



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

15 September 2016*

(Reference for a preliminary ruling — Common regulatory framework for electronic communications networks and services — Directive 2002/21/EC — Articles 4 and 19 — National Regulatory Authority — Harmonisation measures — Recommendation 2009/396/EC — Legal scope — Directive 2002/19/EC — Articles 8 and 13 — Operator designated as having significant market power on a market — Obligations imposed by national regulatory authorities — Price control and cost accounting obligations — Fixed and mobile call termination rates — Scope of the review that national courts can exercise over the decisions of national regulatory authorities)

In Case C-28/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands), made by decision of 13 January 2015, received at the Court on 23 January 2015, in the proceedings

Koninklijke KPN NV,

KPN BV,

T-Mobile Netherlands BV,

Tele2 Nederland BV,

Ziggo BV,

Vodafone Libertel BV,

Ziggo Services BV, formerly UPC Nederland BV,

Ziggo Zakelijk Services BV, formerly UPC Business BV,

v

Autoriteit Consument en Markt (ACM),

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: P. Mengozzi,

* Language of the case: Dutch.

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 March 2016,

after considering the observations submitted on behalf of:

- Koninklijke KPN NV and KPN BV, by L. Mensink and C. Schillemans, advocaten,
- T-Mobile Netherlands BV, by B. Braeken and C. Eijberts, advocaten,
- Tele2 Nederland BV, by P. Burger and P. van Ginneken, advocaten,
- Ziggo BV, by W. Knibbeler, N. Lorjé and P. van den Berg, advocaten,
- Vodafone Libertel BV, by P. Waszink, advocaat,
- Ziggo Services BV and Ziggo Zakelijk Services BV, by W. Knibbeler, N. Lorjé and P. van den Berg, advocaten,
- the Netherlands Government, by J. Langer and M. Bulterman, acting as Agents,
- the German Government, by T. Henze and R. Kanitz, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and A. De Stefano, avvocato dello Stato,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Finnish Government, by S. Hartikainen, acting as Agent,
- the European Commission, by F. Wilman, G. Braun and L. Nicolae, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2016,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 ('the Framework Directive'), read in conjunction with Articles 8 and 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), as amended by Directive 2009/140 ('the Access Directive').
- 2 The request was made in the context of a dispute between Koninklijke KPN NV, KPN BV, T-Mobile Netherlands BV, Tele2 Nederland BV, Ziggo BV, Vodafone Libertel BV, Ziggo Services BV, formerly UPC Nederland BV, and Ziggo Zakelijk Services BV, formerly UPC Business BV, on the one hand, and the Autoriteit Consument en Markt (ACM) (Authority for Consumers and Markets, 'ACM'), on the other hand, regarding a decision setting price caps for fixed and mobile call termination services.

Legal context

EU law

The Framework Directive

- 3 Article 4(1) of the Framework Directive, entitled ‘Right of appeal’, is worded as follows:

‘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.’

- 4 Article 8 of the Framework Directive, entitled ‘Policy objectives and regulatory principles’, provides:

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

...

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

- (a) ensuring that users, including disabled users, elderly users, and users with special social needs derive maximum benefit in terms of choice, price, and quality;

...

3. The national regulatory authorities shall contribute to the development of the internal market ...

...

4. The national regulatory authorities shall promote the interests of the citizens of the European Union

...

...’

- 5 Article 16 of that directive, which is entitled ‘Market analysis procedure’, provides, in paragraphs 2 and 4:

‘2. Where a national regulatory authority is required under ... Article 8 of [the Access Directive] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

...

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.'

6 Article 19 of that directive, entitled 'Harmonisation procedures', provides that:

'1. ... where the Commission finds that divergences in the implementation by the national regulatory authorities of the regulatory tasks specified in this Directive and the Specific Directives may create a barrier to the internal market, the Commission may, taking the utmost account of the opinion of [the Body of European Regulators for Electronic Communications (BEREC)], issue a recommendation or a decision on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8.

2. ...

Member States shall ensure that national regulatory authorities take the utmost account of those recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a recommendation, it shall inform the Commission, giving the reasons for its position.

...'

The Access Directive

7 Recital 20 in the preamble to the Access Directive states:

'Price control may be necessary when market analysis in a particular market reveals inefficient competition. ... The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.'

8 Article 1 of the Access Directive is worded as follows:

'1. Within the framework set out in [Framework Directive], this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive ... sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed'

- 9 Article 5 of the Access Directive, entitled ‘Powers and responsibilities of the national regulatory authorities with regard to access and interconnection’, provides, at paragraph 1 thereof:

‘National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of [the Framework Directive], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.

...’

- 10 Article 8 of the Access Directive, entitled ‘Imposition, amendment or withdrawal of obligations’, provides:

‘1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13a.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

...

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of [the Framework Directive]. Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

...’

- 11 Article 13 of the Access Directive, entitled ‘Price control and cost accounting obligations’, provides:

‘1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.

...’

Recommendation 2009/396/EC

12 According to recitals 5, 7 and 13 of Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU (OJ 2009 L 124, p. 67):

‘(5) Certain provisions of the regulatory framework for electronic communications networks and services require necessary and appropriate cost-accounting mechanisms and price control obligations to be implemented, namely Articles 9, 11 and 13 in conjunction with recital 20 of [the Access Directive]

...

(7) Wholesale voice call termination is the service required in order to terminate calls to called locations (in fixed networks) or subscribers (in mobile networks). The charging system in the [European Union] is based on Calling Party Network Pays, which means that the termination charge is set by the called network and paid by the calling network. The called party is not billed for this service and generally has no incentive to respond to the termination price set by its network provider. In this context, excessive pricing is the main competition concern of regulatory authorities. High termination prices are ultimately recovered through higher call charges for end-users. Taking into account the two-way access nature of termination markets, further potential competition problems include cross-subsidisation between operators. These potential competition problems are common to both fixed and mobile termination markets. Therefore, in the light of the ability and incentives of terminating operators to raise prices substantially above cost, cost orientation is considered the most appropriate intervention to address this concern over the medium term. Recital 20 of [the Access Directive] notes that the method of cost recovery should be appropriate to the particular circumstances. In view of the specific characteristics of call termination markets and the associated competitive and distributional concerns, the Commission has for a long time recognised that setting a common approach based on an efficient cost standard and the application of symmetrical termination rates would promote efficiency, sustainable competition and maximise consumer benefits in terms of price and service offerings.

...

(13) Taking account of the particular characteristics of call termination markets, the costs of termination services should be calculated on the basis of forward-looking long-run incremental costs (LRIC) ...’

13 Points 1 and 2 of Recommendation 2009/396 are worded as follows:

‘1. When imposing price control and cost-accounting obligations in accordance with [the Access Directive] on the operators designated by National Regulatory Authorities (NRAs) as having significant market power on the markets for wholesale voice call termination on individual public telephone networks (hereinafter referred to as “fixed and mobile termination markets”) as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], NRAs should set termination rates based on the costs incurred by an efficient operator. This implies that they would also be symmetric. In doing so, NRAs should proceed in the way set out below.

2. It is recommended that the evaluation of efficient costs is based on current cost and the use of a bottom-up modelling approach using long-run incremental costs (LRIC) as the relevant cost methodology.’

Netherlands law

14 Article 1.3(1) of the Telecommunicatiewet (Law on telecommunications), in the version applicable to the facts in the main proceedings, provides:

‘1. The [ACM] shall ensure that its decisions contribute to achieving the objectives referred to in Article 8(2) to (5) of the [Framework Directive], in any event through:

- a. the promotion of competition in the provision of electronic communications networks and electronic communications services and associated facilities, in particular by supporting efficient investment in infrastructure and innovation;
- b. the development of the internal market;
- c. the support of the interests of end users in terms of choice, price and quality.’

15 Article 1.3(2) and (3) of the Law on telecommunications provides that, in the exercise of its duties and powers, the ACM must take utmost account of the recommendations of the European Commission under Article 19(1) of the Framework Directive. If the ACM does not apply a recommendation, it shall inform the Commission, giving reasons for its decision.

16 The Law on telecommunications provides, in Article 6a.1, that the ACM, as an NRA, must define the relevant markets in the electronic communications sector. To do this, the ACM must, pursuant to Article 6a.1(5) of that law, determine whether the contract in question is or is not actually competitive. If this is not the case, the ACM is required under Article 6a.2 of that law, to determine whether one or more undertakings have significant market power on the market and the appropriate obligations to be imposed on them.

17 Article 6a.2(3) of the Law on telecommunications provides:

‘An obligation in paragraph 1 is appropriate when it is based on the nature of the problem identified in the market concerned and is proportionate and justified in the light of the objectives of Article 1.3.’

18 According to Article 6a.7 of that law:

‘1. In accordance with Article 6a.2(1), the [ACM] may, for the forms of access which it is to determine, impose an obligation on the control of rates calculated above or the calculation of costs in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. The [ACM] may make that obligation subject to rules that are necessary for proper implementation of the obligation.

2. An obligation within the meaning of paragraph 1 may require that a costs-oriented rate must be charged for access or that a cost-calculation system determined or approved by the [ACM] must be applied.

3. If the [ACM] has required an undertaking to charge a costs-oriented rate for access, that undertaking shall demonstrate that its rates are in fact determined on the basis of the costs.

4. Without prejudice to the provision of the second sentence of paragraph 1, the [ACM] may make an obligation to set up a cost accounting system subject to rules regarding the submission of the results of the application of the system by the undertaking that is subject to that obligation ...’

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

- 19 In a procedure prior to that which gave rise to the main proceedings, the Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) (Independent Authority of Posts and Telecommunications), now the ACM and which acts as the NRA in the Netherlands within the meaning of the Framework Directive, by a decision of 7 July 2010, after conducting an analysis of relevant markets, imposed on operators identified as having significant market power in the fixed and mobile call termination markets in the Netherlands price regulation measures in accordance with the ‘pure Bulric’ cost model (*Bottom-Up Long-Run Incremental Costs*, the ‘pure Bulric’ model) under which only incremental costs are reimbursed. On 31 August 2011, the referring court, the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands), annulled that decision on the ground that another model for calculating costs, which takes into account a broader set of costs than the ‘pure Bulric’ model, should have been applied, namely the ‘Bulric plus’ model.
- 20 Subsequently, the ACM, having found that there was a risk on the wholesale fixed and mobile call termination markets that excessively high prices would be applied, on 5 August 2013 adopted a decision by which, in accordance with Netherlands law transposing Articles 8 and 13 of the Access Directive and with Recommendation 2009/396, it fixed price caps for the provision of those services by applying the ‘pure Bulric’ model. The ACM considered that that model was appropriate for determining cost-oriented termination rates and that it was, in accordance with that recommendation, the only cost-oriented model which conformed to EU law. According to the ACM a price regulation measure based on that calculation model ruled out the risk of excessively high prices and margin squeeze, while promoting competition, the development of the internal market and the interests of end-users.
- 21 Koninklijke KPN, KPN, T-Mobile Netherlands, Tele2 Nederland, Ziggo, Vodafone Libertel, Ziggo Services and Ziggo Zakelijk Services, which are operators providing, inter alia, mobile call termination services, brought an action for annulment against the ACM’s decision of 5 August 2013 before the referring court. That court, before which proceedings seeking interim relief were brought, suspended the operation of that decision by order of 27 August 2013.
- 22 In their actions for annulment, Koninklijke KPN, KPN, T-Mobile Netherlands and Vodafone Libertel maintain that a tariff obligation determined according to the ‘pure Bulric’ model infringes Article 6a.2(3) and Article 6a.7(2) of the Law on telecommunications, which provide respectively that a rate must be cost-oriented and that an obligation imposed by the ACM must be appropriate.
- 23 Those undertakings claim that all the statements made by the ACM concerning the anticipated positive effects of the application of the ‘pure Bulric’ model on the pricing structure on a retail market cannot justify the imposition of tariff obligations such as those which would be imposed under the decision of 5 August 2013. According to those undertakings, the effect of prices being determined according to that model is that call termination rates are lower than those which would be obtained in a competitive market. Consequently, Recommendation 2009/396 is not compatible with Article 13 of the Access Directive. Furthermore, those undertakings consider that those tariff obligations, since they are not proportionate to the objectives of the decision of the ACM, are, inter alia, contrary to Article 6a.2(3) of the Law on telecommunications.
- 24 The national court points out that the wording of Article 6a.7(2) of the Law on telecommunications does not support the interpretation that a form of price regulation in accordance with the ‘pure Bulric’ model may be imposed which goes further than a less strict price regulation measure following the ‘Bulric plus’ model which is already cost-oriented.
- 25 That court considers, however, that the ACM may be able to impose a stricter price obligation if it is proportionate and justified having regard to the nature of the problem identified on the markets in question and if it pursues the objectives laid down in Article 8(2) to (4) of the Framework Directive.

In imposing such obligations, ACM is required, according to the referring court, to determine whether the proposed price measure is appropriate for attaining the objective sought and whether it does not go beyond what is necessary for that purpose. The ACM is also required to explain the reasons for its decision and to weigh up all the interests concerned.

26 However, the referring court has doubts about the correctness of that interpretation. It asks, first, what interests may or must be weighed up and what weight may or must be assigned to each of those interests in the judicial review of the ACM's decision which is the object of the dispute before it and it asks, second, what importance should be attached to the fact that the Commission has recommended the 'pure Bulric' method in Recommendation 2009/396 for adopting an appropriate price measure on the wholesale fixed and mobile termination markets.

27 In those circumstances the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, be interpreted as meaning that, in principle, in a dispute concerning the lawfulness of a cost-oriented scale of charges imposed by the [NRA] in the wholesale call termination market, a national court is permitted to make a ruling which does not accord with [Recommendation 2009/396] in which [the "pure Bulric" method] is recommended as the appropriate price regulation measure for call termination markets, if, in that national court's view, this is required on the basis of the facts in the case brought before it and/or on the basis of considerations of national or supranational law?

(2) If the answer to Question 1 is affirmative: to what extent is the national court permitted, in assessing a cost-oriented price regulation measure:

(a) in the light of Article 8(3) of the Framework Directive, to evaluate the NRA's argument that the development of the internal market is promoted by reference to the degree to which the functioning of the internal market is in fact influenced?

(b) to assess, in the light of the policy objectives and regulatory principles laid down in Article 8 of the Framework Directive and Article 13 of the Access Directive, whether the price regulation measure:

(i) is proportionate;

(ii) is appropriate;

(iii) has been applied proportionately and is justified?

(c) to require the NRA to demonstrate adequately that:

(i) the policy objective, referred to in Article 8(2) of the Framework Directive, that the NRAs should promote competition in the provision of electronic communications networks and electronic communications services is genuinely being attained and that users are genuinely deriving maximum benefit in terms of choice, price and quality;

(ii) the policy objective, referred to in Article 8(3) of the Framework Directive, that NRAs should contribute to the development of the internal market is genuinely being attained;

(iii) the policy objective, referred to in Article 8(4) of the Framework Directive, that the interests of the citizens [of the European Union] should be promoted is genuinely being attained?

(d) in the light of Article 16(3) of the Framework Directive, and of Article 8(2) and (4) of the Access Directive, when assessing whether the price regulation measure is appropriate, to take into account the fact that the measure has been imposed on the market on which the regulated undertakings possess significant market power but, in the form chosen ([the "pure Bulric" method]), has the effect of promoting one of the objectives of the Framework Directive, namely the interests of end-users, on another market which has not been earmarked for regulation?

Consideration of the questions referred

The first question

- 28 By its first question, the referring court asks, in essence, whether Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, must be interpreted as meaning that a national court, hearing a dispute concerning the legality of a tariff obligation imposed by the NRA for the provision of fixed and mobile call termination services, may depart from Recommendation 2009/396 advocating the ‘pure Bulric’ model as the appropriate price regulation measure in the termination market.
- 29 With regard to Articles 8 and 13 of the Access Directive it should be observed that the first of these articles provides, in paragraph 2 thereof, that, where, following a market analysis carried out in accordance with Article 16 of the Framework Directive, an operator is designated as having significant market power on a specific market, NRAs are to impose the obligations set out in Articles 9 to 13 of the Access Directive, as appropriate.
- 30 As for Article 13(1) thereof, it provides that NRAs may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.
- 31 It thus follows from a reading of Article 8(2) and Article 13(1) of the Access Directive that, when, following a market analysis carried out in accordance with Article 16 of the Framework Directive, an operator is designated as having significant market power on a specific market, the NRA may, as appropriate, impose on it ‘obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access’.
- 32 For the purposes of the implementation of Article 13 of the Access Directive, Recommendation 2009/396 advocates a cost model, namely the ‘pure Bulric’ model. According to recitals 5, 7 and 13 of this recommendation, it was adopted to end the divergences and the distortions in the EU fixed and mobile termination markets, which are detrimental to effective competition and end-consumers, and also taking into account the particular characteristics of the termination market.
- 33 According to point 1 of Recommendation 2009/396, when imposing price control and cost-accounting obligations in accordance with Article 13 of the Access Directive on the operators designated as having significant market power on the markets for wholesale fixed and mobile call termination as a result of a market analysis carried out in accordance with Article 16 of the Framework Directive, NRAs should set termination rates based on the costs incurred by an efficient operator. In doing so, the NRAs are to proceed in the way set out in the recommendation.
- 34 It should be recalled, however, that, in accordance with Article 288 TFEU, such a recommendation is, on principle, not legally binding. Moreover, the second subparagraph of Article 19(2) of the Framework Directive explicitly allows an NRA to depart from the Commission recommendations adopted on the basis of Article 19(1) of the Framework Directive, provided they inform the Commission and give it the reasons for their position.
- 35 It follows that the NRA, upon adoption of a decision by which it imposes tariff obligations on operators on the basis of Articles 8 and 13 of the Access Directive, is not bound by Recommendation 2009/396.

- 36 In that regard, it must be noted that the Court has already held that, in carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis (judgment of 3 December 2009, *Commission v Germany*, C-424/07 EU:C:2009:749, paragraph 61 and the case-law cited). This is the case in the context of price control, since recital 20 of the Access Directive states that the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.
- 37 Nevertheless, the second subparagraph of Article 19(2) of the Framework Directive requires NRAs, in carrying out their duties, to ‘take the utmost account’ of the Commission recommendations.
- 38 Accordingly, it is for the NRA, when imposing obligations concerning price control and cost accounting in accordance with Article 13 of the Access Directive, to follow, as a rule, the guidance contained in Recommendation 2009/396. It is only where it appears to the NRA, in its assessment of a given situation, that the ‘pure Bulric’ model advocated by this recommendation is not appropriate to the circumstances that it may depart from it, giving reasons for its position.
- 39 With regard to the scope of the judicial review of the NRA’s decision, it follows from Article 4(1) of the Framework Directive that the right of appeal guaranteed by that provision must be based on an effective appeal mechanism which allows the merits of the case to be duly taken into account. Furthermore, this provision clarifies that the body which is competent to deal with such an action, which may be a court, is to have the appropriate expertise to enable it to carry out its functions effectively.
- 40 Thus, when hearing a case concerning the legality of a tariff obligation imposed by the NRA under Articles 8 and 13 of the Access Directive, a national court may depart from Recommendation 2009/396.
- 41 Nevertheless, according to the Court’s settled case-law, even if recommendations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions (judgment of 24 April 2008, *Arcor*, C-55/06, EU:C:2008:244, paragraph 94 and the case-law cited).
- 42 Therefore, in the context of its review of a decision of the NRA adopted on the basis of Articles 8 and 13 of the Access Directive, a national court may depart from Recommendation 2009/396 only where, as stated by the Advocate General in point 78 of his Opinion, it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.
- 43 In the light of all the foregoing, the answer to the first question is that Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, must be interpreted as meaning that a national court, hearing a dispute concerning the legality of a tariff obligation imposed by the NRA for the provision of fixed and mobile call termination services, may depart from Recommendation 2009/396 advocating the ‘pure Bulric’ model as the appropriate price regulation measure in the termination market only where it considers that this is required on grounds related to the facts of the individual case, in particular, the specific characteristics of the market of the Member State in question.

The second question

- 44 By its second question, the referring court asks, in essence, whether EU law must be interpreted as meaning that a national court hearing a dispute concerning the legality of a tariff obligation imposed by an NRA for the provision of fixed and mobile call termination services can assess the proportionality of that obligation in the light of the objectives set out in Article 8 of the Framework Directive and Article 13 of the Access Directive and take into account the fact that the obligation has the effect of promoting the interests of end-users on a retail market which has not been earmarked for regulation.
- 45 In this context, the referring court also raises the question whether it can require an NRA to show that the obligation actually achieves the objectives set out in Article 8 of the Framework Directive.
- 46 As regards the first part of the second question, it should be noted that the first subparagraph of Article 8(1) of the Framework Directive provides that in carrying out the regulatory tasks specified in that directive and the specific directives, and therefore in particular in the Access Directive, the NRAs are to take all reasonable measures which are aimed at achieving the objectives set out in that article, namely to promote competition in the provision of electronic communications networks and electronic communications services, to contribute to the development of the internal market and to promote the interests of the citizens of the European Union. That provision provides, in addition, that such measures are to be proportionate to those objectives.
- 47 Thus, according to Article 1(1) and (2) thereof, the Access Directive falls within the framework set out in the Framework Directive and harmonises the way in which the Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim of the Access Directive is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits. The Access Directive defines, in particular, the objectives assigned to NRAs as regards access and interconnection.
- 48 As regards the conditions allowing the NRA to impose on an operator designated as having significant market power on a relevant market a tariff obligation for the provision of fixed and mobile call termination services, it must be noted that Article 8(4) of the Access Directive provides that obligations imposed by the NRA, including those provided for in Article 13 of that directive, must be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and that the obligations may only be imposed following consultation in accordance with Articles 6 and 7 of the Framework Directive (see, to that effect, judgment of 17 September 2015, *KPN*, C-85/14, EU:C:2015:610, paragraph 47).
- 49 According to Article 13(2) of the Access Directive, the NRAs are to ensure, when exercising the power under paragraph 1 of that article, that any cost recovery mechanism or pricing methodology that is mandated serves to promote economic efficiency and sustainable competition and to maximise consumer benefits. In that regard, the NRAs may also take account of prices available in comparable competitive markets.
- 50 It follows from this that the NRA must, when it adopts a decision in which it imposes obligations on operators on the basis of Articles 8 and 13 of the Access Directive, ensure that those obligations meet all the objectives set out in Article 8 of the Framework Directive and Article 13 of the Access Directive. Similarly, in the context of the judicial review of that decision, a national court must ensure that the NRA meets all requirements arising from the objectives set out by those two articles.

- 51 As the Advocate General has observed in point 82 of his Opinion, the fact that a tariff obligation is founded on Recommendation 2009/396 does not deprive the national court of its power to review the proportionality of such obligations with the objectives laid down in Article 8 of the Framework Directive and Article 13 of the Access Directive.
- 52 Accordingly, as part of its judicial review, a national court hearing an appeal against an NRA decision applying the ‘pure Bulric’ model advocated by Recommendation 2009/396, as in the case in the main proceedings, may check, applying national procedural rules, whether the applicants have adduced sufficient evidence to show that the application of this model is not proportionate to the objectives set out in Article 8 of the Framework Directive and in Article 13 of Access Directive, in view, as appropriate, of the specific characteristics of the relevant market.
- 53 Moreover, it follows from a reading of Article 8(2)(a) and (4) of the Framework Directive and Article 1(1) and Article 8(4) of the Access Directive — the latter article referring to Article 8 of the Framework Directive — that NRAs must, in promoting competition, ensure that end-users and consumers derive maximum benefit in particular in terms of choice and price, and support the interests of EU citizens. Furthermore, when these authorities impose cost recovery mechanisms within the meaning of Article 13(2) of the Access Directive, they must ensure, in particular, that that mechanism maximises consumer benefits.
- 54 It follows that the NRA must, as part of the procedure for adoption of a decision in circumstances such as those in the case in the main proceedings, take into account the interests of end-users and consumers, irrespective of the market in which the regulatory obligations are imposed. Furthermore, since, by definition, end-users and consumers are not present on the wholesale fixed and mobile termination markets, it is essential that their interests can be taken into account and evaluated in the context of the review of the effect that the tariff obligation imposed by the NRA on a wholesale market is intended to produce on the retail market.
- 55 Therefore, a national court may consider, as part of its review of the proportionality of a tariff obligation imposed by the NRA in relation to the objectives set out in Article 8 of the Framework Directive and Article 13 of the Access Directive, whether that obligation on the wholesale fixed and mobile termination markets also has the effect of promoting the interests of end-users on a retail market which has not been earmarked for regulation.
- 56 As to the second part of the second question, concerning whether a national court may require the NRA to establish that the obligation actually attains the objectives set out in Article 8 of the Framework Directive, it should be recalled that that provision provides that the NRA, in carrying out the regulatory tasks specified in that directive and in particular in the Access Directive, must take all reasonable and proportionate measures aimed at achieving the objectives defined in that provision, which are to promote competition in the provision of electronic communications networks and services, to contribute to the development of the internal market and to promote the interests of EU citizens.
- 57 In order to achieve the objectives set out in Article 8 of the Framework Directive, Article 5(1) of the Access Directive states that NRAs must, in particular, exercise their responsibilities in a way that promotes economic efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.
- 58 The tariff obligations which the NRA may impose, including tariff obligations such as those at issue in the main proceedings, must therefore be directed at achieving the objectives set out in Article 8 of the Framework Directive. However, as pointed out by the Advocate General in points 96 and 97 of his Opinion, an NRA cannot be required to demonstrate that those obligations actually attain those objectives.

- 59 Placing such a burden of proof on an NRA would disregard the fact that adoption of regulatory obligations is based on a prospective analysis of market developments, which takes as a reference, in order to address competition concerns, the behaviour and/or the costs of an efficient operator. With regard to measures focused on the future, the proof that they actually attain the objectives set out in Article 8 of the Framework Directive is impossible or excessively difficult to adduce.
- 60 In the light of all the foregoing, the answer to the second question is that EU law must be interpreted as meaning that a national court hearing a dispute concerning the legality of a tariff obligation imposed by the NRA for the provision of fixed and mobile call termination services can assess the proportionality of that obligation in the light of the objectives set out in Article 8 of the Framework Directive and Article 13 of the Access Directive and take into account the fact that the obligation has the effect of promoting the interests of end-users on a retail market which has not been earmarked for regulation.
- 61 A national court may not, when carrying out a judicial review of a decision of the NRA, require that authority to demonstrate that the obligation actually attains the objectives set out in Article 8 of the Framework Directive.

Costs

- 62 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 (Second Chamber) hereby rules:

- 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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, read in conjunction with Articles 8 and 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140, must be interpreted as meaning that a national court, hearing a dispute concerning the legality of a tariff obligation imposed by the national regulatory authority for the provision of fixed and mobile call termination services, may depart from Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU advocating the ‘pure Bulric’ (*Bottom-Up Long-Run Incremental Costs*) cost model as the appropriate price regulation measure in the termination market only where it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.**
- 2. EU law must be interpreted as meaning that a national court hearing a dispute concerning the legality of a tariff obligation imposed by the national regulatory authority for the provision of fixed and mobile call termination services can assess the proportionality of that obligation in the light of the objectives set out in Article 8 of Directive 2002/21, as amended by Directive 2009/140, and Article 13 of Directive 2002/19, as amended by Directive 2009/140, and take into account the fact that the obligation has the effect of promoting the interests of end-users on a retail market which has not been earmarked for regulation.**

A national court may not, when carrying out a judicial review of a decision of the national regulatory authority, require that authority to demonstrate that the obligation actually attains the objectives set out in Article 8 of Directive 2002/21, as amended by Directive 2009/140.

[Signatures]