TEXTO PARA EL HILO

Judgment of the Court (Third Chamber) of 25 March 2021. Case C-152/19 P. Deutsche Telekom AG v European Commission. ECLI:EU:C:2021:238. Decisive influence and absence of decisional autonomy as grounds to impute parent liability. Prof. Dr. Juan Ignacio Ruiz Peris (UVEG)

TEXTO DE LA ENTRADA

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Tags: Parent liability. Undertaking. Economic unit. Control. Decisive influence. Decisional autonomy. Control exercise.

SUMMARY: 1. Decisive influence and control. 2. Control exercise. 3. Prove that subsidiary does not determine independently its own conduct on the market. 4. Control and Undertaking. 5.Control and single economic unit.

1. Decisive influence and control.

The Court of Justice uses the terms “decisive influence” or “control” as synonyms to describe the ground of the parent liability in cases of infraction of the 101 and 102 TFEU by its subsidiary. Decisive influence or control are *de facto* and not *de iure* questions. So, legal limits to the control arguments constant fails in European cases in confront of factual evidence of the existence of control.

The ability to exercise decisive influence over the market decisions of other company has been the meaning of the term control since BERLE and MEANS described by first time the phenomena a century ago. The use of the term control is widespread in European competition law rules and cases, and in national competition laws. The last question of the request for a preliminary ruling by the Audiencia Provincial de Barcelona in case Case C-882/19 *Sumal*, not jet decided was in relation, of the relation of national norms constructed on vertical ascendant liability derived from control. See Conclusions de l'avocat général M. G. Pitruzzella, présentées le 15 avril 2021. ECLI identifier: ECLI:EU:C:2021:293

We note that the German version of the Case C-152/19 P. Deutsche Telekom decision, that is the authentic one uses the word - *bestimmenden Einfluss*, and not *beherrschenden Einfluß* used by paragraph 17 of AktG. I don’t know if it exists a difference of meaning between both terms. In my opinion it may be see more as a form to express the autonomy of the European law legal terms from national ones, in particular, in this case, from the conclusions of the elaborated exegesis on the German Company law paragraph that focuses on the *abhängigkeit* question, that is not included in the European competition law discussion about control and decisive influence. The European Court of Justice doctrine

on parent liability is also independent from other German legal institutions as *Konzern* and *einheitlichen Leitung*, used by paragraph 18 AktG.

The reference to the decisive influence or control is used by the European Court of Justice decisions in two different ways, first examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary and second establishing if decisive influence has been exercised by that company over its subsidiary.

The first implies verify the existence of a *de iure* or *de facto* power. The second the actual exercise of that power.

Evidence of the existence of this power may be enough to assert the existence of the parent liability as remember paragraph 77 Case C-152/19 P. *Deutsche Telekom*

> 77*…it can be sufficient, in order to impute liability for a subsidiary's conduct to the parent company, to examine if the parent company has the possibility of exercising such decisive influence over its subsidiary…*

That control may be asserted following the ways used by the European Court in the last fourty years, as resume paragraph 95 *Deutsche Telekom*.

> *95 That control can, as the Advocate General noted in point 156 of his Opinion, be demonstrated by the Commission either by establishing that the parent company has the ability to exercise a decisive influence over its subsidiary's conduct and, moreover, that it has actually exercised such influence (see, to that effect, judgments of 26 September 2013, The Dow Chemical Company v Commission, C□179/12 P, not published, EU:C:2013:605, paragraph 55, and of 26 September 2013, EI du Pont de Nemours v Commission, C□172/12 P, not published, EU:C:2013:601, paragraph 44), or by proving that that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities (judgment of 26 October 2017, Global Steel Wire and Others v Commission, C□457/16 P and C□459/16 P to C□461/16 P, not published, EU:C:2017:819, paragraph 83 and the case-law cited).*

According to this paragraph, the existence of control can be demonstrates establishing that the parent company has the ability to exercise a decisive influence over its subsidiary's conduct, what is coherent but obvious as the ability to exercise a decisive influence is the essence of the control, or establishing of the control exercise, in relation with the conduct; but also proving that that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, in this case, without necessary reference to the conduct.

Control exercise in relation of the conduct and prove of the subsidiary is carrying out the instructions given by its parent company on the market are seen by paragraph 96 of *Deutsche Telekomm* as alternatives, to prove the control existence.

> *96 Those two means of proving that control must be regarded as being not cumulative but alternative and therefore equivalent. At most, it can be considered that a subsidiary carrying out the instructions given by its parent company on the market concerned by the anticompetitive practices in question potentially constitutes a form of decisive influence exercised by that parent*

company over its subsidiary and not, as submitted by the appellant, an additional condition that the Commission must demonstrate in order to be able to impute that subsidiary's conduct to the parent company.

2. Control exercise

Control actual exercise shall not be identified with the German *einheitlichen Leitung* – common management -. Control exercise seems to be equivalent to *Kontrolle ausubung* or *bestimmenden Einfluss ausubung.* Control exercise refers to the conduct object of the Decision of the Commission appealed. The prove of its existence implies the prove of the existence of instructions from the parent company to the subsidiary in order the conduct object of the Decision.

European Court of Justice *Deutsche Telekomm* decision clarify that the same facts may be used by the court as evidence of control and exercise of control at the same time.

Facts that evidence the existence of the power or its exercise may be the same or different, and can be take isolated or in conjunction with other facts, as its decided in paragraph 77 Case C-152/19 P. *Deutsche Telekom*

> 77***…, the Commission may also take into consideration, in the context of an overall assessment of the situation in question, a fact that contributes to demonstrating that the parent company has the ability to exercise decisive influence over its subsidiary, where such a fact, examined in the light of or in conjunction with other facts relating to that situation, is part of a body of consistent evidence relating to actual and decisive influence of the parent company over its subsidiary****.*

The way in which a company owes control power over other is indifferent, it can be the possibility of exercise enough rights of vote or a contract. It could be interlocking directorates or special market or dependence circumstances unit to contracts or shareholding positions. What is relevant is the evidence of the fact that one company owes a power of decisive influence the market decision of other one. Only note that it may be the case where the internal shareholding power is less than thresholds of presumption of control demands. In this case, for instance a company with a shareholder who owes or may exercise the forty per cent of the voting rights acquired three months ago when the participation of other shareholders doesn't exceed the one per cent.

3. Prove that subsidiary does not determine independently its own conduct on the market

Paragraphs 74 to 77 of *Deutsche Telekomm* decision of the Court of Justice, try to integrate all the ways of analysis that the Court has used in the last decades in an unitary doctrine which coherence will be sure object of futures commentaries and decisions.

As paragraphs 74 to 76 of *Deutsche Telekomm* decision of the Court of Justice remember

> *74 … in accordance with the Court's settled case-law, liability for the conduct of a subsidiary may be imputed to the parent company in particular where,* ***although having a separate legal***

personality, that subsidiary does not determine independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities *(see, inter alia, judgments of 10 September 2009, Akzo Nobel and Others v Commission, C‑97/08 P, EU:C:2009:536, paragraph 58; of 10 April 2014, Areva and Others v Commission, C‑247/11 P and C‑253/11 P, EU:C:2014:257, paragraph 30; and of 18 January 2017, Toshiba v Commission, C‑623/15 P, not published, EU:C:2017:21, paragraph 45). In such a situation, the instructions given by the parent company can constitute a form of decisive influence exercised by that company over its subsidiary.*

75 In examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary, ***account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, account must be taken of the economic reality*** *(judgments of 24 June 2015, Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, C‑293/13 P and C‑294/13 P, EU:C:2015:416, paragraph 76, and of 18 January 2017, Toshiba v Commission, C‑623/15 P, not published, EU:C:2017:21, paragraph 46).*

76 Therefore, while the instructions given by the parent company to its subsidiarity affecting its market conduct can constitute sufficient evidence of such decisive influence, they are not the only permissible evidence. ***The exercise of decisive influence by a parent company over its subsidiary's conduct may*** *also* ***be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such influence*** *(judgments of 24 June 2015, Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, C‑293/13 P and C‑294/13 P, EU:C:2015:416, paragraph 77, and of 18 January 2017, Toshiba v Commission, C‑623/15 P, not published, EU:C:2017:21, paragraph 47).*

What is unclear is the extension and intensity of the control that shall be reflect by the facts take in account. What is clear is that the analysis shall be develop taking account the economic reality of the economic, organizational and legal links which tie the subsidiary to its parent company, that the conclusion that shall be reached is that subsidiary does not determine independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company and that the exercise of decisive influence by a parent company over its subsidiary's conduct may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such influence.

4. Control and Undertaking.

The concept of undertaking is an autonomous concept of the EU Competition Law and design the addressee of the prohibitions on articles 101 and 102 TFUE. The ECJ has assert in many cases the existence of one undertaking, and has explain us some of its characteristics, as in Skanska at 29 and 36 cited by Deutsche Telekomm at 72. Now in this last paragraph the ECJ essays a true concept of undertaking as

any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed

In the light of the recent jurisprudence of the ECJ we cited in our last contribution if this web the past 26th July on the *Goldman Sachs* case, It should be understand be included in the term entity not only the legal entity but also an economic entity composed by a plural legal entity that conform a single economic unit. As Deutsche Telekomm at 72 saids

> *the concept of 'undertaking' referred to in Articles 101 and 102 TFEU must be construed as designating an economic unit, for the purpose of the subject matter of the anticompetitive practice in question, even if in law that economic unit consists of several natural or legal persons*

The reference of the three elements of the undertaking personal, material and immaterial, comes from the organicist doctrine.

As was said in *Skanska* at 47 and confirm by *Deutsche Telekomm* at 72 the concept of undertaking is an autonomous concept of the European Competition Law and shall be interpreted and applied by national courts following the doctrine of ECJ. This concept as said in Skanska at 47

> *47…cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.*

So, after parent liability by control and control exercise, the European Court of Justice developed the single economic unit doctrine constructed on the European competition law autonomous concept of undertaking used by articles 101 and 102 TFEU to designate the perpetrator of an infringement of competition law that may be sanctioned or can be liable to compensate damages.

As personal liability was linked with legal personality ECJ links personal liability to the economic entity, the single economic unit present in the case.

At is said in *Deutsche Telekomm* at 73

> *73…where such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement…*

And as a consequence that

> *73… a legal person may, under certain conditions, be held personally jointly and severally liable for the anticompetitive conduct of another legal person belonging to the same economic entity…*

This two forms to assert the parent liability through control or control exercise and through participation in an anticompetitive conduct as a part of an undertaking, has been used for the Court mostly separately. In last times the ECJ decisions have been walking the road to create an unitary doctrine with both by the way to integrate control and control exercise liability into the single economic doctrine.

72 As regards the substance, it should be recalled that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law that may be sanctioned pursuant to Articles 101 and 102 TFEU. ***This autonomous concept of EU law designates any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed*** *(see, to that effect, judgment of 14 March 2019, Skanska Industrial Solutions and Others, C-724/17, EU:C:2019:204, paragraphs 29, 36 and 47). Thus,* ***the concept of 'undertaking' referred to in Articles 101 and 102 TFEU must be construed as designating an economic unit, for the purpose of the subject matter of the anticompetitive practice in question, even if in law that economic unit consists of several natural or legal persons*** *(see, to that effect, judgments of 12 July 1984, Hydrotherm Gerätebau, 170/83, EU:C:1984:271, paragraph 11, and of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, paragraph 53 and the case-law cited).*

73 It follows from that choice, ***first****, that,* ***where such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement*** *(see, to that effect, judgment of 29 September 2011, Elf Aquitaine v Commission, C-521/09 P, EU:C:2011:620, paragraph 53 and the case-law cited), and,* ***second****,* ***that a legal person may, under certain conditions, be held personally jointly and severally liable for the anticompetitive conduct of another legal person belonging to the same economic entity*** *(see, to that effect, judgment of 27 April 2017, Akzo Nobel and Others v Commission, C-516/15 P, EU:C:2017:314, paragraph 57 and the case-law cited).*

5. Control and single economic unit

As we have seen before *Deutsche Telekomm* decision of the Court of Justice, integrates parent liability by control and control exercise in the European notion of undertaking constructed on the single economic unit between the participants of the conduct or the one and only economic entity. As paragraphs 94 and 95 of the *Deutsche Telekomm* decision of the Court of Justice said.

As it is said by *Deutsche Telekomm* at 94 parent and subsidiary

94…can be regarded as forming an economic unit for the purpose of the subject matter of the anticompetitive practices referred to in those provisions where the parent company exercises control over the conduct of its subsidiary which is the perpetrator of an infringement of those provisions on the market in question.

Deutsche Telekomm at 94 also deals with the question of the formal separation between the parent company and its subsidiary, with a language, in my opinion, unnecessary next form this of the piercing the veil doctrine.

94… In such circumstances, the formal separation between the parent company and its subsidiary, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purpose of applying Articles 101 and 102 TFEU…

In my opinion the application of the single economic unit doctrine in these cases does not constitute a form of lifting the veil of legal personality, but obeys grounds and motivations other than the latter.

The piercing the veil of legal personality doctrine start from the relevance of legal personality and does not apply it in exceptional cases in which it is considered that it has been abused, that the rules establishing the legal personality of certain estates have been used to defraud other rules, or when it turns out to be a mere fiction.

Its application is of an exceptional nature, anchored by jurisprudence in the abuse of rights, fraud of law, and in general the violation of the general principle of good faith.

The irrelevance of the different legal personality in competition law is purely physiological and not pathological, general and not exceptional, and derives from the relevance in competition law of the economic reality as opposed to the legal categories of private law elaborated for purposes other than those that inform competition law.

The single economic unit doctrine is applied according to requirements that have nothing to do with the existence of abuse of rights, fraud of law or violation of the general principle of good faith.

The ECJ doctrine about the undertaking represents a paradigm shift. The target of the rule is the undertaking, conceived as an economic unit capable of autonomously setting its line of action in the market, regardless of whether it is made up of one or several different legal entities.

For all these reasons, the treatment of the legal relevance of the existence of a single economic unit should not be mixed, or even approached, not even in language, in our opinion, with the constellation of problems derived from the lifting of the veil of legal personality.

Such proximity may encourage a very fragmentary application of the doctrine by national courts, according to their own national conceptions of the lifting of the veil of legal personality, far from the true meaning of the single economic unit doctrine in European competition law, especially in the field of private enforcement, which should be avoided.

> *94 As is apparent from paragraph 72 of the present judgment,* ***the possibility of imputing a subsidiary's anticompetitive conduct to its parent company constitutes one of the consequences of the choice of the authors of the Treaties to use the concept of undertaking to designate the perpetrator of an infringement of competition law that may be sanctioned pursuant to Articles 101 and 102 TFEU. Those legal persons can be regarded as forming an economic unit for the purpose of the subject matter of the anticompetitive practices referred to in those provisions where the parent company exercises control over the conduct of its subsidiary which is the perpetrator of an infringement of those provisions on the market in question. In such circumstances, the formal separation between the parent company and its subsidiary, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purpose of applying Articles 101 and 102 TFEU*** *(see, to that effect, judgment of 14 July 1972, Imperial Chemical Industries v Commission, 48/69, EU:C:1972:70, paragraph 140).*
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> *97 Having regard to the above, the General Court did not err in law by considering, in essence, in paragraphs 470 and 471 of the judgment under appeal, that the appellant and ST formed an economic unit during the infringement period on the ground that, in the light of the elements set out in paragraphs 237 to 464 of the judgment under appeal, the* ***appellant had exercised decisive influence over*** *ST by defining ST's* ***general strategy on the market concerned. The***

Commission was not required to prove that ST had also followed the instructions of the appellant in all material respects in order to impute to it the infringement committed by ST.