

# COMPETITION LAW

## C-16/10 THE NUMBER LTD AND CONDUIT ENTERPRISES LTD v OFCOM AND BT: JUDGMENT OF 17 FEBRUARY 2011

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MAY 2011

***The CJEU's recent judgment in this case has found the wholesale obligation and ex ante price regulation imposed by Oftel (Ofcom's predecessor) upon BT in respect of telecommunications subscriber data held on BT's Operator Services Information System database was inconsistent with European law, in particular Directives 2002/20/EC, 2002/21/EC and 2002/22/EC, which form part of the package of telecommunications measures adopted by the EU in 2002 which form what is called the Common Regulatory Framework or CRF.***

***The judgment is a salutary reminder of the importance of looking at the CRF when considering telecommunications disputes and that the ability of NRAs to impose wholesale ex ante price regulation is severely limited by the CRF.***

### EUROPEAN LEGISLATIVE BACKGROUND

The aim of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorization of electronic communications networks and services ("Authorisation Directive") is to harmonise the regulation of electronic telecommunications networks and services within the EU and to limit that regulation to the minimum strictly necessary. To that end, Article 3(2) of the Authorisation Directive stipulates that the provision of electronic communications services and networks in the Member States shall only be subject to general authorization and not a detailed administrative licensing regime. Article 6(1) of the Authorisation Directive and Parts A, B and C of the Annex to the Directive set out an exhaustive list of the (limited) conditions to which the grant of such general authorization may be made subject.

**Article 6(2) of the Authorisation Directive provides in relevant part:**

*“Specific obligations which may be imposed ... on those designated to provide universal service under [Directive 2002/22/EC (Universal Service Directive)] shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.”*

Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal services and users' rights relating to electronic communications networks and services (“the Universal Service Directive”) requires Member States to ensure that there is at least one provider within each Member State territory of each specified universal service.

**Article 5 of the Universal Service Directive provides:**

*“1. Member States shall ensure that:*

- (a) at least one comprehensive directory is available to end-users in a form approved by the relevant authority, whether printed or electronic, or both, and is updated on a regular basis, and at least once a year;*
- (b) at least one comprehensive telephone directory enquiry service is available to all end-users, including users of public pay telephones.*

*2. The directories in paragraph 1 shall comprise, subject to the provisions of Article 11 of Directive 97/66/EC, all subscribers of publicly available telephone services.*

*3. Member States shall ensure that the undertaking(s) providing the services referred to in paragraph 1 apply the principle of non-discrimination to the treatment of information that has been provided to them by other undertakings.”*

**Article 8 of the Universal Service Directive provides in relevant part:**

*“1. Member States may designate one or more undertakings to guarantee the provision of universal service as identified in Articles 4, 5, 6 and 7 and, where applicable, Article 9(2) so that the whole of the national territory can be covered. Member States may designate different undertakings or sets of undertakings to provide different elements of universal service and/or to cover different parts of the national territory...”*

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Article 9 of the Universal Service Directive, entitled “Affordability of tariffs” provides in relevant part:

- “1. National regulatory authorities shall monitor the evolution and level of retail tariffs of the services identified in Articles 4, 5, 6 and 7 as falling under the universal service obligations and provided by designated undertakings, in particular in relation to national consumer prices and income.
  
2. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available telephone service.
  
- ...
  
4. Member States may require undertakings with obligations under Articles 4, 5, 6 and 7 to apply common tariffs, including geographical averaging, throughout the territory, in the light of national conditions or to comply with price caps...”

## UK IMPLEMENTATION: BT'S WHOLESALE OBLIGATION

Oftel sought to implement Article 5 of the Universal Service Directive through Universal Service Condition 7 (“USC7”), which was imposed on BT in connection with its designation as universal service provider under the Electronic Communications (Universal Service) Regulations 2003.

USC 7.1 requires BT to keep a database of all subscribers who have been allocated telephone numbers by any communications network or service provider in the UK (“the OSIS database”). USC 7.2(b) requires BT to provide the contents of the OSIS database to any persons wishing to provide publicly available directory enquiry facilities and/or directories in machine readable form (“the wholesale obligation”). USC 7.4 places a restriction on the charges that BT can levy for supplying the relevant data as required by USC 7.2(b), namely that such charges shall be “fair, objective, cost oriented and not unduly discriminatory”. Where no agreement as to the level of such charges can be reached between BT and a person wishing to provide directories or directory enquiry services, USC 7.4 provides for the dispute to be resolved by referral to Ofcom.

## THE UK PROCEEDINGS

The national proceedings involved a dispute between The Number Limited and Enterprise Conduit Limited (providers of UK 118 services) on the one hand and BT on the other hand concerning the appropriate price for access to the OSIS database. The parties were unable to negotiate mutually satisfactory terms and referred the dispute to Ofcom.

On 10 March 2008, Ofcom gave its decision in the matter; finding that USC 7 was incompatible with EU law in that it incorrectly transposed Article 5 of the Universal Service Directive. In short, it found that Article 5 only permitted the imposition of a retail obligation on BT, namely to make available a comprehensive directory to end-users at an affordable price. Ofcom, therefore, found that BT was not required to grant access to the OSIS database on regulated terms. That decision was successfully appealed to the Competition Appeal Tribunal which held, on 24 November 2008, that USC7 did correctly transpose the relevant provision of the Universal Service Directive.

That decision was then appealed to the Court of Appeal, which came to the preliminary view that USC7 was contrary to EU law, but considered it necessary to refer the matter to the CJEU.

### The key issue referred was whether:

- (a) a Member State's powers in securing the provision of the services specified in the Universal Service Directive were limited to designating an undertaking under Article 8(1) of that Directive to be legally responsible for providing the specified services to all end-users – a retail obligation; or whether instead
  
- (b) a Member State has discretion to impose on an undertaking designated as universal service provider under Article 8(1) such specific obligations as the Member State considers most "*efficient, appropriate and proportionate*" to secure the provision of the universal service in question, including, a wholesale obligation such as that in USC7.2.

## DECISION OF THE CJEU

The CJEU found that Article 8(1) of the Universal Service Directive, providing for the designation of undertaking(s) to provide universal service or an element of universal service, is an exception to the prohibition on imposing specific obligations on telecommunications operators individual contained in the Authorisation Directive, and as such ought to be

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interpreted strictly (paragraph 31).

Taking such a strict approach, the CJEU considered that Article 8(1) of the Universal Service Directive only allows Member States to impose on designated undertakings an obligation to provide specific elements of the universal service to end-users (paragraph 32). Article 8(1) does not give Member States scope to achieve the requirements for universal service through any other means – such as the imposition of a wholesale obligation on universal service providers.

The CJEU noted that, in any event, the imposition of a wholesale obligation and a regulated wholesale price on the designated undertaking would not necessarily guarantee that the universal service would be available to all end-users at an affordable price (paragraphs 35 and 36). In this regard, the CJEU observed that, while Article 9 of the Universal Service Directive requires the Member States to monitor tariffs charged by the designated undertaking for various elements of the universal service and to ensure that such tariffs were “affordable”, the Member States have no similar power or discretion to regulate the prices charged by undertakings other than the designated undertaking. Accordingly, under USC7, a non-designated undertaking could sell directory enquiry services at any price notwithstanding the fact that it bought the underlying data at a regulated price. Thus USC 7 does not guarantee that the universal service is made available at an affordable price.

The CJEU also noted that Article 11 of the Universal Services Directive allowed Member States to monitor and enforce designated undertakings’ compliance with certain quality of service requirements; *“that provision... starts from the premiss that the designated undertakings have at their disposal operational data on the provision of universal service and are in a position to directly influence the manner in which that service is provided, which presupposes that they provide the service themselves”* (paragraph 37).

## COMMENT

The CJEU took a strict approach to the CRF regime. It rejected the argument put forward by the Number that the imposition of an ex ante wholesale pricing obligation was likely to lead to competition at the retail level which would in turn ensure that a directory enquiry service was available to end users at an affordable price. It did so because it started from the premise that the scheme of the CRF was only to impose specific obligations on telecommunications providers by way of exception. So while a Member State has a

discretion in implementing a Directive, it cannot do so in a manner that runs counter to basic principles of the Directive. The permitted system of price control within the CRF is, of course, without prejudice to the application of ex post competition law so it remains open to someone who feels he is a victim of an excessive pricing abuse to take action under EU or domestic competition law.

***Christopher Vajda QC acted for Ofcom before the Competition Appeal Tribunal, the Court of Appeal and the CJEU. In the national courts he led George Peretz and Fiona Banks.***