JUDGMENT OF THE COURT (Second Chamber)

12 May 2011 *

In Case C-410/09,

REFERENCE for a preliminary ruling under Article 234 EC, from the Sąd Najwyższy (Poland), made by decision of 28 October 2009, received at the Court on the same day, in the proceedings

Polska Telefonia Cyfrowa sp. z o.o.

v

Prezes Urzędu Komunikacji Elektronicznej,

intervening party:

Prezes Urzędu Ochrony Konkurencji i Konsumentów,

* Language of the case: Polish.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2010,

after considering the observations submitted on behalf of:

— Polska Telefonia Cyfrowa sp. z o.o., by M. Korcz and S. Dudzik, radcy prawni,

— Prezes Urzędu Komunikacji Elektronicznej, by M. Kołtoński and D. Pawłowska, radcy prawni,

— the Polish Government, by M. Szpunar, acting as Agent,

— the Czech Government, by M. Smolek, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent,

— European Commission, by G. Braun and K. Mojzesowicz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 58 of the 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, p. 33; 'the 2003 Act of Accession').

2 The reference was made in proceedings between Polska Telefonia Cyfrowa sp. z o.o. ('PTC') and the Prezes Urzędu Komunikacji Elektronicznej (President of the Office for electronic communications; 'the Prezes') concerning certain legislative obligations imposed on PTC by the Prezes.

Legal context

The 2003 Act of Accession

3 Under Article 2 of the 2003 Act of Accession:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

4 Article 58 of the 2003 Act of Accession provides:

'The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present 11 languages. They shall be published in the *Official Journal of the European Union* if the texts in the present languages were so published.'

Regulation No 1/58

5 Under Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958 (I), p. 59), as amended by the 2003 Act of Accession ('Regulation No 1/58'), the official languages of the Union are:

'Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish.'

6 Article 4 of Regulation No 1/58 provides:

'Regulations and other documents of general application shall be drafted in the 20 official languages.'

7 Article 5 of that regulation states:

'The *Official Journal of the European Union* shall be published in the 20 official languages.'

8 Under Article 8 of Regulation No 1/58:

'If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.'

Directive 2002/21/EC

9 Article 1(1) of 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, p. 33) reads as follows:

'This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the [European Union].'

10 Paragraphs 1 to 3 of Article 15 of Directive 2002/21, which concerns the market definition procedure, provide:

'1. After public consultation and consultation with national regulatory authorities the Commission shall adopt a recommendation on relevant product and service markets (hereinafter "the recommendation"). The recommendation shall identify in accordance with Annex I hereto those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

The Commission shall regularly review the recommendation.

2. The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter "the guidelines") which shall be in accordance with the principles of competition law.

3. National regulatory authorities shall, taking the utmost account of the recommendation and the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those defined in the recommendation.'

11 Paragraphs 1 to 5 of Article 16 of Directive 2002/21, which is entitled 'Market analysis procedure', provide:

'1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

2. Where a national regulatory authority ["NRA"] is required under Articles 16, 17, 18 or 19 of Directive 2002/22/EC ["the Universal Service Directive"], or Articles 7 or 8 of Directive 2002/19/EC ["the Access Directive"] to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine

on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.

3. Where an [NRA] concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where an [NRA] determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and … shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the [NRAs] concerned shall jointly conduct the market analysis taking the utmost account of the guidelines and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article in a concerted fashion.'

12 Pursuant to Article 15(2) of Directive 2002/21, the Commission adopted 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, p 6; 'the 2002 Guidelines').

The dispute in the main proceedings and the question referred for a preliminary ruling

13 PTC is one of the principal telecommunications operators in Poland.

14 On 17 July 2006, the Prezes identified PTC as having significant market power in the market for the provision of voice call termination services and decided to impose on PTC certain regulatory obligations.

15 PTC's action contesting the Prezes' decision was dismissed by the courts, both at first instance and on appeal. In the context of an appeal brought before the Sąd Najwyższy (Polish Supreme Court), PTC claims that the 2002 Guidelines, on which that decision is based, cannot be relied upon against it since they have not been published in Polish in the *Official Journal of the European Union*.

16 The Sąd Najwyższy is uncertain as to the inferences to be drawn from that fact.

17 The Sąd Najwyższy observes that the Court has held that Article 58 of the 2003 Act of Accession precludes obligations contained in Community legislation which has not been published in the *Official Journal of the European Union* in the language of a new Member State, where that language is an official language of the European Union, from being imposed on individuals in that State, even though those persons could have become acquainted with that legislation by other means (Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraphs 57 to 59, and Case C-560/07 *Balbiino* [2009] ECR I-4447, paragraph 30).

18 That case-law leads the Sąd Najwyższy to find that Polish telecommunications undertakings are in a less favourable situation than undertakings established in Member States other than the Republic of Poland that are in a position to acquaint themselves with the guidelines in the official language of those Member States.

19 The Sąd Najwyższy wonders whether the term 'obligations contained in Community legislation', used in paragraph 51 of *Skoma-Lux*, covers only regulations and decisions which, by their very nature, place obligations on individuals, or whether it also covers other acts of EU institutions affecting individuals' rights or obligations, which are governed by provisions of national law implementing provisions of Community directives. In that regard, the Sąd Najwyższy notes that, in Case C-345/06 *Heinrich* [2009] ECR I-1659, the Court appears to have interpreted broadly the concept of 'Community legislation', a notion which encompasses all acts adopted by the EU institutions. The Sąd Najwyższy also notes that it would appear to follow from Case C-158/06 *ROM-projecten* [2007] ECR I-5103 that it is not only in the case of EU legal measures which impose obligations on individuals that publication is compulsory: rather, in order for such publication to be compulsory, it is sufficient for the measure to impose an obligation on a Member State to take specific action in relation to individuals.

20 The Sąd Najwyższy observes that the 2002 Guidelines give rise to legitimate legal expectations on the part of persons whose situation falls within their scope. Moreover, the Commission's adoption of those guidelines comes about directly as a result of an obligation under Article 15(2) of Directive 2002/21. Articles 15(3) and 16(1) of that directive provide that the NRAs must take 'the utmost account' of the guidelines, both for the definition of the relevant markets and for their analysis.

21 In those circumstances, the Sąd Najwyższy decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Can the 2002 Guidelines, of which, under Article 16(1) of Directive 2002/21, the NRA should take the utmost account when carrying out an analysis of the relevant markets, be applicable to individuals established in a given Member State, where those guidelines have not been published in the *Official Journal of the European Union* in the language of that State, but that language is an official language of the European Union?'

The question referred for a preliminary ruling

22 By its question, the referring court asks, in essence, whether Article 58 of the 2003 Act of Accession must be interpreted as precluding an NRA of a Member State from referring to the 2002 Guidelines in a decision by which that NRA imposes certain regulatory obligations on an operator of electronic communications services, where those guidelines have not been published in the *Official Journal of the European Union* in the language of the Member State in question, but that language is an official language of the European Union.

23 In order to answer this question, it is necessary to bear in mind that a fundamental principle of the EU legal order requires that a measure adopted by the public authorities should not be enforceable against those concerned before they have had an opportunity to make themselves acquainted with it (Case C-98/78 *Racke* [1979] ECR 69, paragraph 15).

24 Furthermore, under Article 2 of the 2003 Act of Accession, measures taken by the institutions before the accession are binding on the new Member States and are applicable in those States with effect from the accession. On the other hand, their enforceability against natural and legal persons in those States is subject to the general

conditions governing the implementation of Community law in the Member States, as laid down in the original Treaties and, in the case of the new Member States, by the 2003 Act of Accession itself (*Skoma-Lux*, paragraph 32).

25 As regards regulations of the Council or the Commission and directives of those institutions, which are addressed to all the Member States, it follows from Article 254(2) EC that those measures cannot produce legal effects unless they have been published in the *Official Journal of the European Union* (see, to that effect, *Skoma-Lux*, paragraph 33).

26 Moreover, those measures cannot be enforced against natural and legal persons in a Member State before those persons have had an opportunity to make themselves acquainted with them through their proper publication in the *Official Journal of the European Union* (*Racke*, paragraph 15, and *Skoma-Lux*, paragraph 37).

27 Those principles must also be observed and have the same consequences where, for its implementation, EU legislation obliges Member States to adopt measures imposing obligations on individuals. Accordingly, national measures which, for the purposes of implementing EU legislation, impose obligations on individuals must be published in order for the individuals concerned to be able to ascertain those obligations (see, to that effect, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 51 and 52). In such circumstances, it must also be possible for the individuals to determine the source of the national measures imposing obligations upon them. Accordingly, not only must the national legislation be published but also the measure of EU law which, in some circumstances, obliges the Member States to take the measures imposing obligations on individuals (see, to that effect, *Heinrich*, paragraphs 45 to 47).

28 Furthermore, it follows from Article 58 of the 2003 Act of Accession, read in conjunction with Articles 4, 5 and 8 of Regulation No 1/58, that the proper publication of an EU regulation, in the case of a Member State whose language is an official language of the European Union, must include the publication of that measure, in that language, in the *Official Journal of the European Union* (*Skoma-Lux*, paragraph 34).

29 The Court has thus held that, where the language of a new Member State is an official language of the European Union, Article 58 of the 2003 Act of Accession precludes obligations laid down in EU legislation which has not been published, in that language, in the *Official Journal of the European Union* from being imposed on individuals in that State, even though those persons could have acquainted themselves with that legislation by other means (see, to that effect, *Skoma-Lux*, paragraph 51, and *Balbiino*, paragraph 30).

30 In the light of the case-law referred to in paragraphs 23 to 29 above, which is based on the principles of legal certainty and non-discrimination, it is necessary to determine whether, owing to their content, the 2002 Guidelines impose obligations on individuals. If that proves to be the case, it will not be possible, unless those guidelines have been published in Polish in the *Official Journal of the European Union*, for them to be relied upon as against individuals in Poland.

31 Articles 15 and 16 of Directive 2002/21, which are expressly addressed to the NRAs, constitute the legal basis for the 2002 Guidelines. Those provisions serve as a guide for the NRAs for the purposes of defining and analysing the relevant markets in order to determine whether those markets must be made subject to *ex ante* regulation. According to point 1 thereof, the 2002 Guidelines set out the principles for use by NRAs in the analysis of markets and effective competition under the regulatory framework for electronic communications. Point 6 of those guidelines also states that they are intended to guide NRAs in the exercise of their new responsibilities for defining

markets and assessing significant market power (Case C-424/07 *Commission* v *Germany* [2009] ECR I-11431, paragraphs 75 and 76).

32 In the first three sections of the 2002 Guidelines, a summary is 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. In essence, this is a summary of the relevant case-law, supplemented with an overview of three Commission communications published, in Polish, in the *Official Journal of the European Union*: (i) Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, and the special Polish edition of the *Official Journal of the European Union*, Volume 1, Chapter 8, p. 155); (ii) Guidelines on the application of EEC competition rules in the telecommunications sector (OJ 1991 C 233, p. 2, and the special Polish edition of the *Official Journal of the European Union*, Volume 1, Chapter 8, p. 43); and (iii) Notice on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant markets and principles (OJ 1998, C 265, p. 2, and the special Polish edition of the *Official Journal of the European Union*, Volume 1, Chapter 8, p. 255).

33 The last three sections are more directly related to the implementation of Directive 2002/21. The fourth section, which is entitled 'Imposition, maintenance, amendment or withdrawal of obligations under the regulatory framework', is designed to provide NRAs with guidance on the measures they should take following the analysis of the competitive nature of the market. The fifth and sixth sections concern, respectively, the powers of investigation and cooperation procedures for the purpose of market analysis, and the procedures for consultation and publication of proposed NRA decisions. As well as rehearsing the relevant provisions of the applicable regulatory framework, those three sections are designed to describe the working of the cooperation procedures between the NRAs, the national competition authorities and the Commission.

34 It follows from those factors that the 2002 Guidelines do not lay down any obligation capable of being imposed, directly or indirectly, on individuals. Accordingly, 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.

35 Moreover, those guidelines were published in 2002 in the 'C' series of the *Official Journal of the European Union*. By contrast with the 'L' series of the Official Journal, the 'C' series is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union.

36 Nevertheless, PTC submits that, since those guidelines were published in 2002 in the *Official Journal of the European Union*, they must, in accordance with Article 58 of the 2003 Act of Accession, also be published in the official languages of the new Member States, including Polish.

37 It should be pointed out, however, that Article 58 of the 2003 Act of Accession does not require the Council, the Commission or the European Central Bank to translate into the nine new languages listed in that provision all the acts of the institutions and the European Central Bank adopted prior to the accession of the new Member States. Article 58, which lays down the rules on the use of languages and on the conditions concerning the publication of acts adopted by the institutions and the European Central Bank prior to that accession, merely provides that, of those acts, only measures which were drawn up in languages of the new Member States which constitute official EU languages are to be authentic, as from accession, under the same conditions as legislation drawn up in the other official languages and are to be published in the *Official Journal of the European Union* whenever that legislation was to be so published. Accordingly, Article 58 implies that the Member States and the institutions are to select acts for publication in the Official Journal and does not rule out the possibility

that certain acts may not be published. Consequently, Article 58 of the 2003 Act of Accession does not require the Polish-language version of the 2002 Guidelines to be published in the Official Journal.

38 It should be noted, moreover, that the Court has already rejected the existence of a general principle of EU law under which anything that might affect the interests of an EU citizen must be drawn up in his language in all circumstances (see, to that effect, Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283, paragraphs 82 and 83).

39 In the light of the foregoing, the answer to the question referred is that Article 58 of the 2003 Act of Accession must be interpreted as not precluding an NRA from referring to the 2002 Guidelines in a decision by which that NRA imposes certain regulatory obligations on an operator of electronic communications services, notwithstanding the fact that those guidelines have not been published in the *Official Journal of the European Union* in the language of the Member State in question, even though that language is an official language of the European Union.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 58 of the 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 must be interpreted as not precluding an NRA from referring to the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services in a decision by which that NRA imposes certain regulatory obligations on an operator of electronic communications services, notwithstanding the fact that those guidelines have not been published in the *Official Journal of the European Union* in the language of the Member State in question, even though that language is an official language of the Union.

[Signatures]