Case C-52/09 TeliaSonera

Judgment of 17 February 2011

Proceedings

- A reference for a preliminary ruling under Article 267 TFEU from the Stockholm District Court
- In the course of proceedings between the Swedish Telecom operator TeliaSonera and the National Competition Authority (NCA)
- A series of questions on the interpretation of Article 102 TFEU concerning an alleged abuse of a dominant position in the form of a margin squeeze

Dispute in the main proceedings

- **TeliaSonera**
  the Swedish fixed telephone network operator, exclusive rights in the past, owns the local loop

  Offers to rivals:
  - unbundled access under legal obligation Reg (EC) 2887/2000
  - an ADSL product for wholesale users without legal obligation i.e. different from the previous cases in the telecom sector *Deutsche Telekom, Telefónica*

- **Allegation**: TeliaSonera abuses its dominant position on the wholesale market by applying a margin between the wholesale price for input ADSL products and the retail price for ADSL services, which is insufficient to cover its incremental costs on the retail market

Summary of the questions posed by the National Court

- what are the conditions under which the prices charged by a vertically integrated dominant firm for its wholesale and retail products would be abusive?
- is the finding of an anticompetitive effect necessary?
- is it necessary to prove that the wholesale input is indispensible?
- should the undertaking be dominant on the downstream market?
- is the degree of market strength relevant?
- should there by an expectation that the dominant firm would recoup its losses?
- is it relevant whether the customers are new or already existing?
- is it relevant whether the markets concerned are mature or feature new technology?

The ECJ’s ruling (1)

- As efficient competitor test
  - wholesale/retail price spread does not allow an equally efficient rival to compete for the retail service (paras 31-32)
  - wholesale and retail price do not need to be in themselves abusive (excessive or predatory) (para 34)
  - the cost and prices of the dominant undertaking are the relevant benchmark (only exceptionally those of competitors) (para 46)
  - concrete/actual effect not necessary, but at least a potential effect affecting as efficient competitors needs to be established (paras 64, 66, 72)

➢ Similar approach already in *Deutsche Telekom*

➢ Aligned with the Commission’s approach in section III C of *the Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings* (the Guidance Paper)

The ECJ's ruling (2)

- Indisponsability
  - it is the first matter to be analysed
  - when the input is indispensable at least potential anti-competitive effects are probable
  - not always necessary; abuse may exist even if the input is not indispensable but still anticompetitive effects need to be established (paras 68-72)

➢ Less stringent test for assessment of margin squeeze than the one in the Guidance Paper, but aligned with the general framework of assessing exclusionary conduct in the Guidance Paper

The ECJ's ruling (3)

- Art. 102 requires market strength amounting to dominance only, but the degree of market strength (dominance) is relevant for the assessment of the effects of the conduct (paras 81-82)

- No need to establish dominance on the retail market (similar to the case law on refusal to deal) (paras 87-89)

- No difference depending on whether the practice drives out new or existing client of the dominant undertaking (para 94-95)

The ECJ’s ruling (4)

- The fact that the dominant undertaking is unable to recoup its losses is irrelevant (already in *France Télécom*)

- The extent of the maturity of the markets is irrelevant; the cost of investment is part of the analysis of the undertaking’s costs in establishing whether a margin squeeze exists (para 110-111)

- Efficiency defence available (already in *British Airways* and *Microsoft*) (para 76)

Conclusion

- Confirms
  - Margin squeeze an independent abuse, subjected to “as efficient competitor” test
- Supports
  - the Commission’s effects-based approach and general framework of analysis of exclusionary conduct
- Novelty
  - The condition for indispensability does not need to be satisfied, margin squeeze ≠ refusal to deal