EU Court of Justice Affirms Retail Price Regulation

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In a recent judgment of June 8, 2010, the EU Court of Justice ("ECJ") upheld the European Union's ("EU") unprecedented regulation of international roaming tariffs as a measure favoring the internal market between EU Member States. This article discusses the ECJ's judgment and its impact on the EU's legislative powers in regulating industries in a free market economy.

Recently, in a remarkable turn of events, the EU resorted to price regulation to control the rates that companies can charge for international mobile voice roaming calls within the EU. On July 1, 2007, Regulation No. 717/2007 ("Roaming Regulation")[2] entered into force, giving way to price controls on wholesale and retail tariffs for roaming calls. Riding the wave of popular success following the Roaming Regulation, the European Commission ("Commission") subsequently adopted a Regulation on June 18 2009, which lowered the voice price caps and extended such caps to SMS and data roaming services.[3] Viviane Reding, then Commissioner in charge of telecommunications stated that "from today, all Europeans making calls or sending texts with their mobiles can experience the EU's single market without borders. The roaming rip-off is now coming to an end thanks to the determined action of the European Commission, the European Parliament and all 27 EU Member States."[4]

Such far-reaching intervention is unprecedented in the history of the European construction. Questioning both the Community legislature's legal authority to wield such

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2 Commission Regulation 717/2007 (EC), Roaming on Public Mobile Telephone Networks within the Community, amending Directive 2002/21 (EC), 2007 O.J. (L171) 32.

3 Commission Regulation 544/2009 (EC), amending Commission Regulation 717/2007 (EC), Roaming on Public Mobile Telephone Networks within the Community and Directive 2002/21 (EC), A Common Regulatory Framework for Electronic Communications Networks and Services, 2009 O.J. (L167) 12, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:167:0012:0023:EN:PDF.

4 Press Release, European Commission, End of 'Roaming Rip-off': Cost of Texting, Calling, Surfing the Web Abroad to Plummet from Today Thanks to EU Action (July 1, 2009) available at http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=5097.

legislative instruments, and the proportionality of the measures imposed, a number of operators[5] ("Applicants") brought an action at the UK High Court, challenging the validity of the Roaming Regulation. The case was referred to the ECJ in Luxembourg, which was called to rule upon whether the European legislature had acted within its powers.

The legal basis used by the Community legislature in adopting the Roaming Regulation was Article 114 of the Treaty on the Functioning of the European Union ("TFEU") (ex Article 95 EC Treaty). Article 114, §1 provides that "the Council shall . . . adopt the **measures for the approximation of the provisions laid down by law**, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[6]

> According to established case law of the ECJ, Article 114 allows the Community legislator to adopt legislative measures for the approximation of laws, subject to two preconditions:
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> (i) disparate laws in the Member States must exist, which (1) create obstacles to the freedom to provide services, or (2) appreciably distort competition; alternatively, the emergence of such disparate laws must be likely[7]; and
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> (ii) the main objective of measures adopted under Article 114 must be the improvement of conditions for the establishment and functioning of the internal market (internal market objective). They must eliminate obstacles to the internal market or competition.[8]

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5 Spain's Telefonica/O2, UK's Vodafone, Germany's T-Mobile and France's Orange.

6 Treaty on the Functioning of the Functioning of the European Union, May 9, 2008, art. 114, 2008 O.J. (115) 94-95 (emphasis added) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E114:EN:HTML.

7 Case C-380/03, F.R.G. v. E. Parliament and Council of the European Union (Tobacco Advertising II), 2006 ECR I-11573, ¶¶ 37-38; Case C-376/98, F.R.G. v. E. Parliament & Council of the E. Union (Tobacco Advertising I), 2000 ECR I-8419, ¶¶ 84, 95; Case C-491/01, British Am.Tobacco (Investments) & Imperial Tobacco, 2002 ECR I-11453, ¶ 60; Case C-434/02, Arnold André, 2004 ECR I-11825, ¶ 30; Case C-210/03, Swedish Match, 2004 ECR I-11893, ¶ 29; Joined Cases C-154/04 & C-155/04, Alliance for Natural Health & Others 2005 ECR I-6451, ¶ 28.

8 Tobacco Advertising I, 2000 ECR I-8419, ¶ 84; Case C-155/91, Comm'n of the E. Communities v. Council of the E. Communities, 1993 ECR I-939, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61991J0155&lg=en.

A Community legislative act must thus have a clearly identified legal justification in the Treaty. If not, it is simply invalid. Legislation adopted on an erroneous basis, or which ventures beyond the scope of conferred power, is *ultra vires* and therefore null and void.[9]

The Applicants argued that none of those conditions for the application of Article 114 was fulfilled. In sum, their reasoning can be set out as follows.

Applicants' Reasoning

No disparate laws. The Applicants set forth that there were no divergent measures, nor were such measures ever likely to be adopted because Member States are not competent to adopt measures in the field of electronic communications. Obviously, the mobile operators' differing pricing requirements naturally created disparate wholesale and retail prices, but not disparate laws.

1. Member States are not competent to regulate international roaming services, other than through implementation of the harmonized telecoms common regulatory framework ("CRF"). The CRF establishes an exhaustive framework for the regulation of all electronic communication services, including international roaming services.[10]

2.

The CRF allows national regulatory authorities ("NRAs") (and not Member States through legislative intervention) to adopt measures, but only in accordance with the provisions set forth in the CRF. Such *ex ante* obligations can only be imposed in cases where particular markets are not effectively competitive because one or more undertakings has significant market power

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9 Indeed, the European Community exercises limited powers, as governed by the Treaty. The Member States are the ultimate source of all such power, as the European Community exists only through the transfer of Member State sovereignty. Therefore, the various Community institutions may only govern in areas as assented to by the Member States in the Treaty: "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." Consolidated Version of the Treaty on European Union, March 30, 2010, art. 5, 2010 O.J. (83) 18 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF.

10 Recital 5 of the Framework Directive indicates, for example, that "*all* transmission networks and services should be covered by a single regulatory framework. That regulatory Framework consists of this Directive and four specific Directives." Directive 2002/21 (EC), recital 5, 2002 O.J. (108) 33 (emphasis added), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF.

("SMP") in that market, and where national and Community competition law remedies are insufficient to address the problem.

However, the CRF establishes procedural safeguards that ensure a coordinated and harmonized approach to *ex ante* obligations imposed by NRAs throughout the EU. In identifying the relevant markets for review, NRAs must take due account of the markets identified in the Commission's Recommendation. And in analyzing the competitiveness of those markets, NRAs must take account of the Commission's Guidelines.[11] The need to ensure consistency between the NRAs' approaches is addressed by both the requirement that NRAs must notify the Commission of intended regulatory measures and that the Commission may veto SMP designations under certain conditions. Similarly, before adopting a finding of SMP or imposing *ex ante* obligations (remedies), the concerned NRA must notify such measures to the Commission for comment by both the Commission and other NRAs.

Hence, even if NRAs had adopted ex ante obligations to regulate roaming services, such obligations could not have been disparate because of the CRF's coordination and notification requirement. In any event, none of the NRAs that analysed the wholesale market for international roaming found this market to not be competitive.

No internal market objective. A measure adopted under Article 114 must, as its *main objective*, contribute to the elimination of obstacles to the fundamental freedoms (free movement of goods, services and capital),[12] and/or appreciable distortions of competition.[13]

However, at no stage did the Community legislature identify any obstacle to trade or appreciable distortion of competition in preparing the Roaming Regulation. In any event, as set out above, there are no disparate laws or likely disparate laws, such that there could not have been any obstacles or distortions of competition *caused by such disparate laws*.

On its face, the price controls are said to constitute "the most effective means of achieving a high level of consumer protections whilst improving the conditions for the

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[11] Commission Guidelines on Market Analysis and the Assessment of Significant Market Power Under the Community Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (165) 6 ("Commission's Guidelines"), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF.

[12] Article 114 explicitly provides that it does not apply to the free movement of persons.

[13] Tobacco Advertising I, 2000 ECR I-8419, ¶¶ 95, 106; Case C-155/91, Comm'n of the E. Communities v. Council of the E. Communities, ECR 1993 I-939, ¶ 19.

functioning of the internal market."[14] Nowhere, however, does the legislature identify the fundamental freedom that would be obstructed in the absence of the Roaming Regulation, nor in what way competition in any market would be appreciably distorted.

It does not suffice that the adopted measure has an internal market objective. Elimination of obstacles to the fundamental freedoms, and/or appreciable distortions of competition must be the measure's main objective.[15] The "main objective criterion" is assessed on the basis of objective factors, which include not only the "aim and the content"[16] of the Regulation, but also its effect.[17]

The Applicants argued that it cannot be inferred from the "aim and the content" of the Roaming Regulation that its *main* objective would be to contribute to eliminating obstacles to trade or competition, let alone any notion that it could effectively do so. The purported objective and effect of the Roaming Regulation is to control roaming retail prices in the interest of consumers. This is clear from the aim and content of the Roaming Regulation, as expressed not only in Recital 1[18] and Article 1[19] of the Regulation, but also in many speeches and press releases by the Community legislature.

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[14] Roaming Regulation, Recital 11.

[15] Tobacco Advertising I, 2000 ECR I-8419, ¶¶ 95, 106; Comm'n of the E. Communities v. Council of the E. Communities, ECR 1993 I-939, ¶ 19.

[16] Case 211/01, Comm'n of the E. Communities v. Council of the E. Communities, 2003 I-8913, ¶ 38; Case C-300/89, Comm'n of the E. Communities v. Council of the E. Communities, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989J0300:EN:HTML; Case 176/03, Comm'n of the E. Communities v. Council of the E. Union, ¶ 45, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0176:EN:HTML; Case 533/03, Comm'n of the E. Communities v. Council of the E. Union, ¶ 43, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003C0533:EN:NOT.

[17] Case C-155/91, Comm'n of the E. Communities v. Council of the E. Communities, ECR 1993 I-939, ¶ 19.

[18] "The high level of the prices payable by users of public mobile telephone networks, such as students, business travellers and tourists, when using their mobile telephones when travelling abroad within the Community is a matter of concern for national regulatory authorities, as well as for consumers and the Community institutions." Roaming Regulation, Recital 1.

[19] "This Regulation introduces a common approach to ensuring that users of public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making calls and receiving calls, thereby

ECJ Ruling

Despite the above-detailed circumstances, the ECJ upheld the Commission's use of Article 114 TFEU to regulate retail prices in a remarkably short and straightforward judgment. The Court first reiterated the basic principles established by it for use of Article 114 of the TFEU as a legal basis. In sum, Article 114 can be used

> where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition. Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measures in question designed to prevent them.[20]

After reiterating the general conditions governing the use of Article 114 of the TFEU, the Court determined whether the case at hand met such general conditions. In doing so, it strictly limited its analysis to the Community legislature's formal findings and assertions. In essence, the Court deferred to the assertions in Recitals 8 and 9 to the Roaming Regulation, in which the Community legislature respectively referred to "the residual competence [of the Member States] to adopt consumer protection rules" and alleged that "there was pressure for Member States to take measures to address the problem of the high level of retail charges for Community-wide roaming services . . . ."[21] For the Court, this sufficed to conclude that "the Community legislature was actually confronted with a situation in which it appeared likely that national measures would be adopted . . . ."[22]

Moving towards the internal market objective, the Court relied on Recital 14 to the Roaming Regulation to conclude that "it is clear that a divergent development of national laws seeking to lower retail charges only, without affecting the level of costs for the wholesale provision of Community-wide roaming services, would have been liable to cause significant

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contributing to the smooth functioning of the internal market while achieving a high level of consumer protection, safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice." Roaming Regulation, Article 1.

20 Case C-58/08, Vodafone Ltd. v. Secretary of State for Business, Enterprise and Regulatory Reform, June 8, 2010, ¶¶ 32-33 (internal citations omitted), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0058:EN:HTML ("Vodafone").

21 Id. ¶¶ 15, 44.

22 Id. ¶ 45.

distortions of competition and to disrupt the orderly functioning of the Community-wide roaming market."[23]

On the basis of these Community legislature's assertions, the Court concluded that "the object of Regulation No 717/2007 is indeed to improve the conditions for the functioning of the internal market and that it could be adopted on the basis of Article 95 EC (now Article 114 TFEU)."[24]

Res ipsa loquitur. The Court's reasoning and conclusions raise the following questions. Although the Court is limited in its capacity to review the facts of a case and is therefore reluctant to do so, it clearly and fully refrained from doing so in the case at hand. In essence the Court seems to solely rely on the facts set out by the Community legislature in the Regulation's recitals, without considering, at least in its judgment, the arguments put forward by the Applicants.

This is striking in many respects. The Court itself has ruled that findings by the Commission can be successfully challenged on the basis of elements provided by the applicants that "cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision."[25] Although the Court has carefully refrained from doing so in competition cases that raise "complex evaluations on economic matters,"[26] the question raised in the present case did not require such a complex factual analysis. As set out above, the Applicants' arguments were, at least with respect to the use of Article 114, based in essence on the scope and functioning of the EU Telecommunications Regulatory Framework and the evidence, or lack thereof, put forward by the Community legislature on the likelihood that Member States would adopt divergent national measures. There was thus no need for "complex evaluations of economic matters," but rather a mere assessment of the scope and functioning of EU secondary legislation and the evidence put forward by the Community legislature.

In other cases relating to the Community legislature's use of Article 114, the Court did assess the facts of the case, albeit to a limited extent. This is the case, for example, in *Tobacco*

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[23] Id. ¶ 47.

[24] Id. ¶ 48.

[25] Case 29/83, Compagnie Royale Asturienne des Mines SA v. Comm'n of the E. Communities, 1984 ECR 1679, ¶ 16; Case C-468/07, Coats Holdings v. Comm'n of the E. Communities (CFI), 2007 ECR II-110, ¶¶ 68–74.

[26] Joined Cases 56/64 & 58/64, Etablissements Consten & Grundig-Verkaufs-GmbH v. Comm'n of the E. Community, July 13, at p. 347, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0056:EN:HTML.

Advertising II relating to the legal basis used by the Community legislature for the adoption of a Directive regulating advertising and sponsorship in respect of tobacco products in media other than television.[27] Although in that case it was established that there were divergent national laws in some Member States, the Court went on to effectively "examine the effects of such disparities."[28]

Such basic assessment is lacking, or is at least not concretized in the present judgment. This is regrettable, particularly in light of the importance of such precedent in terms of the extent of the Community legislature's intervention in the free market.

Proportionality. The Court carried out the same one-dimensional review on the issues of proportionality and subsidiarity. With respect to proportionality, for example, the Court adopts, without any questioning of the Commission's justifications, that the retail price cap "ought to ensure that retail charges for Community-wide roaming services provide a more reasonable reflection of the underlying costs involved in the provision of those services than has been the case."[29] The Court further relies on the Regulation's recitals to state that retail charges were high and "not such as would have prevailed in fully competitive markets," and that the cap "has been set at a level that is significantly below that average charge."[30] Once again, this was enough for the Court to conclude that "the introduction by that provision of ceilings for retail charges must be considered to be appropriate for the purpose of protecting consumers against high levels of charges." While the Court again seems to limit its review to what is stated in the Regulation's recitals, it seems to justify the "appropriateness" of the measure in light of the erroneous object pursued. The object pursued in applying Article 114 is not consumer protection (while this can be part of it), but avoiding obstacles to trade or competition.

The Court then proceeded to assess whether the measure "goes beyond what is necessary to achieve the objective pursued." We recall that the standard set by the Court itself, which determines that "where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued."[31] As put forward by the Applicants, the regulation of only wholesale charges would have obviously been a less onerous measure towards securing

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27 Tobacco Advertising II, 2006 ECR I-11573.

28 Vodafone, ¶ 52.

29 Id. ¶ 57.

30 Id. ¶ 59.

31 See Case C-189/01, Jippes & Others, 2001 ECR I-5689, ¶ 81; Case C-331/88, The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, 1990 ECR 9-4023, ¶¶ 8, 14.

lower retail prices. The Court noted on the basis of the Regulation's recital 14 that "reductions in wholesale prices might not be reflected in lower retail prices for roaming owning to the absence of incentives for that to happen."[32] As submitted by the Commission, this is because "there was no competitive pressure on operators to pass on that reduction."[33] As such, relying on the Commission's impact assessment, it would be "more prudent" to regulate retail charges. In addition, the Court notes that regulating wholesale charges alone "would not have had a direct and immediate effect for consumers." Hence, aside from accepting that consumer protection would be the main objective (no other is stated) of the measure, it seems that the Court lowers the barrier in assessing the proportionality of a measure. Not only, must the effect of the measure be "direct and immediate," merely showing that the adoption of the measure would be "more prudent" in reaching the targeted objective seems to be sufficient. Strictly speaking, therefore, if there is any doubt that a measure may not reach its objective directly and immediately, a more onerous measure would meet the proportionality test.

In sum, the Court has regretfully taken a very hands-off approach in assessing the legality of the Community legislature action, leaving a less than desirable discretionary power to the legislature in adopting intrusive legislation.

A Free Market Economy?

More generally, the Community's direct regulation of prices is contrary to the fundamental principles underpinning the EU. The foundation of the Treaty of Rome and its subsequent evolution clearly demonstrates that the existence of a "market economy" forms the main constitutional foundation of the Community structure.

Except in the sphere of agriculture, the TFEU established a market economy. In this respect, it may be useful to recall that Article 119 of the TFEU stipulated that the "activities of the Member States and the Community shall include . . . the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, **and conducted in accordance with the principle of an open market economy with free competition**."[34]

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32 Vodafone, ¶ 52.

32 Id. ¶ 62.

33 Vodafone, ¶ 63 (emphasis added).

34 Consolidated Version of the Treaty on European Union, May 9, 2008, art. 4, 2006 O.J. (321) E/4-5 (emphasis added) available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E114:EN:HTML. The principle is also present in the Treaty Establishing a Constitution for Europe, 2004 O.J. (310) 11, available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML. Article I-3(3) provides that

It is precisely because the TFEU seeks to encourage a free market economy that it sets out strict competition rules. Such rules, which are inconsistent with a planned economy, are necessary in a market economy in order to impede market distortions caused by anticompetitive agreements or abuses of dominant positions.

We interpret the explicit reference to the principle of an open market economy in the TFEU as meaning that unless expressly stipulated otherwise, market forces should determine prices in liberalized sectors. The TFEU has not empowered the Community to regulate prices. On the contrary, such exercise of control acts to undermine the foundations of the Treaty.

The above principles have been consistently applied over the years by the Community in the electronic communications sector. Indeed, in applying the principle of the market economy, the Community has eliminated telecommunications monopolies and created an appropriate regulatory environment to enable the creation of a market structure where competition between a multiplicity of electronic service providers delivers quality services at competitive prices. This market, of course, is subject to the application of competition rules in the case of anticompetitive conduct.

However, the adoption of price controls on retail and wholesale roaming is entirely inconsistent with the underlying principles of the Treaty and the policies implementing such principles in the electronic communications sector to date. Regulation should be exceptional. Where required, such as in liberalizing the market for electronic communications, it should be limited to the creation of a framework for the free market to operate. Such framework should ensure that market players can provide services on an equal footing, with access to essential resources. This will enable market players to compete on prices, in the consumer's interest.

If competition proves too weak, then the legislative authorities should review the existing framework to enhance competitive conditions. Regulation should not fix retail prices, however popular this may be, and thereby target industries that are "guilty" of nothing more than operating a business within the boundaries of the Community legislator's own regulatory framework.

Conclusion

Although politically appealing, obtaining lower retail prices should not be pursued at the expense of fundamental principles of law such as the principles of conferred powers, proportionality and subsidiarity, nor at the expense of a free market economy itself. With the Roaming Regulation, the Commission accorded itself unprecedented powers and also breathes life into a disquieting movement for far-flung interference in the EU's free market economy. In fact, if Article 114 has indeed been legitimately relied upon to directly regulate international

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the Union's objective of reaching sustainable development should be based on a "highly competitive social market economy . . . ."

roaming tariffs, then nothing will stop the Commission from regulating other purportedly "high" prices for cross-border services such as airfares or hotel rooms.

The Community's loose interpretation of the powers conferred upon it, in combination with the ECJ's narrow review, create a democratic deficit that is alienating stakeholders and citizens from governance. Thus, the Community legislature does precisely the opposite of what it seemingly purports to remedy in adopting measures in the interests of European consumers: it is alienating the citizens of the EU by frustrating a legitimate exercise of legislative powers. Endorsing the Community legislature's misguided "activism" will open the door to future measures (regardless of whether they benefit consumers) that further weaken the democratic legitimacy of Community legislation.

One thing should be clear to industry in any given sector – the EU will regulate prices if it believes these are too high and where competition law enforcement does not provide a readily solution. Watch out for Commissioners' warnings, they mean it!


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