



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 9 September 2014¹

Case C-282/13

T-Mobile Austria GmbH
v
Telekom-Control-Kommission
(Request for a preliminary ruling

from the Verwaltungsgerichtshof (Austria))

(Electronic communications — Protection before national courts of rights derived from EU law — Right of appeal against the decision of a national regulatory authority — Concept of an undertaking ‘affected’ by a decision of a national regulatory authority — Article 4(1) of Directive 2002/21/EC — Transfer of rights to use frequencies — Article 5(6) of Directive 2002/20/EC)

I – Introduction

1. This case affords the Court the opportunity to provide further clarification regarding the requisite *locus standi* for contesting decisions of national regulatory authorities [‘NRAs’ or ‘NRA’, as appropriate] in the field of electronic communications. It also enables it to give more general consideration to the extent to which EU law may interfere in the procedural law of Member States governing the circumstances in which administrative decisions may be contested.

2. The Austrian Verwaltungsgerichtshof (Higher Administrative Court) has requested an interpretation of the concept of an undertaking ‘affected’ by an NRA decision for the purposes of Article 4 of Directive 2002/21/EC (‘the Framework Directive’)² in the context of proceedings relating to the transfer of rights to use frequencies, provided for in Article 5(6) of Directive 2002/20/EC (‘the Authorisation Directive’).³

1 — Original language: Polish.

2 — 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).

3 — 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), 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).

3. The question referred is concerned with determining the range of undertakings entitled to contest a decision taken by an NRA in the context of specific proceedings under electronic communications law. However, the answer to that question will have wider significance, since similar rules are also to be found in other acts of EU law relating to regulated markets.⁴

II – Legal framework

A – EU law

4. The harmonised EU law on electronic communications is based on the Framework Directive and specific directives, including the Authorisation Directive.

5. Article 4(1) of the Framework Directive provides:

‘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.’

6. Article 5(6) of the Authorisation Directive provides:

‘Competent national authorities shall ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of [the Framework Directive]. They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies.’

B – Austrian law

7. Paragraph 8 of the 1991 General Law on Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz 1991, BGBl. 51/1991), in the version published in 2004 (BGBl. I, 10/2004) (‘the AVG’), provides:

‘Persons who avail themselves of an activity of the authority or to whom the activity of the authority relates shall be interested parties and, in so far as they are interested by virtue of a legal entitlement or a legal interest, they shall be parties to the proceedings.’

8. Proceedings relating to the allocation of frequencies, as referred to in Article 5(6) of the Authorisation Directive, are governed by Paragraphs 54 to 57 of the 2003 Law on Telecommunications (Telekommunikationsgesetz 2003, BGBl. I, 70/2003) (‘the TKG 2003’).

4 — See, inter alia, Article 22(3) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of 20 February 2008 (OJ 2008 L 52, p. 3); Article 37(17) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity (OJ 2009 L 211, p. 55); and also 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 (OJ 2009 L 211, p. 94).
That last provision is the subject of Case C-510/13 *E.ON Földgáz Trade*, pending before the Court.

9. In particular, Paragraph 56 of the TKG 2003 provides:

‘1. The transfer of rights to use frequencies allocated by the [NRA] shall require prior authorisation by the [NRA]. The [NRA] shall publish the application for, and its decision on, authorisation to transfer the rights to use frequencies. In its decision, the [NRA] shall, on an individual basis, assess the impact — in particular, the technical impact — of a transfer on competition. Obligations may be attached to the authorisation, to the extent this is necessary to avoid any adverse effect on competition. Authorisation shall be refused in any case where, despite the imposition of obligations, the transfer is likely adversely to affect competition.

...

2. Fundamental modifications of the ownership structure of undertakings to which rights to use frequencies have been allocated in a procedure under Article 55 shall require prior authorisation by the [NRA]. The third to last sentences of subparagraph 1 shall apply *mutatis mutandis*.’

III – The main proceedings

10. The proceedings before the referring court concern an action brought by T-Mobile Austria GmbH (‘T-Mobile’), a mobile telephone network operator, contesting a decision adopted by the Telekom-Control-Kommission (the Austrian Telecommunications Control Commission; ‘the TCK’). By that decision, the TCK rejected T-Mobile’s application to be granted status as a party to the authorisation procedure to transfer the rights to use frequencies to two other Austrian mobile telephone network operators.

11. The transfer of frequencies in question is connected with the takeover of Orange Austria Telecommunications GmbH (‘Orange’) by Hutchison 3G Austria Holdings GmbH and Hutchison 3G Austria GmbH (which subsequently formed the company known as Hutchison Drei Austria Holdings GmbH; ‘Hutchison Drei Austria’).

12. It emerges from the order for reference that, following the concentration, the number of mobile telephone network operators in Austria with the right to use frequencies was reduced to three: A1 Telekom Austria AG (‘A1’), T-Mobile and Hutchison Drei Austria.

13. The concentration and the related transactions were the subject of procedures before the European Commission and also before the Austrian authorities.

A – Procedure before the Commission

14. According to the documents before the Court, Hutchison Drei Austria and Orange notified the Commission on 7 May 2012 of a proposed concentration under Article 4 of Regulation (EC) No 139/2004.⁵

15. In the course of the procedure, the Commission expressed serious doubts as to whether the proposed concentration was compatible with the internal market. Following a market investigation, the Commission found that the elimination of Orange from the market gave rise to problems with competition. According to the Commission, the market at that time was already highly concentrated

⁵ — Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

and it was virtually impossible to enter it. Hutchison Drei Austria accordingly submitted a package of commitments, pledging in particular to hand over to a prospective new operator frequencies which it might have the right to use following the concentration and to allow virtual operators wholesale access to its network on specific terms.

16. The Commission permitted T-Mobile to participate in the control of concentration proceedings as an interested party.

17. By decision of 12 December 2012,⁶ the Commission declared that the concentration was compatible with the internal market, on condition that Hutchison Drei Austria fully honoured the commitments that it had given.

18. It is apparent, however, from that decision that the Commission did not examine two other transactions upon which authorisation of the concentration was conditional: (i) the sale to A1 of a company controlled by Orange and (ii) the transfer to A1 of certain frequencies that Orange held prior to the concentration. In its decision, the Commission stated that the transfer of frequencies was subject, *inter alia*, to authorisation from the TCK.⁷

B – Procedure before the TCK

19. On 23 May 2012, Hutchison Drei Austria and Orange applied to the TCK on the basis of Paragraph 56(2) of the TKG 2003 for authorisation to change their ownership structure as a result of the concentration. Jointly with A1, they applied on 9 July 2012, on the basis of Paragraph 56(1) of the TKG 2003, for authorisation to transfer specific frequencies to A1.

20. T-Mobile submitted its observations to the TCK, requesting that obligations be imposed on the companies involved in the concentration in order to prevent distortion of competition.

21. In addition, T-Mobile applied to the TCK on 10 December 2012 to be granted status as a party to the proceedings to obtain authorisation for a change in ownership structure and for the transfer of frequencies.

22. By decision of 13 December 2012, the TCK authorised the change in ownership structure and the transfer to A1 of rights to use frequencies. On the other hand, the TCK refused T-Mobile's application of 10 December 2012 to be granted status as a party to the administrative proceedings.

23. Regarding T-Mobile's application, the TCK ruled that, in administrative procedures for authorisation of a change in ownership structure and the transfer of frequencies, neither national law nor EU law requires party status to be granted to undertakings competing with the mobile telephone network operators applying for such authorisation.

C – Proceedings before the referring court and the question referred for a preliminary ruling

24. T-Mobile appealed to the Verwaltungsgerichtshof against the TCK's decision of 13 December 2012.

⁶ — Commission Decision declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6497 — Hutchison 3G Austria/Orange Austria) (summary published in OJ 2013 C 224, p. 12).

⁷ — *Loc.cit.*, paragraphs 7 to 11.

25. In support of its appeal, T-Mobile submitted that it was a competitor of the parties to the transaction in question and that it holds frequencies on the same market. It should therefore be recognised, for the purposes of Article 4(1) of the Framework Directive, as an undertaking ‘affected’ by the contested decision of the TCK. Under national law, T-Mobile should also be permitted to participate in the administrative proceedings preceding the adoption of such a decision.

26. The referring court points out that, in the light of Austrian case-law, the grant to T-Mobile of status as a party to the administrative procedure under Paragraph 56 of the TKG 2003 and Article 5(6) of the Authorisation Directive depends on whether T-Mobile is ‘affected’ for the purposes of Article 4(1) of the Framework Directive by the decision adopted by the TCK under that procedure. Under Austrian law, the status of party to an administrative procedure is closely linked to the right of appeal against decisions, under Article 4(1) of the Framework Directive.

27. According to the referring court, the judgment in *Tele2 Telecommunication*⁸ does not provide a conclusive answer to the question raised.

28. On the one hand, in the view of that court, it should be noted that, as the TCK also asserts, a decision adopted during the procedure for authorisation of a change in ownership structure and the transfer of frequencies does not directly create rights for third parties. Their legal position does not change, inasmuch as they may retain the frequencies allocated to them.

29. On the other hand, the referring court points out that, according to T-Mobile’s submissions, the concentration between Orange and Hutchison Drei Austria affects its position, since inter alia it alters the proportion of the frequency spectrum allocated to specific operators on the market. Likewise, the decision concerning the transfer of frequencies affects its position, since its effect is to offset the concentration’s negative effects on competition.

30. In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Articles 4 and 9b of the [Framework] Directive and Article 5(6) of the [Authorisation] Directive to be interpreted as meaning that they confer on a competitor the status, in a national procedure under Article 5(6) of the Authorisation Directive, of an undertaking which is “affected” for the purposes of Article 4(1) of the Framework Directive?’

IV – Proceedings before the Court

31. The request for a preliminary ruling was received at the Court on 24 May 2013.

32. By order of 30 September 2013, the President of the Court refused the referring court’s application for the case to be dealt with under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice and Article 105 of its Rules of Procedure.

33. Written observations were submitted by T-Mobile, Hutchison Drei Austria, A1, the Austrian Government and the Commission. The TCK, which did not participate in the written procedure, requested a hearing, as did T-Mobile.

34. T-Mobile, the TCK, Hutchison Drei Austria, A1 and the Commission participated at the hearing on 15 May 2014.

⁸ — Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103.

V – Analysis

A – Introduction

35. First of all, I would like to point out that the dispute before the referring court is not directly concerned with the right under Article 4(1) of the Framework Directive to contest a decision of a regulatory authority. In the main proceedings, T-Mobile is not challenging the merits of the actual decision concerning the transfer of frequencies, but rather the refusal to grant it status as a party to the relevant procedure before the regulatory authority.

36. The importance of the question referred to the resolution of the dispute stems from Austrian case-law, which makes the grant of status as a party to an administrative procedure dependent on whether the particular undertaking has the right of appeal, under Article 4(1) of the Framework Directive, against a decision adopted following that procedure. The referring court points out that an undertaking that is ‘affected’ by a decision of a regulatory authority for the purposes of Article 4(1) of the Framework Directive also has the right to be a party to the procedure under Paragraph 8 of the AVG, because those are precisely the parties who have a right of appeal against the relevant decision.

37. To answer the question raised by the referring court, it is necessary to provide an interpretation both of Article 4(1) of the Framework Directive and of Article 5(6) of the Authorisation Directive.

38. Before analysing those provisions, I should like to refer to the purpose underlying Article 4(1) of the Framework Directive.

B – Article 4(1) of the Framework Directive and the scope of the autonomy of national procedural law

39. In its order for reference, the referring court refers not only to Article 4(1) of the Framework Directive, but also to provisions of national law and national case-law relating to the *locus standi* required in proceedings before an administrative court.

40. It is necessary to consider whether that reference is relevant to establishing who has *locus standi* in the field governed by EU electronic communications law.

41. I would point out that, in principle, in the absence of relevant EU rules, it is for the legal system of each Member State to determine the system of legal measures and procedures intended to ensure the protection of the rights that individuals derive from EU law. Those measures are determined autonomously by national law, with due regard for the principles of effectiveness and equivalence.⁹

42. It is my belief that the principle of procedural autonomy should not apply, however, to the actual possibility of bringing an action in order to protect rights that individuals derive from EU law. Reference to the principle of procedural autonomy is possible only at the stage of establishing specific provisions and procedures concerning the actual way in which rights based on EU law are exercised. That is especially true in situations in which — as in the present case — EU law lays down specific provisions establishing a particular remedy.

43. In my view, that premiss was inserted by the EU legislature in Article 4(1) of the Framework Directive.

⁹ — See Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral*, EU:C:1976:188, paragraph 5, and Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, paragraph 102.

44. Under Article 4(1) of the Framework Directive, undertakings providing electronic communications networks and/or services, and users, who are ‘affected’ by a decision of a regulatory authority have the right to contest that decision.

45. In the light of the case-law of the Court of Justice, the concept of an undertaking which is ‘affected’ by a decision for the purposes of Article 4 is an autonomous concept of EU law and its meaning must be assessed in the light of the purpose of that provision.¹⁰ According to the same line of authority, that provision reflects the principle of effective judicial protection, which requires the courts of the Member States to ensure judicial protection of rights derived from EU law.¹¹

46. As I understand it, the purpose of that provision is not simply to reflect the principle of effective judicial protection, which, after all, is given expression in a rule of primary law — the second subparagraph of Article 19(1) TEU — and also in Article 47 of the Charter of Fundamental Rights of the European Union.

47. The purpose of Article 4(1) of the Framework Directive is to standardise the requisite *locus standi* for private undertakings in the field of electronic communications.

48. That provision is intended to prevent a situation in which an undertaking in identical circumstances would in one Member State have standing to contest a decision of a regulatory authority in order to protect his rights, but not in another. Such differences regarding access to legal remedies would lead the content of rights that individuals derive from EU law on electronic communications to be perceived differently from one Member State to another. Such differences could also mean that the very existence of such rights might be called into question in some Member States.

49. When interpreting Article 4(1) of the Framework Directive, we need to be guided by the purposes underlying it as referred to in the preceding point.

50. The interpretation of Article 4(1) of the Framework Directive must be sufficiently detailed to prevent any serious differences between the various Member States as regards the requisite *locus standi* since, as was mentioned in point 48 above, the existence of such differences would undermine the uniform application of provisions of EU electronic communications law. The uniform application of those provisions would not be possible if national law determined who is to have *locus standi*.

C – Interpretation of Article 4(1) of the Framework Directive

1. The judgment in *Tele2 Telecommunication*

51. The Court has already given a ruling concerning the interpretation of Article 4(1) of the Framework Directive in *Tele2 Telecommunication*.

52. In that case, the Court endorsed the Opinion of Advocate General Poiares Maduro, holding that the right to contest a decision taken by a regulatory authority may be exercised by users or undertakings which are not themselves addressees of that decision but ‘the rights of which are adversely affected by it’. That interpretation encompasses the situation in which users and competing undertakings derive individual rights from EU law, in particular from telecommunications directives, and those rights are affected by a decision taken by a national regulatory authority.¹²

¹⁰ — *Tele2 Telecommunication*, EU:C:2008:103, paragraph 27.

¹¹ — *Loc.cit.*, paragraph 30.

¹² — *Loc.cit.*, paragraphs 33 and 48.

53. As regards the administrative procedure that gave rise to *Tele2 Telecommunication* — the market analysis procedure referred to in Article 16 of the Framework Directive — the Court stated that that procedure could lead to the imposition of certain specific obligations on undertakings with significant market power. Such obligations and, in particular, the obligation of non-discrimination and the obligation to give competitors access to network facilities are protective measures adopted in the interests of competitors. They may therefore confer rights on those competitors, corresponding to the obligations imposed on the undertaking with significant market power.¹³

54. The Court therefore based its decision on the finding that obligations imposed on an operator with significant market power by a decision of a regulatory authority may potentially confer rights on third parties which may be adversely affected by that decision.

55. The Court used a similar interpretation as the basis for its decision in *Arcor*, concerning the interpretation of Article 5a(3) of Directive 90/387/EEC,¹⁴ which laid down rules similar to those laid down in Article 4(1) of the Framework Directive.

56. In *Arcor*, the Court held that a right to contest a decision establishing rates for access to the local network lay not only with the network operator, but also with an undertaking with the right of unbundled access to the network, which had concluded the relevant contract with the network operator. The Court took account of the fact that the decision affected the applicant's individual rights as a party to that contract. Nevertheless, the Court pointed out that a contractual link is not required in order to establish standing to bring an action.¹⁵

2. Difficulties connected with the application of *Tele2 Telecommunication*

57. As I have already mentioned, according to the judgment in *Tele2 Telecommunication*, undertakings whose individual rights derived from EU law might be adversely affected as a result of a decision of a regulatory authority have standing to contest that decision.

58. That approach, although undoubtedly correct,¹⁶ does not make it possible to establish criteria precise enough to ensure a uniform interpretation of Article 4(1) of the Framework Directive.

59. The fact that the judgment in *Tele2 Telecommunication* does not clarify all doubts concerning the determination of *locus standi* in the field of electronic communications is demonstrated by the present case, which marks the third request for a preliminary ruling on this issue.

60. First, the judgment in *Tele2 Telecommunication* does not preclude an interpretation of Article 4(1) of the Framework Directive to the effect that *locus standi* is conditional upon the applicant being able to demonstrate that it has a specific individual right deriving from EU law.

13 — *Loc.cit.*, paragraphs 34, 36 and 39.

14 — Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 295, p. 23).

15 — Case C-55/06 *Arcor*, EU:C:2008:244, paragraphs 175 to 177.

16 — It follows from the premiss that the principle of effective judicial protection requires Member States to ensure protection of individuals' rights under EU law. See, for example, Case C-432/05 *Unibet*, EU:C:2007:163, paragraphs 37 and 38.

61. In particular, as can be seen from the written observations of the Austrian Government, the condition requiring the applicant to be ‘affected’ by the decision is satisfied, according to Austrian case-law, only where the administrative authority rules or is under a duty to rule on the applicant’s individual rights.¹⁷ In the present case, the TCK and the Austrian Government rely on that case-law, pointing out that Article 5(6) of the Authorisation Directive does not establish individual rights for competing undertakings, but simply provides that Member States may take ‘appropriate measures’ to prevent distortion of competition.

62. To construe the judgment in *Tele2 Telecommunication* in that way — to my mind, incorrectly — is to disregard the differences between the right to bring an action and the subject-matter of that action. The right to bring an action cannot be dependent on the outcome of that action, that is to say, on a finding that the applicant has certain rights.

63. Secondly, account must be taken of the fact that the concept of individual rights may be construed differently depending on the context and that its meaning may also vary from one legal system to another.

64. However, the judgments in *Tele2 Telecommunication* and *Arcor* do not provide a clear answer to the question whether the condition relating to *locus standi*, which assumes that the decision ‘[has] an adverse effect on the applicant’s rights’, refers to:

- its individual rights in relation to an administrative authority,
- its rights corresponding to regulatory obligations imposed on another private undertaking, or
- rights of another kind, for example, rights derived from a private-law contract.

65. For example, in *Tele2 Telecommunication*, the Court based its decision on the assumption that the contested decision affected competitors’ individual rights, corresponding to obligations imposed on the undertaking with significant power on the relevant market.¹⁸ In *Arcor*, on the other hand, the Court pointed out that the decision of the regulatory authority affected the rights of the applicant as a party to a contract concerning access to local loops.¹⁹ Neither of those judgments concerns the applicant’s individual rights under public law.

66. In the present case, Hutchison Drei Austria, A1 and the Austrian Government argue, as regards the interpretation given in *Tele2 Telecommunication*, that the grant of authorisation to transfer frequencies, or the refusal to do so, does not establish obligations capable of conferring rights on third parties in respect of the transaction in question. In their opinion, this follows from the nature of the procedure for the transfer of frequencies, which is not intended to establish regulatory obligations to the benefit of third parties, but rather to ensure effective competition in the general interest.

67. On the other hand, relying on the judgment in *Arcor*, the referring court points out that a decision of a regulatory authority concerning the transfer of frequencies has an impact on the rights of the parties to the transaction, as well as on those of other prospective acquirers of frequencies. For its part, Hutchison Drei Austria argues that T-Mobile never expressed any intention of acquiring frequencies and, accordingly, cannot be said to be a prospective acquirer of frequencies.

68. Those doubts reveal the need for further clarification of the conditions relating to *locus standi* under Article 4(1) of the Framework Directive.

17 — Judgment of the Verwaltungsgerichtshof of 26 March 2008, VwSlg 17.406 A/2008.

18 — *Tele2 Telecommunication*, EU:C:2008:103, paragraph 36.

19 — *Arcor*, EU:C:2008:244, paragraph 177.

3. Proposed interpretation of Article 4(1) of the Framework Directive

69. The condition that the decision must ‘affect’ a particular undertaking for the purposes of Article 4(1) of the Framework Directive should, in my view, be understood as referring to the effect of an administrative decision affecting those interests of a particular undertaking which must be afforded legal protection.²⁰

70. However, for the recognition of *locus standi*, the applicant need not demonstrate that its specific individual rights have been infringed.

71. If the judgment in *Tele2 Telecommunication* is looked at more closely, it cannot but be observed that the Court did not construe Article 4(1) of the Framework Directive as meaning that meeting the condition that a decision must ‘affect’ a particular undertaking depends on whether an individual right has actually been infringed. On the contrary, the Court found that the decision must adversely affect rights in respect of which the applicant is a ‘potential beneficiar[y]’.²¹

72. Moreover, to my way of thinking, Article 4(1) of the Framework Directive is not intended exclusively to protect rights in relation to other private undertakings, as was argued in the written observations of the parties referred to above, but also to protect individual rights under public law, understood as the possibility of compelling a regulatory authority to conduct itself in accordance with the law.²²

73. I have no doubt that every decision affects the legal interests of the person to whom it is addressed. However, a more in-depth analysis is needed in order to determine whether that condition is met in the case of third parties who are not addressees of the decision.

74. I would point out that Article 4(1) of the Framework Directive concerns two categories of individual: (i) users and (ii) undertakings providing electronic communications networks and/or services. In the second category, it is also possible to identify a further category comprising undertakings competing with the addressee of the decision in question on the markets for electronic communications services.

75. That last category is particularly important in connection with the rules relating to electronic communications. It should be noted here that those rules are designed to promote competition in the provision of electronic communications networks and services.

76. In particular, Article 8(2)(b) of the Framework Directive places on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures for the promotion of competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services.²³

77. Electronic communications law is based on the *ex ante* regulation of the market and also lays down provisions establishing the conditions for obtaining authorisation from the regulatory authority for activities or transactions which might result in significant changes in the situation on the relevant markets, leading to distortion of competition.

20 — Likewise, the *locus standi* of private undertakings on the basis of the fourth paragraph of Article 263 TFEU is not linked to the need to demonstrate that an individual right has been adversely affected but rather, in the light of the situations contemplated in that provision, to the fact that the act in question has a direct and individual effect on the applicants’ legal position.

21 — See *Tele2 Telecommunication*, EU:C:2008:103, paragraph 36.

22 — Regarding the various concepts of individual public-law rights, see A. Wróbel, *Prawo podmiotowe publiczne*, in: *System prawa administracyjnego*, Vol. 1 — Instytucje prawa administracyjnego, Instytut Nauk Prawnych PAN, Warsaw, C.H. Beck 2010, pp. 307 to 344.

23 — See Case C-380/05 *Centro Europa 7*, EU:C:2008:59, paragraph 81, and Case C-227/07 *Commission v Poland*, EU:C:2008:620, paragraphs 62 and 63.

78. In that connection, electronic communications law is not only designed to protect the competitive structure of the market as such, but also to protect the rights of competing undertakings.

79. It should be pointed out here that the aim of the rules on competition is not only or primarily to protect the immediate interests of individual competitors, but to protect the structure of the market and thus competition as such.²⁴ However, the public interest in promoting competition may also overlap with the interests of individual competing undertakings, which is to protect themselves against actions affecting their market position.

80. A decision of a regulatory authority adopted in a procedure designed to protect competition undoubtedly has an impact on the individual interests of undertakings, whose market position could be significantly changed as a result of the measures entailed by the decision.

81. In view of the aims, referred to above, of the rules, those interests are legal and not simply a matter of fact. The position of competing undertakings is taken into account by provisions of EU law under which the regulatory authority is required to take measures to prevent changes in the market position of competing undertakings which are so significant as to be capable of leading to the distortion or restriction of competition.

82. In the case of undertakings competing with the addressee of a decision, the condition that the decision must 'affect' a particular individual for the purposes of Article 4(1) of the Framework Directive is met, in my opinion, where the regulatory authority is giving a ruling in a procedure provided for in a rule of EU law designed to protect competition and the decision relates to activities or transactions which have a significant impact on the applicant's market position.

83. As the Commission states in its written observations, the *locus standi* of undertakings competing with the addressee of a decision has also been defined in similar terms in EU law in relation to the interpretation of the fourth paragraph of Article 263 TFEU.

84. In matters relating to the review of State aid, standing to contest the merits of a Commission decision appraising a State aid case or a decision given following a formal procedure is reserved to undertakings which are in competition with the aid recipient and whose market position is significantly affected by the aid.²⁵

85. Likewise, in matters relating to the control of concentrations, an undertaking which is not one of the parties to the concentration or an addressee of the contested decision nevertheless has standing to contest the Commission's decision, if it can demonstrate inter alia that it is at least a potential competitor and that the transaction may significantly change its position on the relevant markets.²⁶

86. Thus, in those examples relating to EU procedural law, *locus standi* is not conditional upon an infringement of individual rights. Only the authority hearing the merits of the case may decide whether individual rights have been infringed.

24 — See Opinion of Advocate General Kokott in Case C-95/04 P *British Airways v Commission*, EU:C:2006:133, point 68, and Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Service and Others v Commission and Others*, EU:C:2009:610, paragraph 63.

25 — See Case 169/84 *COFAZ and Others v Commission*, EU:C:1986:42, paragraphs 22 to 25, and Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum*, EU:C:2005:761, paragraphs 37 and 70.

26 — See Case T-3/93 *Air France v Commission*, EU:T:1994:36, paragraph 82; Case T-290/94 *Kayserberg v Commission*, EU:T:1997:186; Case T-158/00 *ARD v Commission*, EU:T:2003:246, paragraphs 78 and 95; and Case T-114/02 *BaByliss v Commission*, EU:T:2003:100, paragraphs 96 to 100.

87. In the light of the foregoing considerations, I believe that Article 4(1) of the Framework Directive must be interpreted as meaning that an undertaking which is currently or potentially a competitor of the addressee of a decision has the right to contest a decision of a regulatory authority if the regulatory authority is adjudicating in a procedure provided for under EU law with a view to the protection of competition and the decision concerns activities or transactions which could significantly affect the applicant's market position.

4. Application of that interpretation to Article 5(6) of the Authorisation Directive

88. It is necessary to consider next whether that interpretation is applicable to a decision of a regulatory authority concerning the transfer of rights to use frequencies, as referred to in Article 5(6) of the Authorisation Directive.

89. While frequencies are a scarce (limited) resource not capable of meeting the potential needs of all operators, they are nonetheless essential for engaging in certain types of economic activity in the electronic communications field, in particular to enable undertakings to provide services through their own mobile telephone network.

90. The excessive concentration of frequencies in the hands of one undertaking may lead to distortion of the conditions of competition in a field of economic activity in which access to frequencies is essential. The authorisation to use public property which constitutes a scarce resource gives the authorised economic operator advantages as compared with other operators who also wish to use that resource.²⁷

91. That premiss was taken into account in several provisions of the Framework and Authorisation Directives.

92. Article 9(1) of the Framework Directive requires authorisations concerning the use of frequencies to be granted on the basis of objective, transparent, non-discriminatory and proportionate criteria. Article 9b(2) of that directive lays down an obligation to notify the regulatory authority of the intention to transfer rights to use frequencies and also to make that intention public.

93. Under Article 5(6) of the Authorisation Directive, the regulatory authorities of Member States must ensure that competition is not distorted because of any transfer or accumulation of rights of use of radio frequencies. For those purposes, Member States may take appropriate measures such as making it compulsory to sell or lease rights to use frequencies.

94. Despite the use of the permissive mode in the last sentence of Article 5(6) of the Authorisation Directive (Member States 'may' take appropriate measures), it is clear in reality from the preceding sentence that, if a Member State authorises the transfer as between operators of rights to use frequencies, it is also obliged to create the appropriate legal framework to regulate such transfers, in order to prevent distortion of the conditions of competition.²⁸

95. I agree with the view expressed by T-Mobile in its written observations to the effect that it is possible to draw an analogy here between the initial allocation of frequencies and the subsequent transfer of rights.

27 — Regarding the justification for fees for rights to use frequencies, see *C-375/11 Belgacom and Others*, EU:C:2013:185, paragraph 50 and the case-law cited.

28 — See P. Nihoul, P. Rodford, *EU Electronic Communications Law*, Oxford 2011, pp. 101 and 116.

96. There is no doubt that, in the initial allocation of frequencies, Member States must pay particular attention to the need to preserve the competitive structure of the market. That obligation would be wholly frustrated if the competitive structure could be distorted as a result of the subsequent transfer of rights between competing undertakings.

97. In the light of those considerations, the purpose of reviewing transactions involving the transfer of frequencies provided for in Article 5(6) of the Authorisation Directive, and therefore also of the procedure before the TCK at issue in the main proceedings, is above all to protect the competitive structure of the market.

98. In the light of my proposed interpretation of Article 4(1) of the Framework Directive, competitors must have the right to contest a decision adopted in such a procedure, since the transaction in question may significantly affect their market position.

99. Regarding the effect on T-Mobile's market position of the transaction between Hutchison Drei Austria and A1, I would point out that this falls to be determined by the referring court, it being for that court to apply the rule of EU law, as interpreted, to the specific circumstances of the case.

100. I would point out, however, that it is clear from the order for reference that the applicant in the main proceedings is in direct competition with the parties to the transaction involving the transfer of frequencies. Moreover, the competitors are operating on an oligopolistic market characterised, *inter alia*, by substantial barriers to entry.

101. Those circumstances clearly indicate that the transaction significantly affects the market position of competing undertakings.²⁹

102. I would also point out that, as emerges from the Commission's written observations, those circumstances were taken into account in order to grant T-Mobile the status of interested party in the procedure before the Commission for the control of concentrations, in relation to the merger between Hutchison Drei Austria and Orange.

103. Moreover, as the Commission correctly observes, the purpose of the procedure provided for in Article 5(6) of the Authorisation Directive is similar to the purpose of the control of concentrations, but limited to matters involving the transfer of frequencies as a result of the merger. The requirement relating to prior authorisation from the regulatory authority is designed to prevent a situation in which the transfer of rights to use frequencies would lead to the concentration of those rights, or to the reinforcement of a particular undertaking's position, thereby distorting competition.

104. In the light of the foregoing considerations, Article 4(1) of the Framework Directive must be interpreted as meaning that an undertaking competing with the parties to a transaction consisting in the transfer of rights to use frequencies, as referred to in Article 5(6) of the Authorisation Directive, has the right to contest a decision of a regulatory authority authorising the transfer of such rights, if that transaction may significantly affect its market position.

²⁹ — See, to that effect, *BaByliss v Commission*, EU:T:2003:100, paragraph 100.

VI – Conclusions

105. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Verwaltungsgerichtshof (Austria):

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), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that an undertaking competing with the parties to a transaction consisting in the transfer of rights to use frequencies, as referred to in Article 5(6) 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), as amended by Directive 2009/140/EC, has the right to contest a decision of a regulatory authority authorising the transfer of such rights, if that transaction may significantly affect its market position.