

Tying & Bundling in Telecom Sector in Slovenia

Competition Policy Perspective

By Andrej Fatur



General

- Applicable legislation: Slovenian Prevention of the Restriction of Competition Act - 1 ("SPRCA-1"), April 2008
- Article 9 on prohibition of the abuse of dominant position is based on Article 82 of the Treaty
- Provision covering tying & bundling equivalent to Article 82 (d): *"making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*
- Very few Article 82 cases in telecommunications sector in Slovenia (only 4 since 1993). SCA not very active in this area in the past
- Several merger control cases (no prohibition, some undertakings required)
 - ✓ UPS - Telemach (consolidating local cable operators)
 - ✓ Telekom Slovenije (adding additional services: system integrator, local search machine, internet provider etc)
- No coherent official statement of competition policy in telecommunications sector by Slovenian Competition Authority ("SCA"); Research on telecommunications markets in 2004



(Non-genuine) tying & bundling - adding additional conditions (ABM case)

- SCA, Supplemental decision No. 3073-9/2002-50, October 22nd, 2007
- SCA found that between 1998 and 2000 Telekom Slovenije (Slovenian incumbent majority state-owned telecommunications company) had abused its dominant position in the wholesale voice telephony (ISDN) market for provision of narrowband access to internet to end-users by refusing of switch on number 32-370 from special group 0880 for company ABM without objective justification.
- Abuse comprised of conditioning the switch on of service with the following unnecessary /non related conditions:
 - ✓ Additional entering into subscriber relationship for ISDN PA line
 - ✓ Provision of Project of executed works for ISDN PA line
 - ✓ Permission for operating the service
 - ✓ Payment of all outstanding obligations
 - ✓ Non existence of possibility mixed numbering and related issues

“Technological Tying” (ADSL/ISDN case)

- SCA, Decision No. 3072-2/2004-81, March 31st, 2008
- SCA found that between 2001 and 2005 Telekom Slovenije had abused its dominant position in the inter-operators market for provision of ADSL broadband access with bit current over the copper network, by unjustifiably conditioning of establishing of ADSL connection/line over its network to end-users, with acceptance of additional condition i.e. advanced setting up of ISDN connection /line, although technically this was not necessary condition for setting up of ADSL connection/line
- Core of the enquiry: Is ISDN connection/line technically a necessary pre-condition for setting up of ADSL connection/line
- Specific issues:
 - ✓ SCA's lack of technical expertise & funds
 - ✓ SCA acquires “independent” expert opinion, which does not give a definitive answer
 - ✓ Small market/Telekom's leverage on “independent” experts
 - ✓ Sector's regulator (“APEK”) gives impartial opinion which is one of the core bases for the decision

“Bundling of telecommunications services/equipment” (Centrex case)

- Private suite for damages: Sinfonika/Telekom Slovenije, lodged December, 2007, pending
- Sinfonika is suing Telekom Slovenija for damage on the grounds of breaching of telecommunications sector and competition legislation in Slovenia.
- The core of the competition law part of the claim is that incumbent Telekom Slovenije, through bundling of provision of access to the public telephone network at a fixed location for business customers with its virtual private branch exchange – Centrex, abused its dominant position on the relevant telecommunications services market with the following alleged abusive conduct:
 - ✓ Non-cost based prices of Centrex/Predatory pricing
 - ✓ Margin squeezing
 - ✓ Cross-subsidizing
 - ✓ Additional unlawful discounts for Centrex users
 - ✓ Discriminatory pricing towards smaller Centrex customers
 - ✓ Free calling between users in Centrex (and Geocentrex) group
 - ✓ Unlawful rising of rival's costs (i. refusing connection, ii. termination of Direct Dial In service, which was essential for operation of rivals, applying of additional unlawful conditions, such as preparation of project documentation, etc)
- Specific issues:
 - ✓ Very limited/non existent disclosure
 - ✓ Consequently very difficult for private parties to prove all elements of damage claims

Cases in pipeline

- No official cases from telecom sector in SCA's pipeline
- Complaint lodged by alternative telecommunications/internet service provider against Telekom Slovenia concerning price discrimination, margin squeeze, cross-subsidising, bundling ...
- Official start of the proceedings expected soon
- Couple of private damages suits against Telekom Slovenija by alternative telecommunications operators pending

Prospective developments

- New 2008 competition legislation streamlines judicial review, extends SCA's investigation authority and introduces bigger fines aligned with the rest of EU
- SCA much more active lately, developments going into right direction
- However, mostly because of existing structural deficiencies (Telekom's state ownership, SCA as a part of Ministry for Economy, SCA's limitations on resources & technical expertise, lack of independent experts, etc), the accomplishment of coherent and economics-based competition policy in telecommunications sector in Slovenia will be a hard and long journey!

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