

Case C-243/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

14 April 2021

Referring court:

Sąd Okręgowy w Warszawie (Regional Court in Warsaw, Poland)

Date of the decision to refer:

6 April 2021

Applicant:

TOYA Sp. z o.o.

Polska Izba Informatyki i Telekomunikacji

Defendant:

Prezes Urzędu Komunikacji Elektronicznej

Subject matter of the main proceedings

The case before the referring court concerns an action lodged by TOYA Sp. z o.o. against a decision of the Prezes Urzędu Komunikacji Elektronicznej (President of the Office of Electronic Communications) (the Polish national regulatory authority, 'the OEC President') determining *ex ante* conditions of access to the physical infrastructure of TOYA Sp. z o.o. and requiring the company to ensure readiness to enter into both framework and detailed contracts and to accept requests for access to its physical infrastructure in accordance with the conditions of access set out in that decision.

Subject matter and legal basis of the reference

Pursuant to Article 267 TFEU, the referring court wishes to determine whether the provisions of EU law regulating the telecommunications market preclude the provision of Article 18(3) of the ustawa o wspieraniu rozwoju usług i sieci telekomunikacyjnych (Law on support for the development of

telecommunications services and networks) from being interpreted in a manner that authorises the OEC President to impose on a telecommunications undertaking which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but which does not have significant power in the cable duct market, a regulatory obligation consisting in the application of conditions established *ex ante* by the OEC President governing the principles of access to the physical infrastructure of that operator, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator's physical infrastructure and the existence of effective competition in the market.

In deciding this case, the referring court is required to apply the legal and factual situation as at the date of the decision, that is to say, 11 September 2018, when the following directives were in force: 2002/19/EC and 2002/21/EC, which ceased to be in effect as of 21 December 2020 pursuant to Article 125 of the Directive establishing the European Electronic Communications Code ('the EECC Directive'), which superseded the provisions of those directives. In addition, the EECC Directive has not yet been implemented in the Polish legal system. However, if the Court were to find that the provisions of the EECC Directive should be the subject of the questions referred, the referring court requests that version II of the question be answered.

Question(s) referred for a preliminary ruling

1. Must Article 8(3) 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, read in conjunction with Article 3(5) and Article 1(3) and (4) of Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks be interpreted as precluding a national regulatory authority from imposing on an operator which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but has not been designated as having significant market power, the obligation to apply the conditions for access to that operator's physical infrastructure determined *ex ante* by that authority, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator's physical infrastructure and the existence of effective competition in the market?

Alternatively (version II):

2. Must Article 67(1) and (3) read in conjunction with Article 68(2) and (3) of Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, read in conjunction with Article 3(5) and Article 1(3) and (4) of Directive

2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks be interpreted as precluding a national regulatory authority from imposing on an operator which owns physical infrastructure and is at the same time a provider of publicly available electronic communications services or networks, but has not been designated as having significant market power, the obligation to apply the conditions for access to that operator's physical infrastructure determined *ex ante* by that authority, including the rules and procedures for entering into contracts and the applicable access fees, irrespective of the existence of a dispute over access to that operator's physical infrastructure and the existence of effective competition in the market?

Provisions of Community law relied on

Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (OJ 2014 L 155, p. 1), as amended ('the Cost Directive') – Article 1(4) and Article 3(1), (2) and (5)

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 – Article 8(5)

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), as amended – Article 8(1–5) and Article 9(1) and (2)

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36) – Article 67(1) and (3) and Article 68

Provisions of national law relied on

Ustawa z 7 maja 2010 r. o wspieraniu rozwoju usług i sieci telekomunikacyjnych (Law of 7 May 2010 on support for the development of telecommunications services and networks) (consolidated text: *Dziennik Ustaw* (Journal of Laws) of 2017, item 2062, 'the SDTSN Law') – Article 17(1) and (2), Article 18(1) to (3) and (6) to (8) and Article 22(1) to (3)

Ustawa z dnia 16 lipca 2004 r. prawo telekomunikacyjne (Telecommunications Law of 16 July 2004) (consolidated text: *Dziennik Ustaw* (Journal of Laws) of 2019, item 2460, 'the TL') – Article 139

Succinct presentation of the facts and procedure in the main proceedings

- 1 TOYA Sp. z o.o. is a telecommunications undertaking and is also a network operator within the meaning of the Law of 7 May 2010 on support for the development of telecommunications services and networks ('the SDTSN Law').
- 2 The OEC President initiated *ex officio* administrative proceedings and requested that TOYA Sp. z o.o. provide information on the conditions for providing access to its physical infrastructure. In response, TOYA Sp. z o.o. provided the requested information.
- 3 On 11 September 2018, the OEC President issued a decision establishing the conditions of access to the physical infrastructure owned by TOYA Sp. z o.o. with respect to cable ducts and with respect to telecommunication ducts in buildings and obliged TOYA Sp. z o.o. to ensure readiness to enter into both framework and detailed contracts as well as to accept requests for access to its physical infrastructure in accordance with the conditions of access set out in that decision.
- 4 TOYA Sp. z o.o. brought an action against the decision of the OEC President to the Sąd Okręgowy w Warszawie Sąd Ochrony Konkurencji i Konsumentów (Regional Court in Warsaw, Poland, Competition and Consumer Protection Court – the referring court).

Essential arguments of the parties in the main proceedings

- 5 In the grounds of the decision, the OEC President referred to Article 18(3) of the SDTSN Law, pursuant to which, after the network operator has presented information on the conditions for providing access to its physical infrastructure, the OEC President, following the criteria set out in Article 22 (1) to (3), may by way of a decision establish the conditions for providing access to that physical infrastructure. Pursuant to Article 22(1) of the SDTSN Law, the OEC President issues a decision on access to physical infrastructure, taking into account, in particular, the need to ensure non-discriminatory and proportionate access conditions.
- 6 The OEC President stressed that those principles are enshrined in EU legislation, including, in particular, the Treaty on European Union. Consequently, they should be applied taking into account EU legal doctrine and case-law. The principle of proportionality means that the conditions of access to the physical infrastructure established by the administrative decision must be necessary and appropriate, while at the same time the measures applied must be the least restrictive. From this principle follows the prohibition on sovereign action beyond that which is necessary. Therefore, when assessing the need for the application of a particular measure by the Member States, it must first be assessed whether or not a less restrictive measure is available in the situation in question. The assessment of the necessity for, and scope of, the measure is the responsibility of the authority, which verifies the existence of the grounds provided for in the legislation. The

principle of proportionality is always linked to specific and competing interests. As regards that principle, the OEC President decided that there was no other manner of determining the conditions for access to the physical infrastructure owned by TOYA Sp. z o.o. than by way of an administrative decision. In the opinion of the OEC President, the rules of access determined in the decision, although they affect the property rights of TOYA Sp. z o.o., are not excessively restrictive for the company and take due account of its rights and interests. In particular, the company is still capable of determining the content of the framework contract in order to make it compatible with its own operating rules, provided that the provisions of such a framework contract do not conflict with the access conditions laid down in the decision and are not less favourable to the undertakings benefiting from that access.

- 7 The OEC President also pointed out that the provisions of the SDTSN Law concerning the grounds that authorise the OEC President to issue decisions establishing conditions for access to physical infrastructure do not refer to either the scale of the infrastructure owned or the number of disputes over access to that infrastructure. Therefore, when issuing the decision, the OEC President took into account the fact that TOYA Sp. z o.o. would be obliged to give equal treatment to undertakings applying for access under Article 17 of the SDTSN Law. Having regard to the need to ensure proportionate access conditions, the OEC President set the relevant access conditions, adopting a sufficient, but at the same time minimal set of measures to ensure that the objective of that access is achieved.
- 8 The OEC President clarified that the decision was in line with the objectives set out in the Cost Directive, whose provisions were implemented in the SDTSN Law. In particular, it took into account recitals 4, 5, 7, 8 and 9 of the Directive, which point to the benefits of sharing infrastructure and the need to remove barriers that result in the inefficient use of existing resources. According to the OEC President, the universal procedure adopted in the operative part of the decision, which determines the conditions for access to physical infrastructure, will contribute to aligning the time limits, procedures, and market rates related to making cable ducts available. As a consequence, it will result in the equal treatment of all operators, contribute to reducing the costs of acquiring infrastructure for telecommunications undertakings which benefit from access to physical infrastructure, and allow wider access to cable ducts.
- 9 The OEC President is of the opinion that the provision of Article 18(3) of the SDTSN Law authorises the OEC President to establish the conditions for access to physical infrastructure in any situation, even where there is no dispute between the parties and also where the operator does not have significant market power in the relevant market.
- 10 In the view of TOYA Sp. z o.o., the decision, which imposes on it *ex ante* the obligation to enter into framework contracts, grossly infringes Article 3(2) and (5) of the Cost Directive, and also recital 12 and Article 1(4) of the Cost Directive, read in conjunction with Article 8(2) and (3) of the Access Directive and

Article 8(5)(f) of the Framework Directive, pursuant to which such an obligation may only be imposed on an operator which has significant market power in the relevant market, which market must be duly analysed by the national regulatory authority.

Succinct presentation of the reasons for the reference

- 11 The key matter for the resolution of the case at issue is the interpretation of Article 18(3) of the SDTSN Law in the light of the provisions of EU law regulating the telecommunications market.
- 12 Article 18 was introduced into Polish law in order to implement the assumptions and solutions arising from the Cost Directive, whose purpose was to lower the costs of providing broadband internet access.
- 13 Article 3(2) of the Cost Directive provides for the network operator's obligation to meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions. Where access is refused or a dispute arises over the specific terms and conditions of such access, the national regulatory authority should, pursuant to Article 3(5) of the Cost Directive, issue a decision to resolve the dispute. Therefore, the Cost Directive only provides for intervention by the national regulatory authority in the event of a dispute in a specific case and does not contain provisions allowing that authority to impose an obligation to enter into framework contracts in that regard or to interfere with such contracts.
- 14 In the light of the provisions of the Cost Directive, there is doubt as to whether the OEC President has the authority to take sovereign action in the form of issuing an administrative decision that establishes the conditions for access to physical infrastructure and obliges TOYA Sp. z o.o. to apply those conditions vis-à-vis any operator who requests access. Indeed, in order to achieve the objectives of the Cost Directive, it would be sufficient to use administrative decisions only where there is a dispute or where competition in the relevant market is distorted.
- 15 In addition, the decision imposes *ex ante* obligations on TOYA Sp. z o.o., whereas it follows from the provisions of the Access Directive and the Framework Directive, and now the EECC Directive, that such obligations may only be imposed where there is no effective and sustainable competition in the market in question, and on operators which have significant power in that market. However, before issuing the decision in question, the OEC President did not carry out any analysis as to the existence of effective competition in the cable duct market, and there is no doubt that TOYA Sp. z o.o. does not have significant power in that market. The referring court also points out that under Article 1(4) of the Cost Directive, if any provision of that Directive conflicts with a provision of the Directives referred to therein, in particular the Framework Directive and the Access Directive, the relevant provisions of the latter Directives are to prevail.

- 16 It should be noted that, under Polish law, the OEC President's authority to impose *ex ante* obligations regarding telecommunications access on a telecommunications undertaking is also dependent on whether such action is necessary to ensure effective competition. It follows from Article 139(1b) of the TL, read in conjunction with Article 139(1) of the TL, that the obligation to provide access to buildings and telecommunications infrastructure is imposed on all telecommunications undertakings by law, irrespective of whether they have significant market power, but the adoption of a decision imposing *ex ante* obligations must be justified by the lack of effective competition.
- 17 Apart from the decision concerning TOYA Sp. z o.o., the OEC President issued six similar decisions concerning six other operators, who have also brought actions against them. The preliminary ruling in this case will also affect the manner in which the cases resulting from the other actions are resolved and will therefore have a significant impact on the functioning of the national telecommunications market.

WORKING DOCUMENT