

Court of Justice EU, 5 June 2019, Skype v IBPT



ELECTRONIC COMMUNICATIONS SERVICE

Offering a VoIP-service constitutes an electronic communications service within the meaning of article 2(c) of the Framework Directive when the software publisher is remunerated for the provision of that service and the provision of that service involves the conclusion of agreements between that software publisher and telecommunications service that are authorised to send and terminate calls to the PSTN

• In the light of the foregoing, the answer to the questions referred is that Article 2(c) of the Framework Directive must be interpreted as meaning that the provision, by a software publisher, of a feature offering a VoIP service which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the PSTN of a Member State constitutes an ‘electronic communications service’ within the meaning of that provision, provided that, first, the software publisher is remunerated for the provision of that service, and, second, the provision of that service involves the conclusion of agreements between that software publisher and telecommunications service providers that are duly authorised to send and terminate calls to the PSTN.

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Court of Justice EU, 5 June 2019

(M. Vilaras (rapp.), K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra)

JUDGMENT OF THE COURT (Fourth Chamber)

5 June 2019 (*)

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/21/EC — Article 2(c) — Notion of ‘electronic communications service’ — Transmission of signals — Voice over Internet Protocol (VoIP) service to fixed or mobile telephone numbers — SkypeOut service)

In Case C-142/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d’appel de Bruxelles (Court of Appeal, Brussels, Belgium), made by decision of 7 February 2018, received at the Court on 23 February 2018, in the proceedings

Skype Communications Sàrl

v

Institut belge des services postaux et des télécommunications (IBPT),

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Skype Communications Sàrl, by E. Valgaeren, advocaat, and by C. Evrard and D. Gillet, avocates,
– the Belgian Government, by C. Pochet, P. Cottin and J.-C. Halleux, acting as Agents, and by S. Depré, P. Vernet and M. Lambert de Rouvroit, avocats,
– the German Government, by T. Henze and S. Eisenberg, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and P. Huurink, acting as Agents,

– the Romanian Government, by C.-R. Caññar, O.-C. Ichim and R. -I. Hațieganu, acting as Agents,

– the European Commission, by J. Hottiaux, L. Nicolae and G. Braun, acting as Agents,

having decided, after hearing the views of 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 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), 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) (‘the Framework Directive’).

2 The request has been made in proceedings between Skype Communications Sàrl and the Institut belge des services postaux et des télécommunications (IBPT) (Belgian Institute of Postal Services and Telecommunications) (‘the IBPT’) concerning the latter’s decision to impose an administrative fine on Skype Communications for providing an electronic communications service without first having given the required notification.

Legal context**EU law**

3 Recital 10 of the Framework Directive states as follows:

‘The definition of “information society service” 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 and of rules of information society services [(OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18)] spans a wide range of economic activities which take place online. 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 Article 2(c) of the Framework Directive provides:

'For the purposes of this Directive:

...

(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], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.'

5 Article 8 of the Framework Directive, entitled 'Policy objectives and regulatory principles', provides:

'1. Member States shall ensure that, in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Unless otherwise provided for in Article 9 regarding radio frequencies, Member States shall take the utmost account of the desirability of making regulations technologically neutral and 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 do likewise.

...

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:

...

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content;

...

4. The national regulatory authorities 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, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

(c) contributing to ensuring a high level of protection of personal data and privacy;

...

Belgian law

6 Article 2(5) of the loi du 13 juin 2005 relative aux communications électroniques (Law of 13 June 2005 on electronic communications) (Moniteur belge, 20 June 2005, p. 28070), in the version applicable to the dispute in the main proceedings ('the LCE'), provides:

'For the purposes of this law:

...

5° "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance, including switching and routing operations, of signals on electronic communications networks, with the exception (a) of services consisting of content provision (using networks and electronic communications services) or of exercising editorial control over that content, (b) of information society services, as defined in Article 2 of the loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information [(Law of 11 March 2003 on certain legal aspects of information society services)] [(Moniteur belge, 17 March 2003, p. 12962)], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks, and (c) of broadcasting services, including television.'

7 Article 9(1) of the LCE provides:

'The provision or resale in one's own name and on one's own behalf of electronic communications services or networks may start, without prejudice to the provisions of Article 39, only after notification to the [IBPT] of:

1 the name, address, [value added tax (VAT)] number and business registration number of the provider or a similar identification number legitimately aggregating that information;

2 the contact person with the [IBPT];

3 a brief and precise description of his service or network;

4 the date on which the activities are expected to start.

Notification shall be made by registered post.'

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

8 The company Skype Communications is the publisher of the communication software 'Skype', which allows users who have installed that software on a terminal, namely a computer, a tablet or even a smart phone, to enjoy a device-to-device voice-telephony and teleconference service. SkypeOut is an additional feature of the Skype software which allows users to

make calls from a terminal to a fixed or mobile telephone line using the Internet Protocol (IP) and, more specifically, the technique called 'Voice over IP' (VoIP). SkypeOut does not, however, allow users to receive calls from those using Belgian telephone numbers.

9 The service provided by SkypeOut is an 'over the top' service — a service available on the internet without the involvement of a traditional communications operator.

10 The SkypeOut service is available to users under two pricing arrangements: either under prepayment terms or under various subscriptions that entitle the user to a certain volume of phone calls per month for a recurring price.

11 Technically, the use of SkypeOut requires an internet connection provided by an internet service provider ('ISP') and the involvement of telecommunications service providers duly authorised to send and terminate calls to the public switched telephone network (PSTN), with which Skype Communications has entered into agreements and whose involvement is paid for by the latter in the form of a fixed termination rate (FTR) or a mobile termination rate (MTR).

12 By letters of 11 May and 9 August 2011, the IBPT requested that Skype Communications notify it of its services in accordance with Article 9(1) of the LCE, and enclosed the notification form with its correspondence.

13 On 24 August 2011, Skype Communications replied that it did not carry out any activities in Belgium and that, in any event, it did not provide any electronic communications services, as defined by the Framework Directive, since it did not transmit any signals itself. It stated, moreover, that, in respect of the SkypeOut feature, it used international operators which sent the signals themselves.

14 On 14 August 2013, the IBPT once again wrote to Skype Communications, stating that it had failed to comply with its notification obligation in regard to the SkypeOut service. The IBPT argued that SkypeOut was indeed part of an '*electronic communications service*' within the meaning of Article 2(5) of the LCE. First, the fact that a numbering plan was used revealed that the service was more than a web application and was not covered by the content exception referred to in the definition of an electronic communications service. Second, the fact that Skype Communications did not transmit signals over electronic communications networks did not prevent it from in fact offering such services. Lastly, the SkypeOut service was aimed at users resident in Belgium.

15 On 13 December 2013, Skype Communications contested the IBPT's position, arguing that it had not been allocated numbers from the Belgian numbering plan. The fact that the communications terminated in numbers that formed part of the Belgian numbering plan could not reasonably be understood as conferring the status of electronic communications service. Any other interpretation would, it argued, imply that every

telecommunications operator in the world was subject to the Belgian system of notification of electronic communications services, even if it used a third-party operator duly authorised to terminate calls in numbers from the Belgian numbering plan.

16 On 23 December 2014, the IBPT informed Skype Communications of its concerns regarding non-compliance with Article 9(1) of the LCE and of the measures which it proposed to take.

17 On 1 June 2016, after several exchanges and hearings, the IBPT sent Skype Communications its final decision, adopted on 30 May 2016, by which it found that, by providing an electronic communications service without the required notification, Skype Communications had failed to comply with Article 9(1) of the LCE. It ordered the company to remedy its infringement within a period not exceeding one month and imposed on it a fine of EUR 223 454, payable within 60 days.

18 On 29 July 2016, Skype Communications brought an action before the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) for annulment of the IBPT's decision of 30 May 2016. It also asked that court, inter alia, to rule that SkypeOut was not an electronic communications service and that the company was not, therefore, a provider of electronic communications services. In the alternative, it asked that court to refer a question to the Court of Justice for a preliminary ruling.

19 On 9 October 2017, Microsoft Ireland Operations, which, like Skype Communications, is part of the Microsoft Group, notified to the IBPT, on the basis of Article 9 of the LCE, a service called 'PSTN Calling', which also allows calls to be placed from a computer with an internet connection to PSTN numbers. According to Skype Communications, there are important technical differences between the PSTN Calling service and SkypeOut which justify the former's notification as an electronic communications service.

20 In its request for a preliminary ruling, the referring court states that, contrary to what Skype Communications claims, that company does offer a service to Belgian residents, with the result that the SkypeOut service is indeed offered in Belgium. It states, in addition, that the parties to the main proceedings disagree over whether the service provided by SkypeOut consists wholly or mainly in the transmission of signals on electronic communications networks. It notes, in this regard, that the Court ruled, in its judgment of 30 April 2014, UPC DTH (C-475/12, EU:C:2014:285, paragraph 43), that 'the fact that the transmission of signals is by means of an infrastructure that does not belong to [the applicant] is of no relevance to the classification of the nature of the service. All that matters in that regard is that [the applicant] is responsible vis-à-vis the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed'.

21 In those circumstances, the cour d'appel de Bruxelles (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the definition of an electronic communications service laid down in [Article 2(c) of the Framework Directive] be understood to mean that a voice-over IP service, made available via software, terminated on a public switched telephone network, to a fixed or mobile number covered by an (E.164) national numbering plan must be regarded as an electronic communications service, notwithstanding the fact that the internet service by means of which a user accesses that voice-over IP service already itself constitutes an electronic communications service, but where the provider of the software makes available that service for remuneration and enters into agreements with telecommunications service providers duly authorised to send and terminate calls to the public switched telephone network which allow the termination of calls to a fixed or mobile number covered by a national numbering plan?

(2) If the answer to Question 1 is yes, does the answer remain the same if account is taken of the fact that the software functionality which makes it possible to make voice calls is merely a feature of the software, which can be used without that feature?

(3) If the answer to Questions 1 and 2 is yes, does the answer to Question 1 remain the same if account is taken of the fact that the service provider provides in its general terms that it does not accept any responsibility to the end-user for the conveyance of signals?

(4) If the answer to Questions 1, 2 and 3 is yes, does the answer to Question 1 remain the same if account is taken of the fact that the service provided also satisfies the definition of "information society service"?'

Consideration of the questions referred

22 By its four questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(c) of the Framework Directive must be interpreted as meaning that the provision by a software publisher of a feature offering a VoIP service, which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the PSTN of a Member State, must be classified as an 'electronic communications service' within the meaning of that provision, provided that, first, the software publisher is remunerated for providing that service, and, second, the provision of that service involves the conclusion of agreements between the software publisher and telecommunications service providers that are duly authorised to send and terminate calls to the PSTN.

23 In that regard, the referring court is unsure whether the service must be classified as such despite the fact that (i) the internet service by which the user accesses the VoIP service is itself an electronic communications service, (ii) that VoIP service is offered by means of an additional feature to software which can be used without that additional feature, (iii) the provider of the service states in its general terms that it does not accept

any responsibility for the transmission of signals to the end-user, and (iv) the service provided also comes within the definition of an 'information society service'.

24 It should be borne in mind, first of all, that an 'electronic communications service' is defined, in positive and negative terms, in Article 2(c) of the Framework Directive, and that that definition is reproduced in equivalent terms in Article 1(3) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) (judgment of 7 November 2013, UPC Nederland, C-518/11, EU:C:2013:709, paragraphs 36 and 37).

25 Article 2(c) of the Framework Directive, first, defines an electronic communications service as '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'.

26 That same provision states, second, that the notion of 'electronic communications service' excludes, on the one hand, 'services providing, or exercising editorial control over, content transmitted using electronic communications networks and services' and does not include, on the other hand, 'information society services, as defined in Article 1 of [Directive 98/34], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks'.

27 In that connection, recital 5 of the Framework Directive states, inter alia, that the convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework and that, in setting up that framework, it is necessary to separate the regulation of transmission from the regulation of content.

28 As the Court has already held, the various directives forming the new Electronic Communications Services regulatory framework, in particular the Framework Directive and Directive 2002/77, draw a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Content and transmission are covered by different measures which pursue their own specific objectives (see, to that effect, judgments of 7 November 2013, UPC Nederland, C-518/11, EU:C:2013:709, paragraph 41, and of 30 April 2014, UPC DTH, C-475/12, EU:C:2014:285, paragraph 36).

29 The Court has also ruled that, in order to come within the definition of an 'electronic communications service', a service must include the conveyance of signals, and the fact that the transmission of signals is by means of an infrastructure that does not belong to the service provider is of no relevance to the classification of the nature of the service, since all that matters in that regard is that that provider is responsible

vis-à-vis the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed (judgment of 30 April 2014, UPC DTH, C-475/12, EU:C:2014:285, paragraph 43).

30 In the present case, it is apparent from the order for reference and from the written observations submitted to the Court that Skype Communications, the publisher of the Skype software, offers an additional feature to that software (SkypeOut), which allows users to call a fixed or mobile number on the PSTN from a device connected to the internet, such as a computer, a smart phone or a tablet, using the IP and, more specifically, VoIP technology.

31 It is common ground that Skype Communications offers the VoIP service in Belgium and receives remuneration from its users — use of SkypeOut being subject to prepayment or subscription.

32 It is also common ground that use of SkypeOut requires the involvement of telecommunications service providers authorised to send and terminate calls to fixed or mobile telephone numbers via the PSTN and that Skype Communications concludes agreements to that effect with the latter, to which it pays remuneration in the form of a fixed termination rate (FTR) or a mobile termination rate (MTR).

33 It follows, first, that the SkypeOut feature principally consists in transmitting voice signals sent by the user making the call to the user receiving the call on electronic communications networks — namely the internet to begin with, then the PSTN — and, second, that Skype Communications must be regarded as assuming responsibility vis-à-vis the users of the SkypeOut feature, who have subscribed to that service or have prepaid their use of it, for the transmission of voice signals on the PSTN, within the meaning of the judgment of 30 April 2014, UPC DTH (C-475/12, EU:C:2014:285, paragraph 43).

34 Although it is true, at the technical level, that the transmission of the voice calls made through SkypeOut is in practical terms carried out, first, by the ISPs on the internet, the first segment going from the internet connection of the user making the call to the Gateway between the internet and the PSTN and, second, by the telecommunications service providers on the PSTN, the second segment going from that Gateway to the mobile or fixed connection point of the user receiving the call, the fact remains that such transmission occurs pursuant to agreements between Skype Communications and those telecommunications service providers and that it could not be made without the conclusion of such agreements.

35 As the Belgian, German, Netherlands and Romanian Governments and the European Commission have, in essence, submitted, it is Skype Communications which, by entering into interconnection agreements with providers of telecommunications services on the PSTN, makes the transmission of signals from the internet network to the PSTN technically possible and ultimately guarantees to its clients and subscribers the

VoIP service offered by means of the SkypeOut feature of its Skype software.

36 The various factors set out by the referring court in its four questions are not such as to cast any doubt on the classification of the SkypeOut feature as an ‘electronic communications service’ within the meaning of Article 2(c) of the Framework Directive.

37 First, the fact that users of the SkypeOut feature access the VoIP service by using an internet access service provided by an ISP, which in itself constitutes an electronic communications service, does not imply that that VoIP service cannot as such itself be classified as an ‘electronic communications service’.

38 As the referring court, the Belgian Government and the Commission have stated, the VoIP service involves, in fact, two distinct electronic communications services, the first consisting in the transmission of the voice signals from the user making the call to the Gateway between the internet and the PSTN, which is the responsibility of the ISP of the user making the call, and the second consisting in the transmission of those signals on the PSTN to the fixed or mobile termination point, which is the joint responsibility of the telecommunications services providers of the person receiving the call and Skype Communications, by virtue of the contracts linking them.

39 It should be noted in this latter regard that, although, as the Belgian Government has noted, the services provided by the telecommunications providers terminating the mobile or fixed calls on the PSTN constitute electronic communications services, those providers cannot for that reason be considered responsible for the transmission of voice signals by users of the SkypeOut feature within the meaning of the Court’s case-law, since those providers have no contractual relationship with those users.

40 Therefore, although those providers are contractually liable to Skype Communications for the transmission of voice signals broadcast by means of SkypeOut on the PSTN, it is, however, Skype Communications which is responsible for the VoIP service which it provides to its clients and subscribers in return for payment.

41 Second, the fact that SkypeOut is merely a feature of the Skype software, which can be used without that feature, cannot have any bearing on whether or not the VoIP service provided by Skype Communications is to be classified as an electronic communications service.

42 It is true, as Skype Communications argues, that the Skype software provides a bundle of services, which are not at issue in the main proceedings, including, on the one hand, a service allowing users to make free audio and/or video calls between terminal equipment connected to the internet and, on the other hand, a number of services such as screen-sharing services, instant text messaging, file sharing and simultaneous translation, which cannot be classified as ‘electronic communications services’ as they do not consist wholly or mainly in the conveyance of signals.

43 However, although the installation of the SkypeOut feature on a terminal requires the prior installation of

the Skype software, the fact remains, as the Belgian, German, Netherlands and Romanian Governments have noted, that the services offered, respectively, by the Skype Software itself and by its SkypeOut feature appear clearly distinct in their purpose and remain entirely autonomous in their operation.

44 Third, the fact that Skype Communications states in its general terms that it assumes no responsibility for the transmission of signals to users of the SkypeOut feature of its Skype software cannot have any bearing on whether or not the VoIP service which that feature offers is classified as an ‘electronic communications service’.

45 To accept that the provider of a service which in practical terms comes under the classification of ‘electronic communications service’ may escape the scope of the Framework Directive by including in its general terms a clause exonerating it from all liability would deprive of all meaning the new Electronic Communications Services regulatory framework, the purpose of which is to establish a genuine internal market for electronic communications in which those communications are ultimately to be governed solely by competition law (see, to that effect, judgments of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 45, and of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 44).

46 Lastly, fourth, the fact that the VoIP service provided by SkypeOut is also covered by the definition of ‘information society service’ within the meaning of Directive 98/34 in no way implies that it cannot be classified as an ‘electronic communications service’.

47 It is clear from the very wording of Article 2(c) of the Framework Directive, read in the light of recital 10 thereof, that only information society services, as defined in Article 1 of Directive 98/34, that do not consist wholly or mainly in the conveyance of signals on electronic communications networks are excluded from the definition of electronic communications services.

48 It follows, as the Belgian, German, Netherlands and Romanian Governments and the Commission have stated, that an ‘information society service’, within the meaning of Directive 98/34, comes within the scope of application of the Framework Directive provided that it consists wholly or mainly in the conveyance of signals on electronic communications networks.

49 In the light of the foregoing, the answer to the questions referred is that Article 2(c) of the Framework Directive must be interpreted as meaning that the provision, by a software publisher, of a feature offering a VoIP service which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the PSTN of a Member State constitutes an ‘electronic communications service’ within the meaning of that provision, provided that, first, the software publisher is remunerated for the provision of that service, and, second, the provision of that service involves the conclusion of agreements between that software publisher and

telecommunications service providers that are duly authorised to send and terminate calls to the PSTN.

Costs

50 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 (Fourth Chamber) hereby rules:

Article 2(c) 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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that the provision, by a software publisher, of a feature offering a Voice over Internet Protocol (VoIP) service which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the public switched telephone network (PSTN) of a Member State constitutes an ‘electronic communications service’ within the meaning of that provision, provided that, first, the software publisher is remunerated for the provision of that service and, second, the provision of that service involves the conclusion of agreements between that software publisher and telecommunications service providers that are duly authorised to send and terminate calls to the PSTN.