Case C-857/19

Request for a preliminary ruling

Date lodged:

26 November 2019

Referring court:

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, Slovakia)

Date of the decision to refer:

12 November 2019

Applicant:

Slovak Telekom, a.s.

Defendant:

Protimonopolný úrad Slovenskej republiky (Antimonopoly Office of the Slovak Republic)

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)

ORDER

The Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) as the court of cassation in the case brought by the applicant, **Slovak Telekom, a.s.**, […] with its seat in Bratislava, […] [address of the seat] […] against the defendant authority, **Protimonopolný úrad Slovenskej republiky** (the Antimonopoly Office of the Slovak Republic), with its seat in Bratislava, […] [address of the seat] concerning a review of the legality of the decision of the Rada Protimonopolného úradu Slovenskej republiky (Board of the Antimonopoly Office of the Slovak Republic) […] of 9 April 2009 in the proceedings regarding an appeal on a point of law brought by the applicant against the judgment of the Krajský súd v Bratislave (Regional Court in Bratislava, Slovakia) […] of 21 June 2017

has ordered as follows:

pursuant to Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), a question is submitted to the Court of Justice of the European Union for a preliminary ruling concerning the interpretation of the first sentence of Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty:

> Does the phrase 'shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty' mean that the authorities of the Member States lose their powers to apply Articles 81 and 82 of the Treaty?
>
> Does Article 50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, also apply to administrative offences consisting of the abuse of a dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union for which the Commission and the authority of a Member State have imposed sanctions separately and independently in the exercise of their powers under Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002?
>
> The proceedings are stayed.

Grounds

I. Proceedings before the Najvyšší súd (Supreme Court).

1. The Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) as the court of cassation in the proceedings [file reference No] […] is examining the appeal on a point of law brought by the applicant Slovak Telekom, a.s., with its seat in Bratislava, against the judgment of the Krajský súd v Bratislave (Regional Court in Bratislava) […] of 21 June 2017, by which the Regional Court as the competent administrative court dismissed the action brought by the applicant against the final **[Or. 2]** decision of the defendant authority No […] of 9 April 2009. The court of cassation has come to the preliminary conclusion that Article 81 of the Treaty (Article 102 TFEU) was applied to the applicant in parallel by both the Commission and the defendant authority for its infringement, between 12 August 2005 and 21 December 2007, of the margin squeeze prohibition in the retail mass market for broadband services at a fixed location and in the wholesale market for access to unbundled local loops.

II. Decision of the Antimonopoly Office of the Slovak Republic […]

2. By Decision No […] of 9 April 2009, issued at second instance, the Board of the Antimonopoly Office of the Slovak Republic amended point 11 of the contested decision issued at first instance on 21 December 2007 by the defendant authority as follows: pursuant to Paragraph 38(1) in conjunction with Paragraph 2(3) of the

Zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky (Law No 136/2001 on the Protection of Competition and Amending and Supplementing Law No 347/1990 of the Slovak National Council on the Organisation of Ministries and Other Central State Authorities of the Slovak Republic), as amended, the Board imposed on Slovak Telekom, a.s., […] a fine for its abuse of a dominant position (within the meaning of Article 82 of the Treaty), as set out in points 1 to 8 of the operative part of the decision, amounting to EUR 17 453 362.54 (SKK 525 800 000), which Slovak Telekom, a.s., was required to pay within 60 days of the date on which that decision became final.

3. The abuse of a dominant position is described in points 1 to 6 of the operative part of Decision No […] of 9 April 2009 as consisting in the following conduct by Slovak Telekom, a.s., in the retail market: [(1) applying a rate of EUR 0.033 for 30 minutes; (2) applying the free call rate; (3) applying the retail price for the 'Mini Business Internet' product; (4) applying the retail price for the 'Family Internet' product; (5) applying the retail price for the 'Business Partner' product] while at the same time applying wholesale termination rates, which amounts to margin squeeze and the abuse of a dominant position within the meaning of Article 82(a) of the Treaty establishing the European Community and Paragraph 8(2)(a) of Law No 136/2001 on the Protection of Competition.

4. In recital 297 of Decision No […] of 9 April 2009 of the Board of the Antimonopoly Office of the Slovak Republic, the duration of the infringement of the aforementioned Law is determined as follows:

   a) Points 1 and 2 of the operative part — from 15 June 2004, stated rates: EUR 0.033 (SKK 1)/30 minutes until the date of the decision, namely, 3 years and 4 months. Point 5 of the operative part: from 1 March 2005 until the date of the decision, namely, 2 years and 9 months. As regards free calls (point 2 of the operative part), the Board of the Office, as indicated above, determined the start date of the infringement period differently (the Office had determined the start date to be 1 August 2005), since the rate in question had already been introduced onto the market under the first tariff scheme on 15 June 2004. According to the Board, this conclusion does not result in an increase in penalty due to the fact that the authority of first instance correctly assessed that the rates in question alternated with tariff schemes over time, with free calls replacing the rate of EUR 0.033 (SKK 1) for 30 minutes in most cases, and as regards the infringement period, it was assessed in its entirety as medium-term infringement by the authority of first instance.

   b) Points 3 and 4 of the operative part — those also concerned medium-term infringement (that is, lasting from 1 to 5 years) in the case of the 'Mini Business Internet' (from 1 July 2005 until the date of the

decision) and in the case of the 'Family Internet' (from 1 August 2004 until the date of the decision).

c) Point 6 of the operative part — from 1 August 2002 until the date of the decision, which constitutes long-term infringement.

d) Point 7 of the operative part — from 1 January 2003 until the date of the decision, which constitutes medium-term infringement.

e) Point 8 of the operative part of the decision — as regards the bundling of dial-up Internet access with the ordering of a telephone service from 1 May 2001 until the date of the decision (long-term infringement), and as regards high-speed broadband Internet access from 1 June 2003 until the date of the decision (medium-term infringement). **[Or. 3]**

III. Commission Decision C(2014) 7465

5. In Decision C(2014) 7465 of 15 October 2014 (Case AT.39523 — Slovak Telekom) relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, the European Commission, Directorate-General for Competition, resolved in Article 1(1) and (2) that the undertaking formed by Deutsche Telekom AG and Slovak Telekom, a.s., committed a single and continuous infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement. The infringement in question lasted from 12 August 2005 until 31 December 2010 and consisted of the following practices:

a) withholding from alternative operators network information necessary for the unbundling of local loops;

b) reducing the scope of its obligations regarding unbundled local loops;

c) setting unfair terms and conditions in its Reference Unbundling Offer regarding collocation, qualification, forecasting, repairs and bank guarantees;

d) applying unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to the unbundled local loops of ST to replicate the retail broadband services offered by ST without incurring a loss.

6. For the infringement referred to in Article 1, the Commission imposed the following fines:

a) a fine of EUR 38 838 000 on Deutsche Telekom AG and Slovak Telekom, a.s., jointly and severally;

b) a fine of EUR 31 070 000 on Deutsche Telekom AG.

7. It follows from recital (1507) of the statement of reasons for European Commission Decision C(2014) 7465 of 15 October 2014 (Case AT.39523 — Slovak Telekom) that the European Commission found a single and continuous infringement; the decision establishing in detail in parts 7 and 8 thereof that Slovak Telekom engaged in a margin squeeze and in a refusal to supply strategy regarding access to its unbundled local loops.

8. According to recital (1508) of the Commission's statement of reasons, 'each of these measures … would constitute an infringement of Article 102 of the Treaty in its own right. The Commission considers, however, that they form, taken together, a single and continuous infringement because all of these measures had the object (and likely effect) [of] restrict[ing] and distort[ing] competition within the retail mass market for broadband services at a fixed location in Slovakia … and [of] protect[ing] ST's revenues and market position on the mass market for broadband services.[']

9. European Commission Decision C(2014) 7465 of 15 October 2014 (Case AT.39523 — Slovak Telekom) became the subject of proceedings at first instance before the General Court in *Slovak Telekom v European Commission*, T-851/14, and of an appeal before the Court of Justice in Case C-165/19 P.

IV. Grounds for the reference

10. Pursuant to Paragraph 196 of the Zákon č. 162/2015 Z. z. Správny súdny poriadok (Law No 162/2015 on Administrative Court Proceedings, 'the SSP'), the court of cassation, by its order […] of 29 May 2019, ordered the parties to the proceedings to submit within 15 days their observations on compliance with the *ne bis in idem* principle in relation to the abuse of a dominant position in the form of a margin squeeze within the meaning of Article 102 of the Treaty on the Functioning of the European Union during the overlapping part of the period in question (from 12 August 2005 until the date of the first-instance decision by the Antimonopoly Office of the Slovak Republic […] of 21 December 2007). **[Or. 4]**

11. In its submission of 29 May 2019 on compliance with the *ne bis in idem* principle, the defendant authority — the Antimonopoly Office of the Slovak Republic — indicated (in paragraphs 12, 13 and 14) that although both cases concerned an infringement of Article 102 TFEU (formerly Article 82 EC) — the abuse of a dominant position — they were two separate cases (the European Commission made a substantive assessment of a case different to that assessed by the Antimonopoly Office). It is clear from the content of both decisions that the Antimonopoly Office or its Board and the European Commission assessed different products: the Office assessed products at the retail level and the European Commission at the wholesale level. In any event, the cases in question were not identical and thus there could not have been any substantial overlap between them. Therefore, there could not have been any infringement of the *ne bis in idem* principle.

12. According to the defendant authority, the decision of the Board of the Office could not have infringed the *ne bis in idem* principle because of what has been stated above, but above all because of the timeframe, since the Antimonopoly Office or its Board issued its decision in 2009, that is to say, five years before the Commission's decision was issued. In the event of doubt, this would have been a question primarily for the General Court in relation to the Commission's decision, but the General Court did not make such a finding.

13. In its submission of 14 June 2019, the applicant stated that both sanctions were imposed for conduct which, according to both the Commission and the defendant authority, was aimed at weakening or eliminating competition, and that this would not have occurred had there been sufficient wholesale access to the applicant's infrastructure, in particular to the ULL. According to the Commission, together with the margin squeeze and the refusal to grant access to the local loop, this conduct constituted a single and continuous infringement. Any other effects of this single and continuous infringement could not subsequently be penalised by another authority in separate proceedings and by a separate sanction. The proceedings leading to the Commission's decision were formally instituted, as stated in recital 12 of the Commission's decision, by the Commission opening formal proceedings against the applicant on 8 April 2009 (the day before the defendant authority's decision was issued at second instance), but already on 13 June 2008 the Commission had requested the applicant's competitors to provide information on the applicant's practices, and from 13 to 15 January 2009 it had carried out an unannounced inspection at the applicant's premises in cooperation with the defendant authority. The defendant authority was undoubtedly aware of the proceedings conducted by the Commission and of the subject matter of those proceedings, which, in their substance and duration, coincided with the subject matter of the appeal proceedings conducted by the defendant authority. The applicant considers that these infringements of the *ne bis in idem* principle and their effects fundamentally affected its legal status. In particular, it points out that it has paid both penalties, which were exceptionally high (the penalty imposed in the contested decisions issued by the defendant authority was already paid by the applicant on 20 October 2017).

14. The court of cassation disagrees with the defendant authority's position that it is clear from the content of both decisions that the Antimonopoly Office or its Board and the European Commission assessed different products. It clearly follows from the contested decision that the abuse of a dominant position was described in points 1 to 5 of the operative part of Decision No […] of 9 April 2009 as pertaining to the conduct of Slovak Telekom, a.s., in the retail market (for instance, application of the free call rate with the simultaneous application of wholesale termination rates, which amounts to margin squeeze, that is, the abuse of a dominant position within the meaning of Article 82(a) of the Treaty establishing the European Community and Paragraph 8(2)(a) of Law No 136/2001 on the Protection of Competition[)].

15. In the view of the court of cassation, the undertaking's practice as determined by the Commission in Article 1(2)(d) of Decision C(2014) 7465 of 15 October 2014 (Case AT.39523 — Slovak Telekom), which consisted in the application of unfair tariffs which did not allow an equally efficient competitor relying on wholesale access to the unbundled local loops of ST to replicate the retail broadband services offered by ST without incurring a loss, coincides with the conduct referred to in points 1 to 5 of decision No **[Or. 5]** […] of 9 April 2009. In recital 86 of its decision, the Commission defined two markets which are closely related, namely: (a) the retail market for broadband services at a fixed location; and (b) the wholesale market for access to the unbundled local loops.

16. The court of cassation has concluded that, if parallel powers are permissible within the meaning of the Article of the regulation at issue, then parallel decisions imposing penalties in connection with the same subject matter are permissible as well. As that conclusion may be contrary to the *ne bis in idem* principle, the court of cassation asks the Court of Justice of the European Union to provide an interpretation in connection with the question asked, without which it is unable to proceed.

V. European Union law and the case-law of the Court of Justice

17. Pursuant to the first sentence of Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the initiation by the Commission of proceedings for the adoption of a decision under Chapter III is to relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission is only to initiate proceedings after consulting with that national competition authority.

18. The case-law on the *ne bis in idem* principle in the present case is the judgment of the Court of Justice of the European Union of 3 April 2019 in *Powszechny Zakład Ubezpieczeń na Życie S.A.*, C-617/17, which, however, only concerns the issue of the prohibition of renewed prosecution laid down in Article 50 of the Charter of Fundamental Rights of the European Union in relation to the simultaneous application of European Union law and national law in a single decision issued by a national competition authority. The court of cassation points out that the legal situation in *Powszechny Zakład Ubezpieczeń na Życie S.A.*, C-617/17, is different from that in the proceedings before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) […], since the latter concern the independent and separate imposition of sanctions for an infringement of Article 102 of the Treaty by the Commission and by the national competition authority. The court of cassation sees a problem in the parallel imposition of sanctions under European Union law by two authorities. (For this reason, it does not cite the relevant national law).

VI. Stay of proceedings

19. Under Paragraph 100(1)(c) of the SSP, the court of cassation has stayed the proceedings […] since it has referred questions for a preliminary ruling to the Court of Justice of the European Union.

[…] [information that the order cannot be appealed]

Bratislava, 12 November 2019