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Is making the conclusion of contracts for the provision of broadband internet access service conditional upon the conclusion of a contract for telephone services prohibited?. Case comment to the preliminary ruling of...

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**Is making the conclusion of contracts for the provision
of broadband internet access service conditional upon the conclusion
of a contract for telephone services prohibited?**

**Case comment to the preliminary ruling of the Court of Justice
of 11 March 2010**

***Telekomunikacja Polska SA v President of Office of Electronic Communications*
(Case C-522/08)**

Facts

In its preliminary ruling delivered on 11 March 2010, the Court of Justice had yet another opportunity, after the *VTB-VAB* and *Galatea* cases¹, to express its views on the legality of national legislation prohibiting combined sales (that is bundling and tying). The preliminary question arose in a dispute between *Telekomunikacja Polska SA* (hereafter TP SA), the Polish incumbent telecoms operator, and the UKE President (in Polish: *Urząd Komunikacji Elektronicznej*; hereafter, UKE), the Polish national regulatory authority (NRA) responsible for the telecoms field. The original case concerned the conditions for the provision of broadband internet access services, ‘Neostrada TP’ by TP SA. According to Article 57(1)(1) of the Polish Telecommunications Law of 2004 (in Polish: *Prawo Telekomunikacyjne*; hereafter, PT)² ‘A service provider may not make the conclusion of a contract for the provision of publicly available telecommunications services, including connection to a public telecommunications network, conditional upon the conclusion by the end-user of a contract for the provision of other services (...)’. The telecoms regulator has taken the view that the incumbent’s commercial practice (making the conclusion of contracts for the provision of Neostrada TP conditional upon the conclusion of a contract for telephone services) had infringed Article 57(1)(1) PT. The UKE President issued in December 2006 a decision requiring the incumbent to put an end to such practices³. Alleging an incorrect application of Article 57(1)(1) PT, despite its incompatibility with

¹ Judgment of 23 April 2009 in combined cases: C-261/07 *VTB-VAB NV v Total Belgium NV* and C- 299/07 *Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-2949.

² Act of 16 July 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800, as amended).

³ Following the incumbent’s application for re-examination, the decision was subsequently upheld by the NRA on 28 December 2006.

the Universal Service Directive, TP SA lodged an appeal to the Regional Administrative Court⁴ and after its dismissal, a cassation to the Supreme Administrative Court. The latter decided to stay the proceedings and ask the Court of Justice whether EU law precludes a national prohibition, applicable to all telecoms operators, to make the conclusion of a contract for the provision of a service contingent upon the conclusion, by the end-user, of a contract for the provision of another service, and in particular, whether such a measure goes beyond what is necessary to attain the objectives of the EU telecoms package⁵.

Key to the reference for this preliminary ruling was the analysis of the conformity of Article 57(1)(1) PT with the EU telecoms package, and in particular, with Articles 15 and 16 of the Framework Directive⁶, and Articles 10 and 17 of the Universal Service Directive⁷. The relevant provisions of the Framework Directive lay down the tasks assigned to NRAs whereby they are required: to define relevant markets in the electronic communications sector in close collaboration with the European Commission [Article 15(3)]; to carry out an analysis of the relevant markets; and to impose *ex ante* obligations on undertakings with significant market power (SMP) in markets without effective competition (Article 16). The relevant provisions of the Universal Service Directive require Member States to ensure that designated undertakings do not establish such terms and conditions that oblige subscribers to pay for facilities or services which are not necessary or required for the requested service (Article 10), and provide that retail obligations that may be imposed on undertakings with SMP include, *inter alia*, an obligation to not bundle the provision of their services unreasonably [Article 17(2)].

Key legal problems of the case

The main controversy related here to the essentially *per se* prohibition of combined sales, that is, the tying of two products/services, established in Article 57(1)(1) PT. Such general prohibition may be surprising given that tying seems to be a common commercial practice that permeates the everyday life of consumers and that can be found in virtually all industry sectors⁸. Despite EU competition law's overall

⁴ The Regional Administrative Court dismissed on 22 October 2007 the action of TP SA (Ref. No. VI SA/Wa 890/07).

⁵ EU telecom regulatory package consisted of at that time (before the completion of the 2009 review): the *Framework Directive* 2002/21/EC, the *Access Directive* 2002/19/EC, the *Authorisation Directive* 2002/20/EC, the *Universal Service Directive* 2002/22/EC, and the *Data Protection Directive* 2002/58/EC.

⁶ 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 [OJ] 2002 L 108/33 (*Framework Directive*).

⁷ 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 [OJ] 2002 L 108/51 (*Universal Service Directive*).

⁸ Robert H. Bork noted over thirty years ago 'Every person who sells anything imposes a tying agreement. This is true because every product could be broken down into smaller

hostility⁹, tying is acknowledged to occur simply because it can produce efficiencies through production, transportation or information cost saving for instance¹⁰. Combined sales are problematic however, because they can be used in order to pursue a variety of commercial objectives, some of which harmful to competitors and detrimental to consumers. On the one hand however, a seller or service provider may want to increase the attractiveness of a newly launched product by tying its sale to another item with an already established reputation. Depending on the attractiveness of the offer, consumers may be more or less willing to acquire the new product. Still, combined sales may force consumers to acquire an additional service, which by no means is essential or necessary for the acquisition of the main service. Consumers may thus be effectively forced to purchase extra products that they do not actually want. Was this the case in relation to the combined sales of broadband with voice telephony? Driven by technological progress, which brought about many new applications and services for which broadband has become essential, consumer demand for high-speed Internet access has certainly significantly increased over the last decade. Decreasing revenue from fixed telephony, increasing mobile penetration rate, and the substitution of services provided over traditional switched networks by mobile and broadband services¹¹ indicate, *inter alia*, that consumers may be interested in contracting broadband on a stand-alone basis. Given these market developments as well as the technical features of telecoms networks, which make it possible to provide broadband without voice telephony, it is safe to argue that the combined sales of the two contested services could not in the present case be considered commercially attractive for consumers.

The Court of Justice stated that to answer the question whether a national prohibition of combined sales, such as Article 57(1)(1) PT, is in conformity with EU law, it is necessary to determine whether the prohibition affects the powers derived by the NRA from the Framework Directive and Universal Service Directive. The Court of Justice ruled that in its view, no such limitation took place in this case¹². It stressed moreover that the Polish prohibition seeks to guarantee enhanced consumer protection in their relations with telecoms operators. As the EU telecoms package provides for a minimum level of harmonization of consumer protection, national legislation is not precluded from laying down stricter conditions in matters falling

components capable of being sold separately, and every seller refuses at some point to break the product down even further (...). *The Antitrust Paradox: The Policy at War with Itself*, New York 1978, pp. 378–379.

⁹ See e.g. Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 – *Tetra Pak II*).

¹⁰ For an economic analysis of tying see e.g. D. S. Evans, M. Salinger, 'Quantifying the Benefits of Bundling and Tying', Working Paper 2003; A. Renda, D. Valiante, 'Legal and economic approach to tying and other potentially unfair and anticompetitive commercial practices: focus on financial services', available at <http://ssrn.com/abstract=1736555>.

¹¹ European Commission, Progress Report on the Single European Electronic Communications Market, 15th Report [2009].

¹² Case C-522/08, para. 28.

within the scope of the Directives. As such, Article 57(1)(1) PT is not, in opinion of the Court of Justice, incompatible with the Framework Directive and Universal Service Directives.

The Court of Justice considered it essential to examine whether the national law affects the competences of the NRA. It could be argued however that its analysis was one-sided because it only examined whether a 'limitation' took place of the powers of the UKE President concerning market analysis and remedies. The competences of the regulator could have also been affected however if Article 57(1)(1) PT had unduly 'expanded' them. The incumbent claimed that the provisions of the Universal Service Directive preclude national legislation that, without an assessment of the degree of competition on the market and independently of the firms' market power, requires all operators to refrain from combined sales.

The analysis of Article 17 the Universal Service Directive clearly indicates that the obligation not to unreasonably bundle services is a form of regulatory control over retail services. According its paragraph 1, such obligation can be imposed as a result of a market analysis and only on undertakings identified as having significant market power. Such view seems to be confirmed in paragraph 26 of the Court of Justice ruling¹³. If so, is it still possible to conclude that the powers of the Polish NRA were not affected by the prohibition laid down in national legislation? The answer may not be as unambiguous as the judgment seems to imply. It is generally agreed that in the fields covered by the Framework Directive and Universal Service Directive with their minimal level of harmonization only, Member States may lay down stricter rules to enhance end-user protection. However, obligations imposed on the basis of Article 17(1) of the Universal Service Directive must be based on the nature of the problem identified and be proportionate and justified in the light of the objectives of Article 8 of the Framework Directive¹⁴. This requirement seeks to ensure that NRAs impose the most effective but least intrusive remedies possible. While Article 57(1)(1) PT does not limit the powers of the Polish NRA to carry out a market analysis, it seems to allow the regulator to impose retail obligation (a prohibition of combined sales) without having to carry out a full market assessment first. In its absence, how can it be known that a prohibition of combined sales is proportionate and the least intrusive remedy available to address the problem at stake?

In addition to assessing the compatibility of the national prohibition of combined sales with the EU telecoms package, the Court of Justice took the liberty to examine, albeit very briefly, the conformity of the contested provision with the Unfair Commercial Practices Directive 2005/29/EC¹⁵. Unsurprisingly, the Court reached

¹³ Interestingly, the Regional Administrative Court in its 2007 judgment stated that Art. 57(1)(1) PT does not imply an obligation to carry out a market analysis with a view to identify an operator with SMP because the aim of this provision is to protect consumer and not a competitor.

¹⁴ Article 17(2) Universal Service Directive.

¹⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11/05/05 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC AND 2002/65/EC of the

here an opposite conclusion given that the normative objective of this act resides in the full harmonization of consumer protection, as explicitly stated in Recitals 14 and 15 of Directive 2005/29/EC. Referring to its previous judgments in *VTB-VAB* and *Galate*, the Court of Justice reminded that the Unfair Commercial Practices Directive 'must be interpreted as precluding national legislation which, with certain exceptions, and without taking into account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer'¹⁶.

In accordance with Directive 2005/29/EC, only those commercial practices that are black listed in its Annex I are deemed to be unfair *per se*, that is, in all circumstances. As such, they do not need to be examined on a case-by-case basis. It shall be noted that neither Directive 2005/29/EC nor the Polish Act on combating unfair commercial practices¹⁷, which transposes it, contain an outright prohibition of combined sales. Since they are not black listed, the examination of their unfairness must be carried out *in concreto*, taking into account the specific circumstances of each case. Combined sales must therefore be assessed from the point of view whether they can be seen as a misleading (Articles 6 and 7) or aggressive commercial practice (Articles 8 and 9), and if not, they can still be assessed under the general test provided in Article 5(2). However, the prohibition laid down in Article 57(1)(1) PT did not require such an analysis. Since Article 4 of Directive 2005/29/EC expressly provides that Member States may not adopt stricter rules than those provided for in this EU act, even in order to achieve a higher level of consumer protection¹⁸, a general prohibition of combined sales such as that laid down in Article 57(1)(1) PT, is therefore incompatible with Unfair Commercial Practices Directive.

The significance of the judgment

The implications of this preliminary ruling extend beyond the question of the conformity of Article 57(1)(1) PT with EU law. Considering the legality of combined sales first, it can be concluded in general that firms may resort to such a practice in their commercial relationships with consumers. Still, combined sales may be prohibited if they are declared unfair, which in turn requires them to be contrary to good customs and significantly distort, or be capable of distorting, the economic behavior of an average consumer prior to, during or after the conclusion of a product contract¹⁹. Second, any general prohibition of combined sales, irrespective of the legislative act in which it is established, may be declared incompatible with Directive 2005/29/EC. This is implied from the fact that in the preliminary ruling at hand, the Court

European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [OJ] 2005 L 149/22.

¹⁶ Case C-522/08, para. 31.

¹⁷ The Act of 23 August 2007 on combating unfair commercial practices (Journal of Laws 2007 No. 171, item 1206).

¹⁸ Joined Cases C-261/07 and C-299/07, para. 52.

¹⁹ Article 4(1) of the Act on combating unfair commercial practices.

of Justice examined for the first time the conformity with the Unfair Commercial Practice Directive of national legislation that did not directly implement the provisions of this very Directive.

Following the judgment, the Polish Supreme Administrative Court dismissed the cassation stating that it was unfounded²⁰. When it comes to the interpretation of EU law, the Polish court held that an unambiguous and precise answer given to a preliminary question by the Court of Justice effectively determines the content of the national judgment in that case. Moreover, despite the lack of a clear regulation of that matter, the Court's answer becomes universally binding²¹. Furthermore, the assessment of a cassation request is limited to the scope of the complaint. The Supreme Administrative Court could thus not express its views on the compatibility of Article 57(1)(1) PT with the Unfair Commercial Service Directive because TP SA did not raise this issue in its appeal of the UKE decision before the Regional Administrative Court. Ultimately therefore, the Supreme Administrative Court held that Article 57(1)(1) PT is compatible with the EU telecoms package.

Last but not least, the transposition date for Directive 2005/29/EC expired on 12 December 2007 – the contested decision was thus adopted before that date. While found compatible during the proceedings, the national prohibition of combined sales has become incompatible with EU law since the transposition date of the Unfair Commercial Practices Directive expired²². In the aftermath of the ruling, Article 57(1)(1) PT will have to be amended accordingly, which effectively means that point (1) will have to be deleted. Such solution is in fact already proposed in the amendment draft of Polish Telecommunications Act²³.

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²⁰ Judgment of the Supreme Administrative Court of 27 May 2010, II GSK 355/10.

²¹ Judgment of the Supreme Administrative Court of 19 September 2008, I GSK 1038/07.

²² On the basis of Article 3(5) of the Directive 2005/29, Member States may continue to apply stricter provisions until 12/06/13 if they are necessary to ensure that consumers are adequately protected against unfair commercial practices and proportionate to the attainment of this aim.

²³ Draft of the amended Telecommunications Act, which transposes the new revised regulatory framework as well as the preliminary ruling discussed in this Article is available at: http://bip.mi.gov.pl/pl/bip/projekty_aktow_prawnych/projekty_ustaw/ustawy_telekomunikacja_2010/proj_ustawy_o_zmianie_ustawy_prawo_telekom_oraz_niektor_innych_ustaw/px_projekt_pt_na_bip_18.07.2011.pdf.