Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 30 April 2013 [1]

Case C-518/11

UPC Nederland BV
v
Gemeente Hilversum

(Request for a preliminary ruling from the Gerechtshof te Amsterdam (Netherlands))

(Electronic communications networks and services — New regulatory framework — Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC — Scope ratione materiae — Supply of free-to-air radio and television programmes — Sale by a municipality of its cable network to a private undertaking — Compatibility of a contract clause limiting the tariff for the basic service — Sectoral regulation ex ante — Powers of national regulatory authorities — Undertakings with significant market power — Objectives of general interest)

1. This request for a preliminary ruling gives the Court an opportunity to consider, for the first time, the effect of Union law on the competence of Member States to impose on undertakings supplying radio and television broadcasting services a measure limiting an increase in the retail price of those services. The particular feature of the main proceedings is that the limitation measure in question takes the form of a provision in the agreement whereby a local authority, in the present case, Gemeente Hilversum (the municipality of Hilversum), sold its cable network to a private undertaking.

I – The legal context

2. The main provisions of the secondary law of the European Union which are relevant for replying to the questions referred in the present case are those of the different directives which are conventionally called 'the new regulatory framework for electronic communications networks', [2] namely 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) [3] and the four specific directives [4] accompanying it, which are, in addition to 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, [5] 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), [6] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of

1 — Original language: French.
2 — 'NRF'.
3 — OJ 2002 L 108, p. 33, 'the Framework Directive'.
4 — Recital 5 to the Framework Directive.
5 — OJ 1998 L 24, p. 1.
6 — OJ 2002 L 108, p. 7.

electronic communications networks and services (Authorisation Directive),[7] and 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).[8]

3. The provisions of the Framework Directive and of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services[9] primarily involved in the main proceedings will, so far as necessary, be set out below.

II – The facts of the main proceedings

4. It appears from the order for reference and the written and oral observations before the Court that the main proceedings arise from the sale by Gemeente Hilversum of its cable television network and of the municipal undertaking which operated it to the legal predecessor of the company UPC Nederland[10] for approximately EUR 23 227 000.

5. Under the 'agreement on the future operation of the Hilversum cable network' concluded between the parties, Gemeente Hilversum undertook to assist the purchaser in obtaining authorisation to install, maintain and operate a cable broadcasting facility in the territory of the municipality.

6. The purchaser undertook to make the investments necessary for the provision of a cable network capable of offering an improved service to average subscribers in Gemeente Hilversum, including the introduction of glass fibre to the network before 1 January 1998, and to offer, in addition to radio and television[11] channels, an attractive package of telecommunications services to private individuals and businesses.

7. Article 4.2 of the agreement provided that the purchaser would 'ensure a varied minimum supply of radio and television programmes on cable at a socially acceptable price and with optimal reception quality for the subscriber', that is to say, a basic package of RTV programmes the composition and pricing of which would be as set out in the agreement. In particular, it was provided that the monthly tariff for the basic package would be adjusted annually in accordance with the consumer price index in accordance with the formula in Annex 11 of the agreement, and external cost increases exceeding the consumer price index would be reflected in the tariff.[12]

8. By letter of 28 November 2003 UPC informed Gemeente Hilversum that, from 1 January 2004, the tariff for the basic package for all households would be increased from EUR 10.28 per month to EUR 13.32 per month inclusive of VAT.

9. Gemeente Hilversum then brought an action to prohibit the proposed price increase. The application was granted by the Rechtbank te Amsterdam (District Court, Amsterdam) by judgment of 23 December 2003 which, on appeal, was upheld by the Gerechtshof te Amsterdam (Amsterdam Court of Appeal) by judgment of 12 August 2004. The appeal on a point of law by UPC was dismissed by the Hoge Raad der Nederlanden (Netherlands Supreme Court) by judgment of 8 July 2005.

7 — OJ 2002 L 108, p. 21.
8 — OJ 2002 L 108, p. 51.
9 — OJ 2002 L 249, p. 21, 'the Competition Directive'.
10 — 'UPC'.
11 — 'RTV'.
12 — 'The tariff limitation clause'.

10. However, on 27 September 2005 the Netherlands Competition Authority [13] considered the question of whether UPC had abused its dominant position within the meaning of Article 24 of the Netherlands Competition Law by charging excessive subscription tariffs for its analogue standard packages and found that that was not the case.

11. On 28 September 2005, the Netherlands Post and Telecommunications Authority [14] adopted a draft decision concerning 'the market for the transmission and provision of audiovisual signals in UPC's service area'. The OPTA found that UPC had significant market power in its service area in respect of the 'free-to-air radio/television package' and imposed on UPC certain obligations relating to the calculation of tariffs. [15]

12. On 3 November 2005, [16] the Commission of the European Union, to which the draft decision had been referred by OPTA, expressed doubts as to its compatibility with Article 15(3) of the Framework Directive, read in conjunction with the Commission's Recommendation 2003/311/EC. [17]

13. The final decision adopted by OPTA on 17 March 2006 did not include a price control measure.

14. On 15 May 2006 UPC brought an action before the Rechtbank te Amsterdam against Gemeente Hilversum seeking the annulment of the tariff limitation clause and an injunction requiring the municipality to authorise the tariff increases. In that connection the Rechtbank asserted that the tariff limitation clause was incompatible with the provisions of the NRF.

15. On 27 June 2007 the Rechtbank te Amsterdam dismissed UPC's application.

III – The questions referred and the procedure before the Court

16. Consequently, on appeal by UPC, the Gerechtshof te Amsterdam decided to stay the proceedings and to refer no less than 18 questions to the Court for a preliminary ruling, The questions are as follows:

'(1) Does a service consisting of the supply of free-to-air radio and television packages via cable, for the delivery of which both transmission costs and an amount relating to (charges for) payments made to broadcasters and copyright collecting societies in connection with the transmission of programme content are charged, fall within the scope of the new regulatory framework [for electronic communications networks]?

(2) (a) Does the municipality, against the background of the liberalisation of the telecommunications sector and the objectives of the new regulatory framework, including a strict coordination and consultation process before a national regulatory authority acquires (exclusive) competence to intervene in retail tariffs by means of a measure such as price control, still have the power (task) to protect the public interest of its inhabitants by intervening in retail tariffs by means of a tariff-limiting clause?

13 — Nederlandse Mededingingsautoriteit.

14 — Onafhankelijke Post en Telecommunicatie Autoriteit, 'OPTA'.

15 — 'Price control measure'.

16 — See document SG Greffe (2005) D/205996, 3 November 2005, Case NL/2005/0247: Retail markets for the supply of free-to-air radio and television packages via cable transmission in the Netherlands – Opening of Phase II investigation pursuant to Article 7(4) of Directive 2002/21/EC.

17 — Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ 2003 L 114, p. 45).

(b) If not, does the new regulatory framework preclude the municipality from applying a tariff-limiting clause agreed in the context of the sale of its cable network operation?

If Questions 2(a) and (b) are answered in the negative, the following question arises:

(3) Is a public authority, such as the municipality, in a situation such as that at issue here, (still) bound by loyalty to the European Union ("Union loyalty") if, in entering into and then applying the tariff-limiting clause, it is not performing a public duty but is acting in the context of a private-law competence (see also Question 6(a))?

(4) If the new regulatory framework is applicable and the municipality is bound by Union loyalty:

(a) Does the obligation of Union loyalty in conjunction with (the objectives of) the new regulatory framework, including a strict coordination and consultation process before a national regulatory authority can intervene in retail tariffs by means of a measure such as price control, preclude the municipality from applying the tariff-limiting clause?

(b) If not, is the answer to Question 4(a) different with regard to the period after the Commission, in its "letter of serious doubt", expressed serious doubts about the compatibility of the price control proposed by [the Independent Post and Telecommunications Authority] OPTA with the objectives of the new regulatory framework as set out in Article 8 of the Framework Directive, and OPTA consequently abandoned that measure?

(5) (a) Is Article 101 TFEU a provision relating to public policy, which means that the national court must apply that provision of its own motion beyond the ambit of the dispute within the meaning of Articles 24 and 25 of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) ("Rv")?

(b) If so, which of the facts that came to light during the proceedings would justify the national court proceeding of its own motion to examine the applicability of Article 101 TFEU? Is the national court bound to do so also if that examination might lead to the supplementation of facts within the meaning of Article 149 Rv, once the parties have been given an opportunity to comment?

(6) If Article 101 TFEU must be applied beyond the ambit of the dispute between the parties and having regard to (the objectives of) the new regulatory framework, the application thereof by OPTA and the European Commission and the alignment of concepts used in the new regulatory framework, such as significant market power and definition of the relevant markets, with similar concepts in European competition law, the following questions arise from the facts that have come to light during the proceedings:

(a) Is the municipality, in its sale of its cable network operation and its agreement to the tariff-limiting clause in that context, to be regarded as an undertaking within the meaning of Article 101 TFEU (see also Question 3)?

(b) Is the tariff-limiting clause to be regarded as a hardcore restriction for the purposes of Article 101(1)(a) TFEU and as defined in Commission Notice 2001/C 368/07 on agreements of minor importance which do not appreciably restrict competition [under Article 81(1) of the Treaty establishing the European Community] (De Minimis Notice, OJ 2001 C 368, p. 13, point 11)? If so, is there thus an appreciable restriction of competition within the meaning of Article 101(1) TFEU? If not, is the answer affected by the circumstances mentioned in Question 6(d) …?

(c) If the tariff-limiting clause is not a hardcore restriction, does it have an effect which restricts competition (purely) because:

— the Netherlands competition authority has ruled that UPC has not abused its dominant position by virtue of the (higher) tariffs it charged for performing the same services as the supply of the basic package via cable, in the same market;

— the Commission, in its letter of serious doubt, expressed serious doubts about the compatibility with the objectives set out in Article 8 of the Framework Directive of intervening (*ex ante* by means of price control) in retail tariffs for services such as UPC's supply of the basic package via cable? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?

(d) Does the Agreement [on the future operation of the Hilversum cable network] containing the tariff-limiting clause appreciably restrict competition within the meaning of Article 101(1) TFEU (also) taking into account that:

— under the new regulatory framework, UPC is considered to be an undertaking with significant market power (Commission Notice 2001/C 368/07, point 7);

— virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the basic package (Commission Notice 2001/C 368/07, point 8)?

(e) Must the Agreement containing the tariff-limiting clause be regarded as (being capable of) having an appreciable effect on inter-State trade within the meaning of Article 101(1) TFEU and as further defined in the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101, p. 81), given that:

— under the new regulatory framework, UPC is considered to be an undertaking with significant market power;

— OPTA has followed the European consultation procedure in order to take a price control measure in respect of services such as the supply of the basic package via cable by cable operators with significant market power such as UPC, a procedure which, under the new regulatory framework, must be followed if a proposed measure would affect trade between Member States;

— the Agreement at that time represented a value of NLG 51 million (over EUR 23 million);

— virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the basic package?

(7) Does the national court still have the power under Article 101(3) TFEU to declare a prohibition under Article 101(1) TFEU inapplicable in respect of the tariff-limiting clause, in the light of the new regulatory framework and the Commission's serious doubts in its letter of serious doubt about the compatibility with the objectives of competition law of (*ex ante*) intervention in retail tariffs? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?

(8) Does the European penalty of invalidity under Article 101(2) TFEU allow for some latitude in respect of its effects in terms of time having regard to the circumstances at the time of the conclusion of the Agreement (the beginning of the liberalisation of the telecommunications sector) and later developments in the telecommunications sector, including the entry into force of the new regulatory framework and the consequent serious objections expressed by the Commission against the introduction of price control?'

IV – Discussion

A – *Preliminary observations on the scope and the admissibility of the questions referred*

17. It must be said straightaway that it will not be necessary to reply to all 18 questions from the referring court.

18. The referring court itself presents certain questions as secondary as the need for a reply to them is made expressly subject to the reply to other questions. That is the case with regard to question 2(b), which is subject to a negative reply to question 2(a), and with regard to question 3, which is itself subject to a negative reply to the preceding questions.

19. However, as will be seen below, certain questions are obviously secondary as a logical consequence of the replies to the first questions. That applies to questions 3 and 4 concerning the scope of the obligation of sincere cooperation, which will be answered in the course of the discussion of the preceding questions. That applies also, as the Commission observes, to questions 5 to 8 concerning Article 101 TFEU.

20. Furthermore, as Gemeente Hilversum points out in its written observations, it is possible, at the present stage, that some of the questions from the referring court, in particular questions 5 to 8, which relate to Article 101 TFEU, will have to be ruled inadmissible or, at least, devoid of purpose as there may, in the light of the information provided by the referring court, be serious doubt regarding their relevance to the outcome of the main proceedings.

21. Finally, as we shall see, the questions from the referring court fall into three main groups of issues, the first relating to the scope of the NRF, that is to say, the applicability of the relevant directives to the main proceedings (question 1), the second to the scope of the obligations of Gemeente Hilversum on the basis of those directives (question 2) and the duty of sincere cooperation on the basis of Article 4(3) TFEU (questions 3 and 4) and, finally, the third concerning the effect, if any, of Article 101(1) TFEU (questions 5 and 6), Article 101(2) TFEU (question 7) and Article 101(3) TFEU (question 8) on the outcome of the main proceedings.

B – *The substantive scope of the NRF: the concept of electronic communications services (question 1)*

22. The first question from the referring court is whether a service consisting in the supply of free-to-air RTV packages via cable falls within the substantive scope of the NRF, bearing in mind that the charge for the service includes the transmission costs, payments to radio and television broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content.

1. Summary of observations

23. UPC claims that it supplies principally electronic communications services, so that the main proceedings fall within the scope of the NRF. On the other hand, the Netherlands Government and Gemeente Hilversum contend that, as UPC merely purchases the content of different television channels so as to constitute a RTV package and supply it to its end-users by means of its cable network, it is offering a service for the supply of content which is outside the scope of the NRF.

24. The Commission and the EFTA Surveillance Authority consider that the service supplied by UPC falls within both the transmission of signals and the supply of RTV content, so that the NRF is applicable only to the first component. However, the EFTA Surveillance Authority considers that it is for the referring court to determine the nature of the service supplied by UPC and to draw the appropriate conclusions.

2. Discussion

25. In my view, there can be no doubt regarding the reply to this question, as is clear from the definition of 'electronic communications service' in Article 2(c) of the Framework Directive and Article 1(3) of the Competition Directive, and also from the interpretation of the relevant provisions of the NRF in the particular context and in the light of the objective which they pursue and the provisions of Directive 2010/13/EU. [18]

26. Article 2(c) of the Framework Directive defines 'electronic communications service' as 'a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services'. Article 2(c) also makes it clear that that concept 'does not include information society services, as defined in Article 1 of Directive 98/34/EC, [19] which do not consist wholly or mainly in the conveyance of signals on electronic communications networks'.

27. As is apparent from this definition, which is repeated in more or less equivalent terms in Article 1(3) of the Competition Directive, electronic communications services are defined both positively and negatively.

28. In that connection, recital 5 to the Framework Directive states that 'the convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework' and that, in setting up that framework, it is 'necessary to separate the regulation of transmission from the regulation of content'. Recital 5 adds that 'this framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism'.

18 — Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1). This Directive replaced Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p.23) (Audiovisual Media Services Directive).

19 — Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p.37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

29. Likewise, recital 7 to the Competition Directive, which, after stating that the terms 'electronic communications services' and 'electronic communications networks' are preferred to the terms 'telecommunications services' and 'telecommunications networks' in order to take account of the convergence phenomenon, adds that those definitions bring together all electronic communications services and/or networks which are 'concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means', thus covering 'fixed, wireless, cable television [and] satellite networks'. It adds that 'the transmission and broadcasting of radio and television programmes should be recognised as an electronic communication service'.

30. Article 1(1)(a)(i) of the Audiovisual Media Services Directive defines an audiovisual media service as 'a service as defined by Articles 56 and 57 [TFEU] which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC'. The same provision states that 'such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph'.

31. In the present case, it appears from the order for reference and the written and oral observations submitted to the Court that UPC's principal business is the transmission of RTV programmes by cable to its subscriber customers. In particular, it is common ground that UPC does not itself produce RTV programmes or have any editorial responsibility for the content of the programmes which it transmits.

32. On that point, it is not possible to accept the argument, put forward by Gemeente Hilversum and the Kingdom of the Netherlands on the basis of the distinction between 'supply of RTV services' and 'transmission of signals' relating thereto, that UPC's operations are not covered by the NRF in so far as its customers do not purchase empty transmission capacity, but content, a package of RTV programmes transmitted via a cable distribution network.

33. As shown by the various definitions mentioned above, the relevant directives make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Content and transmission are covered by different measures [20] which pursue their own specific objectives, [21] without referring to customers of the services supplied or to the structure of the transmission costs charged to them.

34. Therefore, while it is true that UPC customers purchase content by subscribing to UPC in order to access the analogue package of RTV programmes that it offers, that does not mean that UPC's operations, which consist in transmitting the programmes produced by the content editors (in the present case, radio and television channels) under their own editorial responsibility to the connection point of its cable network in the subscriber's home, cannot be described as an electronic communications service within the scope of the NRF.

35. On the contrary, as the Commission observed, the supply of free-to-air RTV packages via cable is covered by the term 'electronic communications service' and is therefore within the substantive scope of the NRF in so far as it covers the transmission of signals on the cable television network.

36. Any other interpretation would considerably reduce the scope of the NRF, undermine the effectiveness of its provisions and thereby compromise the attainment of the objectives which it pursues.

20 — See recital 5 of the Framework Directive.

21 — In this respect recital 6 of the Framework Directive states that 'audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors'.

37. As it is the very purpose of the NRF to establish a genuine internal market of electronic communications,[22] in which electronic communications must ultimately be governed by competition law alone,[23] exclusion of the operations of an undertaking like UPC from its scope on the pretext that it does not merely transmit signals would render the NRF ineffective.

38. Likewise, the fact that the transmission charges billed to subscribers incorporate payments to radio and television channels and royalties paid to copyright collecting societies in connection with the transmission of programme content cannot, for the same reasons, preclude classification of the service supplied by UPC as an electronic communications service within the meaning of the NRF.

39. Consequently I propose that the Court rule that Directive 2002/21 must be interpreted as meaning that its substantive scope covers a service consisting in the supply of free-to-air radio and television packages via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, provided that the service consists of the transmission of signals on electronic communications networks.

C – *The scope of the NRF : the rights of the Member States and the powers of Gemeente Hilversum (question 2)*

40. The second question from the referring court is, in essence, whether a local authority, such as Gemeente Hilversum, may, having regard to the NRF, intervene in setting the tariff to the end-user for electronic communications services via a cable network, which are supplied by an economic operator such as UPC.

41. The question is divided into two sub-questions which take into account the specific legal situation at issue in the main proceedings arising from the tariff limitation clause in the agreement for sale concluded between Gemeente Hilversum and UPC. Accordingly the referring court asks, first, whether the NRF, taking account of the powers which it confers upon national regulatory authorities ('NRA'), prevents a local authority from having the power to adopt price control measures. Secondly, if not, the referring court asks whether the NRF prevents a local authority from applying a contractual tariff limitation clause of that kind.

1. Summary of observations

42. The Gemeente Hilversum and the Netherlands Government point out, first, that the tariff limitation clause was freely negotiated when the agreement was concluded between the parties and that it is the consideration for the price stipulated in the agreement. They consider that, in any case, the NRF does not preclude the tariff limitation clause because the clause cannot prevent the adoption by the NRA, in the present case the OPTA, at any time of a measure aiming to promote competition pursuant to Article 17 of the Universal Service Directive.

22 — That objective itself forms part of the broader objective of a single European information space and an information society open to all. See Communications from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 1 June 2005, '*i2010 – A European Information Society for growth and employment*'.

23 — See recital 5 of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37).

43. UPC, the EFTA Surveillance Authority and the Commission consider, on the other hand, that such a clause is now incompatible with the NRF because the Gemeente Hilversum cannot be considered a NRA, which alone has the right to adopt retail price control measures such as the tariff limitation clause, or considered to have acted legally as a NRA. However, the Commission considers that such a measure, provided that it is consistent with the principles of transparency, proportionality and non-discrimination, may constitute the consideration for a public service obligation covered by Article 106(2) TFEU, which must be determined by the referring court.

2. Assessment

44. First of all, although the agreement containing the tariff limitation clause was concluded before the NRF was adopted, the different directives of which the NRF consists had to be implemented by the Member States by 24 July 2003 and the Member States have since then been required to comply with their provisions and to ensure that they are observed throughout their territory.

45. The Member States have that obligation by virtue of the directives themselves, independently of their duty of sincere cooperation under Article 4(3) TEU, so that, if it were found that the NRF precludes the application of the tariff limitation clause at issue in the main proceedings, it would be unnecessary to reply to questions 3 and 4 since disregard of the provisions of the NRF entails *ipso facto* a failure in that duty.

46. Next, as is apparent from the examination of the relevant provisions of the NRF, and as UPC, the EFTA Surveillance Authority and the Commission stated, in essence, in their written observations and at the hearing, price control measures for electronic communications services such as that at issue in the main proceedings [24] are permissible only if they are measures which may be adopted by a NRA in relation to an undertaking with significant market power or if they may be justified on the basis of an objective of general interest or of Article 106(2) TFEU.

47. Even assuming that Gemeente Hilversum meets the requirements of competence, functional and legal independence, impartiality and transparency laid down by Article 3 of the Framework Directive and by the Court's case-law [25] for valid recognition as a NRA, [26] it cannot in any case be regarded as having acted legally in that capacity, as I shall show first, in so far as the tariff limitation clause imposed on UPC was adopted without regard to the detailed procedural rules of the relevant directives.

48. Although the possibility cannot be ruled out that Gemeente Hilversum may, as a local authority, not as a NRA, adopt a tariff limitation measure, provided that it is justified by objectives of general interest or under Article 106(2) TFEU, it is the referring court that will have to make enquiries on that point, as I shall show secondly.

24 — The measures referred to in Article 5(1) and (2) of the Access Directive are not applicable in the main proceedings.

25 — Case C-389/08 *Base and Others* [2010] ECR I-9073, paragraphs 27 to 30.

26 — Article 3(6) of the Framework Directive provides that Member States must notify the Commission of all national regulatory authorities assigned tasks under the NRF. However, in its pleadings the Commission stated that the Gemeente Hilversum was not included in the list received fom the Netherlands. This was not denied.

a) Price control measures that may be adopted on the basis of the NRF

49. The purpose of the NRF is to establish a genuine internal market in electronic communications, in which they must ultimately be governed by competition law alone, [27] by means of the gradual reduction of *ex ante* sectoral legislation. [28]

50. Article 2(3) of the Competition Directive states that Member States are to ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks, without prejudice to the provisions of the Access, Authorisation, Framework and Universal Service Directives.

51. Consequently the compatibility of the tariff limitation clause must be examined on the basis of the relevant provisions of those directives, through which the competition rules established by the NRF and its amendments take shape.

52. In that connection, the Framework Directive lays down the tasks to be performed by the NRA under the supervision of the Commission and the procedures for ensuring the harmonised application of the NRF throughout the Union.

53. Under Article 8(1) of the Framework Directive, the NRA, defined in Article 2(g) thereof, must take all reasonable and proportionate measures which are aimed at achieving the objectives set out in Article 8(2), (3) and (4), namely promoting competition in, inter alia, the provision of electronic communications services and associated facilities and services, contributing to the development of the internal market and promoting the interests of European Union citizens.

54. Article 3 of the Authorisation Directive in turn requires the Member States to ensure the freedom to provide electronic communications networks and services, adding that such provision is in principle to be subject only to a general authorisation, [29] without prejudice to the specific obligations referred to in Article 6(2) of that Directive.

55. Article 6(2) of the Authorisation Directive provides [30] that NRAs may impose specific obligations on providers of electronic communications services with significant market power, in accordance with Articles 6 and 8 of the Access Directive, their adoption being subject to specific conditions and rules. [31] Article 6(2) states, on the one hand, that those specific obligations must be legally separate from the rights and obligations under the general authorisation and, on the other hand, that the criteria and procedures for imposing such specific obligations must be referred to in the general authorisation.

56. It must be pointed out here that the Court has no information concerning the general authorisation granted to UPC, apart from the fact that Gemeente Hilversum had to assist it to obtain that authorisation.

27 — See paragraph 37 above.

28 — See Commission Recommendation 2003/311/EC, and Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ 2007 L 344, p. 65).

29 — Subject, it must also be added, only to the conditions laid down by the Directive, particularly in Part A of the annex, and restrictions justified by considerations of public policy, public health and public security referred to in Article 52(1) TFEU which are not at issue in the main proceedings. See recital 3 of the Authorisation Directive.

30 — Article 6(2) also provides that specific obligations may be imposed on suppliers designated to provide a universal service under the Universal Service Directive but, as mentioned above, it is not relevant in the present case.

31 — See also recital 27 to the Framework Directive.

57. However that may be, the tariff limitation clause imposed by Gemeente Hilversum on UPC cannot be considered to fall within the price control measures referred to in Article 13 of the Access Directive which may be taken in relation to undertakings with significant market power in accordance with Article 8 of that Directive.

58. First of all, because of the competition between the broadcasting of RTV programmes by cable and the development of digital terrestrial television, on the one hand, and the broadcasting of RTV programmes by DSL networks, on the other hand,[32] the market at issue in the main proceedings is no longer among those covered by Recommendation No 2007/879/EC as being open to *ex ante* regulation.

59. It is true that, as the Commission observes, that circumstance does not in principle prevent a NRA from defining markets of end-users corresponding to the national circumstances justifying *ex ante* regulation.[33]

60. However, such markets must also be defined in accordance with the procedures laid down in Articles 6 and 7 of the Framework Directive, in particular after interested parties have been given an opportunity to comment.[34] It is also necessary for those markets to be assessed in conformity with the procedure laid down in Article 16 of the Framework Directive and, if it is found that the relevant market is not competitive, the undertakings with significant market power must be identified in accordance with Article 14 of the Framework Directive and, finally, price control measures must be adopted, first, in accordance with the procedure laid down in Article 7(2) of the Framework Directive and, secondly, with the requirements laid down in Article 13 of the Access Directive.

61. It is clear from the file that the measure imposed on UPC disregarded the various procedural obligations laid down by the relevant provisions of the NRF, in particular Articles 6 and 7 of the Framework Directive.

62. The relevance of the Universal Service Directive must be ruled out for the same reasons. While Article 9 provides that price control measures may be imposed on undertakings designated to provide a universal service, such measures, assuming that they may be applied to RTV services, may be imposed only after a market analysis as laid down by Article 16 of the Framework Directive and Articles 16 and 17 of the Universal Service Directive.[35]

63. Consequently it may be provisionally concluded that the NRF in principle precludes the tariff limitation clause unless it is shown to be justified by objectives of general interest.

64. Article 1(2) and (3) of the Framework Directive states that the provisions of the Directives constituting the NRF are without prejudice to obligations imposed by national law in accordance with European Union law or by European Union law itself in respect of services and without prejudice to measures taken at European Union or national level, in compliance with European Union law, to pursue general interest objectives.

65. In the present case it is not alleged that the tariff limitation clause arises from an obligation laid down by national law pursuant to European Union law or laid down by European Union law itself. On the other hand, it is necessary to determine whether the application of the clause pursues a general interest objective within the meaning of Article 1(3) of the Framework Directive or whether it may be justified on the basis of Article 106(2) TFEU.

32 — See the working document accompanying Recommendation No 2007/879/EC, SEC(2007) 1483/2, p. 48.

33 — See Article 15(3) of the Framework Directive.

34 — See Article 6 of the Framework Directive.

35 — Judgment of 6 May 2010 in Case C-545/08 *Commission* v *Poland*, paragraphs 47 to 57.

b) Justification on the basis of a general interest objective

66. Article 1(3) of the Framework Directive provides that it and the specific directives are without prejudice to measures taken at European Union or national level, in compliance with European Union law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.

67. It follows from recital 6 to the Framework Directive that the Member States may, in compliance with Union law, implement an audiovisual policy and regulate content in pursuit of general interest objectives such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors.

68. In the present case, although, in the statement of the grounds of the order for reference and in question 2, the referring court mentions the idea that Gemeente Hilversum acted on the basis of private-law instruments in order to defend the public interests of its inhabitants, the referring court does not give the slightest indication of the nature of the interests in question.

69. On that point Gemeente Hilversum and the Netherlands Government claim that the tariff limitation clause, which was freely agreed, has the objective of consumer protection. It is said to ensure the supply of a RTV service, the basic digital package, at a socially acceptable tariff which should remain affordable for households with modest incomes, that service therefore constituting a service of fundamental public interest.

70. As already mentioned, the objective of the NRA is precisely to ensure, by the promotion of competition, that users derive maximum benefit from electronic communications services in terms of choice, price, and quality.[36] It is for the NRAs alone to take action if necessary, impartially and transparently,[37] where a market analysis indicates that an undertaking with significant market power might, without effective competition, sustain prices at an excessively high level, to the detriment of end-users.[38]

71. Therefore, irrespective of the fact that in the present case, as noted in points 11 to 13 above, the OPTA adopted a decision to the contrary after reference to the Commission, the justification put forward by Gemeente Hilversum and the Netherlands Government cannot be accepted as such.

72. However, in its pleadings the Commission considered the question of whether UPC could be regarded as having been entrusted by Gemeente Hilversum with a service of general economic interest within the meaning of Article l06(2) TFEU. The Commission, however, considers that it does not have sufficient information to answer that question and consequently proposes that the referring court be requested to give a ruling on that point in the light of the Court's case-law.

73. It is true that the Court has had occasion to rule that Article 106(2) TFEU, which permits derogations from the general rules of the Treaty on certain conditions, seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy, with the European Union's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.[39] In view of the Member

36 — Article 8(2)(a) of the Framework Directive.

37 — Article 3(3) of the Framework Directive.

38 — Article 13(1) of the Access Directive.

39 — Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12; Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39; Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 103; and C-265/08 *Federutility and Others* [2010] ECR I-3377, paragraph 29.

States' interest as defined, and as mentioned in Article 14 TFEU, they cannot be precluded, when deciding on the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings. [40]

74. However, it must be said that the referring court makes no reference at all to Article 106(2) TFEU or even to the idea that the tariff limitation clause is the manifestation of Gemeente Hilversum entrusting a service of general economic interest to UPC. Furthermore, neither Gemeente Hilversum nor the Netherlands Government has alleged that the tariff limitation clause could be justified on the basis of Article 106(2) TFEU. UPC, for its part, has not expressed an opinion on that point. At the hearing it also denied the claim by Gemeente Hilversum that the tariff limitation clause was compensated for by a reduction in the selling price of the cable network.

75. In those circumstances the Court can only remit to the referring court the question of whether Article 106(2) TFEU should, in view of the relevant case-law, be applied in the main proceedings. [41]

76. To be more exact, the referring court should determine, first, whether Gemeente Hilversum may be considered to have actually entrusted to UPC the operation of a service of general economic interest and, if so, whether European Union law precludes the performance of the particular task entrusted to it. [42] In particular, the referring court must determine the nature of the needs arising from the performance of the task of general interest in question. [43]

77. The referring court must then satisfy itself, in the light of the Court's case-law, that the obligations imposed comply fully with the principle of proportionality, taking account of all the circumstances of the main proceedings. [44]

78. Consequently I propose that the Court rule that Articles 6, 8 and 13 of the Access Directive, Articles 3 and 6(2) of the Authorisation Directive, Articles 1(2) and (3), 3, 6 and 7 as well as Articles 14 to 16 of the Framework Directive must be interpreted as in principle precluding the application of a tariff limitation clause such as that at issue in the main proceedings, unless it is shown that it is justified by the pursuit of general interest objectives or on the basis of Article 106(2) TFEU and complies fully with the principle of proportionality, which is to be ascertained by the referring court.

D – *The effect of Article 101 TFEU (questions 5 to 8)*

79. In view of the proposed replies to the first questions considered above, it does not appear necessary to reply to questions 5 to 8, all of which relate to the interpretation of Article 101 TFEU.

80. It may be observed in any case that it is not possible to see in what way the situation at issue in the main proceedings could fall within the scope of Article 101 TFEU as the referring court has given no details concerning the reasons leading it to conclude that Gemeente Hilversum should be regarded as an undertaking which has concluded an agreement [45] in the context of economic activities [46] for the purpose of that provision.

40 — *Commission* v *Netherlands*, paragraph 40, and *Albany*, paragraph 104.

41 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 50.

42 — Case 311/84 *CBEM* [1985] ECR 3261, paragraph 17; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 24; and Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 49.

43 — Case 66/86 *Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraphs 55 and 56.

44 — *Federutility and Others*, paragraphs 33 to 47.

45 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 29.

46 — *Höfner and Elser*.

V – Conclusion

81. In the light of the foregoing, I propose that the Court should answer the questions referred by the Gerechtshof Amsterdam as follows:

(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 must be interpreted as meaning that its substantive scope covers a service consisting in the supply of free-to-air radio and television packages via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, provided that the service consists of the transmission of signals on electronic communications networks.

(2) Articles 6, 8 and 13 of Directive 2012/19/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, Articles 3 and 6(2) of 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, Articles 1(2) and (3), 3, 6 and 7 as well as Articles 14 to 16 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 must be interpreted as in principle precluding the application of a tariff limitation clause such as that at issue in the main proceedings, unless it is shown that it is justified by the pursuit of general interest objectives or on the basis of Article 106(2) TFEU and complies fully with the principle of proportionality, which is to be ascertained by the referring court.