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Commission guidelines on market analysis and the assessment of significant market power do not impose obligations on individuals. Case comment to the preliminary ruling of the Court of Justice of the European Union of 12 May 2011 *Polska Telefonia Cyfrowa sp. z o.o.(PTC) v Prezes Urzędu Komunikacji Elektronicznej* (Case C-410/09)

Introduction

The ruling of the Court of Justice (hereafter, CJ) in the *PTC* case concerns the interpretation of Article 58 of the Treaty of Accession[1] establishing an obligation to publish EU legal acts in the languages of Member States which accessed the EU on 1 May 2004. A controversy emerged in this context whether the said obligation also applied to European Commission Guidelines on relevant market analysis and the assessment of significant market power in the field of electronic communication (hereafter, 2002 Guidelines)[2]. In general, guidelines issued by the Commission are regarded as acts of soft law, also called innominate acts or *sui generis* acts.

Soft laws are defined in literature[3] as acts that are not given binding force directly by the Treaties but which may create actual and legal effects nevertheless. This definition should be complemented by the realisation that soft laws are inferior to binding legislation and must be compliant with it. With reference to the body issuing the act in question, literature[4] differentiates between: institutional soft law; Member States' European soft law; private self-regulation and co-regulation as well as; technical

[1] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and the adjustments to the Treaties on which the European Union is founded, OJ [2003] L 236/33.

[2] European Commission, Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002] C 165/6; part of the so-called EU telecoms-package.

[3] O. Stefan, 'Hybridity before the Court: a Hard Look at Sotf Law in the EU Competition and State Aide Case Law' (2012) 37 *E.L.Rev*. 49.

[4] A. Peters, I. Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective, 2006 NEWGOV *New Modes of Governance*, 16.

and financial standard-setting by or with the involvement of private bodies. Soft law of EU institutions, due to its function, includes: preparatory, informative, steering, interpretative, and decisional instruments[5]. Examples of preparatory and informative instruments include Green Papers, White Papers, Action Programmes and informative Communications. Their aim is to prepare the development and acceptance of legally binding provisions and to conduct consultations in this regard with entities to which the relevant legislation is meant to be addressed to. The function of such acts, spurring negotiations and leading to the achievement of a political consensus, is also called a 'pre-law' function[6]. By contrast, steering instruments include acts meant to achieve goals of EU law, that is, closer cooperation between Member States as regards the uniform application of EU law, and even harmonization of national legislation using political and declaratory means rather than binding measures. This category of soft law fulfils the so-called 'para-law' function[7] and includes Recommendations referred to in Article 288 TFEU as well as Conclusions, Declarations, Resolutions, and Guidelines passed by European institutions. The third group includes interpretative and decisional instruments which have a 'law-plus' function represented by Guidelines concerning how European institutions should interpret and apply EU law[8]; Commission Communications and Notices, as well as Guidelines, Opinions, and Recommendations passed by the Commission for example in the field of competition law and state aid[9].

Factual and legal background

Article 58 of the 2003 Act of Accession provides that the text of legal acts issued by European institutions and the European Central Bank, adopted before the accession and drawn up by the Council, Commission or European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of their accession, be considered authentic under the same conditions as those drawn up in the 11 languages official preceding the 2004 accession. Moreover, they shall be published in the Official Journal of the European Union (hereafter, Official Journal EU) if they were so published in the earlier official languages.

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[5] L. Senden, 'Soft law and its implications for institutional balance in the EC' (2005) 1 *Utrecht Law Review* 81.

[6] A. Peters, 'Soft Law as a New Mode of Governance', [in:] U. Diedrichs, W. Reiners, W. Wessels (eds.), *The Dynamics of Change in EU Governance*, Cheltenham, Northampton 2011, p. 34–35.

[7] L. Senden, 'Soft law as a New…', p. 82; W. Sanetra, *Europeizacja polskiego prawa pracy* [*Europeanization of Polish labour law*], Warszawa 2004, p. 45.

[8] L. A. J. Senden, 'Soft law as a New…', p. 82.

[9] O. Stefan, 'Hybridity before the Court…', p. 56; M. Aldestam, 'Soft Law in the State Aid Policy Area', [in:] U. Mörth (ed.), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Bodmin, p. 11.

Under the Directive establishing a common regulatory framework for electronic communications networks and services ('Framework Directive')[10], the Commission was obliged to publish specific guidelines concerning the analysis of telecoms markets and the assessment of significant market power found therein. National Regulatory Authorities (hereafter, NRAs) were obliged at the same time to take utmost account of the Commission's guidelines when defining relevant markets in a way appropriate to national circumstances and, in particular, of relevant geographic markets within their territory, in accordance with the principles of competition law (art. 15(3) Directive 2002/21). Under paragraphs 1 to 5 of Article 16 Directive 2002/21, NRAs must also take utmost account of these guidelines carrying out an analysis of the defined relevant telecoms markets.

In 2006, the President of the Polish Office for Electronic Communications (in Polish: *Urzad Komunikacji Elektronicznej*, UKE) identified PTC (Polska Telefonia Cyfrowa – one of the main telecoms operators in Poland) as having significant market power in the market for the provision of voice call termination services. The UKE President decided to impose certain regulatory obligations on PTC. In the context of an appeal brought before the Polish Supreme Court, PTC claimed that the 2002 Guidelines, on which that decision was based, could not be relied upon against it since they had not been published in the Official Journal EU in the Polish language. The Supreme Court asked the Court of Justice whether the 2003 Act of Accession precluded the Polish NRA from referring to the 2002 Guidelines in a decision by which it had imposed certain regulatory obligations on a telecoms operator, where those guidelines had not been published in the Official Journal EU in the language of that Member State despite the fact that its language is an official language of the European Union.

Judgment of the CJ

The CJ pointed out that a fundamental principle of the EU legal order requires that a measure adopted by public authorities should not be enforceable against those concerned before they had an opportunity to make themselves acquainted with it. The CJ reiterated that, where the language of a new Member State was an official language of the EU, Article 58 of the 2003 Act of Accession precluded obligations laid down in EU legislation, which was not published in that language in the Official Journal EU, from being imposed on individuals in that country, even though they could have acquainted themselves with that legislation by other means. The CJ continued on to consider whether the 2002 Guidelines imposed obligations on individuals. It found, after analysing the content of the 2002 Guidelines, that their content sets out the principles to be used by NRAs in their analysis of markets and effective competition under the EU telecoms package. The CJ concluded however that the Guidelines

[10] 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 contain any obligation capable of being imposed, directly or indirectly, on individuals. The CJ ruled therefore that the fact that the relevant act had not been published in the Official Journal EU in the Polish language did not prevent the UKE President from referring to them in a decision addressed to an individual. By taking this view, the CJ effectively contradicted the existence of a general principle of EU law that confers a right on its every citizen to have a version of any EU act that might affect his/her interests drawn up in his/her language in all circumstances.

Analysis

Role and characterization of the 2002 Guidelines

National Regulatory Authorities play the key role in the telecoms regulation model applied in the EU. Despite the expansion of EU competences, the implementation of EU law remains in the hands of Member States or is based on the cooperation between national and EU authorities. Competences of NRAs include, for example, their powers in the scope of pro-competitive sector specific regulation. In principle, such regulation is asymmetric, that is, regulatory obligations are imposed not on all telecoms enterprises operating on a given market, but only on those with significant market power. On the basis of an analysis of the domestic telecoms field, an NRA: determines relevant markets; decides if a given market is effectively competitive; establishes which enterprise has market power, and; imposes upon the latter appropriate regulatory measures[11]. In the fulfilment of their duties, NRAs take decisions at their own discretion. It is only after conducting a comprehensive legal and economic analysis that NRAs decide whether to impose special ex-ante obligations on undertakings with significant market power (such as to help remedy existing market problems) or indeed, decide to withdraw regulatory obligations. In order to limit the discretionary power of NRAs and to ensure coherent and uniform application of the EU telecoms package throughout Europe, the framework directive empowers the Commission to issue relevant soft laws. As a result, NRAs are obliged to define relevant markets and assess market power pursuant to, *inter alia*, the Commission 2002 Guidelines.

This particular act can be regarded as a steering soft law instrument, that is, an act meant to approximate national legislation and facilitate the uniform application of EU law, or indeed Europeanized national laws, by domestic administrative authorities and courts. This type of soft law is primarily meant to supplement and clarify binding legislation, and is thus similar to executive acts. That realisation is proven by the fact that the Commission's power to issue the said act results directly from Article 15(2)

[11] J.-D. Braun, R. Capito, 'The Framework Directive', [in:] Ch. Koenig, A. Bartosch, J.-D. Braun, (eds.), *EC Competition and Telecommunications Law*,The Hague, London New York 2002, p. 335; M. Szydło, 'Wybrane aspekty regulacji sektora łączności elektronicznej w prawie wspólnotowym' ['Selected aspects of regulation in electronic communications in EC law'] (2004) 7–8 *Prawo Unii Europejskiej* 71.

of the framework directive which is a blank provision that effectively empowers the Commission to issue guidelines for market analysis and the assessment of significant market power.

The 2002 Guidelines, specifying the meaning telecommunications directives, is also meant to facilitate the proper implementation of the EU telecoms directives by Member States. In the 2009 Commission v Germany case[12], the CJ ruled that the accused Member State has failed to properly implemented the EU telecoms package because Article 9a inserted into the German Telecommunications Act (TKG)[13] made it possible not to regulate 'new markets' for a certain period of time if their creation would require considerable investments. Germany referring to, inter alia, section 32 of the 2002 Guidelines argues that from the European telecommunications regulatory framework emerges the principle of non-regulation of new markets[14]. In its judgment[15], CJ clearly states that, this defective interpretation of the 2002 Guidelines led to the adoption of the Article 9a TKG inconsistent with the EU telecommunications directives. Therefore, despite the fact that the 2002 Guidelines formally have no legal binding effect they are the appropriate instrument for judicial dispute resolution and they can constitute a part of legal background of the case.

Legal effects of soft law

Article 288 TFEU (ex Article 249 TEC) stipulates that only certain EU acts may have binding force namely: Regulations, Directives, and Decisions. Pursuant to Article 288(5) TFEU, Recommendations and Opinions are not legally binding; other derivative acts such as Guidelines, for instance, should similarly be regarded as non-binding. Stipulating the legality of which type of acts can be challenged before the Court of Justice of the EU, Article 263 TFEU (ex 230 TEE) also uses the term 'acts intended to produce legal effects vis-à-vis third parties'. Despite different terminology, literature assumes that the terms 'legally binding' and 'causing legal effects' have the same meaning. L. Senden argues that legally binding acts have a 'capability to affect a person's legal position and rights and obligation contained in it can be enforced or have to be complied with'[16]. Still, CJ jurisprudence concerning the review of the legality of EU acts[17] suggests that regarded as such are not merely acts which are directly determined as legally binding by the Treaty and the legal nature of the act depends on its content rather than name and

[12] Judgment of the Court of 3 December 2009, case C-424/07 *European Commission v Federal Republic of Germany*, ECR [2009] I-11431, para. 70.

[13] Telecommunications Act, Federal Official Journal (*Bundesgesetzblatt*) June 25, 2004, no. 29/2004, p. 1190 (*Telekommunikationsgesetzes vom 22. Juni 2004, BGB1. I S. 1190*), available at http://www.gesetze-im-internet.de/tkg_2004/BJNR119000004.html.

[14] Case C-424/07, para. 49.

[15] Case C-424/07, paras 67–71.

[16] L. Senden, 'Soft Law in European Community Law…', p. 237.

[17] Judgment of the Court of 31 March 1971, case 22–70, *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport (ERTA)*, ECR [1971], 00263 para 42.

form. The CJ adopted an umbrella concept according to which non-legally binding acts can be incidentally binding, which results from specific features of such acts (incidental legally binding force)[18]. Additionally, a legal act which cannot be ascribed binding force within a wider meaning may cause indirect legal effects. According to the CJ ruling in the Salvatore Grimaldi v Fonds des maladies professionnelles case[19], the fact that Recommendations do not have binding force does not mean that they do not cause any legal effects. They should be taken into consideration by national courts when deciding a pending dispute. The judgment of the CJ in *Grimaldi* case clearly points to the hybrid nature of EU law that includes not only binding legislation but also acts of soft law that specify how to interpret EU law or 'Europeanized' national laws[20]. Indirect legal effects may result from a certain interpretation of a legal act or from general rules of law, mainly the rule of legal certainty and the rule of protection of legitimate expectations. Soft laws may determine the policy of administrative authorities or the means in which they act. As such, they create legitimate expectations for market players entitled to expect that administrative decisions will be taken in accordance with the content of the relevant soft laws. The nature of non-binding indirect legal effects is expressed by T. C. Hartley: 'legal effect is not an all-or-nothing characteristic: an instrument may have some legal effects but not others – for example, an instrument may not have direct legal consequences in its own right, but may affect the interpretation of another instrument and thus have indirect legal consequences'[21]. Soft law acts may thus only indirectly determine the legal situation of natural and legal persons, for example, affecting legislative actions of Member States and indeed, the actions of public authorities applying law in a certain field.

Legal effects of 2002 Guidelines

Articles 15(3) and 16(1) of the Framework Directive directly stipulate that NRAs have the obligation to take into consideration to the widest extent possible the market definition and assessment Guidelines issued by the Commission. It can thus be argued that the 2002 Guidelines determine the way in which telecom laws are applied

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[18] L. Senden, 'Soft Law…', p. 238; A. Wróbel, 'Komentarz do art. 288 TFUE' ['Comment to Article 288 TFEU'], [in:] A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej, Komentarz*, *Tom III* [*Treaty on the Functioning of the European Union. Commentary. Vol. III*], Warszawa 2012, p. 632.

[19] Judgment of the Court of 13 December 1989, case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, ECR [1989] 4407: 'However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law'.

[20] O. Stefan, 'Hybridity before the Court…', p. 49; D. M. Trubek, P. Cottrell, and M. Nance, 'Soft Law', 'Hard Law' and European Integration: Toward a Theory of Hybridity' (2005) *Legal Sudies Research Paper Series University of Wisconsin Law School* 30.

[21] T. C. Hartley, *The Foundations of European Community Law: an Introduction to the Constitutional and Administrative Law of the European Community*, Oxford 1998, p. 89.

by NRAs[22]. Moreover, the 2002 Guidelines can be seen as instructions for Member States' legislators also seeing as it was found in the C-424/07 judgment that their faulty interpretation may lead to an improper implementation of EU directives. Rights and obligations contained therein can thus be enforced if the Commission decides that non-compliance leads to a violation of binding EU law and lodges a complaint to that effect with the Court of Justice.

The CJ indicated in the commented judgment that the 2002 Guidelines, among others, 'set out of the methods and criteria useful in defining the market, for assessing significant market power and for designating undertakings as having significant market power' and 'provide NRAs with guidance on the measures they should take following the analysis of the competitive nature of the market'[23]. The choice of the prescribed methods, criteria and considerations taken into account and used by NRAs to analyse their domestic telecoms markets largely determine the outcomes of such assessments. As a result, the content of the 2002 Guidelines strongly affects how relevant markets are defined; which undertakings will be deemed to have significant market power therein and have regulatory obligations imposed upon them by NRAs; and even what kind of obligations can be imposed. The 2002 Guidelines largely determine therefore the outcome of national telecoms proceedings regarding the imposition of regulatory obligations. So, the statement of the CJ that this act does not indirectly affect rights and obligations of individuals cannot be concurred with.

Publication of soft law acts

All EU law acts are published in the Official Journal of the European Union called, until 1 February 2003, the Official Journal of the European Communities. The Official Journal has three series: L (*Legislatio*), C (*Communicatio*) and S (*Supplement*). Article 297 TFEU (ex Article 254 TEC) establishes an obligation to publish all binding EU laws: all legislative acts and non-legislative acts: Resolutions and Directives, which are addressed to all Member States, as well as Decisions without an addressee. Directives and Decisions with an addressee are notified to them. Despite the fact that the Treaty does not impose an obligation to publish soft law acts, Recommendations and Opinions are published in the L series of the Official Journal whereas the remaining acts are published in its C series.

Publication of 2002 Guidelines in languages of new Member States

Although the obligation to publish all EU laws applies to binding legislation only, the 2002 Guidelines were originally published in the C series of the Official Journal of the European Communities in all of its, then, official languages (11 at that time).

[22] W. Hoff, *Prawny model regulacji sektorowej* [*Legal model of sector-specific regulation*], Warszawa 2008, p. 106.

[23] Paras 32 & 33.

Nevertheless, they were not subsequently published therein in the languages of the Member States which joined the European Union on 1 May 2004.

From the fact that the 2002 Guidelines do not cause direct and indirect legal effects, the CJ drew further conclusions. It stated that 'the fact that those guidelines have not been published in Polish in the Official Journal of the European Union does not prevent the NRA of the Republic of Poland from referring to them in a decision addressed to an individual'. *A contrario*, assuming that the 2002 Guidelines are binding for NRAs, they cause indirect legal effects and indirectly influence the legal situation of natural and legal persons. The principle of legal certainty suggests that they should be published in all of the languages of the new Member States. Publishing them officially, and as a result, allowing operators to become acquainted with their content strengthens the reliability of a legally established order. It improves also legal certainty of economic activity enabling individuals to anticipate that telecoms decisions will be compliant with the 2002 Guidelines. As such, individuals would be able to prepare for such decisions properly. The PTC operator was at a disadvantage compared to the operators which had their registered seat in older Member States, as they could become acquainted with the guidelines in their own languages. The lack of an official publication of the 2002 Guidelines in the Official Journal in the languages of new Member States leads thus to the discrimination of telecoms operators conducting their business activity in those countries. In the light of the above analysis it must be said therefore that the ruling of the CJ in the *PTC* case cannot be received in a positive way.

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