



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 24 October 2019¹

Case C-578/18

Energiavirasto
joined parties:
A,
Caruna Oy

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling — Internal market in electricity — Directive 2009/72/EC — Material scope — Remedies — Article 37(17) — Concept of ‘party affected by a decision of a regulatory authority’ — Standing of consumer customer of electricity network company — Principle of effective judicial protection)

I. Introduction

1. Can a consumer who requests a national regulatory authority to verify whether the billing arrangements of the consumer’s electricity distributor are compliant with Member State law be considered a ‘party affected by a decision of a regulatory authority’ under Article 37(17) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC,² so that the consumer has a right of appeal against the decision taken by that authority before a body independent of the parties involved and of any government as stipulated by that provision?
2. That is in essence the key issue raised by this reference for a preliminary ruling submitted to the Court by the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).
3. The present case provides the Court with the first occasion to give a ruling on the interpretation of Article 37(17) of Directive 2009/72 and the consequences which follow, in terms of judicial review rights, when that provision is triggered.

¹ Original language: English.

² OJ 2009 L 211, p. 55.

II. Legal framework

A. EU law

4. Article 37(17) of Directive 2009/72 provides:

‘Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.’

B. Finnish law

5. Pursuant to Paragraph 2 of the Sähkö- ja maakaasumarkkinoiden valvonnasta annettu laki (590/2013) (Law No 590/2013 on the supervision of the electricity and gas market, ‘the Supervision Law’), that law applies, inter alia, to the performance of the supervision and inspection tasks assigned to the Energiavirasto (Energy Authority, Finland; ‘the Energiavirasto’) in the Sähkömarkkinalaki (588/2013) (Electricity Market Law (588/2013), ‘the Electricity Market Law’), as well as the provisions and administrative orders issued on the basis thereof.

6. Pursuant to Paragraph 5 of the Supervision Law, the Energiavirasto has the task of monitoring compliance with the provisions under national law and EU law and the administrative orders mentioned in Paragraph 2 of that law and of performing the other tasks mentioned in Paragraph 2 that are assigned thereto by law.

7. Pursuant to point 13 of the first subparagraph of Paragraph 6 of the Supervision Law, the Energiavirasto has the task of contributing, in its activity as the national regulatory authority within the meaning of the EU legal provisions concerning the electricity and gas sector, to ensuring efficiency and enforcement of consumer protection measures concerning the electricity and gas market.

8. The second subparagraph of Paragraph 57 of the Electricity Market Law provides, inter alia, that a distribution system operator must offer consumers different payment methods for paying invoices for the distribution of electricity. The alternatives offered may not include unjustified conditions or conditions discriminating between different customer groups.

9. The second subparagraph of Paragraph 106 of the Electricity Market Law provides that the Energiavirasto is responsible for monitoring compliance with that law and the provisions and administrative orders issued on the basis thereof, as well as compliance with the approval decisions issued on the basis of that law. Under that provision, supervision is regulated separately in the Supervision Law. Pursuant to the fourth subparagraph of that same paragraph, the Kuluttaja-asiamies (Consumer Ombudsman, Finland) monitors the legality of clauses of the contracts mentioned in Chapter 13 of the Electricity Market Law (electricity contracts) from the perspective of consumer protection.

10. Paragraph 114 of the Electricity Market Law provides that an appeal against a decision of the Energiavirasto on the basis of the Electricity Market Law may be lodged in accordance with the procedures laid down in the Hallintolainkäyttölaki (586/1996) (Administrative Court Procedures Code (586/1996), ‘the Administrative Court Procedures Code’). Pursuant to the first subparagraph of Paragraph 5 of that code, a decision against which a complaint may be filed means a measure by which a case has been ruled on or dismissed as inadmissible. Pursuant to the first subparagraph of Paragraph 6 of that same code, a complaint against a decision may be filed by the party to whom the decision is directed or whose rights, obligations or interests are directly affected thereby.

III. Facts, main proceedings and questions referred

11. According to the order for reference, A, as a consumer customer, concluded a contract for electricity transmission with the distribution system operator Caruna Oy (formerly Fortum Sähkösiirto Oy).³

12. On 5 September 2013, A sent a request by email to the Energiavirasto acting as the national regulatory authority ('NRA') under Directive 2009/72, asking it to verify whether Caruna Oy's billing system complied with the second subparagraph of Paragraph 57 of the Electricity Market Law which requires the distribution system operator to offer the customer different payment methods for paying the invoices for the distribution of electricity. A's request therefore involved, according to the referring court, a consumer customer's right pursuant to Annex I, point 1(d), to Directive 2009/72 to be able to choose between several different payment methods. In response to A's request, the Energiavirasto elected to examine the legality of Caruna Oy's billing system.

13. By decision of 31 March 2014, the Energiavirasto found that Caruna Oy did not breach the second subparagraph of Paragraph 57 of the Electricity Market Law and that no further measures were required in the matter. In that decision, Caruna Oy was designated as involved party and A was designated as the person who made the investigation request.

14. By decision of 28 April 2014, the Energiavirasto rejected A's application for correction of the decision of 31 March 2014 as inadmissible, and rejected his application to be granted the position of involved party and to correct that decision on the merits.

15. A filed an appeal before the Helsingin hallinto-oikeus (Helsinki Administrative Court, Finland), with a request to be granted the position of involved party in the case heard by the Energiavirasto. A also requested that the decisions of 31 March and 28 April 2014 be annulled and the case be referred back to the Energiavirasto for a new hearing.

16. By decision of 23 May 2016, the Helsingin hallinto-oikeus (Helsinki Administrative Court) granted A's claims.

17. The Energiavirasto appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland). In support of its action, the Energiavirasto claims that the fact that A submitted a request for investigation to the Energiavirasto does not entitle A to participate in the treatment of his request or to appeal against its decisions concerning his request before a national court.

18. The Korkein hallinto-oikeus (Supreme Administrative Court) does not consider it to be clear, as a matter of the proper interpretation of Article 37(17) of Directive 2009/72, whether a consumer customer of an electricity network company, such as A, who considers that he has been harmed by that company's billing system and has brought the matter before the NRA, qualifies as a 'party affected by a decision of a regulatory authority' within the meaning of that provision and therefore has the right to appeal against that decision before a court.

19. In particular, the Korkein hallinto-oikeus (Supreme Administrative Court) considers that the Court's case-law does not contain any cases in which a consumer customer or other natural person acting as a customer has been found to be authorised to file an appeal at a court against decisions of an NRA under circumstances similar to those of the present case, taking into account that the decision issued by the Energiavirasto as NRA regarding the compatibility of the network company's

³ It should be noted that a consumer customer is referred to as a 'household customer' in Directive 2009/72, according to the definition set out in Article 2(10) thereof, and a definition of 'distribution system operator' is found in Article 2(6) of that directive. In this Opinion, I will generally use the terms 'consumer customer' and 'network company', respectively, in line with the wording of the order for reference.

invoicing with the Electricity Market Law was also connected with a clause, relating to invoicing, of the electricity transmission contract between that company and the consumer customer. Moreover, the Korkein hallinto-oikeus (Supreme Administrative Court) indicates that supervision of the legality of electricity contracts from the perspective of consumer protection is regulated in the national legislation as a task of the Consumer Ombudsman, and it is also possible for the consumer to bring disputes before the Kuluttajariitalautakunta (Consumer Disputes Board, Finland) or the ordinary courts, although the competence for a legally binding ruling in an individual consumer dispute lies only with an ordinary court, and not an administrative court, as there is no specific legal institution for minor consumer disputes in Finland.

20. It was in these circumstances that the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the main proceedings, and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is Article 37 of [Directive 2009/72] to be interpreted as meaning that a person who is a consumer customer of a network company and who has brought a case concerning the network company before the national regulatory authority is to be regarded as an “affected party” within the meaning of paragraph 17 of the article mentioned, which is affected by the decision of the regulatory authority and is therefore authorised to file an appeal at a national court against a decision affecting the network company made by the national regulatory authority?
- (2) If the person designated in the first question is not to be regarded as an “affected party” within the meaning of Article 37 of [Directive 2009/72], does a consumer customer in a position like that of the appellant in the main proceedings have a right on any other legal basis under EU law to be involved before the regulatory authority in the treatment of a request made thereby for the introduction of a measure or to have the case reviewed by a national court, or is this question governed by national law?

21. Written observations were submitted to the Court by A, the Finnish, Hungarian and Netherlands Governments, and the European Commission. A, Energiavirasto, the Finnish Government and the Commission took part in the hearing which was held on 19 June 2019.

IV. Summary of the observations of the parties

22. A, the Netherlands Government, and the Commission consider that a consumer customer in A’s position qualifies as an ‘affected party’ under Article 37(17) of Directive 2009/72, whereas the Energiavirasto and the Finnish and Hungarian Governments take the opposite view.

23. A argues that his request to the Energiavirasto regarding Caruna Oy’s billing system constitutes a complaint with an entitlement to appeal under Article 37(11) of Directive 2009/72. The routes for handling consumer complaints in Finnish law do not replace Article 37(11) of Directive 2009/72, in view of, inter alia, the time and fees involved with bringing complaints before the ordinary courts, as well as the fact that the Consumer Disputes Board’s decision is a non-binding recommendation to the parties. A stated at the hearing that he had brought a complaint on the same subject matter before the Consumer Disputes Board, but that following the Energiavirasto’s decision, he did not consider it reasonable to continue, since in practice that board is not likely to take a decision diverging from a decision of the NRA.

24. The Energiavirasto submits that Article 37 of Directive 2009/72 does not concern consumer customers, and NRAs are not obliged to handle consumer complaints under that directive. Requests for investigation are provided for in national law, and the decisions in issue are not based on Article 37(11) of Directive 2009/72. A was merely an informant. Effective judicial protection is ensured through the Consumer Disputes Board and the ordinary courts, and giving the consumer in the main proceedings a right of appeal to the administrative courts would mean that all potential consumer customers in Finland would have the same rights.

25. The Finnish Government, broadly supported by the Hungarian Government, submits that the national legislation providing for the possibility for any natural or legal person to address a request for investigation to the Energiavirasto constitutes a purely national solution which is not linked to Directive 2009/72. NRAs are not obliged under Directive 2009/72 to handle consumer complaints, and in view of the wording, origins, context and purpose of Directive 2009/72, Article 37(11), (12) and (17) of that directive only concern electricity undertakings. It emphasises that Finnish law provides for mechanisms for handling consumer complaints through the Consumer Disputes Board and the Consumer Ombudsman, and consumers may also bring actions before the ordinary courts against electricity undertakings allegedly infringing their rights under the Electricity Market Law, and thus effective judicial protection is ensured.

26. The Netherlands Government submits that, following from the Court's case-law concerning the standing of parties affected by NRA decisions,⁴ a consumer customer is regarded as an 'affected party' under Article 37(17) of Directive 2009/72, in so far as the NRA decision affects his rights derived from EU law. That is the case in the main proceedings, whereby A addressed a request to the NRA, which it presumes was treated as a complaint under Article 37(11) of Directive 2009/72, and the NRA decision affects A's right to a choice of payment methods under Article 3(7) and Annex I, point 1(d), to Directive 2009/72. It stresses that Article 3(13) of Directive 2009/72 is distinct from Article 37(11) of that directive, which in no way restricts the right of access to a court when an NRA decision affects the customer's rights derived from that directive.

27. The Commission agrees with this position. Based on the wording and context, Article 37(17) of Directive 2009/72 covers consumer customers and, as it stressed at the hearing, is formulated in a general way and is therefore broader than Article 37(11) and (12) of that directive. The Commission further contends that Article 3(13) and Article 37(17) of Directive 2009/72 entail separate obligations for Member States, and since it appears that the ordinary courts in Finland do not have jurisdiction to examine the legality of NRA decisions, if the consumer customer does not have a right of appeal under Article 37(17) of that directive, he cannot challenge an NRA decision which has become final.

V. Analysis

28. The heart of the questions referred by the Korkein hallinto-oikeus (Supreme Administrative Court) entails consideration of whether Directive 2009/72 and EU law more broadly obliges it to open up, in the circumstances of the main proceedings, what appears to be an avenue of judicial review which does not exist under Member State law.

29. I take the view that, as a starting point, consideration must be given to the Court's rulings on the standing of parties affected by NRA decisions and whether the Energiavirasto's decision in issue falls within the material scope of Directive 2009/72, before proceeding to the interpretation of Article 37(17) of Directive 2009/72.

⁴ The Netherlands Government refers in particular to the judgment of 21 February 2008, *Tele2 Telecommunication* (C-426/05, EU:C:2008:103, paragraphs 26, 30 and 32).

30. That said, I take the view that the second question is inadmissible in so far as it concerns A's rights to participate in the procedure leading to the Energiavirasto's decision in issue. No submissions were made by the parties on this issue, and nor is there any discussion of its relevance in the order for reference. There is therefore insufficient information in the case file of pertinent facts and law to enable the Court to give a decision.⁵ Given that what remains of the second question relates to judicial review rights before a Member State court, it is a repetition of the first question. I will answer the first question only.

31. My analysis is divided into three parts. First, in Section A, I will assess the Court's rulings on the standing of parties affected by NRA decisions in relation to the present case. Second, in Section B, I will examine whether the Energiavirasto's decision in issue falls within the material scope of Directive 2009/72. Third, in Section C, I will address the interpretation of Article 37(17) of Directive 2009/72 in the circumstances of the main proceedings.

32. On the basis of that analysis, I have reached the conclusion that a consumer customer of an electricity network company such as A in the circumstances of the main proceedings cannot be considered to be a 'party affected by a decision of a regulatory authority' for the purposes of Article 37(17) of Directive 2009/72.

A. The Court's rulings on parties affected by NRA decisions

33. As indicated in the observations of the Finnish, Hungarian and Netherlands Governments and the Commission, the Court has already considered the standing of parties affected by NRA decisions and in particular in its rulings in *Tele2 Telecommunication*,⁶ *T-Mobile Austria*,⁷ *Arcor*⁸ and *E.ON Földgáz Trade*⁹ in respect of the interpretation of EU measures relating to other regulated markets, namely, telecommunications and natural gas. However, I take the view that the circumstances of the cases addressed by those rulings differ from the circumstances of the main proceedings because the substantive reach of EU law was not in issue in any of them. As I will explain in Section B of this Opinion, this is central to the resolution of the dispute in the main proceedings.

34. *Tele2 Telecommunication*¹⁰ concerned the interpretation of, inter alia, 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).¹¹ The main proceedings involved the standing of an undertaking to contest an NRA decision addressed to a competing undertaking in the context of administrative market analysis proceedings conducted by the NRA pursuant to that directive. In other words, the material scope of the Framework Directive had already been triggered when the Court ruled in *Tele2 Telecommunication* that Article 4 of that directive and the principle of effective judicial protection guaranteed by EU law protected the rights of third parties affected by the decision of the NRA in question in that case.

⁵ See, for example, judgments of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraphs 37 to 39), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraphs 16 to 20).

⁶ Judgment of 21 February 2008 (C-426/05, EU:C:2008:103).

⁷ Judgment of 22 January 2015 (C-282/13, EU:C:2015:24).

⁸ Judgment of 24 April 2008 (C-55/06, EU:C:2008:244).

⁹ Judgment of 19 March 2015 (C-510/13, EU:C:2015:189).

¹⁰ Judgment of 21 February 2008 (C-426/05, EU:C:2008:103, in particular paragraphs 2, 12 to 15, 27, 30 to 39 and 43 to 48).

¹¹ OJ 2002 L 108, p. 33; 'the Framework Directive'. Article 4(1) of Directive 2002/21 states: '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[n] NRA] has the right of appeal against the decision to an appeal body that is independent of the parties involved.'

35. In *T-Mobile Austria*,¹² the Court followed the framework set out in *Tele2 Telecommunication* in relation to assessing the standing of an undertaking to contest a decision adopted by an NRA in a procedure for the authorisation of the modification of the ownership structure resulting from the merger-acquisition of certain undertakings under the EU telecommunications rules. The Court held that such an undertaking must be regarded as an affected party under Article 4(1) of the Framework Directive where it is a competitor of the undertaking(s) to which the NRA decision is addressed, and where that decision is adopted in a context of a procedure intended to safeguard competition and is likely to have an impact on that undertaking's position on that market.

36. In *Arcor*,¹³ the Court took a similar approach in its interpretation of Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision,¹⁴ which is nearly identical to Article 37(17) of Directive 2009/72. Like *Tele2 Telecommunication* and *T-Mobile Austria*, *Arcor* concerned the standing of a third party to contest a decision taken by an NRA which was within the material scope of Directive 90/387, namely a decision concerning the authorisation of rates for unbundled access to the local loop. The Court underlined in *Arcor* that no contractual link between the third party and the party subject to the NRA's decision was required before the third party was entitled to effective judicial review under that directive and EU law more broadly.

37. *E.ON Földgáz Trade*¹⁵ concerned the standing of an operator in the Hungarian market in natural gas to challenge, as a holder of a gas transmission authorisation, a decision of an NRA which amended the rules of the gas network code for deciding on applications for long-term capacity allocation. The Court found that although Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC¹⁶ did not contain specific provisions on the remedies available to such an operator, the NRA was subject to EU rules concerning access of market operators to the natural gas transmission network in adopting its decision. On this basis, the Court held that those EU rules and the principle of effective judicial protection guaranteed by EU law ensured judicial review for third parties whose rights were potentially infringed by the NRA decision in question. As with *Tele2 Telecommunication*, *T-Mobile Austria* and *Arcor*, *E.ON Földgáz Trade* concerned an NRA decision which fell within the material scope of the relevant EU rules, namely, a decision relating to access to the gas transmission network.

38. The circumstances of the cases addressed by the foregoing rulings therefore differ from the circumstances of the present case in at least two crucial respects. First, they were all cases in which a third party to a decision issued by an NRA was asserting its judicial review rights. Here, on the contrary, A may be considered an addressee of the Energiavirasto's decision in issue, as A made the request for investigation and is designated therein (see point 13 of this Opinion). Second, in all of the foregoing rulings, the material scope of the relevant EU measure had unquestionably been triggered by virtue of a procedure which the NRA was authorised, or bound, to institute under the relevant EU measure. In contrast, in the present case, it is necessary to establish whether the Energiavirasto's decision in issue falls within the material scope of Directive 2009/72.

¹² Judgment of 22 January 2015 (C-282/13, EU:C:2015:24, in particular paragraphs 12 to 26, 32 to 39 and 46 to 48).

¹³ Judgment of 24 April 2008 (C-55/06, EU:C:2008:244, in particular paragraphs 32 to 39 and 171 to 178).

¹⁴ OJ 1990 L 192, p. 1, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (OJ 1997 L 295, p. 23). Article 5a(3) of Directive 90/387 stated: 'Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the [NRA] has a right of appeal to a body independent of the parties involved.'

¹⁵ Judgment of 19 March 2015 (C-510/13, EU:C:2015:189, paragraphs 17 to 29 and 37 to 51).

¹⁶ OJ 2003 L 176, p. 57, and corrigendum OJ 2004 L 16, p. 74. In its judgment of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189, paragraphs 30 to 35), the Court held that Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 (OJ 2009 L 211, p. 94) was not applicable *ratione temporis*, so it did not have the opportunity to interpret Article 41(17) of that directive, which is identical to Article 37(17) of Directive 2009/72.

B. Application of Directive 2009/72 to the main proceedings

39. It is important to recall that the European Union has no general competence over remedies outside the fields of EU law in which it has substantive competence.¹⁷ Given that Article 37(17) of Directive 2009/72 is essentially a remedial provision identifying the persons able to challenge an NRA decision, the answer to the question referred depends on whether the material scope of Directive 2009/72 extends to the Energiavirasto's decision in issue. If it does, the remedial guarantees provided for in Directive 2009/72 and EU law more broadly necessarily apply.

40. First, I conclude that Directive 2009/72, on a literal interpretation, does not impose an obligation on NRAs to entertain requests for investigation of the kind in issue in this case. As indicated by the Energiavirasto and the Finnish Government, the possibility for natural and legal persons under the Finnish legislation to submit requests to the NRA for investigation constitutes a national solution which is not linked to Directive 2009/72.

41. Second, as indicated by the Energiavirasto and the Finnish and Hungarian Governments, nor does the text of Directive 2009/72 impose an obligation on NRAs to handle consumer complaints. As the Court has ruled,¹⁸ Directive 2009/72 contains several provisions on consumer protection. It provides in Article 3(7) thereof that Member States must take appropriate measures to protect consumers and ensure a high level of consumer protection, regarding, inter alia, dispute settlement mechanisms. In particular, that directive obliges the Member States to ensure adequate complaint handling procedures and out-of-court dispute settlement procedures for consumer complaints.¹⁹

42. As indicated by certain provisions and recitals to Directive 2009/72, the NRAs play a collaborative role with other competent authorities in ensuring the effectiveness and enforcement of the consumer protection measures set out in that directive,²⁰ which may include complaint handling. Under Article 3(13) of Directive 2009/72, 'Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements'. It may be inferred from the wording 'such as' in that provision that the choice of the competent authority for handling consumer complaints and dispute settlement falls within the discretion of the Member States. The Finnish Government's observations concerning the legislative history of Directive 2009/72, whereby the European Parliament's proposed amendments regarding the handling of consumer complaints by NRAs were moved from what is now Article 37 to Article 3 of Directive 2009/72,²¹ further support this point.

¹⁷ See, in that regard, Opinion of Advocate General Tanchev in *GRDF* (C-236/18, EU:C:2019:441, point 34 and the case-law cited).

¹⁸ See, for example, order of 14 May 2019, *Acea Energia and Others* (C-406/17 to C-408/17 and C-417/17, not published, EU:C:2019:404, paragraph 55).

¹⁹ See Directive 2009/72, in particular recitals 42, 54; Annex I, point 1(f).

²⁰ See Directive 2009/72, in particular recitals 37, 51; Article 36(g), Article 37(1)(j), (n) and (2). See also, for example, the Commission's Interpretative note of 22 January 2010 on the retail markets in Directive 2009/72 and Directive 2009/73, available at <https://ec.europa.eu/energy/>, in particular Sections 3 and 4.5.

²¹ In the Parliament's first reading of the proposal culminating in Directive 2009/72, it proposed to add a paragraph to what is now Article 37: 'The [NRA] shall put in place an independent complaints service or alternative redress scheme, such as an independent energy ombudsman or a consumer body. That service or scheme shall be responsible for the efficient treatment of complaints and shall comply with best practice criteria. The [NRA] shall set standards and guidelines on how complaints will be handled by producers and network operators.' European Parliament legislative resolution of 18 June 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity (OJ 2009 C 286 E, p. 106), proposed Article 22c(13). That proposal was not taken up in the Council's common position (OJ 2009 C 70 E, p. 1), and by the second reading, similar provisions were added to what is now Article 3. See European Parliament Recommendation for second reading, 2 April 2009, A6-0216/2009.

43. It may be useful to add that this analysis appears to be in line with Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast),²² which repeals Directive 2009/72 as of 1 January 2021.²³ Of note, Directive 2019/944 contains a provision identical to Article 37(17),²⁴ and the NRAs' collaborative role in consumer protection is maintained.²⁵ In particular, Article 26(1) of that directive provides for consumers' right to out-of-court dispute settlement 'through an independent mechanism such as an energy ombudsman or a consumer body, or through a regulatory authority',²⁶ which substantiates the NRAs' facultative role.

44. Third, subject to verification by the referring court, it does not appear that the Energiavirasto's decision in issue constitutes a decision falling within the category of dispute settlement under Article 37(11) or (12) of Directive 2009/72. As indicated by various provisions of Directive 2009/72, Article 37(11) and (12) relate to decisions adopted by the NRA acting as a dispute settlement authority,²⁷ with a view to resolving horizontal disputes between two or more parties in the situations laid down therein. Article 37(11) provides for a specific procedure regarding complaints brought by 'any party' against a transmission or distribution system operator in relation to that operator's obligations under that directive, which results in a binding decision of the NRA unless or until overruled on appeal. Article 37(12) involves 'complaints for review' relating to NRA decisions on tariffs or methodologies submitted by 'any party who is affected and who has a right to complain' concerning such decisions, and sets down certain procedural restrictions on such complaints relating to the deadline for submission and lack of suspensive effect.²⁸

45. If that were the end of the matter, I would have no difficulty in answering the first question in the negative. However, as indicated by the referring court (see points 12 and 19 of this Opinion), the Energiavirasto's decision in issue concerns the electricity network company's compliance with the second subparagraph of Paragraph 57 of the Electricity Market Law which is based on Article 3(7) and Annex I, point 1(d), to Directive 2009/72, requiring the Member States to ensure that consumer customers are offered a wide choice of payment methods, and that decision is also connected with a clause in the contract between the consumer customer and that network company in the main proceedings.

46. Consequently, the present case involves a complicated situation whereby, as I understand it, under the Member State legislation, the Energiavirasto is not obliged to take a decision on a request for investigation, but because it has acted on A's request and adopted a decision concerning measures to protect consumer customers such as A under Directive 2009/72, this appears to create the requisite subject matter nexus between the Energiavirasto's decision in issue and Directive 2009/72. In effect, the Energiavirasto's decision concerns domestic provisions which constitute an implementation under Finnish law of certain protections afforded to consumer customers under Directive 2009/72. On that basis, the Energiavirasto's decision can be considered to fall within the material scope of Directive 2009/72 and thus the remedial guarantees afforded by Article 37(17) of Directive 2009/72 and EU law more broadly apply.

22 OJ 2019 L 158, p. 125.

23 See Directive 2019/944, Article 72, first paragraph.

24 See Directive 2019/944, Article 60(8).

25 See Directive 2019/944, in particular recital 86; Article 58(g) and Article 59(r).

26 Emphasis added. See also Directive 2019/944, recital 36.

27 See Directive 2009/72, in particular Article 34(4) and Article 37(3)(b), (4)(e), and (5)(c). Under Article 37(15) of that directive, complaints referred to in Article 37(11) and (12) thereof are 'without prejudice to the exercise of rights of appeal under [EU] or national law'.

28 See, in that regard, Cabau, E. and Ennsner, B., 'Chapter 6. National Regulatory Authorities', in Jones, C. (ed.), *EU Energy Law. Volume I: The Internal Energy Market*, 4th ed., Claeys & Casteels, 2016, paragraphs 6.107 to 6.115.

C. Interpretation of Article 37(17) of Directive 2009/72

47. The novelty of the present case therefore relates to how Article 37(17) of Directive 2009/72 and the principle of effective judicial protection guaranteed by EU law must be interpreted in relation to a consumer customer such as A in these circumstances. Are there sufficient routes afforded by Member State law to safeguard the consumer customer's right to effective judicial protection, or rather does EU law require the Member State to create a new remedial avenue in the context of the administrative procedure relating to requests for investigation before the NRA?

48. According to settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, along with the second subparagraph of Article 19(1) TEU, pursuant to which the Member States must ensure judicial protection of an individual's rights under EU law.²⁹ It follows that, even though it is in principle for national law to determine an individual's standing and legal interest in bringing proceedings, EU law nonetheless requires, inter alia, that the national legislation does not undermine the right to effective judicial protection.³⁰ Importantly, as the Court has ruled starting in *Unibet*,³¹ the Member States are only obliged to create new legal remedies under national law to ensure effective judicial protection for an individual's rights under EU law when none exist.

49. In the present case, it is apparent from the order for reference (see point 19 of this Opinion) that Finnish law provides for legal remedies which make it possible for a consumer customer to bring an individual complaint against an electricity network company to determine that company's obligations under Directive 2009/72. These legal remedies include the possibility for a consumer to bring a complaint before the Consumer Disputes Board and the Consumer Ombudsman, along with an action before the ordinary courts.

50. In that regard, it should be pointed out that none of the parties making observations in the present case refuted the Finnish Government's statements at the hearing that a consumer customer may bring an action before the ordinary courts to determine the network company's compliance with Directive 2009/72, thereby ensuring a consumer customer's right to effective judicial protection under EU law, and that NRA decisions are not binding on the ordinary courts or the Consumer Disputes Board. Moreover, A's arguments relating to possible disadvantages of bringing a complaint before the Consumer Disputes Board and the ordinary courts (see point 23 of this Opinion) do not demonstrate that those legal remedies cannot be availed of by consumer customers or that a consumer customer's right to effective judicial protection is otherwise precluded.

51. On the basis of the foregoing considerations, I take the view that the principle of effective judicial protection under EU law does not in principle require a Member State to create a new legal remedy in the procedure for requests for investigation before an NRA, where there exist other effective legal remedies which make it possible for a consumer customer to determine the network company's compliance with its obligations under Directive 2009/72, which is a matter for the referring court to establish.

²⁹ See, for example, judgments of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraphs 37 and 38 and the case-law cited), and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 48 and 49 and the case-law cited).

³⁰ See, for example, judgments of 16 July 2009, *Mono Car Styling* (C-12/08, EU:C:2009:466, paragraph 49 and the case-law cited), and of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189, paragraph 50).

³¹ Judgment of 13 March 2007 (C-432/05, EU:C:2007:163, in particular paragraphs 40 and 41). See also, for example, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 103 and 104), and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 51).

52. I therefore reach the conclusion that, given the routes available to A under Finnish law, and as required by the provisions detailed above in Directive 2009/72, A cannot be considered to be a ‘party affected by a decision of a regulatory authority’ under Article 37(17) of Directive 2009/72, even though remedial provisions such as Article 37(17) of Directive 2009/72 are ordinarily interpreted broadly by the Court.³² The interpretation of that provision cannot disturb the legal framework for dealing with consumer complaints detailed above and set out in Directive 2009/72, even when an NRA elects to deal with a complaint which might be viewed as one entailing implementation of that directive. Provided that these routes are adequate to ensure effective judicial protection of consumer rights, which is a question to be determined by the referring court, neither the text of Article 37(17) of Directive 2009/72, nor its context or purpose, can be taken to warrant the interpretation of that provision advocated by A, the Netherlands Government and the Commission.

53. I am mindful of the fact that Article 37(16) and (17) were introduced in Directive 2009/72 along with new rules enhancing the independence of the NRAs and their objectives, duties and powers.³³ As indicated in the Commission’s Interpretative note on the NRAs,³⁴ Article 37(16) and (17) relate to the NRA’s legal accountability, namely, that it must be possible to introduce legal actions against NRA decisions, which is linked to the NRA’s independence and responsibilities.³⁵ That note also calls attention to the possibility that a State government can contest an NRA decision.³⁶ While this suggests that the concept of ‘affected party’ under Article 37(17) of Directive 2009/72 applies in principle to any type of party which is affected by an NRA decision, it does not take account of the unusual situation in which an NRA is asked to take a decision which is inconsistent with the remedial framework provided for under Directive 2009/72 and Member State law.

VI. Conclusion

54. In light of the foregoing considerations, I propose that the Court should answer the questions referred by the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) as follows:

Article 37(17) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as meaning that a consumer customer of an electricity network company in the circumstances of the main proceedings cannot be considered to be a ‘party affected by a decision of a regulatory authority’ for the purposes of that provision.

32 Indeed, this is illustrated by the Court’s rulings discussed above in Section A of this Opinion. See also, for example, judgment of 13 October 2016, *Polkomtel* (C-231/15, EU:C:2016:769, paragraphs 20 and 21).

33 See Directive 2009/72, in particular recital 33. Article 37(16) of that directive states: ‘Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.’

34 See the Commission’s Interpretative note of 22 January 2010 on the regulatory authorities in Directive 2009/72 and Directive 2009/73, available at <https://ec.europa.eu/energy/> (‘the Commission’s Interpretative note on the NRAs’), Section 5.

35 See, in that regard, Opinion of Advocate General Geelhoed in *Connect Austria* (C-462/99, EU:C:2001:683, points 43 to 49). For further discussion, see, for example, De Somer, S., ‘The powers of national regulatory authorities as agents of EU law’, *ERA Forum*, Vol. 18, 2018, pp. 581 to 595, particularly pp. 589 to 593.

36 See the Commission’s Interpretative note on the NRAs (see footnote 34 above), p. 20.