



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

25 January 2024*

(Reference for a preliminary ruling – Internal market in natural gas – Directive 2009/73/EC – Article 41(17) – Natural gas transmission system – National regulatory authority – Fixing of system usage charges and connection fees – Fixing of remuneration for any services provided by the system operator – Concept of ‘a party affected by a decision of a regulatory authority’ – Appeal against that decision – Right to an effective remedy – Article 47 of the Charter of Fundamental Rights of the European Union)

In Case C-277/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 22 March 2022, received at the Court on 22 April 2022, in the proceedings

Global NRG Kereskedelmi és Tanácsadó Zrt.

v

Magyar Energetikai és Közmű-szabályozási Hivatal,

intervening party:

FGSZ Földgázszállító Zrt.,

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), President of the Chamber, M. Safjan and N. Jääskinen, Judges,

Advocate General: A. Rantos,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2023,

after considering the observations submitted on behalf of:

– Global NRG Kereskedelmi és Tanácsadó Zrt., by K. Bendzsel-Zsebik, M. Kohlrusz and B. Világi, ügyvédek,

* Language of the case: Hungarian.

- the Magyar Energetikai és Közmű-szabályozási Hivatal, by L. Hoschek, A.T. Kiss and F.F. Tölgyessy, Legal Advisers,
- FGSZ Földgázszállító Zrt., by K. Barkasziné Takács and P. Németh, Legal Advisers,
- the Hungarian Government, by M.Z. Fehér and M.M. Tátrai, acting as Agents,
- the Spanish Government, by A. Gavela Llopis and J. Ruiz Sánchez, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Finnish Government, by A. Laine, acting as Agent,
- the European Commission, by O. Beynet, T. Scharf and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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), in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Global NRG Kereskedelmi és Tanácsadó Zrt. ('Global NRG'), a company which markets natural gas, and the Magyar Energetikai és Közmű-szabályozási Hivatal (Hungarian Regulation Authority for the Energy Sector and Public Utilities) ('the national regulator') concerning the lawfulness of the national regulator's decision fixing the usage charges and connection fees for the natural gas transmission system and the remuneration for any services provided by the operator of that system.

Legal context

European Union law

Directive 2009/73

- 3 Recital 33 of Directive 2009/73 states:

'... The independent body to which a party affected by the decision of a national regulator has a right to appeal could be a court or other tribunal empowered to conduct a judicial review.'

4 Article 32 of that directive, entitled ‘Third-party access’, provides in paragraph 1 thereof:

‘Member States shall ensure the implementation of a system of [third-party] access to the transmission and distribution system, and [liquefied natural gas (LNG)] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.’

5 Under Article 41 of that directive, entitled ‘Duties and powers of the regulatory authority’:

‘1. The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;

...

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs, and terms, conditions and tariffs for access to LNG facilities. ...;

...

10. Regulatory authorities shall have the authority to require transmission, storage, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. ...

...

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.’

Regulation (EC) No 715/2009

6 Article 13 of 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), entitled ‘Tariffs for access to networks’, provides, in paragraph 1 thereof:

‘Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities pursuant to Article 41(6) of Directive [2009/73], as well as tariffs published pursuant to Article 32(1) of that Directive, shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, in so far as such

costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner.’

Hungarian law

- 7 Paragraph 129/B of the a földgázellátásról szóló 2008. évi XL. törvény (Law No XL of 2008 concerning the supply of natural gas) (‘the Law on the supply of natural gas’) provides, in subparagraph 1 thereof:

‘In the procedures to set the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system manager affected shall be considered as being directly affected.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 8 By a decision of 10 August 2021, the national regulator fixed, for the period from 1 October 2021 to 30 September 2025, the special tariff concerning the supply of natural gas, applicable by FGSZ Földgázszállító Zrt., the operator of the natural gas transmission system, and the amount of the fees for connecting to the gas pipelines (‘the contested decision’). That decision is based on an earlier decision of the national regulator of 30 March 2021 establishing the reference price methodology, which, following an appeal brought by Global NRG, was declared unlawful and annulled with retroactive effect by the Kúria (Supreme Court, Hungary).
- 9 Global NRG also brought, before the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court, an appeal seeking annulment of the contested decision. It claims that that decision was unlawful because, first, the decision of 30 March 2021 was declared unlawful and, secondly, the tariffs applicable to the title transfer service were fixed in breach of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (OJ 2017 L 72, p. 29).
- 10 Global NRG also claims that, since national law grants the user of the natural gas transmission system a right of appeal against decisions such as that of 30 March 2021 on the reference price methodology on which the usage charges for that system are based, it is contrary to EU law to deprive such a user of a right of appeal against the subsequent decision which fixes the usage charges for that system.
- 11 The national regulator contests the appeal primarily on the ground that Global NRG does not have ‘standing to bring proceedings from a substantive point of view’, since that company was not party to the procedure for the adoption of the contested decision and has no direct link to the subject matter of that procedure. In those circumstances, the national regulator claims that Global NRG is affected by that decision only in an indirect way and a mere economic interest on its part is not sufficient to establish a right of appeal against that decision.
- 12 The referring court notes that, according to Global NRG, since the tariffs fixed by the contested decision are binding on both the operator and the user of the natural gas transmission system, they directly affect the rights and legitimate interests of that user. However, it specifies that, in accordance with Hungarian law, when an appeal is brought by a person that, like Global NRG,

has *locus standi* in a procedural sense, it is necessary to examine whether that person also has standing to bring proceedings from a substantive point of view, that is to say, whether it is directly affected in respect of its rights or legitimate interests by the contested decision, on which condition that court's ability to examine an appeal brought by such a person against that substantive decision depends.

- 13 In the present case, according to the referring court, it is necessary to determine, before examining the substance of the appeal brought by Global NRG, whether that company may be qualified as 'a party affected by a decision of a regulatory authority' within the meaning of Article 41(17) of Directive 2009/73. Since that concept is not defined by that directive, it must be considered in the light of the judgments of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189), and of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)* (C-771/18, EU:C:2020:584).
- 14 The referring court is uncertain, in the first place, whether Article 41(17) of that directive, read in the light of the right to an effective remedy laid down in Article 47 of the Charter, precludes a provision of national law, such as Paragraph 129/B, subparagraph 1, of the Law on the supply of natural gas, under which, in the procedures to set the system usage charges, transmission charges and connection fees, in addition to remuneration for any services provided by the operator of that system, only that operator is considered to be 'a party affected by a decision of a regulatory authority', within the meaning of Article 41(17), to the exclusion of all other market operators in the natural gas sector. That court considers that Paragraph 129/B, subparagraph 1, thus requires it to dismiss the appeal brought by Global NRG without examining its substance, which, according to that court, constitutes a 'disproportionate restriction' of the right of appeal provided for in Article 41(17) of Directive 2009/73.
- 15 In the second place, that court, on the basis of paragraphs 48 and 49 of the judgment of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189), takes the view that a market operator, such as Global NRG, has a right of appeal on the ground that it is directly affected by the contested decision. It notes, in that regard, that the operator of the natural gas transmission system must impose the special tariff fixed in that decision on the market operator and that that market operator cannot carry out its activity before paying the amounts required on that basis.
- 16 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - '(1) Must Article 41(17) of Directive [2009/73] be interpreted, in the light of Article 47 of the [Charter], as meaning that it precludes national legislation according to which, in the procedures by which the regulatory authority of that Member State sets system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, only the system operator is recognised as a party directly affected and, as such, the only party having a right of appeal against a decision made in that procedure?
 - (2) If the Court answers the first question in the affirmative, must Article 41(17) of [Directive 2009/73] be interpreted, in the light of Article 47 of the [Charter], as meaning that where that article is applied to a case such as that in the main proceedings, an actor in the natural gas market in a situation such as that of the applicant, which, under a decision by the regulatory authority of the Member State setting the system usage charges, remuneration for any services provided by system operators under a special tariff and connection fees, is

charged a tariff by the system manager for a service that can be provided under a special tariff, must be found to be a party affected by that decision and, as such, to have a right of appeal against it?’

Consideration of the questions referred

- 17 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 41(17) of Directive 2009/73, read in the light of the first paragraph of Article 47 of the Charter, must be interpreted as precluding legislation of a Member State under which only the operator of the natural gas transmission system is classified as a ‘party affected’ by a decision of the national regulatory authority fixing the connection fees and usage charges for that system in addition to the remuneration for any services provided by that operator and, consequently, only that operator has standing to bring an effective appeal against that decision.
- 18 Article 41(17) of Directive 2009/73, read in conjunction with recital 33 thereof, requires Member States to establish, at national level, suitable mechanisms under which a party affected by a decision of a national regulatory authority has a right to bring proceedings before a body independent of the parties involved and of any government, which ‘could be a court or other tribunal empowered to conduct a judicial review’. Such a requirement is a corollary of the principle of effective judicial protection, a general principle of EU law guaranteed in Article 47 of the Charter (judgment of 2 September 2021, *Commission v Germany (Transposition of Directives 2009/72 and 2009/73)*, C-718/18, EU:C:2021:662, paragraph 128 and the case-law cited).
- 19 In the first place, although the concept of ‘party affected’ within the meaning of Article 41(17) is not defined by Directive 2009/73, the Court has already interpreted a similar provision, namely Article 5a(3) of 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), as meaning that a market operator which is not the addressee of a decision of a national regulatory authority acquires the status of party affected, when its rights are potentially affected by such a decision by reason of its content and the activity exercised or envisaged by that party. It stated that a contractual link between that market operator and the addressee of that decision is not required for the rights of such a market operator to be potentially affected by that decision (judgment of 24 April 2008, *Arcor*, C-55/06, EU:C:2008:244, paragraphs 176 and 177).
- 20 In the second place, the Court held, as regards 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, and corrigendum OJ 2004 L 16, p. 74) which – unlike Directive 2009/73 which replaced it – contained no provision explicitly granting market operators a right to apply to the courts for legal review of decisions of a national regulatory authority, that, when that national regulatory authority adopts a decision concerning market operators’ access to the natural gas transmission system, on the basis of EU legislation which confers certain rights on a market operator holding a natural gas transmission authorisation, that market operator must be regarded as potentially having its rights infringed by that decision, even if it is not the addressee thereof (see, to that effect, judgment of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189, paragraphs 38, 48 and 51).

- 21 In that regard, it must be noted that Article 41(1)(a) of Directive 2009/73 grants the national regulatory authority the power to ‘[fix] or [approve], in accordance with transparent criteria, transmission or distribution tariffs or their methodologies’. Article 41(6)(a) of that directive also grants that authority the power to fix or approve at least the methodologies used to establish the terms and conditions for connection and access to national networks, including applicable transmission and distribution tariffs. Moreover, Article 41(10) of that directive empowers that authority to require transmission system operators, if necessary, to modify the terms and conditions, including the tariffs and methodologies referred to in that article, to ensure that those tariffs are proportionate and applied in a non-discriminatory manner.
- 22 Furthermore, it is apparent from Article 13(1) of Regulation No 715/2009 that system access charges must be transparent and applied in a non-discriminatory manner to all users (see, to that effect, judgment of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)*, C-771/18, EU:C:2020:584, paragraph 46).
- 23 It follows that proportionate, transparent and non-discriminatory charges and tariffs must be applied to a market operator, such as Global NRG, on the basis of the abovementioned provisions of Directive 2009/73 and of Regulation No 715/2009. Subject to verification to be carried out by the referring court, such a market operator could, on account of those rights being infringed, be affected by the contested decision. In those circumstances, the status of party affected by such a decision and, consequently, the right to an effective appeal against that decision, in accordance with Article 41(17) of Directive 2009/73, must be conferred on such a market operator (see, to that effect, judgment of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189, paragraphs 48 and 51).
- 24 In the absence of EU legislation in the field, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. This must, however, be done without infringing the right to effective judicial protection (judgment of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)*, C-771/18, EU:C:2020:584, paragraph 62 and the case-law cited).
- 25 It is settled case-law, with regard to the right to an effective remedy, that in order for a court or tribunal to be able to determine a dispute concerning rights and obligations arising under EU law, it must, in accordance with Article 47 of the Charter, have power to consider all the questions of fact and law that are relevant to the resolution of the matter before it (see, to that effect, judgment of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)*, C-771/18, EU:C:2020:584, paragraph 64 and the case-law cited).
- 26 In the present case, the referring court finds that Paragraph 129/B, subparagraph 1, of the Law on the supply of natural gas does not allow it to examine the substance of an appeal brought by a market operator in the natural gas market affected by a decision of the national regulator, such as Global NRG, based on the simple fact that that market operator is not a system operator. To the extent that that provision of national law cannot be interpreted in a manner consistent with Article 41(17) of Directive 2009/73, as interpreted in paragraph 23 above, that provision of national law cannot be regarded as providing for ‘suitable mechanisms’ within the meaning of Article 41(17) of that directive (see, to that effect, judgment of 16 July 2020, *Commission v Hungary (Charges for access to electricity and natural gas transmission networks)*, C-771/18, EU:C:2020:584, paragraph 65).

- 27 If such a consistent interpretation is not possible, the referring court, on the basis of EU law, can disapply Paragraph 129/B, subparagraph 1, of the Law on the supply of natural gas only where the obligation provided for in Article 41(17) of Directive 2009/73 is sufficiently precise and unconditional to be considered as having direct effect. Reliance, by a litigant like Global NRG against a public authority like the national regulator, on a provision of a directive which is not sufficiently precise and unconditional to confer on it direct effect may not, solely on the basis of EU law, lead to a provision of national law being disapplied by a court of a Member State (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 64 and the case-law cited).
- 28 A provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, secondly, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms. Moreover, even though a provision of a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, that provision may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraphs 18 and 19 and the case-law cited).
- 29 In the present case, it is apparent from the very wording of Article 41(17) of Directive 2009/73 that the Member States must prescribe the suitable redress mechanisms under which all affected parties may dispute a decision of a national regulatory authority before an independent body. While Member States retain a degree of latitude to decide the nature of and detailed rules for those redress mechanisms as well as the form which the independent body is to take, the fact remains that, by requiring that such mechanisms be implemented, Article 41(17) of that directive imposes on Member States, in unequivocal terms, a precise obligation which is not qualified by any condition regarding application of the rule laid down therein and so prescribes, unconditionally and sufficiently precisely, a guarantee of redress for affected parties (see, by analogy, judgments of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraphs 22 to 29, and of 20 April 2023, *Autorità Garante della Concorrenza e del Mercato (Municipality of Ginosa)*, C-348/22, EU:C:2023:301, paragraph 67 and the case-law cited).
- 30 Therefore, Article 41(17) of Directive 2009/73 must be recognised as having direct effect, so that the referring court must disapply the national law that is contrary to that provision where that law cannot be interpreted in a manner consistent with that provision.
- 31 In the light of all the foregoing considerations, the answer to the questions referred is that Article 41(17) of Directive 2009/73, read in the light of the first paragraph of Article 47 of the Charter, must be interpreted as precluding legislation of a Member State under which only the operator of the natural gas transmission system is classified as a ‘party affected’ by a decision of the national regulatory authority fixing the connection fees and usage charges for that system in addition to the remuneration for any services provided by that operator and, consequently, only that operator has standing to bring an effective appeal against that decision.

Costs

- 32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

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, read in the light of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding legislation of a Member State under which only the operator of the natural gas transmission system is classified as a ‘party affected’ by a decision of the national regulatory authority fixing the connection fees and usage charges for that system in addition to the remuneration for any services provided by that operator and, consequently, only that operator has standing to bring an effective appeal against that decision.

[Signatures]