



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 January 2016*

(Reference for a preliminary ruling — Common regulatory framework for electronic communications networks and services — Directive 2002/21/EC — Article 7(3) — Procedure for consolidating the internal market for electronic communications — 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 — Authorisation of mobile call termination fees)

In Case C-395/14,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 25 June 2014, received at the Court on 19 August 2014, in the proceedings

Vodafone GmbH

v

Bundesrepublik Deutschland,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, C. Toader, E. Levits, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Vodafone GmbH, by T. Tschentscher and D. Herrmann, Rechtsanwälte,
- the European Commission, by G. Braun and L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 7(3) 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; ‘the Framework Directive’).
- 2 The request has been made in proceedings between Vodafone GmbH (‘Vodafone’) and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning a decision of the Federal Network Agency (Bundesnetzagentur; ‘the Federal Network Agency’) authorising, on a provisional basis, Vodafone’s mobile call termination fees.

Legal context

EU law

The Framework Directive

- 3 Recital 38 in the preamble to the Framework Directive states:

‘Measures that could affect trade between Member States are measures ... that have a significant impact on operators or users in other Member States, which include, inter alia: measures which affect prices for users in other Member States; ...’
- 4 Article 1 of the Framework Directive determines the objectives and scope thereof. Article 1(1) provides:

‘This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities [(“NRAs”)] and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.’
- 5 Article 2(l) of the Framework Directive defines the ‘Specific Directives’ to which the Framework Directive refers as being Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21); 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); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1).
- 6 Article 6 of the Framework Directive, entitled ‘Consultation and transparency mechanism’, provides, in essence, that where NRAs intend to take measures in accordance with this directive or the Specific Directives which have a significant impact on the relevant market, they are to give interested parties the opportunity to comment on the draft measures.

- 7 Article 7 of the Framework Directive, entitled ‘Consolidating the internal market for electronic communications’, provides:

‘1. In carrying out their tasks under this directive and the Specific Directives, [NRAs] shall take the utmost account of the objectives set out in Article 8, including insofar as they relate to the functioning of the internal market.

2. [NRAs] shall contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives. ...

3. In addition to the consultation referred to in Article 6, where a[n] [NRA] intends to take a measure which:

(a) falls within the scope of Articles 15 or 16 of this Directive, Articles 5 or 8 of [the Access Directive] or Article 16 of [the Universal Service Directive], and

(b) would affect trade between Member States,

it shall at the same time make the draft measure accessible to the Commission and the [NRAs] in other Member States, together with the reasoning on which the measure is based, ... and inform the Commission and other [NRAs] thereof. [NRAs] and the Commission may make comments to the [NRA] concerned only within one month or within the period referred to in Article 6 if that period is longer. The one-month period may not be extended.

...

5. The [NRA] concerned shall take the utmost account of comments of other [NRAs] and the Commission and may, except in cases covered by paragraph 4, adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

...’

- 8 Article 8 of the Framework Directive, entitled ‘Policy objectives and regulatory principles’, provides, in paragraph (3):

‘The [NRAs] shall contribute to the development of the internal market by inter alia:

...

(d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.’

- 9 Article 14 of the Framework Directive, entitled ‘Undertakings with significant market power’, lays down the criteria allowing the NRAs to take the view that a particular operator held significant market power.

- 10 Article 16 of the Framework Directive, entitled ‘Market analysis procedure’, provides:

‘...

2. Where [an NRA] is required under Articles 16, 17, 18 or 19 of [the Universal Service Directive], or Articles 7 or 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 [an NRA] determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the [NRA] 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. Measures taken according to the provisions of paragraphs 3, 4 and 5 of this Article shall be subject to the procedures referred to in Articles 6 and 7.'

- 11 Article 19 of the Framework Directive 2001/29, entitled 'Harmonisation procedures', provides in paragraph (1):

'Where the Commission, acting in accordance with the procedure referred to in Article 22(2), issues recommendations to Member States 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, Member States shall ensure that [NRAs] take the utmost account of those recommendations in carrying out their tasks. Where [an NRA] chooses not to follow a recommendation, it shall inform the Commission giving the reasoning for its position.'

The Access Directive

- 12 The Access Directive states, in recitals 13 and 20 in the preamble thereto:

'(13) ... In order to ensure that market players in similar circumstances are treated in similar ways in different Member States, the Commission should be able to ensure harmonised application of the provisions of this Directive. [NRAs] and national authorities entrusted with the implementation of competition law should, where appropriate, coordinate their actions to ensure that the most appropriate remedy is applied. ...

...

(20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable ..., or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. ...'

- 13 Article 1 of that directive, entitled 'Scope and aim', provides in paragraph (1) thereof:

'Within the framework set out in Directive 2002/21/EC (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.'

14 Article 2(a) and (b) of that directive contains the definitions of the concepts of ‘access’ and of ‘interconnection’ respectively. The latter means ‘the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. ... Interconnection is a specific type of access implemented between public network operators’.

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

‘1. Member States shall ensure that [NRAs] are empowered to impose the obligations identified in Articles 9 to 13.

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], [NRAs] 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.

...’

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

‘1. [An NRA] 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 might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. [NRAs] 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 the risks involved.

2. [NRAs] 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.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, [NRAs] may use cost accounting methods independent of those used by the undertaking. [NRAs] may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

...’

German law

- 17 The Law on telecommunications (Telekommunikationsgesetz) of 22 June 2004 (BGBl. 2004 I, p. 1190), as amended by the Law of 17 February 2010 (BGBl. 2010 I, p. 78; ‘the TKG’), provides, in Paragraph 12 thereof:

‘(1) The Federal Network Agency shall give the interested parties the opportunity to comment on the draft results as referred to in Paragraphs 10 and 11. ...

(2) If Paragraph 10(3) and Paragraph 11(3) provide for submission in accordance with this rule, the following procedure shall apply:

1. After implementation of the procedure under (1), the Federal Network Agency shall make the draft results as referred to in Paragraphs 10 and 11 accessible to the Commission and, at the same time, to the [NRAs] in other Member States, together with reasoning on which they are based, and shall inform the Commission and other [NRAs] thereof. The Federal Network Agency may not adopt results as referred to in Paragraphs 10 and 11 before the end of one month or a longer period laid down pursuant to paragraph (1).
2. The Federal Network Agency must take the utmost account of the comments of the Commission and other [NRAs] pursuant to point 1. It shall forward the resulting draft to the Commission.

...

4. In exceptional circumstances, where the Federal Network Agency considers that there is an urgent need to act — by way of derogation from the procedure set out in subparagraph (1) and points 1 to 3 — in order to safeguard competition and protect the interests of users, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission and the other [NRAs]. A decision by the Federal Network Agency to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.’

- 18 Paragraph 13(1) of that law provides that:

‘Where, as a result of a market analysis carried out in accordance with Paragraph 11, the Federal Network Agency imposes, amends, maintains or repeals obligations as referred to in [Paragraph 30], the procedure under Paragraph 12(1) and (2), points 1, 2 and 4, shall apply *mutatis mutandis*, in so far as the measure affects trade between Member States. ...’

- 19 Paragraph 30(1) of that law states:

‘Subject to the following paragraphs, fees charged by an operator of a public telecommunications network having significant market power shall be subject to authorisation by the Federal Network Agency in accordance with Paragraph 31 for access services imposed under Paragraph 21.’

- 20 Under Article 31(1) of the TKG:

‘Fees which require authorisation in accordance with the first sentence of Paragraph 30(1) ... shall be eligible for authorisation if they do not exceed the costs of efficient provision of the services. ...’

21 Paragraph 35(3) of that law provides:

‘Authorisation shall be granted in full or in part in so far as the fees comply with the requirements of Paragraphs 28 and 31 in accordance with subparagraph (2) and there are no reasons for refusal according to the second or third sentence. ...’

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

- 22 Vodafone is a company operating mobile communications networks which are interconnected with telecommunications networks of other operators. In a procedure prior to that which gave rise to the main proceedings, the Federal Network Agency designated Vodafone as an operator with significant power on the mobile telephone market and made its fees for mobile call termination services subject to authorisation.
- 23 In September 2010, Vodafone applied to the Federal Network Agency for authorisation of termination fees for the period with effect from 1 December 2010. Since it intended, in that regard, to carry out for the first time the consultation and consolidation procedures provided for in Articles 6 and 7 respectively of the Framework Directive, the Federal Network Agency authorised those fees in a decision of 30 November 2010 on a provisional basis. After those procedures had been completed, the Federal Network Agency granted Vodafone final authorisation of the fees in a decision of 24 February 2011, effective retrospectively from 1 December 2010 and valid until 30 November 2012.
- 24 Vodafone challenged the decision of 30 November 2010 before the Verwaltungsgericht Köln (Administrative Court, Cologne) on the ground that it was without legal basis, since, according to that company, a consolidation procedure should not be carried out before an authorisation of fees is issued. By judgment of 19 September 2012, that court, firstly, dismissed the action for annulment brought by Vodafone as inadmissible, since the contested decision had become devoid of purpose, and, secondly, rejected Vodafone’s alternative claim seeking a declaration of the unlawfulness of that decision.
- 25 Vodafone lodged an appeal on a point of law against this judgment before the Bundesverwaltungsgericht (Federal Administrative Court), in which it sought a finding that the decision of 30 November 2010 was unlawful. That court states, in that regard that, although the decision of 30 November 2010 had ceased to be relevant, Vodafone retains a legitimate interest in its unlawfulness being declared, since it is possible that, in the future, the Federal Network Agency may again act in the manner disputed by that company.
- 26 As to the substance, the Bundesverwaltungsgericht (Federal Administrative Court) states that, in the light of German law alone, the action brought by Vodafone should succeed. Since the TKG does not provide that a consolidation procedure may be carried out before the issue of an authorisation of fees, it is not possible to issue a provisional authorisation in order to avoid disadvantages which arise from the delay in the adoption of a final decision associated with such a procedure.
- 27 Nevertheless, that court is doubtful as to the conformity of German law with EU law. It notes that it could indeed be maintained, in the light of Paragraph 12(2), the first sentence of Paragraph 31(1) and the first sentence of Paragraph 35(3) of the TKG and Articles 7(3) of the Framework Directive and 8 and 13 of the Access Directive, that the Federal Network Agency is required to carry out the consolidation procedure before issuing an authorisation of fees, since such authorisation may fall within the concept of the ‘obligations relating to cost recovery and price controls, including obligations for cost orientation of prices’ referred to in Article 13(1) of the Access Directive, and, in general, has an effect on trade between Member States.

28 That court is of the view, none the less, that doubts remain as to the accuracy of such an interpretation. EU law does not include detailed rules for the procedure in the case of price controls or the criteria to be applied in respect of fees. Article 13 of the Access Directive thus allows organisation of the regulation of fees, in essence, to be governed by national law. In the present case, the TKG has established a two-step procedure, of which only the first, relating to the abstract obligation to reflect the costs and not to the actual fixing fees, falls within the scope of that article. Paragraph 3 thereof could, moreover, in the view of the referring court, be understood as meaning that EU law also lays down a stepped system of fee regulation. Furthermore, the direct involvement of the Commission in the setting of actual fees could be regarded as contrary to the principles of subsidiarity and proportionality.

29 Under those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 7(3) of [the Framework Directive] to be interpreted as meaning that a national regulatory authority which has required an operator with significant market power to provide mobile call termination services and has made the fees charged for this subject to authorisation in compliance with the procedure laid down in the aforementioned provision of the directive is required to carry out the procedure under [that provision] again before each authorisation of fees specifically requested?’

Consideration of the question referred for a preliminary ruling

30 By its question, the referring court asks, in essence, whether Article 7(3) of the Framework Directive must be interpreted as meaning that, when an NRA has required an operator which has been designated as having significant market power to provide mobile call termination services and has made the fees charged for this subject to authorisation following the procedure laid down in that provision, that NRA is required to carry out the procedure again before each authorisation of fees to that operator.

31 That provision provides that, where an NRA intends to adopt a measure which, on the one hand, is covered, in particular, by Article 16 of the Framework Directive or Article 8 of the Access Directive and, on the other, will affect trade between the Member States, it is to provide the Commission and the other NRAs with the draft measure and the grounds on which the measure is based and to inform the Commission and the other NRAs thereof.

32 Under Article 16(2) of the Framework Directive, where an NRA is required under, inter alia, Article 8 of the Access Directive to decide whether to impose, maintain, amend or withdraw obligations on undertakings, it is to determine on the basis of its market analysis referred to in Article 16(1) whether a relevant market is effectively competitive. Under Article 16(4) thereof, where an NRA determines that a relevant market is not effectively competitive, it is to identify undertakings with significant market power on that market and on such undertakings impose appropriate specific regulatory obligations referred to in Article 8 of the Access Directive or maintain or amend such obligations where they already exist. Article 16(6) states that measures taken according to the provisions of paragraph 4 of that article are to be subject to the procedures referred to in Articles 6 and 7 of the Framework Directive.

33 Article 8(2) provides that, 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, NRAs are to impose the obligations set out in Articles 9 to 13 of the Access Directive as appropriate. Article 8(4) provides, in addition, that obligations imposed in accordance with Article 8 are to be imposed only following consultation in accordance with Article 7 of the Framework Directive.

- 34 The first sentence of Article 13(1) of the Access Directive lays down that an NRA may, in accordance with the provisions of Article 8 of that directive, impose obligations on an operator 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 might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users.
- 35 Thus, it follows from a combined reading of Article 7(3) and Article 16(4) of the Framework Directive and Articles 8(2) and 13(1) of the Access Directive that, where an NRA proposes to adopt, in respect of an operator designated as having significant power on a given market, a measure which imposes ‘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’, which affect trade between Member States, that NRA is required to carry out the consolidation procedure provided for in Article 7(3).
- 36 It is irrelevant in that regard that that consolidation procedure has already previously been carried out, in the context of a market analysis procedure carried out in accordance with Article 16 of the Framework Directive, following which obligations may already have been imposed on the operator concerned, given that, by providing, in Article 16(2) that the NRA may be required to decide whether ‘to impose, maintain, amend or withdraw’ the obligations provided for inter alia in Article 8 of the Access Directive and imposed on an undertaking, the Framework Directive expressly provides that a single obligation may be the subject of a number of consolidation procedures, leading, as appropriate, to the imposition, maintenance, amending or withdrawal of that obligation.
- 37 In the present case, it is not in dispute that, at the date of adoption of the decision of 30 November 2010, Vodafone was designated by the Federal Network Agency as being an operator with significant power on the mobile telephone market within the meaning of Article 14 of the Framework Directive. In order to answer the question referred, it therefore remains to ascertain whether the issue of a mobile call termination fees authorisation, such as that at issue in the main proceedings, is covered by the measures referred to in Article 7(3)(a) of the Framework Directive and, if so, whether the issue of such an authorisation is capable of affecting trade between the Member States within the meaning of Article 7(3)(b) of the Framework Directive.
- 38 Firstly, as regards whether the issue of a mobile call termination fees authorisation is covered by Article 7(3)(a) of the Framework Directive, it must be borne in mind that that provision must be read in conjunction with Articles 8(2) and 13(1) of the Access Directive and that it results from a combined reading of those provisions that such an authorisation falls within the scope of Article 7(3)(a) if it is an ‘[obligation] 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’ referred to in Article 13(1) of the Access Directive.
- 39 In that regard, it is appropriate to note that, although the concepts of ‘access’ and ‘interconnection’ are defined in Article 2(a) and (b) respectively of the Access Directive, no provision of that directive states what is to be understood by the concept of ‘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 Article 13(1) of the Access Directive.
- 40 It is therefore necessary, in order to interpret that concept, to consider not only the wording of its terms, but also its context and the objectives pursued by the rules of which it is part (see, to that effect, judgments in *The Number (UK) and Conduit Enterprises*, C-16/10, EU:C:2011:92, paragraph 28, and *KPN*, C-85/14, EU:C:2015:610, paragraph 33).

- 41 With regard to the wording of that provision, it must be noted, first of all, that it follows from the term ‘including’ used in Article 13(1) of the Access Directive that the ‘obligations for cost orientation of prices’ are merely examples of the ‘obligations relating to cost recovery and price controls’ referred to in that provision. Accordingly, it is appropriate at the outset to reject Vodafone’s line of argument that the issue of a mobile call termination fees authorisation is not covered by Article 13(1) of the Access Directive and, accordingly, by Article 8(2) of that directive and Article 7(3)(a) of the Framework Directive, on the ground that it is not an ‘obligation for cost orientation of prices’.
- 42 Next, it is clear that the concept of ‘obligations relating to ...price controls’ has a broad meaning and that, having regard to the usual meaning of the terms used in it, it encompasses, of necessity, a measure such as the issue of a mobile call termination fees authorisation, given that such a measure concerning a specific operator, prior to the implementation of the fees in question, is, by its nature, a price control.
- 43 Finally, it is also apparent from the wording of Article 13(1) of the Access Directive that the ‘obligations relating to ...price controls’ to which it refers must concern ‘the provision of specific types of interconnection and/or access’. Firstly, interconnection is defined in Article 2(b) of that directive as consisting, in particular of ‘the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking’. Secondly, according to the observations lodged by the Commission before the Court, the mobile call termination is the service which enables a telephone call to reach the subscriber requested. It follows of necessity that the issue of a mobile call termination fees authorisation concerns ‘the provision of specific types of interconnection and/or access’ within the meaning of Article 13(1) of the Access Directive.
- 44 It thus follows from the wording of that provision that the issue of a mobile call termination fees authorisation is one of the obligations relating to price control referred to in that provision which the NRAs are, by virtue of Article 8(2) of the Access Directive, entitled to impose on an operator with significant power on the mobile telephone market and which, if they are proposed and in so far as they will affect trade between the Member States, can be imposed, pursuant to Article 8(4) thereof, only following the procedure provided for in Article 7 of the Framework Directive.
- 45 That interpretation of Article 13(1) of the Access Directive is strengthened by the context of which that provision forms part. Apart from the heading of Article 13, which expressly refers to ‘price control’, Article 13(2) refers in particular to the ‘pricing methodology that is mandated’ by an NRA. Moreover, recital 20 in the preamble to the Access Directive states, in essence, that, in the context of price control, ‘the regulatory intervention may be relatively light ... or much heavier ...’. Also to that effect, Article 16(4) of the Framework Directive, read in conjunction with paragraph 2 of that article, refers to the ‘appropriate specific regulatory obligations’, also referred to in Article 8 of the Access Directive.
- 46 Both the Access Directive and the Framework Directive therefore envisage that the precise obligations relating to price control, as specific as the issue of a mobile call termination fees authorisation, may be included in the obligations referred to in Article 13(1) of the Access Directive which the NRAs may impose on operators with significant market power.
- 47 The interpretation set out in paragraph 44 of the present judgment is, moreover, corroborated by the aims pursued, firstly, by the Access Directive, which seeks, in accordance with Article 1(1) thereof, to harmonise the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. In that regard, that directive recalls, in recital 13 in the preamble thereto, that, in order to ensure that market players in similar circumstances are treated

in similar ways in different Member States, the Commission should be able to ensure harmonised application of the provisions of that directive and NRAs should coordinate their actions to ensure that the most appropriate remedy is applied.

- 48 Secondly, and analogously Article 1(1) of the Framework Directive states that its aim, inter alia, is to establish a set of procedures to ensure the harmonised application of the regulatory framework throughout the European Union. Thus, it is clear from Article 7(2) of the Framework Directive that the object of the procedure provided for in paragraph 3 of that article, entitled, moreover, ‘Consolidating the internal market for electronic communications’, is to enable the NRAs to contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of that directive and the Specific Directives. That obligation of transparent cooperation on the NRAs and the Commission is, furthermore, expressly imposed on the NRAs under Article 8(3)(d) of the Framework Directive, which adds that that cooperation must also ensure the development of consistent regulatory practice.
- 49 According to the statements of the Federal Network Agency set out by the referring court and the observations lodged by the Commission before the Court, the issue of a mobile call termination fees authorisation, such as that at issue in the main proceedings, seeks to implement abstract obligations defined in an earlier decision and, in consequence, has a specific and direct effect on the market, for the regulated undertakings and for those seeking access to them, in terms of costs and competitiveness. Furthermore, the effective application of such abstract obligations, which the issue of that authorisation would enable, is, as the Commission points out, likely to lead to considerable differences in the regulatory treatment of mobile call termination fees.
- 50 In those circumstances, all the aims of harmonisation, coordination, cooperation and transparency, intended to lead to the consolidation of the internal market in electronic indications, pursued by the Framework Directive and the Access Directive, would be compromised if the issue of such an authorisation were to avoid the application of the procedure laid down in Article 7(3) of the Framework Directive.
- 51 It is also appropriate to note that neither the wording of the provisions at issue, the general scheme of the Access Directive or of the Framework Directive, all the aims which they pursue enable the view to be taken that the EU legislature intended, as Vodafone and the referring court suggest, to make a distinction, among the obligations relating to price control referred to in Article 13(1) of the Access Directive, between measures referred to as ‘basic’, ‘fundamental’ or ‘regulatory’, which must be subject to the procedure laid down in Article 7(3) of the Framework Directive, and measures referred to as ‘implementing’ the former, which may avoid that procedure.
- 52 In that regard, the Court has previously held that it is not the nature of the procedure ongoing before the NRA, but on the actual subject-matter of the measure which the NRA intends to adopt and the effect that it may have on trade between Member States which is decisive in order to assess whether that measure is covered by the procedure laid down in Article 7(3) of the Framework Directive (see, to that effect, judgment in *Prezes Urzędu Komunikacji Elektronicznej and Telefonia Dialog*, C-3/14, EU:C:2015:232, paragraph 34).
- 53 Furthermore, the fact that such a distinction would be likely to compromise the aims pursued by the Framework Directive and the Access Directive referred to in paragraphs 47 and 48 of the present judgment, since it could lead to a different regulatory treatment of similar situations, there is no argument in support of that distinction which can be drawn from Article 13(3) of the Access Directive, since it is unequivocally clear that that provision concerns only cases where an undertaking has been placed under an obligation to make its prices follow the costs, an obligation which, as has already been noted in paragraph 41 of this judgment, is only one example of the obligations referred to in Article 13(1) of that directive.

- 54 Furthermore, it must be noted that the interpretation set out in paragraph 44 of the present judgment cannot be regarded as running counter to the principles of subsidiarity and proportionality on the ground that, in the view of the referring court, it implies the ‘direct involvement of the Commission in setting the actual fees’, since it is clear that neither the procedure at issue nor that interpretation has the effect of conferring such a power on the Commission to take it upon itself to set the fees for electronic communications services.
- 55 Secondly, as regards whether the issue of a mobile call termination fees authorisation would affect trade between the Member States within the meaning of Article 7(3)(b) of the Framework Directive, it must be borne in mind that, in accordance with the case-law of the Court, a measure proposed by an NRA has such an effect on trade between Member States, within the meaning of that provision, if it may have, other than in an insignificant manner, an influence, direct or indirect, actual or potential, on that trade (see, to that effect, judgment in *Prezes Urzędu Komunikacji Elektroniczej and Telefonii Dialog*, C-3/14, EU:C:2015:232, paragraphs 49 to 54 and 59). Recital 38 in the preamble to the Framework Directive states, moreover, that measures which may affect trade between Member States include, inter alia, measures which affect prices for users in other Member States.
- 56 In the present case, it is apparent from the position of the Federal Network Agency as presented in the request for a preliminary ruling and the observations lodged by the Commission before the Court that the mobile call termination fees correspond to the prices that other undertakings, including undertakings of other Member States, must pay to the operator of the called mobile telephone network in order to connect the calls in that network and that those fees affect the prices which the users in other Member States must pay when they call clients of the operator concerned in a given Member State, those mobile call termination fees being passed on in the end-user’s call charges.
- 57 In such circumstances, which it is for the referring court to ascertain, it is appropriate, in the light of what is set out in paragraph 55 of the present judgment, to find that the issue of a mobile call termination fees authorisation affects trade between the Member States within the meaning of Article 7(3)(b) of the Framework Directive.
- 58 Having regard to all the foregoing considerations, the answer to the question referred is that Article 7(3) of the Framework Directive must be interpreted as meaning that, when an NRA has required an operator which has been designated as having significant market power to provide mobile call termination services and has made the fees charged for this subject to authorisation following the procedure laid down in that provision, that NRA is required to carry out the procedure again before each authorisation of those fees to that operator, where that authorisation is likely to affect trade between the Member States within the meaning of that provision.

Costs

- 59 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 (Third Chamber) hereby rules:

Article 7(3) 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) must be interpreted as meaning that, when an national regulatory authority has required an operator which has been designated as having significant market power to provide mobile call termination services and has made the fees charged for this subject to authorisation following the procedure laid down in that provision, that national regulatory

authority is required to carry out the procedure again before each authorisation of those fees to that operator, where that authorisation is likely to affect trade between the Member States within the meaning of that provision.

[Signatures]