Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 October 2016*

(Reference for a preliminary ruling — Electronic communications networks and services — Directive 2002/21/EC — Article 4(1) — Right of appeal against a decision taken by a national regulatory authority — Effective appeal mechanism — Decision of a national regulatory authority to continue to apply pending the outcome of the appeal — Temporal effects of a decision of a national court annulling a decision of a national regulatory authority — Possibility of annulling a decision of the national regulatory authority with retroactive effect — Principles of legal certainty and protection of legitimate expectations)

In Case C-231/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 18 February 2015, received at the Court on 21 May 2015, in the proceedings

Prezes Urzędu Komunikacji Elektronicznej,

Petrotel sp. z o.o. w Płocku

v

Polkomtel sp. z o.o.,

THE COURT (Second Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Prezes Urzędu Komunikacji Elektronicznej, by L. Ochniewicz, radca prawny,

— Petrotel sp. z o.o. w Płocku, by K. Stompel, adwokat,

— Polkomtel sp. z o.o., by E. Barembruch, radca prawny,

* Language of the case: Polish.

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by G. Braun, J. Hottiaux and L. Nicolae, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1), first subparagraph, first and third sentences, and second subparagraph, of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) ('the Framework Directive').

2 The request has been made in proceedings between (i) the Prezes Urzędu Komunikacji Elektronicznej (President of the Office for Electronic Communications; 'President of the UKE') and Petrotel sp. z o.o. w Płocku ('Petrotel') and (ii) Polkomtel sp. z o.o., concerning a decision taken by the President of the UKE in the context of a dispute between those two undertakings relating to the call termination rates applied by Polkomtel on its mobile telephone network.

Legal context

3 Article 4 of the Framework Directive, which relates to the right of appeal against a decision taken by a national regulatory authority ('NRA'), provides in paragraph 1:

'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 [an NRA] 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 to enable it to carry out its functions effectively. 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 the appeal, the decision of the [NRA] shall stand, unless interim measures are granted in accordance with national law.'

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

4 In a procedure which took place prior to the proceedings before the referring court, the President of the UKE, after carrying out an analysis of the relevant market, adopted a decision on 30 September 2008 whereby he required Polkomtel, as an undertaking having significant market power in the market concerned, to adjust the voice call termination rates on its mobile telephone network to the level set in that decision ('the decision of 30 September 2008'). Polkomtel appealed against that decision.

5 While the appeal against the decision of 30 September 2008 was pending before the court with jurisdiction, Polkomtel entered into negotiations with Petrotel concerning, inter alia, the adjustment of voice call termination rates on its mobile telephone network. When those undertakings failed to come to an agreement, the President of the UKE was asked to resolve the dispute between them.

6 By a decision of 17 March 2009, which implements the decision of 30 September 2008, the President of the UKE resolved that dispute by amending, in particular, the terms in the contract concluded between Petrotel and Polkomtel which related to the voice call termination rates on Polkomtel's mobile telephone network ('the decision of 17 March 2009'). By that decision the President of the UKE required Polkomtel to adjust those rates to the level set in his decision of 30 September 2008. Polkomtel also brought an appeal against the decision of 17 March 2009 before the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers, Poland).

7 While the appeal against the decision of 17 March 2009 was pending, the decision of 30 September 2008 was annulled by a judgment of 23 March 2011 of the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers), which was upheld by a judgment of 30 January 2012 of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland).

8 By a judgment of 26 October 2012, the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers) also annulled the decision of 17 March 2009 on the ground that there was no longer any basis for the latter, which implemented the decision of 30 September 2008, since the obligations laid down by the decision of 30 September 2008 had been annulled with retroactive effect. It therefore considered that annulment of the decision of 17 March 2009 also entailed the annulment, with retroactive effect, of Polkomtel's obligation to adjust its rates to the level set by the decision of 30 September 2008.

9 The President of the UKE and Petrotel appealed against the judgment of the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers) of 26 October 2012 before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which dismissed their appeals by a judgment of 19 September 2013, holding, inter alia, that it was not appropriate to apply in this case the principles of administrative procedure established by the case-law of the Polish administrative courts, according to which the annulment of an administrative decision produces effects only *ex nunc*. The President of the UKE and Petrotel lodged an appeal on a point of law against that judgment before the Sąd Najwyższy (Supreme Court).

10 The referring court agrees with the approach adopted by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), taking the view that the application, in circumstances such as those of the case before it, of the principles of administrative procedure referred to in the previous paragraph does not secure effective judicial protection for the purposes of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 4 of the Framework Directive. In its view it was reasonable for the courts ruling in a case concerning regulation of electronic communications networks and services to develop an independent approach with regard to the effects of the annulment of the decision of 30 September 2008.

11 It explains that, following that approach, the court ruling on the appeal against the decision of 17 March 2009, which was immediately enforceable and which implemented the decision of 30 September 2008, could, following the annulment of the latter decision, either alter the voice call termination rates on the mobile telephone network for the period covered by the decision of 17 March 2009, or annul that decision, removing the obligation to apply the termination rates set for that period. In the referring court's view, annulment of the decision of 17 March 2009 does not undermine the effectiveness of EU law on electronic communications and enables the NRA to issue a new decision setting the level of voice call termination rates on the mobile telephone network which are provided for in the contract between the network providers for the period covered by the decision of 17 March 2009.

12 However, given that Petrotel maintains that the decision of 17 March 2009 'stood' within the meaning of the second subparagraph of Article 4(1) of the Framework Directive and that annulment of the decision of 30 September 2008 cannot have effect *ex tunc*, the referring court asks whether that provision entails a restriction of the Member States' procedural autonomy and is uncertain about the meaning to be given to implementation of the principle of effective judicial protection for the purposes of that article, read in conjunction with Article 47 of the Charter.

13 According to the referring court, a finding that the principle of effective judicial protection authorises variation or annulment, with retroactive effect, of a decision of the NRA serves to maintain the balance between the principle of the effectiveness of EU law regulating electronic communications networks and services and the principle of effective judicial protection; nor is such a finding contrary to the principles of legal certainty or the protection of legitimate expectations.

14 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the first and third sentences of [the first subparagraph of] Article 4(1) of the Framework Directive be interpreted as meaning that — in the event that a network provider contests a decision of the NRA setting call termination rates in the network of that undertaking [(the first decision)] and that undertaking then contests a subsequent decision (implementing decision) of the NRA amending a contract between the addressee of the [first decision] and another undertaking so that the rates paid by that other undertaking for call termination in the network of the addressee of the [first decision] correspond to the rates set in the [first decision] — the national court, having found that the [first decision] has been annulled, cannot annul the implementing decision in view of the [second subparagraph] of Article 4(1) of the Framework Directive and the interests which the undertaking benefiting from the implementing decision derives from the principle of the protection of legitimate expectations or of legal certainty, or must the first and third sentences of [the first subparagraph of] Article 4(1) of the Framework Directive, in conjunction with Article 47 of the Charter, be interpreted as meaning that the national court may annul the implementing decision of the NRA and consequently remove the obligations laid down therein for the period preceding the judgment if it finds that that is necessary in order to provide effective protection for the rights of the undertaking appealing against the NRA's decision that enforces the obligations laid down in the [first decision] which was subsequently annulled?'

The question referred for a preliminary ruling

Admissibility

15 Polkomtel maintains that the question raised by the Sąd Najwyższy (Supreme Court) is inadmissible on the grounds (i) that the referring court does not identify the applicable provisions of Polish law and does not specifically describe the connection that it finds between the provisions of national law and the provisions of EU law in respect of which it is requesting an interpretation and (ii) that the question raised is general and hypothetical since it amounts to seeking a general assessment of the effects of a decision of a national court annulling a decision of the NRA when such an assessment is not necessary for the purpose of resolving the dispute in the main proceedings.

16 In that regard, it should be observed that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or

where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraph 37 and the case-law cited).

17 That is not the case here. The order for reference gives an explanation of the factual and legal context and of the case-law of the Polish courts which is sufficient to allow the scope of the question referred to be determined. Moreover, the request for a preliminary ruling makes clear that the referring court is seeking to ascertain whether Article 4(1) of the Framework Directive permits a national court to annul with retroactive effect a decision of the NRA and that the answer to that question is necessary in order for it to give a decision in the appeals brought against the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which annulled, with retroactive effect, the decision of 17 March 2009.

18 Consequently, the question referred for a preliminary ruling is admissible.

Substance

19 By its question, the referring court asks, in essence, whether Article 4(1), first subparagraph, first and third sentences, and second subparagraph, of the Framework Directive, in conjunction with Article 47 of the Charter, must be interpreted as meaning that a national court hearing an appeal against a decision of the NRA must be able to annul that decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal.

20 It must be recalled at the outset that the Court has already held that Article 4 of the Framework Directive is an expression of the principle of effective judicial protection safeguarded by Article 47 of the Charter, pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under EU law (see, to that effect, judgment of 22 January 2015, *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraph 33 and the case-law cited).

21 The first and third sentences of the first subparagraph of Article 4(1) of the Framework Directive require the Member States to provide for effective appeal mechanisms under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of an NRA has the right of appeal against the decision. Under the second subparagraph of Article 4(1), the decision of the NRA is to stand pending the outcome of the appeal, unless interim measures are granted in accordance with national law.

22 Article 4(1) of the Framework Directive does not lay down specific rules of procedure for implementing the obligation to ensure that an effective appeal mechanism exists; nor does it make any provision as to the temporal effects of a decision of a national court annulling a decision of the NRA.

23 In the absence of EU rules governing the matter, it is, generally, for the Member States, in the exercise of their procedural autonomy and subject to compliance with the requirements arising from the principles of equivalence and effectiveness, to lay down the procedural rules applicable to an appeal such as that at issue in the main proceedings (see, by analogy, judgments of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 47 and the case-law cited, and of 27 June 2013, *Agrokonsulting*, C-93/12, EU:C:2013:432, paragraph 35).

24 Nevertheless, as is clear from paragraph 20 of the present judgment, Article 4(1) of the Framework Directive, which lays down the requirement to ensure that an effective appeal mechanism exists, is an expression of the principle, enshrined in Article 47 of the Charter, of effective judicial protection of an individual's rights under EU law (see, to that effect, judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 44); that principle must be respected in every case.

25 Therefore, a national court hearing an appeal against a decision of the NRA must be able to annul the decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal.

26 The second subparagraph of Article 4(1) of the Framework Directive in no way precludes or restricts that ability.

27 Indeed, all that follows from that provision is that the appeal brought against a decision of the NRA does not have suspensory effect, unless interim measures are granted in accordance with national law. The NRA's decision will, as a rule, thus apply throughout the proceedings: that does not mean that it is not possible, at the end of the proceedings, to annul that decision with retroactive effect if the national court finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal.

28 Moreover, as the referring court points out, the fact that a national court has the possibility of annulling a decision of the NRA with retroactive effect is not incompatible with observance of the principles of legal certainty and the protection of legitimate expectations.

29 It should be recalled in that regard that the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them (see, to that effect, judgments of 10 September 2009, *Plantanol*, C-201/08, EU:C:2009:539, paragraph 46 and the case-law cited, and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited).

30 It is clear from the second subparagraph of Article 4(1) of the Framework Directive that, under that provision, the decision of the NRA against which the appeal has been brought is to continue to apply only pending the outcome of the appeal. In those circumstances, economic operators who are parties to an appeal such as that provided for in Article 4(1) of the directive cannot have a legitimate expectation that, in the event of the decision of the NRA in question being annulled, that annulment will not produce effects *ex tunc*.

31 Having regard to all the foregoing considerations, the answer to the question raised is that Article 4(1), first subparagraph, first and third sentences, and second subparagraph, of the Framework Directive, in conjunction with Article 47 of the Charter, is to be interpreted as meaning that a national court hearing an appeal against a decision of the NRA must be able to annul that decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal.

Costs

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

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

Article 4(1), first subparagraph, first and third sentences, and second subparagraph, 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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a national court hearing an appeal against a decision of the national regulatory authority must be able to annul that decision with retroactive effect if it finds that to be necessary in order to provide effective protection for the rights of the undertaking which has brought the appeal.

[Signatures]