

Case C-329/21**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:**

26 May 2021

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

18 May 2021

Applicant:

DIGI Communications NV

Defendant:

Nemzeti Média- és Hírközlési Hatóság Hivatala (Office of the National Media and Communications Authority, Hungary)

Subject matter of the main proceedings

Administrative-law action in the field of communications

Subject matter and legal basis of the request for a preliminary ruling

In the main proceedings, the preliminary question that arises is whether the applicant has the right of appeal provided for in Article 4(1) of Directive 2002/21/EC against the decision announcing the outcome of the auction procedure when it is not an addressee of that decision. The purpose of the request is to determine whether the applicant is a competitor of the addressees or an undertaking affected by the decision.

The legal basis for the request is Article 267 TFEU.

Questions referred

‘1)

1.1 Can an undertaking be considered a competitor of the undertakings to which a decision of a national regulatory authority falling within the terms of Article 4(1) 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) is addressed, where the undertaking in question is registered and operates in another Member State and does not itself provide electronic communications services in the market to which the decision refers, but an undertaking under its direct control is present in the relevant market as a service provider and competes in that market with the undertakings to which the decision is addressed?

1.2 In order to reply to question 1.1, is it necessary to examine whether the parent company that wishes to bring the action forms an economic unit with the undertaking under its control which is present as a competitor in the relevant market?

2)

2.1 Is an auction of rights to use radio frequencies for additional wireless broadband services in support of the roll-out of 5G conducted by a national regulatory authority, falling within the terms of Article 4(1) of the framework directive and Article 7 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), a procedure intended to safeguard competition? Must the decision of the national regulatory authority announcing the outcome of the auction procedure also be considered a procedure intended to safeguard competition in that regard?

2.2 If the reply from the Court of Justice to question 2.1 is in the affirmative, is the decision’s objective of safeguarding competition affected by the fact that, in a final decision contained in a separate ruling, the national regulatory authority refused to register the bid submitted by the undertaking that is bringing an action, with the result that that undertaking was unable to take part in the auction procedure and was therefore not an addressee of the decision that determined the outcome of that procedure?

3)

3.1 Must Article 4(1) of the framework directive, in conjunction with Article 47 of the Charter of Fundamental Rights, be interpreted as conferring a right of appeal against a decision by a national regulatory authority on an undertaking only where the position of that undertaking in the market:

a) is directly and genuinely affected by the decision; or

- b) is shown to be highly likely to be affected by the decision; or
- c) may be directly or indirectly affected by the decision?

3.2 Is the fact that the undertaking submitted a bid in the auction procedure, that is to say, that it wished to take part in the procedure but was unable to do so because it did not satisfy the requirements, in itself proof of the effect referred to in question 3.1, or can the court legitimately require the undertaking also to furnish evidence to show that it is affected by the decision?

4) In the light of the replies to questions 1 to 3, must Article 4(1) of the framework directive, in conjunction with Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that an undertaking is an electronic communications provider affected by a decision of the national regulatory authority announcing the outcome of an auction of rights to use radio frequencies for additional wireless broadband services in support of the roll-out of 5G, and therefore has a right of appeal, where that undertaking:

- does not carry on an economic activity involving the provision of services in the relevant market, but directly controls an undertaking that provides electronic communications services in that market; and
- was denied registration in the auction procedure by a final decision of the national regulatory authority before the decision on the outcome of the contested auction procedure was adopted, thus preventing the undertaking from subsequently taking part in the procedure?

Provisions of EU law relied upon

- Articles 4(1) and 8(2) 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).
- Article 7 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).
- Article 47 of the Charter of Fundamental Rights of the European Union.

Provisions of national law relied upon

Law I of 2017 on the Code on Administrative Litigation

‘Article 17 The following shall have the right to institute an action:

- a) any person whose right or legitimate interest is directly affected by the administrative activity’.

‘Article 88 [Dismissing the claim]

(1) The court shall dismiss the claim if

[...]

b) the applicant cannot be held to have suffered a direct injury to a right or legitimate interest.’

Case-law relied upon

- Judgment of 21 February 2008, *Tele2 Telecommunication* (C-426/05, EU:C:2008:103).
- Judgment of 24 April 2018, *Arcor* (C-55/06, EU:C:2008:244).
- Judgment of 22 January 2015, *T-Mobile Austria* (C-282/13, EU:C:2015:24).
- Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317).
- Judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324).
- Judgment of 27 April 2017, *Akzo Nobel and Others v Commission* (C-516/15 P, EU:C:2017:314).

Brief description of the facts and the main proceedings

- 1 On 18 July 2019 the Nemzeti Média- és Hírközlési Hatóság (National Media and Communications Authority, ‘the Authority’) launched a procedure to auction rights to use radio frequencies for additional wireless broadband services in support of the roll-out of 5G (‘the Auction Procedure’) and published the documentation containing the detailed rules for the auction (‘the Documentation’).
- 2 DIGI Communications NV (‘the applicant’) is a commercial holding company registered in the Netherlands which is not registered as an electronic communications services provider in Hungary. The applicant applied to take part in the Auction Procedure, but its application was declared formally invalid by the Authority on the grounds that the applicant had abused its right to take part in the Auction Procedure, engaged in conduct designed to evade the procedure, and sought to deceive the Authority. The Authority considered that the applicant had submitted an application purely because, if DIGI Távközlési és Szolgáltató Korlátolt Felelősségű Társaság (‘DIGI Kft’) – an undertaking under its control which is registered in Hungary and provides electronic communications services in that country – had applied, it would have been excluded under the rules in the Documentation. For this reason, by a final decision the Authority refused to allow the applicant to register for the auction and concluded that the applicant had

forfeited its status as a party to the Auction Procedure. The applicant lodged an action against this decision, but its action was dismissed at first instance by the referring court and at second instance, in a final judgment, by the Kúria (Supreme Court).

- 3 The applicant commenced an administrative-law action for the annulment of the decision of the Authority announcing the outcome of the Auction Procedure; the action constitutes the main proceedings pending before the referring court.

Main arguments of the parties to the main proceedings

- 4 The applicant maintains that, under Article 4(1) of the framework directive, it has standing to bring an action against the decision announcing the outcome of the Auction Procedure. In its view, it is an effective competitor of the undertakings which acquired rights of use of frequencies in the Auction Procedure given, first, that, along with DIGI Kft, it belongs to a group of undertakings that is present in the market as a service provider and, secondly, that it sought to take part in the Auction Procedure as a potential competitor, as it is entitled to do under the fundamental principle of the freedom to provide services. In any event, in its view, in order to be recognised as an interested party it is not necessary to be a competitor, since it is sufficient for that purpose that its position in the market is potentially affected by the Authority's decision. It maintains that its direct legitimate economic interest is affected by the fact that the Authority frustrated its participation in the auction on the basis of illegal Documentation and a procedure that was contrary to law. It rejects the suggestion that it is required to provide evidence to show that its interest has been adversely affected, since the fact that it paid the registration fee and submitted a bid demonstrates that it was genuinely seeking to obtain the frequencies. In its view, the fact that it was denied registration and was not a party to the procedure completely prevented it from exercising its right to an effective remedy. Because it was not a party, it also lost its right to appeal against the decision that brought the auction procedure to an end since, in its view, a legal challenge against the Documentation can only be brought in conjunction with a challenge to the decision announcing the conclusion of the procedure.
- 5 The Authority denies that the applicant has standing to bring an action, on the grounds that it ceased to be a party when it was excluded from the Auction Procedure, and therefore the decision and the judgment in the main proceedings cannot affect its legal status. It emphasises that the statement by the applicant that it has no specific plans to enter the Hungarian market also excludes it from being a competitor. Moreover, there are public documents which show that the applicant is not even present in the services market in the Member State in which it is established. In its view, the market position of DIGI Kft. cannot be taken into consideration in this regard.

Brief statement of the reasons for the request for a preliminary ruling

- 6 Since the framework directive does not define the concept of ‘interested party’, the concept needs to be examined in the light of the case-law of the Court of Justice. In *Tele2 Telecommunication, Arcor and T-Mobile Austria*, the Court of Justice examined three requirements for determining whether an undertaking was an interested party for the purposes of Article 4(1) of the framework directive and whether it had a right of appeal against the contested decision in the case in question.
- 7 Those three requirements, which require an additional interpretation in the proceedings before the referring court, are, first, that the undertaking in question must be an undertaking that provides electronic communications networks or services and is a competitor of the undertaking or undertakings to which the authority’s decision is addressed; secondly, that the national regulatory authority must have adopted the decision in the context of a procedure intended to safeguard competition; and thirdly, that the decision in question has or is likely to have an impact on the position in the market of the first undertaking.
- 8 The purpose of the first question referred is to clarify whether an undertaking qualifies as a competitor where another member of the business group controlled by the undertaking that is seeking to lodge the action is a provider of electronic communications services in the relevant market, but the applicant itself does not provide such services and has an infrastructure only through its Hungarian subsidiary.
- 9 The question also arises whether, in order to determine whether the undertaking is a competitor, it is necessary to examine the extent to which the applicant and the undertaking under its control form an economic unit. The principle set out in paragraph 31 of the judgment of the Court of Justice in *Assitur* – which establishes that groups of undertakings can have different forms and objectives which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities – together with the criteria laid down in paragraphs 27 to 29 of the Court’s judgment in *Specializuotas transportas* can be relevant by analogy in determining the nature of the actual, economic and control relationship between the applicant and DIGI Kft.
- 10 In the view of the referring court, given that the EU competition cases cited in the arguments put forward by the applicant – which concern restrictive agreements – address the imputation of liability, they cannot provide the basis for a general statement that even where, in legal terms, a group comprises several different legal persons, it can be considered a single ‘undertaking’ for competition law purposes.
- 11 Rather, the objective of Article 4(1) of the framework directive, which is to safeguard the rights of an undertaking affected by a decision of the national regulatory authority, must be interpreted as applying to the market affected by the

decision rather than to the entire group of undertakings. It is for the Court of Justice to decide whether, in order for an undertaking to be deemed a competitor within the meaning of Article 4(1) of the framework directive, it must be directly present in the market, or whether it is enough for it to be present indirectly, via a subsidiary.

- 12 The referring court also has questions as to whether the mere fact that the applicant submitted a bid in the Auction Procedure is sufficient to prove that it genuinely intended to enter the market. Given that DIGI Kft. is present in the market as a service provider and has invested in the launch of 5G services, it would not be reasonable market behaviour for the applicant to seek to enter the service provider market in competition with its own subsidiary, given the high investment costs entailed.
- 13 Having regard to Article 8(2) of the framework directive and Article 7(1)(a) of the authorisation directive, the referring court considers that a tender procedure to award rights of use of frequencies, such as the Auction Procedure at issue in the main proceedings, satisfies the requirement that the national regulatory authority must have adopted the decision in the context of a procedure intended to safeguard competition. The Auction Procedure in question in the main proceedings is a tender procedure in respect of which the Court of Justice has yet to interpret Article 4 of the framework directive; hence the need for a reply from the Court of Justice to the second question referred. Moreover, the main proceedings must also be considered from the standpoint of the appropriateness of the Authority's decision for the attainment of the objective of safeguarding competition as far as the applicant is concerned.
- 14 It is not clear from an examination of the earlier case-law of the Court of Justice (the judgments in *Tele2 Telecommunication*, *Arcor* and *T-Mobile Austria*) whether a minimal potential effect on an undertaking's position in the market is sufficient for it to qualify as an affected undertaking within the meaning of Article 4(1) of the framework directive, or whether it is necessary to examine the particular circumstances of the case, including the specific effects of the decision on the market position of the undertaking that is seeking to challenge the decision, and the probability that those effects will materialise. In its third question, the referring court seeks guidance from the Court of Justice on the level of proof that can be required of the applicant as evidence of the effect of the decision on its position in the market in order to demonstrate its standing to bring the action.
- 15 In *Tele2 Telecommunication*, the Court of Justice clarified that the rights of parties in administrative proceedings do not fall within the scope of the framework directive. It can be inferred from this that the existence or extinction of the applicant's right to be a party to the administrative proceedings is not relevant to the questions raised in this reference for a preliminary ruling.
- 16 With regard to the fourth question referred, the referring court considers that the right to an effective remedy guaranteed by Article 47 of the Charter of

Fundamental Rights may also be infringed by the fact that operators may, in some cases vexatiously, hinder or prevent the implementation of the authority's decisions by bringing legal actions in which they do not have a genuine direct legal interest, to the detriment of effective fair competition in the market. An interpretation by the Court of Justice is therefore needed in order to ascertain how Article 4(1) of the framework directive can most effectively be applied in the light of the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights, having regard to the interests of all parties, both the addressees of the decision and the undertaking seeking to exercise its right of appeal.

WORKING DOCUMENT