



Reports of Cases

Case C-277/16

Polkomtel sp. z o.o.

v

Prezes Urzędu Komunikacji Elektronicznej

(Request for a preliminary ruling from the Sąd Najwyższy)

(Reference for a preliminary ruling — Common regulatory framework for electronic communications networks and services — Directive 2002/21/EC — Articles 8 and 16 — Directive 2002/19/EC — Articles 8 and 13 — Operator designated as having significant market power — Price control — Obligations imposed by national regulatory authorities — Obligation to ensure cost orientation of prices — Prices set below the costs incurred by the operator concerned for the provision of voice call termination services on mobile networks — Charter of Fundamental Rights of the European Union — Article 16 — Freedom to conduct a business — Proportionality)

Summary — Judgment of the Court (Second Chamber), 20 December 2017

1. *Approximation of laws — Telecommunications sector — Electronic communications networks and services — Regulatory framework — Directive 2002/19 — Price control by national regulatory authorities — Power to require an operator with a significant market presence to set prices based on costs — Imposition of an obligation to set rates at a level lower than that of costs incurred — Lawfulness — Conditions*

(European Parliament and Council Directive 2002/19, Arts 8(4) and 13)

2. *Approximation of laws — Telecommunications sector — Electronic communications networks and services — Regulatory framework — Directives 2002/19 and 2002/21 — Price control by national regulatory authorities — Power to require an operator with a significant market presence to set prices based on costs — Imposition of an obligation to update its rates on an annual basis and to submit them for periodic monitoring — Lawfulness — Conditions*

(Charter of Fundamental Rights of the European Union, Arts 16 and 52(1); European Parliament and Council Directives 2002/19, Arts 8(4) and 13(3) and 2002/21, Art. 8)

3. *Approximation of laws — Telecommunications sector — Electronic communications networks and services — Regulatory framework — Directive 2002/19 — Price control by national regulatory authorities — Power to require an operator with a significant market presence to set prices based on costs — Possibility to require updating of prices before or after the operator applies them*

(European Parliament and Council Directive 2002/19, Art. 13(1) and (3))

1. Article 8(4) and Article 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 ('the Access Directive') must be interpreted as meaning that, where an obligation

in regard to cost orientation of prices is imposed by a national regulatory authority on an operator, designated as having significant market power on a specific market, that national regulatory authority may, in order to promote efficiency and sustainable competition, set the prices of the services covered by such an obligation below the level of the costs incurred by that operator to provide them, if those costs are higher than the costs of an efficient operator, which is for the referring court to verify.

It follows that NRAs may, after having monitored the compliance of the operator concerned with the obligation to cost orient its prices and decided that it is necessary to require those prices to be adjusted, oblige that operator to set the rate at a level lower than that of the costs incurred by it if those costs are higher than the costs of an efficient operator, it being necessary for those latter costs to include the reasonable rate of return on adequate capital employed by it.

(see paras 39, 40, operative part 1)

2. Article 8(4) and Article 13(3) of Directive 2002/19, read in conjunction with Article 16 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a national regulatory authority may require an operator, designated as having significant market power on a specific market and under an obligation in regard to cost orientation of prices, to set its prices annually on the basis of the most up-to-date data and to submit those prices to it for verification together with justification before they become applicable, provided that such obligations are based on the nature of the problem identified, are proportionate and are justified in the light of the objectives laid down in Article 8 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), which is for the referring court to verify.

The possibility for the NRA to require an operator to update its rates on an annual basis and to submit them for periodic monitoring constitutes an interference in the exercise of the right guaranteed by Article 16 of the Charter. Therefore, it must, pursuant to Article 52(1) of the Charter, be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 46 to 48, and of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 70 and the case-law cited). Thus, it is for the national court to verify whether the obligation to adjust prices annually is in conformity with the requirement of proportionality referred to in Article 8(4) of the Access Directive, in so far as that obligation is necessary to achieve the objectives of general interest mentioned in the preceding paragraph.

(see paras 51, 53, 55, operative part 2)

3. Article 13(3) of Directive 2002/19 must be interpreted as meaning that, where an obligation in regard to cost orientation of prices has been imposed on an operator on the basis of Article 13(1) of that directive, that operator may be required to adjust its prices before or after it has started to apply them.

(see para. 63, operative part 3)