Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 23 October 2014[1]

Case C-510/13

E.ON Földgáz Trade Zrt
v
Magyar Energetikai és Közmű-szabályozási Hivatal

(Request for a preliminary ruling from the Kúria (Hungary))

(Internal market in natural gas — Directive 2003/55 — Directive 2009/73 — Scope ratione temporis — Locus standi of a legal person, a natural gas distribution company, to contest a decision of the national regulatory authority — National condition for locus standi based exclusively on a 'legal interest' — Fundamental right to effective legal protection — Article 47 of the Charter of Fundamental Rights of the European Union)

1. By this request for a preliminary ruling, the Kúria (Supreme Court, Hungary) has referred to the Court of Justice a number of questions on the interpretation of Directives 2003/55/EC[2] and 2009/73/EC,[3] both of which concern common rules for the internal market in natural gas.

2. More specifically, the referring court asks the Court, in the first place, about the temporal application of both directives in a situation in which the contested national decision was adopted and appealed against at a time when Directive 2003/55 was still applicable but Directive 2009/73, which repeals it, was at the transposition stage.

3. In addition, and more significantly, the Kúria raises doubts about the compatibility with EU law of a condition for *locus standi* to bring administrative proceedings in Hungary, requiring an applicant to have a 'legal interest', the existence of mere economic loss being insufficient. In the instant case, an operator in the Hungarian market in natural gas, E.ON, has brought an action contesting a decision of the Hungarian national regulatory authority, which establishes the criteria for deciding on applications for long-term reserve capacity in a gas pipeline. The Hungarian court of first instance held that that decision did not affect the applicant's 'legal interest', but only its economic interest. The referring court's uncertainties as to whether that approach is compatible with EU law are at the heart of the present reference for a preliminary ruling.

1 — Original language: Spanish.

2 — Directive 2003/55/EC **of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing** Directive 98/30/EC (OJ 2003 L 176, p. 57).

3 — 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).

I – **Legal framework**

A – *EU legislation*

4. Directive 2003/55, also known as the 'second directive', requires Member States to create one or more bodies with the function of regulatory authorities in the gas sector. Article 25 of Directive 2003/55 sets out, inter alia, the rights of parties affected by the decisions of those authorities. For the purposes of the present reference for a preliminary ruling, the most important provisions are those laid down in paragraphs 5, 6 and 11:

'Article 25

Regulatory authorities

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall, through the application of this Article, at least be responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market …

…

5. Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 and in Article 19 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authorities. Such a decision shall have binding effect unless and until overruled on appeal.

6. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to paragraphs 2, 3 or 4 or, where the regulatory authority has a duty to consult, concerning the proposed methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

…

11. Complaints referred to in paragraphs 5 and 6 shall be without prejudice to the exercise of rights of appeal under Community and national law.'

5. Directive 2003/55 was repealed by Directive 2009/73 concerning common rules for the internal market in natural gas, also known as the 'third directive'. For the purposes of these proceedings, attention should be drawn to the following provisions of Article 41 of that directive:

'11. Any party having a complaint against a transmission, storage, LNG or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authorities. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.

12. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

13. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. Those mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

14. Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

15. Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under Community or national law.

16. Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.'

6. Regulation No 1775/2005 on conditions for access to the natural gas transmission networks,[4] repealed and replaced by Regulation No 715/2009,[5] lays down the principles governing capacity allocation mechanisms and the congestion management procedures applicable to system operators. In particular, under the heading 'Principles of capacity allocation mechanisms and congestion management procedures', Article 5 of the regulation provides as follows:

'1. The maximum capacity at all relevant points referred to in Article 6(3) shall be made available to market participants, taking into account system integrity and efficient network operation.

2. Transmission system operators shall implement and publish non-discriminatory and transparent capacity allocation mechanisms, which shall:

(a) provide appropriate economic signals for efficient and maximum use of technical capacity and facilitate investment in new infrastructure;

(b) be compatible with the market mechanisms including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances;

(c) be compatible with the network access systems of the Member States.

4 — Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 (OJ 2005 L 289, p. 1).

5 — Regulation (EC) No 715/2009 **of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing** Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36).

3. When transmission system operators conclude new transportation contracts or renegotiate existing transportation contracts, these contracts shall take into account the following principles:

(a) in the event of contractual congestion, the transmission system operator shall offer unused capacity on the primary market at least on a day-ahead and interruptible basis;

(b) network users who wish to re-sell or sublet their unused contracted capacity on the secondary market shall be entitled to do so. Member States may require notification or information of the transmission system operator by network users.

4. When capacity contracted under existing transportation contracts remains unused and contractual congestion occurs, transmission system operators shall apply paragraph 3 unless this would infringe the requirements of the existing transportation contracts. Where this would infringe the existing transportation contracts, transmission system operators shall, following consultation with the competent authorities, submit a request to the network user for the use on the secondary market of unused capacity in accordance with paragraph 3.

5. In the event that physical congestion exists, non-discriminatory, transparent capacity allocation mechanisms shall be applied by the transmission system operator or, as appropriate, the regulatory authorities.'

B – *National legislation*

7. Article 3(1) of the *a Polgári perrendtartásról szóló 1952. évi III. törvény* (Law No III of 1952 concerning the Civil Procedure Code) provides that, unless otherwise provided for by law, an action may be brought before the civil courts only by someone who has an interest in the matter.

8. Article 327(1)(a) and (b) of that Law includes a special rule relating to administrative proceedings, according to which an action may be brought before the administrative courts by any party to an administrative procedure and anyone expressly affected by the contested measure.

II – **The facts and the national proceedings**

9. FGSZ Földgázszállító Zrt. is the manager of the gas network in Hungary. In accordance with the national legislation currently in force, FGSZ ('the manager') decides, in the order in which applications are lodged, on the long-term reserve capacities of operators in the gas market. After checking the available spare capacity, the manager decides on the level of long-term reserve capacity requested and concludes the relevant long-term capacity contract with the operator.

10. E.ON Földgáz Trade Zrt. ('E.ON') is an operator in the Hungarian gas market. According to the case-file, E.ON submitted applications to the manager for long-term reserve capacity of more than one gas year for the HAG gas pipeline (gas interconnector between Hungary and Austria). The applications exceeding the available spare capacity for the gas year, the manager asked the Hungarian regulatory authority to give a ruling on the matter.

11. By Decision No 98/2010 of 22 February 2010, the Hungarian regulatory authority amended the decision in force on that date, stipulating for the manager the criterion applicable to applications for spare capacity of the HAG gas pipeline for the 2010/2011 gas year. The new decision authorised the manager to deal with applications for capacity of more than one year's duration, where those referred

to the 2010/2011 gas year, for up to 80% of the spare capacity of the gas pipeline. The remainder, that is to say, 20% of the spare capacity of the gas pipeline, was assigned to the processing of the annual reserves for gas year 2010/2011. In the authority's opinion, an excess of reserves for more than one year is liable to restrict competition and hinder the entry of other operators onto the market.

12. E.ON brought an action before the Fővárosi Bíróság, contesting in part the authority's Decision No 98/2010, and, on 27 March 2010, the Fővárosi Bíróság ruled on the action at first instance, basing its decision on the applicant's want of *locus standi*. In that court's opinion, E.ON had not produced a contract for the supply of services or an agreement concluded to ensure access to the resources, nor had it signed any contract with the network manager. In accordance with Hungarian procedural law and the case-law of the Kúria, a right of action cannot be founded on the fact of economic loss.

13. E.ON appealed against the decision of the court of first instance before the Kúria, which, by order of 2 July 2013, made the present reference for a preliminary ruling to the Court.

III – **The questions referred for a preliminary ruling and the procedure before the Court**

14. The request for a preliminary ruling, made pursuant to Article 267 TFEU, which was received at the Court Registry on 25 September 2013; refers the following questions for a preliminary ruling:

'(1) In proceedings relating to an administrative decision adopted when Directive 2003/55/EC … was in force, do the provisions laid down in Article 25 of that directive, determining who is entitled to bring an action, apply, or are the provisions to be taken into consideration for the purposes of those proceedings laid down in Article 41 of Directive 2009/73/EC … which entered into force during the proceedings, account being taken of the second subparagraph of Article 54(1) of that directive, under which those provisions are to be applicable from 3 March 2011?

(2) In the event that the 2009 Directive is applicable, can an approved vendor with a financial interest comparable to the interest at stake in the present proceedings, in relation to an action contesting the decision approving a network code or determining its content, be regarded as "a party affected" for the purposes of Article 41(17) of that directive, or can only the network manager who is authorised to seek approval of the code be regarded as "a party affected"?

(3) In the event that the 2003 Directive is applicable, does the approval or amendment of the network code, such as that which has taken place in the present case, fall within the situations contemplated in Articles 25(5) and (6), in as much as it refers to the assessment of requests for reserve capacity?

(4) In the event that the case falls within one of the situations contemplated in Article 25(6) of the 2003 Directive, can an approved vendor with a financial interest comparable to the interest at stake in the present proceedings, in relation to an action contesting the decision approving a network code or determining its content, be regarded as "a party affected" for the purposes of Article 41(17) of that directive, or can only the network manager who is authorised to seek approval of the code be regarded as "a party affected"?

(5) What interpretation is to be given to Article 25(11) of the 2003 Directive, in accordance with which the claims referred to in Article 25(5) and (6) are to be without prejudice to the exercise of rights of appeal under Community and national law, in the event that it is apparent from the answers to the preceding questions that national law makes the bringing of an action subject to more stringent requirements than those laid down in the directive or in Community law?'

15. Written observations were submitted by the Polish Government and the European Commission.

IV – **Analysis**

16. The five questions referred by the Kúria may be reduced, in short, to two. The first concerns the applicability *ratione temporis* of Directives 2003/55 and 2009/73 to a procedural context. The reply to that first question will enable me to recast the four remaining questions as a single question, thus focusing on whether a national provision which grants a right of action solely to operators in the gas sector showing a 'legal interest' is compatible with EU law. I shall address those two questions separately.

A – *The applicability* ratione temporis *of Directives 2003/55 and 2009/73*

17. The Kúria asks the Court which of the two directives concerning the market in natural gas is applicable in a situation such as that in the present case. The question is important, for Directive 2009/73 contains provisions of a procedural nature not included in Directive 2003/55 that could lead to a different outcome in the resolution of this case.

18. Only the Commission has made submissions on that point, arguing that Directive 2003/55, and not Directive 2009/73, is applicable. According to the Commission, the date to be used as the material date is the date on which the decision of the regulatory authority was adopted, namely 22 February 2010. Because the period allowed for transposing Directive 2009/73 expired on 3 March 2011, the date on which Directive 2003/55 was repealed pursuant to Article 53 of Directive 2009/73, the Commission submits that the only provision relevant to the present case is Directive 2003/55.

19. I cannot agree with the Commission's argument concerning the temporal point of reference, which, according to the Commission, is the date on which the contested measure was adopted. I do not agree with that criterion, for the present case raises a difficulty relating to the *locus standi* of a party bringing an action and, as we know, it is settled case-law both of national courts and of the Court of Justice that the relevant point in such cases is the time when the action was brought and not the time when the contested measure was adopted.[6] Accordingly, I believe that the material date in the present case is 27 March 2010, the date on which, as the Commission has informed the Court, the application was lodged with the Fővárosi Bíróság, and not 22 February 2010.

20. At all events, Directive 2003/55 was fully in force on 27 March 2010, whereas Directive 2009/73 was in the process of transposition, as is apparent from the case-file. Therefore, the Commission is right to assert that the legislation applicable to the present case is Directive 2003/55.

21. That said, there may be a question as to whether Directive 2009/73 might have an effect on this case, because that act was already in force, albeit still in the process of transposition.

22. As is well known, the Court has held on many occasions that, during the period allowed for transposition of a directive, the Member States to which the latter is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.[7] Such an obligation to refrain being incumbent on all the national authorities, it must be understood, according to the case-law, to refer to the adoption of any measure, general or specific, liable to produce such a compromising effect.[8]

6 — See, inter alia, *Campogrande* v *Commission*, 60/72, EU:C:1973:50, paragraph 4, and *Bensider and Others* v *Commission*, 50/84, EU:C:1984:365, paragraph 8.

7 — See *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45; *Stichting Natuur en Milieu and Others*, C-165/09 to C-167/09, EU:C:2011:348, paragraph 78; and *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 57.

8 — Ibid.

23. However, the case-law referred to above concerns positive measures adopted by the Member States with a view to seriously compromising the effect of a directive and not national legislation already in existence when the directive concerned entered into force. In other words, the objective of the case-law cited is to prevent measures adopted after the entry into force of a directive and before the expiry of the period allowed for implementation, that seek, *de jure* or *de facto*, to jeopardise the attainment of the objectives pursued by the directive.

24. The present case concerns an individual decision of a court, applying settled case-law in accordance with which, in order to have a right of action in administrative proceedings, it is necessary to establish a legal interest and not solely an economic interest. It is not, therefore, concerned with national legislation or case-law appearing specifically in relation to this case.

25. Moreover, the present case concerns a situation in which there are two directives one after the other, meaning that during the period for transposition of Directive 2009/73, there already existed applicable EU legislation fully transposed into the Hungarian legal order.

26. In those circumstances, it is to be noted that the Court has previously dealt with several situations of this kind. In *Hochtief AG*,[9] in the context of a procedure for the award of an administrative contract during which the period allowed for implementation of a new directive expired, the Court, relying on the principle of legal certainty, held that that directive was not applicable to a decision taken by a contracting authority concerning the award of a public works contract before the expiry of the period for transposition of that directive into national law. The Court relied on that judgment in *Commission* v *France*,[10] in which a directive had already been declared inapplicable to a procedure begun before the date on which the period allowed for transposition of that directive expired.[11]

27. The foregoing leads me to argue for the exclusive application of Directive 2003/55, for the issue in this case is the time when the administrative action was lodged, which is the point at which the applicant was required, in accordance with Hungarian law, to demonstrate that it had a legal interest. It remains only to confirm whether Directive 2009/73 could have any effect on the interpretation of the Hungarian legislation at the time when it was still in the process of transposition and Directive 2003/55 was still in force.

28. In that connection, it is my understanding that the Court has declared categorically that the duty of interpretation in conformity with a directive begins only at the moment when the directive is specifically transposed into national law (and transposition is therefore notified) or, if the directive is not transposed, when the period for transposition expires. In *Adeneler and Others*,[12] the Grand Chamber of the Court was faced with that question and concluded that 'where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only *once the period for its transposition has expired*'.[13]

29. I believe that that approach is all the more necessary in the case of a series of directives, when there already exists EU legislation in relation to the matter, which calls for an interpretation by the national court in conformity with the directive still in force. To require a national court to give an interpretation in conformity with two directives, whose provisions differ on many points, would lead to legal uncertainty contrary to EU law that must be rejected.

9 — *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627.

10 — C-337/98, EU:C:2000:543.

11 — *Commission* v *France*, paragraphs 38 to 40.

12 — C-212/04, EU:C:2006:443.

13 — *Adeneler and Others*, paragraph 115 (emphasis added).

30. Accordingly, I propose that the Court answer the first question referred for a preliminary ruling by the referring court to the effect that, in a situation such as that in the present case, account being taken of the time when the application was lodged with the court hearing the case, the national court must apply Directive 2003/55 exclusively.

B – *The provision of national law under which only those demonstrating 'a legal interest' have* locus standi

1. The positions of those who have submitted observations

31. The Republic of Poland and the Commission, the only participants to have submitted observations in these proceedings, approach the matter from different angles.

32. The Polish Government takes the view that the reference to the 'party who is affected' in Article 25(6) of Directive 2003/55 relates not to system operators but to the manager. Accordingly, the Polish Government submits that that article is not applicable to the present case and, consequently, there is no solution to the question raised by the Kúria in any of the provisions of the directive.

33. In the Commission's opinion, Article 25(5) and (6) of Directive 2003/55 provides for a right of administrative complaint only but not for a right to bring judicial proceedings. That interpretation is, in its view, confirmed if the provision is compared with the wording of Directive 2009/73, which does provide expressly for proceedings to be brought before the national courts. Moreover, although the Commission submits that, in principle, the contested decision falls within the ambit of Article 25(1) of Directive 2003/55, that decision was not adopted by the Hungarian regulatory authority acting as a 'dispute settlement authority'. Accordingly, Article 25(5) of Directive 2003/55 is not applicable. The same conclusion may be reached in relation to Article 25(6), relating to decisions on methodologies referred to in paragraphs 2, 3 and 4. The contested decision concerning a measure other than those referred to in paragraphs 2, 3 and 4, Article 25(6) is not applicable either. In short, the Commission submits that the relevant provisions of Directive 2003/55 are not applicable to the present case.

34. I believe that it is important to point out that the Commission has also taken a view, albeit by way of an alternative, on the outcome of the case in the light of Directive 2009/73. It is important to draw attention to this point because, in that context, the Commission concluded that the national court was required to observe the principles of effectiveness and equivalence, not, however, owing to the application of Directive 2009/73, but rather pursuant to Regulation No 715/2009 on conditions for access to the natural gas transmission networks. That regulation grants a number of rights to operators in the gas sector, including the right that capacity-allocation mechanisms and congestion-management procedures should be non-discriminatory and transparent. Although the Commission puts forward that proposal in the context of the application of Directive 2009/73 to the specific case, it is important to draw attention to it because it will be decisive in the analysis I shall now carry out.

2. Analysis

35. As I have argued in points 19 to 30 of this Opinion, the only directive applicable to the present case is, in principle, Directive 2003/55, known as 'the second directive'. That text was repealed by Directive 2009/73, a measure which, unlike Directive 2003/55, includes additional provisions on the legal remedies available to the parties concerned. Therefore, the directive applicable in the present case, Directive 2003/55, is notable for its want of detail on the matter of access to justice.

36. The only provision of Directive 2003/55 that refers to the exercise of the right to bring proceedings is Article 25(11). That provision refers to Article 25(5) and (6), adding that, in the situations governed therein, complaints brought by parties who are affected 'shall be without prejudice to the exercise of rights of appeal under Community and national law'.

37. However, as the Commission has argued, the decision contested in the main proceedings is not included among the decisions referred to in paragraphs 5 and 6. Those provisions refer, respectively, to decisions adopted while acting as a dispute settlement authority and decisions on methodologies. The present case does not appear to be concerned with either of those two categories, with the result that the provisions concerning rights of appeal in paragraph 11 are not applicable to the present case.

38. Nevertheless, the EU regulatory framework for the gas sector is considerably broader, for it is not confined solely to those harmonising measures. [The national regulatory authorities, and network managers and operators, are subject to the provisions of various regulations, among which for the purposes of the present case may be distinguished Regulation No 1775/2005 on conditions for access to the natural gas transmission networks, repealed in 2009 by the abovementioned Regulation No 715/2009.]

39. Regulation No 1775/2005 was, in fact, applicable *ratione materiae* and *ratione temporis* to the case before the court, for it specifically concerns the conditions under which operators have access to the natural gas transmission networks, it being understood that it remained in force until 3 March 2011, when Regulation No 715/2009 became applicable. [14]

40. Article 5 of Regulation No 1775/2005 lays down the principles of capacity allocation mechanisms and congestion management procedures applicable to transmission system operators. That provision provides for the right of all operators to have 'the maximum capacity' made available to them, and to be subject to 'non-discriminatory and transparent' capacity allocation mechanisms. Those principles are intended to cover system operators and regulatory authorities, which, according to Article 10, 'shall ensure compliance' with Regulation No 1775/2005.

41. In particular, Article 5(5) provides that in the event of physical congestion existing, 'non-discriminatory, transparent capacity allocation mechanisms shall be applied' by the transmission system operator and the regulatory authorities. It is clear that, although the addressees of the provision are transmission system operators and regulatory authorities, the beneficiaries are none other than network operators, who are granted the right to have decisions relating to congestion management adopted in accordance with criteria of transparency and non-discrimination.

42. Having reached this stage, I believe that, in the instant case, Article 5(5) of Regulation No 1775/2005 grants the applicant in the main proceedings a right to ensure that decisions relating to congestion management are adopted in accordance with criteria of transparency and non-discrimination. Therefore, that being a right conferred directly by EU law on, in this case, E.ON, Hungary must guarantee that right by means of national judicial procedures, respecting, of course, the procedural autonomy of the national courts but also respecting the right to an effective remedy, as required by Article 47 of the Charter of Fundamental Rights of the European Union. That conclusion is supported by extensive, settled case-law of the Court.

14 — Article 32 of Regulation No 715/2009.

43. It is well known that Article 47, as an extension of previous case-law based on the principles of effectiveness and equivalence and on the general principle of effective judicial protection, takes effect in relation to any national procedural rules aimed at guaranteeing the enforceability of the rights conferred by Union law.[15] It is clear that that includes national rules on *locus standi*, inasmuch as these act as important filters of access to justice in the Member States.

44. In fact, the conditions for access to justice in the Member States are particularly relevant for the purposes of EU law. Proof of that is Article 19(1) TEU, which requires Member States to *provide* remedies 'sufficient to ensure effective legal protection in the fields covered by EU law'.

45. It is therefore from the perspective of effective judicial protection that I must examine whether the national criteria for *locus standi* called into question by the referring court are compatible with EU law.[16]

46. As is well known, when doubts are raised as to whether a national procedural provision is compatible with the principles referred to, the fundamental right to effective legal protection calls for an analysis by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary, according to the case-law, to take into consideration, where relevant, the principles lying at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[17]

47. The application of the fundamental right to effective judicial protection to the national conditions for *locus standi* has given rise to various judgments of the Court of interest for the purposes of the present preliminary-ruling proceedings.

48. In 2005, in *Streekgewest*,[18] the Court found that it was incompatible with Community law for a national decision to rule inadmissible an action brought by a consortium of municipalities against the decision of another administrative authority not to implement a prohibition of aid declared to be unlawful. The Court held that '[a]n individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 93(3) [now Article 108(3) TFEU]'.[19] The national decision ruling the action inadmissible required the applicant to have been affected by the distortion of competition derived from the aid measure. However, the Court disagreed and held that '[t]he only fact to be taken into consideration is that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision [last sentence of Article 93(3), now Article 108(3) TFEU]'.[20]

49. In *Club Hotel Loutraki and Others*,[21] in which judgment was given in 2010 after the entry into force of the Charter of Fundamental Rights of the European Union, the Court again criticised a Member State for having limited excessively the criteria for *locus standi* in a case concerning the award of administrative contracts. The tenderer bringing the action was precluded from making a

15 — See Article 51 of the Charter, which limits the application of the Charter to situations in which the Member States 'are implementing Union law'. The recent case-law of the Court, particularly that concerning the right to effective judicial protection, is significant in that regard. See, inter alia, *DEB*, C-279/09, EU:C:2010:811; *Samba Diouf*, C-69/10, EU:C:2011:524; and *Sánchez Morcillo*, C-169/14, EU:C:2014:2099.

16 — This broad interpretation of effective judicial protection as also encompassing the well-known principles of effectiveness and equivalence is shared by other Advocates General. That was the approach taken by Advocate General Bot in his Opinion in *Agronkonsulting*, C-93/12, EU:C:2013:172, point 36, and also by Advocate General Jääskinen in his Opinion in *Liivimaa Lihaveis*, C-562/22, EU:C:2014:155, point 47.

17 — *Tele 2 Telecommunication*, C-426/05, ECLI:EU:C:2008:103, point 55 and the judgments cited therein. See also the Opinion of Advocate General Szpunar in *T-Mobile Austria*, C-282/13, EU:C:2014:2179.

18 — C-174/02, ECLI:EU:C:2005:10.

19 — Ibid., point 19.

20 — Ibid.

21 — C-145/08, EU:C:2010:247.

claim before the Greek courts for compensation for damage suffered by reason of a breach of EU law by an administrative act liable to have influenced the outcome of the procedure for the award of the contract. In those circumstances, the Court held that '[s]uch a tenderer is thus deprived of effective judicial protection of the rights in that area of the law which it has under EU law'. [22]

50. It follows from the foregoing that a mere expectation may be sufficient for a finding that an administrative action is inadmissible before the national courts. That outcome would not be contrary to the fundamental right to effective legal protection. However, where the interest is sufficiently clear and is reflected in economic consequences, the combination of a right conferred by EU law and the economic loss suffered requires the Member States to guarantee access to justice.

51. Turning now to the case referred by the referring court, I consider it clear from the case-file that the case-law of the Hungarian courts requires a 'legal interest' as a condition for *locus standi* in administrative proceedings. That interest may be contrasted with mere economic loss, in that the former guarantees access to proceedings but the latter does not. It follows from the order for reference that E.ON has not entered into a specific legal relationship with either the network manager or the regulatory authority, at least in relation to the specific matter relating to congestion management, which would be sufficient to categorise the appellant's interest as 'legal'.

52. That is the approach adopted by various Member States, a feature of whose administrative justice systems is a certain strictness in the conditions for *locus standi*. [23] That is the case of the Republic of Poland, which warrants its participation in these proceedings.

53. There is no doubt that those systems of administrative justice were adopted in accordance with the principle of the procedural autonomy of the Member States, without EU law raising any objection to their operation from a general perspective. [24] It is legitimate for the Member States to ensure judicial review of the actions of the administrative authorities for those individuals and groups directly affected by certain public decisions, while other Member States may opt for more open systems. In specific cases, as may occur in the context of environmental law, EU law may require Member States to make certain alterations but, as a whole, the Union legal system co-exists peacefully with different national systems of administrative justice.

54. In the present case, I believe that E.ON could not exercise a right under Directive 2003/55 for, although the directive was applicable *ratione temporis*, by reason of its subject-matter it does not contain provisions that might resolve the specific case referred by the Kúria.

55. However, as I have stated above, E.ON has a right under Article 5(5) of Regulation No 1775/2005. That provision guarantees all operators the right to have decisions on congestion management adopted in accordance with the principles of non-discrimination and transparency. It is a decision of precisely that kind that is contested by E.ON, for it concerns criteria relating to the spare capacity available for the gas year. Accordingly, I believe that E.ON, in addition to having a right granted by Regulation No 1775/2005, had clear financial interests at stake. The combination of those two factors leads me to conclude that, when viewed in the light of the right to effective legal protection, the decision denying that that E.ON lacked *locus standi* owing to the want of a 'legal interest' is difficult to reconcile with that right.

22 — Ibid., point 78.

23 — On that question, there is a highly informative analysis by Eliantonio, M., Backes, C., van Rhee, C.H., Spronken, T. and Berlee, A., *Standing up for your right(s) in Europe. A comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, Intersentia, 2013.

24 — See, for example, the case-law of the Court dealing with the case of Germany and the adaptation of its provisions on *locus standi* in administrative proceedings to bring them into line with the international and European framework outlined in the Aarhus Convention and, specifically, the provisions of that convention on access to justice: *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 43, and *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 45.

56. It is not the Court's task to give a ruling on the validity of a general national criterion for *locus standi* or to deprive the national court of its function as guarantor and interpreter of national law. It is for the Kúria to find the interpretation of national law that enables that law to be reconciled with EU law. The Court assists the referring court solely with the task of interpreting provisions of EU law.

57. Therefore, and in conclusion, I consider that Article 5(5) of Regulation No 1775/2005, in conjunction with Article 47 of the Charter, must be interpreted as precluding a criterion for *locus standi* of the kind applied in the present case, based on the existence of a 'legal interest', which excludes access to administrative justice for a natural gas operator seeking to contest a decision of a national regulatory authority.

V – **Conclusion**

58. In the light of the foregoing considerations, I propose that the Court the questions referred by the Kúria as follows:

(1) In a situation such as that in the present case, taking account of the time when the application was lodged with the court hearing the case, the national court must apply exclusively Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

(2) Article 5(5) of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a criterion for *locus standi* of the kind applied in the present case, based on the existence of a 'legal interest', which excludes access to administrative justice for a natural gas operator seeking to contest a decision of a national regulatory authority.