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 alternatives to impute parent liability.

Facts demonstrating that the parent company was in a position to exercise decisive influence over subsidiary can be taken into account, in the light of or in conjunction with other facts relating to that situation, as indications contributing to a finding of an actual exercise of such influence. These facts can conform a part of a body of consistent evidence relating to actual and decisive influence of the parent company over its subsidiary. Decisive influence and absence of decisional autonomy as alternatives to impute parent liability. Rights of defence. (JIRP)

TEXTO DE LA ENTRADA

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.

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Tags: Abuse of dominance. Conditions to give a competitor access to infrastructure that it had developed for the needs of its own business. Refusal of access. Indispensability of access. Absence of actual or potential substitute. Parent liability. Undertaking autonomous European competition concept. Control. Control exercise. Facts demonstrating control and control exercise.Decisive influence. Absence of decisional autonomy. Rights of defence.

Context:

Deutsche Telekom AG - the appellant - is the incumbent telecommunications operator in Germany. During the period between 12 August 2005 and 31 December 2010, the appellant owned 51% of the capital of the incumbent telecommunications operator in Slovakia, Slovak Telekom a.s. ('ST'). ST, which enjoyed a legal monopoly on the Slovak telecommunications market until 2000, is the largest telecommunications operator and broadband provider in Slovakia. ST's copper and mobile networks cover almost the entire Slovak territory.

Following a market analysis, in 2005 the Slovak national regulatory authority for telecommunications ('the TUSR') designated ST as an operator with significant power on the wholesale market for unbundled access to the local loop within the meaning of Regulation No 2887/2000.

Consequently, the TUSR imposed on ST, inter alia, the requirement to grant all reasonable and justified requests for unbundling of its local loop in order to enable alternative operators to use that loop with a view to offering their own services on the retail mass market for broadband internet access services at a fixed location in Slovakia. In order to make it possible to fulfil that obligation, ST published its reference unbundling offer which set out the contractual and technical conditions for access to its local loop.

Following an investigation of the Commission, opened on its own initiative, into, inter alia, the conditions for unbundled access to ST's local loop, a statement of objections sent to ST and the appellant on 7 and 8 May 2012, respectively, a proposal for commitments and various meetings and exchanges of correspondence, the Commission adopted the decision at issue on 15 October 2014.

By that decision, the Commission found that the undertaking comprising ST and the appellant had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), concerning broadband internet access services in Slovakia between 12 August 2005 and 31 December 2010.

In particular, it stated that ST's local loop network, which could be used to supply broadband internet access services after the lines concerned have been unbundled from that operator, covered 75.7% of all Slovak households between 2005 and 2010. However, during that same period, only very few of ST's local loops were unbundled, as from 18 December 2009, and were used only by a single alternative operator to provide retail broadband services to undertakings.

According to the Commission, the infringement committed by the undertaking comprising the appellant and ST consisted in, first, withholding from alternative operators network information necessary for the unbundling of local loops, second, reducing the scope of ST's obligations regarding unbundled local loops, third, setting unfair terms and conditions in ST's reference unbundling offer regarding collocation, qualification, forecasting, repairs and bank guarantees, and fourth, applying unfair tariffs which did not allow a competitor as efficient as ST relying on wholesale access to the unbundled local loops of that operator to replicate the retail broadband services offered by that operator without incurring a loss.

By the decision at issue, the Commission imposed for that infringement, first, a fine of EUR 38 838 000 on the appellant and ST, jointly and severally, and second, a fine of EUR 31 070 000 on the appellant.

The appellant brought an annulment action relied on five pleas in law alleging, first, errors of fact and of law in the application of Article 102 TFEU as regards ST's abusive conduct, and a breach of the rights of the defence, second, errors of fact and of law as regards the duration of ST's abusive conduct, third, errors of law and of fact in the imputation of ST's abusive conduct to the appellant, in so far as, in its view, the Commission has not proved that the appellant did indeed exercise a decisive influence over ST, fourth, misinterpretation of the concept of 'undertaking' within the meaning of EU law and breach of the principle that the penalty must be specific to the offender and the offence, and failure to state reasons, and fifth, errors in the calculation of the amount of the fine for which ST and the appellant were held jointly and severally liable.

The General Court rejected all the pleas in law by Judgment of the General Court (Ninth Chamber, Extended Composition) of 13 December 2018. Case T-827/14. Deutsche Telekom AG v European Commission. ECLI:EU:T:2018:930.

Doctrine:

Abuse of dominance

41 In accordance with the Court's settled case-law, the concept of 'abuse of a dominant position', within the meaning of Article 102 TFEU, is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because

of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (judgment of 30 January 2020, Generics (UK) and Others, C‑307/18, EU:C:2020:52, paragraph 148 and the case-law cited).

42 The examination of the abusive nature of a dominant undertaking's practice pursuant to Article 102 TFEU must be carried out by taking into consideration all the specific circumstances of the case (see, to that effect, judgment in TeliaSonera, paragraph 68; and judgments of 6 October 2015, Post Danmark, C‑23/14, EU:C:2015:651, paragraph 68, and of 19 April 2018, MEO – Serviços de Comunicações e Multimédia, C‑525/16, EU:C:2018:270, paragraphs 27 and 28).

43 As follows from paragraph 37 of the judgment in Bronner, the case which gave rise to that judgment concerned the question whether the refusal of the owner of the only nationwide home-delivery scheme in the territory of a Member State, which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival newspaper access to it constituted an abuse of a dominant position, within the meaning of Article 102 TFEU, on the ground that such refusal deprives that competitor of a means of distribution judged essential for the sale of its products.

44 In response to that question, the Court found, in paragraph 41 of that judgment, that for that refusal to have constituted an abuse of a dominant position, it would have been necessary not only that the refusal of the service comprised in home delivery were likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal were incapable of being objectively justified, but also that the service in itself were indispensable to carrying on that person's business, inasmuch as there was no actual or potential substitute in existence for that home-delivery scheme.

45 The imposition of those conditions was justified by the specific circumstances of that case which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct.

48 … where a dominant undertaking refuses to give access to an infrastructure that it has developed for the needs of its own business, the decision to oblige that undertaking to grant that access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

49 …that undertaking may be forced to give a competitor access to an infrastructure that it has developed for the needs of its own business only where such access is indispensable to the business of such a competitor, namely where there is no actual or potential substitute for that infrastructure.

50 By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in paragraph 41 of the judgment in Bronner do not apply. It is true that where access to such an infrastructure – or service or input – is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anticompetitive effects and will constitute abuse within the meaning of Article 102 TFEU (see, to that effect, judgment of 14 October 2010,

Deutsche Telekom v Commission, C‑280/08 P, EU:C:2010:603, paragraph 234, and judgment in TeliaSonera, paragraphs 70 and 71). Nevertheless, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purposes of the examination of potentially abusive practices on the part of a dominant undertaking (see, to that effect, the judgment in TeliaSonera, paragraph 72).

51 While such practices can constitute a form of abuse where they are able to give rise to at least potentially anticompetitive effects, or exclusionary effects, on the markets concerned, they cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted. The measures that would be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business.

52 To that effect, the Court of Justice has previously held, in paragraphs 75 and 96 of the judgment of 10 July 2014, Telefónica and Telefónica de España v Commission (C‑295/12 P, EU:C:2014:2062), that the conditions laid down by the Court of Justice in paragraph 41 of the judgment in Bronner, and in particular the condition relating to the indispensability of the access, did not apply in the case of abuse in the form of a margin squeeze of competitor operators in a downstream market.

53 To the same effect, the Court of Justice held, in paragraph 58 of the judgment in TeliaSonera, in essence, that it cannot be required that the examination of the abusive nature of any type of conduct of a dominant undertaking towards its competitors be systematically carried out in the light of the conditions laid down by the Court of Justice in the judgment in Bronner, which concerned a refusal to provide a service. Therefore, the General Court was right to find, in paragraphs 108 to 110 of the judgment under appeal, that, in paragraphs 55 to 58 of the judgment in TeliaSonera, the Court of Justice was not referring only to the particular form of abuse constituted by a margin squeeze of competitor operators in a downstream market when it assessed the practices to which the conditions of the judgment in Bronner did not apply.

54 In the present case, ST's situation was characterised in particular by the fact, referred to in paragraph 99 of the judgment under appeal, that it was subject to a telecommunications regulatory obligation, in accordance with which it was required to give access to its local loop network. Following the decision of 8 March 2005 of the TUSR, confirmed by the director of that authority on 14 June 2005, ST was required to grant, in its capacity as operator with significant market power, all alternative operators' reasonable and justified requests for unbundling of its local loop, in order to enable those operators, on that basis, to offer their own services on the retail mass market for broadband services at a fixed location in Slovakia.

55 Such an obligation meets the objectives of development of effective competition on the telecommunications markets laid down by the EU legislature. As indicated in recitals 3, 6 and 7 of Regulation No 2887/2000, the imposition of such an access obligation is justified by the fact that, first, as operators with significant market power were able, over significant periods of time, to roll out their local access networks protected by exclusive rights and fund investment costs through monopoly rents, it would not be economically viable for new entrants to duplicate the incumbent's local access infrastructure and, second, alternative infrastructures do not constitute a viable substitute for those local

access networks. Unbundled access to the local loop would therefore be such as to allow new entrants to compete with operators with significant market power. It follows that, as the General Court recalled in paragraph 99 of the judgment under appeal, the access obligation imposed in the present case by the TUSR resulted from the intention to encourage ST and its competitors to invest and innovate, whilst ensuring that competition in the market is maintained.

56 That regulatory obligation applied to ST during the entire infringement period taken into account by the Commission in the decision at issue, or from 12 August 2005 until 31 December 2010. In addition to the fact that, pursuant to Article 8(5)(f) of Directive 2002/21, as amended by Directive 2009/140, the telecommunications regulatory authorities may impose such an access obligation only where there is no effective and sustainable competition and are required to relax or lift it as soon as that condition is fulfilled, the appellant has neither alleged nor demonstrated that it has disputed that ST was subject to such an obligation during the infringement period. Moreover, the Commission stated the reasons for the existence of such an access obligation in section 5.1 of the decision at issue and noted, in recital 377 of that decision, that it had carried out its own ex post analysis of the markets in question to find that the situation on those markets had not significantly changed in that regard during the infringement period.

57 By analogy with the Court of Justice's findings in paragraph 224 of the judgment of 14 October 2010, Deutsche Telekom v Commission (C‑280/08 P, EU:C:2010:603), referred to in paragraph 97 of the judgment under appeal, it should be considered that a regulatory obligation can be relevant for the assessment of abusive conduct, for the purposes of Article 102 TFEU, on the part of a dominant undertaking that is subject to sectoral rules. In the context of the present case, while the obligation imposed on ST to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU, by taking account in particular of the applicable case-law, the imposition of that obligation has the consequence that, during the entire infringement period taken into account in the present case, ST could not and did not actually refuse to give access to its local loop network.

58 However, ST retained, during that period, decision-making autonomy, notwithstanding the abovementioned regulatory obligation, in respect of the conditions for such access. Apart from certain guiding principles, the mandatory content of the local loop unbundling reference offer, referred to in Article 3 of Regulation No 2887/2000, was not prescribed by the regulatory framework or by the decisions of the TUSR. It was in accordance with that decision-making autonomy that ST adopted the practices at issue.

59 Nevertheless, as the practices at issue did not constitute refusal of access to ST's local loop but related to the conditions for such access, for the reasons referred to in paragraphs 45 to 51 of the present judgment, the conditions set out by the Court of Justice in paragraph 41 of the judgment in Bronner, referred to in paragraph 44 of the present judgment, did not apply in the present case.

60 Therefore, the General Court did not err in law when it considered, in paragraph 101 of the judgment under appeal, that the Commission was not required to demonstrate 'indispensability', for the purposes of the last condition set out in paragraph 41 of the judgment in Bronner, in order to find an abuse of a dominant position on the part of ST by virtue of the practices at issue.

Parent liability

68 … in accordance with the Court's settled case-law, where the General Court has determined or assessed the facts, the Court of Justice has sole jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn from them. The assessment of the facts is not therefore, other than in cases where the evidence produced before the General Court has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, inter alia, judgment of 17 October 2019, Alcogroup and Alcodis v Commission, C‑403/18 P, EU:C:2019:870, paragraph 63 and the case-law cited).

69 The appellant has not claimed, in the second ground of appeal, that the evidence examined by the General Court demonstrating that the appellant could be held responsible for ST's conduct was distorted, and it is not for the Court of Justice to re-examine its evidential value.

70 By the second part of that ground of appeal, however, the appellant asserts that the General Court erroneously considered that the Commission could rightly rely on a certain number of facts in order to conclude that there was actual exercise of decisive influence by the appellant over ST, whereas, in the appellant's view, those facts are only such as to demonstrate that such influence is possible. According to the appellant, it follows from that that the General Court erroneously classified those facts as constituting actual decisive influence on the part of the appellant over ST. Thus, by that part of its second ground of appeal, the appellant is not requesting that the Court of Justice carry out a new assessment of the facts but that it review their legal classification by the General Court.

71 It follows that the second part of the second ground of appeal is admissible.

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).

74 Thus, 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).

77 As follows from paragraphs 75 and 76 of the present judgment, 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. Therefore, contrary to what the appellant asserts, 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.

Decisive influence and absence of decisional autonomy as alternatives to impute parent liability

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).

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).

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.

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.

Rights of defence

105 The rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures (judgment of 25 October 2011, Solvay v Commission, C□109/10 P, EU:C:2011:686, paragraph 52 and the case-law cited). That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union and applies where the authorities are minded to adopt a measure which will adversely affect an individual

(see, to that effect, judgment of 16 January 2019, Commission v United Parcel Service, C‑265/17 P, EU:C:2019:23, paragraph 28 and the case-law cited).

106 In the context of competition law, observance of the rights of the defence means that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement (see, to that effect, judgments of 5 December 2013, SNIA v Commission, C‑448/11 P, not published, EU:C:2013:801, paragraph 41, and of 14 September 2017, LG Electronics and Koninklijke Philips Electronics v Commission, C‑588/15 P and C‑622/15 P, EU:C:2017:679, paragraph 43).

The Court of Justice dismisses the appeal.