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## EUROPEAN COURT RULES ON ASPECTS OF ELECTRONIC COMMUNICATIONS FRAMEWORK DIRECTIVE

Two recent decisions of the European Court of Justice ('ECJ') and the Court of First Instance ('CFI') have shed some light on important aspects of Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services (the 'Framework Directive').

### *Case C-426/05: Tele2 Telecommuniacion GmbH v Telekom-Control-Kommission (ECJ, 21 February 2008)*

This case involved a reference from the Austrian Courts for a preliminary ruling in the context of a dispute between an Austrian undertaking providing electronic communications networks and services, Tele 2, and the Austrian telecommunications regulator ('TCK'). The reference concerned the interpretation of Articles 4 and 16 of the Framework Directive.

In 2004, TCK conducted a review of competition in a particular electronic communications market, as it was required to do by Article 16 of the Framework Directive. Tele2 sought to become a party to that review process, even though it was not the undertaking which had been previously designated with significant market power ('SMP') in that market. The Austrian regulator refused to permit Tele2 to become involved in the process and Tele2 appealed this decision.

Article 16(3) of the Directive provides as follows:

*"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 ... this Article. In cases where sector specific 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."*

The relevant Austrian law giving effect to Article 16 stated that "only undertakings in respect of which specific obligations are imposed, amended or withdrawn shall have the status of parties to [the market review] proceedings" and this was the basis for TCK's decision.

Tele2 argued that the decision taken by TCK to refuse to allow it to participate in the market review process constituted a decision which was

capable of appeal by it under Article 4 of the Framework Directive. Article 4(1) of the Framework Directive states:

**“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...”**

The Austrian Courts asked the ECJ, essentially, whether a user or an undertaking ‘affected’ by a decision for the purposes of Article 4(1) or a party ‘affected’ within the meaning of Article 16(3) included not only the undertaking which had formerly been designated with SMP on that market and which was the subject of the market review proceedings, but also users and undertakings in competition with that undertaking.

It was acknowledged by the Court that Article 4(1) and Article 16(3) pursue distinct objectives. Article 4(1) refers to an adversarial process and grants rights to undertakings to appeal decisions of regulators which affected them, whereas Article 16(3) relates to a non-adversarial, administrative (market review) process and grants undertakings the right, in the case of a decision to withdraw obligations placed on the undertaking (formerly) having SMP, to be given appropriate notice of that withdrawal.

The Court concluded that users or undertakings which competed with an undertaking with SMP on a particular market must be considered to be potential beneficiaries of the imposition of specific regulatory obligations on that undertaking (such as obligations of non-discrimination or obligations requiring access to networks). Consequently, those users and undertakings may be regarded as being ‘affected’ within the meaning of Article 4(1) by decisions of the national regulatory authority which amend or withdraw those obligations, even though those decisions are not addressed to them.

As regards Article 16(3), the Court decided that it was self evident that decisions withdrawing regulatory obligations would be notified to the undertaking with SMP and that Article 16(3) was intended to protect, above all, competitors of that undertaking which would ordinarily benefit from the imposition of SMP obligations and would potentially be harmed by their withdrawal.

Consequently, it was held that the use of the term ‘affected’ in both Article 4(1) and Article 16(3)

must be interpreted as being applicable not only to the undertaking which has significant market power on the market being reviewed and to which a decision withdrawing specific obligations is addressed, but also users and competing undertakings which are not themselves addressees of that decision but which have rights adversely affected by it.

## *Case T-109/06: Vodafone Espana SA & Vodafone Group plc v Commission of the European Communities (CFI, 12 December 2007)*

In December 2007, the CFI clarified the legal status of the European Commission’s actions in performing its functions under Article 7(3) of the Framework Directive.

Under the EU’s electronic communication regulatory framework, when a national regulatory authority (‘NRA’) intends to impose, maintain, amend or withdraw regulatory obligations on an undertaking and this would affect trade between member states, it is required at the same time to make the draft measure accessible to the European Commission and the NRAs of other Member States, together with the reasoning on which the measure is based. The Commission and the NRAs are entitled to comment on the draft measure, pursuant to Article 7(3) of the Framework Directive. Such comments are generally communicated by way of a letter to the notifying NRA (an ‘Article 7(3) Letter’). The NRA in question may adopt the draft measure, but is required to take the ‘utmost account’ of comments which it receives from the Commission and other NRAs.

Alternatively, where an intended measure defines a relevant market which differs from those recommended for analysis by the Commission or designates an undertaking as having SMP, the Commission may, if this would affect trade between Member States and 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, require (by way of a letter, known as a ‘Serious Doubts Letter’) that the draft measure shall not be adopted for a further two months during which period the Commission may (but shall not necessarily) take a decision requiring the NRA concerned to withdraw the draft measure following a more detailed investigation.

The legal status of an Article 7(3) Letter was considered by the CFI in response to an action brought by Vodafone Espana & Vodafone Group

(collectively, ‘Vodafone’) against the Commission.

Vodafone and two other entities, Telefonica and Amena, operate public mobile communication networks and provide mobile communication services in Spain. The Spanish Regulatory Authority, CMT, having conducted its market review, proposed to designate Vodafone, Telefonica and Amena jointly with SMP in the wholesale market for the supply of access and call origination on public mobile telecommunications networks in Spain.

CMT forwarded its draft designations and proposed remedies to the Commission and other NRAs for comment in accordance with Article 7. CMT proposed the imposition of an obligation on the three operators requiring them to deal reasonably with requests for access to their networks. The Commission effectively accepted the finding of joint dominance and communicated this, together with its comments on the market in question, to the CMT in an Article 7(3) Letter. CMT subsequently adopted its draft decision designating the three operators jointly with SMP and imposing certain regulatory obligations.

Vodafone appealed the CMT decision in the Spanish Courts. It also brought an action under Article 230 of the EC Treaty seeking an annulment of the decision of the Commission not to issue a ‘Serious Doubts Letter’ and commence a more in-depth market investigation.

### The Legal status of the Article 7(3) Letter

Article 230 provides a system of judicial review of the legality of those acts of the European Council, Commission and Parliament which are intended to produce legal effects vis-à-vis third parties. Any natural or legal person may bring judicial review proceedings against a decision of those institutions which is addressed to that person or which, although addressed to another person, is of direct and individual concern to the complainant.

It is settled case-law that any measure which has binding legal effects on, and is capable of affecting, the interests of the applicant by bringing about a distinct change in its legal position is an act or decision which may be the subject of an annulment under Article 230.

Vodafone claimed that the issue of the Article 7(3) Letter instead of a Serious Doubts Letter constituted a decision which was of direct and individual concern to it.

However, the Court held that the Commission’s decision not to issue a Serious Doubts Letter did not produce such binding legal effects. The Court held, inter alia, as follows:

- The obligation on NRAs to “take the utmost account of the comments of other [NRAs] and the Commission” (Article 7(5)) signified the non-binding nature of the Commission’s letter. The Commission’s comments do not necessarily prevail over those of other NRAs and a notifying NRA would not be infringing Article 7(5) by following the approach proposed by another NRA and not that suggested by the Commission;
- It is not the Article 7(3) Letter which entitles the NRA concerned to adopt the proposed measures. According to the Court, the NRA’s authority to take such measures derives directly from Article 16(4) of the Framework Directive which provides that where an NRA determines a market is not effectively competitive, it shall identify undertakings with SMP on that market and impose appropriate specific regulatory obligations on them. The exercise of such powers by an NRA requires no ‘authorisation’ on the part of the Commission;
- The Article 7(3) Letter constitutes a preparatory Community act in the context of a procedure which leads to the adoption of a national measure by an NRA. Preparatory acts cannot be the subject of an act for annulment;
- While the exercise of a right of veto (which may follow the issuing of a Serious Doubts Letter) would give rise to binding legal effects, given that the NRA in question would no longer be entitled to adopt the proposed measure, the Court considered that “the non-exercise of the right of veto can be treated as non-adoption of a decision which does not give rise to any binding legal effect”;
- Any binding legal effects deriving from a measure adopted by an NRA are attributable to the NRA and not to the Commission’s comments or the fact that a more in-depth investigation by the Commission is not set in motion; and
- The content of the Article 7(3) Letter actually sent by the Commission in this case did not seek to produce any binding legal effects.

## Locus Standi of Vodafone

The Court went on to hold that even if the contested act of the Commission was open to challenge, Vodafone would have no standing to bring the proceedings in any case.

For a contested Community act to be of concern to a natural or legal person, it must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone, without the application of other intermediate rules. According to the Court, the procedure under Article 7(3) constitutes a consultation and co-operation procedure between NRAs and the Commission in the context of which the Commission and NRAs may make comments on a notified measure. Even though the NRA must take utmost account of such comments, according to the Court,

*“[the NRA] has some leeway to determine the content of the final measure, so that a Community act based on Article 7(3) of the [Framework Directive] cannot be regarded as directly affecting the legal situation of the undertakings concerned.*

*Vodafone cannot claim that the fact that the NRA might not adopt the draft measure once the Commission’s comments have been presented is only a theoretical possibility. Even if there is a strong possibility that the NRA will in fact adopt the draft measure, it is for that authority alone to decide whether to adopt that measure and to determine its content.”*

Vodafone’s application for annulment under EU law was dismissed as inadmissible, leaving the company to pursue possible remedies under Spanish national law.

### Footnote:

In a very similar case heard by the CFI on 22 February 2008 (T-295/06 – Base NV v European Commission), the Court handed down a similar judgement in respect of an Article 7(3) Letter issued by the Commission to the Belgian regulatory authority. A Belgian operator, Base NV, had challenged the Commission’s decision not to commence a detailed investigation of the wholesale market for call termination on individual mobile markets.

## ■ CONTACT INFORMATION

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This memorandum is a general summary of developments and is not a complete statement of the law. Specific legal advice should be obtained before taking action.

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