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Judgment of the Court in Case C-92/23 | Commission v Hungary (Right to provide media services on a radio frequency)

Failure of a Member State to fulfil its obligations: by preventing Klubrádió from providing media services on a radio frequency, Hungary has infringed EU law

Klubrádió is a Hungarian commercial radio station which, in 1999, began to broadcast its programmes on radiofrequencies. In 2014, it signed a contract with the Hungarian Media Council for the right to provide media services on the frequency 92.9 MHz in the broadcasting area of Budapest. The contract was concluded for a term of seven years, renewable for a further period of five years.

Upon expiry of the contract, the Media Council refused the application for renewal: it took the view that Klubrádió had twice infringed the monthly reporting obligation concerning broadcasting quotas, which amounted to a repeated infringement. Under the Hungarian Law on media services, such an infringement automatically results in the refusal of an application for renewal.

The Media Council subsequently published a call for tenders for the provision of media services on the frequency concerned, but Klubrádió's application was declared invalid. The reasons given for that decision were that there were errors in the programming schedule and that Klubrádió had a negative net worth during the five years preceding the submission of its application, making its tender unsuitable for ensuring the presence on the media market of a radio station the functioning of which is stable and predictable.

Taking the view that Hungary had, *inter alia*, failed to comply with the EU regulatory framework for electronic communications,¹ the principles of proportionality, non-discrimination and good administration, and the freedom of expression and information enshrined in the Charter of Fundamental Rights of the European Union,² the European Commission brought an action for failure to fulfil obligations before the Court of Justice.

In its judgment, the Court upholds most of the Commission's complaints and finds that Hungary has failed to fulfil its obligations under EU law.

In that regard, the Court recalls that, under the EU regulatory framework for electronic communications, rights to use radio frequencies must to be allocated on the basis of objective, transparent, non-discriminatory and proportionate criteria. **The Hungarian Law on media services automatically precludes the renewal of rights to use radio frequencies** in the event of the commission of a repeated infringement, **even where the infringements are minor infringements of a purely formal nature and have already been penalised and rectified. Consequently,** that law and the decision to refuse renewal adopted in respect of Klubrádió on the basis thereof **fail to observe the principle of proportionality.** That law is also at odds with the principle of proportionality inasmuch as it precludes media service providers whose right to use radio frequencies has not been renewed due to the commission of a repeated infringement from applying for temporary rights of use.

Similarly, **the decision declaring Klubrádió's tender to be invalid is disproportionate** in so far as it is based on minor irregularities in the programming schedule, which, if corrected, would have had no effect on the substantive particulars of

the application. Moreover, the ground for invalidity based on Klubrádió's negative net worth and its inability to cover its expenditure with its net turnover alone **is contrary to the principles of transparency and proportionality**. First, the conditions relating to financial viability imposed on applicants by the call for tenders at issue did not include any requirement concerning the applicants' net worth or the need for them to be able to cover their expenditure with their net turnover alone. Nor could any such requirement be reasonably inferred from any rule contained in that call for tenders. Secondly, where the viability of the applicant concerned is not in question, a ground for invalidity based on such a requirement goes beyond what is necessary to ensure the presence on the media market of a radio station the functioning of which is stable and predictable.

Furthermore, the Court notes that the decision to refuse renewal was adopted long after the six-week period provided for in the regulatory framework. In addition, the tendering procedure was not organised in sufficient time to allow for the adoption of a decision before the expiry of Klubrádió's rights of use. Thus, **Hungary has also infringed the principle of good administration**.

Lastly, the Court holds that Hungary has **infringed the freedom of expression and information enshrined in Article 11 of the Charter of Fundamental Rights** on account of, first, the adoption of the decision to refuse renewal and the Law on media services and, secondly, the adoption of the invalidity decision and the call for tenders concerned. **According to the Court, any national measure limiting or restricting broadcasters' access to radio frequencies is liable to interfere with their right to freedom of the media associated with freedom of broadcasting. The Court holds in that regard that the infringements and defects attributed to Klubrádió in the present case, which form the basis of both the refusal decision and the invalidity decision and which materially prevented that radio station from pursuing its activities in the broadcasting sector, relate either to minor inaccuracies of a formal nature or to aspects which, in themselves, should not make it impossible for a radio station to pursue its activities.**

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

Unofficial document for media use, not binding on the Court of Justice.

The [full text and, as the case may be, the abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ That regulatory framework comprises, in particular, [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, as amended by Directive 2009/140 (Authorisation Directive); [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, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC (Framework Directive); Commission [Directive 2002/77/EC](#) of 16 September 2002 on competition in the markets for electronic communications networks and services (Competition Directive); and [Directive 2018/1972/EU](#) establishing the European Electronic Communications Code, which recast Directives 2002/21/EC and 2002/20/EC.

² Article 11.