access Directive since, as between provisions having the same (secondary) status in EU Law, the one that is later and/or more specific takes precedence, provided that it is intended to replace or limit the earlier and/or more general provision (which would be the case here).[37]

21. As suggested in my Instructions, the Roaming Regulation provides a precedent. It was explicitly recognised in the preamble to the Regulation that the mechanism for *ex ante* regulatory intervention under the NRF of 2002 had not proved sufficient to deal with the problem of excessive charges for international roaming services,[38] and that this called for a departure from the normal rule "that prices for service offerings should be determined by commercial agreement in the absence of [SMP]".[39] The Framework Directive was, accordingly, amended, through the insertion into Article 1 of a paragraph (5) in the following terms:

    "This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile telephone networks within the Community".[40]

    A similar solution could be found to cure any possible conflict between an instrument mandating BaK and Article 13 of the Access Directive.

22. My answer to the second question is, therefore, that there would be no legal impediment to the adoption of a new directive or regulation mandating BaK on the basis of Article 114 TFEU.

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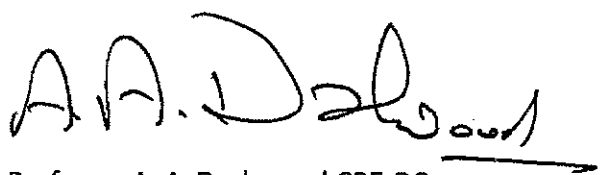
[37] See Lenaerts & Van Nuffel, *Constitutional Law of the European Union* (2nd ed.), para. 17-054 and the authorities cited in footnote 190.
[38] Recital (9).
[39] Recital (12).
[40] Roaming Regulation, Article 10.

Summary of advice

23. My answers to the two additional questions that have been put to me are as follows:

(1) If I was right in the answers given to the first two questions in my Initial Opinion, that the imposition of a BaK regime in substitution for CPNP would be incompatible with Article 13 of the Access Directive, it would not be legally permissible for BaK to be mandated as an obligation under Article 5 of the Directive.

(2) There would be no legal impediment to the adoption of a new directive or regulation mandating BaK on the basis of Article 114 TFEU.



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8 April 2010

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SUPPLEMENTARY OPINION

RE:

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