

**Stopping the creeping telecoms regulation.
Case comment to the judgment of the European Court of Justice
of 13 November 2008 – *European Commission v Republic of Poland*
(Case C-227/07)**

Facts

On 13 November 2008, the European Court of Justice (ECJ) delivered a judgment concerning the scope of the obligation to negotiate access agreements by telecoms operators, which constituted one of the most controversial provisions of the Polish Telecommunications Law of 2004 (hereafter, TL)¹. According to Article 26(1) TL, all operators of public communications networks were obliged to conduct, upon the request of other telecoms operators, negotiations regarding the conclusion of telecoms access agreements. The provision of Article 26(1) was accompanied by specific rules on dispute resolution among telecoms undertakings. On its basis, every operator that received an access request had to enter into access negotiations. In case of a dispute, any of the parties could submit to the President of the Office of Electronic Communications (UKE) a request for the issuance of a decision on any contentious issues concerning access. Such a request could be filed if negotiations were not taken up, access was refused or the agreement was not concluded within 90 days. The access-seeking party could even ask the UKE President to set a shorter time limit for the closure of the negotiations. All decisions resolving such disputes were immediately enforceable. As a result, an access request concerning any network could lead to the issuance of an administrative decision imposing access obligations.

The European Commission noticed as early as in its 10th Implementation Report that the Polish TL² imposed a general obligation to negotiate access on all telecom undertakings. In the opinion of the Commission, its provisions failed to correctly transpose the rules contained in the Access Directive³ into the Polish legal system. While Article 4(1) of the Access Directive indeed provided that the obligation to

¹ Act of 16 July 2004 – Telecommunications Law (Journal of Laws No. 171, item 1800, with subsequent amendments).

² European Electronic Communications Regulation and Markets 2004 (10th Report), COM(2004)759 Final, p. 191.

³ 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, OJ [2002] L 108/7.

negotiate applied to all operators of public telecoms networks, it nevertheless restricted this obligation solely to interconnection agreements. Interconnection constitutes a specific type of access whereby networks are being linked physically and logically in order to allow their users to communicate or to access services provided in another network. Whereas the obligation to negotiate access may be imposed as a result of a market analysis of operators with significant market power (SMP), an obligation to grant access means a much wider commitment whereby facilities and/or services are made available to another undertaking for the purpose of providing electronic communications services. Access may cover network elements (local loop), physical infrastructure (ducts and masts), software systems, number translation, access and wholesale services (call origination or termination, wholesale line rental).

The Commission claimed additionally that Poland failed to correctly transpose Article 5(1) of the Access Directive. This provision concerned the power of national regulatory authorities (NRAs) to encourage and, where appropriate, ensure adequate access, interconnection and interoperability of services in accordance with the directive's provisions. The TL did not contain provisions strictly related to the transposition of this requirement.

Key legal problems of this case

The first controversy related to the means of ensuring access to telecoms networks and services. The TL relied on statutory provisions imposing obligatory access negotiations on all operators. The statutory obligation to negotiate access contained in the TL was combined with a dispute settlement mechanism applicable in the absence of an agreement. In contrast, the Access Directive required, in principle, the conduct of a market analysis, the determination of SMP operators and the imposition of a negotiation obligation with access-seeking undertakings.

The Commission and the Polish authorities disagreed as to whether the Polish approach met the aim of ensuring adequate access in accordance with Article 4(1) and 5(1) of the Access Directive. Polish authorities believed that requiring an operator of a telecoms network to enter into negotiations with those seeking access to that network (Article 4(1)) constituted a form of encouraging access to telecoms networks – the goal of Article 5(1) of the Access Directive. The Polish government claimed also that the fact that Article 26(1) TL contains an obligation to negotiate access, rather than only interconnection, constitutes a form of ensuring adequate access to telecoms networks. In its opinion, this extended obligation substituted for the lack of separate provisions directly devoted to ensuring adequate access. According to the Polish government, the sum of exceeding the scope of Article 4(1) but failing to include provisions equivalent to the first subparagraph of Article 5(1) of the Access Directive, fulfilled the overall purpose and function of the Access Directive.

The reasoning of the judgment stated that the means of the implementation of the goal of ensuring access can not conflict with the procedural safeguards that prevent the market from overregulation. These safeguards are crucial for the long term development of competition. Thus, the ECJ rejected the purely functional approach

to the transposition of the Access Directive demonstrated by Polish authorities. The difference in the scope between access and interconnection agreements was said to result from their distinct definitions. The transposition of the obligations relating to interconnection (a specific type of access) should not embrace other forms of access to networks (included in the definitions of access). Both definitions were contained in the Access Directive and in the TL.

The functional and purposive approach favoured by Polish authorities risked an uncontrolled expansion of regulation over the activities of operators without SMP. As the ECJ indicated, the Access Directive limited the obligation to negotiate access to operators designated as having SMP on specific markets. This was done on the basis of a specific market determination and analysis carried out by a NRA. The imposition of an obligation to negotiate access was envisaged in the Access Directive as the final part of a broader procedure, where the primary goal of promoting competition was balanced with safeguards preventing excessive regulation. The functional approach of the TL collided with the basic concepts of the EU regulatory framework. The statutory obligation to negotiate access precluded the UKE President from considering the state of the market as a whole before examining a request to resolve an access dispute. In other words, access disputes were settled by the regulator without a prior evaluation of the degree of effective competition on the market concerned. This approach made it impossible to withdraw an access obligation where competition intensified.

The Commission also complained that the first subparagraph of Article 5(1) of the Access Directive has not been correctly transposed into the Polish TL. Article 5(1) requires NRAs to hold the power necessary to intervene in order to ensure adequate access and interconnection in compliance with the objectives of Article 8 of the Framework Directive⁴. The TL did not have specific provision on such an *ex officio* intervention. Instead, it contained detailed provisions concerning access dispute settlement between operators.

The case at hand potentially required the assessment of two major legal issues. First, whether the general provision of Article 5(1) of the Access Directive constituted a type of a programmatic norm giving Member States considerable freedom in choosing the form and methods of its implementation. Second, whether it is admissible to make the power of a NRA dependent on the initiative of access seeking parties or on the existence of a dispute between undertakings. ECJ admitted that the contentious norm of Article 5(1) is limited to the provision of a general power to NRAs for the purpose of achieving the objectives of Article 8 of the Framework Directive. Thus, the ECJ found that the Commission's complaint that this norm was not properly transposed was not sufficiently substantiated by the fact that the Polish TL lacked the exact same wording of the directive empowering the regulator to intervene. In the opinion of the ECJ, it was the duty of the Commission to show that the relevant provisions of the TL

⁴ 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 108/33.

did not achieve the objectives of the directives. Since this was not the case, the second complaint of the Commission was rejected by the ECJ without further investigation.

The significance of the judgment

The ECJ judgment is a milestone in a series of EU interventions against excessive regulation of Polish telecoms markets. One route of expanding regulation beyond the boundaries set out by the EU regulatory framework followed the application pattern of Article 26(1) TL. Telecoms undertakings demanded a type of access that was not covered by regulatory decisions. Upon the ineffective lapse of the 90 days time limit for negotiations, they asked the UKE President to issue a decision settling the dispute by imposing an obligation to grant the requested type of access. Some requests took place before an analysis of the market concerned was carried out. Some access demands occurred in markets not subject to *ex ante* regulation or even in markets already said to be competitive. When notifying to the Commission draft decisions imposing access obligations, the UKE President used Article 5(1) of the Access Directive as their formal legal basis. In practice however, they resulted from the excessive definition of the obligation to negotiate access contained in Article 26(1) TL.

One of the cases disputed by the Commission involved a mobile virtual network operator (MVNO) requesting national roaming services from an established mobile network operator. The request was made even though an analysis of the market for access and call origination on public mobile telephone networks (market 15/2003) was not yet carried out and, most importantly, it was later found to be competitive. The Commission questioned the legal grounds of the decision and forced the UKE President to withdraw the draft imposing a national roaming obligation⁵. Another case of premature and excessive regulation concerned the market of peering services. Telekomunikacja Polska S.A. (TP SA) used to refuse peering agreements in connection with its offer of paid transit services for other telecoms undertakings. The draft decision notified by the UKE President was once again based on Article 5(1) of the Access Directive. The draft obliged TP SA to provide other telecoms undertakings with peering services, some of them free of charge. TP SA was also meant to apply cost oriented prices for peering services and prepare a reference peering offer. The Commission considered this obligation to be unfounded, infringing the proportionality principle, as well as premature in light of all the other obligations imposed on TP SA in order to ensure communication between subscribers of telecoms networks⁶.

Polish attempts at extending regulation beyond the boundaries of the EU regulatory framework were also a primary concern of numerous interventions by the Commission within the consolidation procedure based on Article 7 of the Framework Directive. The Commission vetoed draft decisions concerning markets 1/2003 and 2/2003, effectively preventing the extension of regulation onto retail broadband access markets⁷. Draft

⁵ PL/2007/0631, SG-Greffe (2007) D/203442

⁶ PL/2006/0656, SG-Greffe (2007) D/204768

⁷ Commission Decision of 10 January 2007, PL/2006/0518, PL/2006/0524.

decisions regarding markets 9/2003 and 14/2003 were questioned because included in these markets were services that were not substitutes (eg. calls to premium numbers and free phone numbers in the market 9/2003). Draft decisions pertaining to markets 3-6/2003 were amended and the draft decision concerning market 14/2003 withdrawn following serious doubts letters sent by the Commission to the UKE President. In these cases, the Commission believed that the market share of the leading operator was overestimated due to an incorrect market definition. Draft decisions regarding markets 10/2003 and 15/2003 were withdrawn. They were said to be insufficiently substantiated in terms of their initial conclusion that they were susceptible to *ex ante* regulation and the fact that an operator with SMP could be identified. The claim that regulation was extended to the retail broadband services market constituted the grounds of an action brought by the Commission in December 2008 (case C-545/08) against the regulation of retail tariffs for broadband access services without carrying out a prior market analysis⁸.

The ECJ judgment emphasizes the necessity of drawing a clear division between regulatory powers concerning access and those concerning interconnection. In case of interconnection requests, a NRA has broader competences to intervene regardless of market power of the operators involved. Demands for access in markets where no SMP exists, or where no *ex ante* regulation applies, require thorough individual selection. The legal demarcation between access and interconnection gains in importance. The difference between these two forms of cooperation in the telecoms sector is determined by statutory definitions contained both in the TL and in the Access Directive. Nonetheless, it can cause disputes where a regulator finds interconnection problems in order to justify an intervention. Such classification issues arise in the case of national roaming services and wholesale line rental (WLR).

The judgment emphasizes the role of a precise transposition of obligations based on pre-defined terms. It sheds some light on the disputed admissibility of the imposition of a “functional separation” obligation on the grounds of the wording of Article 8(3) of the Access Directive (imposing “other obligations for access or interconnection”) rather than obligations clearly listed in the Directive. The obligation of a “functional separation” including: separation of network assets, personnel separation, separate management of business units, different trade brands, separate budgets and accounting as well as separate systems of operational support, clearly and significantly exceeds the scope of “access” and “interconnection” as defined in the Directive. Imposing an obligation of a “functional separation” prior to the amendment of the Access Directive, which introduces explicit powers to apply new remedies, may exceed the powers of the regulator, which are restricted to clearly defined terms of access and interconnection.

The ECJ judgment closed the main route for the spread of regulation over telecoms markets, which was based on the unlimited obligation to negotiate access

⁸ See S. Piątek, W. Szpringer, “Efektywność regulacji rynków telekomunikacyjnych” [“Efficiency of Telecommunications Markets Regulation”] [in:] S. Piątek (ed.), *Regulacja rynków telekomunikacyjnych [Regulation of telecommunications markets]*, Warszawa 2007, p. 347–353.

combined with a dispute resolution mechanism. The judgment is also a warning against creeping regulation that exceeds the boundaries of the EU regulatory framework for communications networks and services.

Following the ECJ judgment, Article 26(1) TL was amended by the Polish Parliament on 24 April 2009. The new Article 26a TL imposes an obligation to negotiate interconnection on all operators but limits the obligation to negotiate access agreements to operators with SMP.

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