Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 14 June 2016 [1]

Case C-231/15

Prezes Urzędu Komunikacji Elektronicznej,
Petrotel sp. z o.o. w Płocku
v
Polkomtel sp. z o.o.(Request for a preliminary ruling

from the Sąd Najwyższy (Supreme Court, Poland))

(Electronic communications networks and services — Directive 2002/21/EC — Article 4(1) — Decisions of national regulatory authorities — Resolution of a dispute between operators — Effects of annulment of a decision of a national regulatory authority — Right to an effective remedy — Charter of Fundamental Rights of the European Union — Article 47 — Scope of the judgment)

1. The Sąd Najwyższy (Supreme Court, Poland) has asked the Court for clarification of the interpretation of Article 4(1) of Directive 2002/21/EC, which established a 'common regulatory framework for electronic communications networks and services'. [2]

2. The question referred for a preliminary ruling has arisen in an appeal brought against a decision of the Polish electronic communications authority. [3] The question essentially seeks to ascertain whether, under the Framework Directive, the judgment of the national court annulling that administrative decision must take effect *ex tunc* (from the time when the NRA adopted the decision) or only *ex nunc* (from the date of the judgment annulling the decision).

3. The request for a preliminary ruling is therefore concerned with the enforceability of acts of NRAs in the electronic communications sector and the effects of judgments declaring such acts void. In the instant case, there are two further relevant facts: (a) the decision of the NRA was not suspended as an interim measure and was therefore immediately enforceable, [4] and (b) that decision required the redrafting of the contracts governing the relationship between two telecommunications undertakings.

4. The problem appears to become more complex because the Sąd Najwyższy (Supreme Court) does not agree with the case-law of the Polish Naczelny Sąd Administracyjny (Supreme Administrative Court) pursuant to which, where enforcement of an administrative act has not been suspended and that act is annulled by a judgment, the judgment takes effect only from the time when it is delivered, meaning that the earlier effects resulting from application of the administrative act, which was not

1 — Original language: Spanish.

2 — Directive of the European Parliament and of the Council of 7 March 2002 (OJ 2002 L 108, p. 33; 'the Framework Directive').

3 — Called the 'Office for Electronic Communications' (abbreviated as 'UKE'). These authorities are usually referred to, without distinction, as the 'national regulator' or the 'national regulatory authority'. Although there may be some differences between them, it is possible to equate them in this document. I shall use the abbreviation 'NRA'.

4 — That is the general rule in legal systems which attach the presumption of legality to acts adopted by the administration. The presumption usually entails the immediate enforceability of those acts (also, as will be seen, in Article 4 of the Framework Directive); however, a court seised of an appeal against such an act may suspend the effects of that act.

initially suspended but later annulled, cannot be altered. The Sąd Najwyższy (Supreme Court) questions whether that case-law is compatible with the principle of effectiveness laid down in Article 4 of the Framework Directive and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

5. The novel aspect of the reference for a preliminary ruling concerns the application of the appeal mechanisms provided for in Article 4(1) of the Framework Directive and, in particular, the scope which, under that provision, must be attributed to judgments annulling decisions of NRAs, matters on which, unless I am mistaken, the Court has not yet given judgment.

I – Legal framework

A – *EU law*

1. The Framework Directive

6. According to recital 12 of the Framework Directive:

'Any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court. Furthermore, any undertaking which considers that its applications for the granting of rights to install facilities have not been dealt with in accordance with the principles set out in this Directive should be entitled to appeal against such decisions. This appeal procedure is without prejudice to the division of competences within national judicial systems and to the rights of legal entities or natural persons under national law.'

7. Article 4(1) provides:

'Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.'[5]

5 — As amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/CE on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37).

2. Directive 2009/140

8. Recitals 14 and 15 read as follows:

‘(14) In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy. Interim measures suspending the effect of the decision of [an NRA] should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires.

(15) There has been a wide divergence in the manner in which appeal bodies have applied interim measures to suspend the decisions of the [NRAs]. In order to achieve greater consistency of approach common standards should be applied in line with Community case-law. …’

3. The Charter

9. Pursuant to the first paragraph of Article 47:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

B – *Polish law*

1. The Law on telecommunications [6]

10. In accordance with Article 40, in the circumstances provided for in Article 25(4), the President of the Office for Electronic Communications (‘President of the UKE’) may, through a decision, require an operator with a significant market presence to set prices for access to telecommunications, based on the costs it has incurred.

11. Article 206(2aa) of that law provides that decisions of the President of the UKE are immediately enforceable.

2. The Code of Administrative Procedure

12. Under the heading ‘Reopening of proceedings’, Article 145(1) provides:

‘Where a final decision has been adopted, the proceedings shall be reopened if the following conditions are met:

…

(8) The decision was adopted pursuant to another decision or a judgment which has been annulled or amended.’

6 — Version in force at the time of the facts material to the main proceedings.

13. In accordance with Article 156(1):

'A public authority shall annul a decision where that decision:

…

(2) Was adopted without a legal basis or in obvious breach of the law.

…'

3. The Code of Civil Procedure

14. Article 479[63] provides that a court may, on application by the person who brought the appeal, suspend enforcement of the decision pending the outcome of the proceedings if it finds that there are significant risks or irreversible effects.

15. Article 479[64] provides that, following examination of the matter, the court may dismiss or allow the appeal. In the latter case, the court will annul or amend the contested decision, in whole or in part, and will rule on the substance of the case.

II – Facts of the main proceedings and the question referred for a preliminary ruling

16. Following a comparative analysis of the rates charged by Polkomtel sp. z o.o.[7] ('Polkomtel') for voice call termination on its mobile telephone network[8] and an assessment of the lawfulness of those rates, the UKE declared that there were differences between the MTR rates applied by Polkomtel and those of other Member States and that the rates were fixed in accordance with incorrect methods of calculation.

17. The President of the UKE adopted an initial decision ('the MTR decision of 2008') on 30 September 2008, imposing certain maximum rates on Polkomtel for the provision of call termination services to other telecommunications operators, in accordance with a specific timetable.

18. Polkomtel appealed against the MTR decision of 2008 before the Rejonowy Sąd (District Court), Warsaw, which annulled the decision by judgment of 23 March 2011. On 30 January 2012, that judgment was upheld on appeal by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) and is final.[9]

19. On 4 December 2008, while the appeal against the MTR decision of 2008 was ongoing, Polkomtel sent Petrotel sp. z o.o.[10] (an operator which receives call termination network access services from Polkomtel in return for payment of a charge) a proposal for amendment of the MTR rates under the contract of 21 October 1999 which governed the details of Petrotel's right of access to Polkomtel's network.

20. On 6 February 2009, having failed to reach agreement with Polkomtel regarding the fixing of the rate in accordance with the MTR decision of 2008, Petrotel asked the UKE to intervene with a view to securing the amendment of the network access contract.

7 — In Poland, Polkomtel had significant power in the market for the provision of voice call termination services on the mobile telephone network.

8 — Mobile termination rates ('MTR rates').

9 — The grounds on which the MTR decision of 2008 was annulled are related to the failure to carry out the consultation provided for in law.

10 — 'Petrotel'.

21. The President of the UKE resolved the dispute between Petrotel and Polkomtel, adopting, on 17 March 2009, a decision ('the implementing decision') pursuant to which it amended the contract between the two operators. The implementing decision complied with the system of rates in the MTR decision of 2008.

22. Polkomtel lodged an appeal against the implementing decision with the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers), which annulled the decision by a judgment of 26 October 2012. The grounds of the judgment were, essentially and inter alia, that the MTR decision of 2008 had already been annulled in the previous proceedings. Given that the implementing decision merely applied the MTR decision of 2008, once the latter had been annulled it could no longer constitute the legal basis for the obligations imposed on Polkomtel in the implementing decision.

23. Petrotel and the UKE both appealed to the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) against the judgment of 26 October 2012; those appeals were dismissed by judgment of 19 September 2013, which largely upheld the reasoning of the court of first instance.

24. The Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) took the view that the annulment of the MTR decision of 2008 did not produce effects only for the future, since, if that were the case, the electronic communications network provider's right to challenge the MTR decision of 2008 and the effects of the favourable judgment given in the proceedings brought against that decision would be illusory.

25. Petrotel and the UKE lodged an appeal on a point of law against the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) before the Sąd Najwyższy (Supreme Court), which, before giving judgment, believes that it is necessary to seek a preliminary ruling.

26. The Sąd Najwyższy (Supreme Court) considers that, in principle, the position adopted in the judgments of the two lower courts is compatible with the right to an effective remedy (Article 4 of the Framework Directive and Article 47 of the Charter). However, the referring court has expressed doubts in relation to the national case-law which states that, in accordance with the principles of legality and protection of acquired rights, the annulment of an administrative act deprives that act of its ability to produce legal effects only from the time when the judgment annulling that act takes effect, in other words, it takes effect *ex nunc*. [11]

27. Moreover, annulment of a decision of the NRA which has been used as the basis for adoption of another administrative decision does not affect the existence of the latter decision; annulment of the former decision enables the reopening of proceedings, while any subsequent decision adopted will only produce effects *ex nunc*. [12]

28. The application by the courts of the above principles would mean that the annulment of the MTR decision of 2008 (which set the maximum rate subsequently used by the implementing decision) would be irrelevant to the outcome of the appeal brought by Polkomtel against the implementing decision.

29. In the light of the last sentence of Article 4(1) of the Framework Directive, the MTR decision of 2008 continues to stand unless and until it is annulled. Therefore, the subsequent annulment of that decision should not affect the MTR rates applicable to the relationship between Petrotel and Polkomtel during the period from the date of amendment of the contract, determined by the NRA, to the definitive annulment of the MTR decision of 2008 by the court. That might entail a restriction of the right to an effective remedy.

11 — Judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 13 November 2012.

12 — Article 145(1)(8) of the Code of Administrative Procedure and judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 May 2011.

30. The referring court reasons that, in the absence of EU rules governing the effects of judgments annulling the decisions of NRAs, the principle of procedural autonomy of the Member States applies, as limited by the principle of effectiveness reflected in Article 4(1) of the Framework Directive. The referring court's uncertainties have arisen because, in the absence of an interim measure in accordance with the last sentence of that provision, the immediate enforceability of the decision could interfere with the right to an effective judicial remedy, which would be respected only by conferring retroactive effect on the judgment annulling the decision.

31. On those grounds, the Sąd Najwyższy (Supreme Court) has referred the following question for a preliminary ruling:

'Must the first and third sentences of Article 4(1) of Directive 2002/21/EC … be interpreted as meaning that — in the event that a network provider contests a decision of the [NRA] setting call termination rates in the network of that undertaking (MTR decision), and that undertaking then contests a subsequent decision (implementing decision) of the [NRA] amending a contract between the addressee of the MTR decision and another undertaking so that the rates paid by that other undertaking for call termination in the network of the addressee of the MTR decision correspond to the rates set in the MTR decision — the national court, having found that the MTR decision has been annulled, cannot annul the implementing decision in view of the fourth sentence of Article 4(1) of Directive 2002/21 and the interests which the undertaking benefiting from the implementing decision derives from the principle of the protection of legitimate expectations or of legal certainty, or must the first and third sentences of Article 4(1) of Directive 2002/21, in conjunction with Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that the national court may annul the implementing decision of the [NRA] and consequently remove the obligations laid down therein for the period preceding the judgment if it finds that that is necessary in order to provide effective protection for the rights of the undertaking appealing against the [NRA's] decision that enforces the obligations laid down in the MTR decision which was subsequently annulled?'

III – Summary of the parties' observations

32. Polkomtel contends that the question referred is inadmissible because it is hypothetical. Any reply given to it will, moreover, be irrelevant to the outcome of the dispute, while the referring court's uncertainties relate more to the effects of the MTR decision of 2008 than to the implementing decision, notwithstanding the fact that it is only the latter with which the main proceedings are concerned. Furthermore, the referring court has not given details of the national legal provisions at issue, thereby infringing Article 94 of the Rules of Procedure of the Court of Justice.

33. Polkomtel submits that the Sąd Najwyższy (Supreme Court) addresses matters which go beyond the scope of the proceedings in that they relate to the procedure which the UKE would have to apply following the annulment of the implementing decision, based on the ground for annulment, and to any actions between the two undertakings concerned. Polkomtel further complains that the referring court has not analysed the possible consequences arising from the interpretation of procedural provisions. Polkomtel contends that there are no permissible grounds for interpreting the first and third sentences of Article 4(1) of the Framework Directive as meaning that the national court, having annulled the MTR decision of 2008, cannot annul the implementing decision in the light of the wording of the last sentence of that provision, and the effects of the judgment must be examined pursuant to the relevant provisions of national law.

34. The UKE points out that, although the MTR decision of 2008 has been annulled, Polkomtel continues to be bound by the obligation to set its rates by reference to the costs incurred, as it is required to do by another decision of 19 July 2009 ('the SMP decision'), which is final.

35. The UKE argues that, when the implementing decision was adopted, the MTR decision of 2008 was in force. Annulment of that decision does not lead directly to annulment of the implementing decision, since the last sentence of Article 4(1) of the Framework Directive provides that the contested decision stands unless interim measures are adopted. Both the MTR decision of 2008 and the implementing decision complied with that provision.

36. The UKE submits that it is reasonable that the annulment of a decision of the NRA should produce effects *ex nunc*, in accordance with settled academic opinion and case-law. The annulment of an administrative decision pursuant to which another, subsequent decision has been adopted does not necessarily and directly result in the annulment of the latter decision but rather it allows the parties to request the reopening of the proceedings, in accordance with Article 145(1)(8) of the Polish Code of Civil Procedure.

37. As regards the legislative requirement (third sentence of Article 4(1) of the Framework Directive) that the appeal body must rule on the 'merits of the case', the UKE contends that the judgment takes effect *ex nunc*. Taking account of the arguments of the parties and the evidence adduced, the appeal body will be able to give a ruling on the merits which affects the subject matter of the contested administrative decision by replacing that decision.

38. The UKE submits that the court does not have to confine itself to annulling the implementing decision on account of the prior annulment of the MTR decision of 2008; rather, it must examine the substantive issues and give a ruling on the calculation of the rate based on the costs actually incurred by Polkomtel, since that obligation is incumbent on it pursuant to the SMP decision even though the MTR decision of 2008 has been annulled.

39. The UKE therefore proposes that the reply to the question referred for a preliminary ruling should be that the annulment of the MTR decision of 2008 is not a sufficient basis for annulling the implementing decision, as the national appeal body must examine all aspects of the merits of the case.

40. Petrotel states that, under Polish law, decisions of the UKE are immediately enforceable, although the Code of Civil Procedure permits the adoption of interim measures if there is a risk of significant damage or other irreversible consequences. For the purpose of ensuring that the appellant has effective judicial protection, there is no need for the contested administrative decision to be annulled with retroactive effect, which could be contrary to the principle of legal certainty and lead to unfavourable consequences for interested third parties.

41. Petrotel proposes that the reply to the question referred for a preliminary ruling should be that Article 4(1) of the Framework Directive must be interpreted as meaning that where a network provider challenges an MTR decision and then challenges the decision implementing the MTR decision, a finding by the national court that the MTR decision was annulled after the adoption of the implementing decision cannot be relied on by that court as the basis for annulling the latter.

42. The Polish Government submits that the rule on the immediate enforceability of the decision of the NRA (last sentence of Article 4(1) of the Framework Directive) does not preclude the judgment of the appeal body which annuls that decision from having retroactive effect, as illustrated by the possibility, provided for in the last sentence of Article 4(1) of the Framework Directive, that that body may grant interim measures.

43. The Polish Government submits that delimitation of the powers of appeal bodies is covered by the procedural autonomy of the Member States, subject to compliance with the principles of effectiveness and equivalence. The Polish Government points out that Polish law includes provisions pursuant to which the appeal body, irrespective of whether or not it adopted interim measures during the proceedings, may rule on the merits of the case for the purpose of amending the contested decision in

whole or in part.[13] However, the case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court) attributes effects *ex nunc* to judgments annulling decisions, which leaves open to interested parties the possibility of bringing an action for damages in accordance with the general principles in that regard.

44. The Polish Government adds that the principle of effectiveness must be weighed against the principles of legal certainty and the protection of legitimate expectations. In the instant case, annulment of the implementing decision affects not only the relationship between the UKE and Polkomtel but also the contract between Polkomtel and a third party (Petrotel), and the judgment given may benefit one of the parties to the contract while being detrimental to the other.

45. In the light of those observations, the Polish Government proposes that the article at issue should be interpreted as meaning that it does not preclude a national court, in a situation like that in the main proceedings, from annulling a decision of an NRA with retroactive effect. The method of guaranteeing the effectiveness of the right of appeal falls within the scope of national law and case-law.

46. The Commission submits that Article 4(1) of the Framework Directive provides for the right to an effective remedy before an independent body and lays down the principle that the decisions of NRAs are immediately enforceable unless an interim measure suspending the decision is granted. The need for that provision is based on the fact that national systems exist in which an appeal to the courts against an administrative decision entails the automatic suspension of the enforceability of that decision pending the outcome of the proceedings.

47. The Commission argues that immediate enforcement of the contested act produces only provisional effects while the proceedings are heard and decided on, without there being any limitation of the court's ability to rule on the merits of the case. If the decision is annulled, the effects of nullity apply from the time when it was adopted (effects *ex tunc*). Where an appeal body does not have the right to require payment of sums wrongly received under the annulled decision, the EU legislation authorising suspension of enforcement should be applied.

48. The scope of the effects of a judgment annulling a decision of an NRA is within the procedural autonomy of the Member States, subject always to observance of the principles of effectiveness and equivalence. In order to guarantee the operation of the appeal mechanism, the Commission believes that it is essential to recognise the judgment annulling a decision as producing effects *ex tunc*. An appeal procedure which did not enable decisions of NRAs to be annulled with retroactive effect but solely as regards the future would render illusory the exercise of the right laid down in Article 4(1) of the Framework Directive.

IV – Analysis

A – *Admissibility of the question referred for a preliminary ruling*

49. The Sąd Najwyższy (Supreme Court) asks the Court to interpret Article 4(1) of the Framework Directive, in conjunction with Article 47 of the Charter. The dispute arose as a result of the immediate enforceability of two consecutive decisions, adopted by the NRA; appeals were lodged against those decisions, which were not suspended by the grant of any interim measures but were subsequently annulled.[14]

13 — The Polish Government refers to Article 479^{64} of the Code of Civil Procedure. See point 15 of this Opinion.

14 — The implementing decision was annulled in the two judgments of the lower courts and the appeal against the second of those judgments is pending before the Sąd Najwyższy (Supreme Court).

50. In the first decision (the MTR decision of 2008), the NRA ordered Polkomtel not to exceed certain maximum rates for access to its network, which were applicable to all communications operators wishing to use the network. Since Polkomtel failed to reach agreement with one of those operators (Petrotel) regarding the amendment of the contract governing their relationship in order to bring it into line with the MTR decision of 2008, in the second decision (the implementing decision) the President of the UKE, at the request of Petrotel, set a mandatory maximum rate for the contract governing access by Petrotel to Polkomtel's network.

51. Since the MTR decision of 2008 was annulled while the appeal was pending against the implementing decision, the Sąd Najwyższy (Supreme Court) questions whether EU law (specifically, Article 4(1) of the Framework Directive) has a bearing on the outcome of the dispute. In particular, the referring court seeks to ascertain whether, under that provision, the subsequent annulment of the MTR decision of 2008, which was enforceable when the implementing decision was adopted, enables (or requires) the court with jurisdiction to give judgment on the latter decision to annul the decision and deprive of effect the obligations that derived from it while it was in force.

52. Polkomtel maintains that the question referred is inadmissible for the reasons set out above.[15] I do not agree with Polkomtel's objections, as the question raised is not hypothetical and the referring court has presented succinctly, but in sufficient detail for them to be intelligible, the provisions and facts on which the dispute is based. The referring court cites Polish legislation and the case-law of the Supreme Administrative Court of Poland, mentioning, in particular, two judgments of that court and, inter alia, Article 145(1)(8) of the Code of Administrative Procedure[16] in order to define the problem before it. The referring court could, of course, have been more explicit but, I repeat, its order for reference contains the essential information needed to resolve the dispute and, during these preliminary ruling proceedings, the parties have had no difficulty in putting forward their arguments for or against the respective positions.

53. The difficulty to which the Sąd Najwyższy (Supreme Court) refers can be approached in two ways. First, there is the purely internal approach, based on the national provisions and case-law. According to the description provided by the referring court, the judgments annulling the decisions of the NRA produce effects from the time they are adopted. Where the annulment of one act derives from the annulment of another, earlier act, and the former implements the latter, the administrative proceedings must be reopened and, at the end of those proceedings, the final decision given will have effects only as regards the future. The consequence is that it will not be possible to alter the effects of acts carried out in compliance with the annulled decision.

54. The Sąd Najwyższy (Supreme Court) questions whether the application of the national provisions, interpreted in the way described above, is compatible with EU law, and this is where the second approach to the question raised comes into play. The reason the referring court seeks a preliminary ruling from the Court of Justice on the interpretation of Article 4 of the Framework Directive (and Article 47 of the Charter) is because, in its view, that interpretation could affect the judgment it must give.

55. Understood in those terms, the question referred for a preliminary ruling is admissible. It is true that, in replying to that question, the arguments set out by the referring court will have to be refined[17] in such a way that some of them will be disregarded because they are less relevant. That is the case, for example, of the effects of the prior annulment of the MTR decision of 2008 on the

15 — See points 41 and 42 of this Opinion.

16 — See point 12 above and footnotes 11 and 12.

17 — A reading of the order for reference reveals that the uncertainties of the Sąd Najwyższy (Supreme Court) are broader in scope than they might appear. In fact, the referring court seeks to ascertain how far judicial scrutiny of the conduct of NRAs may extend. It is clear that that problem is part of the discussion because, in its submissions, one of the parties proposed that the national court should give judgment on the substantive issue (that is, the correctness of the maximum rates imposed, by reference to Polkomtel's costs), either dismissing the action outright or attaching a specific meaning to the implementing decision which would be binding on all parties.

validity of the implementing decision: what matters is to give a ruling, in the light of Article 4(1) of the Framework Directive, on the effects which annulment of the implementing decision would have, whatever the grounds for that judgment may have been at the relevant time. Nor, logically, may the Court intervene in the interpretation of Polish law, which falls exclusively within the competence of the national courts.

B – *The appeal mechanisms provided for in Article 4(1) of the Framework Directive*

56. I shall begin by setting the boundaries of the dispute, focusing on the last sentence of Article 4(1) of the Framework Directive.

57. The Court has had occasion to interpret [18] Article 4, observing that it 'follows from the principle of effective judicial protection, pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under EU law'. [19] The Court has also asserted that, 'in the case covered by Article 4 of the Framework Directive, the Member States are required to provide for a right of appeal before an appellate body in order to protect the rights which users and undertakings derive from the Community legal order'. The Court has also ruled on observance of the principle of effective judicial protection in other cases relating to electronic communications, without addressing the scope and effects of decisions of the national appeal body. [20]

58. The last sentence of Article 4(1) of the Framework Directive merely provides for another of the features inherent in effective judicial protection, namely interim relief. The Community legislature starts from the premiss that the decisions of NRAs may be suspended, [21] pending final judgment, by the court (or other 'appeal body that is independent of the parties involved') before which they have been challenged. It goes on to provide that, if the decision of the NRA is not suspended it continues to stand. [22] It cannot be inferred from that sentence, as a number of the parties to the proceedings have done, that the (provisional, pending the outcome of the appeal) maintenance of the effects of the decision of the NRA is an obstacle preventing a final judgment annulling the decision from also annulling the (until that time, provisional) effects of that decision, which was *sub judice*, by declaring that those effects are also unlawful.

59. The absence of interim measures staying the effects of the decision of the NRA during the appeal proceedings cannot, from the perspective of Article 4(1) of the Framework Directive, preclude the judgment bringing the proceedings to an end not only from annulling the contested decision but also from extending the declaration of nullity to all past and future effects of that decision. Moreover, that

18 — On some occasions, the Court has given a very tangential ruling. Thus, the judgments of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 29, and of 17 September 2015, in *KPN*, C-85/14, EU:C:2015:610, paragraph 54, refer to the conditions to be satisfied by NRAs and to how their decisions are subject to an effective remedy. The judgment of 13 July 2006, *Mobistar*, C-438/04, EU:C:2006:463, focused on access by the appeal body to certain confidential documents in order to give judgment on the substance with sufficient material for a ruling.

19 — Judgment of 22 January 2015, *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraph 33.

20 — Judgments of 21 February 2008, *Tele2 Telecommunication*, C-426/05, EU:C:2008:103, paragraphs 30 and 31, and of 22 January 2015, *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraphs 33 and 34. Those judgments refer to the concept of 'affected' for the purposes of Article 4 of the Framework Directive.

21 — On that point, see, in point 8 above, recitals 14 and 15 of Directive 2009/140.

22 — In all the language versions I have consulted it is the *effectiveness* of the decision of the NRA rather than its *validity* which is maintained. The Portuguese text is expressly worded to that effect ('Na pendência do recurso, a decisão da autoridade reguladora nacional mantém-se *eficaz*'), as are, in similar terms, the German ('Bis zum Abschluss eines Beschwerdeverfahrens *bleibt* die Entscheidung der nationalen Regulierungsbehörde *wirksam*'), the English ('Pending the outcome of the appeal, the decision of the national regulatory authority *shall stand*'), the French ('Dans l'attente de l'issue de la procédure, la décision de l'autorité réglementaire nationale *est maintenue*') and the Italian ('In attesa dell'esito del ricorso, *resta in vigore* la decisione dell'autorità nazionale di regolamentazione') (no italics in the original). However, the Spanish text states that the decision of the NRA 'seguirá siendo válida', which does not accord with the other versions because it wrongly places on the same footing different legal categories: the validity of an act and its effectiveness.

is the rationale for the system of appeals including claims for annulment of administrative acts, which are governed by the general rule *quod nullum est, nullum effectum producit*. If the court has the power to suspend the administrative act as an interim measure then, *a fortiori*, it must have the power to guarantee enforcement of the judgment annulling that act by undoing the effects of the contested act.

60. From a different perspective, Article 4(1) of the Framework Directive provides that Member States must lay down in their legal systems an 'effective appeal mechanism' against decisions of NRAs, a term repeated in the first and third sentences of the provision. The third sentence also provides that 'Member States shall ensure that the merits of the case are duly taken into account'.

61. Therefore, Member States must lay down in their respective legal systems the legislative measures necessary for ensuring that rulings in appeals against decisions of NRAs in the electronic communications sector are 'effective'. However, the Framework Directive does not go further than the wording set out above, allowing the procedural and judicial autonomy of the Member States a certain amount of latitude so that that purpose is attained by means (in this case, procedural means) which each Member State considers appropriate.

62. Does the requirement of effectiveness laid down in Article 4(1) of the Framework Directive unavoidably mean that a judgment which brings an appeal to an end by annulling a decision of the NRA does so with effects *ex tunc*? That is, in reality, the key question of the reference for a preliminary ruling, if the analysis of it is approached from the perspective of EU law.

63. Following my suggestion that the effects *ex tunc* of the judgment annulling the decision are not weakened by the reference to the 'maintenance' of the decision of the NRA in the absence of an interim measure suspending that decision (last sentence of Article 4(1)), the dispute now moves to the area not of the right but of the alleged obligation to undo, from the outset, the effects provisionally maintained.

64. As I have argued above, the rationale for the system of appeals against the decisions of NRAs means, as a rule, that where those decisions are annulled by a court, their nullity must extend also to the effects they have produced, since these are deprived of the legal foundations from which they derived. However, that is a general rule which is open to a number of exceptions.

65. One of the exceptions (whose exceptional nature confirms — should that be necessary — the fact that the rule is the 'norm') is that, where its legal system so permits, a court may rule that certain effects of an annulled act may stand definitively.[23] Reasons linked to legal certainty, the rights of third parties or the general interest, among others, may make it advisable that, where the court seised considers it appropriate, the effects of an annulled act should continue to apply, especially where the immediate effects of the declaration of nullity made in the judgment entail particularly serious consequences for those interests.

66. Another understandable exception may be made where, in the appeal proceedings, the lawfulness of the contested act has not been challenged on account of its purpose or its content but on grounds unconnected to the substance, such as the lack of competence of the body which adopted the act or the existence of other, more or less essential, procedural defects. If the appeal is upheld on those grounds, and the act is consequently annulled, it may be accompanied (again, if the legal system of a

23 — That right, granted to the Court of Justice in relation to direct actions, has been incorporated into primary EU law: Article 264 TFEU provides that 'if the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. *However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive*' (no italics in the original).

particular Member State so permits) by a declaration that the effects of the annulled act are to stand until such time as that act is replaced by another which is free from those defects, in order to avoid the creation of a legal vacuum with disruptive effects with regard to the public interest.[24] In those cases, the judgment annulling the act will therefore have prospective rather than retroactive effect.

67. National legal systems may also provide that their courts may restrict the temporal effects of a judgment, again as an exception and based on serious considerations pertaining to the principle of legal certainty.[25] Although, logically, this type of judicial decision must continue to be unusual so that the force of *res judicata* of judgments is not weakened,[26] the existence of such decisions cannot be ruled out and may be justified without diminishing the right to an effective remedy.

68. In short, it is equally acceptable for national law to provide, in certain circumstances, as a response to an action for annulment of an administrative act (or a public contract), that the judgment declaring that act invalid may be deprived of its 'natural' effect, which may be replaced by an obligation to pay compensation or by other alternative measures. That possibility is not unknown in EU law[27] and I see no reason why it could not be extended to national legal systems in similar cases.

69. The considerations I have set out confirm that the operation of the 'appeal mechanisms' against decisions of NRAs, in accordance with Article 4(1) of the Framework Directive, requires, as a general rule, that the judgment annulling such a decision must also annul the provisional effects arising as a result of it. However, that rule is open to exceptions of the kind I referred to above, and it is for the Member States to lay down such exceptions in their own legal systems, subject to compliance with the principles of equivalence and effectiveness by which their procedural autonomy is limited.

70. In this respect, the reference to Article 47 of the Charter offers no significant guidance (leaving aside the fact that, *ratione temporis*, it can hardly apply to a legal situation arising as a result of decisions adopted, and appeals brought, in 2008 and 2009). The right to effective judicial protection, enshrined in the Charter in respect of the cases referred to in Article 51 thereof, does not imply an unequivocal solution to difficulties which may arise in relation to the effects of judgments annulling administrative acts. Admittedly, the general rule I have mentioned can be inferred from that right but that rule does not preclude the possibility of making use of the exceptions referred to above.

71. I believe that the remainder of the dispute between the UKE and the two communications operators affected by the setting of maximum rates (and the effects of these on their network access contracts), as that dispute has been described in their submissions to the Court during these preliminary ruling proceedings, relates more to the interpretation of national law than EU law. There

24 — Especially in the case of acts of a legislative nature.

25 — That also occurs in EU law. Starting with the judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, the Court has ruled on a number of occasions on limitation of the temporal effects of its judgments, endeavouring to reconcile the requirements of the principle of legal certainty with those which, as a rule, arise as a result of the incompatibility of national provisions with Community law. See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Edis*, C-231/96, EU:C:1998:134, point 15 et seq.

26 — The Court expressed it as follows in the judgment of 16 July 1992, *Legros and Others*, C-163/90, EU:C:1992:326, paragraph 30: 'It should be observed that it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon the provisions thus interpreted with a view to calling in question legal relationships established in good faith. … In determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision (judgment in … Blaizot, [24/86, EU:C:1988:43], paragraphs 28 and 30).'

27 — For example, in Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). Under that directive (recital 22 and Articles 2d and 2e), in the case of a contract which should, in principle, be considered ineffective in view of its unlawful origin, the independent appeal body may, if there are overriding reasons in the general interest, opt to recognise 'some or all of its temporal effects'; in other words, the effects of the contract may be maintained, without prejudice to the imposition of the appropriate penalties and the award of damages.

is disagreement between the UKE and the two electronic communications operators (and the Polish Government) regarding the interpretation of the national provisions [28] and the case-law of their highest civil and administrative courts. It is not for the Court of Justice to intervene in that debate, which does not fall within its task of interpreting only EU law.

72. The answer I suggest to the question referred for a preliminary ruling, in keeping with the considerations I have set out, is confined to clarifying the meaning of Article 4(1) of the Framework Directive in terms which are helpful to the referring court but which at the same time do not encroach upon that court's own jurisdiction to interpret national law.

73. From that perspective, I think it is helpful to split the answer by separating the part relating to the first sentence of the provision (which requires Member States to have 'effective mechanisms' for appealing against decisions of NRAs in the electronic communications sector) from the part relating to the last sentence (which, in the case of an appeal, provides for the effects of the contested decision to be maintained unless they are suspended by the appeal body).

74. As regards the first sentence of Article 4(1) of the Framework Directive, its substance, and the right to effective judicial protection on which it is founded, means that appeal bodies may annul the decisions of NRAs which they are called upon to adjudicate and may extend the nullifying force of their judgments to effects already produced by those decisions.

75. As regards the last sentence of that provision, the provisional maintenance of the effects of a decision of an NRA, unless and until that decision is suspended by an appeal body, is compatible with the fact that the subsequent annulment of such a decision may extend, *ex tunc*, to the effects which the decision has produced.

76. However, neither sentence of the provision prevents — if national law so permits and by way of exception — the annulment of a decision of an NRA from producing effects which are only *ex nunc* if the appeal body considers it appropriate for overriding reasons aimed at the preservation of legal certainty and the protection of legitimate expectations, or for the purpose of safeguarding the rights of third parties, or for reasons relating to the general interest.

77. I must add one remark concerning the third sentence of Article 4(1) of the Framework Directive, although it is not essential to include it in the operative part of the judgment. The provision requires that the 'merits of the case' be duly taken into account by the appeal body. If that body has sufficient evidence before it, it should rule on the merits by either allowing or dismissing the respective forms of order sought. It is for the appeal body to examine, at the end of the proceedings, whether it has before it the criteria for assessment and the evidence necessary to give a ruling on those lines. Further, in cases like this one, its judgment may be based, amongst other factors, on the lack of a legal basis for the contested decision. [29]

28 — The differences of opinion are concerned, in particular, with the combined operation of the provisions on civil procedure (Article 479[63], Article 479[64] and Article 365(1)) and the provisions of the Code of Administrative Procedure (Article 145(1)) vis-à-vis a judgment annulling an administrative act where it is necessary to adopt another act replacing the annulled act and a fresh procedure must be commenced for that purpose. Nor do the parties agree about the possible effects which the invalidity of the MTR decision of 2008 might have on the implementing decision or about the reasons determining the nullity of that decision (relating to the procedural defect of failure to consult, the improper use of the exceptional mechanism provided for in the Polish Law on telecommunications, and also the lack of a legal basis following the annulment of the MTR decision of 2008). Lastly, the UKE put forward an additional factor which does not feature as relevant in the order for reference: the new SMP decision which followed the implementing decision.

29 — The reference to the 'merits of the case' in no way prevents the examination by the appeal body from not proceeding beyond formal defects determining the nullity of the act, with no need to go any further. If, for example, the essential formalities were not observed when the act was drawn up, that defect may suffice for the purposes of annulling it.

78. More specifically, if the referring court agrees with the court of first instance and the appeal court that, from a substantive point of view, the MTR decision of 2008 was a necessary prerequisite for the subject matter of the implementing decision, with the result that, once the former had been annulled the same outcome had to be applied to the latter, proceeding in that way would not be contrary to the third sentence of Article 4(1) of the Framework Directive.

79. Furthermore, if, under national law, a decision must be adopted to replace the annulled decision, once the relevant procedure has been reopened by the NRA, Article 4(1) does not preclude the new, now lawful, maximum rate from being used to calculate the amounts corresponding to the chargeable periods, with the appropriate payments or refunds as the case may be. That option would be lawful and at the same time compatible with the wording of the third sentence of Article 4(1) of the Framework Directive, and it would avoid postponing until an action for damages (compensation) is brought any possible financial consequences of annulment.

V – Conclusion

80. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) in the following terms:

(1) Article 4(1) 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), in conjunction with the right to effective judicial protection, means that:

— an appeal body may annul a decision of a national regulatory authority on which it is required to adjudicate and may extend the nullifying force of a judgment annulling such a decision to the effects already produced by that decision;

— the provisional maintenance of the effects of a decision of a national regulatory authority, unless and until that decision is suspended by an appeal body, is compatible with the fact that the subsequent annulment of such a decision may extend, *ex tunc*, to the effects the decision has produced.

(2) Where national law so permits, the annulment of a decision of a national regulatory authority may, by way of exception, only produce effects *ex nunc* if the appeal body considers it appropriate for overriding reasons aimed at the preservation of legal certainty and the protection of legitimate expectations, or for the purpose of safeguarding the rights of third parties, or for reasons relating to the general interest.