



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 October 2016*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/21/EC — Article 3 — Impartiality and independence of national regulatory authorities — Institutional reform — Merger of national regulatory authority with other regulatory authorities — Dismissal of the President and a board member of the merged national regulatory authority before the expiry of their terms of office — Ground for dismissal not provided for under national law)

In Case C-424/15,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 3 July 2015, received at the Court on 31 July 2015, in the proceedings

Xabier Ormaetxea Garai,

Bernardo Lorenzo Almendros

v

Administración del Estado,

THE COURT (Second Chamber),

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

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by A. Rubio González, acting as Agent,
- the Belgian Government, by J. Van Holm and M. Jacobs, acting as Agents,
- the Netherlands Government, by J. Langer, M. Bulterman and M. de Ree, acting as Agents,
- the European Commission, by J. Rius, G. Braun and L. Nicolae, acting as Agents,

* Language of the case: Spanish.

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37; corrigendum OJ 2013 L 241, p. 8) ('the Framework Directive').
- 2 The reference has been made in of proceedings between Mr Xabier Ormaetxea Garai and Mr Bernardo Lorenzo Almendros, the appellants in the main proceedings, and the Administración del Estado (State Administration, Spain) concerning royal decrees which brought to an end their term of office as member of the board and President, respectively, of the Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission, Spain) ('the CMT'), a national regulatory authority (an 'NRA') within the meaning of the Framework Directive.

Legal context

EU law

The Framework Directive

- 3 Recital 11 of the Framework Directive provides as follows:

'In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of [NRAs], with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article [345 TFEU]. [NRAs] should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.'
- 4 Article 2(g) of the Framework Directive defines '[NRAs]' as 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives'. Article 2(l) sets out the directives which, in addition to the Framework Directive, make up the regulatory framework applicable to electronic communications and are referred to as the 'Specific Directives'.
- 5 Directive 2009/140 added to Article 3 of the original version of the Framework Directive new paragraphs 3 to 3c, which concern the independence of NRAs. Recital 13 of Directive 2009/140 states as follows in that regard:

'The independence of the [NRAs] should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, [an NRA] responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. ... For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the [NRA] in order

to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that [NRAs] responsible for ex-ante market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually.'

6 Article 3 of the Framework Directive, entitled '[NRAs]', provides as follows:

'1. Member States shall ensure that each of the tasks assigned to [NRAs] in this Directive and the Specific Directives is undertaken by a competent body.

2. Member States shall guarantee the independence of [NRAs] by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.

3. Member States shall ensure that [NRAs] exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that [NRAs] have adequate financial and human resources to carry out the task assigned to them.

3a. Without prejudice to the provisions of paragraphs 4 and 5, [NRAs] responsible for ex-ante market regulation or for the resolution of disputes between undertakings ... shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the [NRAs].

Member States shall ensure that the head of [an NRA], or where applicable, members of the collegiate body fulfilling that function within [an NRA] referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the [NRA] concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the [NRA], or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.

Member States shall ensure that [NRAs] referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member States shall also ensure that [NRAs] have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC) [set up by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ 2009 L 337, p. 1)].

...

4. Member States shall publish the tasks to be undertaken by [NRAs] in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. ...

5. [NRAs] and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. ...
6. Member States shall notify to the Commission all [NRAs] assigned tasks under this Directive and the Specific Directives, and their respective responsibilities.'
- 7 Article 4 of the Framework Directive, entitled 'Right of appeal', provides, essentially, that the Member States are to ensure that effective mechanisms exist at national level under which any user or undertaking affected by a decision of an NRA has the right of appeal against the decision to an appeal body that is independent of the parties involved.

Directive 95/46/EC

- 8 Article 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) is entitled 'Supervisory authority'. Article 28(1) of that directive provides as follows:

'Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.'

Spanish law

- 9 Real Decreto-Ley 6/1996 de Liberalización de las Telecomunicaciones (Royal Decree Law 6/1996 on the Liberalisation of Telecommunications) of 7 June 1996 (BOE No 139 of 8 June 1996, p. 18973) established the CMT as an independent body responsible for ensuring the implementation of the principles of free competition, transparency and equal treatment in the telecommunications sector and for arbitrating in disputes between operators in that sector.
- 10 The purpose of Ley 2/2011 de Economía Sostenible (Law 2/2011 on Sustainable Economy) of 4 March 2011 (BOE No 55 of 5 March 2011, p. 25033) is to amend the statute of certain existing regulatory and supervisory bodies with a view, inter alia, to strengthening their independence. Accordingly, Article 13 of that law laid down new rules regarding the appointment of the President and members of the board of those bodies, the duration of their term of office and the procedures for renewing such appointments. That provision, which is applicable, inter alia, to the CMT, is worded as follows:

'1. The President and Members of the Board shall be appointed by the Government by Royal Decree adopted on a proposal by the competent Minister; they shall be selected from among individuals of recognised authority and professional expertise, following a hearing at which the Minister and the persons proposed as President and Members of the Board are questioned by the relevant committee of the Congreso de los Diputados (Spanish Congress of Deputies) ...

2. The term of office of the President and of the members of the board shall be six years and there shall be no possibility of reappointment to the Board. The term of office of board members shall be renewed on a partial basis in order to ensure the stability and continuity of the board.'

11 Article 16 of Law 2/2011 stated as follows:

‘The President and the members of the board shall cease to perform their duties:

- (a) if they resign;
- (b) on the expiry of their term of office;
- (c) as a result of the discovery of an incompatibility after appointment;
- (d) following a conviction for an intentional offence;
- (e) on grounds of permanent incapacity;
- (f) if they are removed from office by the Government in the event of serious breach of any duty connected with the post or failure to fulfil their obligations as regards incompatibilities, conflict of interest or duty of confidentiality. ...’

12 The Ninth Additional Provision of Law 2/2011 laid down transitional measures to bring the composition of the boards of the regulatory and supervisory bodies concerned and of the Comisión Nacional de la Competencia (National Competition Commission, Spain) in line with the changes which that law was intended to implement. That provision provided, inter alia that: (i) within two month from the date of entry into force of that law, the Government was required, by Royal decree, to dismiss the board members of the bodies whose term of office had expired by the date of entry into force of the Royal decree; (ii) new Presidents were to be appointed on the expiry of the term of office of Presidents in post; and (iii) the new board members were to be appointed at the stage when the number of members of the board whose term of office was about to expire was below six. As regards Vice-Presidents, that provision stipulated that, on the entry into force of Law 2/2011, they were to continue to perform their duties until expiry of their term of office, following which the post of Vice-President would be abolished.

13 Real Decreto 667/2011 por el que se nombra Presidente de la Comisión del Mercado de las Telecomunicaciones a don Bernardo Lorenzo Almendros (Royal Decree 667/2011 appointing Mr Bernardo Lorenzo Almendros as President of the Telecommunications Market Commission) of 9 May 2011 (BOE No 111 of 10 May 2011, p. 47215) and Real Decreto 669/2011 por el que se nombra Consejero de la Comisión del Mercado de las Telecomunicaciones a don Xabier Ormaetxea Garai (Royal Decree 669/2011 appointing Mr Ormaetxea Garai as member of the board of the Telecommunications Market Commission) of 9 May 2011 (BOE No 111 of 10 May 2011, p. 47217) were published on 10 May 2011. Those appointments were made in accordance with Article 13 and the Ninth Additional Provision of Law 2/2011.

14 Ley 3/2013 de creación de la Comisión Nacional de los Mercados y la Competencia (Law 3/2013 establishing the National Markets and Competition Commission) of 4 June 2013 (BOE No 134 of 5 June 2013, p. 42191) repealed Article 13 of Law 2/2011.

15 The preamble to Law 3/2013 states, inter alia, that the changes introduced by that law, entailing the creation of the Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission, Spain) (‘the CNMC’), which was to centralise the tasks relating to the proper functioning of markets and sectors previously supervised by different regulatory authorities, were intended to increase economies of scale and ensure consistency and effectiveness in the regulation of all network industries for the benefit of consumers and users. That preamble also states that the CNMC is to have independent legal personality, the capacity to act in accordance with public

and private law and act in conformity with the law, be independent as regards its organisation and operation and wholly independent of the Government, public authorities and commercial and business interests.

- 16 Under Article 6 of Law 3/2013, the CNMC is responsible for the monitoring and control of the proper functioning of electronic communications markets. It is entrusted with other tasks by virtue of other provisions of that law, such as the task of protecting and promoting competition on all markets and production sectors and that of supervising and controlling the electricity and gas sectors, the postal market, the audiovisual communications market and the railway sector.
- 17 The Second Additional Provision of Law 3/2013 provides, in paragraph 1 thereof, that the establishment of the CNMC entails the abolition of the National Competition Commission, the Comisión Nacional de Energía (National Energy Commission, Spain), the CMT, the Comisión Nacional del Sector Postal (National Commission for the Postal Sector, Spain), the Comité de Regulación Ferroviaria (Committee for Regulation of the Railways, Spain), the Comisión Nacional del Juego (National Gambling Commission, Spain), the Comisión de Regulación Económica Aeroportuaria (Commission for Economic Regulation of Airports, Spain) and the Consejo Estatal de Medios Audiovisuales (National Council for Audiovisual Media, Spain).
- 18 Article 23(1) of Law 3/2013 sets out, in essence, the same grounds on which members of the board of directors of the CNMC will be required to cease to perform their duties as those previously provided for in Article 16 of Law 2/2011.
- 19 Real Decreto 657/2013 por el que se aprueba el Estatuto Orgánico de la Comisión Nacional de los Mercados y la Competencia (Royal Decree 657/2013 approving the Statute of the National Markets and Competition Commission) was adopted on 30 August 2013 (BOE No 209 of 31 August 2013, p. 63623).
- 20 On 10 September 2013, the Royal Decrees of 9 September 2013 appointing the President, Vice-President and board members of the CNMC were published (BOE No 217, p. 66444 et seq.).
- 21 Real Decreto 795/2013 por el que se dispone el cese de don Bernardo Lorenzo Almendros como Presidente de la Comisión del Mercado de las Telecomunicaciones (Royal Decree 795/2013 removing Mr Lorenzo Almendros from his post as President of the Telecommunications Market Commission) (BOE No 247 of 15 October 2013, p. 83736) and Real Decreto 800/2013 por el que se dispone el cese de don Xabier Ormaetxea Garai como Consejero de la Comisión del Mercado de las Telecomunicaciones (Royal Decree 800/2013 removing Mr Ormaetxea Garai from his post as Member of the Board of the Telecommunications Market Commission) (BOE No 247 of 15 October 2013, p. 83741) were adopted on 11 October 2013. Those royal decrees provided that those dismissals were to take effect retroactively as from 7 October 2013.

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

- 22 Mr Ormaetxea Garai Lorenzo Almendros and Mr Lorenzo Almendros have challenged before the Tribunal Supremo (Supreme Court, Spain) Royal Decrees 795/2013 and 800/2013, which removed them from their posts as member of the board and President of the CMT, respectively. In support of their actions, they claim, inter alia, that their dismissal infringes Article 3(3a) of the Framework Directive on the basis that, as a result of those royal decrees, they were removed from their posts before their term of office had expired in the absence of any lawful ground for dismissal, such grounds being set out exhaustively under national law. They also maintain that the adoption of the royal decrees was not preceded by any disciplinary proceedings, that no reasons were given for the decrees and that they were not informed of the grounds for their dismissal.

- 23 Referring to the second subparagraph of Article 3(3a) of the Framework Directive and to the judgments of 6 March 2008, *Comisión del Mercado de las Telecomunicaciones* (C-82/07, EU:C:2008:143), of 6 October 2010, *Base and Others* (C-389/08, EU:C:2010:584), and of 8 April 2014, *Commission v Hungary* (C-288/12, EU:C:2014:237), the referring court is uncertain whether the creation of a single body for the supervision and regulation of the markets and competition, which merges a number of national regulatory authorities that had been responsible for different sectors, including the NRA within the meaning of the Framework Directive, is compatible with the provisions of that directive. According to that court, it is possible to interpret the Framework Directive as meaning that, in order to ensure sufficient safeguards as regards the independence and technical expertise of NRAs within the meaning of the directive, they must have an independent structure that does not form part of another entity.
- 24 The Tribunal Supremo (Supreme Court) is also uncertain whether, where such institutional reform takes place and on the assumption that it is consistent with the Framework Directive, the board members and President of the NRA previously in post may be denied the possibility of serving the full term of office for which they were initially appointed. That court states, in that regard, that such reform and the ensuing dismissals may be covered by the freedom enjoyed by Member States to choose the form their NRA is to take. However, the fact that that reform entailed the early removal from office of the board members previously appointed, even though none of the grounds for dismissal expressly provided for in Article 16 of Law 2/2011 were made out, and the fact that no transitional measures were in place under which it would have been possible for the terms of office to be curtailed, may, in that court's view, be considered to be at odds with the requirement for NRAs to be independent laid down in Article 3(2) and (3a) of the Framework Directive.
- 25 Against that background, the referring court asks, in particular, whether the notion of the independence of NRAs in the Framework Directive is to be interpreted in the light of the considerations set out in the judgment of 8 April 2014, *Commission v Hungary* (C-288/12, EU:C:2014:237), as regards the requirement for the independence of authorities responsible for supervising the protection of personal data laid down in Article 28 of Directive 95/46.
- 26 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is [the Framework Directive] to be interpreted to the effect that, from the perspective of the effective protection of the public interest for which the national regulatory body [for the electronic communications networks and services sector] is responsible, the creation by the national legislature of a regulatory and supervisory body of an unspecialised institutional model, which merges into a single body the pre-existing supervisory bodies in the energy, telecommunications and competition sectors, may be considered compatible with the directive?
- (2) Must the conditions of “independence” of [NRAs] for electronic communications networks and services, referred to in Article 3(2) and (3a) of [the Framework Directive], be the same as those required for national supervisory authorities for data protection under Article 28 of Directive [95/46]?
- (3) Is the decision in the [Court's] judgment of 8 April 2014 [*Commission v Hungary*, (C-288/12, EU:C:2014:237)], applicable to a situation in which the officers of an [NRA] are dismissed before their term of office has expired owing to the requirements of the new legal framework which creates a supervisory body grouping together various national regulatory authorities for [various] ... sectors? May that early dismissal, due only to the entry into force of a new national law and not to an unforeseen change in the circumstances of the office holders as previously established in national law, be considered compatible with the provisions of Article 3(3a) of [the Framework Directive]?’

Consideration of the questions referred

Question 1

- 27 By its first question, the referring court seeks to ascertain, in essence, whether the Framework Directive is to be interpreted as precluding national legislation which entails the merger of an NRA, within the meaning of that directive, with other national regulatory authorities, such as the authorities responsible for competition, the postal sector and the energy sector, in order to create a multisectoral regulatory body responsible, inter alia, for the tasks entrusted to NRAs within the meaning of the directive.
- 28 Article 2(g) of the Framework Directive defines an ‘NRA’ as the body or bodies charged by a Member State with any of the regulatory tasks assigned in that directive and the Specific Directives. However, as the Court has previously had occasion to observe, neither the Framework Directive nor the Specific Directives specify the bodies of the Member States to which the latter must entrust the regulatory tasks assigned to their NRAs (see, to that effect, judgment of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 23).
- 29 It should be noted in that regard that it follows from Article 288 TFEU that the Member States are required, when transposing a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain (see, to that effect, judgment of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraphs 24 and 25 and the case-law cited).
- 30 Therefore, although, in those circumstances, Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs within the meaning of Article 2(g) of the Framework Directive, that autonomy may be exercised only in accordance with the objectives and obligations laid down in that directive (judgments of 6 March 2008, *Comisión del Mercado de las Telecomunicaciones*, C-82/07, EU:C:2008:143, paragraph 24; of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 26, and of 17 September 2015, *KPN*, C-85/14, EU:C:2015:610, paragraph 53).
- 31 Accordingly, in the context of an institutional reform such as that at issue in the main proceedings, a Member State may assign to a multisectoral regulatory body the tasks incumbent on NRAs under the Framework Directive and the Specific Directives only if that body, in the performance of those tasks, meets the organisational and operational requirements to which those directives subject NRAs (see, by analogy, judgment of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 27).
- 32 It is apparent from Article 3(1) to (3) of the Framework Directive that Member States must ensure that each of the tasks assigned to NRAs is carried out by a competent body, that they must guarantee the independence of NRAs by ensuring that they have separate legal identity from and are functionally independent of all organisations providing electronic communication networks, equipment or services, and that they must ensure that such NRAs exercise their powers impartially, transparently and in a timely manner and that they have adequate financial and human resources to carry out the tasks assigned to them.
- 33 Moreover, under Article 3(3a) of the Framework Directive, without prejudice to cases in which consultation and cooperation with other national authorities is required under Article 3(4) and (5), NRAs responsible for ex-ante market regulation or for resolution of disputes between undertakings must act independently and cannot seek or take instructions from any other body in relation to the

exercise of the tasks assigned to them. Article 3(3a) also requires Member States to ensure that such NRAs have separate annual budgets, which are made public, and that NRAs have adequate financial and human resources to enable them to actively participate in and contribute to the BEREC.

- 34 Article 3(4) and (6) of the Framework Directive also provides that Member States are to publish the tasks to be undertaken by NRAs in an easily accessible form and give the Commission notification of all NRAs assigned tasks under the Framework Directive and the Specific Directives, and their respective responsibilities.
- 35 In addition, under Article 4 of the Framework Directive, decisions of NRAs must be made subject to an effective right of appeal to a body independent of the parties involved.
- 36 It must therefore be concluded that the Framework Directive does not preclude, in principle, an NRA, within the meaning of the directive, merging with other national regulatory authorities or all those entities coming together to form a single multisectoral regulatory body, provided that, in performing the tasks entrusted to NRAs by the Framework Directive and the Specific Directives, that body meets the requirements of competence, independence, impartiality and transparency laid down by the Framework Directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved (see, by analogy, judgments of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraph 30, and of 17 September 2015, *KPN*, C-85/14, EU:C:2015:610, paragraph 57).
- 37 It is for the national court to ascertain whether the CNMC meets those requirements when it takes action in the electronic communications sector as an NRA. It may, nonetheless, be observed in that regard that it appears that Law 3/2013 contains the provisions necessary to ensure that the CNMC performs the functions attributed to NRAs by the Framework Directive and the Specific Directives, that the CNMC is structured in such a way that due account may be taken of the various functions attributed to it, that its decision-making bodies are composed of members whose authority and professional expertise are recognised in the areas for which the CNMC is responsible and that it has its own assets which are independent of those of the general Spanish administrative authorities as well as sufficient autonomy and the legal capacity necessary to manage its resources. It is also apparent from the terms of Law 3/2013 that legal remedies are available against the decisions of the CNMC.
- 38 In the light of the foregoing considerations, the answer to the first question is that the Framework Directive is to be interpreted as not precluding, in principle, national legislation which entails the merger of an NRA, within the meaning of that directive, with other national regulatory authorities, such as the authorities responsible for competition, the postal sector and the energy sector, in order to create a multisectoral regulatory body responsible, inter alia, for the tasks entrusted to NRAs, within the meaning of the directive, provided that, in performing those tasks, that body meets the requirements of competence, independence, impartiality and transparency laid down by that directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved, which is a matter to be determined by the national court.

Questions 2 and 3

- 39 By its second and third questions, which it is appropriate to examine together, the referring court seeks to ascertain, in essence, whether Article 3(3a) of the Framework Directive is to be interpreted as precluding — on the sole ground that an institutional reform has taken place involving the merger of an NRA responsible for ex-ante market regulation or for resolution of disputes between undertakings with other national regulatory authorities in order to create a multisectoral regulatory body responsible, inter alia, for the tasks entrusted to NRAs, within the meaning of that directive — the dismissal of the President and a board member of the merged NRA before the expiry of their terms of office.

- 40 The second subparagraph of Article 3(3a) of the Framework Directive provides, in essence, that Member States are to ensure that the head of an NRA responsible for ex-ante market regulation or for resolution of disputes between undertakings or, where applicable, members of the collegiate body fulfilling that function within the NRA, may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. Moreover, under that provision, the dismissal decision must be made public and the grounds for the dismissal must be communicated to the dismissed head or to the dismissed members of the collegiate body fulfilling that function, who have the right to request its publication, where this would not otherwise take place.
- 41 In the present case, it should be noted that it is common ground, first, that the CMT, which was responsible, inter alia, for the resolution of disputes between undertakings in the telecommunications sector, was run by a collegiate body and, second, that the dismissal of the President and a board member of the CMT, the appellants in the main proceedings, before the expiry of their respective terms of office was the result, not of the application of one of the grounds on which they are required to cease to perform their duties under Article 16 of Law 2/2011, but of the institutional reform at issue in the main proceedings, which led to the abolition of the CMT and to its NRA tasks, within the meaning of the Framework Directive, being taken over by the CNMC.
- 42 It is also common ground that although, for the reform introduced by Law 2/2011, provision was made for transitional measures, that was not the case as regards the reform introduced by Law 3/2013, which had the effect of terminating prematurely the terms of office of the President and one of the members of the board of the CMT, the appellants in the main proceedings.
- 43 The Court therefore finds, in the light of the wording of the second subparagraph of Article 3(3a) of the Framework Directive, that the dismissals in question in the main proceedings do not satisfy the requirements laid down by that provision, as they came about for a reason other than the fact that those appellants no longer fulfilled the conditions required for the performance of their duties, which are laid down in advance in national law.
- 44 The referring court entertains doubts, however, as to whether, in view of the institutional autonomy enjoyed by Member States as regards the organisation and the structuring of their NRAs, an institutional reform such as that at issue in the main proceedings may nonetheless justify early dismissal as it does not interfere with the independence of NRAs guaranteed by the Framework Directive.
- 45 In that regard, it should be noted that while, in its initial version, the aim of Article 3 of the Framework Directive was essentially, as stated in recital 11 of that directive, to guarantee the independence and impartiality of NRAs by ensuring that regulation and operation are functionally separate, the intention of the EU legislature was, by means of Directive 2009/140 and as stated in recital 13 thereof, to strengthen the independence of NRAs in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions (see, to that effect, judgment of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, EU:C:2016:608, paragraphs 32 and 34).
- 46 Recital 13 of Directive 2009/140 states that, to that end, express provision should be made in national law to ensure that, in the exercise of its tasks, an NRA responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it, and that, for that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the NRA in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors.

- 47 The attainment of that objective of strengthening the independence and impartiality of NRAs now pursued by the Framework Directive, which finds expression in Article 3(3a) thereof, would be jeopardised if, merely as a result of an institutional reform such as that at issue in the main proceedings, it were possible to bring to an immediate and premature end the term of office of one or more members of the collegiate body running the NRA in question. If that were permissible, the risk of immediate dismissal on grounds other than those laid down in advance by national law, which may be faced by even a single member of such a collegiate body, may give rise to reasonable doubt as to the neutrality of the NRA concerned and its imperviousness to external factors and jeopardise its independence, impartiality and authority.
- 48 It should also be noted, as observed, in essence, by the Advocate General in point 45 of his Opinion, that, in the tasks assigned to them by the Framework Directive and the Specific Directives, NRAs are required, *inter alia*, to grant individual rights and to settle disputes between undertakings, have certain regulatory powers, in particular as regards price control, and may impose obligations on undertakings with significant power on a particular market. The Court has also held that, in performing the functions of regulating the electronic communications markets entrusted to them by the Framework Directive, NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each individual situation, on a case-by-case basis (see, to that effect, judgment of 3 December 2009, *Commission v Germany*, C-424/07, EU:C:2009:749, paragraphs 55 to 61).
- 49 In that context, it should be observed that, while Directive 2009/140 strengthened the independence of NRAs, as previously noted in paragraph 45 above, in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions, the fact remains that, in accordance with the Court's settled case-law cited in paragraph 30 above, as long as the objectives and obligations laid down by the Framework Directive are fully complied with, Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs.
- 50 The need to have due regard for the impartiality and independence of the head of an NRA responsible for *ex ante* market regulation or resolution of disputes between undertakings or, where applicable, the members of the collegiate body fulfilling that function, cannot therefore prevent the implementation of an institutional reform such as that at issue in the main proceedings when the term of office of such persons is not yet completed.
- 51 However, in order to comply with the requirements laid down in Article 3(3a) of the Framework Directive, it is for the Member State concerned to lay down rules which guarantee that their dismissal before the expiry of their term of office does not jeopardise the independence and impartiality of the persons concerned.
- 52 It follows from all the foregoing considerations that the answer to Questions 2 and 3 is that Article 3(3a) of the Framework Directive is to be interpreted as precluding — on the sole ground that an institutional reform has taken place involving the merger of an NRA responsible for *ex ante* market regulation or for resolution of disputes between undertakings with other national regulatory authorities in order to create a multisectoral regulatory body responsible, *inter alia*, for the tasks entrusted to NRAs, within the meaning of that directive — the dismissal of the President and a board member, members of the collegiate body running the merged NRA, before the expiry of their terms of office in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members.

Costs

- 53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, is to be interpreted as not precluding, in principle, national legislation which entails the merger of a national regulatory authority, within the meaning of Directive 2002/21, as amended by Directive 2009/140, with other national regulatory authorities, such as the authorities responsible for competition, the postal sector and the energy sector, in order to create a multisectoral regulatory body responsible, *inter alia*, for the tasks entrusted to national regulatory authorities, within the meaning of that directive, as amended, provided that, in performing those tasks, that body meets the requirements of competence, independence, impartiality and transparency laid down by that directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved, which is a matter to be determined by the national court.
2. Article 3(3a) of Directive 2002/21, as amended by Directive 2009/140, is to be interpreted as precluding — on the sole ground that an institutional reform has taken place involving the merger of a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings with other national regulatory authorities in order to create a multisectoral regulatory body responsible, *inter alia*, for the tasks entrusted to national regulatory authorities, within the meaning of that directive, as amended — the dismissal of the President and a board member, members of the collegiate body running the merged national regulatory authority, before the expiry of their terms of office, in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members.

[Signatures]