



Munich Personal RePEc Archive

2010 and 2011 EU Competition Law and Sector-specific Regulatory Jurisprudence and Case Law Developments with a Nexus to Poland

Kuik, Krzysztof and Mościbroda, Anna

European Commission, Research Group Law Science Technology Society (LSTS) at the Vrije Universiteit Brussel

2012

Online at <https://mpra.ub.uni-muenchen.de/48542/>
MPRA Paper No. 48542, posted 25 Jul 2013 00:32 UTC

2010 and 2011 EU Competition Law and Sector-specific Regulatory Jurisprudence and Case Law Developments with a Nexus to Poland

by

Krzysztof Kuik, Anna Mościbroda*

CONTENTS

- I. Introduction
- II. Case summaries
 - 1. Antitrust
 - 2. Mergers
 - 3. State Aid
 - 4. Regulatory cases (infringements and preliminary rulings of Court of Justice of European Union)
- III. Tables

Abstract

This third overview of EU competition and sector-specific regulatory jurisprudential and case law developments with a nexus to Poland covers the years 2010 and 2011. This period of time is worth noting for several reasons. First, EU courts delivered a significant number of judgments in ‘Polish’ cases including an increased number of preliminary rulings. Second, 2010-2011 developments were dominated by judgments and decisions concerning telecoms. Finally, the Commission adopted only a handful of Polish State aid decisions following a formal investigation procedure under Article 108(2) TFEU.

* Krzysztof Kuik is an official of the European Commission (DG Competition). The views expressed in this overview are personal and do not necessarily represent the position of the European Commission. Anna Mościbroda has previously worked for the European Commission (DG Competition) and is currently a researcher at the Research Group Law Science Technology & Society (LSTS) at the Vrije Universiteit Brussel.

The main developments in telecoms relate to the Court of Justice's preliminary reference judgment in *Tele 2 Polska* focusing on the interpretation of Regulation 1/2003 and the *PTC v UKE* ruling that dealt with number portability charges. Relevant is also the antitrust prohibition decision issued by the Commission against Telekomunikacja Polska S.A. for its refusal to grant access to its wholesale broadband services.

In other fields, the Court of Justice delivered three State aid judgments (including two appeals against pre-2010 judgments of the General Court) and two judgments in infringement proceedings (regarding pre EU Accession marketing authorisations for medicines and the reutilisation of data from the public sector). The General Court ruled on appeal in the butadiene rubber cartel case (e.g. in *Trade-Stomil v Commission*). Finally, the Commission dealt with a merger case with a truly Polish specificity (Kraft Foods/ Cadbury), approved subject to divestiture of the E. Wedel brand.

Résumé

Ce troisième aperçu portant sur les développements de la réglementation relative au droit de la concurrence de l'UE et droit séctoriel, ainsi qu'à la jurisprudence ayant un lien important avec la Pologne, couvre les années 2010 et 2011. Cette période vaut l'intérêt pour plusieurs raisons. Premièrement, les tribunaux de l'UE ont délivré un nombre important d'arrêts dans les cas « polonais » dont un nombre croissant de questions préjudicielles. Deuxièmement, les développements en 2010-2011 ont été dominés par les jugements et décisions concernant les télécommunications (télécoms). Enfin, la Commission n'a adopté qu'un petit nombre de décisions sur les aides de l'État polonais à la suite d'une procédure formelle d'examen conformément à l'article 108 (2) du TFUE.

Les développements principaux dans les télécoms se rapportent au renvoi préjudiciel de la Cour de justice dans le cas *Tele 2 Polska* portant sur l'interprétation du règlement 1/2003 et celui relatif au cas *UKE v PTC* sur les frais de portabilité des numéros. La décision concernant une infraction en application adoptée par la Commission contre Telekomunikacja Polska SA pour son refus d'accorder l'accès à ses services de gros de la large bande est également pertinente.

Dans les autres domaines, la CJCE a rendu trois arrêts sur les aides d'État (deux recours contre les arrêts rendus par le Tribunal de première instance avant 2010) et deux arrêts dans une procédure d'infraction (en ce qui concerne les autorisations de marketing pour la médecine préalable à l'adhésion à l'UE et la réutilisation des données du secteur public). Le Tribunal de première instance a statué sur le recours dans le cas de cartel caoutchouc butadiène (par exemple le cas *Trade-Stomil v Commission*). Enfin, la Commission a traité un cas de fusion avec une spécificité typiquement polonaise (Kraft Foods / Cadbury), approuvé assujetti à la cession de la marque E. Wedel.

Classifications ad key words: telecommunication; pharmaceuticals; antitrust; cartel; competition law; Commission decision; state aid; merger control; case law; regulatory cases; infringement; preliminary ruling; Electronic Communications Framework;

broadband; alternative operators; powers of NCA; Regulation 1/2003; modernisation; procedural autonomy; number portability; conditional approval; general prohibition of combined sales; publication requirements; Act of Accession; internet tariffs; Universal Service Directive; Framework Directive; retail broadband tariffs; generic products; marketing authorisations.

I. Introduction

From the perspective of a regular contributor to YARS, the years 2010–2011 are notable for a number of reasons. First, as expected by the Authors, far more regulatory than competition law decisions and judgments were delivered. A particularly large number of them concerned the telecoms sector, seven in total, far more than in any other economic area. Second, the Commission adopted only a handful of State aid decisions following a formal investigation procedure under Article 108(2) TFEU. Third, some EU merger and infringement decisions directly considered Polish specificity.

Four out of the seven ‘Polish’ telecoms cases of 2010–2011 were preliminary references submitted to the Court of Justice of European Union (hereafter, Court of Justice or CJ) by Polish courts. Three preliminary rulings were issued in the context of disputes between the UKE President – the national regulatory authority responsible for telecoms (hereafter, NRA) – and Polish telecoms operators. The fourth, concerning the interpretation of Regulation 1/2003, had its origins in a dispute between the UOKiK President – the national competition authority (hereafter, NCA) – and the telecoms incumbent Telekomunikacja Polska S.A. (hereafter, TP). In two preliminary rulings (concerning Regulation 1/2003 and number portability charges), the CJ sought the written opinion of the Advocate General. The CJ also rendered judgments in infringement proceedings brought by the Commission against Poland for its failure to perform a market analysis necessary to impose regulatory measures in telecoms and for its non-compliance with the EU Directive on reutilisation of public information. The General Court (hereafter, GC) issued an order dismissing, on formal grounds, the action for annulment submitted by the UKE President against a Commission decision adopted in the framework of the Article 7 mechanism¹. The significant size of the Poland-related output

¹ GC Order of 23 May 2011 in Case T-226/10, *UKE v Commission*, not yet reported. The GC dismissed the action for annulment brought by the NRA against the Commission decision (C (2010) 1234) as inadmissible on formal grounds (improper representation before the CJ of the EU); the GC order was upheld in the CJ Judgment of 06/09/12 in Joined Cases C-422/11 P *UKE v Commission* and C-423/11 *Poland v Commission*, not yet reported.

of the Court of Justice in 2010–2011 shows the potential for an increase in the number of ‘Polish’ cases dealt with in the EU and the resulting need to focus on key developments in the future. Finally, the Commission has adopted a prohibition decision against TP (an appeal against this decision is pending).

It should be noted also that the Commission adopted in 2010–2011 very few Polish State aids decisions following a formal investigation procedure under Article 108(2) TFEU. There may be several reasons behind this phenomenon. The Commission is focusing its enforcement efforts, particularly on the financial sector, which limits the scope for *ex officio* enforcement against cases of lesser importance. The Polish authorities may also have been less pro-active in notifying aid. It is also possible, however, that the UOKiK President’s work and the overall efforts made in the run up to and during Poland’s EU Presidency may have lowered the scope for contentious issues with the Commission. The economic crisis may also be taking its toll drying up the sources of State support. In addition to the low number of State aid decision, no new infringement cases were brought to the CJ against Poland and no veto decisions were issued under the Article 7 mechanism for telecoms.

Finally, account has to be taken of particular Polish aspects of other EU decisions and judgments. This concerns Kraft’s purchase of Cadbury and the resulting sale of the E. Wedel to an independent Japanese purchaser. It also concerns Poland’s approach to granting marketing authorisations for medicine which, while facilitating market entry of generic drugs and thus arguably lowering healthcare costs, was found to be in breach of applicable EU law.

II. Case summaries

1. Antitrust Jurisprudence

UOKiK v Tele 2 Polska

On 3 May 2011, the CJ’s Grand Chamber ruled² on two preliminary reference questions regarding the ability of NCAs to adopt ‘negative’ decisions, i.e. decision stating that no infringement of Article 102 TFEU occurred³. The

² CJ Judgment in Case C-375/09 *UOKiK v Tele 2 Polska*, not yet reported.

³ Under Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1-25), when an NCA applies national competition law to an abuse prohibited by Article 102 TFEU, it should also apply the later Article alongside its national law (Article 3). To this effect, Regulation 1/2003 authorises the NCA to adopt decisions requiring an infringement to be brought to an end, ordering interim measures, accepting commitments, imposing fines, periodic penalty payments or any other penalty provided for in their national law (Article 5(1)). In case

ruling clarifies the division of competences between the European Commission and NCAs⁴ as laid down in Regulation 1/2003⁵.

The problem arose in the context of antitrust proceedings before the Polish NCA concerning the potential abuse of dominance by the incumbent operator, TP. Following an investigation, the UOKiK President concluded that TP's behaviour did not constitute an abuse and thus, that its conduct did not amount to an infringement of national laws and of Article 102 TFEU. If an antitrust infringement was not established, Polish law applicable at that time required the NCA to adopt a decision declaring that the practice in question had not restricted competition⁶. The UOKiK President adopted such decision stating that TP had not implemented any restrictive practice under Polish competition law. As far as Article 102 TFEU was concerned, the UOKiK President merely brought the procedure to an end on the grounds that it was devoid of purpose. In other words, the NCA did not adopt a negative decision with respect to Article 102 TFEU because it considered that Regulation 1/2003 did not allow it to issue a negative decision on the merits as regards the assessment of the compatibility of the scrutinised practice with EU competition law.

Tele 2 Polska, one of TP's key competitors and a third party to the antitrust proceedings, challenged the UOKiK decision. In the course of this dispute, the Polish Supreme Court asked the CJ two preliminary questions, i.e. whether (i) EU law precludes the NCA, if the latter fails to establish a restriction of competition, from adopting a negative decision on the merits, and (ii) Article 5 Regulation 1/2003 is directly applicable and can constitute a legal basis for a decision issued by an NCA.

In line with Advocate-General Mazak's opinion⁷, the CJ replied to both questions in affirmative. It confirmed that Article 5 Regulation 1/2003 precludes the application of national rules insofar as they empower NCAs to issue 'negative decisions' with respect to EU competition rules. It is the sole competence of the Commission to find that a given practice does not breach Article

an NCA finds that, on the basis of information in its possession, the conditions of prohibition of Articles 101 or 102 TFEU are not met, the NCA may adopt a decision stating that there are no grounds for action on its part (Article 5(2)).

⁴ The judgment has been summarised in the European Competition Network (ECN) Brief 02/2011, available at: <http://ec.europa.eu/competition/ecn/brief/index.html>, last consulted on 28 August 2012.

⁵ Regulation 1/2003, *supra* note 4.

⁶ Art. 8 of the Competition and Consumers Protection Act of 15 December 2000 (consolidated text: Journal of Laws 2003 No. 86, item 804, as amended). Such obligation has been abolished by subsequent legislative changes: the Competition Act 2000 has been repealed and replaced by the Competition and Consumers Protection Act of 16 february 2007 (Journal of Laws 2007 No. 50, item. 331, as amended).

⁷ AG Mazak's opinion of 7 December 2010.

101 and 102 TFEU. Otherwise, the uniform application of EU competition law would be undermined as a national decision finding that no infringement of Article 101 or 102 TFEU occurred could prevent the Commission from later adopting a decision finding that a breach of EU competition rules has taken place. The CJ also confirmed that Article 5 Regulation 1/2003 was directly applicable and could constitute a legal basis for a decision issued by an NCA.

The judgement gave rise to a renewed discussion on the rationale and objectives of the 2004 reform of the EU competition law enforcement model. Some commentators point out to the inconsistency in giving power to the NCAs to adopt infringement decisions while preventing them from finding no breach of EU competition law. Such model is understood as maintaining the Commission's exclusive power to issue 'negative clearance' letters as used before 2004⁸. The CJ judgment is therefore perceived as running counter to the logic of the decentralisation of EU competition law enforcement introduced by Regulation 1/2003. It is seen as resulting in legal insecurity for companies, and a definite restriction in the procedural autonomy of Member States in their enforcement of EU competition law⁹. The judgment might also be considered as impeding the judicial review of national antitrust decisions for those whose interests are affected by an NCA *de facto* finding that no infringement of Article 101 and 102 TFEU has taken place despite the fact that such finding is not articulated in the form of a formal decision on substance¹⁰.

BR/ESBR cartel

On 13 July 2011, the GC rendered several judgments¹¹ concerning the *BR/ESBR* Decision¹² issued by the Commission on 29 November 2006. The

⁸ Certain commentators see the NCAs' inability to issue negative decisions as a way to avoid the re-establishment of the old notification/exemption system but this time at the national level (see S. Brammer in: (2012) 49(3) *C.M.L.R.* 1173–1175.

⁹ See, *inter alia*: S. Brammer, *supra note* 8; A. MacGregor, B. Gecic, 'EU Antitrust Proceedings and National Competition Authorities: A Leap in the Wrong Direction', (2012) 1 *International Trade Law & Regulation*; N. Petit, Ch. Lousberg, 'Arrêt «Tele 2 Polska»: Une interprétation contestable de la compétence des autorités nationales de concurrence' (2011) 19 *Journal de droit européen* 243; K. Kowalik-Bańczyk, 'Glosa do wyroku TS z dnia 3 maja 2011 r., C-375/09' (2012) 2 *Europejski Przegląd Sądowy* 39–45.

¹⁰ As illustrated by Tele 2's appeal against the UOKiK decision. For more detailed analysis of the judgment and its potential implications we refer to the contribution of I. Szwedziak to the current edition of YARS.

¹¹ GC Judgments in, *inter alia*, Case T-53/07 *Trade-Stomil*, Case T-44/07 *Kaucuk* and Case T-45/07 *Unipetrol*, cases not yet reported.

¹² Commission Decision COM (2006) 57 final of 29 November 2006 in Case COMP/F/38.638, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf (last consulted on 27 August 2012).

BR/ESBR Decision found that 13 companies had entered into a cartel concerning certain types of synthetic rubber [butadiene rubber (BR) and emulsion styrene butadiene rubber (ESBR)]¹³. Among the 13 addressees of the *BR/ESBR* Decision was the Polish trading company Trade-Stomil Sp. z o.o., as well as two Czech producers of petrochemicals, Unipetrol a.s. and Kaučuk a.s., both controlled by Polish petrochemical and chemical groups¹⁴.

The *BR/ESBR* Decision found that Trade-Stomil had represented the Polish producer Chemical Company Dwory S.A. (Dwory) in its export business for around 30 years, until at least 2011¹⁵. Trade-Stomil was said to have participated in the meetings of the investigated trade association (a forum for cartelists) and was thus found to have participated in the cartel. Kaučuk was seen as liable for the behaviour of the dissolved Czech trading company Tavorex s.r.o., which run Kaučuk's exports between 1991 and 2003 and was also found to have participated in the cartel. Unipetrol, Kaučuk's parent company, was found liable for the infringement committed by Kaučuk. The Commission imposed upon the participants of the cartel a fine totalling EUR 519 million, including EUR 3.8 million on Trade-Stomil and EUR 17.55 million jointly on Kaučuk and Unipetrol.

Several parties, including Trade-Stomil, Kaučuk and Unipetrol appealed the *BR/ESBR* Decision. The three Central and Eastern European (CEE) companies argued, *inter alia*, that the Commission had failed to prove to the required standard that they participated in the cartel or were liable for the infringement. They have also made a number of arguments challenging the level of their fines¹⁶.

In succinct judgments¹⁷, the GC annulled the *BR/ESBR* Decision in its entirety where it concerned Kaučuk and its parent company Unipetrol. The *BR/ESBR* Decision was also annulled with respect to Trade-Stomil but this judgment is not yet published. The GC noted that the evidence presented in the part of the *BR/ESBR* Decision which related to Tavorex's participation

¹³ For details, see K. Kuik, '2007 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland' 2008 1(1) *YARS* 168–170.

¹⁴ Unipetrol a.s. was since 2005 part of the Polish petrochemical group PKN ORLEN S.A., and Kaučuk a.s., was a subsidiary of the Polish chemical group Synthos S.A known since 2007 as SYNTHOS Kralupy a.s. For details, see K. Kuik, '2007 EU Competition Law...', p. 171.

¹⁵ Dwory was also targeted by the Commission's investigation but was not an addressee of the Decision because the Commission at an earlier stage took a view that there was insufficient evidence of Dwory's participation in the cartel to establish its liability (para. 88 of the *BR/ESBR* Decision).

¹⁶ For more detail on Trade-Stomil's appeal, see OJ [2007] C 95/45; for more detail on Kaučuk's and Unipetrol's appeals, see OJ [2007] C 82/49.

¹⁷ The judgments in Kaučuk's and Unipetrol's appeals do not exceed 69 paragraphs. The judgment in Trade-Stomil's appeal is not yet published.

in cartel meetings (e.g. expense reports, notes from the meetings and witness statements) was not sufficient to support the conclusion that Tavorex (and thus Kaučuk/ Unipetrol) participated in the cartel. While some other evidence (notably the general leniency statement given by Bayer referred to in the part of the *BR/ESBR* Decision that relates to the description of the cartel) was considered to have a certain probative value, the GC found such general statements insufficient¹⁸ to justify the finding that Tavorex (and thus Kaučuk/ Unipetrol) participated in the cartel.

As the GC annulled the *BR/ESBR* Decision due to lacking evidence with respect to the three aforementioned CEE companies, it did not examine their other pleas in law, notably the issue of the relationships between principals and agents in the context of competition law infringements.

The Commission did not challenge the GC judgments regarding Trade-Stomil, Kaučuk and Unipetrol. Neither did it appeal the partial annulments of the *BR/ESBR* Decision with respect to the Italian producer ENI SpA ('ENI') and its subsidiary Polimeri Europa SpA¹⁹, or the US producer The Dow Chemical Company and its subsidiaries (Case T-42/07).

Commission Decisions

Telekomunikacja Polska

On 22 July 2011, the Commission adopted a decision (hereafter, TP Decision)²⁰ finding that the Polish telecoms incumbent TP²¹ had abused its dominant position on two Polish markets for wholesale broadband services by refusing to grant access to its fixed telephone network to Alternative Operators (hereafter, AOs). Taking into account the gravity and duration of the infringement (4 years 2 months), the Commission imposed on TP a fine of EUR 127.5 million (after deducting several fines previously imposed by the

¹⁸ Some evidence regarding cartel meetings gave rise to doubts that must act in favour of the applicant (see Case T-38/02 *Groupe Danone v Commission*, judgment of 25 October 2005, ECR [2005] II-04407, para. 215).

¹⁹ Cases T-38/07 and T-59/07, not yet published. That said, in 2012, the Commission sent ENI a letter in which it communicated its decision to recommence the *BR/ESBR* procedure despite the judgment in which the GC re-determined the amount of the fine. ENI appealed the letter in Case T-240/12 and argued lack of competence (in light of the GC's exercise of its unlimited jurisdiction, the Commission could not recommence the procedure with a view to adopting a fresh decision imposing fines). The appeal is pending.

²⁰ Commission Decision in Case COMP/39.525 – *Telekomunikacja Polska*, available at http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1&case_number=39525 (last consulted on 28 August 2012).

²¹ TP was formed in 1991 from the previous state monopoly 'Polish Post, Telegraph and Telephony', and privatised in 1998.

Polish NRA). The TP Decision followed an unannounced inspection of TP's premises in autumn of 2008²² and the opening of formal proceedings against the incumbent on 17 April 2009²³.

The Commission applied Article 102 TFEU to the telecoms sector before in a number of cases²⁴. However, the TP decision is the first Article 102 decision addressed to a company from a Member State that joined the EU in 2004²⁵.

Poland's fixed telephone network (specifically, the digital subscriber line, DSL) is its main platform of broadband internet access. TP is the only operator with a country-wide DSL network. If AOs wish to provide broadband internet access services to end users via a DSL, they can either build an alternative local access network (which is uneconomical due to high sunk costs) or obtain remunerated access to TP's network. To obtain access, AOs can in principle purchase from TP either: (a) wholesale broadband access (BSA) or (b) unbundled access to the local loop (LLU). BSA wholesale services consist of selling to AOs data transmission capacity over TP's fixed telephone network²⁶. The LLU wholesale services involve the granting of physical access to the 'last meters' of the telephone network infrastructure leading to end user premises (the so-called local loop²⁷ or the sub-local loop²⁸).

Both the EU and national regulatory framework in force at the time of the proceedings imposed an obligation on TP (as on the operator with significant market power on the fixed public telephone network) to grant access – both BSA and LLU under Polish law – and to publish a Reference Offer ('RO') in that respect²⁹.

The Commission identified three relevant product markets in this case: two separate wholesale services markets for BSA and LLU as well as the downstream retail product market for standard broadband access services

²² European Commission, MEMO/08/666 of 30 October 2008. On 03 December 2008, TP lodged an appeal (Case T-533/08) with the CFI (now the GC) against the Commission inspection decision but it withdrew the appeal on 18 February 2010.

²³ European Commission, MEMO/09/203 of 27 April 2009.

²⁴ Commission decisions in *Wanadoo* (a subsidiary of France Telecom) in a predatory pricing case (Commission Decision of 16 July 2003 in Case COMP/38.233), as well as *Deutsche Telekom* (Commission Decision of 21/05/03 in Case COMP/37.451) and *Telefonica* (Commission Decision of 4 July 2007 in Case COMP/38.784) regarding margin squeeze practices in Germany and Spain, respectively.

²⁵ D. Kamiński, A. Rogozińska, B. Sasinowska, 'Telekomunikacja Polska Decision: competition law enforcement in regulated markets' (2011) 3 *Competition Policy Newsletter*.

²⁶ BSA is defined in recital 50 of the TP Decision.

²⁷ As defined in recital 53 of the TP Decision.

²⁸ As defined in recital 53 of the TP Decision.

²⁹ Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ [2000] L 336/4) and the Telecommunications Law of 16 July 2004 (Journal of Laws 2004 No. 171, item 1800, as amended).

offered at a fixed location to end users³⁰. The relevant geographic market for all three services was found to cover the entire territory of Poland.

The Commission found TP dominant on all three relevant markets. In particular, as regards the wholesale markets for BSA and LLU, it identified TP as the only supplier of such services in Poland and thus an unavoidable trading partner. The decision identifies also TP's high market share in the retail market and the existence of significant barriers to both entry and expansion.

The Commission found that TP had abused its dominant position on the two wholesale markets by refusing to supply BSA and LLU wholesale services to AOs. The incumbent was seen as deliberately preventing, or at least postponing, the entry of AOs onto the Polish market for broadband services with the view of protecting its customer base and revenue on the downstream retail broadband access market. To this effect, TP was, *inter alia*, proposing unreasonable conditions for access to its network and wholesale broadband products, delaying access negotiations, obstructing the implementation of access agreements (e.g. by rejecting orders in an unjustifiable manner), as well as refusing to provide reliable and accurate general information indispensable for AOs to operate (e.g. technical specifications relating to data transmission and equipment, etc.). The Commission concluded that TP's abusive conduct was likely to reduce the rate of entry and expansion of its DSL competitors on the downstream retail market for broadband Internet access services. As a result, TP delayed the growth of competition and thereby the development of alternative infrastructure. The incumbent's conduct could have been detrimental for final consumers, possibly leading to a low broadband penetration rate, high broadband prices and low average broadband connection speeds. The Commission ordered TP to cease the infringement in so far as it had not done so already and to refrain from engaging in the same or equivalent conduct in the fuThe TP Decision also discussed TP's arguments as regards the Commission's lack of competences to act in a field which is highly regulated by national law, and which is subject to the supervision and intervention of an NRA (the UKE President). The Commission considered, however, that its competence was not affected by the existence of regulatory decisions imposing fines with respect to TP's obligations to provide network access and to treat AOs in a non-discriminatory manner. The Commission referred to the CJ judgment in *Deutsche Telekom*³¹ where it was held that sector specific regulations did not exclude the application of EU competition

³⁰ The market for retail broadband access services encompasses all technologies providing broadband access (incl. DSL lines, cable, LAN/WLAN and others) except retail broadband access provided via mobile networks.

³¹ CJ Judgment of 14 October 2010 in Case C-280/08, *DT v Commission*, ECR [2010] I-09555, paras 80–96.

rules. It emphasised also the regulatory character of the intervention by the NRA (UKE decisions did not consider the applicability of Article 102 TFEU) and the fact that TP did not change its behaviour despite being already fined by the UKE President. The Commission did, nevertheless, deduct the amounts of several fines imposed earlier by the NRA and already paid by TP from the total fine it imposed on TP³².

Moreover, TP argued that the Polish competition authority had in 2008 closed its own investigation against TP without finding an infringement. As regards the effects of such decision and its impact on the Commission's competences to investigate, the TP Decision noted a different scope and different focus of the two investigations³³. It also recalled the conclusions of the *Tele 2 Polska* preliminary ruling where the CJ held that NCAs do not have the competence to formally declare that an infringement of Article 102 TFEU had not taken place. Therefore, a negative decision issued by an NCA cannot prevent the Commission from subsequently finding that the same practice is in breach of EU competition law³⁴.

TP appealed the TP Decision on 2 September 2011³⁵ alleging failure to demonstrate a legitimate interest in pursuing a case regarding historic conduct, the violation of human rights (imposition of a criminal penalty by an administrative body) and rights of defence, as well as several factors leading to fine reduction. The appeal is pending.

2. Mergers

Commission Decisions

Not unlike in previous years, most merger decisions concerning Polish companies or Polish markets issued in 2010-2011 did not raise competition concerns. Notified transactions were either (i) unconditionally approved in Phase I, or (ii) identified concerns were eliminated by way of remedies but neither the concerns nor the remedies related to markets in Poland³⁶.

³² D. Kamiński, A. Rogozińska, B. Sasinowska, *supra* note 25.

³³ According to the TP Decision, the UOKiK investigation had much narrower scope. The NCA investigated TP's practices in the context of providing BSA services to Netia and GTS only and the investigation was conducted in the context of the potential infringement of the collective consumer interests (Art. 24 Competition Act 2007 rather than its Art. 9 (Article 102 TFEU's equivalent)).

³⁴ CJ Judgment of 03 May 2011 in Case C-375/09, *supra*, paras 22–23, 28.

³⁵ OJ [2011] C 340/27.

³⁶ E.g. Case No. COMP/M.5865, *Teva/Ratiopharm*; Case No. COMP/M.5721, *Otto/Primondo Assets*; Case No. COMP/M.5855, *DB/Arriva*.

The Commission adopted three decisions with competition concerns relating to Polish markets. Two cases related to pharmaceuticals: *Abbott/Solvay Pharmaceutical*³⁷ and *Novartis/Alcon*.³⁸ Both led to divestitures of businesses across the EEA which removed overlaps in the problem areas. Kraft's takeover of Cadbury³⁹ raised, however, concerns relating specifically to Polish (and Romanian) markets for chocolate confectionery. The Commission approved the operation on condition that Kraft divested the famous Polish E. Wedel businesses and brand as well as its Romanian businesses.

Kraft Foods/Cadbury

On 6 January 2010, the Commission conditionally approved⁴⁰ the takeover of Cadbury (United Kingdom) by Kraft Foods (United States). Kraft Foods is a global food and beverage company active in over 150 countries. Cadbury is a producer and seller of chocolate and sugar confectionery active in over 60 countries. The companies' activities overlapped mainly with regards to the production and sale of chocolate confectionery and, to a minor extent, sugar confectionery, biscuits, soft cases and chocolate drinks. The consolidation of their chocolate confectionery businesses gave rise to significant overlaps in 19 Member States, including Poland and Romania where preliminary competition concerns were identified.

The Commission distinguished three separate market segments within the overall market for chocolate confectionery: (i) chocolate tablets (chocolate blocs of more than 59 g); (ii) countlines (small individually wrapped chocolate bars) and; (iii) pralines. In line with its earlier decisions, the geographic market for chocolate confectionery was seen as national.

The Commission observed that the transaction would lead to high combined market shares of Kraft/Cadbury (significantly out-sizing their competitors) on the markets for chocolate tablets in Poland and Romania, and on the market for chocolate pralines in Poland. The decision emphasised the close competition existing between the brands of the two companies prior to their merger. In Poland, the tablets and pralines offered by Kraft under its Milka and Alpen Gold brands are regarded as the closest substitutes for the Polish 'iconic' Wedel brand, belonging to Cadbury. To address these concerns, Kraft offered to divest Cadbury's domestic Romanian chocolate confectionery businesses as well as the Polish business conducted under the Wedel brand. The Commission accepted the commitments and approved the transaction

³⁷ Case No. COMP/M.5661, *Abbott/Solvay Pharmaceutical*.

³⁸ Case No. COMP/M.5778, *Novartis/Alcon*.

³⁹ Case No. COMP/M.5644, *Kraft Foods/Cadbury*.

⁴⁰ *Idem*.

in Phase I. As a consequence of the decision, the Polish E. Wedel brand and business were sold in 2010 to the Japanese food company Lotte Holdings.⁴¹

3. State Aid Jurisprudence

ISD Polska judgment (Huta Częstochowa)

On 24 March 2011, the CJ issued a judgment in the appeal brought by ISD Polska⁴² and Industrial Union of Donbass Corp., against a GC judgment⁴³ dismissing their appeal against a Commission decision⁴⁴ concerning State aid for Huta Częstochowa (hereafter, *HCz Decision*). The CJ upheld the GC judgment and dismissed the appeal in its entirety⁴⁵. As a result, the 2005 *HCz Decision* was upheld.

The CJ examined whether the GC had infringed Protocol 8 of the Act of Accession⁴⁶ by holding that the Commission was competent to monitor Poland's compliance with EU State aid rules in its pre-Accession period from 1997 to 2003. The appellants claimed by contrast that the Commission's power covered only the time period between the publication of the Protocol on 23 September 2003 and the end of 2003. The CJ unequivocally confirmed that, taking into account the wording, purpose and general scheme of Protocol No. 8, it constituted a *lex specialis* which extended the power of the Commission to monitor aid during the period from 1997 to 2003.

⁴¹ UOKiK President Decision of 16 August 2010, DKK-83 /2010.

⁴² Due to restructuring, the appeal was brought by ISD Polska sp. z o.o. and ISD Polska sp. z o.o. (formerly Majatek Hutniczy sp. z o.o.).

⁴³ GC Judgment of 01 July 2009 in joined cases T-273/06 and T-297/06 *ISD Polska and Others v Commission* [2009] ECR II-2185 dismissing the appeal (see below). In a parallel appeal against this Decision, judgment of 01/07/07 in Case T-291/06 *Operator ARP v Commission*, the GC annulled the Decision in so far as it concerned Operator ARP sp. z o.o. (to which *HCz's* non-steel assets were transferred during *HCz's* restructuring in 2002-2005), see also Koska D., Kuik, K. '2008 and 2009 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland' 2010 3(3) *YARS* 194–196.

⁴⁴ Commission Decision 2006/937/EC of 05/07/05 on State aid C 20/04 (ex NN 25/04) in favour of Huta Czestochowa S.A. (*HCz Decision*), OJ [2006] L 366/1. See also K. Kuik, *supra note*, 14 pp. 174–175.

⁴⁵ CJ Judgment of 24 March 2011 in case C-369/09 P, *ISD Polska and others v Commission*, (the ISD Polska (Huta Czestochowa) judgment), not yet reported.

⁴⁶ Protocol No. 8 on the restructuring of the Polish steel industry, annexed to the Act of Accession (OJ [2003] L 236/948) authorised Poland (derogation from general state aid rules) to grant aid for the restructuring of its steel sector according to detailed rules set out in the restructuring plans and the conditions stipulated in that protocol.

The CJ also examined whether the procedures, laid down by Protocol No. 2 of the 1991 Europe Agreement⁴⁷ by which the aid was brought to the notice of both the Commission and the Council gave rise to legitimate expectation for the appellants regarding that aid.⁴⁸ The CJ noted that the right to rely on the protection of the legitimate expectations principle extended to any person in a situation where an EU authority had, by giving it precise assurances, caused that person to entertain justified expectations⁴⁹. While the appellants argued that various documents and acts had given them such precise assurances, the CJ upheld the finding of the GC that the condition of precise assurances had not been met and the 2005 HCz Decision had not undermined the appellants' legitimate expectations.

Finally, the CJ dismissed as inadmissible or unfounded the claims concerning the 'appropriate' interest rate applicable at the time of recovery.

Commission v Poland (Buczek – Recovery)

On 14 April 2011, the CJ delivered a ruling⁵⁰ in an infringement case concerning Poland's failure to implement Commission Decision 2008/344 (hereafter, Buczek Decision)⁵¹. CJ concluded that addressees of Buczek Decision, i.e. Technologie Buczek (TB), Huta Buczek (HB) and Buczek Automotive (BA), had made no repayment or only partly repaid the illegal aid identified in the Buczek Decision. In their defence, the Polish authorities relied on several technical (e.g. missing documents) and legal (notably a risk of 'double repayment'⁵²) arguments to justify the delays in aid recovery.

The CJ agreed with the Commission's application and found Poland in breach of Article 249 EC and Articles 3 and 4 of the Buczek Decision. It held,

⁴⁷ Protocol No 2 of the Europe Agreement, signed in Brussels on 16 December 1991 (OJ [1993] L 348/2), concerning European Coal and Steel Community products provided that public subsidies were prohibited in principle while containing five-year derogation for the ECSC steel products from the general prohibition. The five-year derogation period was subsequently extended until the Accession.

⁴⁸ The *ISD Polska (Huta Czestochowa)* judgment, supra, para. 130.

⁴⁹ The *ISD Polska (Huta Czestochowa)* judgment, supra, para 123 and the case law cited therein.

⁵⁰ CJ Judgment in Case C-331/09 *Commission v Poland*, not yet published.

⁵¹ Commission Decision 2008/344/EC of 23 October 2007 on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for the steel producer Technologie Buczek Group (OJ [2008] L 116/26). See K. Kuik, supra note 14 for the summary of the rescue and restructuring cases in the steel sector, including the Buczek Decision.

⁵² Poland argued that a risk of 'double repayment' arose from the absence of a legal basis enabling administrative bodies to abandon the debts owed to them by TB, including amounts which should be recovered from TB's subsidiaries. Moreover, if those debts were repaid, there would be no longer any legal basis in Polish insolvency law enabling TB to recover from its subsidiaries the sums paid by it.

in particular, that the registration of the addresses' debts was delayed and had not constituted a proper implementation of the Buczek Decision, and that the amount recovered from TB had not corresponded to the amounts meant to be recovered. It also held that Poland had failed to show that implementing the Buczek Decision has proven absolutely impossible. The CJ re-confirmed established jurisprudence that apprehension of internal difficulties in the course of implementing a State aid decision could not justify a failure by a Member State to comply with its obligations under EU law⁵³.

While the judgment confirms once again the principles applicable to Member State obligations to recover unlawful State aid, its practical implications appear limited in light of the GC judgment in Case T-1/09 *Buczek Automotive v Commission*, as discussed below.

Buczek Automotive v Commission

On 17 May 2011, the GC issued a judgment⁵⁴ concerning an appeal submitted by Buczek Automotive sp. z o.o. against the 2007 Buczek Decision⁵⁵ which required Poland, among other things, to recover approximately EURO 1.8 million (PLN 7.2 million) (plus recovery interests) from Buczek Automotives⁵⁶.

The Commission stated in the Buczek Decision that Polish authorities had failed to recover public debts from BA's parent company, Technologie Buczek. Their behaviour was found to have failed to comply with the 'private creditor' test whereby non-enforcement of public debt constitutes State aid if it is done on terms unacceptable for a private creditor operating under normal market conditions. The Commission found that Polish authorities not only held 'good' securities against which they could have enforce the debts but were also aware of the poor prospects for TB's future performance. The Commission thus concluded that their behaviour amounted to granting illegal aid to TB. As the company has meanwhile fallen into bankruptcy, the Commission required debt recovery from two of its subsidiaries: Huta Buczek and Buczek Automotive considering that these companies had, according to the Commission, benefitted from the alleged aid. All three companies had filed appeals against the Buczek Decision, although TB and HB withdrew their submissions at a later date.

The GC judgment is notable for two main reasons. First, it held that the Commission had not presented sufficient evidence that State aid had indeed

⁵³ The *ISD Polska (Huta Czestochowa)* Judgment, *supra* para.72 and the case-law cited therein.

⁵⁴ GC Judgment in Case T-1/08 *Buczek Automotive v Commission*, not yet published.

⁵⁵ *Supra* note 52.

⁵⁶ Before delivering its judgment on the merits, the GC issued orders on interim measure applications submitted by TB and HB- GC Orders of 14/03/08 in Case T-1/08 R *Buczek Automotive v Commission* and Case T-440 R *Huta Buczek v Commission*. See also Koska D., Kuik. K., *supra* note 43, pp. 191–193.

been granted to TB by misapplying the ‘private creditor test’. Second, the GC stated the Commission did not prove that the aid distorted competition⁵⁷.

As regards the first point, the ‘private creditor test’ is used to establish the conditions under which a public sector debts is to be repaid to avoid being categorised as State aid⁵⁸. The ‘private creditor test’ was developed along the lines of the ‘private investor test’⁵⁹. While the latter involves a comparison of a private investor who is investing money with a view to receiving a return on that investment, the ‘private creditor test’ considers whether the State, just like a private creditor, seeks to maximise the re-payment of debts owed to it⁶⁰. The GC held that BA was granted an advantage in that the authorities allowed it a period of time during which it could freely dispose of its assets without being forced into insolvency⁶¹. The GC proceeded to analyse whether the Commission had shown if such approach is consistent with the behaviour of a private creditor. The Commission did not perform a detailed analysis / comparison of the returns to be obtained under different recovery solutions available to the Polish authorities. The GC ruled therefore that the Commission had lacked the material elements enabling it to assert that a private creditor would have opted for insolvency proceedings as the best debt recovery method. As a result, the Buczek Decision was annulled in so far as the Commission had found that Poland had unlawfully granted State aid to TB⁶².

⁵⁷ It is worth noting also that BA and HB argued that the aid had been granted to a different legal entity, TB, and that the Commission was not entitled to require recovery from BA and HB (no legal basis for assuming that the subsidiaries could have been the actual beneficiaries of the aid which had been granted to their parent). However, the GC did not address the question of liability.

⁵⁸ E.g., a payment facility granted by a public authority must be regarded as State aid whenever the recipient would manifestly have been unable to obtain the resulting economic advantage from a private creditor in a comparable situation (Case C-256/97 *DM Transport*, [1999] ECR I-3913, para. 30). For non-recovered public debts, public bodies must be compared to a private creditor who is seeking to obtain recover overdue debts from a debtor in financial difficulties (Case T-152/99 *HAMSA v Commission*, ECR [2002] II-3049, para. 167). Advocate-General Sharpstone’s opinion in C-73/11 P *Frucona Košice a. s. v European Commission* provides the most recent discussion of the private creditor principles.

⁵⁹ Under the ‘private investor test’, a measure involves State aid if fresh capital is offered in circumstance that a private investor would not accept. See CJ Judgment in Case C-124/10 P *Commission v EDF*, not yet reported.

⁶⁰ See U. Soltes, ‘General Court Tightens Judicial Review when Commission Applies ‘Private Creditor Test’ (2011) 2(6) *Journal of European Competition Law & Practice* 556–7.

⁶¹ According to the GC, the Buczek Decision was based on the fact that Polish authorities could use a different method of claim enforcement (i.e. insolvency) which would make effective recovery possible.

⁶² See also M. Munoz de Juan, J.M. Pinero Rivas, ‘Locus stand and the Private Creditor Test after the Judgment of the General Court on Buczek Automotive v Commission’ (2012) 1 *EStAL* 273–281.

As regards the second point, the GC annulled the Buczek Decision because it found that the Commission had not provided sufficient reasons for finding that competition and trade between Member States had been distorted / affected by the measure. This approach follows other judgments in which the GC and CJ presented similar considerations⁶³.

The Commission appealed the GC judgment on 28 July 2011⁶⁴. The appeal focuses on the requirement envisaged by the GC whereby the Commission must calculate gains from various debt enforcement methods and to compare the duration of the various public debt recovery procedures. The Commission argues that it is not obliged to carry out precise calculations of this kind but merely to take account of the factors that a private creditor would consider. The Commission challenges the GC ruling as it placed upon it the obligation to adduce additional evidence to reject the argument concerning the conduct of a private creditor. The Commission is also of the opinion that Protocol No. 8, used as its decision's legal basis, is sufficient to show that the aid in question distorts or threatens to distort competition.

Commission Decisions

During 2010–2011, the Commission adopted only two Polish State aids decisions⁶⁵ following a formal investigation procedure under Article 108(2) TFEU. This may be explained by various factors, including: (i) the Commission focusing its enforcement efforts on the financial sector; (ii) lack of Polish notifications (and UOKiK's efforts to screen and advise Polish authorities on State aid issues), and; (iii) the economic crisis.

PZL Hydral

PZL Hydral S.A. (hereafter, PZL Hydral) was established shortly after World War II as a state enterprise. The company specialised until 2008 in the production of civil and military aviation hydraulics and related services. Since 2008, PZL Hydral operated as a holding company and ceased industrial activities. Its activities concerning aviation hydraulics and related services were gradually taken over by its subsidiary, PZL Wrocław S.A. (hereafter, PZL Wrocław).

⁶³ Case T-214/95 *Lamas Guest v Commission* ECR [1998] II-717; Case C-494/06 P *Commission v Italy and Wam* ECR [2009] I-3639; Joined Cases T-304/04 and T-316/04, *Italy and Wam v Commission* ECR [2006] II-64.

⁶⁴ Case C-405/11 P, OJ [2011] C 311/19.

⁶⁵ Decisions in cases concerning aid to PZL-Hydral, and to WRJ / WRJ-Servis (formerly Huta Jednosc). Only the former was decided on merits. In the WRJ decision, the Commission held it was not competent under Protocol No 8 to the Accession Treaty to review the measures granted by Poland in 2001–2003.

PZL Hydral has had difficulties in repaying private and public liabilities since 1998. On 27 March 2008, Poland notified a restructuring plan for PZL-Hydral under the Guidelines for State aid for rescuing and restructuring firms in difficulty⁶⁶. The plan envisaged the transfer of PZL-Hydral's profitable assets to PZL Wrocław. While the latter was to be privatised (and resources obtained from privatisation were to cover part of the accumulated debts), PZL Hydral was to be liquidated. Approximately PLN 130 million (EUR 37.5 million) of public funds were estimated to be spend in the form of capital injections and a loan⁶⁷ from the Polish Industrial Development Agency⁶⁸.

On 10 September 2008, the Commission adopted a decision initiating a formal investigation procedure with respect to the aforementioned measures. However, a further decision was adopted on 12 November 2008 which extended the investigation to cover additional State support measures which the Commission meanwhile identified (amounting to PLN 218.6 million⁶⁹).

Polish authorities have subsequently modified PZL Hydral's restructuring plan and, notably, withdrew the investment injections of PLN 113 million. In light of such developments, the Commission adopted a decision on 4 August 2010⁷⁰ closing the PZL Hydral investigation because it concluded that the various measures provided to that company did not constitute State aid as they had been granted on market terms (met the private investor and/or private creditor principles).

4. Regulatory cases (preliminary rulings and infringements)

Electronic communication

Telekomunikacja Polska v UKE

On 11 March 2011, the CJ ruled⁷¹ on two preliminary reference questions from the Polish Supreme Administrative Court (in Polish: *Naczelny Sąd Administracyjny*, hereafter, NSA) regarding regulatory obligations imposed by the UKE President on the incumbent operator Telekomunikacja Polska S.A. (TP).

⁶⁶ Communication from the Commission – Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ [2004] C 244/2.

⁶⁷ Invitation to submit comments pursuant to Article 88(2) of the EC Treaty in case State aid C 40/08 (ex N 163/08) – Restructuring aid to PZL Hydral S.A., OJ [2008] C 324/10.

⁶⁸ In 2003, IDA acquired 80.94 % PZL Hydral's shares and gradually increased its stake to 92.42 % in January 2010 (the remaining shares were held by PZL Hydral's employees).

⁶⁹ Invitation to submit comments pursuant to Article 88(2) of the EC Treaty in case State aid C 40/08 (ex N 163/08) – Restructuring aid to PZL Hydral S.A., OJ [2010] C 158/08.

⁷⁰ Commission Decision of 4 August 2010 on State aid C 40/08 (ex N 163/08) implemented by Poland for PZL Hydral S.A., OJ [2010] L 298/51.

⁷¹ CJ Judgment in Case C-522/08 *Telekomunikacja Polska v UKE*, ECR [2010] I-02079.

The preliminary reference was made in the context of a dispute between UKE and TP. In its decision of 28 December 2006 and another of 14 March 2007 upholding the earlier decision⁷², the UKE President required TP to terminate its practice of making the provision to end users of its ‘neostrada tp’ broadband internet access service conditional upon the conclusion of a telephony services contract. The NRA based its decision on Article 57(1) of the Telecommunications Law Act (hereafter, Telecommunications Law)⁷³ which expressly prohibited making the conclusion of a contract for the provision of publicly available telecoms services contingent upon the conclusion of a contract for other services, or for the purchase of equipment from the service provider. Article 57(1) Telecommunications Law imposed this general prohibition without reference to the degree of market competition and market position of the undertakings concerned. TP challenged the regulatory decision and claimed that its legal basis [Article 57(1) Telecommunications Law] was incompatible with the EU electronic communication framework (notably the Universal Services Directive 2002/22/EC⁷⁴).

The dispute reached NSA which decided to ask the CJ for a preliminary ruling regarding whether the contested national provision is compatible with the Electronic Communications Framework. The CJ ruled that neither the Framework Directive⁷⁵ nor the Universal Service Directive precluded national legislation which, in order to protect end-users, prohibited bundling. The Court focused on the fact that the Polish provision, which generally and without discrimination prohibited linked sales, did not affect the powers of the NRA to, *inter alia*, define and analyse markets or impose regulatory obligations. Neither did the Directive provide for full harmonisation of the consumer protection field. The Universal Service Directive is explicitly without prejudice to EU rules on consumer protection or national consumer protection legislation conforming to EU law.

Nevertheless, the CJ found that national legislation which, with certain exceptions and without taking account of specific circumstances, imposes a general prohibition of combined offers by a vendor to consumers was in fact incompatible with EU consumer protection law (notably the Unfair

⁷² The UKE decisions have not been published.

⁷³ Article 57(1) of the Telecommunications Law (see *supra* note 29).

⁷⁴ Directive 2002/22/EC of the European Parliament and of the Council of 07/03/02 on universal service and users’ rights relating to electronic communications networks and services, (OJ [2002] L 108/51).

⁷⁵ Directive 2002/21/EC of the European Parliament and of the Council (OJ [2002] L 108/33).

Commercial Practices Directive 2005/29/EC⁷⁶) which *harmonises the relevant consumer protection aspects*⁷⁷.

Following the preliminary ruling, the NSA dismissed as unfounded TP's appeal (cassation)⁷⁸. Given that the scope of the appeal was limited to the scope of the complaint (compatibility of Article 57(1) of Telecommunications Law with the Electronic Communication Framework), the NSA could not rule on the compatibility of Article 57(1) of Telecommunications Law with the Unfair Commercial Practices Directive⁷⁹.

Polska Telefonia Cyfrowa (PTC) v UKE (number portability charge)

On 1 July 2010, the CJ answered⁸⁰ a preliminary question submitted by the Polish Supreme Court regarding the interpretation of the Universal Service Directive. The latter obliges Member States to, *inter alia*, ensure that all subscribers of publicly available telephone services (including mobile networks) may retain, if they so request, their numbers despite switching telephone providers. The preliminary question related to the direct fee that could be charged for the use of number porting service.

The number portability service carries with it certain costs for operators. Typically, the donor operator (the number is ported from its network) charges the recipient operator (to whom the subscriber ports his number) an interconnection charge incurred when dealing with such request. The recipient may recover all or part of that cost by passing it on to its subscribers. This is done either directly (by way of a one-off payment charged to the subscriber using number porting facility) or indirectly (where the cost is included in the price of telecoms services).

In addition to ensuring the availability of number porting services, the Universal Service Directive obliges Member States to ensure that its pricing

⁷⁶ 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 European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ [2005] L 149/22–39.

⁷⁷ CJ Judgment in Joined Cases C-261/07 and C-299/07 *VTB/VAB and Galatea* ECR [2009] I-2949, para. 68. See note on this case by A. Pisarkiewicz '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)' 2011 4(5) *YARS* 235–240.

⁷⁸ NSA Judgment of 27 May 2010, II GSK 355/10.

⁷⁹ See A. Pisarkiewicz, *supra* note 7.

⁸⁰ CJ Judgment in Case C-99/09, *Polska Telefonia Cyfrowa v UKE*, (the PTC judgment), ECR [2010] I-06617.

for interconnections related to the provision of number portability is cost-oriented and that direct charges, if applied, do not discourage consumers from using that facility⁸¹. The relevant Polish provisions are found in Article 71 of Telecommunications Law. On 1 August 2006, the Polish NRA adopted a decision⁸² imposing a fine of PLN 100 thousand (approximately EUR 24 thousand) on the mobile operator Polska Telefonia Cyfrowa sp. z o.o. (PTC) for infringing Article 71 of Telecommunications Law by charging, for approximately two months in 2006, its subscribers a one-off fee of 122 PLN (approximately EUR 30) for number porting. On the basis of a consumer survey, the UKE President decided that the level of the contested fee dissuaded PTC's subscribers from porting their numbers to a new mobile operator. The results of the survey indicated that phone users were prepared to pay for that service no more than 50 PLN (approximately 12 Euro). PTC challenged the UKE decision on the grounds that a number porting charge could not be set without reference to costs incurred when providing it. PTC's appeal eventually reached the Supreme Court which asked a preliminary reference question to the CJ clarified by Advocate-General Bot⁸³, the matter before the CJ was not whether the service should be free of charge (although he noted in his Opinion that such a solution, if pursued by the EU legislator, would have several advantages). Rather, the question arose as to how best to control the pricing of number portability. AG Bot criticised the UKE President's 'subjective' methodology relying solely on the results of a consumer survey. He noted that the method used by an NRA to assess whether a direct charge had a dissuasive effect had to be consistent with principles governing interconnection pricing to ensure its objectivity, full effectiveness and transparency.

The CJ examined the preliminary question in the context of its earlier *Mobistar* judgment⁸⁴ concerning the interconnection fees charged between operators. The CJ stated therein that such prices were to be set up on the basis of their costs⁸⁵ and that NRAs can fix, in advance and on the basis of an abstract model, the maximum costs which may be charged by the donor operator to the recipient operator as set-up costs. That is so provided that prices are fixed on the basis of costs in such a way that subscribers are not dissuaded from making use of the number portability facility⁸⁶. Agreeing with AG Bot, the CJ stated in the PTC judgment that NRAs must identify, using an objective and reliable method, both the actual cost incurred by operators

⁸¹ Article 30 (2) of the Universal Service Directive.

⁸² The UKE decision has not been published.

⁸³ AG Opinion in Case C-99/09 dated 15 May 2010.

⁸⁴ CJ Judgment of 13/07/06 in Case C-438/04 *Mobistar v IBPT*, ECR [2006] I-06675.

⁸⁵ *Mobistar*, supra, para. 33.

⁸⁶ *Mobistar*, supra, para 37.

and the level of direct charge beyond which subscribers are unlikely to port their numbers. Following that examination, an NRA must oppose a direct charge likely to act as a disincentive to consumers even if it is in line with costs incurred by operators when providing the service. In other words, always taking into account the actual cost of number porting, an NRA can fix a ceiling for the direct charge lower than the actual costs if it arrives at the informed conclusion that a fully cost-oriented direct fee would be likely to dissuade users from porting numbers⁸⁷.

Some commentators argued that while cost levels remain an objective factor, the notion of a charge that does not discourage consumers from number porting is in principle a subjective benchmark⁸⁸. This subjectivity would remain despite the fact that the CJ judgement requires that objective cost factors must be taken into account to define the maximum permissible number porting charges. It seems that the difficulty in balancing those objective and subjective elements have not gone unnoticed by the Polish regulator and thus the revised Telecommunications Law Act of 24 April 2009 abolished altogether the possibility of using direct charges for the number portability service.

PTC v UKE (Publication requirements)

On 12 May 2011, CJ ruled⁸⁹ in another dispute between the Polish mobile operator PTC and the UKE President. This judgment concerned a preliminary reference question regarding the publication requirements for guidelines adopted by the Commission and the interpretation of rules on languages and publication contained in the 2003 Act of Accession⁹⁰.

The dispute arose following a UKE decision of 17 July 2006 identifying PTC as an undertaking having significant market power in the market for the provision of voice call termination services and imposing upon it certain

⁸⁷ Para. 28 of the PTC judgment: '[NRA] retains the power to fix the maximum amount of that charge levied by the operators at a level below the costs incurred by them, when a charge calculated only on the basis of those costs is liable to dissuade users from making use of the portability facility.'

⁸⁸ C. Flynn, 'The regulation of number porting services in the EU: Are the principles set out by the ECJ in the recent PTC decision reconcilable with the practical consequences of the earlier Mobistar judgment? Case comment to the preliminary ruling of the Court of Justice of 1 July 2010 *Polska Telefonia Cyfrowa v President of Office of Electronic Communications* (Case C-99/09)' (2011) 4(5) *YARS* 242. See also M. Wach, 'Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 06/03/07 (Ref. No. XVII AmT 33/06) – Portability fee' (2008) 1(1) *YARS* 266–270.

⁸⁹ CJ Judgment in Case C-410/09 *PTC v UKE*, not yet reported.

⁹⁰ OJ [2003] L 236/33.

regulatory obligations. PTC launched an action contesting the UKE decision, which was however unsuccessful both at first instance and on appeal. Eventually, PTC brought the case before the Polish Supreme Court claiming that the 2002 Commission Guidelines for market analysis and the assessment of significant market power (2002 Guidelines)⁹¹, on which the UKE decision was based, cannot be relied upon because they were not published in the Polish language in the Official Journal of the European Union (OJEU).

The Supreme Court was uncertain as to the conclusions to be drawn from this fact, particularly in light of judgments such as *Skoma-Luc*⁹² and *Balbiino*⁹³, which preclude obligations contained in EU legislation⁹⁴ that was not published in the OJEU in the language of a new Member State (where that language is an official EU language) from being imposed upon individuals in that State, even though they could have become acquainted with that legislation by other means. The Polish Supreme Court asked the CJ whether the 2002 Guidelines can be applied to individuals established in a given Member State even though that act was not published in the OJEU in the language of that state.

The CJ confirmed that, in line with *Skoma-Luc* and *Balbiino*, it follows from Article 254(2) EC (now Article 297 TFEU) that EU regulations and directives which are addressed to all Member States cannot produce legal effects unless they have been published in the OJEU. They cannot be enforced against natural or legal persons in a State before those persons have had an opportunity to get acquainted with them through their proper publication. The publication requirement also applies to situations in which EU legislation obliges Member States to adopt measures imposing obligations on individuals.

The CJ concluded that the 2002 Guidelines did not lay down any obligations capable of being imposed, directly or indirectly, on individuals. It was also found that the transitional regime applicable to the accessions period (Article 58 of the Act of Accession) implied that Member States and institutions were to select EU acts for publication in the OJEU. The possibility that certain acts might not be published was thus not ruled out. The fact, therefore, that the 2002 Guidelines had not been published in the OJEU in the language of

⁹¹ 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 6.

⁹² Case C-161 *Skoma-Lux* ECR [2007] I-10841, paras 57–59.

⁹³ Case C-560/07 *Balbiino* ECR [2009] I-4447, para. 30.

⁹⁴ SN understood the CJ's case-law on the concept of 'obligations contained in Community legislation' as possibly covering all acts of EU institutions affecting individuals' rights or obligations, which are governed by provisions of national law implementing provisions of Community directives (C/410-99, para 19).

a given Member State did not prevent its NRA from referring to them in a decision imposing certain regulatory obligations on a telecoms operator⁹⁵.

Commission v Poland (Access to broadband internet)

On 6 May 2010, the CJ ruled⁹⁶, following an action brought by the European Commission⁹⁷, that Poland had failed to fulfil its obligations under the Electronic Communications Framework (in particular the Universal Service Directive and the Framework Directive) by regulating retail tariffs for broadband access without previously carrying out a market analysis. The controversy dated back to 2006 when the UKE President imposed on TP an obligation to submit for approval its retail broadband internet tariffs, and to have such tariffs cost-oriented. In 2007, the Commission initiated an infringement procedure against Poland⁹⁸ after it discovered that no market analysis preceded the imposition of such obligations despite the fact that a market analysis was required under the Electronic Communications Framework.

The CJ confirmed that under the 2002 Universal Service Directive⁹⁹, NRAs may impose regulatory requirements on undertakings with significant market power only after analysing the relevant market first. The 2002 Framework Directive¹⁰⁰ regulates the market analysis procedure. The provisions of these two 2002 Directives differ from the earlier electronic communications framework which imposed regulatory obligations on undertakings with significant market power by virtue of legislation, without any prior market analysis. While the 2002 Framework Directive¹⁰¹ allows Member States to maintain in force, as transitional measures, obligations imposed under the previous regulatory regime, transitional measures can only relate to tariffs for the use of the fixed public telephone network and fixed public telephone services and not broadband access. Moreover, the UKE President imposed the contested obligations in 2006, two years after the entry into force of the new EU telecoms package. Those obligations could thus not be treated as transitional measures.

The CJ ruling led to the delivery of a national judgment on 18 April 2011 by the Polish Competition and Consumer Protection Court (in Polish: *Sąd*

⁹⁵ Case C-410/09, para 34. For detailed analysis of the judgment, please see I. Kawka in the current issue of YARS.

⁹⁶ CJ judgment in Case C-545/08 *Commission v Poland* ECR [2010] I-00053* (summary publication).

⁹⁷ See K. Kuik, *supra note 3*.

⁹⁸ Case INFSO 2007/2120.

⁹⁹ Articles 16 and 17.

¹⁰⁰ Article 16.

¹⁰¹ Article 27.

Ochrony Konkurencji i Konsumentów, hereafter, SOKiK)¹⁰². SOKiK quashed the contested NRA decision which had imposed on the incumbent a fine of approximately PLN 339 million (approximately EUR 82 million)¹⁰³. SOKiK found that the UKE President had no legal basis for imposing the fine in light of the CJ judgment in Case 545/08. SOKiK's judgment was upheld by the Court of Appeals¹⁰⁴.

Pharmaceuticals

Commission v Poland (Pre-Accession marketing authorisations)

On 22 December 2010, the CJ delivered a judgment¹⁰⁵ in infringement proceedings brought by the Commission against Poland in relation to its authorisation requirements for medicinal products.

The case had its origin in Polish administrative practice predating its EU accession on 1 May 2004. Transitional provisions annexed to the Act of Accession¹⁰⁶ contained derogation from the applicability of quality, safety and efficacy requirements contained in Directive 2001/83 EC¹⁰⁷. They stated that all authorisations for pharmaceutical products issued under Polish law prior to its EU accession should stay valid until they are prolonged in compliance with the *acquis* or until 31 December 2008 (whichever is the earlier)¹⁰⁸.

Several marketing authorisations were issued immediately before Poland's EU accession, including an authorization for generic versions of the reference product Plavix. The Commission challenged the administrative practice of Polish authorities granting such authorizations under national law applicable at the time despite the lack of required documentation and on a conditional basis (although issued before the accession, the authorisations have not become effective until after that date). The Commission argued that such conditional authorizations should not benefit from the derogation provided in the Act of Accession. They should, therefore, have complied with EU law from 1 May 2004 onwards. In the Commission's view, the contested authorisations did not comply with the requirements and procedures of relevant EU directives and

¹⁰² SOKiK Judgment of 18/04/11 r. sygn. akt XVII AmT 22/07.

¹⁰³ UKE President Decision of 21/02/07 no. DRTD-WUD-079-33/2006(42).

¹⁰⁴ Sygn. akt VI ACa 1001/11.

¹⁰⁵ CJ judgment of 22 December 2010 in Case C-385/08, *Commission v Poland*, ECR [2010] I-00178* (Summary publication).

¹⁰⁶ Annex XII, chapter 1, para 5.

¹⁰⁷ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ [2001] L 311/67.

¹⁰⁸ Paragraph 1.5, Annex XII to the Act of Accession (*supra note* 46).

regulations (i.e. Directive 2001/83/EC, Regulation 2309/93¹⁰⁹ and Regulation 726/2004¹¹⁰). In particular, they did not respect the 10-year period of protection enjoyed by the reference product Plavix (until the end of 2008).

The Polish government argued that the validity of marketing authorizations issued before its EU accession remains the issue of national law; therefore, the EU lacks competence in that respect.

The CJ disagreed and ruled that the Commission proceedings concerned Poland's compliance with the conditions of the derogation granted under the Act of Accession, rather than the validity of Polish administrative acts. The CJ confirmed the competence of the EU to examine the conditions for the derogation, and whether they have been met. As regard the latter, the CJ found to the contrary. Therefore, CJ concluded that Poland had failed to fulfil its obligations under EU law by maintaining in force the contested authorisations and by placing and keeping on the market of medicinal products whose marketing authorisations were not issued in accordance with EU law even after 1 May 2004.

Literature

Brammer, S., 'Case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o (now: Netia SA), Judgment of the Court of Justice (Grand Chamber) of 3 May 2011' (2012) 49(3) *C.M.L.R.*.

Flynn, C., 'The regulation of number porting services in the EU: Are the principles set out by the ECJ in the recent PTC decision reconcilable with the practical consequences of the earlier Mobistar judgment? Case comment to the preliminary ruling of the Court of Justice of 1 July 2010 Polska Telefonía Cyfrowa v President of Office of Electronic Communications (Case C-99/09)' (2011) 4(5) *YARS*.

Kamiński, D., Rogozińska, A., Sasinowska, B., 'Telekomunikacja Polska Decision: competition law enforcement in regulated markets' (2011) 3 *Competition Policy Newsletter*.

Kawka, I., '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 Telefonía

¹⁰⁹ Council Regulation (EEC) No 2309/93 of 22/07/93 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, OJ [1993] L 214/1.

¹¹⁰ Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31/03/04 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ [2004] L 136/1.

- Cyfrowa sp. z o.o.(PTC) v Prezes Urzędu Komunikacji Elektronicznej (Case C-410/09)' (2012) 5(7) *YARS*.
- Kowalik-Bańczyk, K., 'Glosa do wyroku TS z dnia 3 maja 2011r, C-375/09' (2012) 2 *Europejski Przegląd Sądowy*.
- Kośka D., Kuik K., '2008 and 2009 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland' 2010 3(3) *YARS*.
- Kuik K., '2007 EU Competition Law and Sector-specific Regulatory Case Law Developments with a Nexus to Poland' 2008 1(1) *YARS*.
- MacGregor, A., Gecic B., 'EU Anitrust Proceedings and National Competition Authorities: A Leap in the Wrong Direction' (2012) 1 *International Trade Law & Regulation*.
- Munoz de Juan, M., Panero Rivas, J.M., 'Locus standi and the Private Creditor Test after the Judgment of the General Court on Buczek Automotive v Commission' (2012) 1 *EStAL*.
- Petit, N., Lousberg, Ch., 'Arrêt « Tele 2 Polska »: Une interprétation contestable de la compétence des autorités nationales de concurrence' (2011) 19 *Journal de droit européen*.
- Pisarkiewicz, A., '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)' 2011 4(5) *YARS*.
- Soltész, U., 'General Court Tightens Judicial Review when Commission Applies 'Private Creditor Test' (2011) 2(6) *Journal of European Competition Law & Practice*.
- Szwedziak, I., 'Is the parallel competence set out in Regulation 1/2003 totally clear? Case comment to the preliminary ruling of the Court of Justice of 3 May 2011 Tele 2 v President of Office of Competition and Consumer Protection (Case C-375/09)' (2012) 5(7) *YARS*.
- Wach, M., 'Should a fee for mobile phone number portability be determined solely by subscriber preferences? Comments to the judgments of the Court of Competition and Consumers Protection of 8 January 2007 (Ref. No. XVII AmT 29/06) and 6 March 2007 (Ref. No. XVII AmT 33/06) – Portability fee' (2008) 1(1) *YARS*.

Table A: Court of Justice of European Union cases

	Case no.	Parties	Area	Subject	Application	Status	Decision date
1	C-422-423/11 P	UKE v Commission	Industrial policy/ telecoms	Action for annulment/ Article 7 Veto	2011-08-10 2011-08-11	Pending	
2	C-405/11 P	Commission v Buczek Automotive and Poland	State aid/ Aid recovery	Restructuring aid/ Steel – aid recovery	2011-07-28	Pending	
3	C-362/10	Commission v Poland	Industrial policy/ Public sector information	Infringement/ Reutilisation of PSI	2010-07-20	Judgment	2011-10-27
4	C- 410/09	Polska Telefonia Cyfrowa v UKE	Industrial policy/ Telecoms	Preliminary reference/ SMP Guidelines	2009-10-28	Judgment	2011-05-12
5	C-375/09	Tele2 Polska v UOKiK	Competition/ Telecoms	Preliminary reference/ National Competition Authority powers	2009-09-23	Judgment	2011-05-03
6	C-369/09 P	ISD Polska and others v Commission	State aid/ Aid recovery	Restructuring aid/ Steel – aid recovery	2009-09-15	Judgment	2011-03-24
7	C-331/09	Commission v Poland	State aid/ Aid recovery	Restructuring aid/ Steel – aid recovery	2009-08-17	Judgment	2011-04-14
8	C-99/09	Polska Telefonia Cyfrowa v UKE	Approximation of laws/Con- sumer protection/ Telecoms	Preliminary reference/ Number portability	2009-03-11	Judgment	2010-07-01
9	C-545/08	Commission v Poland	Industrial policy/ Telecoms	Infringement/ Retail tariffs for broadband access services	2008-12-04	Judgment	2010-05-06
10	C-522/08	Telekomunikacja Polska v UKE	Industrial policy/ telecoms	Preliminary reference/ Prohibition of combined sales	2008-11-28	Judgment	2010-03-11
11	C-385/08	Commission v Poland	Approximation of laws/ Pharmaceuticals	Infringement/ Marketing authorisation for generics	2008-09-02	Judgment	2010-12-22
12	C-309/08	Commission v Poland	Industrial policy/ Telecoms	Infringement/ Regulatory separation	2008-07-11	Removed from register	2009-09-17
13	C-492/07	Commission v Poland	Industrial policy/ Telecoms	Infringement/ Subscriber definition	2007-11-07	Judgment	2009-01-22
14	C-227/07	Commission v Poland	Industrial policy/ Telecoms	Infringement/ Interconnection negotiation obligation	2007-05-08	Judgment	2008-11-13
15	C-416/06	Commission v Poland	Industrial policy/ Telecoms	Infringement/ Directory enquiry service	2006-10-11	Removed from register	2008-06-10

Source: CJEU's website.

Table B: General Court Cases

	Case no.	Parties	Area	Subject	Application	Status	Decision date
1	T-486/11	Telekomunikacja Polska v Commission	Competition/ Abuse of dominance	Abuse of dominance	2011-09-02	Pending	
2	T-226/10	UKE v Commission	Industrial policy/ Telecoms	Action for annulment / Article 7 Veto	2010-05-14	Dismissed	2011-05-23
3	T-533/08	Telekomunikacja Polska v Commission	Competition/ Abuse of dominance	Abuse of dominance/ Inspection decision	2008-12-03	Removed from register	2010-03-19
4	T-398/08	Stowarzyszenie Autorów 'ZAiKS' v Commission	Competition/ Restrictive agreement	Restrictive agreement/ Appeal	2008-09-22	Pending (IM rejected on 2008-11-14)	
5	T-1/08	Buczek Automotive v. Commission	State aid	Restructuring aid/ Steel	2008-01-08	Judgment	2011-05-17
6	T-465/07	Salej and Technologie Buczek v Commission	State aid	Restructuring aid/ Steel	2007-12-20	Removed from register	2010-07-07
7	T-440/07	Huta Buczek v Commission	State aid	Restructuring aid/Steel	2007-12-05	Removed from register	2010-09-03
8	T-88/07	Fabryka Samochodów Osobowych v Commission	State aid	Restructuring aid/ Steel	2007-03-22	Removed from register	2010-09-01
9	T-53/07	Trade-Stomil v Commission	Competition/Cartels	Cartel/ Appeal	2007-02-19	Judgment	2011-07-13
10	T-273/06 and T-297/06	ISD Polska (formerly Majątek Hutniczy) and others v Commission	State aid	Restructuring aid/ Steel	2006-09-11 2006-10-17	Dismissed	2009-07-01
11	T-291/06	Operator ARP v Commission	State aid	Restructuring aid/Steel	2006-10-18	Partial annulment	2009-07-01
12	T-288/06	RFG (formerly Huta Częstochowa) v Commission	State aid	Restructuring aid/ Steel	2006-10-18	Dismissed	2009-07-01
13	T-142/06	Elektrociepłownia "Zielona Góra" v Commission	State aid	Stranded costs/ Power purchase agreements	2006-05-12	Removed from register	2008-04-14
14	T-41/06	Poland v Commission	Competition	Merger/ Appeal	2006-02-06	Removed from register	2008-04-10
15	T-191/98 and T-212-214/98	Atlantic Container Line and Others v Commission	Competition	Cartel/ Appeal	1998-12-07	Partial annulment	2003-09-30

Source: CJEU's website.

Table C: Infringement cases

	Case no.	DG	Subject matter	Latest action	Date	Closed
1	2011/0914	INFSO	Non-communication of transposition measure on “Citizens’ Rights” Directive 2009/136/EC	Court referral	2012-05-31	
2	2011/0915	INFSO	Non-communication of transposition measure on “Better Regulation” Directive 2009/140/EC	Court referral	2012-05-31	
3	2010/2037	INFSO	Transposition of provisions concerning the imposition of price control obligations	Reasoned opinion	2010-10-28	2011-09-29
4	2010/0162	INFSO	Non-communication of measures transposing the Directive amending the Audiovisual Media Services Directive	Court referral	2012-06-21	
5	2009/2202	ENER	Transparency of conditions for access to the natural gas transmission networks	Reasoned opinion	2010-06-24	
6	2009/2208	ENER	Congestion management and transparency concerning access to the network for cross-border exchanges in electricity	Reasoned opinion	2010-06-24	
7	2009/2162	ENER	Directive 2003/55 concerning common rules for the internal market in natural gas – regulated prices	Reasoned opinion	2011-04-06	
8	2008/2245	INFSO	Reutilisation of information from public sector	Judgment	2011-10-27	
9	2007/2102	INFSO	Broadband retail regulation	Judgment	2010-05-06	
10	2006/2506	INFSO	Non-availability of caller location information for 112	Court referral	2007-11-28	2008-10-16
11	2006/2505	INFSO	Independence and impartiality of the NRA	Court referral	2008-01-31	2009-06-25
12	2006/2070	ENER	Non-conformity with the EU Gas Directive 2003/55/ EC	Reasoned opinion	2006-12-12	2007-12-11
13	2006/2060	ENER	Non-conformity with the EU Electricity Directive 2003/54/EC	Court referral	2008-06-05	2009-02-19
14	2005/2291	INFSO	Failure to carry out market reviews	Reasoned opinion	2006-04-04	2009-10-29
15	2005/2207	INFSO	Lack of comprehensive directories of subscribers	Court referral	2006-06-28	2008-02-28
16	2005/2063	INFSO	112 emergency number	Reasoned opinion	2005-07-05	2005-12-13
17	2005/2062	INFSO	Number portability	Reasoned opinion	2005-07-05	2006-10-12
18	2005/2061	INFSO	Non-conformity with the Access Directive	Judgment	2008-11-13	2009-06-25
19	2005/2060	INFSO	Non-conformity with the Framework Directive	Judgment	2009-01-22	2010-06-24

Source: Commission’s infringement website.

Table D: Formal investigations in Polish new and existing aid cases

	Case no.	Beneficiary	Type	Objective	Launch / Proposal	Decision	Date
1	C 11 (SA.30340)	LIP – Fiat Powertrain Technologies PL	Individual	Other	2010-01-28	Withdrawn	2011-12-01
2	C 49/2008	PZL Dębica	Individual	R&R	2008-12-19	Pending	
3	C 47/2008	Przędzalnia Zawiercie	Individual	R&R	2008-12-10	Withdrawn	2009-03-03
4	C 46/2008	Dell Poland	Individual	Other	2008-12-10	Positive	2009-09-23
5	C 40/2008	PZL-Hydral S.A.	Individual	R&R	2008-09-10	Positive	2010-08-04
6	C 32/2008	Hartwig-Katowice	Individual	Other	2008-07-16	Withdrawn	2009-06-18
7	C 11/2008	BVG Medien Beteiligungs GmbH	Individual	Other	2008-03-11	Positive	2008-12-10
8	C 48/2007	WRJ I WRJ-Servis (formely Huta Jedność)	Individual	R&R	2007-10-23	Other	2010-07-06
9	C 43/2007	Huta Stalowa Wola	Individual	R&R	2007-10-10	Positive	2009-03-10
10	C 34/2007	Maritime transport	Scheme	Other	2007-09-12	Positive	2009-12-18
11	C 6/2007	Techmatrans	Individual	R&R	2007-02-21	Positive	2007-11-28
12	C 54/2006	Bison-Biał	Individual	R&R	2006-12-20	Conditional	2007-09-12
13	C 52/2006	Odlewnia Żeliwa Śrem	Individual	R&R	2006-12-06	Positive	2008-12-10
14	C 51/2006	Arcelor Huta Warszawa	Individual	R&R	2006-12-06	Negative with recovery	2007-12-11
15	C 32/2006	Huta Cynku Miasteczko S.	Individual	R&R	2006-07-19	No aid	2007-09-25
16	C 23/2006	Technologie Buczek	Individual	R&R	2006-06-07	Negative with recovery	2007-10-23
17	C 49/2005	Chemobudowa Kraków	Individual	R&R	2005-12-21	Withdrawn	2006-09-26
18	C 44/2005	Huta Stalowa Wola	Individual	R&R	2005-11-23	Positive Revocation/Positive	2006-12-20 2009-03-10

	Case no.	Beneficiary	Type	Objective	Launch / Proposal	Decision	Date
19	C 43/2005	Stranded costs	Individual	Other	2005-11-23	Mixed: positive and negative without recovery	2007-09-25
20	C 22/2005	Poczta Polska	Scheme	Other	2005-06-29	Withdrawn	2006-04-25
21	C 21/2005	Poczta Polska	Individual	Other	2005-06-29	Termination (non-implementation of aid) Conditional	2007-01-09 2009-12-15
22	C 19/2005	Stocznia Szczecińska Nowa	Individual	R&R	2005-06-01	Negative with recovery	2008-11-06
23	C 18/2005	Stocznia Gdańska	Individual	R&R	2005-06-01	Positive	2009-07-22
24	C 17/2005	Stocznia Gdynia	Individual	R&R	2005-06-01	Negative with recovery	2008-11-06
25	E 12/2005	Poczta Polska	Existing / Individual	Other	2005-04-29	Abolition	2007-04-24
26	C 3/2005	Daewoo / FSO	Individual	R&R	2005-01-19	Conditional	2006-12-20
27	C 20/2004	Huta Częstochowa	Individual	R&R	2004-05-19	Mixed: negative with recovery, no aid and positive	2005-07-05

Source: DG Competition's website.

Table E: Antitrust and merger cases

	Case no.	Party/ies	Type	Industry	Filed/opened	Decision	Date
1	COMP/39.525	Telekomunikacja Polska	Antitrust	Telecommunications	2009-04-26	Abuse of dominance/ prohibition	2011-06-22
2	COMP/M.5855	DB / Arriva	Merger	Rail	2010-06-22	Conditional approval in Phase I	2010-08-11
3	COMP/M.5865	Teva/ Ratiopharm	Merger	Pharmaceuticals	2010-06-14	Conditional approval in Phase I	2010-08-03
4	COMP/M.5778	Novartis / Alcon	Merger	Pharmaceuticals	2009-06-18	Conditional approval in Phase I	2010-08-09
5	COMP/M.5721	Otto / Primondo Assets	Merger	Retail	2009-12-18	Conditional approval in Phase I	2010-02-16
6	COMP/M.5661	Abbott / Solvay Pharmaceuticals	Merger	Pharmaceuticals	2009-12-15	Conditional approval in Phase I	2010-02-11
7	COMP/M.5644	Kraft Foods / Cadbury	Merger	Food processing	2009-11-09	Conditional approval in Phase I	2010-01-06
8	COMP/M.5476	Pfizer/ Wyeth	Merger	Pharmaceuticals	2009-05-29	Conditional approval in Phase I	2009-07-17
9	COMP/M.5335	Lufthansa/ SN Airholdind	Merger	Passenger and Freight air transport	2008-11-26	Conditional approval in Phase II	2009-06-22
10	COMP/M.5295	Teva/ Barr Pharmaceuticals	Merger	Pharmaceuticals	2008-11-03	Conditional approval in Phase I	2008-12-19
11	COMP/38.698	CISAC Agreement	Antitrust	Collective rights management	2006-02-07	Cartel infringement/ Prohibition	2008-07-16
12	COMP/M.4522	Carrefour/ Ahold Polska	Merger	Retail	2007-02-16	Full referral to NCA	2007-04-10
13	COMP/38.638	BR/ ESBR (Trade-Stomil)	Cartel	Chemicals	2005-06-07	Cartel infringement/fine	2006-11-29
14	COMP/M.4141	Linde/ BOC	Merger	Industrial gases	2006-04-06	Conditional approval in Phase I	2006-06-06

Source: DG Competition's website.

Table F: Regulatory proceedings in telecoms cases ((Article 7 veto decisions)

	Case no.	Sector	Legal basis	Decision	Date
1	PL/2006/0524	Electronic communications	Article 7(4) of Directive 2002/21/EC	Retail access to the public telephone network at a fixed location for non-residential customers in Poland	2007-01-10
2	PL/2006/0518	Electronic communications	Article 7(4) of Directive 2002/21/EC	Retail access to the public telephone network at a fixed location for residential customers	2007-01-10

Source: Website of DG Communications Networks, Content and Technology.