

Telekomunikacja Polska Decision: competition law enforcement in regulated markets

by Damian Kamiński, Anna Rogozińska, Beata Sasinowska ⁽¹⁾

1. Introduction

On 22 June 2011 the Commission imposed on telcoms operator Telekomunikacja Polska S.A. (TP) a fine of € 127.5 million for refusing to supply wholesale broadband products to alternative operators (AOs). The decision found that TP's behaviour aimed at hindering alternative operators' access to TP's wholesale products at every stage of the process.

The finding of the abuse under Art 102 TFEU takes place in a regulated market, where the national regulator is particularly active. The pattern of behaviour over time that the Commission qualifies as abusive is different from the individual violations of national rules that TP was found to have committed by the Polish regulator.

The abuse started on 3 August 2005 and lasted at least until 22 October 2009, when, following the opening of proceedings by the Commission and an agreement signed between TP and the National Regulatory Authority, UKE, the market situation improved significantly.

The Commission applied Art 102 TFEU to the telcoms sector before in a number of cases: against Wanadoo (a subsidiary of France Telecom) in a predatory pricing case, and against Deutsche Telekom and Telefónica for engaging in margin squeeze practices respectively on the German and Spanish markets. This is, however, the first Article 102 TFEU decision addressed to a company from a Member State that joined the EU in 2004.

2. Timeline

The Commission initiated proceedings on 17 April 2009. On 26 February 2010 the Commission adopted a Statement of Objections ("SO"). An Oral Hearing took place on 10 September 2010. On 28 January 2011, the Commission sent TP a letter indicating some specific pieces of evidence relating to the Commission's existing objections, which the Commission said it might use in a potential final decision.

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

In the course of the investigation the Commission carried out an inspection at TP's premises and sent a number of requests for information to TP, major market players and UKE.

3. Relevant markets and dominance

Having analysed demand and supply substitutability and competitive constraints, the Commission identified three relevant product markets:

- (i) the market for wholesale broadband access ("the wholesale market for BSA ⁽²⁾");
- (ii) the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location ("the wholesale market for LLU ⁽³⁾");
- (iii) the retail mass market, which is the downstream market of standard broadband products offered at a fixed location by telecommunications operators to their own end-users, whether provided through DSL, cable modem, LAN/WLAN or other technologies such as FTTx, CDMA, WiMAX, FWA and satellite. The relevant retail market excludes mobile broadband services.

The relevant geographic market covers the entire territory of Poland.

TP is the owner of the only nation-wide access network and is the only supplier of LLU and BSA in Poland. Therefore, in the wholesale markets TP has a market share of 100%.

In the period covered by the decision (2005-2009), TP also held high market shares in the retail market. In revenue terms TP's market shares ranged between 46% and 57%. In terms of number of lines, TP's market shares were between 40% and 58%. In addition, the presence on the market of PTK (TP's subsidiary) adds to the overall market share of the TP group in the retail market.

Furthermore, there are significant barriers to entry and expansion in the relevant markets. They arise from the fact that duplicating TP's network is not economically viable. Other barriers include investment and sunk costs, limited products and price differentiation as well as the absence of

⁽²⁾ BSA stands for bitstream access.

⁽³⁾ LLU stands for local loop unbundling.

countervailing buying power. The identified high barriers to entry and expansion are consistent with the observed market structure, where each of TP's competitors is left with a small market share of maximum 9% (in terms of number of lines) in the case of Netia, TP's biggest xDSL competitor.

4. Abuse of a dominant position

4.1. Refusal to supply – legal framework

The case law established that an undertaking enjoying a dominant position is under a special responsibility not to allow its conduct to impair genuine undistorted competition on the internal market.⁽⁴⁾

In this case the Commission established that TP had been abusing its dominant position in the Polish broadband access markets by refusing to give access to its network and supply BSA and LLU wholesale products to alternative operators.

Although undertakings are, as a rule, free to choose their business partners, the Commission considers that in the present case the intervention on competition law grounds is justified. The Commission in its Guidance on the enforcement priorities in applying Article 102 TFEU⁽⁵⁾ indicates that cases of refusal to supply constitute an enforcement priority if the following conditions are met: (i) the refusal relates to a product or service which is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on that downstream market; and (iii) the refusal is likely to lead to consumer harm.⁽⁶⁾

The Court of Justice further clarified that the conditions for a refusal to supply to be abusive do not necessarily apply when assessing conduct which consists of supplying services or selling goods on conditions which are disadvantageous or under which there might be no purchaser.⁽⁷⁾

The national sector-specific regulation already imposed on TP obligations to provide access to, and

use of, specific network facilities.⁽⁸⁾ Under the Polish Telecommunications Law TP has had an obligation to supply BSA and LLU access since 1 October 2003. The national regulation is based on the EU regulatory framework for electronic communications. Such access obligations result from a balancing by the public authorities of the incentives of TP and its competitors to invest and innovate. The need to promote downstream competition in the long term by imposing access to TP's upstream inputs exceeds the need to preserve TP's *ex ante* incentives to invest in and exploit the upstream infrastructure for its own benefit.⁽⁹⁾

Furthermore, there is no alternative infrastructure in Poland which would enable AOs to offer retail broadband services on a national scale and which would be substitutable to TP's local access network. AOs have to request access to TP's wholesale broadband products or duplicate TP's infrastructure. The latter it is not an economically viable option. Moreover, there are additional constraints: the development of an electronic communications network entails numerous administrative obstacles, such as obtaining permits from local authorities, complying with local development plans etc. This would make the network roll-out process even more costly, longer and difficult. Furthermore, TP rolled out its local access infrastructure over a long period of time protected by exclusive rights and was for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds.

Therefore, TP's duty to supply the upstream inputs (BSA and LLU access) is related to the finding that a denial of access to the upstream product or access on unreasonable terms and conditions having a similar effect would hinder the emergence and/or continuation of sustainable competition at the retail level.

4.2. TP's strategy

TP's abusive conduct was part of TP's strategy to limit competition on the markets at all stages of the process of accessing TP's network and using its wholesale broadband products. An internal document confirms that TP's strategic approach to wholesale broadband services was to "*minimize PKO [TP's Wholesale Division] sales to protect retail revenues*". Various other internal documents also

⁽⁴⁾ See Judgment of the Court of Justice of 9 November 1983 in Case 322/81, *Michelin v Commission* [1983] ECR 3461, at paragraph 57, and Judgment of the CFI of 9 September 2009 in Case T-301/04, *Clearstream*, ECR [2009], p.II-3155 at paragraph 132.

⁽⁵⁾ Commission Decision of 24 March 2004 in case COMP/37.792 *Microsoft*, para. 547.

⁽⁶⁾ See "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings*", Communication from the Commission C(2009) 864 final of 9 February 2009, OJ 2009/C 45/02.

⁽⁷⁾ Judgment of the Court of Justice of 17 February 2011 in Case C-52/09, *TeliaSonera Sverige* not yet reported, at paragraph 55.

⁽⁸⁾ Namely *inter alia* the obligation to: negotiate in good faith, give third parties access, provide specified services on a wholesale basis for resale, provide collocation or other forms of facility sharing, provide access to operational support system and interconnect networks or network facilities.

⁽⁹⁾ "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings*", paragraph 82.

indicate that TP planned and engaged in abusive practices aimed at creating “*impediment(s) to [alternative] operators’ access to the local loop*”, “*delaying the implementation of a regulatory [BSA] offer*” and “*limiting wholesale offers for [BSA and LLU] products*.” Such strategy is also visible in tangible obstacles that AOs faced at each stage of accessing TP’s wholesale products.

4.3. Elements of the abuse

The decision identifies a number of abusive practices, which had a cumulative, negative impact on the ability of AOs to access the incumbent’s network and effectively compete on the retail market. The evidence gathered shows that TP was:

- proposing unreasonable conditions governing AOs’ access to the wholesale broadband products;
- delaying the negotiation process: in 70% of negotiations TP did not meet a 90-day regulatory deadline for concluding negotiations;
- limiting access to its network by *inter alia* rejecting AOs’ orders on unreasonable grounds or proposing difficult technical conditions for connecting to TP’s network;
- limiting access to subscriber lines by *inter alia* rejecting AOs’ orders to activate subscriber lines on unreasonable grounds or limiting the availability of subscriber lines;
- refusing to provide reliable General Information (“GI”) indispensable for AOs, or providing inaccurate information.

4.3.1. Unreasonable conditions

TP was under a regulatory obligation to offer access and collocation contracts with conditions not worse than the ones guaranteed by the Reference Offers (“ROs”). The decision lists many contractual clauses contained in TP’s standard contracts, which were disadvantageous to AOs and which did not even meet the minimum standards set in the ROs. Despite several revised drafts of TP’s standard contracts, TP’s subsequent proposals still did not even come close to the ROs’ stipulations. The fact that AOs had very limited bargaining power vis-à-vis TP aggravated their situation. AOs were forced to accept TP’s proposal, refer the case to the regulator, or abandon the negotiation and the market entry. As a result, UKE had to intervene on the AOs’ side on a regular basis, imposing decisions on TP which removed the unfavourable contractual clauses.

4.3.2. Delaying tactics at different stages of the negotiation process

In addition to unreasonable contract clauses, TP used various delaying tactics throughout the negotiation process, including at least the following: (i) delaying the start of the access negotiations (for instance, one AO received a draft contract after 226 days instead of three days, as required by the regulation), (ii) further delays at the stage of negotiating contract clauses when AOs were forced to negotiate even the minimum conditions guaranteed by law, (iii) AOs could not be certain that the negotiated compromise would be reflected in the final contract, as TP’s representatives were not authorised to commit the incumbent, and (iv) delaying the contract signature (i.e. the contract agreed between TP and AOs required the approval of intermediate departments of TP, which sometimes took up to three months).

4.3.3. Limited access to TP’s network

AOs ran into difficulties again at the stage of accessing TP’s network. In particular, TP rejected a high number of AOs’ BSA and LLU orders on formal and technical grounds. Rejections were mainly due to: (i) unnecessary formal requirements imposed by TP for completing the orders, as well as (ii) unjustified technical rejections and, at least until 2007, a lack of satisfactory alternative solutions when there was no technical possibility to connect to the network in the way requested by AOs. Furthermore, TP proposed exaggerated cost estimates for LLU collocation, which often resulted in a very high percentage of locations not being accessed by AOs despite the positive outcome of the technical verification. Moreover, TP delayed the implementation of orders and delayed execution of certain collocation works. The evidence in the file shows that TP applied better conditions to its subsidiary PTK.

4.3.4. Limited access to subscriber lines

TP also hindered AOs’ access to subscribers, particularly by rejecting many AOs’ orders on formal and technical grounds. As a result, AOs could not provide service to a large number of customers who had signed up for it. At the same time, PTK, TP’s subsidiary, enjoyed a lower rejection rate. Rejections were caused by two factors: (i) the use of outdated TP data to verify AOs’ orders and (ii) a faulty verification mechanism on TP’s side. Furthermore, AOs faced limited availability of subscriber lines linked to the failure to provide BSA services on WLR⁽¹⁰⁾ lines and delays in the repair of faulty lines. In

⁽¹⁰⁾ Wholesale Line Rental used for the provision of fixed telephony.

practice, TP prevented AOs from upgrading their narrowband clients to broadband, thus limiting their ability to expand and grow on the retail broadband market. Finally, TP significantly delayed the implementation of AOs' orders for subscriber lines.

4.3.5. Refusal to provide the reliable information indispensable for AOs

AOs need reliable and accurate information to make sound decisions regarding access to TP's wholesale broadband products at specific locations. The decision finds that TP did not provide AOs with reliable information or provided incomplete information. Also, TP provided the data in a format (such as paper or scanned pdf) which was difficult to process and failed to provide an IT interface enabling AOs to have efficient access to BSA and LLU-related information and to process orders. The incompleteness and unreliability of the GI provided by TP possibly resulted in increased costs for AOs and the inability to implement their business plans.

Additionally, the evidence in the file illustrates that TP provided PTK with supplementary channels of information as well as with additional information which was not made available to other AOs. So the process of obtaining the GI was quicker and cheaper for PTK and led for example to a reduced number of order rejections. This also indicates that TP could have improved the quality of GI and the information channels, but that it refused to do so.

4.4. Likely impact on competition and consumers

TP's abusive conduct in the wholesale market was capable of restricting competition in the retail market. Access contracts that include burdensome obligations may diminish the quality of the product or increase AOs' costs or limit their sales. Lengthy negotiations and access procedures may benefit the incumbent, especially when introducing new services. There is empirical evidence that TP's refusal to supply was likely to reduce the rate of entry by competitors on the retail market for DSL services. There was a low take-up of BSA and LLU lines.

TP's refusal to supply was likely to have a detrimental impact on end users, which is reflected in low broadband penetration, high broadband prices and low average broadband connection speeds. In January 2010, broadband penetration in Poland was only 13.5%, one of the lowest in Europe and significantly below the EU average of 24.88%. Further, Poland has one of the lowest broadband speeds in Europe, with over 66% of connections falling in the range of 144Kbps and 2 Mbps compared to an EU average of 15,4% for this segment (data for 2009).

Finally, retail broadband prices in Poland are the second highest in the OECD area (date for 2009).

4.5. Objective justifications

Exclusionary conduct may escape the prohibition of Article 102 TFEU if the dominant undertaking can provide an objective justification for its behaviour or if it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant company.⁽¹¹⁾

TP denied the existence of the abuse. It admitted certain difficulties in providing access to its wholesale broadband products, in particular in 2006 and 2007, but argued that they could be explained "by the technical efforts and internal reorganization which TP had to undergo in a very short period of time to adjust to the new regulatory environment." TP explained that it had to manage simultaneously several projects on various wholesale services and had difficulties in developing proper IT systems and in finding human resources to perform certain projects.

The Commission did not accept TP's arguments. The case file contains solid evidence of TP's exclusionary conduct. Contemporaneous internal documents confirm that TP's strategy was designed to impede the AOs' access to TP's network. The incumbent had a lot of time to prepare its internal resources and IT systems for upcoming access obligations (imposed in 2005 for LLU and 2006 for BSA). TP had been aware of these obligations at least since 2003, when the decision identifying TP as an SMP (significant market power) operator was issued. The signature of TP's Agreement with UKE in October 2009 and the improved treatment of AOs that followed prove that TP could have applied effective access conditions also prior to the Agreement.

5. TP's arguments

TP argued during the administrative procedure that the Commission had limited itself to verifying the consistency of TP's behaviour with regulatory obligations. This is incorrect. Although the regulatory context was a key factor for the assessment under competition law, the Commission conducted an in-depth assessment of TP's behaviour under Art. 102 TFEU on the basis of a large number of documents in the file. The decision did not qualify as an abuse one or more breaches of a particular

⁽¹¹⁾ See judgement of the General Court of 30 sept. 2003 Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* (Michelin II) [2003] ECR II-4071, at paragraphs 107-109.

regulatory obligation vis-à-vis a given AO, but rather examined TP's pattern of behaviour vis-à-vis a large number of AOs over more than four years, which qualified as a refusal to supply wholesale inputs.

TP also questioned the Commission's competence in the case, claiming that the existing regulatory framework was efficient and guaranteed competition on the market and TP had already been subject to sanctions for breaching regulatory obligations. To address these arguments the decision evokes jurisprudence of the European courts which held that competition law may apply where sector specific legislation exists. For example, the recent judgment by the Court of Justice in *Deutsche Telekom* explains that "the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets".⁽¹²⁾ The General Court also found that even under the assumption that the regulator is obliged to consider whether the behaviour of the company concerned is compatible with Article 102 TFEU, the Commission would not be precluded from finding that the company was responsible for an infringement of Article 102 TFEU.⁽¹³⁾ To this end the decision recalls that the decisions of the regulator that TP refers to do not contain any findings on Article 102 TFEU. Finally, the intervention of the Commission was justified, as (despite the regulation in place and the sanctions imposed by UKE) TP did not change its anticompetitive behaviour, which negatively affected the development of wholesale broadband services in Poland. TP appealed the Commission's decision on 28 October 2011 (case T-486/11, pending). TP mainly contests the level of the fine.

6. Remedies and fines

The decision required TP to bring the infringement to an end to the extent that any of the identified abusive practices was still ongoing, and to refrain from any practices which would have the same or similar object or effect as described in the decision.

The decision imposed a fine taking into account the gravity and the duration of the infringement (four years and two months). No aggravating or mitigating circumstances were taken into account. In view of the partial overlap of facts between the Commission's decision and two regulatory sanctions imposed by UKE, the Commission decided to deduct the sum of two fines imposed by UKE and paid by TP in the amount of € 8.5 million. The final fine amount was € 127.5 million.

⁽¹²⁾ See judgement of the Court of Justice of 14 October 2010 in Case C-280/08 *Deutsche Telekom*, at paragraph 92, ECR [2010], p.I-9555.

⁽¹³⁾ Judgment of the General Court of 10 April 2008 in Case T-271/03, *Deutsche Telekom*, ECR [2008] II-477, at paragraph 113 and judgment of the Court of Justice of 14 October 2010 in Case C-280/08 *Deutsche Telekom* at paragraphs 80-96.