

RECENT DEVELOPMENTS IN THE EU CASE-LAW ON ELECTRONIC COMMUNICATIONS

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Independence of National Regulatory Authorities & Appeal Bodies

Organisational Independence

- Case C-240/15, AGCOM v. ISTAT and others

Corporate Independence

- Case C-424/15, Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v. Administración del Estado

Legal Independence

- Case C-222/13, TDC A/S v Erhvervsstyrelsen

Case 282/13, T-Mobile Austria v. Telecom-Control-Kommission

Facts

- Interpretation of Articles 4(1) and 9b FD and 5(6) AuD
- T-Mobile Austria challenged TCK's refusal to grant it party status in a procedure to authorise the transfer of spectrum between competitors following a merger

Key take-away

- Undertaking is 'affected' by a NRA decision for the purposes of Article 4(1) FD & has right of appeal against that decision where:
 - it is a competitor of the undertaking(s) to whom the decision is addressed,
 - the decision is adopted in a procedure intended to safeguard competition &
 - the decision in question is likely to have an impact on the position on the market of that first undertaking.

Case C-231/15, UKE v. Polkomtel

Facts

- Pending preliminary ruling on interpretation of Article 4 FD
- 2008 - UKE adopts decision to reduce Polkomtel's MTR.
- 2009 - UKE amends contract between Polkomtel and Petrotel to reflect this.
- 2012 – 2009 decision annulled on ground that 2008 decision was invalid.

Issues at stake

- Consequences of the annulment of a regulatory decision for the validity of implementing decisions made on that basis.
- Validity of NRA decisions pending appeal.
- Retroactive effect of the annulment of a regulatory decision.

Case C-3/14, UKE & Telefonía Dialog v. T-Mobile Polska SA

Facts

- Interpretation of Articles 7(3) & 20 FD, 5 AD & 28 USD
- UKE & TD challenged the annulment of a dispute resolution decision for not following the Article 7(3) FD EU consolidation procedure

Key take-away

- Obligation to implement EU consolidation arises from the content of that measure & its possible effect on intra-State trade.
- NRA must follow the EU consolidation procedure if, in resolving a dispute, it intends to impose obligations for access to non-geographic numbers under Article 28 USD and those obligations may affect trade between Member States.
- A NRA measure ensuring end-users access to non-geographic numbers under Article 28 USD affects trade between MS, if it may have, other than in an insignificant manner, an influence, direct or indirect, actual or potential, on that trade.

C-85/14 KPN v. ACM

Facts

- Interpretation of Article 28(1) USD
- KPN challenged ACM order to adjust its tariffs for call transit services to non-geographic numbers to the same as those for call transit services to geographic numbers

Key take-away

- Article 28 USD permits NRAs to impose a tariff obligation to remove an obstacle to call non-geographic numbers within the EU, outside SMP, where necessary for end-users to access non-geographic numbers within the EU.
- Such tariff obligations must be objective, transparent, proportionate and non-discriminatory, based on the problem identified, justified by Article 8 FD objectives and adopted in compliance with EU consolidation procedures.
- Relevant national authorities may also impose tariff obligation under Article 28 USD provided that they satisfy the conditions of competence, independence, impartiality and transparency & their decisions are subject to effective appeal under Article 4 FD.

Case C-376/13, Commission v. Bulgaria

Facts

- COM alleged breaches of Articles 2 of the CD, 7 AuD & 9 FD
 - Precluding non-BG TV content providers from participating in a tender for Right of Use of frequencies for DTT broadcasting
 - Precluding providers acquiring Right of Use for DTT broadcasting from operating a ECN
 - Limiting the number of DTT licenses to 2

Key take-away

- Un-necessary insofar as it restriction was an obstacle to TV content providers that required further authorisation in order to distribute that content in BG.
- Disproportionate prohibition, since the objective (maintenance of competition) could be ensured through less restrictive measures (ex ante market regulation)
- By limiting the number of licenses to two, on the basis of disproportionate criteria (as explained above), BG did not put in place special rights for the provision of electronic communications services, violating Article 2(1) of the Competition Directive

Case C-346/13, Ville de Mons v. Base Company S.A.

Facts

- Interpretation of Article 13 AuD
- Base challenged a tax on owners of mobile telephone transmission pylons & masts that could not be placed on an existing site in Mons, BE

Key take-away

- MS may not, within the framework of the AuD, levy charges or fees in relation to the provision of networks and ECS other than those provided for by the AuD
- Trigger for such a tax must be linked to the general authorisation procedure.
- Tax imposed on owners of pylons or masts intended for mobile telecom network, i.e. physical infrastructure enabling provision of ECNS.
- Such a tax is not a fee imposed on undertakings providing electronic communications networks and services in return for the right to install facilities.

Case C-1/14, Base & Mobistar v. Ministerraad, Belgacom

Facts

- Interpretation of Articles 9 and 32 USD
- Base & Mobistar challenged national law requiring operators providing end-users with mobile voice or Internet services to contribute to the financing of the net cost of those services as components of the 'social component of the US'.

Key take-away

- Special tariffs and the financing mechanism apply to fixed Internet subscription services, but not to mobile communications services, including mobile Internet
- MS are free to consider mobile communication services, including mobile internet, as additional mandatory services for the purposes of Article 32 USD.
- When MS decide to make additional mandatory services publicly available in their own territory, the financing mechanism provided for in Article 13(1)(b) of the USD does not extend to such services.

Case C-508/14, Český telekomunikační úřad (ČtÚ) v. T-Mobile CZ, Vodafone CZ

Facts

- Interpretation of Articles 12 and 13 USD
- T-Mobile and VF challenge a ČTÚ decision to including Telefonica's reasonable profit in the amount of the net cost of providing US

Key take-away

- Articles 12 & 13 USD are unconditional & sufficiently precise to be recognised direct effect
- These provisions do not preclude the net cost of the provision of the US to include the 'reasonable profit' of the provider of that service, fixed at the rate of return on equity capital required by a comparable undertaking to provide the SGEI for the whole duration and taking into account the risk
- Calculation of compensation for net cost of US must take account of rules relating to assessment of aid for SGEI
- USD does not apply to determine the net cost of the US provided by the designated undertaking pre-Accession.



Case C-326/14, Verein für Konsumenteninformation v. A1 Telekom Austria AG

Facts

- Interpretation of Article 20 USD
- Consumer Information Association challenged A1's standard terms which prevented changes to charges consequent upon agreed indexation to give subscribers the right to immediately terminate their contract without penalty.

Key take-away

- Changes in charges consequent upon a price adjustment clause contained in an undertaking's standard terms and conditions and operating by reference to a consumer price index compiled by a public institution does not constitute a "modification to the contractual conditions" within the meaning of Article 20 USD such as to allow the subscriber the right to withdraw from the contract without penalty.