

The Upcoming Polish 5G Auction: Assessing the Role of the EECC Directive

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Starting in 2016, the EU set out the shift to high-capacity 5G networks with the adoption of the “5G for Europe Action Plan”.² These days, the buildout of the 5G network throughout Europe is starting. Slovenia,³ the Czech Republic,⁴ Slovakia,⁵ Portugal,⁶ and Sweden⁷ are among the first Member States to commence the 5G spectrum auctions for the allocation of frequency licenses. Yet, although the aim is the same for all Member States, namely, to expand the 5G telecom network nationwide, the way the auctions have been conducted varies.

What distinguishes the various 5G auctions is, among others, the choice made by some national regulators to condition the granting of the frequency licenses to the use of telecom hardware or software supplied by certain suppliers, which are considered not to pose risks to the Member’s national security. Some Member States, like Slovenia, require the successful bidder to conduct a risk assessment of the various telecom hardware or software suppliers in order to identify potential risks posed to the country’s national security.⁸ Others, like Sweden, have gone as far as explicitly banning the use of hardware or software from suppliers of specific origin. However, there are others, like Germany, that have signaled that they will not discriminate against specific telecom hardware or software suppliers on national security grounds.⁹

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² See <<https://ec.europa.eu/digital-single-market/en/5g-europe-action-plan>>.

³ See <<https://www.akos-rs.si/javna-posvetovanja-in-razpisi/novica/neuradni-angleski-prevod-informativnega-memoranduma-za-dodelitev-radijskih-frekvenc-za-javne-mobilne-storitve>>.

⁴ See <<https://5gobservatory.eu/completion-of-the-czech-5g-auction-in-the-700-mhz-and-3-4-3-6-ghz-spectrum-bands/>>.

⁵ See <<https://5gobservatory.eu/slovakias-regulator-auctioned-700-mhz-spectrum/>>.

⁶ See <<https://www.euractiv.com/section/5g/news/portugal-eu-asked-telecoms-regulator-to-clarify-controversial-5g-auction-terms/>>.

⁷ See <<https://www.pts.se/sv/nyheter/pressmeddelanden/2020/fyra-sokande-godkanda-att-delta-som-budgivare-i-35-ghz-och-23-ghz-auktionerna/>>.

⁸ See <IM_multiband_10082020.pdf (akos-rs.si)> p. 32.

⁹ See *e.g.* <<https://www.insidetelecom.com/germany-resists-u-s-fueled-huawei-ban/>>; <<https://www.handelsblatt.com/technik/it-internet/it-sicherheitsgesetz-das-bedeutet-die-huawei-entscheidung-fuer-die-deutschen-netze/26649350.html?ticket=ST-2936769-gHY5J3TrTdybhhnHEToVV-ap3>>; <<https://www.itwire.com/government-tech-policy/germany-japan-and-south-korea-defy-us-over-huawei-ban-report.html>>; <<https://www.reuters.com/article/germany-huawei-idUSL1N2I61RZ>>.

Amidst these developments, which admittedly pose questions of compatibility with both EU and WTO law,¹⁰ network operators await the commencement of the Polish 5G spectrum auction. The President of the Polish Office of Electronic Communications [“UKE”] is expected to issue the notice for public consultations, *i.e.* the first step in the auction process under Polish law, before the end of 2020. During the public consultations, stakeholders will be invited to express their views on the subject and scope of the auction, the conditions of participation, the tender evaluation criteria, the draft decision on the frequency allocation, etc. The success of the Polish 5G spectrum auction will depend, among others, on its alignment with EU law and policies. For in the globalized telecom industry, “*fragmentation amongst national policies [can] result in increased costs and lost market opportunities*”.¹¹ In this vein and considering that the Polish 5G auction is still forthcoming, the key consideration for the UKE to bear in mind from a legal perspective is the auction’s compatibility with the stipulations of the European Electronic Communications Code Directive [“EECC Directive”].¹²

The EECC Directive was the result of the European Commission’s latest review of the legislative framework governing electronic communications’ networks, services, facilities and equipment. It aims to ensure that national regulatory initiatives reflect the changing market conditions and incorporate the EU’s political objectives, as they pertain to the telecom industry.¹³ Notably, the EECC Directive through its established body, *i.e.* the Body of European Regulators for Electronic Communications [“BEREC”], operates as a gateway to EU compliance for national telecom regulations.

Article 32.3(b) of the EECC Directive requires national regulatory authorities to consult with the European Commission when their proposed regulations “*would affect trade between Member States*”. The aim of such consultations is to assess whether the measure at stake would create a barrier to the internal market, and whether there are serious doubts as to its compatibility with EU law.¹⁴ In cases where the proposed telecom regulation includes

¹⁰ See *e.g.* <<http://regulatingforglobalization.com/2020/11/30/the-swedish-arbitrary-ban-on-chinese-telecom-equipment-suppliers-under-the-national-cybersecurity-excuse-exploring-violations-of-eu-and-wto-law/>>.

¹¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018 [hereinafter referred to as the “EECC Directive”], preambular clause 32.

¹² *Ibid.*

¹³ R. Feasey, “New European Electronic Communications Code: Interpretation & Implementation”, Centre on Regulation in Europe (January 2019), p. 3.

¹⁴ Article 32.4 of the EECC Directive.

provisions taken on the basis of national security considerations, the envisaged compatibility check includes the measure's compliance with the requirements of the public security derogation of Article 36 of the TFEU,¹⁵ namely the existence of a genuine and sufficiently serious threat to the security of the Member State and the proportionality of the envisaged restriction.¹⁶

Against this backdrop, what will determine whether the UKE's draft decision and the documentation setting the scope and conditions of the 5G auction will have to undergo the above consolidation procedure with the European Commission, is whether the proposed regulation "**would affect trade between Member States**".

In interpreting this key term, we draw from the CJEU's interpretation of Article 101 of the TFEU. Article 101 extends the scope of application of EU competition law to "*all agreements ... which may affect trade between Member States*". The concept of "*trade between Member States*" has been interpreted broadly, so as to cover all cross-border economic activities.¹⁷ Notably, the CJEU has explained that nationwide practices "*have, by their nature, the effect of reinforcing compartmentalization of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about*", thus, affecting the trade between Member States.¹⁸ In turn, the term "*may affect*" implies that it must be possible to foresee with a sufficient degree of probability that the agreement or practice is capable of having an influence,¹⁹ direct or indirect, actual or potential, on the pattern of trade between Member States.²⁰

¹⁵ See Case C-546/07, *Commission v Germany* [2010] ECR I-439, para. 49; Case C-114/97, *Commission v Spain* [1998] ECR I-6717, para. 46; Case C-567/07, *Woningstichting Sint Servatius* [2009] ECR I-0000, para. 28. See also, Case C-72/83, *Campus Oil* [1984] ECR I-2727, para. 6. See also, in the context of the free movement of capital and the public security derogation under Article 65 of the TFEU: Case C-503/99, *Commission v Belgium* [2002] ECR I-4809; Case C-463/00, *Commission v Spain* [2003] ECR 4581; Case C-171/08, *Commission v Portugal* [2010] ECR I-6817; Case C-54/99, *Église de scientologie* [2000] ECR I-1335.

¹⁶ Article 1.3 (c) of the EEC Directive provides that "[t]his Directive is without prejudice to ... actions taken by Member States for public order and public security and for defence". However, this provision is not a *carte blanche*. Rather, it should be read together with Article 32.4, that calls for a complete compatibility assessment of the proposed measure under EU law.

¹⁷ Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, para. 21.

¹⁸ Joined Cases T-213/95 and T-18/96, *SCK and FNK v Commission* [1997] ECR II-1739, para. 179.

¹⁹ Case T-228/97, *Irish Sugar v. Commission* [1999] ECR II-2969, para. 170; Case 19/77, *Miller v Commission* [1978] ECR 131, para. 15.

²⁰ Case 172/80, *Züchner / Bayerische Vereinsbank* [1981] ECR 2021, para. 18; Case C-319/82, *Kerpen & Kerpen* [1983] ECR 4173; Joined Cases 240/82 and others, *Stichting Sigarettenindustrie and others v Commission* [1985] ECR 3831, para. 48; Joined Cases T-25/95 and others, *Cimenteries CBR and others v Commission* [2000] ECR II-491, para. 3930.

On this basis, the criterion of Article 32.3(b) of the EECC Directive implies that in cases where a proposed telecom regulation would be able to affect the trade between Member States, directly or indirectly, actually or potentially, then the national regulator would be required to consult with the European Commission before proceeding to adoption.

Analysis of the current provisions related to the Polish 5G auction and information on the possible requirements to be added in the draft decision on the frequency allocation and supporting documentation, which will form the basis of the public consultations in Poland, indicates that it will “*affect trade between Member States*”. Notably, this would be the case if the UKE were to include in the terms of the 5G auction conditions that could directly or indirectly, actually or potentially, exclude the use of telecom hardware or software supplied by certain suppliers. Granting a frequency license with nationwide reach to one or more bidders under conditions that could preclude the network operator, directly or indirectly, actually or potentially, from using telecom hardware or software supplied by some suppliers – even if based on grounds of national security – would, *in fact*, affect the trade in telecom hardware or software between Member States.

What is more, should the UKE include conditions which “*would affect the trade between Member States*” that are discriminatory, or – in case of alleged national security risks – not proportional, *e.g.* because they are not based on an independent risk assessment of the suppliers and their key assets,²¹ then the consultations with the European Commission could result in the BEREC formulating a negative opinion. In particular, the Commission could take a decision requiring the UKE to withdraw the draft measure, as per Article 32.6(a) of the EECC Directive.

In conclusion, the UKE should be aware of the EU requirements applicable in the 5G auction process already from this early stage and proceed with the auction in a way that ensures compliance with Union Law.

²¹ See NIS Cooperation Group – Report on Member States’ Progress in Implementing the EU Toolbox on 5G Cybersecurity, 07.2020, pp. 15-17.