Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 30 June 2016[1]

Case C-424/15

Xabier Ormaetxea Garai,
Bernardo Lorenzo Almendros
v
Administración del Estado

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Directive 2002/21/EC — Telecommunications sector — Electronic communications networks and services — National regulatory authorities — Requirement for independence — Institutional autonomy of the Member States)

1. In this case, the Court is, first, called upon to examine the extent of the discretion enjoyed by Member States when organising and restructuring their national regulatory authorities ('NRAs'), in view of the institutional autonomy enjoyed by Member States in this area. Secondly, the Court is asked whether the dismissal of the President and a member of the board of an NRA before the expiry of their terms of office, following an institutional reform which has the effect of merging that NRA with other regulatory authorities, prejudices the guarantee of independence of the NRA.

2. In the present case, the Spanish Government undertook wide-ranging reforms intended to maximise economies of scale and ensure a consistent approach to regulating all network industries by combining the various regulatory bodies into one single multi-sector body. It was through this institutional reform that the NRA at issue in the main proceedings, the Spanish Comisión del Mercado de las Telecomunicaciones (Commission for the Telecommunications Market (CMT)), merged with, inter alia, the Spanish Comisión Nacional de la Competencia (National Competition Commission), the Spanish Comisión Nacional del Sector Postal (National Commission for the Postal Sector) and the Spanish Comisión Nacional de Energía (National Energy Commission). As a direct consequence of that reform, the terms of office of the President and one of the members of the board of the CMT were terminated early, although their dismissals were not justified on any of the grounds exhaustively set out in Spanish law.

3. In this Opinion, I will state that, in my view, Directive 2002/21/EC[2] must be interpreted as not precluding the merger of an NRA, within the context of an institutional reform, with other regulatory bodies, such as those regulating competition, the postal sector or the energy sector, provided that the tasks conferred by that directive on NRAs can be carried out in compliance with the requirements and safeguards laid down by the directive, which is a matter for the national courts to verify.

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37, and corrigendum OJ 2013 L 241, p. 8) ('the Framework Directive').

4. I will then set out the reasons why I consider that Article 3(3a) of the Framework Directive must be interpreted as meaning that the dismissal of the President and a member of the board of an NRA before the expiry of their terms of office, following an institutional reform merging that NRA with other regulatory bodies, without any transitional arrangements being put in place to ensure that the former is allowed to serve his full term of office and that the latter's term of office may be adjusted, is at odds with the independence of that NRA.

I – Legal framework

A – *EU law*

5. The Framework Directive establishes a regulatory framework for electronic communications in order to create the conditions for effective competition in the telecommunications sector. [3]

6. In particular, the Framework Directive sets out the tasks for which NRAs are responsible and the principles on the basis of which those tasks are to be performed.

7. Article 2(g) of the Framework Directive defines an NRA as 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in [that directive] and the Specific Directives'.

8. Article 3 of the Framework Directive is worded as follows:

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

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

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

3a. Without prejudice to the provisions of paragraphs 4 and 5, [NRAs] responsible for *ex ante* market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the [NRAs].

Member States shall ensure that the head of an [NRA], or where applicable, members of the collegiate body fulfilling that function within an [NRA] referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the [NRA] concerned, or where applicable members of the collegiate body fulfilling that

3 — See recital 1 of that directive.

function shall be made public at the time of dismissal. The dismissed head of the [NRA], or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.

Member States shall ensure that [NRAs] referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member States shall also ensure that [NRAs] have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC) [4].

3b. Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective [NRAs].

3c. Member States shall ensure that [NRAs] take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.

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

5. [NRAs] and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as the originating authority.

…'

9. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [5] puts in place a regulatory framework to establish a balance between a high level of protection for the private lives of individuals and the free movement of personal data within the European Union.

10. To that end, Article 28(1) of that directive states as follows:

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

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

4 — Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ 2009 L 337, p. 1).

5 — OJ 1995 L 281, p. 31.

B – *Spanish law*

11. Real Decreto-Ley 6/1996 de Liberalización de las Telecomunicaciones (Royal Decree Law 6/1996 on the Liberalisation of Telecommunications)[6] created the CMT as an independent body responsible for ensuring the implementation of the principles of free competition, transparency and equal treatment and for arbitrating in disputes between operators in that sector.

12. Article 13(1) of Ley 2/2011 de Economía Sostenible (Law 2/2011 on the Sustainable Economy) of 4 March 2011[7] provided that the President and members of the board of the CMT were to be appointed by the Government, by Royal Decree adopted on a proposal by the relevant minister. They were selected from among individuals of recognised standing and professional expertise, following a hearing to determine the ability of the candidates at which the minister and the persons proposed as President and members of the board were questioned by the relevant committee of the Spanish Congreso de los Diputados (Congress of Deputies). The candidate for President was also examined in relation to his plan of action for the body and for the regulated sector.

13. Article 13(2) of Law 2/2011 stated that the term of office of the President and members of the board was to be six years with no possibility of reappointment to the board. The term of office of board members was to be renewed on a partial basis so as to ensure the stability and continuity of the board.

14. Under Article 16 of Law 2/2011, the President and members of the board of regulatory bodies could be dismissed only for a limited number of reasons, namely resignation, expiry of the term of office, the discovery of an incompatibility subsequent to appointment, conviction for an intentional crime, permanent incapacity or removal from office by the Government in the event of a serious breach of duties connected with the post or failure to fulfil their obligations in relation to incompatibilities, conflict of interests or duty of confidentiality. Removal from office by the Government was a separate matter from that of penalties, which could, where appropriate, be imposed following examination of the case by the relevant minister.

15. As part of the reforms implemented by Law 2/2011 to alter the number of board members of regulatory bodies and of the National Competition Commission, transitional arrangements were put in place in the Ninth Additional Provision of that law. These transitional arrangements provided, inter alia, for the appointment of new Presidents of those bodies to take place on the expiry of the term of office of the Presidents in post and for new board members to be appointed at the stage when the number of board members whose term of office was about to expire was below six.

16. The preamble to Ley 3/2013 de creación de la Comisión Nacional de los Mercados y la Competencia (Law 3/2013 creating the National Markets and Competition Commission) of 4 June 2013[8] stated that the purpose of the law was to create the National Markets and Competition Commission (CNMC) which would group together various regulatory bodies, namely the National Energy Commission, the CMT, the National Competition Commission, the Spanish Comité de Regulación Ferroviaria (Committee for Regulation of the Railways), the National Commission for the Postal Sector, the Spanish Comisión de Regulación Económica Aeroportuaria (Commission for the Economic Regulation of Airports) and the Spanish Consejo Audiovisual del Estado (State Council for Audiovisual Media). That law repealed Article 13 of Law 2/2011.

6 — BOE No 139 of 8 June 1996, p. 18973.

7 — BOE No 55 of 5 March 2011, p. 25033 (‘Law 2/2011’).

8 — BOE No 134 of 5 June 2013, p. 42191 (‘Law 3/2013’).

17. Under Article 6 of Law 3/2013, the CNMC is entrusted with the monitoring and control of the proper functioning of electronic communications markets. Under other provisions of that law, it is also entrusted, inter alia, with the general maintenance and promotion of effective competition in all production sectors and markets and the supervision and control of the electricity and gas sectors, the postal sector, audiovisual communication and the railway sector.

18. Article 23 of Law 3/2013 provides that members of the board may be dismissed on the same grounds as those set out in Article 16 of Law 2/2011.

19. Under the Second Additional Provision of Law 3/2013, the establishment of the CNMC entails the abolition of the National Competition Commission, the National Energy Commission, the CMT, the National Commission for the Postal Sector, the Committee for Regulation of the Railways, the Spanish Comisión Nacional del Juego (National Gambling Commission), the Commission for the Economic Regulation of Airports and the State Council for Audiovisual Media.

20. Real Decreto 657/2013 por el que se aprueba el Estatuto Orgánico de la Comisión Nacional de los Mercados y la Competencia (Royal Decree 657/2013, approving the Statute of the National Markets and Competition Commission) of 30 August 2013 [9] was published on 31 August 2013. The President and members of the board of the CNMC were appointed by Royal Decrees published on 10 September 2013.

21. Finally, Real Decreto 795/2013 por el que se dispone el cese de don Bernardo Lorenzo Almendros como Presidente de la Comisión del Mercado de las Telecomunicaciones (Royal Decree 795/2013, removing Mr Bernardo Lorenzo Almendros from his post as President of the Commission for the Telecommunications Market) of 11 October 2013 [10] and Real Decreto 800/2013 por el que se dispone el cese de don Xabier Ormaetxea Garai como Consejero de la Comisión del Mercado de las Telecomunicaciones (Royal Decree 800/2013, removing Mr Xabier Ormaetxea Garai from his post as member of the board of the Commission for the Telecommunications Market) of 11 October 2013 [11] brought to an end the terms of office of the President and a member of the board of the CMT. Moreover, those two Royal Decrees provide for the dismissals to take effect retroactively as from 7 October 2013.

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

22. On 10 March 2011, Mr Bernardo Lorenzo Almendros and Mr Xabier Ormaetxea Garai ('the applicants') were appointed, respectively, as President and member of the board of the CMT. Following the reforms undertaken by the Spanish Government, Royal Decrees 795/2013 and 800/2013 were published on 15 October 2013, dismissing the applicants with effect from 7 October 2013.

23. The applicants then lodged an appeal against the Royal Decrees. They contended that the Royal Decrees terminated their terms of office before the expiry of those terms without any legal ground for dismissal being established. They also claimed that adoption of the Royal Decrees had not been preceded by any disciplinary proceedings or by the communication to the applicants of the grounds for their dismissal and was therefore in breach of the second subparagraph of Article 3(3a) of the Framework Directive.

9 — BOE No 209 of 31 August 2013, p. 63623.

10 — BOE No 247 of 15 October 2013, p. 83736.

11 — BOE No 247 of 15 October 2013, p. 83741.

24. The Tribunal Supremo (Supreme Court, Spain) also states that, by letter of 4 November 2013, a complaint alleging breach of that provision was lodged by one of the applicants with the European Commission and was registered.

25. Since it had doubts as to the interpretation of EU law, the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [the Framework Directive] to be interpreted to the effect that, from the perspective of the effective protection of the public interest for which the national regulatory body [for electronic communications networks and services] is responsible, the creation by the national legislature of a regulatory and supervisory body of an unspecialised institutional model, which merges into a single body the pre-existing supervisory bodies in the energy, telecommunications and competition sectors, may be considered compatible with the directive?

(2) Must the conditions of "independence" of [NRAs] for electronic communications networks and services, referred to in Article 3(2) and (3a) of [the Framework Directive] be the same as those required for national supervisory authorities for data protection under Article 28 of Directive 95/46 …?

(3) Is the decision in the judgment of 8 April 2014 [*Commission* v *Hungary* (C-288/12, EU:C:2014:237)], applicable to a situation in which the officers of a telecommunications [NRA] are dismissed before their term of office has expired owing to the requirements of the new legal framework which creates a supervisory body grouping together various [NRAs] for regulated sectors? May that early dismissal, due only to the entry into force of a new national law and not to an unforeseen change in the circumstances of the office-holders as previously established in national law, be considered compatible with the provisions of Article 3(3a) of [the Framework Directive]?'

III – My analysis

26. By its first question, the referring court asks, in essence, whether the Framework Directive must be interpreted as meaning that the merger of an NRA, in the context of an institutional reform, with other regulatory bodies such as those regulating competition, the postal sector or the energy sector, is at odds with the requirements laid down in that directive relating, in particular, to the independence, capacity and technical competence of the NRA.

27. By its second and third questions, which, in my view, should be dealt with together, the referring court seeks to ascertain, in essence, whether Article 3(3a) of the Framework Directive must be interpreted as meaning that the dismissal of the President and of a member of the board of an NRA before the expiry of their terms of office, following an institutional reform which has the effect of merging that NRA with other regulatory bodies, runs counter to the guarantee of independence of the NRA.

28. The first question posed by the referring court in fact requires an examination of the degree of discretion enjoyed by Member States in organising and restructuring their NRAs, having regard to the institutional autonomy that Member States have in this area.

29. The Framework Directive does not set out any requirements as to the form that an NRA must take. Article 2(g) of the directive merely defines an NRA as 'the body or bodies charged by a Member State with any of the regulatory tasks assigned in [that] directive and the Specific Directives'. In addition, it is settled case-law that, although the Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs within the meaning of that provision, that

autonomy may be exercised only in full compliance with the objectives and obligations laid down in the Framework Directive [12] .

30. The Court has thus acknowledged that Directive 2002/22/EC [13] does not in principle preclude, of itself, the national legislature from acting as an NRA within the meaning of the Framework Directive or preclude Member States from assigning tasks deriving from the application of the regulatory framework for electronic communications services to several bodies, provided that, in carrying out their functions, those bodies meet the requirements of competence, independence, impartiality and transparency laid down by those directives and that decisions which they take in the performance of those functions may be subject to an effective appeal to a body independent of the parties involved [14]. Similarly, the functions of assigning national numbering resources and managing national numbering plans — functions devolved to NRAs — may be shared by a number of independent regulatory authorities, including ministerial authorities, provided that the allocation of the tasks is made public in an easily accessible form, and notification is given to the Commission. [15]

31. It follows from this case-law that, within the context of their institutional autonomy, Member States have wide discretion as regards the organisation and structuring of their NRAs, which is limited by the need to comply with the requirements and safeguards laid down by the Framework Directive.

32. Thus, in accordance with Article 3(2) of the Framework Directive, the national body responsible for carrying out the tasks assigned by the directive to NRAs must be legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services and, where applicable, the Member State must ensure effective structural separation of the regulatory function from activities associated with ownership or control of undertakings providing electronic communications networks and/or services.

33. Moreover, in order to comply with the requirements in Article 3(3) of the Framework Directive, that body must be able to fulfil the tasks assigned by the directive to NRAs impartially, transparently and in a timely manner and must also have available to it adequate financial and human resources to carry out those tasks.

34. I am therefore of the opinion that there is nothing, in principle, to preclude the legislation of a Member State providing for an NRA to merge with other regulatory bodies and for them all to form one single entity, as provided for under Spanish law. The national court must, however, verify that the tasks conferred by the Framework Directive on the NRA are performed in compliance with the requirements and safeguards laid down by that directive.

35. Furthermore, the Spanish model is by no means exceptional within the European Union. The Grand Duchy of Luxembourg and the Kingdom of the Netherlands have also created a single body responsible for regulating various sectors, such as transport, gas, energy, postal services and electronic communications. In the United Kingdom, the Office of Communications (Ofcom) is responsible for monitoring the television, radio and electronic communications sectors. In Belgium, Greece, France, Slovakia and Sweden, a single body is responsible for regulating the postal and telecommunications sectors. [16]

12 — See judgment of 17 September 2015, *KPN* (C-85/14, EU:C:2015:610, paragraph 53 and the case-law cited).

13 — Directive of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

14 — See judgments of 6 October 2010, *Base and Others* (C-389/08, EU:C:2010:584, paragraph 30), and of 17 September 2015, *KPN* (C-85/14, EU:C:2015:610, paragraph 57).

15 — See judgment of 6 March 2008, *Comisión del Mercado de las Telecomunicaciones* (C-82/07, EU:C:2008:143, paragraphs 25 to 27).

16 — See the website of the Autorité de régulation des communications électroniques et des postes (Regulatory authority for postal and electronic communications) at the following address: http://www.arcep.fr/index.php?id=11270#c21478.

36. Consequently, in the light of the above, I consider that the Framework Directive must be interpreted as not precluding the merger of an NRA, within the context of an institutional reform, with other regulatory bodies, such as those regulating competition, the postal sector or the energy sector, provided that the tasks conferred by that directive on NRAs can be carried out in compliance with the requirements and safeguards laid down by the directive, which is a matter for the national courts to verify.

37. That said, it is now appropriate to examine whether, following such an institutional reform, the effect of the dismissal of the President and a member of the board of the NRA before the expiry of their terms of office is to prejudice the guarantee of independence of that NRA.

38. In particular, the referring court asks whether the Court's case-law in relation to Directive 95/46 may be applied to the present case. In the case giving rise to the judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237), the Court, in the context of an action for failure to fulfil obligations, was required to examine, inter alia, whether the requirement, set out in the second subparagraph of Article 28(1) of that directive, to ensure that each supervisory authority responsible for supervising the processing of personal data is able to carry out the tasks entrusted to it in complete independence, entailed an obligation for the Member State concerned to allow such an authority to serve its full term of office. [17]

39. The Court observes, in that judgment, that the supervisory authorities responsible for supervising the processing of personal data must enjoy an independence allowing them to perform their duties free from external influence, thus precluding any directions or any other external influence in whatever form, whether direct or indirect, which may have an effect on their decisions and which could call into question the performance by those authorities of their task of striking a fair balance between the protection of the right to private life and the free movement of such data [18]. In the Court's view, the mere risk that the State scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks, since, as the Court points out, there could be 'prior compliance' on the part of those authorities and a suspicion of partiality. [19]

40. That is why the Court held, in that judgment, that 'if it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence … That is true even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model, which must be organised in such a way as to meet the requirement of independence laid down in the applicable legislation'. [20]

41. In the view of the Spanish, Belgian and Netherlands Governments and also that of the Commission, the fundamental differences between the tasks assigned to the authorities responsible for supervising the protection of personal data and those tasks assigned to NRAs justify a different definition being given to the notion of independence in the present case from that adopted by the Court in the case-law referred to above.

17 — Judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237, paragraph 50).
18 — Judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237, paragraph 51).
19 — Judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237, paragraph 53).
20 — Judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237, paragraph 54).

42. While it is true that the role assigned to the authorities responsible for supervising the protection of personal data and that assigned to NRAs have different aims, it is nonetheless the case that compliance with the requirement of independence is equally an essential condition for the proper functioning of NRAs. I therefore see no reason to apply a different solution from that adopted in the judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237).

43. The importance of regulating electronic communications services, which directly affects freedom of communication and consumer protection, should not be underestimated. Thus, NRAs must be truly independent not only as regards economic operators but also political operators. Moreover, this is apparent from EU provisions themselves.

44. Article 3(2) of the Framework Directive states that Member States must guarantee the independence of NRAs by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. In addition, it is clear from recital 13 of Directive 2009/140/EC,[21] which added Article 3(3a) to the Framework Directive, that, by that addition, the EU legislature specifically intended to strengthen the independence of NRAs, by making 'express provision … to ensure that, in the exercise of its tasks, an [NRA] responsible for *ex ante* market regulation or for resolution of disputes between undertakings is *protected against external intervention or political pressure* liable to jeopardise its independent assessment of matters coming before it'.[22] The EU legislation explained that 'such outside influence makes a national legislative body unsuited to act as an [NRA] under the regulatory framework'.

45. In view of the regulatory function conferred on NRAs and the powers granted to them for that purpose, it is not surprising that the EU legislature intended to strengthen the guarantee of independence of NRAs. It should be noted that NRAs, within the context of the tasks assigned to them by the Framework Directive, are required, inter alia, to grant individual rights[23] and to settle disputes between undertakings, with the possibility of imposing obligations.[24] They also have certain regulatory powers to the extent that they may be required to control prices[25] or to adopt corrective measures if they consider that the market is not competitive by imposing obligations on undertakings with significant market power.[26] They therefore have a broad discretion, as the Court observed in its judgment of 3 December 2009, *Commission* v *Germany* (C-424/07, EU:C:2009:749).[27]

46. It is therefore essential that the requirement of independence should be complied with and that NRAs should be able to perform their functions impartially and free from external pressure, especially when the Member State has retained ownership or control of undertakings which provide electronic communications networks and/or services. This had already been emphasised by the Court in its judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125), in which it stated that independent authorities of that type — in that case, the Court was not referring only to the authorities

21 — Directive of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21, 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).

22 — My emphasis (in italics).

23 — See, in particular, Articles 9 to 11 of the Framework Directive. See also Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), as amended by Directive 2009/140.

24 — See Article 20 of the Framework Directive.

25 — See Article 13 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), as amended by Directive 2009/140.

26 — See Article 17 of Directive 2002/22, as amended.

27 — See paragraph 61 and the case-law cited.

responsible for the monitoring of personal data but also to other administrative authorities existing in the German judicial system type — often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law, subject to the review of the competent courts. [28]

47. On that basis, the composition of NRAs, the terms of office of their members, and above all, the irrevocability of those terms on grounds other than those provided for by law are safeguards against any external pressure. By providing in the second subparagraph of Article 3(3a) of the Framework Directive that the head of the NRA or where applicable, members of the collegiate body fulfilling that function within the NRA or their replacements may not be dismissed for any reasons other than those laid down by law and because they no longer fulfil the conditions required for the performance of their duties, the EU legislature is seeking to strengthen the guarantee of the independence of NRAs by protecting the decision-making members from all external pressure, in particular any threat — including an indirect threat — to terminate a term of office prematurely for reasons other than those laid down by law.

48. The premature dismissal of the head of an NRA, as in the present case, and, potentially, of one of the members of the board of that NRA, for the sole reason that the Member State has chosen to amend the institutional model of that NRA, may therefore constitute a threat to the independence of the NRA.

49. That being the case, how can the institutional autonomy enjoyed by each Member State be reconciled with the requirement for independence?

50. In its judgment of 8 April 2014, *Commission* v *Hungary* (C-288/12, EU:C:2014:237), the Court stated that the early termination of the term of office of a supervisory authority compromises the requirement of independence and 'that is true even where [that termination] comes about as a result of the restructuring or changing of the institutional model, *which must be organised in such a way as to meet the requirement of independence laid down in the applicable legislation*'. [29] It may be inferred from this that the restructuring or changing of the institutional model of a supervisory authority or, for our purposes, an NRA, are not necessarily incompatible with the requirement to comply with the NRA's independence.

51. It is my opinion, in the light of the case-law referred to above, that it must be possible for the Member State concerned to put in place transitional arrangements to ensure compliance with the requirement for an NRA to be independent while preparations are being made for the restructuring of the NRA.

52. In the present case, it should be noted that such arrangements had been provided for by the Spanish Government in 2011 but were repealed by Law 3/2013. The Ninth Additional Provision of Law 2/2011 which changed the number of members of the board of regulatory bodies and of the National Competition Commission contained transitional arrangements specifically to enable the reforms implemented by that law to be prepared for, whilst guaranteeing the terms of office of the Presidents concerned. Under that law, the appointment of new Presidents was to take place on the expiry of the term of office of the Presidents in post and new board members were to be appointed at the stage when the number of board members whose term of office was about to expire was below six. Similarly, it was provided that, when Law 2/2011 came into force, the Vice-Presidents of the boards of regulatory bodies would continue to perform their duties until expiry of their terms of office, following which the post of Vice-President of each body would be abolished.

28 — See paragraph 42.

29 — Paragraph 54. My emphasis.

53. Even though, as the Spanish Government observes, allowing all the board members of the NRA and of the other regulatory bodies affected by the reform to serve their full term of office could result in the creation of a new body that was expensive and inefficient, I am nevertheless of the view that transitional arrangements providing the head of the NRA or, where applicable, the members of the collegiate body fulfilling that function within the NRA to serve their full term of office, would enable the independence of that NRA to be guaranteed.

54. Similarly, even though the role of a member of the board of an NRA differs from that of the head of that authority, the fact remains that the board member must also be able to act independently and not seek or take instructions from external sources.[30] Since Spanish law provided for the same limited number of reasons justifying dismissal to apply to members of the board, the change in institutional model sought by the Spanish Government cannot have the effect of simply bringing an end to their term of office in the absence of any transitional arrangements. It seems to me that the initial solution adopted by Law 2/2011 would have made it possible to comply with the requirement for NRAs to be independent. The national court, must therefore, in my view, consider to what extent the term of office of those board members could have been adjusted by means of transitional arrangements.

55. In view of all the above considerations, I consider that Article 3(3a) of the Framework Directive must be interpreted as meaning that the dismissal of the President and a member of the board of an NRA before the expiry of their terms of office, following an institutional reform which had the effect of merging that NRA with other regulatory bodies, without any transitional arrangements being put in place to ensure that the former is allowed to serve his full term of office or that the latter's term of office may be adjusted, is at odds with the independence of that NRA.

IV – Conclusion

56. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunal Supremo (Supreme Court, Spain) as follows:

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as not precluding the merger of a national regulatory authority, within the context of an institutional reform, with other regulatory bodies, such as those governing competition, the postal sector or the energy sector, provided that the tasks conferred by Directive 2002/21, as amended, on national regulatory authorities can be carried out in compliance with the requirements and safeguards laid down by that directive, which is a matter for the national courts to verify.

Article 3(3a) of Directive 2002/21, as amended, must be interpreted as meaning that the dismissal of the President and a member of the board of a national regulatory authority before the expiry of their terms of office, following an institutional reform which had the effect of merging that authority with other regulatory bodies, without any transitional arrangements being put in place to ensure that the former is allowed to serve his full term of office or that the latter's term of office may be adjusted, is at odds with the independence of that authority.

30 — See the first subparagraph of Article 3(3a) of the Framework Directive.