

Developments of the CJEU on the concept of “electronic communications service”

Posted 29.01.2020

In two judgments issued during summer 2019, the Court of Justice of the European Union (“**CJEU**”) provided certain guidance regarding the qualification of an “electronic communications service” within the meaning of Article 2(c) of Directive 2002/21/EC on electronic communications networks and services (“**Framework Directive**”), depending on which type of service is offered to end-users (see our developments below).

As a reminder, an “electronic communications service” is “*a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks...*”

It is important to keep in mind though that the Framework Directive will be repealed with effect from 21 December 2020 due to the entry into force of Directive 2018/1972 establishing the European Electronic Communications Code, as this instrument relies on new concepts and (updated) definitions.

1. a. VoIP service

On 5 June 2019, the CJEU rendered its judgement on the “SkypeOut” feature, which is provided by Skype Communications (“Skype”). SkypeOut is a “voice-over Internet protocol” (VoIP) service allowing users to call fixed or mobile lines from a terminal device connected to the Internet.

In this case, the Belgian Institute of Postal Services and Telecommunications (“**BIPT**”) imposed a fine on Skype in May 2016 as it refused to register itself as a telecommunications operator for offering SkypeOut.

Skype subsequently brought an action before the Brussels Court of Appeal for cancellation of the Belgian authority’s decision and for requesting the Court of Appeal to declare that SkypeOut was

not an “electronic communications service” and accordingly that Skype could not be qualified as an electronic communications service provider.

The Court of Appeal decided to stay the proceedings and referred to the CJEU for a preliminary ruling, mainly asking whether such a “VoIP” service, as made available via a software terminated on a public switched telephone network to a fixed or mobile number covered by a national numbering plan, is to be considered as an “electronic communications service” within the meaning of Article 2(c) of the Framework Directive.

In its judgement of June 2019, the CJEU sided with the BIPT and decided that “SkypeOut” was an “electronic communications service” as i) Skype receives remuneration for the provision of such a service and ii) Skype enters into interconnection agreements with telecommunications service providers which are authorised to initiate and terminate calls from or to fixed or mobile telephone numbers, via a public switched telephone network, such that the transmission of signals is ultimately a service provided by Skype to its users.

In this respect, the CJEU stated that the fact that the transmission of signals takes place via an infrastructure that does not belong to the service provider (i.e. Skype) is not relevant for determining the nature of the service. The key consideration is whether the service provider is responsible towards the end-users for the transmission of the signals comprising the service for which they have subscribed.

This decision should be read in conjunction with the upcoming Directive 2018/1972 on the European Electronic Communications Code, which notably updates the definition of an “electronic communication service” as being *“a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services*

- (a) ‘internet access service’ as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
- (b) interpersonal communications service; and
- (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting; “

The “interpersonal communications service” is also defined as “ a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service”.

While it appears that “over-the-top” (OTT) services like Skype, WhatsApp or Facebook Messenger would fall under the scope of the new definition of electronic communications service. Luxembourg must now transpose this Directive into national law and authorities will have to rely on the new definition of electronic communications service notably with regard to other OTT and web-mail services (see below).

b. Web-based emailing service

Only eight days after the Skype decision mentioned above, the CJEU issued another judgement holding that, a web-based emailing service (Gmail, in this instance) is not an “electronic communications service” within the meaning of Article 2 (c) of the Framework Directive.

In this case, a conflict arose between Google and the German Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks as, according to the German agency, Google’s Gmail service is a telecommunication service subject to specific legal requirements pursuant to the German law (Telekommunikationsgesetz) transposing the Framework Directive. In this respect, the German agency ordered Google to register as a telecommunications service provider.

Google challenged this decision arguing that Gmail was not an “electronic communications service” as this service does not emit signals and is not remunerated.

The matter finally reached the German Regional High Administrative Court, which decided to refer the case to the CJEU for a preliminary ruling by questioning whether a web-based email service, which does not itself provide Internet access, constitutes a service consisting wholly or mainly in the conveyance of signals on electronic communications networks, as a result of the electronic processing that the service provider supplies via its email servers.

The CJEU recognized that a service like Gmail conveys signals by transmitting data online since “it uploads to the open internet and receives from it, via its email servers, the data packets relating to the emails sent and received, respectively, by the holders of a Google email account”. However, the CJEU decided that such a service does not consist “wholly or mainly” in the conveyance of signals on electronic communications networks.

Indeed, it is the Internet access providers and the operators of the Internet’s various networks who convey the signals necessary for the functioning of the web-based email service, under their sole responsibility.

The determining factor in the assessment of whether Gmail was or was not an electronic communications service consisted in the fact that the service did not wholly or mainly convey signals on electronic communications network.

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