JUDGMENT OF THE COURT (Second Chamber)

21 February 2008 *

In Case C-426/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 22 November 2005, received at the Court on 1 December 2005, in the proceedings

Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH,

v

Telekom-Control-Kommission,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kūris (Rapporteur) and J.-C. Bonichot, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2006,

after considering the observations submitted on behalf of:

— Tele2 Telecommunication GmbH, by M. Parschalk, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and W. Bauer, acting as Agents,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Danish Government, by J. Molde, N. Holst-Christensen and B. Weis Fogh, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Slovene Government, by T. Mihelič, acting as Agent,

— the Commission of the European Communities, by C. Ladenburger and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4 and 16 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) (OJ 2002 L 108, p. 33; 'the Framework Directive').

2 The reference has been made in the context of a dispute between Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH, an Austrian undertaking providing electronic communications networks and services ('Tele2') and the Telekom-Control-Kommission (Telecommunications Control Commission; 'the TCK') by reason of the latter's refusal to grant the former the status of a party in administrative market analysis proceedings.

Legal context

Community law

3 Pursuant to recital 12 in the preamble to the Framework Directive:

'Any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court. …'

4 Article 4 of the Framework Directive, entitled 'Right of appeal', states:

'1. 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 a national regulatory authority 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 available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.'

5 Article 6 of the Framework Directive, entitled 'Consultation and transparency mechanism', provides:

'Except in cases falling within Articles 7(6), 20 or 21, Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.'

6 Article 7 of the Framework Directive, entitled 'Consolidating the internal market for electronic communications', states:

'…

3. In addition to the consultation referred to in Article 6, where a national regulatory authority intends to take a measure which:

(a) falls within the scope of Articles 15 or 16 of this Directive, Articles 5 or 8 of Directive 2002/19/EC [of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities] (Access Directive) [OJ 2002 L 108, p. 7] or Article 16 of Directive 2002/22/EC [of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services] (Universal Service Directive) [OJ 2002 L 108, p. 51], and

(b) would affect trade between Member States,

it shall at the same time make the draft measure accessible to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based, in accordance with Article 5(3), and inform the Commission and other national regulatory authorities thereof. National regulatory authorities and the Commission may make comments to the national regulatory authority concerned only within one month or within the period referred to in Article 6 if that period is longer. The one-month period may not be extended.

4. Where an intended measure covered by paragraph 3 aims at:

(a) defining a relevant market which differs from those defined in the recommendation in accordance with Article 15(1), or

(b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power, under Article 16(3), (4) or (5),

and would affect trade between Member States and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, then the draft measure shall not be adopted for a further two months. This period may not be extended. Within this period the Commission may, in accordance with the procedure referred to in Article 22(2), take a decision requiring the national regulatory authority concerned to withdraw the draft measure. This decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted together with specific proposals for amending the draft measure.

5. The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities and the Commission and may, except in cases covered by paragraph 4, adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

…'

7 Article 8 of the Framework Directive, entitled 'Policy objectives and regulatory principles', states in paragraph 2:

'The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.'

8 Article 16 of the Framework Directive, entitled 'Market analysis procedure', provides:

'1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where a national regulatory authority is required under Articles 16, 17, 18 or 19 of [the Universal Service Directive], or Articles 7 or 8 of [the Access Directive] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

…

6. Measures taken according to the provisions of paragraphs 3, 4 and 5 of this Article shall be subject to the procedures referred to in Articles 6 and 7.'

National law

The 1991 General Law on Administrative Procedure

9 Paragraph 8 of the 1991 General Law on Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz 1991, BGBl. No 51/1991), in the version published during 2004 (BGBl. I No 10/2004), 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.'

The 2003 Law on Telecommunications

10 Paragraph 37 of the 2003 Law on Telecommunications (Telekommunikationsgesetz 2003, BGBl. I No 70/2003; 'the TKG'), entitled 'Market analysis procedure', aims to implement Article 16 of the Framework Directive. That paragraph states the following:

'1. The regulatory authority shall, of its own motion, carry out at regular intervals, but at least every two years, an analysis of the relevant markets established by the regulation pursuant to Paragraph 36(1), taking account of the provisions of the European Communities. The objective of this procedure shall be, after it has been decided whether, on a specific relevant market, one or more undertakings have significant market power or whether effective competition exists on that market, to withdraw, maintain, amend or impose specific obligations.

2. Where the regulatory body decides in this procedure that one or more undertakings have significant market power on the relevant market and consequently no effective competition exists, it shall impose on that undertaking or those undertakings appropriate specific obligations pursuant to Paragraphs 38 to 46 or Paragraph 47(1). Existing specific obligations on undertakings shall, in so far as they concern the relevant markets, be amended or re-imposed by the regulatory authority in accordance with the results of the procedure, taking account of the regulatory objectives.

3. Where the regulatory authority decides on the basis of the procedure that effective competition exists on the relevant market and consequently no undertaking has significant market power, it may not — with the exception of Paragraph 47(2) — impose any obligations under subparagraph 2. In this case, the procedure relating to this market shall be discontinued by order of the regulatory authority without any formality having to be completed and that order shall be published. In so far as specific obligations exist on this market, they shall be withdrawn by that order. An appropriate period of no more than six months, laying down the time from which the withdrawal is effective, shall also be laid down in that order.

…

5. Only undertakings in respect of which specific obligations are imposed, amended or withdrawn shall have the status of parties to these proceedings.

…'

11 Paragraph 128 of the TKG, entitled 'Consultation procedure', states:

'1. The Federal Minister for Transport, Innovation and Technology and the regulatory authority shall give interested persons the opportunity to comment, within a reasonable period, on draft implementing measures adopted pursuant to this Federal Law which will have a significant impact on the relevant market. Measures adopted pursuant to Paragraphs 91(4), 122 and 130 shall be excluded. The consultation procedure and the results thereof shall be made publicly available, save where Paragraph 125 stipulates otherwise.

…

4. The Federal Minister for Transport, Innovation and Technology and the regulatory authority shall give interested persons the opportunity to comment, within a reasonable period, on matters concerning the rights of end users or consumers in connection with public communications services. They shall take account of these comments in so far as is appropriate, in particular where significant impact on the market is to be expected.

…'

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

12 In the context of administrative market analysis proceedings conducted by the TCK, on 16 July 2004 Tele2 requested the latter to grant it party status and access to the file pursuant to Paragraph 37 of the TKG.

13 By decision of 6 September 2004 the TCK turned down that request on the ground that, under Paragraph 37(5) of the TKG, only undertakings in respect of which specific obligations were imposed, amended or withdrawn, and no other, could be party to market analysis proceedings. In its view, that was precisely not the case with regard to Tele2.

14 Tele2 lodged an appeal against that decision before the Verwaltungsgerichtshof (Higher Administrative Court) as it was of the view that a decision taken by the TCK in market analysis proceedings constitutes a decision for the purposes of the Framework Directive which affects not only the undertaking in respect of which specific obligations have been imposed, amended or withdrawn, but also its competitors. According to Tele2, that is because the rights which a competitor of the dominant undertaking has in respect of that undertaking depend directly on the result of that market analysis.

15 It is in those circumstances that the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following two questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles 4 and 16 of [the Framework Directive] to be interpreted as meaning that the term “parties affected” [(betroffenen)] includes undertakings operating as competitors on the relevant market in respect of which specific obligations are not imposed, maintained or amended in market analysis proceedings?

(2) In the event that the first question is answered in the affirmative, does Article 4 of [the Framework] Directive … preclude a national provision which provides that only the undertaking in respect of which specific obligations are imposed, amended or withdrawn has the status of a party to market analysis proceedings?'

The questions

The first question

16 By its first question the national court asks, in essence, whether the terms user 'affected' or undertaking 'affected' (betroffen) for the purposes of Article 4(1) of the Framework Directive and the term party 'affected' (betroffene) within the meaning of Article 16(3) of that directive must be interpreted as covering not only an undertaking (formerly) having significant power on the relevant market which is the subject of a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive, and which is the addressee of that decision, but also users and undertakings in competition with such an undertaking (formerly) having significant power which are not themselves addressees of that decision but the rights of which are adversely affected by it.

17 It should be noted, at the outset, that, as is apparent from the decision making the reference, at issue in the case in the main proceedings is the right to be a party in non-adversarial administrative proceedings, in this case market analysis proceedings conducted by the TCK pursuant to Paragraph 37 of the TKG, which imple-

ments Article 16 of the Framework Directive. However, Article 4 of that directive, also raised by the referring court, regulates an issue of adversarial administrative-law proceedings. That article states that Member States are to ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services which is affected by a decision of a national regulatory authority has the right of appeal against that decision to an appeal body which is independent of the parties involved, and which may be a court. Where the appeal body is not judicial in character, written reasons for its decision must always be given and, furthermore, in such a case, its decision is to be subject to review by a court or tribunal within the meaning of Article 234 EC.

18 In addition, it is apparent from the decision making the reference that, under Austrian procedural law, the status of party to market analysis proceedings confers the right to participate in those proceedings, as well as the right to consult the file in the administrative proceedings, the right to be heard, the right to be informed of the results of the procedure for administration of the evidence and to comment on it, and the right to appeal against the decision taken at the end of such proceedings.

19 In the light of the wording of Article 4 of the Framework Directive, as noted in paragraph 17 above, it is necessary to assess the scope of the terms user 'affected' or undertaking 'affected' by a decision of a national regulatory authority for the purposes of that article in order to answer the first question referred by the national court.

20 First, it must be pointed out that the Framework Directive does not define that term.

21 According to the Belgian Government, the fact that, in the English and German versions of that directive, Articles 4(1) and 16(3) use the same term, namely 'affected' and 'betroffen' respectively, indicates that those two provisions concern the same idea and that, consequently, the Dutch versions 'getroffen' (affected) and 'die gevolgen ondervinden' (literally, 'incurring consequences'), given in Articles 4(1) and 16(3) respectively, have the same meaning.

22 The national court also takes the view that, since, in the German version, Articles 4(1) and 16(3) of the Framework Directive both use the expression 'betroffenen', their scope must be deemed to be the same.

23 However, the answer to the question referred by the national court cannot be deduced from those findings.

24 Several language versions of the Framework Directive, namely the Bulgarian, Czech, Danish, English, German, Greek, Italian, Latvian, Lithuanian, Polish, Slovak, Spanish and Swedish and versions, use one and the same term in Articles 4(1) and 16(3) of that directive, whereas in other language versions of the same provisions two different terms are used, such as user 'affecté' or undertaking 'affectée' and parties 'concernées' in the French version.

25 It is settled case-law that the different language versions of a provision of Community law must be uniformly interpreted, and thus, in the case of divergence between those versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-420/98 *W.N.* [2000] ECR I-2847, paragraph 21, and Case C-56/06 *Euro Tex* [2007] ECR I-4859, paragraph 27).

26 It is also settled case-law that the need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 24).

27 Accordingly, the scope which the Community legislature intended to confer on the terms user 'affected' or undertaking 'affected' by a decision of a national regulatory authority for the purposes of Article 4(1) of the Framework Directive must be assessed in the light of the purpose of that article within the context of that directive.

28 It must, however, be noted that, even if one assumes that an undertaking in a situation similar to that of the applicant in the main proceedings falls within Article 16(3) of the Framework Directive, it does not automatically follow that that undertaking may fall within the scope of Article 4(1) thereof. As pointed out by the Advocate General in point 19 of his Opinion, Article 4(1) of the Framework Directive pursues objectives which are very distinct from those pursued by Article 16(3) thereof.

29 The consequence of the applicability of Article 4(1) to an undertaking is that that undertaking is granted a right to appeal against a decision taken by a national regulatory authority by which it is affected, whereas Article 16(3) grants it the right, in the case of a decision to withdraw obligations placed on the undertaking (formerly) having significant power on the relevant market, to be given an appropriate period of notice of that withdrawal.

30 As stated by the Advocate General in point 22 of his Opinion, Article 4 of the Framework Directive follows from the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited), pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under Community law (*Unibet*, paragraph 38 and the case-law cited).

31 In the case covered by Article 4 of the Framework Directive, the Member States are required to provide for a right of appeal before an appellate body in order to protect the rights which users and undertakings derive from the Community legal order.

32 It follows that the requirement to provide effective judicial protection, which is at the origin of Article 4 of the Framework Directive, must apply to both users and undertakings which may derive rights from the Community legal order, in particular from telecommunications directives, and whose rights are affected by a decision taken by a national regulatory authority.

33 It is thus necessary to determine whether the users and undertakings operating in competition with an undertaking (formerly) having significant power on the relevant market may derive rights from the Community legal order, in particular from telecommunications directives, and whether their rights may be affected by a decision taken by a national regulatory authority which is not addressed to them. If that is the case, they should be entitled to a right of appeal in order to make that decision amenable to judicial review.

34 As pointed out by the Advocate General in point 29 of his Opinion, and as submitted by the applicant in the main proceedings and the Commission, certain specific obligations imposed on the undertaking with significant power on the relevant market in accordance with Article 16(3) and (4) of the Framework Directive and the provisions of the Access Directive which are cited therein are protective measures adopted in the interest of users and undertakings in competition with that undertaking with significant market power and are therefore capable of conferring rights on them. Those protective measures include, for example, those which may be adopted by national regulatory authorities under Article 8 of the Access Directive and the obligations of non-discrimination between competitors and the obligations to give competitors access to specific network facilities and the use of such facilities, laid down respectively in Articles 10 and 12 of the latter directive.

35 As regards, inter alia, those obligations to provide access to network facilities and the use of those facilities, Article 12(1) of the Access Directive provides that 'a national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest'. As in the case of the obligation of non-discrimination laid down in Article 10 of that directive, those obligations concerning the access of competitors to specific network facilities and the use thereof seek to enable interested competitors to benefit from such access.

36 It follows that users or undertakings competing with an undertaking with significant power on the relevant market must be considered to be potential beneficiaries of the rights corresponding to the specific regulatory obligations imposed by a national regulatory authority on that undertaking with significant market power pursuant to Article 16 of the Framework Directive and the telecommunications directives

cited therein. Consequently, those users and undertakings may be regarded as being 'affected', within the meaning of Article 4(1) of the Framework Directive, by decisions of that authority which amend or withdraw those obligations.

37 Next, it should be pointed out that, under Article 8(2) of the Framework Directive, the national regulatory authorities must promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by, inter alia, ensuring that there is no distortion or restriction of competition in the electronic communications sector.

38 As noted by the Advocate General in point 24 of his Opinion, and as submitted by the Danish Government, a strict interpretation of Article 4(1) of the Framework Directive to the effect that that provision confers a right of appeal only on persons to whom the decisions of the national regulatory authorities are addressed would be difficult to reconcile with the general objectives and regulatory principles resulting, for those authorities, from Article 8 of that directive, particularly with the objective of promoting competition.

39 It follows that Article 4(1) of the Framework Directive must be interpreted as granting a right of appeal also to persons other than the addressees of a decision taken by a national regulatory authority in the context of a market analysis. Thus, users and undertakings competing with an undertaking (formerly) having significant power on the market concerned must be regarded as being 'affected' for the purposes of that provision when their rights are potentially affected by such a decision.

40 As regards, next, the third sentence of Article 16(3) of the Framework Directive, that provision provides that the parties 'affected' by the withdrawal of sector-specific regulatory obligations are to be given an appropriate period of notice. An under-

taking (formerly) having significant power on the market concerned is an addressee of the decision withdrawing such obligations, with the result that it is self-evident that that undertaking must be notified of the decision. The same applies with regard to decisions imposing such obligations on such an undertaking, irrespective of the fact that Article 16(4) of that directive does not state so expressly. By contrast, the period of notice laid down in Article 16(3) of that directive acquires its full significance in relation to competing undertakings which, for their part, benefit from the obligations the withdrawal of which has been decided. It follows that, in providing that a period of notice must be given, the Community legislature sought to protect, above all, competitors of the undertaking (formerly) having significant power on the market in their capacity as 'affected' parties. Furthermore, in that provision the Community legislature would otherwise have used the term 'undertaking', as in the second sentence of that provision, and not the term parties 'affected'.

41 Consequently, the rights of the competitors of an undertaking (formerly) having significant power on the relevant market are covered by Article 16(3) of the Framework Directive and those rights must therefore be regarded as stemming from both that provision and Article 4(1) of that directive.

42 It must also be pointed out that, pursuant to Article 16(6) of the Framework Directive, measures taken under that provision are subject to the procedures laid down in, inter alia, Article 6 of that directive and that that latter provision contains, among other things, a right for the interested parties to comment on the draft measure within a reasonable period.

43 It follows from all of the foregoing that the terms user 'affected' or undertaking 'affected' for the purposes of Article 4(1) of the Framework Directive and the term party 'affected' within the meaning of Article 16(3) of that directive must be interpreted as being applicable not only to an undertaking (formerly) having significant

power on the relevant market which is subject to a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive and to which that decision is addressed, but also users and undertakings in competition with such an undertaking which are not themselves addressees of that decision but the rights of which are adversely affected by it.

44 Consequently, the submission of the Austrian and Slovene Governments that reading Article 4(1) of the Framework Directive in conjunction with recital 12 in the preamble thereto justifies, on its own, the finding that that directive grants the possibility of bringing an appeal only to the person who is actually the subject of the decision of the national regulatory authority and who is the addressee thereof cannot be upheld.

45 Admittedly, that recital states that '[a]ny party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court'. Thus, that recital merely raises the possibility, for whoever is concerned by a decision of a national regulatory authority, of appealing against that decision. However, the mere fact that that recital raises the possibility for the addressee of a decision to appeal against it in no way implies that such an appeal is excluded in relation to other undertakings, such as those in competition with the addressee.

46 The Austrian and Slovene Governments also submit that, for the interpretation of the provisions concerned by the present reference for a preliminary ruling, account must be taken of the principle of effectiveness, inherent in Community law, which also encompasses the aspect relating to the speed at which specific regulatory decisions are implemented. Those governments thus appear to be attempting to demonstrate that the possibility of granting 'interested parties', within the meaning of

Paragraph 8 of the 1991 General Law on Administrative Procedure, in the version published during 2004, rights reserved to 'parties' may extend significantly the total duration of the market analysis procedure, whereas the national regulatory authority must react as quickly as possible in order to cancel out imbalances liable to arise in markets with rapidly changing conditions.

47 That argument cannot be upheld. As has been pointed out in paragraph 17 above, Article 4 of the Framework Directive lays down the obligation to provide for a judicial or non-judicial right of appeal, but in no way concerns the non-adversarial administrative procedure which precedes the bringing of such an appeal.

48 In the light of all of the foregoing considerations, the answer to the first question referred must be that the terms user 'affected' or undertaking 'affected' for the purposes of Article 4(1) of the Framework Directive and the term party 'affected' within the meaning of Article 16(3) of that directive must be interpreted as being applicable not only to an undertaking (formerly) having significant power on the relevant market which is subject to a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive and which is the addressee of that decision, but also to users and undertakings in competition with such an undertaking which are not themselves addressees of that decision but the rights of which are adversely affected by it.

The second question

49 By its second question the national court asks, essentially, whether it follows from Article 4 of the Framework Directive that, when it has a right to appeal against decisions taken by a national regulatory authority following administrative market anal-

ysis proceedings, an undertaking such as the applicant in the main proceedings must for that reason also be granted the status of a party to the non-adversarial market analysis proceedings.

50 In that regard, Article 4 of the Framework Directive does not state which are the parties to the non-adversarial administrative proceedings referred to in Article 16 of that directive. The wording of that provision also does not provide any indication to the effect that an undertaking such as the applicant in the main proceedings must have a right to participate, as a party, in those market analysis proceedings. The third sentence of Article 16(3) of the Framework Directive merely affirms that the parties affected by the withdrawal of specific regulatory obligations must be given an appropriate period of notice.

51 Thus, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions before the courts for safeguarding rights which individuals derive from the direct effect of Community law (see, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12 and the case-law cited, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33 and the case-law cited).

52 It follows that Community law does not, *a priori*, require the Member States to permit all users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market to participate in a market analysis procedure referred to in Article 16 of the Framework Directive as a party for the purposes of the applicable Austrian procedural law with the rights described in paragraph 18 of the present judgment. It is thus for the national legislature to specify whether an undertaking such as the applicant in the main proceedings has the status of a party to those non-adversarial administrative proceedings and, if so, to decide

whether that undertaking may be granted procedural rights other than those laid down expressly in Article 16 of the Framework Directive and rights inherent in the consultation procedure laid down expressly in Article 6 of that directive.

53 Consequently, a provision of national law which, in the context of such proceedings, grants party status only to undertakings (formerly) having significant power on the relevant market in respect of which specific regulatory obligations are imposed, amended or withdrawn is not, in principle, contrary to Article 4 of the Framework Directive.

54 However, the detailed national procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law must not be less favourable than those governing similar domestic actions (principle of equivalence) or render virtually impossible or excessively difficult the exercise of the rights conferred by Community law (principle of effectiveness) (see, to that effect, inter alia, *Peterbroeck*, paragraph 12 and the case-law cited, and *Grundig Italiana*, paragraph 33 and the case-law cited).

55 As regards the principle of effectiveness, on which the applicant in the main proceedings relies for the purpose of claiming entitlement to participate in the administrative market analysis proceedings in question, it is clear from the Court's case-law that each case which raises the question whether a national procedural provision renders the exercise of rights conferred on individuals by the Community legal order impossible or excessively difficult must be analysed 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 to take into consideration, where relevant, the principles which lie 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 (see, to that effect, *Peterbroeck*, paragraph 14, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 33).

56 It is thus for the national court to ensure that national procedural law guarantees the safeguarding of the rights which users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market derive from the Community legal order in a manner which is not less favourable than that in which comparable domestic rights are safeguarded and which does not prejudice the effectiveness of the legal protection of those users and undertakings guaranteed in Article 4 of the Framework Directive.

57 In those circumstances, the answer to the second question referred must be that a provision of national law which, in the context of non-adversarial market analysis proceedings, grants party status only to undertakings (formerly) having significant power on the relevant market and in respect of which specific regulatory obligations are imposed, amended or withdrawn is not, in principle, contrary to Article 4 of the Framework Directive. However, it is for the national court to ensure that national procedural law guarantees the safeguarding of the rights which users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market derive from the Community legal order in a manner which is not less favourable than that in which comparable domestic rights are safeguarded and which does not prejudice the effectiveness of the legal protection of those users and undertakings guaranteed in Article 4 of the Framework Directive.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

1. **The terms user 'affected' or undertaking 'affected' for the purposes of 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) and the term party 'affected' within the meaning of Article 16(3) of that directive must be interpreted as being applicable not only to an undertaking (formerly) having significant power on the relevant market which is subject to a decision of a national regulatory authority taken in the context of a market analysis procedure referred to in Article 16 of that directive and which is the addressee of that decision, but also to users and undertakings in competition with such an undertaking which are not themselves addressees of that decision but the rights of which are adversely affected by it.**

2. **A provision of national law which, in the context of non-adversarial market analysis proceedings, grants party status only to undertakings (formerly) having significant power on the relevant market and in respect of which specific regulatory obligations are imposed, amended or withdrawn is not, in principle, contrary to Article 4 of Directive 2002/21. However, it is for the national court to ensure that national procedural law guarantees the safeguarding of the rights which users and undertakings in competition with an undertaking (formerly) having significant power on the relevant market derive from the Community legal order in a manner which is not less favourable than that in which comparable domestic rights are safeguarded and which does not prejudice the effectiveness of the legal protection of those users and undertakings guaranteed in Article 4 of Directive 2002/21.**

[Signatures]