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Back to the Basics: Concepts of Undertaking and Economic Activity in the SELEX Judgment

(SELEX Sistemi Integrati SpA v Commission, ECJ (Second Chamber), Judgment of 26 March 2009, C-113/07 P)

(1) Facts and Procedure

The European Organisation for the Safety of Air Navigation (*Eurocontrol*) was established in 1963 under the International Convention on Cooperation for the Safety of Air Navigation¹ (the Convention) with the aim of strengthening cooperation between the Contracting States in the field of air navigation and developing joint activities between them in order to achieve the harmonization and integration necessary for the creation of a uniform system of air traffic management (ATM). Eurocontrol's activities can be generally grouped into three major categories: (1) the activity of regulation, standardization and validation; (2) Research and development (R&D) activities, which consist in coordinating national policies on R&D in the field of air navigation and leading the development actions for new technologies in this sector; and (3) assistance provided, on request, to administrations of the Contracting States of Eurocontrol, particularly in the field of planning, specification and creation of ATM services and systems.

On 28 October 1997 SELEX Sistemi Integrati SpA (SELEX), which designs and develops systems and radars for air defence, battlefield management, naval defence, air and airport traffic management, coastal and maritime surveillance, lodged a **complaint with the Commission** under Article 3(2) of Regulation No 17,² in which it alleged **violations of competition law by Eurocontrol in carrying out its standardization tasks** in relation to ATM equipment and systems. SELEX complained *inter alia* that: (1) the regime of intellectual property (IP) rights governing Eurocontrol's contracts led to creation of monopolies in the production of ATM systems, which are standardized by Eurocontrol; and (2) undertakings supplying prototypes used for the purposes of standardization were thereby placed in a particularly advantageous position as compared with their competitors on the public tenders organized by the Contracting States for acquisition of ATM equipment. Following an investigation, on 12 February 2004 the **Commission** has rejected SELEX's complaint on the following grounds: The Commission noted that although the EC competi-

tion law applies in principle to international organizations such as Eurocontrol, the specific activities carried out by such organizations must be economic activities for the purpose of application of Article 82 EC. In the present case, the **activities of Eurocontrol** which were the subject of the complaint were **not of an economic nature** according to the Commission, but of public interest. On that basis the Commission concluded that Eurocontrol could not be considered to be an undertaking within the meaning of Article 82 EC.

SELEX disagreed with the Commission's findings and on 23 April 2004 lodged an **appeal with the Court of First Instance** (CFI). Referring to the relevant Community case law³ SELEX argued that the concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and any activity consisting in offering goods and services on a given market is an economic activity. In response, the Commission referred to the *SAT Fluggesellschaft* case, where the European Court of Justice (ECJ) has ruled that «[t]aken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority, [t]hey are not of an economic nature justifying the application of the Treaty rules of competition».⁴ The CFI held such a generalized transposition of its holding in *SAT Fluggesellschaft* could not be accepted because it was rendered in relation to particular factual situation and that **various activities of an entity must be considered individually** and the treatment of some of them as powers of a public authority does not mean that all other activities are also non-economic for the purposes of EC competition law. The CFI then proceeded with the detailed assessment of each type of Eurocontrol's activities referred to in the SELEX's application.

In relation to the Eurocontrol's **standardization activity**, SELEX argued that since the **acquisition of prototypes**, which is a precondition to the standardization, is an economic activity, stand-





ardization itself should be also regarded as economic activity. In response, Commission argued that Eurocontrol carries out standardization on behalf of the Contracting States without any interest of its own and therefore pursues a public service objective of maintaining and improving the safety of air navigation. CFI noted that according to the relevant Community case law,⁵ any activity consisting in offering goods and services on a given market is an economic activity. In the present case SELEX has not demonstrated that there was a market for technical standardization services in the sector of ATM equipment because the only purchasers of such services were Contracting States in their capacity as air traffic control authorities. Thus, even though Eurocontrol acquired goods and services on the market, it did not mean that standardization services, for which such goods and services were acquired, should be regarded as an economic activity. In this regard CFI explained that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.⁶ Thereby CFI transposed to the present case its ruling in *FENIN*, where it held that generally, an organization which purchases goods or services not for the purpose of offering them as part of an economic activity but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market.⁷ The CFI held in that case that while an *entity purchasing a product to be used for the purposes of a non-economic activity* «*may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC*».⁸

When assessing the acquisition of prototypes and IP rights for *Eurocontrol's R&D activity*, the CFI addressed the issue of remuneration as one of the decisive factors in determining whether the activity in question is economic or not. In this regard CFI emphasized that the *absence of remuneration* is only one indication among several others and cannot by itself exclude the possibility that the activity in question is economic in nature. Nevertheless, in the present case, the fact that the licenses for the IP rights acquired by Eurocontrol in the context of the development of

the prototypes were granted at no cost added to the finding that this *activity was ancillary to the promotion of technical development*, forming part of the Eurocontrol's public service aims, which excluded the possibility that the activity in question was economic in nature.⁹ In this sense, according to the CFI, Eurocontrol's activity could not be compared to that of organizations' governed by private law, which manage the rights of composers or authors and which are authorized by the holders of those rights to collect fees payable by third parties for the representation of their works.

In relation to the third type of Eurocontrol's activity – *assistance to the national administrations*, SELEX submitted that by drafting bidding documents and contracts used at public tenders or by *taking part in the selection procedure of undertakings participating in public tenders* Eurocontrol was engaged in intrinsically economic activity. The CFI held that the activity of assisting national administrations was separable from Eurocontrol's tasks of air space management and development of air safety. The Court noted that Eurocontrol offered such *assistance only on request* of the national administrations and therefore such activity was *in no way* an activity *essential to ensuring the safety of air navigation*. The fact that such *services could be also rendered by private undertakings* implied that there could be a market for such services and therefore such activity could be regarded as economic.¹⁰ The fact that the services in question were not at the current time offered by private undertakings did not prevent their characterization as an economic activity, since it was possible for them to be carried out by private entities. CFI further explained that the fact that the assistance was given in pursuit of a public service objective might be an indication that it was a non-economic activity, but this did not prevent an activity consisting in offering services on a given market from being considered to be an economic activity. On the basis of the above, CFI concluded that assistance to the national administrations was an economic activity and that, consequently, Eurocontrol, in the exercise of that activity, was an undertaking within the meaning of Article 82 EC.

The Court then proceeded with the analysis of whether by rendering assistance to the national administrations Eurocontrol has abused its dominant position. SELEX criticized Eurocontrol for its failure to observe the principles of equal treatment, transparency and non-discrimination when





invitations to tender were launched by the national administrations for the acquisition of ATM equipment and systems. Aligning with the Commission, the Court noted that the national administrations alone have the power to award contracts and, therefore, they alone are responsible for compliance with the relevant provisions on tendering procedures. The Court stated that SELEX did not show that Eurocontrol has in fact influenced the decisions to award the contracts to particular bidders. As Eurocontrol was not carrying out any activity on the market for supply of ATM equipment and systems and it did not have any financial or economic interest of its own in that market, CFI found ***no relationship of competition between Eurocontrol and SELEX*** or any other undertaking active in the sector. Thus, although the Court found that certain activities carried out by Eurocontrol were economic activities, there was no evidence that Eurocontrol has infringed Article 82 EC and SELEX's application was ultimately dismissed.¹¹

On ***appeal*** to the ECJ SELEX submitted that the CFI has erred in law as regards the applicability of Article 82 EC to the activities of Eurocontrol, namely the activities of assisting the national administrations, technical standardisation and R&D and the infringement of that provision by Eurocontrol. The Commission contested SELEX's submissions relating to Eurocontrol's activity of assisting the national administrations and that of technical standardisation. Eurocontrol, in the capacity of intervener, submitted that its immunity precluded the application of the EC competition law to its activities and this plea should be considered by the Court on its own motion and should be upheld in order to dismiss the appeal.

(2) Judgment

One of the issues raised before the ECJ by Eurocontrol, as an intervener, was its ***general immunity*** from the application of the Community law. Eurocontrol argued that ***under public international law*** its activities were not subject to Community law and it enjoyed immunity from any investigations carried out by any Contracting State in relation to competition matters. Eurocontrol pointed out that both it and the Commission are international organizations whose members are states which are, to some extent, different and operate within two separate independent legal systems, so that, on the basis of the general principle *par in parem non habet imperium* (an equal has no authority over an equal), the Community does not have the power to make Eurocontrol

subject to its own rules. Eurocontrol further submitted that at the very least, public international law protected the activities in question, since those activities formed an essential part of Eurocontrol's institutional objectives and were not, in any event, acts of a commercial nature. Advocate General *Trstenjak* in her Opinion¹² aligned with the CFI and stated that the plea of immunity raised by Eurocontrol alters the context of the dispute substantially and therefore should be rejected as inadmissible. The ECJ concluded that there was no need for the Court to examine on its own motions Eurocontrol's submissions concerning its immunity from the application of the EC competition law.

The Commission challenged the CFI's determination that ***provision of assistance to national authorities*** should be regarded as an economic activity. The ECJ referred to its judgment in *SAT Fluggesellschaft*, where it held that Article 82 EC must be interpreted as meaning that an international organization such as Eurocontrol is not an undertaking for the purposes of that provision. According to the ECJ, that conclusion also applied with regard to the assistance, which Eurocontrol provided to the national administrations when so requested by them, in connection with tendering procedures carried out by those administrations for the acquisition of ATM equipment and systems. Article 2(2)(a) of the Convention provided that Eurocontrol may, at the request of one or more Contracting States and on the basis of a special agreement or agreements between it and the Contracting States concerned, assist such Contracting States in the planning, specification and setting up of ATM systems and services. The specified provision allowed the ECJ to infer that the activity of providing assistance was ***one of the instruments of cooperation entrusted to Eurocontrol by the Convention*** and played a direct role in the attainment of the objective of technical harmonization and integration in the field of air traffic with a view to contributing to the maintenance of and improvement in the safety of air navigation. On that basis, ECJ concluded that CFI committed an error in law by finding that activity of providing assistance to national authorities was separable from Eurocontrol's tasks of air space management and development of air safety by considering that that activity had an indirect relationship with air navigation safety. The fact that such assistance was optional and was provided on request did no alter the above conclusion. It was not necessary for the activity concerned to be essential or indispensable to ensuring the safety of air navigation. The decisive point was the connec-





tion of that activity with the maintenance and development of air navigation safety, which constituted exercise of public powers. Since the CFI had nevertheless concluded that there was no evidence that Eurocontrol violated Article 82 EC, the ECJ rejected SELEX's submissions relating to the alleged infringement of Article 82 EC as redundant.

The Commission also took the view that the distinction made by the CFI between the activity of adopting technical standards, which formed part of the task of managing air space and developing air safety, and that of the preparation and production of such standards, which did not form part of that task, was incorrect and requested the ECJ to dismiss the respective grounds of appeal advanced by SELEX. The ECJ found that both *preparation and production of technical standards played a direct role in the attainment of Eurocontrol's objectives*, defined in the Convention, which was to achieve harmonization and integration with the aim of establishing a uniform European ATM system. On that basis the ECJ concluded that CFI committed an error in law by finding that the preparation and production of technical standards by Eurocontrol can be separated from its task of managing air space and developing air safety. However, since the CFI eventually came to the conclusion that both types of activities cannot be considered as economic, the ECJ upheld the judgment under appeal. The ECJ agreed with the CFI's interpretation of the Community case law that a *non-profit status of an entity* was a relevant factor for the purpose of determining whether or not an activity is of an economic nature.¹³ The Court upheld also the CFI's finding that the absence of remuneration was only one indication among several others and could not by itself exclude the possibility that the activity in question was economic in nature.

(3) Commentary

The *SELEX* case has raised important issues regarding application of the EC competition law to the activities of public bodies, in the present case of an international organization. Eurocontrol's plea regarding its general immunity under public international law from the application of EC competition rules was not considered by the Court as it was altering the subject of the main submissions of the parties to the appeal. This *preserved the status quo approach* developed in the preceding jurisprudence¹⁴ that has in principle admitted *application of the EC competition law to public bodies*, including international organiza-

tions, provided that they engage in economic activity. The Court has addressed in more detail the method of assessment that should be applied to particular activities of an entity in order to determine whether they are economic. The CFI's approach towards such assessment presupposes identification of various activities of an entity and, consequently, their differentiated analysis. As it was mentioned above, the CFI rejected the generalized application of its holding in *SAT Fluggesellschaft*, where it held that taken as a whole Eurocontrol's activities are related to its exercise of public powers and therefore should be considered non-economic. The Court stressed that its finding in the above case was based exclusively on a review of the particular type of Eurocontrol's activities – the creation and collection of route charges on behalf of the Contracting States from users of air navigation services. In *SELEX*, following such differentiated assessment the CFI defined certain activities of Eurocontrol as economic because they could be offered on a hypothetical market by private entities and therefore could not be equalized with Eurocontrol's public powers. The ECJ took a different stance: it held that activities defined by the CFI as economic when viewed in the light of the Eurocontrol's objectives stipulated in the Convention were non-economic because they led to the achievement of the public objectives of the Eurocontrol. Thus, ECJ has favored a teleological interpretation of the Convention, which regulated public powers and objectives that Contracting States have entrusted to Eurocontrol. Since assistance to the national administration appeared among Eurocontrol's tasks, the ECJ held that such activities should not be viewed as economic even if they could be carried out by private undertakings.

The disagreement between CFI and ECJ related to the appreciation of particular types of activities of an undertaking vested with public powers received various, sometimes radically opposing *appreciations from the legal community*. Some commentators emphasizing the important role of the services of general economic interest applauded the ECJ's approach as preferring more a functional and reasonable assessment of an undertaking's activities and dismissing the overly formalistic and analytical approach chosen by the CFI.¹⁵ Others, that have already characterized the Court's approach as «*exceedingly narrow and non-functional (sub-)concept of 'economic activity'*» were more concerned with the distorting effects on competition caused by the public buying power and on those grounds viewed the *SELEX*





ruling as another legal construction shielding public entities from the application of competition law rules.¹⁶ As it was noted, the *SELEX* judgment affirmed the Court's approach to the assessment of purchasing activities in *FENIN*, where the Court held that such activities should be assessed according to whether or not the subsequent use of the purchased goods amounts to an economic activity.¹⁷ However, as the Court noted on several occasions, this factor should be considered in combination with other circumstances of the particular case, thus dismissing clear-cut solutions and rejecting a decisive nature of particular factors. The focal point of analysis according to the ECJ should be the nature of the underlying activities and their connection to the public powers of an entity. Like in *SELEX*, ECJ found such connection in *Diego Cali*: «*Such [anti-pollution] surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers related to the protection of environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition...*».¹⁸

As acknowledged by Advocate General *Jacobs*, the notions of «*undertaking*» and «*economic activity*» continue to *remain relative concepts* in EC competition law¹⁹ and the *SELEX* judgment demonstrates that rules for the assessment of activities carried out by public bodies constantly undergo the process of refinement where Community jurisprudence defines the role and significance of various elements in such assessment. In *SELEX* the ECJ once again acknowledged the uneasy correlation between free market competition and exercise of public powers, which has to be taken into account in each particular case. Thus, the connection between particular activities of a public body with its public aims and powers will continue to play a decisive role in a functional overall assessment whether such activities should be considered as economic, which justifies application of EC competition law.

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¹ International Convention relating to Cooperation for the Safety of Air Navigation of 13 December 1960.

² Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *Official Journal* 13, 21.02.1962 p. 204 – 0211.

³ ECJ [1991] ECR I-1979 *Höfner and Elser* *vs* *Mactotron GmbH*, para. 21; ECJ [1995] ECR I-4013 *Fédération française des sociétés d'assurances and Others* *vs* *Ministère de l'Agriculture et de la Pêche*, para. 14; ECJ [1997] ECR

I-7119 *Job Centre*, para. 21; ECJ [1998] ECR I-3851 *Commission* *vs* *Italy*, para. 36; and ECJ [2000] ECR I-6451 *Pavlov and Others* *vs* *Stichting Pensioenfonds Medische Specialisten*, para. 74.

⁴ ECJ [1994] ECR I-43 *SAT Fluggesellschaft* *vs* *Eurocontrol*, para. 30.

⁵ CFI [2000] ECR II-3929 *Aéroports de Paris* *vs* *Commission*, para. 107.

⁶ CFI [2003] ECR II-357 *FENIN* *vs* *Commission*, para. 36.

⁷ CFI [2003] ECR II-357 *FENIN* *vs* *Commission*, para. 37.

⁸ CFI [2003] ECR II-357 *FENIN* *vs* *Commission*, para. 37.

⁹ ECJ [2004] ECR I-2493 *AOK Bundesverband and Others* *vs* *Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others*, para. 63.

¹⁰ ECJ [2002] ECR I-9297 *Aéroports de Paris* *vs* *Commission*, para. 82.

¹¹ CFI of 12 December 2006, T-155/04 *SELEX Sistemi Integrati SpA* *vs* *Commission*. See the commentary by *Jean-Philippe Kovar*, *Scope of competition law*. The CFI gives precise details about the notion of economic activity and confirms the case law *Fenin* about the qualification of the purchase act (*Selex Sistemi Integrati*), *Concurrences* [2007] 168-169.

¹² Opinion of Advocate General *Trstenjak* of 3 July 2008, C-113/07 P *SELEX Sistemi Integrati SpA* *vs* *Commission*.

¹³ ECJ [1995] ECR I-4013 *Fédération française des sociétés d'assurances and Others* *vs* *Ministère de l'Agriculture et de la Pêche*, para. 21; ECJ [1999] ECR I-5751 *Albany International BV* *vs* *Stichting Bedrijfspensioenfonds Textielindustrie*, para. 85; and ECJ [2006] ECR I-2843 *Enirisorse SpA* *vs* *Sotacarbo SpA*, para. 31.

¹⁴ See ECJ [1991] ECR I-1979 *Höfner and Elser* *vs* *Mactotron GmbH*, para. 24. In that judgment the Court held that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest is subject to the competition rules pursuant to Article 90(2) EC unless and to the extent to which the application of that provision is incompatible with the discharge of the particular duties entrusted to it. See also ECJ [1994] ECR I-43 *SAT Fluggesellschaft* *vs* *Eurocontrol*, para. 41. Notably, the activities of an entity don't have to be analyzed together and competition law rules «*are applicable to the [economic] activities of an entity which can be severed from those in which it engages as a public authority*». See ECJ [1985] ECR-2655 *Commission* *vs* *Germany*, paras. 14-15.

¹⁵ *Jean-Philippe Kovar*, *Notion of economic activity*: The ECJ confirms the cases law *Eurocontrol* and *Fenin* on the notion of economic activities and the qualification of the purchase act (*Selex Sistemi Integrati - Eurocontrol*), *Concurrences* [2009] 212-213. See also *Anne-Lise Sibony*, *Economic activity*: The ECJ rules that *Eurocontrol* is not an undertaking: providing assistance to the national administrations in the implementation of tendering procedures for the acquisition of air traffic management systems is closely linked to the task of technical standardisation entrusted to *Eurocontrol* with a view to maintaining and developing the safety of air navigation and is thus connected with the exercise of public powers (*Selex Sistemi Integrati; Eurocontrol*), *Concurrences* [2009] 117.

¹⁶ *Albert Sánchez Graells*, *Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It* (2009), p. 32. Available at SSRN: <http://ssrn.com/abstract=1458949>.

¹⁷ ECJ [2006] ECR I-6295 P *FENIN* *vs* *Commission*, para. 26.

¹⁸ ECJ [1997] ECR I-1547 *Diego Cali e Figli Srl* *vs* *SEPG*, para. 23.

¹⁹ Opinion of Advocate General *Jacobs* of 17 May 2001, Case C-475/99 *Ambulanz Glockner* *vs* *Landkreis Südwestpfalz*,





para. 72: «The notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules». See also *Wouter P. J. Wils*, The Undertaking as Subject of EC Competition Law and the Im-

putation of Infringements to Natural or Legal Persons, 25 *Eur. L. Rev.* [2000] 99; and *Victoria Louri*, «Undertaking» as a Jurisdictional Element for the Application of EC Competition Rules, 29 *Legal Issues of Economic Integration* [2002] 143.

III.

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European and International Energy Law and Policy: A crucial year

(Conference Report: 3rd St. Gallen International Energy Forum 2009)

The date of the 3rd St. Gallen International Energy Forum (IEF) in late October could not have taken place at a better time with respect to the «Third Energy Package» that entered into force in September and the forthcoming UN Climate Conference in Copenhagen in December. Prof. Dr. Carl Baudenbacher, President of the EFTA Court and Director of the Institute of European and International Business Law at the University of St. Gallen, and Dr. Dirk Buschle, Legal Counsel of the Energy Secretariat Community and Vice-Director of the Institute of European and International Business Law, invited the energy elite in order to discuss the most crucial topics of the intriguing energy year 2009. The program was as promising as cutting-edge: Topics were the UN Climate Conference in Copenhagen, the Third Legislative Package, the new Renewable Directive, Energy Competition Law and European Foreign Energy Policy.

The start of the IEF was a high-level evening event that was dedicated to the current **UN Climate Conference in Copenhagen**. Chaired by *Martin Läubli* from the *Tagesanzeiger*, representatives of three countries (Switzerland, Austria and Germany) stated their positions. Facing the upcoming Climate Conference, Germany's representative *Franzjosef Schafhausen*, Deputy Director-General «Environment and Energy» of the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, reminded the audience of the importance to start fighting against climate change, better yesterday than today. Demanding a **total restructuring of the economy and the society** with respect to carbon dioxide emissions, it would be much less expensive to act now than to remove the damages caused by the greenhouse effect. The Swiss position was represented by *Xavier Tschumi Canosa* from the Federal Office for the Environment and *Dr. Thomas Roth* from

the State Secretariat for Economic Affairs. *Mr. Tschumi Canosa* made clear that - similar to the EU arrangements - Switzerland is willing to act by reducing its carbon dioxide emissions by 20% until 2020 with a reduction option of up to 30%. However, the UN Climate Conference will only be a success if the most important industrial countries are included. Nevertheless, at this time, he was (still) convinced that they will achieve a political as well as a legally binding agreement in Copenhagen. *Dr. Roth* took an economics perspective and pointed out the need for **cost-efficiency of the measures** striving against global warming. In consensus with *Mr. Schafhausen* and in consideration of more international coordination, he declared that from an economic perspective it is indispensable to act now. *Ambassador Dr. Irene Freudenschuss-Reichl* focused - besides the Austrian position - in particular on the situation of developing countries. In this regard she reminded the audience of the unfairness that the poorest developing countries will suffer most from climate change and global warming.

After this vividly discussed political warm-up, the following IEF conference day faced more ordinary energy law based topics. Addressing again an audience of more than 100 participants, *Dr. Hans-Jürgen Meyer-Lindemann*, Partner at *Shearman & Sterling LLP*, opened the first panel under the title «**The State of the Internal Market for Energy**». After an introduction of the «Third Energy Package» that entered into force on September 3, 2009, *Dr. Florian Ermacora* from the European Commission, who took part in the negotiations of the package, was given the floor. Reminding the audience of the main objective of the package of a **fully open and effective energy market**, *Dr. Ermacora* put the main focus on the formerly diversely discussed and contentious unbundling