Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 June 2022[1]

Case C-289/21

IG
v
Varhoven administrativen sad

(Request for a preliminary ruling from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria))

(Preliminary ruling procedure – Energy policy – Promotion of energy efficiency – Directive 2012/27/EU – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy and to judicial protection – Damages for breach of EU law – Amendment of national legislation during the course of an appeal)

1. Under Bulgarian procedural law, as described in this reference for a preliminary ruling, in principle, legal actions against substatutory legislative acts become devoid of purpose where the act in question has been amended before judgment is given.

2. In the original proceedings, after his action was declared devoid of purpose as a result of the amendment to the legislative act, the individual to whom this rule of procedure was applied lodged an action for non-contractual liability against the State.

3. The court which has to rule on that action wishes to know, in summary, whether that rule of procedure is compatible with the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

[1] Original language: Spanish.

I. Legislative framework

A. European Union law

1. Directive 2012/27/EU[2]

4. Article 9(1) provides that:

'Member States shall ensure that, in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings, final customers for electricity, natural gas, district heating, district cooling and domestic hot water are provided with competitively priced individual meters that accurately reflect the final customer's actual energy consumption and that provide information on actual time of use.'

5. Article 10 specifies the content and characteristics of the information to be provided to customers in their bills.

B. Bulgarian law

1. Administrativnoprotsesualen kodeks[3]

6. Article 156 establishes that:

'(1) … With the agreement of the other defendants and the interested parties who benefit from the disputed act, the administrative authority may withdraw the said act in whole or in part, or adopt the act which it had refused to adopt.

(2) The consent of the applicant is also required in order to withdraw the act after the first hearing has been held.

(3) Once an act has been withdrawn it may be reissued only if new circumstances arise.

(4) Where an action against an act is accompanied by a claim for damages, the proceedings in respect of that claim shall continue.'

7. Article 187 provides that:

'(1) There shall be no time limit on actions brought against implementing regulatory acts.

(2) An action may not be brought against a regulatory act following an earlier action founded on the same grounds.'

[2] Directive of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1).

[3] Code of administrative procedure (DV No 30 of 11 April 2006).

8. Article 195 stipulates that:

'(1) An implementing regulatory act shall be deemed to be annulled from the date on which the judicial decision comes into force.

(2) The legal consequences of a regulatory act that has been declared void or voidable shall be adopted by the competent authority of its own motion within a maximum period of 3 months from the entry into force of the judicial decision.'

9. Under Article 204(3), where the loss or damage has been caused by an administrative act which is void or has been withdrawn, the court with which the claim for damages has been lodged must establish whether the act is unlawful.

10. Article 221(4) states:

'Where the administrative authority, with the consent of the other defendants, withdraws the administrative act or adopts the act whose adoption had been refused, the Varhoven administrativen sad [Supreme Administrative Court] shall set aside the judicial decision issued in respect of the said act or refusal, on the grounds of procedural irregularity, and shall close the case.'

2. Zakon za otgovornostta na darzhavata i obshtinite za vredi[4]

11. Article 1 provides:

'1. The State and the municipalities shall be liable for loss or damage caused to natural or legal persons by unlawful legal acts and unlawful acts and omissions performed by State or municipal bodies or officials in the exercise of their administrative functions …

2. Actions brought pursuant to paragraph 1 shall be heard under the administrative procedure established by the [Code of administrative procedure] …'

II. Facts, proceedings and questions referred for a preliminary ruling

12. The Naredba No 16-334/06.04.2007 za toplosnabdyavaneto,[5] adopted by the Ministry of Economy and Energy of the Republic of Bulgaria, included, in Annex 1 to Article 61(1), the method for allocating thermal energy consumption in buildings in shared ownership ('the calculation method').

13. IG challenged the calculation method before the Varhoven administrativen sad (Supreme Administrative Court; 'the VAS') in case No 1372/2016.

4 Law on the liability of the State and the municipalities for damages (DV No 60 of 5 August 1988).

5 Decree No 16-334 of 6 April 2007 on the supply of district heating (DV No 34 of 24 April 2007).

14. On 13 April 2018 the VAS, sitting in a Chamber of three judges, found in favour of the applicant, ruling that the calculation method did not satisfy the objective of Articles 9 and 10 of Directive 2012/27 (that thermal energy should be billed for on the basis of actual consumption), rendering it void *ex tunc*.[6]

15. The Ministry of Economy and Energy lodged appeal No 1318/2019 against the judgment at first instance with the VAS, which would hear the case sitting in a Chamber of five judges.

16. On 20 September 2019 a new decree came into force which, in particular, amended the formula for the calculation method.

17. On 11 February 2020 a Chamber of the VAS comprising five judges with jurisdiction to hear the appeal ruled that the case had become devoid of purpose. The ground for its ruling was that the amendment to point 6.1.1 of the calculation method had resulted in its repeal and that, under national law, the courts can make substantive rulings only in respect of provisions that are in force.

18. The five-judge Chamber of the VAS therefore set aside the judgment at first instance without needing to examine the validity of the calculation method. That ruling became final.

19. At this point, IG lodged a claim with the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) for damages of BGN 830, equating to the costs of the first proceedings (Case No 1372/2016) and BGN 300 for the non-material damage[7] caused by the judgment in appeal No 1318/2019.

20. The claim for damages is brought against the VAS, which is the defendant in the proceedings before the referring court.

21. In this context, the Administrativen sad Sofia-grad (Administrative Court, Sofia) refers the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the amendment of a provision of a national normative legal act previously declared by a court of appeal [sic] to be incompatible with an applicable provision of EU law relieve the Court of Cassation of the obligation to examine the provision applicable prior to the amendment and accordingly to assess whether it is compatible with EU law?

(2) Does the presumption that the provision at issue has been withdrawn constitute an effective remedy with regard to rights and freedoms guaranteed by EU law (*in casu*, Articles 9 and 10 of [Directive 2012/27]), or does the possibility provided for in national law to examine whether the national provision in question was compatible with EU law before it was amended constitute such a remedy if it exists only if the competent court is seised of a specific action for damages on account of that provision and only in relation to the person who brought the action?

[6] At the hearing, the VAS argued that the judgment of 13 April 2018 had been founded on other grounds. However, the order for reference is absolutely clear on this point, and the Court of Justice must confine itself to the details as presented by the referring court. Paragraph 5 of that order states: 'by decision … of 13 April 2018 … the formula in point 6.1.1. … was annulled as it did not serve to achieve the objective of Articles 9 and 10 of Directive 2012/27/EU, transposed in Article 155(2) of the Energy Law'.

[7] The damages claimed comprised compensation for 'the disappointment, anger and insult caused by the conduct of the judges of the Chamber of the VAS, who failed to ensure the effectiveness of EU law and who, instead of ruling on the dispute, declined to exercise their control over the activities of the executive'.

(3) If Question 2 is answered in the affirmative, is it permissible for the provision in question to continue to regulate, during the period between its adoption and its amendment, legal relationships in respect of an unlimited group of persons who have not brought actions for damages on account of that provision, or for the assessment of the compatibility of the national rule with the EU law provision in respect of the period prior to the amendment not to have been carried out in relation to those persons?'

III. Proceedings before the Court of Justice

22. The request for a preliminary ruling was lodged with the Court on 5 May 2021.

23. Written observations were submitted by IG, the VAS, the Polish Government and the European Commission. With the exception of the Polish Government, all appeared at the hearing held on 6 April 2022.

IV. Analysis

A. Preliminary considerations

24. The subject matter of a reference for a preliminary ruling derives, naturally, from the dispute to be resolved in the main proceedings. The point at issue in those proceedings is simply whether IG is entitled to compensation for the loss or damage allegedly caused him by the judgment given in accordance with Bulgarian procedural law, which prevented him from obtaining a substantive ruling on the validity of the calculation method.

25. It is therefore beyond the remit of this reference for a preliminary ruling to determine: (a) whether point 6.1.1 of the calculation method is compatible with Directive 2012/27; (b) whether IG was entitled to damages for breach of that directive; and (c) whether third parties other than IG would be entitled to such damages.

26. The reference for a preliminary ruling therefore does not address whether or not it is appropriate to award damages for the application of a regulatory provision concerning energy efficiency which was allegedly contrary to EU law. The only damages sought by IG are, I stress, those (allegedly) arising from domestic rules of procedure which enable a ruling given at first instance that the method for calculating energy bills is void to be set aside.

27. In order to rule on the harm suffered and on possible damages, the referring court needs to know whether the rule of national law which caused the annulment of the calculation method ordered at first instance to be set aside is compatible with EU law. [8]

[8] Paragraph 17 of the order for reference outlines a debate in the domestic case-law over the effects of amendments to regulations on actions for annulment already in train. IG states that another judgment of the VAS, of 26 June 2020, examined the substance of appeal No 14350/2019 and analysed the legality of certain articles of Decree No 16-334 which had been repealed or amended before the date of the judgment. However, when this point was debated during the hearing, all the indications were that appeal No 14350/2019 concerned provisions that had not been repealed or amended at the date of the conclusion of the oral part of the procedure.

28. When the reference for a preliminary ruling is interpreted in that way, the objections of inadmissibility asserted by the VAS – in essence: (a) breach of Article 94(c) of the Rules of Procedure of the Court of Justice; (b) the absence of any connection between the originating proceedings and EU law; and (c) *res judicata* of the judgment of 11 February 2020 [9] – cannot be accepted.

29. Contrary to those objections, in my opinion:

– The order for reference contains a sufficient explanation of the reasons that led the referring court to formulate the questions referred for a preliminary ruling. It therefore satisfies the requirement in Article 94(c) of the Rules of Procedure of the Court of Justice.

– There is a connection between the subject matter of the original proceedings and EU law, given that the original proceedings, which gave rise to the subsequent action for damages, concerned the application of Directive 2012/27. The viability of that action may depend on the extent to which the procedural remedies provided for in Bulgarian law enable rights under EU law to be asserted.

– The *res judicata* effect of the judgment of the VAS of 11 February 2020 is not called into question. There is a separate issue over whether or not, once that effect has been acknowledged, there is a right to damages in respect of any loss or damage resulting from the judgment, in so far as it applies the procedural rule at issue.

30. I would also add that, in my view, the first two questions can be answered together, and that the third question is – as I shall explain below – inadmissible, on the ground that it is hypothetical.

B. First and second questions referred

1. Actions for annulment and actions for damages as means of ensuring respect for an individual's rights

31. In the judgment of 21 December 2021, *Randstad Italia*, [10] the Court reiterated that the second subparagraph of Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection for individual parties in the fields covered by EU law. [11]

32. That obligation on Member States is compatible with the principle of procedural autonomy under which, without prejudice to the existence of EU rules on the matter, it is for the Member States to establish procedural rules for those remedies. [12]

[9] Noting that the judgment of 11 February 2020 had become *res judicata*, the VAS argues that EU law does not require the disapplication of domestic rules that confer that effect on national judicial decisions.

[10] C-497/20, EU:C:2021:1037; 'the judgment in *Randstad Italia*'.

[11] The judgment in *Randstad Italia*, paragraph 56, citing judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 32).

[12] The judgment in *Randstad Italia*, paragraph 58: 'Provided there are EU rules on the matter, it is, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to establish procedural rules for the remedies referred to in paragraph 56 of the present judgment, on condition, however, that those rules are not – in situations governed by EU law – less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)'.

33. The freedom enjoyed by Member States to set those rules is so broad that EU law does not require them to provide for a *free-standing* action [13] that enables a *direct* challenge which seeks primarily to dispute national provisions that are contrary to EU law.

34. The Court has rejected the notion that the absence of such a free-standing action in national law is in breach of Article 47 of the Charter: 'the principle of effective judicial protection does not require it to be possible, as such, to bring a free-standing action which seeks primarily to dispute directly the compatibility of national provisions with EU law, provided one or more legal remedies exist which make it possible to ensure, indirectly, respect for an individual's rights under EU law'. [14]

35. Thus, to preserve 'an individual's rights' under EU law, it is sufficient that there are other remedies that, indirectly, ensure respect for those rights.

36. Procedural remedies capable of ensuring, even indirectly, respect for rights under EU law include an action for liability against the Member State for loss or damage suffered by individuals as a result of breaches of those rights.

37. Thus 'the full effectiveness of EU law and effective protection of the rights which individuals derive from it may … be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based'. [15]

38. According to that case-law, Article 47 of the Charter is, in principle, compatible with rules of procedure which do not provide for actions for annulment but which enable actions for damages which provide affected parties with effective protection of their rights.

39. It is for the referring court to determine whether, having regard to its characteristics, an action for damages under Bulgarian law, which is being heard by that court, provides an effective safeguard for the applicant's rights under EU law.

40. As part of that analysis, the referring court may find some helpful material in the judgment of 4 October 2018, *Kantarev*, [16] cited by the referring court, since it addressed issues concerning Bulgarian regulation of actions for non-contractual liability brought against the State. [17]

41. In that judgment the Court stated as follows:

– 'national courts may enquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, inter alia, he availed himself in time of all the legal remedies available to him'; [18]

– however, it is clear from the case-law that it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to

[13] By this is meant an action or appeal which seeks primarily to challenge the provision itself and not simply individual instances of its application.

[14] Judgment of 21 November 2019, *Deutsche Lufthansa* (C-379/18, EU:C:2019:1000, paragraph 61).

[15] Judgment of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 54).

[16] C-571/16, EU:C:2018:807.

[17] The general points contained in that material remain valid, even though the relevant Bulgarian legislation has been amended, as was noted at the hearing.

[18] Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 140).

them even if that would give rise to excessive difficulties or could not reasonably be required of them';[19]

– the duty to seek prior annulment of the administrative measure which caused the harm is not, per se, contrary to the principle of effectiveness. However, such a duty may make it excessively difficult to obtain compensation for the loss or damage caused by the infringement of EU law if, in practice, that annulment is precluded'.[20]

2. The dual procedural regime in Bulgarian law: actions against regulatory acts and actions for damages

42. Bulgarian law provides for a direct (free-standing) action which enables domestic legislation to be reviewed for compatibility with EU law. It was precisely such an action that made possible the judgment at first instance of 13 April 2018, which declared point 6.1.1. of the calculation method void because it did not meet the objectives of Directive 2012/27.[21]

43. Separately from that direct action, Bulgarian law also provides an indirect route, through the bringing of a claim against the State for non-contractual damages for breach of an EU law conferring rights on individuals.

44. At the hearing it was noted that the remedy of damages enables the competent courts to declare, albeit *incidenter tantum* and with *inter partes* effect, that the substatutory legislative act which causes the damage suffered by the applicant is unlawful. Those courts do not appear to be restricted by the fact that the regulatory act has been withdrawn or amended prior to the judgment.

45. This dual procedural regime would, in principle, be sufficient to satisfy the right to an effective remedy, as argued by the VAS, the Polish Government and the Commission:

– According to the VAS, national law offers individuals who believe they have been harmed by an allegedly unlawful administrative act the possibility of obtaining compensation for the loss and damage suffered, through an action for damages. That action also enables judgment to be given on the legality of the act in question and, in particular, satisfies the principles of equivalence and effectiveness required by EU law.

– According to the Polish government, Article 47 of the Charter does not require it to be possible to bring a free-standing action to challenge the compatibility of national provisions with EU law. In so far as Bulgarian law appears to provide for an administrative act that has been withdrawn to be declared illegal in the course of an action for damages for the loss and damage caused by that act, the national legislation at issue satisfies the requirements of the right to an effective remedy.

– The Commission essentially agrees with the Polish Government's position as regards the ability of an action for damages to satisfy the purposes of Article 47 of the Charter where it permits an examination of the legality of the regulatory provision that has been amended.

[19] Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 142).

[20] Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 143).

[21] See footnote 6 of this Opinion.

46. Under the case-law of the Court cited above it would be possible to endorse this view. Provided that it is effective, provision for State liability can offer a remedy for loss and damage suffered by individuals if it is still possible, through this route, to review the compatibility of the national provision of law with EU law.

47. However, that initial response must be qualified, since a free-standing action, as provided for in Bulgarian law, may not be effective in fully guaranteeing a review of the compatibility of a national regulatory provision with EU law, or may have a distortive effect. That distortive effect also impacts on the remedy of damages, as I shall explain below.

48. As I have already noted, it is true that EU law does not require the existence of a free-standing action. But, where a Member State does provide for such an action, I believe that Member States' freedom to establish procedural rules for the remedies referred to in the second subparagraph of Article 19(1) TEU is subject to the principles of equivalence and effectiveness. [22]

49. The State liability route constitutes an alternative remedy for the effective protection of individuals' rights where national law does not offer a free-standing action. Where a free-standing action does exist, it must, I stress, comply with the equivalence and effectiveness conditions required by EU law.

50. Moreover, in so far as domestic procedural law obstructs, hinders or delays the ability of individuals to obtain compensation, it will not satisfy the right to an effective remedy, and that may give rise to a new ground for State liability. It is precisely that liability under which IG is seeking compensation in the main proceedings.

51. Does the free-standing action provided for in Bulgarian law satisfy the equivalence and effectiveness conditions required by EU law?

52. With regard to the principle of *equivalence*, all the evidence would suggest that loss of purpose (as found by the VAS in the present case) is not restricted to actions disputing domestic provisions of legislation that are incompatible with EU law.

53. Subject to verification by the referring court, the available information suggests that an action would also have become devoid of purpose if the disputed provision were invalid because it infringed a higher-ranking rule of domestic law.

54. With regard to the principle of *effectiveness*, it is evident from the dispute in the main proceedings that, in practice, it is very difficult to exercise the right conferred on IG by EU law by means of a free-standing action where the disputed provision is amended during the course of the proceedings, as I shall examine below.

[22] The judgment in *Randstad Italia*, paragraph 58; and judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175, paragraph 49).

3. Loss of purpose of an action to dispute a regulatory act and consequences of the amendment of that act

55. According to the information on the case file, which was confirmed during the hearing, under Bulgarian law, actions against substatutory legislative acts are configured in such a way that they may (as has occurred here) become devoid of purpose if the disputed act is amended before the courts reach a final substantive decision. [23]

56. From an abstract perspective, EU law does not preclude a Member State from configuring actions for nullity of legislative acts in such a way that, as a general rule, the competent courts are only required to rule on the legality of provisions that are in force when judgment is given. [24]

57. However, depending on the specific characteristics of the rule under domestic law, the way in which the rule applies may significantly restrict the ability of the courts to review, as the primary purpose and with *erga omnes* effect, the legality of a disputed provision which has subsequently been amended.

58. Therefore it must be determined whether, through such a restriction, Bulgarian law provides effective protection for rights conferred by the European Union with regard to the effects which a legal rule has before it is amended or repealed.

59. In the original proceedings, the fact that the provision disputed by IG in proceedings No 1372/2016 was amended before the appeal was decided was sufficient to annul the judgment given in favour of the applicant at first instance. The annulment of the provision by the judgment at first instance was followed by the annulment of the judgment, with no examination of the substance of the case by the appeal court.

60. As a result, IG has not been able to obtain the definitive annulment of the regulatory act whose annulment he obtained at first instance. Instead, in spite of that judgment, the act, which was contrary to EU law, has continued to have effect during the period between its entry into force and its subsequent amendment.

61. This outcome is the result of a regulatory regime (or, at least, a judicial interpretation of that regime) which, according to the evidence heard at the hearing, does not appear to satisfy the requirements of clarity and predictability needed to safeguard the right to an effective remedy.

[23] In the event of a supervening amendment, the effects which the provision in question had until that point can thus be maintained. In its written observations, the VAS argues that, under Article 149 of the Rules of Procedure of the Court of Justice, the EU procedural system recognises that a direct action may become devoid of purpose where the disputed act has been amended before judgment is given. However, although that solution prevails where judgment has not been given at first instance, under the case-law of the Court, where an action for annulment is brought against an act that is no longer in force, this does not necessarily render the action devoid of purpose, if the applicant retains his or her interest in having the act annulled. See, to that effect, Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, paragraph 7.10 and the case-law cited.

[24] In some Member States the same rule applies to *a posteriori* review of the constitutionality of laws. Where the law is repealed after the action has been lodged, in principle the case is dismissed on the ground that, where the objective of proceedings is to cleanse the content of the legislation, there is no need to give judgment on a legal text that is not in force. However, that criterion may not be applicable where, in spite of its repeal, the law continues to have certain effects (continuing effect), or where the law applies to the facts at issue under the principle of '*tempus regit factum*', making it necessary to determine whether it was constitutional.

62. At the hearing, there was a discussion over the legal basis for the ruling by the five-judge Chamber of the VAS that the proceedings had become devoid of purpose. In response to questions from the Court, the representative of the VAS maintained that no such legal basis was provided by Article 221(4) of the Code of administrative procedure, [25] and that the Chamber of five judges had not cited any other positive precept as grounds for the ruling. [26]

63. The consequences of the lack of clarity and predictability of this legal rule (which are detrimental to the applicant, who is deprived of a judicial response on the substance of the case, even though he was successful at first instance) would be even greater if, as IG contends, the rule is applied without first granting the parties to the proceedings a hearing to enable them to comment on its impact on the case. [27]

64. It is for the referring court to verify whether the rule of procedure at issue is sufficiently clear and predictable as to its effects, or whether, on the other hand, an individual who is affected by a domestic provision that is incompatible with EU law is left to the vagaries of the differing opinions of the various courts, to the detriment of legal certainty.

65. Nevertheless, when assessing that rule of procedure, the most problematic point lies in the fact that it enables the executive to deprive of effect, retrospectively, a judgment which has already been given and which ruled that there had been a breach of EU law. It simply has to amend [28] the legal rule annulled by the judgment before the appeal court gives judgment.

66. This is what appears to have happened in the present case: the amendment to the calculation method would appear to have been 'due specifically to' the judgment at first instance which had ordered its annulment. [29]

67. If that were to be the case – which is, once again, a matter for the referring court to determine – the effectiveness of actions for the annulment of substatutory provisions in which the provisions have been ruled to be incompatible with EU law would be dependent on the wishes of the authority that issued the disputed provision.

68. Given that situation, there would be nothing to prevent that authority from deciding to amend the legislative act, precisely to evade the effects of a judgment at first instance which ruled in favour of the applicant and annulled the provision, before the first instance judgment was upheld in a final judgment on appeal.

[25] It should be recalled that that precept, reproduced in point 10 of this Opinion, provides for the administrative authority to 'withdraw' the disputed act, in which case the VAS sets aside the judicial ruling given on that act.

[26] According to the order for reference (paragraph 9), the VAS had argued that the proceedings included a legislative act which had been withdrawn, to which Article 204(3) of the Code of administrative procedure applied. That article establishes that, where the damage is the result of an act that has been withdrawn, the court hearing the action for damages must determine whether the act in question was unlawful.

[27] At the hearing, IG stated that the Chamber of the VAS reached its decision without hearing his arguments on the possible loss of purpose of the action.

[28] It would appear from the discussion at the hearing that a minimal change to the regulation would be sufficient to render the judicial proceedings in train devoid of purpose. IG had maintained (paragraph 45 of his written observations) that the amendment that was introduced was not actually an amendment, because the new decree adopted the same calculation method. However, the referring court states that the decree published on 20 September 2019 amended the previous decree 'in particular' in respect of point 6.1.1. of the method for the allocation of thermal energy in buildings in co-ownership (paragraph 6 of the order for reference).

[29] Paragraph 4 of the written observations submitted by IG, who emphasised this point at the hearing. In my opinion, his observations were not rebutted during the subsequent debate.

69. In other words, it would be possible for the rules of procedure at issue to be used as a means to render ineffective a previous declaration of nullity on grounds of breach of EU law. It would also make the defence of individual rights excessively difficult, thus undermining the principle of effectiveness.

70. It is true that, as the VAS argued at the hearing, the executive or, in general, any government authority which issues a substatutory legislative act, has the power to amend or repeal it at any time.

71. However, that power cannot be used as a means to *neutralise* judgments already issued by the courts which have found a breach of EU rules, where that mechanism simultaneously:

– prevents the review of the judgment at first instance by a higher court (in this case, the VAS sitting as a five-judge Chamber), which will set aside the original judgment, not on substantive grounds but for reasons which are totally extrinsic to the proceedings and dependent solely on the unilateral will of the author of the legal provision, who is also the appellant;

– prevents the declaration of nullity of the disputed regulatory act from having effect in the terms established by the court of first instance, including preventing it from having effect in respect of the period for which it was in force.

72. The result is that an action for annulment that was brought when the legislative act was in force and on which a judgment at first instance, given at a time when the act was still in force, had validly ruled in favour of the applicant, becomes devoid of purpose due to the subsequent amendment of that same act, introduced after the judgment at first instance.

73. To summarise, where an authority which originally adopts the act amends it as a 'reaction' to the judgment at first instance (against which that same authority has lodged an appeal), it robs that judgment of all potential, even though no higher court has pronounced on its content.

74. The outcome of an action for annulment would, in short, be governed by chance, which is unacceptable. It would not depend on a judicial assessment of the substance of the case but on the potential for a legislative change instigated by the authority which issued the disputed provision, once it finds it has lost the case at first instance.

75. In my view, it can be seen from the above that, in the circumstances I have just examined, the free-standing action provided for in Bulgarian law does not appear to offer effective protection to individuals claiming breach of their rights under EU law.

76. It is, however, for the referring court to assess whether the domestic rules of procedure can be interpreted in such a way as to ensure that, in the circumstances of the case before it, the amendment to the disputed provision of law does not prevent a definitive judgment on the substance of the case.

77. To that end, it would be necessary to determine precisely whether the consequences of the rules at issue concerning the loss of purpose of actions that remain *sub iudice* are sufficiently clear and precise and have a solid legal basis.

78. In the final analysis, consideration could be given to the possibility that, where the action for annulment has failed because it has become devoid of purpose, it would be open to the injured party to bring an action against the State for liability, as a subsidiary mechanism to protect the rights that have been infringed.

79. As I indicated earlier, an action for damages would enable IG to obtain compensation for the loss and damage he suffered because he was forced to use a procedural remedy which ultimately, and for reasons entirely unconnected with his conduct, proved fruitless.

80. In my opinion, liability for loss and damage caused by the application of legislation that is incompatible with EU law should only be attempted through an action for damages if the rules of procedure at issue do not admit of an interpretation that satisfies the requirements of the right to an effective remedy.

81. Moreover, it is necessary to clarify whether, given the particular characteristics of the arrangements for implementing directives, national law is capable of satisfying the legitimate interest of those individuals who find themselves in IG's situation and who are able to enforce the rights conferred on them by a directive only if the domestic provision which is incompatible with the directive is declared void.

82. Indeed, even if the directive which confers the rights on the individual were directly applicable, IG would find it difficult to rely on the directive against a private person such as the energy supply company, to which he paid the sums calculated on the basis of point 6.1.1 of the disputed method. [30]

83. In short, under the dual procedural regime described in the order for reference, in order to obtain protection for their rights under EU law, individuals would be required:

– first, to seek the annulment of the regulatory provision that is incompatible with EU law, through an action which, even if successful at first instance, could unexpectedly become devoid of purpose as the result of an amendment to that provision which was designed to evade the effects of its annulment;

– subsequently, to seek damages for the loss and damage suffered, by invoking State liability. [31]

84. In those circumstances, I consider that the rules of procedure at issue make it excessively difficult to obtain judicial protection which would provide an effective safeguard for rights deriving from EU law.

85. The above comments apply to individuals who have sought a judicial annulment of the legislation that is incompatible with EU law. They do not apply to those who have not challenged that incompatibility, who will have to seek compensation, where applicable, by invoking State liability.

[30] See, in general, to that effect, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631).

[31] The VAS argued at the hearing that where an individual brings an action before it challenging the legality of a regulatory provision, that individual can also apply for the corresponding damages. However, according to its explanation, the VAS would be required to refer that application to the competent court, which would determine whether the State was liable.

C. Third question referred

86. The referring court wishes to know whether it is 'permissible for the provision in question to continue to regulate, during the period between its adoption and its amendment, legal relationships in respect of an unlimited group of persons who have not brought actions for damages on account of that provision'.

87. In view of my suggested response to the first and second questions, I do not believe it is essential to answer the third question.

88. In any event, the issue raised in the third question is purely hypothetical in the context of the reference for a preliminary ruling.

89. For the purposes of adjudicating on the claim for damages brought by IG (which, it should be recalled, is the point at issue in the original proceedings), it makes no difference what provisions govern the legal relationships of third parties who have not brought actions, or whether 'the assessment of the compatibility of the national rule with the EU law provision in respect of the period prior to the amendment [has not] been carried out in relation to those persons'.

90. Indeed, the outcome of the action brought by IG which gave rise to this request for a preliminary ruling has nothing to do with the outcome for those 'persons who have not brought actions for damages'. The referring court need only concern itself with the former action.

91. Consequently, when formulated in these terms, I consider that the third question referred is inadmissible.

V. Conclusion

92. In the light of the above, I suggest to the Court that it should reply to the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria) in the following terms:

The principle of effective judicial protection and, in particular, Article 47 of the Charter of Fundamental Rights of the European Union do not require it to be possible, as such, to bring a free-standing action which seeks primarily to challenge the compatibility of national provisions with EU law, provided one or more legal remedies exist, which make it possible, indirectly, to ensure respect for an individual's rights under EU law.

National legislation which establishes a free-standing action to challenge the compatibility of national provisions with EU law must ensure the effectiveness of that challenge mechanism made available to individuals.

That effectiveness is not ensured where, under national law, the judgment of a court at first instance that a legislative act not having the status of primary legislation is incompatible with EU law, against which an appeal has been lodged, can be set aside without any examination of the grounds for the judgment, purely as the result of an amendment made to the regulatory act, after the judgment had been given, by the same authority which issued the contested act, thereby depriving that judgment of effect and preventing a substantive examination on appeal.