

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

5 September 2019 (*)

(Reference for a preliminary ruling — Directive 2002/22/EC — Universal service and users' rights relating to electronic communications networks and services — Article 26(5) — Single European emergency call number — Making available caller location information)

In Case C-417/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), made by decision of 21 June 2018, received at the Court on 26 June 2018, in the proceedings

AW,

BV,

CU,

DT

v

Lietuvos valstybė, represented by the Lietuvos Respublikos ryšių reguliavimo tarnyba, the Bendrasis pagalbos centras and the Lietuvos Respublikos vidaus reikalų ministerija,

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. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 2 May 2019,

after considering the observations submitted on behalf of:

- AW, BV, CU and DT, by L. Šaltinytė, and by L. Žalnierius, advokatas,
- the Lithuanian Government, by R. Dzikovič, K. Dieninis and R. Krasuckaitė, acting as Agents,
- the European Commission, by G. Braun, S.L. Kalėda, L. Nicolae and A. Steiblytė, acting as Agents,

having decided, after hearing 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 Article 26 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Directive 2002/22').
- 2 The request has been made in proceedings between, on the one hand, AW, BV, CU and DT ('AW and Others ') and, on the other hand, the Lietuvos valstybė (the Lithuanian State), represented by the Lietuvos Respublikos ryšių reguliavimo tarnyba (Communications Regulatory Authority), the Bendrasis pagalbos centras (Joint Emergency Services Centre) and the Lietuvos Respublikos vidaus reikalų ministerija (Ministry of the Interior of the Republic of Lithuania) concerning their claim for damages.

Legal context

EU law

Directive 2002/22

- 3 Recital 36 of Directive 2002/22 states:

'It is important that users should be able to call the single European emergency number "112", and any other national emergency telephone numbers, free of charge, from any telephone, including public pay telephones, without the use of any means of payment. ... Caller location information, to be made available to the emergency services, will improve the level of protection and the security of users of "112" services and assist the emergency services, to the extent technically feasible, in the discharge of their duties, provided that the transfer of calls and associated data to the emergency services concerned is guaranteed. ... '

- 4 Article 26 of that directive provides:

'1. Member States shall ensure that all end-users of the service referred to in paragraph 2, including users of public pay telephones, are able to call the emergency services free of charge and without having to use any means of payment, by using the single European emergency call number "112" and any national emergency call number specified by Member States.

2. Member States, in consultation with national regulatory authorities, emergency services and providers, shall ensure that undertakings providing end-users with an electronic communications service for originating national calls to a number or numbers in a national telephone numbering plan provide access to emergency services.

3. Member States shall ensure that calls to the single European emergency call number "112" are appropriately answered and handled in the manner best suited to the national organisation of emergency systems. Such calls shall be answered and handled at least as expeditiously and effectively as calls to the national emergency number or numbers, where these continue to be in use.

...

5. Member States shall ensure that undertakings concerned make caller location information available free of charge to the authority handling emergency calls as soon as the call reaches that authority. This shall apply to all calls to the single European emergency call number "112". Member States may extend this obligation to cover calls to national emergency numbers. Competent regulatory authorities shall lay down criteria for the accuracy and reliability of the caller location information provided.

...’

Directive 2009/136

5 Recital 39 of Directive 2009/136 states:

‘End-users should be able to call and access the emergency services using any telephone service capable of originating voice calls through a number or numbers in national telephone numbering plans. ... The obligation to provide caller location information should be strengthened so as to increase the protection of citizens. In particular, undertakings should make caller location information available to emergency services as soon as the call reaches that service independently of the technology used. ...’

Lithuanian law

Law No IX–2135 of the Republic of Lithuania on electronic communications

6 Article 34(10) of the Lietuvos Respublikos elektroninių ryšių įstatymas No IX–2135 (Law No IX–2135 of the Republic of Lithuania on electronic communications) of 15 April 2004 (Žin., 2004, No 69–2382), in the version applicable to the facts in the main proceedings, provided:

‘All providers of public communications networks and public electronic communications services are required to ensure, in accordance with the procedure and conditions set by the Communications Regulatory Authority, free access, for their subscribers and/or users of public electronic communications services, including users of public pay telephones and disabled subscribers and/or users, to emergency services established by the authorities.’

7 Article 68(2) of that law was worded as follows:

‘Providers of public communications networks and providers of public electronic communications services shall transmit, without the consent of the subscriber or the actual user of the electronic communications services, location information for each emergency call (including traffic data) free of charge to the Joint Emergency Services Centre. Location information for each emergency call shall be transmitted free of charge as soon as the emergency call is answered by the Joint Emergency Services Centre. The Joint Emergency Services Centre shall submit proposals to the Communications Regulatory Authority regarding criteria for the accuracy and reliability of caller location information. Having regard to the proposals submitted to it by the Joint Emergency Services Centre, the Communications Regulatory Authority shall lay down criteria for the accuracy and reliability of caller location information. Expenses relating to the acquisition, installation (adaptation), updating and support of hardware (and associated software) which is not necessary to ensure the provider’s economic activity but which is necessary for providing location information (including traffic data) to the Joint Emergency Services Centre shall be reimbursed to providers of public communications networks and providers of public electronic communications services from the State budget in accordance with the procedure set by the Government. The other provisions of this paragraph shall be implemented in accordance with the procedure and conditions laid down in Article 34(10) of the present Law.’

The Procedure for access to emergency services

8 By Order No 1V–1087 of 7 November 2011, the Director of the Communications Regulatory Authority laid down the Procedure for access of subscribers and/or users to emergency services provided by the authorities (‘the Procedure for access to emergency services’).

9 Point 4.5.4.1 of that procedure provides that mobile network providers are to transmit location information with an accuracy of base station (sector) coverage (Cell-ID). In that regard, the referring court points out that that procedure does not specify the minimum accuracy with which base stations must transmit the caller’s location or the density of distribution of base stations.

- 10 Under point 4.5.4.2 of the Procedure for access to emergency services, 95% of all location information must be transmitted within 20 seconds from the time at which the connection is made with the Joint Emergency Services Centre, or from the time of the request made by the Joint Emergency Services Centre to the network provider or mobile communication services provider.
- 11 Point 4.5.4.3 of the Procedure for access to emergency services provides that the mobile network providers' system for the transmission of location information must be fully duplicated and be available for at least 97% of the year.

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

- 12 AW and Others are close relatives of ES, a girl aged 17 who was the victim of a criminal act. It is apparent from the documents before the Court that on 21 September 2013, at around 6.00 a.m., in a suburb of Panevėžys (Lithuania), ES was kidnapped, raped and burnt alive in the boot of a car. Finding herself trapped in that car boot, she had called the Lithuanian emergency call answering centre, using a mobile telephone, on the single European emergency call number '112' ('112') 10 times in order to seek help. However, the equipment in the emergency call answering centre did not show the number of the mobile telephone used, which prevented the employees of that answering centre from locating her. It has not been possible to determine whether the mobile telephone used by ES was fitted with a SIM card or why her number was not visible at the emergency call answering centre.
- 13 AW and Others brought an action before the referring court seeking an order requiring the Lithuanian State to pay compensation for the non-material damage suffered by the victim, ES, and by themselves, her close relatives. In support of their action they submit that the Republic of Lithuania has failed properly to ensure practical implementation of Article 26(5) of Directive 2002/22. That failure, they argue, meant that it was impossible to pass on to operational police officers information on ES's location, which prevented the police from coming to her assistance.
- 14 The referring court addresses the question whether, first, Article 26(5) of Directive 2002/22 imposes an obligation to transmit caller location information, in the case where the call is made from a mobile telephone without a SIM card and, secondly, whether, in a case such as that in the main proceedings, in which the legislation of a Member State allows 112 to be called from a mobile telephone without a SIM card, caller location information must be defined in accordance with Article 26(5) of Directive 2002/22.
- 15 If the view were to be taken that, in the case of a call made to 112 from a mobile phone without a SIM card, the Member States are required to ensure that the location of the caller is established, the national court also wishes to know whether, in the light of the obligations arising from Article 26(5) of Directive 2002/22, the applicable Lithuanian legislation makes it possible to ensure that the location of the caller is established with sufficient accuracy.
- 16 Finally, the referring court states that, if it is established that the competent authorities of the Member States must ensure that the location of a person who calls 112 is established, even in the case where that person calls using a mobile telephone which has not been fitted with a SIM card, it must resolve the question as to whether there must be a direct causal link between the breach of that obligation by the Member State concerned and the damage sustained by individuals or whether an indirect causal link is sufficient in the case where, under national legislation or case-law, such a causal link is sufficient to fulfil one of the conditions giving rise to the liability of the Member State concerned.
- 17 In those circumstances, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 26(5) of Directive 2002/22 ... regulate the mandatory transmission of location information where calls are made from mobile telephones without SIM cards?

- (2) Where a Member State's national legislation allows [112] to be called without a SIM card, does that mean that location information for such emergency calls has to be established in accordance with Article 26(5) of Directive 2002/22 ...?
- (3) Is the national legislation laid down in point 4.5.4 of the Procedure for access [to the Emergency Services] which, inter alia, provides that public mobile network providers are to transmit location information with an accuracy of base station (sector) coverage (Cell-ID), but which does not specify the minimum accuracy (in terms of distance) with which base stations must establish the caller's location or the density (in terms of distance) at which base stations must be distributed, compatible with Article 26(5) of Directive 2002/22 ... which provides that competent regulatory authorities are to lay down criteria for the accuracy and reliability of the caller location information provided?
- (4) If the answers to the first question and/or second question are such that a Member State has to ensure that location information is established in accordance with Article 26(5) of Directive 2002/22 ... and/or the answer to the third question is such that the national legislation is incompatible with Article 26(5) of Directive 2002/22 ... which provides that competent regulatory authorities are to lay down criteria for the accuracy and reliability of the caller location information provided, is a national court required, when deciding on the issue of compensation for damage, to establish a direct causal link between the breach of EU law and the damage sustained by the individuals, or is it sufficient to establish an indirect causal link between the breach of EU law and the damage sustained by the individuals, where, under the provisions of national law and/or national case-law, such an indirect causal link is sufficient to give rise to liability?

Consideration of the questions referred

The first and second questions

- 18 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 26(5) of Directive 2002/22 must be interpreted as requiring the Member States to ensure that the undertakings concerned make available, free of charge, to the authority handling emergency calls made to 112, caller location information as soon as the call reaches that authority, including in cases where the call is made from a mobile telephone which is not fitted with a SIM card.
- 19 As a preliminary point, it must be noted that, in its written observations submitted to the Court, the Lithuanian Government argues that such a situation does not come within the scope of Article 26(5) of Directive 2002/22, but is governed by the domestic law of each Member State, in this case Lithuanian law.
- 20 In that regard, it is sufficient to note that the subject matter of the first and second questions is, specifically, the applicability of Article 26(5) of Directive 2002/22 in a situation such as that which gave rise to the dispute in the main proceedings. By its questions, the referring court is therefore not asking the Court to interpret Lithuanian law but to interpret EU law, in particular Directive 2002/22.
- 21 As regards the answer to the first and second questions, it is apparent from the actual wording of Article 26(5) of Directive 2002/22 that 'all calls to the single European emergency call number' are covered by the obligation to make caller location information available.
- 22 It must also be borne in mind that the Court has previously held that it followed from Article 26(3) of Directive 2002/22, in its original version, which corresponds to Article 26(5) in the current version of that directive, that that provision imposes on the Member States, subject to technical feasibility, an obligation to achieve a result, which is not limited to putting in place an appropriate regulatory framework, but which requires that the information on the location of all callers to '112' be actually transmitted to the emergency services (judgment of 11 September 2008, *Commission v Lithuania*, C-274/07, EU:C:2008:497, paragraph 40).

- 23 Therefore, it cannot be accepted that calls to 112 made from a mobile telephone not fitted with a SIM card are excluded from the scope of that provision.
- 24 Consequently, the answer to the first and second questions is that Article 26(5) of Directive 2002/22 must be interpreted as requiring the Member States, subject to technical feasibility, to ensure that the undertakings concerned make caller location information available free of charge to the authority handling emergency calls to 112 as soon as the call reaches that authority, including in cases where the call is made from a mobile telephone which is not fitted with a SIM card.

The third question

- 25 By its third question, the referring court asks the Court, in essence, to rule on whether the national legislation which defined the criteria relating to the accuracy and reliability of the information on the location of the caller to 112 is in accordance with Article 26(5) of Directive 2002/22.
- 26 In particular, the referring court has doubts, as is apparent from paragraph 9 of the present judgment, as to whether a Member State may confine itself to providing that the information on the location of a caller to 112 must be provided with an accuracy of base station coverage. The referring court considers that operators could be required to provide information which indicates, with a minimum degree of accuracy, the distance of the caller from the base station through which that person's call has been transmitted. In addition, it points out that the applicable Lithuanian legislation does not specify the required density of base stations and does not lay down a maximum distance between them.
- 27 In that regard, it is necessary, at the outset, to point out that, in accordance with the Court's case-law, it is for the national court with jurisdiction to determine whether national legislation is compatible with EU law, as the Court, when giving a preliminary ruling under Article 267 TFEU, has jurisdiction only to provide the national court with all the criteria for the interpretation of EU law which may enable it to determine that issue of compatibility (see, to that effect, judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraph 126).
- 28 In those circumstances, it is necessary to reformulate the third question and to take the view that, by that question, the referring court is asking, in essence, whether Article 26(5) of Directive 2002/22 must be interpreted as conferring on the Member States a measure of discretion when laying down the criteria relating to the accuracy and reliability of the information on the location of the caller to 112 which enables them to limit that information to the identification of the base station which relayed the call.
- 29 As the Lithuanian Government and the European Commission have stated in their observations submitted to the Court, it is apparent from the wording of the last sentence of Article 26(5) of Directive 2002/22 that the Member States enjoy some latitude when laying down the criteria relating to the accuracy and reliability of information on the location of the caller to 112 that the undertakings concerned must make available free of charge to the authority dealing with emergency calls, in accordance with the first sentence of that paragraph.
- 30 However, it should be noted that it is apparent from recital 36 of Directive 2002/22 and from recital 39 of Directive 2009/136 that the mandatory transmission of information on caller location is intended to improve the level of protection and the safety of users of 112 and to assist the emergency services in the discharge of their duties.
- 31 Thus, the criteria relating to the accuracy and reliability of information on caller location must, in any event, ensure, subject to technical feasibility, that the position of that caller is located as reliably and accurately as is necessary to enable the emergency services usefully to come to that caller's assistance.
- 32 The discretion enjoyed by the Member States in laying down those criteria is therefore limited by the need to ensure the usefulness of the information transmitted in enabling the caller to be effectively located and, therefore, in enabling the emergency services to intervene.

- 33 Since such an assessment is eminently technical and intimately linked to the specific characteristics of the Lithuanian mobile telecommunications network, it is for the national court to carry out that assessment.
- 34 The answer to the third question must therefore be that Article 26(5) of Directive 2002/22 must be interpreted as conferring on the Member States a measure of discretion when laying down the criteria relating to the accuracy and reliability of the information on the location of the caller to 112; however, the criteria which they lay down must ensure, within the limits of technical feasibility, that the caller's position is located as reliably and accurately as is necessary to enable the emergency services usefully to come to the caller's assistance, this being a matter for the national court to assess.

The fourth question

- 35 By its fourth question, the referring court asks, in essence, whether EU law must be interpreted as meaning that where, in accordance with the domestic law of a Member State, the existence of an indirect causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is regarded as sufficient to render the State liable, such an indirect causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also be regarded as sufficient for the purposes of rendering that Member State liable for that breach of EU law.
- 36 In its observations submitted to the Court, the Lithuanian Government disputed whether an indirect causal link between the unlawful act committed and the damage sustained could be sufficient to render the Lithuanian State liable under national law. According to the Lithuanian Government, it is apparent from the applicable Lithuanian provisions that, in order for the liability of the State to be incurred, there must be a direct causal link between the unlawful act committed by the national authorities and the breach of the rights of the individual who has sustained damage.
- 37 Suffice it to note, in this regard, that it is not for the Court, in the context of the judicial cooperation established by Article 267 TFEU, to give a ruling on the interpretation of provisions of national law, or to decide whether the referring court's interpretation of those provisions is correct (judgment of 26 March 2015, *Macikowski*, C-499/13, EU:C:2015:201, paragraph 51 and the case-law cited).
- 38 As regards the answer to the fourth question, it must, admittedly, be noted that the conditions that must be satisfied in order for a Member State to incur non-contractual liability for loss and damage caused to individuals as a result of breaches of EU law for which it is responsible include that relating to the existence of a direct causal link between the breach of EU law and the loss or damage sustained by those individuals (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 94 and the case-law cited).
- 39 However, it is clear from the Court's case-law that, in the event of a breach of EU law attributable to the State, it is on the basis of the rules of national law on liability that that State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 123 and the case-law cited).
- 40 It follows that, in a situation where, in accordance with the domestic law of a Member State, as interpreted by the case-law of its domestic courts, the existence of an indirect causal link between a breach of national law by that Member State and the damage sustained is regarded as sufficient to incur the liability of the State, an indirect causal link between a breach of EU law attributable to the Member State in question and the damage sustained by individuals must also, in accordance with the principle of equivalence, be regarded as sufficient for the purposes of rendering that Member State liable for that breach.
- 41 Consequently, the answer to the fourth question is that EU law must be interpreted as meaning that, where, in accordance with the domestic law of a Member State, the existence of an indirect causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is

regarded as sufficient to render the State liable, such an indirect causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also be regarded as sufficient for the purposes of rendering that Member State liable for that breach of EU law.

Costs

- 42 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:

- 1. Article 26(5) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as requiring the Member States, subject to technical feasibility, to ensure that the undertakings concerned make caller location information available free of charge to the authority handling emergency calls to the single European emergency call number '112' as soon as the call reaches that authority, including in cases where the call is made from a mobile telephone which is not fitted with a SIM card.**
- 2. Article 26(5) of Directive 2002/22, as amended by Directive 2009/136, must be interpreted as conferring on the Member States a measure of discretion when laying down the criteria relating to the accuracy and reliability of the information on the location of the caller to the single European emergency call number '112'; however, the criteria which they lay down must ensure, within the limits of technical feasibility, that the caller's position is located as reliably and accurately as is necessary to enable the emergency services usefully to come to the caller's assistance, this being a matter for the national court to assess.**
- 3. EU law must be interpreted as meaning that where, in accordance with the domestic law of a Member State, the existence of an indirect causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is regarded as sufficient to render the State liable, such an indirect causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also be regarded as sufficient for the purposes of rendering that Member State liable for that breach of EU law.**

[Signatures]

* Language of the case: Lithuanian.