OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 15 February 2007 [1]

1. In this reference for a preliminary ruling, the Verwaltungsgerichtshof (Higher Administrative Court) (Austria) has put two questions to the Court concerning the interpretation of Articles 4 and 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 (Framework Directive). [2]

I — Facts of the case, legal framework and questions referred to the Court

2. Tele2 UTA Communications GmbH ('the applicant' or 'Tele2') is an Austrian undertaking providing electronic communications networks and services. On 16 July 2004 it requested that it be granted the status of a party and to have access to the file in administrative market analysis proceedings being carried out by the Telekom-Control-Kommission ('the regulatory authority' or 'the TCK') pursuant to Paragraph 37 of the 2003 Telekommunikationsgesetz (Law on Telecommunications) (BGBl. I No 70/2003; 'the TKG').

3. According to Paragraph 37 of the TKG, entitled 'Market analysis procedure':

'1. The regulatory authority shall, of its own motion, carry out at regular intervals, but at least every two years, an analysis of the relevant markets established by the regulation pursuant to Paragraph 36(1), taking account of the provisions of the European Communities. The objective of this procedure shall be, after it has been decided whether, on a specific relevant market, one or more undertakings have significant market power or whether effective competition exists on that market, to withdraw, maintain, amend or impose specific obligations.

2. Where the regulatory body decides in this procedure that one or more undertakings

1 — Original language: Portuguese.

2 — OJ 2002 L 108, p. 33 ('the Framework Directive').

have significant market power on the relevant market and consequently no effective competition exists, it shall impose on that undertaking or those undertakings appropriate specific obligations pursuant to Paragraphs 38 to 46 or Paragraph 47(1). Existing specific obligations on undertakings shall, in so far as they concern the relevant markets, be amended or re-imposed by the regulatory authority in accordance with the results of the procedure, taking account of the regulatory objectives.

3. Where the regulatory authority decides on the basis of the procedure that effective competition exists on the relevant market and consequently no undertaking has significant market power, it may not — with the exception of Paragraph 47(2) — impose any obligations under subparagraph 2. In this case, the procedure relating to this market shall be discontinued by order of the regulatory authority without any formality having to be completed and that order shall be published. In so far as specific obligations exist on this market, they shall be withdrawn by that order. An appropriate period of no more than six months, laying down the time from which the withdrawal is effective, shall also be laid down in that order.

4. In the case of transnational markets identified by decision of the European Commission, the national regulatory authorities concerned shall carry out a market analysis in close collaboration with each other and having regard to the guidelines on market analysis and the assessment of significant market power, and shall jointly decide whether one or more undertakings have significant market power or whether effective competition exists on the market. Subparagraphs 1, 2, 3 and 5 shall apply as appropriate.

5. Only undertakings in respect of which specific obligations are imposed, amended or withdrawn shall have the status of party to these proceedings.

6. Users and operators of communications services and networks shall be required to cooperate in proceedings conducted pursuant to Paragraphs 36 and 37 to the extent laid down in Paragraph 90.

7. The regulatory authority shall publish orders issued pursuant to subparagraphs 2 to 4 and shall communicate a copy thereof to the European Commission.

…'

4. Paragraph 37 of the TKG concerning the market analysis procedure implements Article 16 of the Framework Directive, also entitled 'Market analysis procedure', which provides as follows:

'1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where a national regulatory authority is required under Articles 16, 17, 18 or 19 of Directive 2002/22/EC (Universal Service Directive), or Articles 7 or 8 of Directive 2002/19/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services] [3] ['the Access Directive'] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the guidelines and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article in a concerted fashion.

3 — OJ 2002 L 108, p. 7.

6. Measures taken according to the provisions of paragraphs 3, 4 and 5 of this Article shall be subject to the procedures referred to in Articles 6 and 7.'

5. By a decision of 6 September 2004, the regulatory authority turned down Tele2's request to be granted the status of a party to the market analysis proceedings the ground that, under Paragraph 37(5) of the TKG, only undertakings in respect of which specific obligations had been imposed, amended or withdrawn, and such undertakings alone, could be parties to market analysis proceedings, which was specifically not the case in regard to the applicant.

6. The applicant lodged an appeal against that decision before the Verwaltungsgerichtshof on the ground that the national provision in Paragraph 37(5) of the TKG was contrary to Article 4(1) of the Framework Directive, which provides for a 'right of appeal'. According to the latter provision, 'Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise'.

7. According to the applicant, a decision adopted by the TCK in the course of market analysis proceedings constitutes a decision within the meaning of the Framework Directive which 'affects' not only the particular undertaking in respect of which specific regulatory obligations were imposed, amended or withdrawn but also its competitors. The result of that market analysis directly determines the rights which a competitor of the dominant undertaking has in respect of that undertaking.

8. For its part, the defendant authority takes the view that Article 4(1) of the Framework Directive provides no indication as to who is 'affected' by a specific decision. The mandatory consultation procedure under Article 6 of the Framework Directive guarantees that competitors of the undertaking directly affected are integrated into the market analysis procedure. Article 6, entitled 'Consultation and transparency mechanism' provides that '[e]xcept in cases falling within Articles 7(6), 20 or 21, Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the specific directives which have a significant impact on the relevant market, they give interested

parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality'.

9. Under those conditions, having regard to the need to interpret Articles 4(1) and 16(3) of the Framework Directive, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following two questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 4 and 16 of [the Framework Directive] to be interpreted as meaning that the term "parties affected" includes undertakings operating as competitors on the relevant market in respect of which specific obligations are not imposed, maintained or amended?

(2) In the event that the first question is answered in the affirmative, does Article 4 of [the Framework Directive] preclude a national provision which provides that only the undertaking in respect of which specific obligations are imposed, amended or withdrawn has the status of a party to market analysis proceedings?'

II — Analysis

10. The main proceedings originated in a request by Tele2 to the TCK that it be granted the status of a party, in other words, that it be granted the right to take part in the market analysis proceedings conducted by the regulatory authority. As can be seen from the order for reference, under Austrian administrative law, the status of a party to market analysis proceedings involves, among other things, the right to consult the file, the right to be informed of the results of the procedure for administration of the evidence and to comment on it, and the right of appeal.

11. It follows that, under Austrian law, only those who have the status of party to market analysis proceedings have a right of appeal. It is that link in Austrian law between the status as a party and the right of appeal which explains the relevance of the first question inasmuch as it concerns the question whether Article 4 of the Framework Directive requires that an undertaking such as the applicant in the main proceedings be granted a right of appeal, in the circumstances of this case, against decisions adopted by the national regulatory authority in the course of market analysis proceedings.

12. It is on the basis of that link between the status as party and the exercise of a right of appeal that Tele2 argues, first of all, that Article 4 of the Framework Directive grants it an effective right of appeal against decisions of the regulatory authority adopted in the course of market analysis proceedings. It goes on to express the view that, once Community law guarantees it such an effective right of appeal, it should also be entitled to take part, as a party, in the non-adversarial market analysis proceedings. Only a complete knowledge of the pre-contentious procedure — which it can obtain only through participation as a party — will allow it effectively to exercise its right of appeal.

13. The national court's first question to the Court of Justice is thus essentially whether Article 4 of the Framework Directive must be interpreted as conferring on undertakings such as the applicant in the main proceedings a right of appeal against decisions of a regulatory body such as the TCK. In the context of that question, it also must be determined whether the concept of 'parties affected' set out in Article 16(3) of the Framework Directive includes undertakings such as the applicant in the main proceedings. By its second question, the national court seeks to ascertain whether it follows from Article 4 of the Framework Directive that, if an undertaking such as the applicant in the main proceedings has a right of appeal against decisions adopted by a regulatory authority in the course of an administrative market analysis, it must also be entitled to take part in the non-adversarial proceedings as a party.

A — *The first question*

14. Does Article 4 of the Framework Directive provide judicial protection to persons who are not the persons to whom a regulatory authority's decision is addressed but

who are adversely affected by it? That, in essence, is the first question to be examined.

15. To answer that question, the category of third party to which the applicant in the main proceedings belongs must first be determined. The wording of the first question refers simply to undertakings operating as competitors on the relevant market. It can be seen from the order for reference, however, that Tele2 is a competitor of the undertaking having significant market power but is also, and more precisely, a contractual partner of that undertaking whose legal position could be adversely affected by a decision of the regulatory authority adopted in the course of market analysis proceedings. It would seem to follow from the order for reference, therefore, that the existence of contractual relations with the undertaking having significant market power, based on the specific obligations imposed on that undertaking by the regulatory authority — and not merely the fact that it is a competitor — is the factor which constitutes the applicant's specific situation. That is the more specific context in which consideration must first be paid to the question whether an undertaking such the applicant in the main proceedings is entitled to a right of appeal under Article 4 of the Framework Directive.

16. Article 4(1) of the Framework Directive requires the Member States to ensure that effective mechanisms exist at national level under which 'any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved'. There is no definition, either in Article 4 or in any other provision of the Framework Directive, of the concept of an undertaking 'affected by a decision of a national regulatory authority'.

17. The national court suggests that clarification as to the meaning of an 'affected' party for the purposes of Article 4(1) may be found in Article 16(3), which provides that 'parties affected' by the withdrawal of sector-specific regulatory obligations imposed on an undertaking formerly having significant market power are to be given an appropriate period of notice of such withdrawal. I do not think that clarification of the concept of affected persons or undertakings, within the meaning of Article 4, is to be obtained simply by treating that concept as similar in meaning to that of 'parties affected' in Article 16(3) of the same directive.

18. Although it is true that several language versions use the same term in Articles 4

and 16(3),[4] in particular 'affected' and 'betroffen(en)' in the English and German versions respectively, other language versions use different terms.[5] Comparison of the different language versions of the two articles does not therefore allow the conclusion that the two concepts necessarily have the same meaning. Moreover, given that the meaning of the two provisions of the directive is not absolutely clear, as will be seen, it would appear that recourse to Article 16(3) in order to clarify the term 'affected' in Article 4(1) would be the legal equivalent of a blind person leading another blind person out of a labyrinth.

19. Obviously, an undertaking such as Tele2 must, in my opinion, be regarded in this case as a 'party affected' within the meaning of Article 16(3) and, consequently, as being entitled to an appropriate period of notice of a decision to withdraw obligations. Clearly, the undertaking having significant market power to which the decision withdrawing specific obligations is addressed will be notified of such a decision concerning it and from which it benefits directly. For that reason, it would be impossible to understand why the Community legislature, in expressly providing that 'an appropriate period of notice shall be given to parties affected by such a withdrawal of obligations', would have gone so far beyond what was required as to limit the obligation to notify a decision withdrawing obligations only to the undertakings having significant market power which benefit from that decision.[6] However, the fact that an undertaking such as Tele2 is, in my view, an 'affected' party within the meaning of Article 16(3) of the Framework Directive does not mean that the applicant in the main proceedings must automatically be regarded as an 'affected' party within the meaning of Article 4(1) and for that reason entitled to a right of appeal against decisions of a regulatory authority which affect it. That is thus a specific effect of Article 4, which is intended to achieve purposes quite distinct from those of Article 16(3) when it confers a right to notification on 'affected' parties. That notice is intended to permit 'affected' parties to prepare for the unfavourable situation created by the decision to withdraw the obligations imposed on the undertaking formerly having significant market power, before that withdrawal takes effect.

20. It follows that the essential factor in determining whether an undertaking such as

4 — Thus, in particular, the English, German, Italian, Spanish, Czech, Greek and Swedish versions.

5 — Thus, the Portuguese version uses 'prejudicadas' in Article 4(1) and 'abrangidas' in Article 16(3). The French version also uses different terms: 'affecté(e)' and parties 'concerné[e]s'. Likewise, different terms are used in the Dutch version: 'getroffen' and 'gevolgen'.

6 — Article 16(3) refers to the undertakings having significant market power to which the decision is addressed. It then mentions parties affected by the withdrawal, entitling them to be notified of the decision. If that obligation to notify was intended to favour only undertakings benefiting from the withdrawal, the most natural thing would have been for the legislature to provide in the following sentence that 'those undertakings' (and not the 'parties affected') were entitled to be notified of the decision.

the applicant is affected within the meaning of Article 4(1) cannot be the fact that it is an affected party within the terms and for the specific purposes of Article 16(3). In the absence of any indication from the wording of Article 4(1) as to the scope of the concept of an affected undertaking, the answer to such a question must be based, as the Belgian Government points out in its written observations, on an examination of the purposes and objectives of Article 4, viewed in the context of the Framework Directive. When the text of a Community provision is ambiguous, the meaning of the words the interpretation of which is in dispute must be established by taking account of the context of the provision and the purpose of the rules at issue. [7]

21. It is clear that Article 4(1) seeks to ensure that an effective appeal mechanism is available to '*any* user' or '[*any*] undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority'. [8] The text of that article, as originally proposed by the Commission, was shorter and more limited inasmuch as it provided simply that 'Member States shall ensure that a mechanism exists ... under which *a* user or undertaking providing electronic communications networks and/or services has the right of appeal against a decision of a national regulatory authority'. [9] Independently of these not insignificant changes to the text of Article 4, recital 12 in the preamble, according to which 'any party who is the subject of a decision by a national regulatory authority should have the right to appeal' against such a decision, was not modified.

22. First of all, I agree with the Commission, Tele2 and the Belgian Government that the article at issue follows from the principle of effective judicial protection. The Court has consistently held that that general principle, which underlies the constitutional traditions common to the Member States, requires that 'individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order'. [10] There must therefore be effective judicial scrutiny of all decisions of national authorities refusing the benefit of a right conferred by Community law. [11]

7 — See, inter alia, Case 803/79 *Roudolff* [1980] ECR 2015, paragraph 7; Case C-287/98 *Linster and Others* [2000] ECR I-6917, paragraph 43; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 35.

8 — Emphasis added. See Case C-438/04 *Mobistar* [2006] ECR I-6675, paragraph 41.

9 — See the text proposed by the Commission and the Parliament's amendments in OJ 2001 C 277, pp. 91 and 98.

10 — See Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39 and the case law cited therein, in particular Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17 to 20; and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 29.

11 — See Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 64, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 101 and the case law cited therein.

23. Recital 12 in the preamble to the Framework Directive must specifically be read in the light of that principle, from which Article 4 follows. The recital in question must be interpreted in a broader way than its terms would suggest, with the result that any person whose rights under the Community legal order are affected by a decision of a national regulatory authority, and not merely the person to whom the decision is addressed, should have a right of appeal against that decision under Article 4(1) of the Framework Directive. [12]

24. Secondly, having regard to the general objectives and regulatory principles concerning national regulatory authorities set out in Article 8(2) of the Framework Directive, the objective laid down for regulatory authorities to 'promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services' [13] stands out clearly. [14] However, as the Danish Government has correctly pointed out in its observations, a strict interpretation of Article 4(1) of the Directive as meaning that it confers a right of appeal only on persons to whom the decision in question is addressed would be difficult to reconcile with such an objective of promoting competition. The consequence of such an interpretation would be that only undertakings having significant market power would in principle be considered to be 'affected' parties. Other competing undertakings, although affected in their rights flowing from specific obligations imposed, amended or withdrawn in regard to the undertaking having significant market power by a decision of the national regulatory authority, would, unlike the latter undertaking, be denied any right of appeal against such a decision.

25. I therefore take the view that neither the terms of Article 4 nor the general principle of effective judicial protection from which that article follows, nor the general objectives and regulatory principles concerning regulatory authorities — in particular, the promotion of effective competition — justify interpreting the concept of an 'affected' undertaking within the meaning of Article 4(1) in the restrictive way proposed by the Austrian and Slovenian Governments as meaning only those undertakings to which the regulatory authority's decisions are addressed.

26. In its judgment in *Connect Austria*, [15] the Court specifically went in the direction of a non-restrictive interpretation of Article 4 of the Framework Directive, in the light of

12 — It is worth pointing out in this context that Article 4(1) refers to users or undertakings *affected* by a decision adopted by a regulatory authority, and not to users or undertakings to which such a decision is *addressed*.

13 — See Article 8(2) of the Framework Directive.

14 — See also recital 1 in the preamble to the Framework Directive, which indicates clearly the importance of 'effective competition in the telecommunications sector during the transition from monopoly to full competition'.

15 — Case C-462/99 [2003] ECR I-5197. See also, on the interpretation of Article 4(1) of the Framework Directive, *Mobistar*, cited above, paragraphs 40 and 43.

the principle of effective judicial protection, when it interpreted a provision which may rightly be regarded as a predecessor of Article 4 of the Framework Directive. The provision in question was Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, [16] as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997. [17]

27. In *Connect Austria*, as in the present case, the application was brought by a third party. The Court pointed out, first, that 'it is the Member States' responsibility to ensure that [individual rights derived from Community law] are effectively protected in each case' [18] and that Article 5a(3) of Directive 90/387 requires 'Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to an independent body'. It concluded that 'in order to ensure that national law is interpreted in compliance with Directive 90/387 and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387'. [19] If national law cannot be applied in such a way as to comply with the requirements of Article 5a(3), a national court or tribunal which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excluded its competence has the obligation to disapply that provision. [20]

28. As the Commission and Tele2 pointed out in their observations, the Court appears to have implicitly recognised that the right of appeal provided for in Article 5a(3) of Directive 90/387 must also be extended to certain concerned third parties to which, like Connect Austria, the regulatory authorities' decisions were not addressed although they were in fact affected by those decisions. [21] However, I consider that the fact

16 — OJ 1990 L 192, p. 1.

17 — OJ 1997 L 295, p. 23. Article 5a(3) of Directive 90/387, repealed pursuant to Article 26 of the Framework Directive when the latter came into effect, provided, in identical terms to Article 4(1) of the Framework Directive, that 'Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved'.

18 — *Connect Austria*, cited above, paragraph 35.

19 — *Ibidem*, paragraph 42.

20 — *Ibidem*, paragraph 42.

21 — That is so even though the Court did not, in its judgment, expressly uphold the views of Advocate General Geelhoed, who stated very clearly, in point 48 of his Opinion, that 'It certainly cannot be the case that interested third parties who are directly affected by the decision do not have a right of appeal. Indeed, Article 5a(3) is, precisely, intended partly to protect the interests of newcomers to the market such as Connect Austria'.

that that conclusion may properly be drawn from the judgment in *Connect Austria* does not, as such, make it possible to decide the present case. In *Connect Austria*, the Court was dealing with the question whether Article 5a(3) of Directive 90/387 was to be interpreted as having direct effect and not with the specific question of whether the concept of a 'party affected by a decision' within the meaning of that article included an undertaking such as Connect Austria in the circumstances of that case. The Court did not therefore address specifically the question — which is at the heart of the present case — of how to determine the conditions under which the rights of a concerned third party such as Tele2 are to be regarded as being affected by an administrative decision adopted by a regulatory authority.

29. It should be pointed out that underlying Article 4(1) of the Framework Directive is, first of all, the imperative need to provide effective judicial protection for *the rights which individuals derive from the Community legal order*. As Tele2 and the Commission pointed out in their observations, it must be recognised that certain specific obligations imposed on undertakings having significant market power under Article 16(3) and (4) of the Framework Directive and the provisions of the Access Directive cited therein are precisely protective measures adopted in the interest of competitors and are therefore liable to confer rights on those competitors. Among those measures are, for example, those which may be adopted by regulatory authorities under Article 8 of the Access Directive, [22] in particular, the obligation of non-discrimination between competitors (Article 10 of the Access Directive) and the obligation to provide competitors with access to network facilities (Article 12 of the Access Directive).

30. With regard, in particular, to the obligations to grant network access laid down in the Access Directive, Article 12(1) thereof provides that '[a] national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest'. [23] Like the obligation of non-discrimination laid down in Article 10 of the Framework Directive, these obligations concerning access to, and use of, specific network resources are intended to benefit competitors interested in such access. It is

22 — According to Article 1(2) thereof, the Access Directive 'establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities'.

23 — That provision thus lays down many specific obligations which may be imposed on operators. Among them, in particular, are the obligation to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop, and the obligation to negotiate in good faith with undertakings requesting access.

therefore those competitors which are the immediate beneficiaries of the rights corresponding to the specific obligations imposed by the regulatory authority on the operator which has significant market power. [24]

31. The imposition of obligations such as those laid down in Articles 10 and 12 of the Access Directive thus confers rights of access and/or non-discriminatory treatment on competing undertakings which are the beneficiaries of those obligations. The imposition of such obligations obliges the undertaking having significant market power to make available to competing undertakings, under clearly defined and non-discriminatory conditions, facilities and/or services for the purpose of providing electronic communications services. [25] In those circumstances, for example, a decision taken by a national regulatory authority to withdraw obligations of that kind imposed on an undertaking having significant market power will affect the rights under Community law of competing operators which, like Tele2, are contractual partners of that undertaking.

32. It can be seen from the order for reference and from the applicant's written observations that, although Tele2 had established contractual relations with the undertaking formerly having significant market power, those rights were based on the specific obligations which the regulatory authority had imposed on the latter undertaking under Article 16(4) of the Framework Directive and the provisions of the Access Directive cited therein. Clearly, Tele2 is the contractual partner of the undertaking formerly having significant market power because that undertaking has had obligations imposed upon it by the regulatory authority which forced it to enter into contractual relations with Tele2 on specific terms. Tele2's access rights were therefore conferred on it by Community law in so far as they flow from the specific obligations imposed on the dominant undertaking under Community law.

33. It follows that decisions of the regulatory authority adopted on the basis of Article 16(3) of the Framework Directive which amend or withdraw obligations to grant access previously imposed on the undertaking having significant market power are liable to affect the corresponding rights conferred by Community law. When a competing undertaking has a contractual relationship with the undertaking having significant market power which is based on specific obligations imposed on the latter undertaking by the regulatory authority, the competing undertaking must be granted a right of appeal within the meaning of Article 4 of the Framework Directive against

24 — See, in that regard, recital 6 in the preamble to the Access Directive, which states that '[i]n markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection …'.

25 — See the definition of 'access' in Article 2(a) of the Access Directive.

decisions of the regulatory authority which may amend or withdraw such obligations. [26]

34. The question whether competitors which are not in contractual relations with an undertaking formerly having significant market power ought also to have a right of appeal under Article 4 of the Framework Directive was discussed at the hearing. An analysis of that problem may be of use to the national court.

35. As Tele2, the Commission and the Danish Government argued at the hearing, undertakings which, although not yet in contractual relations with an undertaking having significant market power, have demonstrated a firm intention to enter into such relations with a view to obtaining access to the latter undertaking's network should also be granted the right of appeal provided for in Article 4. Where a competing undertaking is faced with a decision of a regulatory authority concerning the imposition, amendment or withdrawal of specific obligations on the undertaking having significant market power which does not permit the establishment of the contractual relationship desired by the competing undertaking, that undertaking ought also to be able to avail itself of the rights guaranteed by Community law. It must therefore be accepted that a competing undertaking must, in those circumstances, have a right of appeal against the decisions of the regulatory authority which infringe Community telecommunications law.

36. In a broader context, I am of the view that safeguarding the objectives which the Community regulatory framework on telecommunications seeks to achieve, in particular the promotion of competition, which, as Article 8(2) of the Framework Directive provides, should expressly guide the intervention of the national regulatory authorities, justifies the conclusion that the right of appeal is not limited solely to competitors which are contractual partners of the undertaking having significant power in the relevant market.

37. I am thinking, in particular, of undertakings which do not have contractual relations with the undertaking having significant market power but which, as direct beneficiaries of the Community rules designed to promote competition in the telecommunications sector, are adversely affected by a

26 — See, by analogy, Case 11/82 *Piraiki-Patraiki and Others* [1985] ECR 207, concerning applications for annulment brought by third parties affected by a Commission decision authorising a Member State (in that case, the French Republic) to impose a system of quotas on imports of cotton yarn from Greece. The Court took the view (in paragraph 19) that 'the fact that, before the adoption of the decision at issue, [the applicants] had entered into contracts which were to be carried out during the months to which the decision applied constitutes a circumstance which distinguishes them from any other person concerned by the decision, in so far as the execution of their contracts was wholly or partly prevented by the adoption of the decision'. See also paragraph 31 of that judgment.

decision adopted by a national regulatory authority in the course of market analysis proceedings. Those undertakings, which are not in contractual relations with the undertaking having significant market power, should also be granted a right of appeal under Article 4(1) of the Framework Directive.

38. Recognition of a right of appeal for those whose pre-existing legal relationships are affected may, in some cases, be sufficient to guarantee achievement of the objectives fixed by the provisions of Community law at issue. This follows from the symmetry which exists between the protection of the rights arising under those legal relationships by way of the corresponding right of appeal granted to contractual partners affected by a decision and the protection of the social values upheld by the Community rule on the basis of which those relationships were established. However, it is possible that that symmetry may be imperfect, in particular in so far as the beneficiaries of the values which the rule seeks to protect are a group of persons larger, for example, than that of the contractual partners. In that case, those beneficiaries and the values upheld by the rule would not be protected if a right of appeal were to be granted only to those who had already entered into legal relations.

39. It is precisely such a lack of symmetry that is to be found in the application of the Community rules designed to ensure effective competition in the telecommunications sector through the imposition, amendment or withdrawal of obligations to grant access to specific network elements and associated facilities belonging to an undertaking having significant market power. It could logically be supposed that neither the undertaking having significant market power nor its competitors which already have a contractual right of access would have any interest in lodging an appeal against decisions adopted by a regulatory authority which are to the disadvantage of other undertakings which have recently entered the market and which may wish to establish new relationships with the undertaking having significant market power. According a right of appeal to such competing undertakings which are not yet contractual partners is essential in order to ensure genuine protection for the competition objectives referred to in the Community rules designed to promote the entry and integration of market newcomers.

40. Article 4(1) of the Framework Directive must therefore be interpreted as meaning that, on the one hand, competing undertakings which have contractual rights vis-à-vis an undertaking having significant power in the relevant market and the rights of which are affected by a decision adopted by a regulatory authority to withdraw or amend specific obligations, and, on the other hand, undertakings which might wish to enter into contractual relations with an undertaking having significant market power and which are adversely affected, in their capacity as

direct beneficiaries of Community-law provisions designed to ensure effective competition in the telecommunications sector, by a decision of a national regulatory authority, must be regarded as being undertakings affected by a decision taken by a national regulatory authority in the course of market analysis proceedings and, consequently, as having a right of appeal against such a decision.

B — *The second question*

41. If the answer to the first question is, as I propose, in the affirmative, it will be necessary to determine whether an undertaking such as the applicant in the main proceedings, in the case where it is entitled to a right of appeal under Article 4(1) of the Framework Directive must, for that reason, also be given the status of a party to the non-adversarial market analysis proceedings.

42. It might be said that the reasoning behind the second question is somewhat out of the ordinary. Normally, a person must be granted a right of appeal on the ground that that person has a right. [27] However, the applicant argues, conversely, that a right to take part in non-adversarial administrative proceedings must also follow from the fact that Community law grants a right of appeal against decisions adopted in the course of that procedure. Tele2 thus argues, on the one hand, that if it is established that, in the light of the principle of effective judicial protection, Article 4 of the Framework Directive grants it a right of appeal against a decision of the regulatory authority to maintain, amend or withdraw specific obligations imposed on an undertaking having significant market power, then, by necessary implication, that right of appeal must be effective. However, without being able to see the case-file, to take part in the administration of the evidence and to submit its observations in the market analysis proceedings, it would not be possible to prepare effectively an appeal against decisions of the regulatory authority adopted in the course of those proceedings. Moreover, the applicant submits, such a right to take part in the market analysis proceedings also follows from the right to due process.

43. In order to answer the second question referred by the Verwaltungsgerichtshof, it must first be borne in mind that the Framework Directive does not contain any express provision setting out who are the parties to the non-adversarial administrative proceedings referred to in Article 16. The terms of that provision give no indication that Tele2 must be entitled to participate, as a party, in the non-adversarial market analysis proceedings. Indeed, the third sentence of Article 16(3) merely provides that 'parties affected' must be notified in advance of the

27 — See point 22, above, and the case law cited therein.

withdrawal of specific obligations. Admittedly, Article 6 of the Framework Directive, to which Article 16 refers, gives all 'interested parties' the opportunity to comment on the draft measures which regulatory authorities propose to adopt and Tele2 may, undoubtedly, be regarded as an interested party within the meaning of that provision. However, such a right to submit observations in the course of the consultation procedure cannot be confused with conferral of the status as a party to the market analysis proceedings, as sought by Tele2, which involves broader rights, in particular, the right to have sight of the file in the market analysis proceedings and to comment on the evidence.

44. In the absence of Community rules on the organisation and functioning of the non-adversarial market analysis proceedings provided for in Article 16 of the Framework Directive, there can be no doubt that it is essentially for the national procedural law of each Member State to regulate that matter. [28] It is therefore for Austrian law to determine whether an undertaking such as the applicant in the main proceedings may be considered a party to the non-adversarial administrative proceedings in question. If so, Austrian law will also have to determine whether that undertaking may be granted procedural rights in those non-adversarial proceedings beyond those expressly conferred by Article 16 and, naturally, the rights inherent in the consultation procedure expressly laid down in Article 6. Community law does not require, *a priori*, that national procedural law must permit all competitors of an undertaking having significant market power to take part in a market analysis procedure under Article 16 of the Framework Directive. The national legislature may legitimately take the view that it is inappropriate to burden the preliminary procedure with what might turn out to be a very significant number of parties. [29]

45. It must be emphasised, however, as the Court has held in the related context of the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, that, although it is for national law to regulate this matter, that national law must comply with the requirements of the general principles of Community law. In particular, the detailed procedural rules may not be less favourable than those governing similar domestic situations (principle of equivalence) and they may not render virtually impossible or excessively difficult the exercise of rights

28 — See, for example, the judgment in Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12 and the case law cited therein.

29 — See recital 22 in the preamble to the Framework Directive, which stresses the importance of 'timely' procedures.

conferred by the Community legal order (principle of effectiveness). [30]

46. However, the applicant is invoking, precisely, the principle of effectiveness in this case in order to claim a right to take part in the non-adversarial market analysis proceedings. In is not, in fact, out of the question that the refusal to accord Tele2 the status of a party under Paragraph 37(5) of the TKG might significantly limit its right of appeal under Community law against decisions of the national regulatory authority adopted in the course of such proceedings.

47. One may ask whether a specific provision, such as Paragraph 37(5) of the TKG, which does not, in this case, grant Tele2 the status of a party to the market analysis proceedings, renders impossible or excessively difficult the exercise of the right of appeal against decisions adopted in the course of those non-adversarial proceedings. [31] In evaluating Austrian procedural law in that perspective, several factors already indicated in the Court's case-law must be considered. [32] Account must therefore be taken, in particular, of the position of such an Austrian legal provision within the entire proceedings before the different national authorities, the manner in which those proceedings are conducted and their specific characteristics.

48. Although it is, of course, for the national court to determine in those circumstances whether the right of appeal of an undertaking which, under Austrian law, does not have the status of a party to market analysis proceedings would on that ground be rendered purely formal, it does not seem, *a priori*, that the right which the applicant claims to participate, as a party, in the market analysis proceedings is essential to enable it to have an effective avenue of redress against decisions of the regulatory authority.

49. National procedural law can ensure by a wide variety of means that the right of appeal against a decision adopted in the course of market analysis proceedings is effective. First of all, and by way of illustration, I think that if an adequate statement of the reasons for the decision adopted by the regulatory authority is provided, it would be possible for

30 — Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 19 and 34; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 18 and the case law cited therein; *Peterbroeck*, paragraph 12 and the case law cited therein; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33; Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 60; Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 45; and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 17. See also, more recently, Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paragraph 69.

31 — For a parallel analysis of the applicable rules of evidence, see *Dounias*, paragraph 69, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 48. See also the Opinion of Advocate General Stix-Hackl in *Mobistar*, point 85.

32 — See *Steffensen*, paragraph 66, and *Peterbroeck*, paragraph 14; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraph 19; *Levez*, paragraph 44; and *Evans*, paragraph 46.

an undertaking such as Tele2 to be informed of the factors and information essential to ensure that the exercise of its right of appeal does not become virtually impossible or excessively difficult. Such a link between the obligation to provide a statement of reasons and the principle of effective judicial protection was laid down in the judgment in *Heylens and Others*. [33] Following on from its judgment in *Johnston*, cited above, the Court stated in *Heylens and Others* that the existence of a judicial remedy against any decision of a national authority refusing the benefit of a fundamental right conferred by the Community legal order is essential in order to secure for the individual effective protection for his or her right. [34] The Court derived from that principle of effective judicial protection an obligation on the part of the competent national authorities to state the reasons on which their refusal is based either in the decision itself or in a subsequent communication made at the request of an interested person. [35]

50. Finally, I would like to deal with the applicant's second argument that a right to take part in the market analysis proceedings is necessary in order to respect the fundamental right to a fair hearing and the principle of equality of arms. [36] I consider that that argument cannot be accepted. The reasoning behind it is based on the premiss that market analysis proceedings are in the nature of adversarial proceedings between the undertaking having significant market power and a competing undertaking such as the applicant. That is clearly not the case in regard to administrative market analysis proceedings in the course of which decisions are adopted concerning the imposition, amendment or withdrawal of specific obligations in regard to undertakings having significant market power.

51. I accordingly take the view that Article 4 of the Framework Directive, considered in the light of the principle of effective judicial protection, of which it is an expression, should be interpreted as requiring a Member State to ensure that the national procedural rules governing the adoption of decisions in the course of market analysis proceedings do not render virtually impossible or excessively difficult the exercise of rights of appeal against such decisions adopted by the national regulatory authority. It is for the national court to determine whether, in the light of all the rules of Austrian procedural law, a provision, such as Paragraph 37(5) of the TKG, which does not permit an undertaking such as the applicant in the main proceedings to participate, as a party, in market analysis proceedings is of such a nature as to render impossible or excessively difficult the exercise of the right of appeal conferred on such an undertaking by Article 4 of the Framework Directive.

33 — Case 222/86 [1987] ECR 4097.

34 — *Ibidem*, paragraph 14.

35 — *Ibidem*, paragraph 15.

36 — In this connection Tele2 relies, in particular, on the judgments in *Steffensen*, in Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, and in Case T-42/96 *Eyckeler and Malt* v *Commission* [1998] ECR II-401, paragraphs 76 to 78.

III — Conclusion

52. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it by the Verwaltungsgerichtshof:

(1) Article 4(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 (the Framework Directive) must be interpreted as meaning that, on the one hand, competing undertakings which have contractual rights vis-à-vis an undertaking having significant power in the relevant market and the rights of which are affected by a decision adopted by a regulatory authority to withdraw or amend specific obligations, and, on the other hand, undertakings which might wish to enter into contractual relations with an undertaking having significant market power and which are adversely affected, in their capacity as direct beneficiaries of Community-law provisions designed to ensure effective competition in the telecommunications sector, by a decision of a national regulatory authority, must be regarded as being undertakings affected by a decision taken by a national regulatory authority in the course of market analysis proceedings and, consequently, as having a right of appeal against such a decision.

(2) Article 4 of the Framework Directive, considered in the light of the principle of effective judicial protection, of which it is an expression, must be interpreted as requiring a Member State to ensure that the national procedural rules governing the adoption of decisions in the context of market analysis

proceedings do not render virtually impossible or excessively difficult the exercise of rights of appeal against such decisions adopted by the national regulatory authority. It is for the national court to determine whether, in the light of all the rules of Austrian procedural law, a provision such as Paragraph 37(5) of the Telekommunikationsgesetz (Law on Telecommunications), which does not permit an undertaking such as the applicant in the main proceedings to participate, as a party, in market analysis proceedings, is of such a nature as to render impossible or excessively difficult the exercise of the right of appeal conferred on such an undertaking by Article 4 of the Framework Directive.