

Case C-277/22**Request for a preliminary ruling****Date lodged:**

22 April 2022

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

22 March 2022

Applicant:

Global NRG Kereskedelmi és Tanácsadó Zrt.

Defendant:

Magyar Energetikai és Közmű-szabályozási Hivatal (Hungarian Regulation Authority for the Energy Sector and Public Utilities)

Fővárosi Törvényszék (Budapest High Court, Hungary)

[...] **Applicant:** Global NRG Kereskedelmi és Tanácsadó Zrt. ([...] Budapest [Hungary] [...])

[...] **Defendant:** Magyar Energetikai és Közmű-szabályozási Hivatal (Hungarian Regulation Authority for the Energy Sector and Public Utilities) ([...] Budapest [...])

[...] **Other party intervening in support of the defendant:** FGSZ Földgázszállító Zrt. ([...] Siófok (Hungary) [...])

[...] **Subject matter of the dispute:** application for judicial review of an administrative decision [...] in the field of energy

Decision:

The referring court hereby refers questions to the Court of Justice of the European Union for a preliminary ruling interpreting Article 41(17) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing

Directive 2003/55/EC, in conjunction with Article 47 of the Charter of Fundamental Rights.

The referring court hereby refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. **Must Article 41(17) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('the Directive') be interpreted, in the light of Article 47 of the Charter of Fundamental Rights, as meaning that it precludes national legislation according to which, in the procedures by which the regulatory authority of that Member State sets system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system operator is recognised as a party directly affected and, as such, the only party having a right of appeal against a decision made in that procedure?**
2. **If the Court answers the first question in the affirmative, must Article 41(17) of the Directive be interpreted, in the light of Article 47 of the Charter of Fundamental Rights, as meaning that where that article is applied to a case such as that in the main proceedings, an actor in the natural gas market in a situation such as that of the applicant, which, under a decision by the regulatory authority of the Member State setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, is charged a tariff by the system manager for a service that can be provided under a special tariff, must be found to be a party affected by that decision and, as such, to have a right of appeal against it?**

[...] [Matters of national procedural law]

Grounds

- 1 The referring administrative court asks the Court of Justice of the European Union ('the Court'), under Article 267 of the Treaty on the Functioning of the European Union, to interpret provisions of EU law required in order to resolve the dispute in the main proceedings.

Subject matter of the dispute and relevant facts

- 2 By decision of 10 August 2021 [...] ('the contested decision') the defendant, as the national regulatory authority, in the procedure commenced by it on its own initiative in relation to FGSZ Földgázszállító Zrt. ('FGSZ Zrt. '), as the system manager of the natural gas transmission system, determined the scales for the special tariffs applicable by the system transmission manager and for the connection fees that can be charged for connection to the gas pipeline, in relation

to the supply of natural gas for the period between 1 October 2021 and 30 September 2025. The applicant (Global NRG Zrt.), which is engaged in the trade in natural gas and uses the natural gas transmission system as a system user, has applied to the referring court for a judicial review of the contested decision. A preliminary ruling by the Court on the questions referred is necessary in order to determine the substance of the dispute in the main proceedings.

- 3 The defendant based the contested decision, inter alia, on an earlier decision of 30 March 2021 [...], establishing the reference price methodology, which was likewise appealed by the applicant in 2021. By its judgment of 12 January 2022 [...], which has not yet become final, the Budapest High Court set aside the defendant's decision of 30 March 2021 and ordered that court to rehear the matter. The applicant claims, in particular, that the contested decision is unlawful because, first, the decision of 30 March 2021, on which the contested decision is based, was also unlawful and, secondly, because the defendant should not have set a tariff for the title transfer service. The applicant contends that the service in question is included in the 'non-transmission services' category, having regard to Article 3(15) of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas. It also alleges an infringement of Articles 4(4) and 19(2) of that regulation, and seeks annulment of the contested decision.
- 4 The defendant has applied for the application for judicial review to be dismissed on the grounds that the applicant does not have *locus standi* and, in the alternative, on the grounds that the action is unfounded.

Grounds of the request for a preliminary ruling and arguments of the parties

- 5 As a preliminary issue, the referring court examines whether the applicant, a system user, is entitled to bring proceedings against the contested decision, which sets the tariffs applicable by the system manager. According to the applicable national legislation, in the procedures setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system manager affected is to be considered as being directly affected.
- 6 According to the applicant, the tariffs set by the contested decision are binding on both the system manager and system users and, therefore, directly affect the rights and legitimate interests of both, since, if those tariffs are not set in accordance with the law, the system users will suffer an injury. As a natural gas vendor, mindful of the need to comply with its commercial contracts, the applicant cannot decline to use the title transfer service envisaged in the contested decision, for which FGSZ Zrt. automatically and unavoidably charges it the applicable tariff. For a natural gas vendor, this is not an optional additional service, but is the only means of carrying on its business of trading in natural gas with other vendors, and it therefore affects the rights and legitimate interests of all purchasers of the

service and other market actors in a similar situation (holders of licences to trade in natural gas).

- 7 The applicant contends that, according to the national legislation, it had a right of appeal in the procedure establishing the reference price methodology on which the system usage charges are based and determining the discounts, multipliers and seasonal factors for the transmission system management tariffs and that, in consequence, the distinction to the effect that it has no right of appeal against the contested decision, which sets the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, is discriminatory and contrary to EU law. In its view, whether or not the vendor passes on the system usage charges as costs is irrelevant for the purposes of its status as a party affected.
- 8 The defendant disputes that the applicant has a right of appeal, arguing that the applicant was not a party to the procedure to adopt the contested decision and that there is no direct relationship between the applicant and the subject matter of the action. It argues that the contested decision imposes obligations directly on FGSZ Zrt. alone, and therefore affects the applicant's situation only indirectly, rather than directly. It also refers to the national legislation according to which, in the procedure to adopt the contested decision, only the system manager affected is recognised as a party directly affected. The defendant denies that the applicant is obliged to use the title transfer service concerned and to pay the corresponding tariff and also claims that the applicant does not necessarily have to bear the ultimate burden of the tariff, since it is free to pass it on. It observes on that point that were the applicant to be acknowledged as having a right of appeal, any person who bears the ultimate burden of that tariff could be regarded as a 'party affected by a decision of a regulatory authority' and could, as such, bring proceedings for judicial review in circumstances such as those of the dispute in the main proceedings.
- 9 The defendant refers to recital 33 of the Directive, from which it can be inferred that the concept of 'party affected' is not defined in the Directive and must therefore be interpreted and determined by the national legislation. According to national case-law, in order for a ruling to be made on the substance of a dispute it is necessary to demonstrate a direct legal interest, and a purely economic interest is not sufficient to serve as the basis of a right of appeal.

Relevant legislation

- 10 EU law
 - Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC: Article 41(17)
 - Charter of Fundamental Rights of the European Union: Article 47

National legislation:

- The földgázellátásról szóló 2008. évi XL. törvény (Get.) (Law No XL of 2008 concerning the supply of natural gas) ('Law on the supply of natural gas'):

‘Article 129/B

1. In the procedures to set the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system manager affected shall be considered as being directly affected.
 2. In the procedures establishing the reference price methodology on which the system usage charges are based and determining the discounts, multipliers and seasonal factors for the transmission system management tariffs, the persons entitled to be consulted on the transmission system management tariffs shall also be considered as being directly affected.’
- The közigazgatási perrendtartásról szóló 2017. évi I. törvény (Kp.) (Code on Administrative Litigation, Act I of 2017)

‘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 48. Non-admission

1. The Court shall declare the application for judicial review inadmissible where:

...

- c) it is not brought by a person entitled to do so in accordance with the law;

...’.

Grounds for referring the questions for a preliminary ruling

- 11 The referring court is the administrative court with jurisdiction to hear the application for judicial review brought against the contested decision made by the national regulatory authority. In order to examine the substance of the applicant’s action, it is necessary as a preliminary issue to determine whether that party – in the light of all the circumstances of the case – has a right of appeal in accordance with Article 41(17) of the Directive. Where the judicial proceedings have been

brought by a person not entitled to do so, under the national legislation and in view of the procedural obstacle, it would be necessary to declare the application for judicial review inadmissible without embarking upon examination of the substance of the case. Where it can be confirmed that the applicant is entitled to bring judicial proceedings, the necessary next step, as a precondition for determining the substance of the case, is to examine whether that person also has *locus standi*, that is to say, whether the contested decision directly affects the rights or legitimate interests of that person.

- 12 The Directive does not define the concept of ‘party affected by a decision of a regulatory authority’ in relation to the judicial appeal against decisions of the regulatory authority referred to in Article 41(17), and that concept must therefore be examined having regard to the guidelines laid down by the case-law of the Court. In its judgments of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189), (*‘E.ON Földgáz’*) and of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)* (C-771/18, EU:C:2020:584), (*‘judgment in Case C-771/18’*) the Court examined, first, the scope *ratione personae* of the entitlement, under EU law, to bring an appeal against a decision by a national regulatory authority concerning the regulation of the internal market in natural gas and, secondly, in the light also of the principle of effective judicial protection, the content of the obligation on Member States to establish those appeal mechanisms. In the case pending before the referring court there is reason to interpret both aspects in greater detail.

First question referred – Applicability of the national legislation restricting the right of appeal

- 13 By its first question, the referring court asks the Court to interpret the content of the obligation on Member States established in Article 41(17) of the Directive, also taking into consideration the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. It enquires whether the legislation of a Member State, which applies in a situation such as that at issue in the main proceedings, is compatible with EU law where, according to that legislation, in the procedures setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system manager affected is considered to be a person directly affected (Article 129/B(1) of the Law on the supply of natural gas). National law restricts the right of appeal, by operation of law, and does not allow any weighing up or individual assessment by the administrative court. In the referring court’s view it thereby disproportionately restricts the right of appeal established in Article 41(17) of the Directive.
- 14 The Court has jurisdiction to interpret the concept of ‘[person] affected’ contained in Article 41(17) of the Directive. The referring court, for its part, in the absence of a clear and decisive preliminary interpretation by the Court, does not have jurisdiction to determine that EU law has primacy and that national legislation not compliant with EU law must be disapplied. Unless it has clear interpretive

guidance from the Court, the referring court must, in accordance with national law, declare the application for judicial review brought by the applicant to be inadmissible, without examining the substance of the case, because, according to national law, the applicant is not among the persons entitled to bring the judicial proceedings. Accordingly, a legal interpretation by the Court is necessary in the interests of exercise of the right of appeal guaranteed by Article 41(17) of the Directive and by Article 47 of the Charter of Fundamental Rights.

- 15 In the judgment in Case C-771/18, delivered in infringement proceedings No INFR(2014)2271 brought by the European Commission, the Court examined whether the appeal proceedings established by the Hungarian legislature were compliant with EU law – including, among other provisions, Article 41(17) of the Directive, which it is also appropriate to examine in the present case. The Commission particularly criticised the fact that, according to Article 129/A(3) and (4) of the Law on the supply of natural gas, which was in force until 20 December 2016, in relation to the procedures for setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system manager affected was considered to be a party and could exercise the right to apply for judicial review. However, as a result of the Commission commencing proceedings, the Hungarian legislature repealed the contested provisions, and the Commission accepted that step as having resolved the issues, even though it maintained its allegation that Hungary had failed to completely fulfil its obligations because it had not established a suitable mechanism guaranteeing the right of appeal against decisions of the national regulatory authority under Article 41(17) of the Directive.
- 16 Even though in the infringement proceedings the Court was not required to examine the appeal mechanisms under Article 129/A(3) and (4) of the Law on the supply of natural gas, which was in force until 20 December 2016, it should be emphasised that those earlier provisions are strikingly similar to the current provisions established in the same law. The most significant similarity is that in both models only the system manager is classified as a party directly affected, with the effect that only that party is entitled to apply for judicial review. The referring court is of the view that the content of Article 129/A(3) and (4) of the Law on the supply of natural gas, in force until 20 December 2016, coincides with the content of Article 129/B(1) of that law, which is currently in force, meaning that the current provisions are identical to the provisions previously challenged by the Commission.
- 17 As the Court stated in paragraph 50 of *E.ON Földgáz*, whilst it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, EU law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation should not undermine the right to effective judicial protection, as provided for in Article 47 of the Charter of Fundamental Rights of the European Union.

- 18 Also bearing in mind the objections that the Commission expressed to the 2016 model for appeal proceedings, the referring court believes that the first question referred should be answered to the effect that Article 41(17) of the Directive must be interpreted, in the light of Article 47 of the Charter of Fundamental Rights, as meaning that it precludes national legislation which, in the procedure by which the regulatory authority of that Member State sets system usage charges, establishes that the system operator is the only party directly affected and, as such, the only party with a right of appeal against a decision made in that procedure. In the view of the referring court, Article 129/B(1) of the Law on the supply of natural gas in fact unjustifiably restricts the range of persons enjoying a right of appeal against decisions of the regulatory authority so that it includes only the system manager, thereby preventing other market actors in the natural gas sector who may be directly affected by the decision from bringing an appeal.
- 19 In the light of the foregoing, should the Court answer the first question referred in the affirmative, it will be necessary in the main proceedings to disapply Article 129/B(1) of the Law on the supply of natural gas in so far as concerns the applicant's right to bring judicial proceedings, since the national legislation complies neither with the provisions of EU law on the right of appeal nor with the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. Since, in such circumstances, the EU legislation would be directly applicable and would have primacy over the national legislation, meaning that the applicant would have to be found to have a general right to bring judicial proceedings, it would also be necessary to answer the second question referred, on the scope, as defined by EU law, of the *locus standi* of the applicant in this specific case, associated with the extent to which it is individually affected.

Second question referred – Locus standi of a market actor such as the applicant

- 20 By its second question, the referring court seeks interpretation and guidance from the Court on whether, in relation to the provisions of EU law on the regulation of the internal market in natural gas that identify the persons having a right of appeal against decisions of the regulatory authority, a market actor in a situation such as that of the applicant in the judicial review proceedings against the contested decision at issue in the main proceedings can be found to be a 'party affected by a decision of a regulatory authority'.
- 21 The referring court believes that matter to be similar to that examined by the Court in *E.ON Natural Gas*. According to paragraph 48 of that judgment, the right of appeal enjoyed by E.ON Trade Földgáz Zrt. was based on the fact that it was the holder of certain rights and it had to be found that those rights could be infringed by a decision of the regulatory authority. In paragraph 49 of *E.ON Földgáz*, the Court stated that, when there are no EU rules governing the matter, it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, but that the Member States are, however, responsible for ensuring that those rights are

effectively protected in every case. Nevertheless, the Member States must exercise that power in accordance with and without infringing the right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights.

- 22 In the light of the foregoing, in the main proceedings pending before the referring court it is necessary to interpret Article 41(17) of the Directive in order to determine whether the applicant, a company engaged in the trade in natural gas which, as a system user, uses the natural gas transmission system, must be found to be a person enjoying rights under the Directive whose situation is or may be affected as the result of a decision of the regulatory authority setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, and that it should therefore have a right to apply for judicial review. The applicant's claim in its application for judicial review, to the effect that the contested decision is contrary to EU law because it infringes Articles 3(15), 4(4) and 19(2) of Regulation 2017/460, is also relevant to determining that issue, and can only be examined on the merits if the referring court confirms that the applicant has *locus standi*.
- 23 The referring court proposes to answer to the effect that an actor in the natural gas market in a situation such as that of the applicant, in a matter such as that examined in the main proceedings, does have a right of appeal because it may be directly affected. That answer is premised on the fact that the system manager, which is directly bound by the contested decision, automatically and unavoidably charges the applicant the tariffs set by that decision, and the applicant, as a market actor engaged in the trade in natural gas, is obliged to pay those fees and tariffs to the system manager and cannot carry on its business of trading in natural gas unless it complies with that obligation. Accordingly, the fact that the contested decision may be unlawful – in the present case, contrary to EU law – directly affects the applicant's rights and legitimate interests.
- 24 In the light of the foregoing, it is necessary for the purposes of the main proceedings that both questions referred be answered, in order to determine, as an issue preliminary to resolution of the substance of the case, whether the applicant has a right to bring judicial proceedings and *locus standi* – whether its rights or legitimate interests have been directly infringed.
- 25 [...]
- 26 [...] [Matters of national procedural law]

Budapest, 22 March 2022

[...] [Signatures]