Summary of Commission Decision
of 15 October 2014
relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement
(Case AT.39523 — Slovak Telekom)
(notified under document number C(2014) 7465 final)
(Only the English and German texts are authentic)

On 15 October 2014, the Commission adopted a decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. INTRODUCTION

(1) On 15 October 2014, the Commission adopted a decision pursuant to Article 7 of Regulation (EC) No 1/2003 ('the Decision'), addressed to Slovak Telekom (ST) and Deutsche Telekom (DT), its parent company, imposing a fine on ST and DT for infringing Article 102 TFEU and Article 54 of the EEA Agreement. The Decision concerns ST’s exclusionary conduct (refusal to supply and margin squeeze), concerning its legacy broadband infrastructure. The Decision covers the period from 12 August 2005, when ST published its reference unbundling offer (RUO) setting out unfair terms and conditions for access, until 31 December 2010 (overall duration of 5 years and 4 months).

2. PROCEDURE

(2) On 13-15 January 2009 the Commission carried out an inspection under Article 20(4) of Regulation (EC) No 1/2003 at ST’s premises. The Commission initiated proceedings on 8 April 2009 against ST and on 13 December 2010 against DT. On 7 May 2012 the Commission adopted a Statement of Objections (SO) outlining its preliminary view that ST may have imposed a margin squeeze as concerns access to its unbundled local loops (ULL) and regional as well as national wholesale broadband access (WBA) to its competitors, and may have refused access to the first two of these wholesale products. The Commission took the preliminary view that DT may be liable for the conduct of its subsidiary on grounds of parental liability. On 6-7 November 2012 Oral Hearings took place.

(3) On 6 December 2013 a Letter of Facts was sent to ST and on 10 January 2014 to DT in order to provide them with the opportunity to comment on additional evidence.

(4) On 9 October 2014 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 10 October 2014 the Hearing Officer issued his final report.

3. FACTS

(5) The final decision adopted in this case concerns ST’s abusive conduct regarding access to its ULL.

(6) ST, the incumbent telecoms operator in the Slovak Republic, owns the only fixed nationwide copper access network. In accordance with the EU regulatory framework for electronic communications and pursuant to a regulatory Decision of the Slovak telecoms regulator (TUSR), ST has to give alternative operators (’AOs’) access to the ULL within its network. ST has a monopoly on the wholesale market for access to the ULL and a dominant position on the retail mass market for fixed broadband services. As a consequence of ST’s abusive behaviour, AOs did not get access to the ULL and could thus not enter the Slovak retail broadband market in a manner which would have allowed them to offer high quality retail broadband services and compete effectively with ST.

4. LEGAL ASSESSMENT

4.1. Relevant Markets

(7) In line with previous Article 102 TFEU cases (Deutsche Telekom, Telefónica, Telekommunikacja Polska (1)) the Decision defines a national wholesale market for access to ST’s ULL. This market definition is in line with the market definition carried out by TUSR, the Slovak telecoms regulator. ST started to offer access to its ULL, in line with its regulatory obligations, by publishing a reference unbundling offer (RUO) on 12 August 2005. Access to the other possible local access networks (fibre, TV cable, Fixed Wireless Access (FWA) and mobile broadband access) is not offered by the owners of these networks. It is also technically not possible for AOs to use such networks to access retail customers throughout Slovakia with a similar level of quality as over ST’s ULL. WBA is not a substitute for ULL wholesale access as the monthly fees are higher than in the case of ULL, an AO invests much less on its own infrastructure and the WBA product gives the AO very little control over the connection, with practically no possibility to differentiate its retail offering from that of ST.

(8) The Decision defines a national retail mass market for broadband services offered at a fixed location (whether wireline or wireless). The product market comprises broadband connections over xDSL, fibre, TV cable and FWA networks. Mobile broadband services are not included in the relevant market, in particular because there exist appreciable differences in quality and data usage profiles between fixed and mobile broadband services throughout the infringement period. Also, the prices and price developments, as well as the switching evidence, do not allow to conclude that fixed and mobile broadband services are part of the same relevant market.

(9) The relevant geographic retail market for fixed broadband services and the relevant geographic wholesale market for ULL access are national because ST (both in the retail and in the wholesale market) and other operators (in the retail market) act uniformly (same price, terms and conditions) across their network area. This market definition is in line with the Commission’s decisional practice in telecom cases (Deutsche Telekom, Telefónica, Telekommunikacja Polska).

4.2. Dominance

(10) The Decision concludes that ST holds a monopoly position on the wholesale ULL market and that there are no direct or indirect constraints in the form of actual or potential competition, which could limit the market power of ST as a monopoly ULL services provider. The absence of competition is explained, in particular, by the existence of high barriers to entry which make impossible the replication of ST’s network in terms of geographic and technical coverage. This conclusion in the Decision is consistent both with the Commission’s past decisional practice and with the regulation of telecommunications markets.

(11) As regards ST’s position on the retail market the Decision concludes that, throughout the analysed period, ST held a dominant position on the mass-market for retail broadband services offered at a fixed location. The market share of ST on the basis of the number of subscribers varied between [35 % - 55 %] during the infringement period. The second largest competitor, UPC, had almost a five times lower (and decreasing) market share ([5 % - 15 %] in 2010). Although ST faced some competition from AOs (in particular as regards the gradual roll-out of fibre networks), these competitors could not exercise a sufficient constraint on ST. For instance, despite its heavy investment into fibre-roll out and marketing, Orange remained only a marginal market player with a market share of [0 % - 10 %] in 2010.

4.3. Abuse of a dominant position

4.3.1. Refusal to supply ULL

(12) The Decision demonstrates that although several AOs had a strong interest in obtaining access to ULL ST set unfair terms and conditions in its Reference Offer on Unbundling (RUO), to render unbundled access to the local loop unacceptable for AOs, thereby delaying, making difficult or preventing their entry in the retail broadband services market. In particular:

(a) ST withheld from AOs the information on the network necessary for the unbundling of the local loop, not allowing AOs to prepare appropriate business plans.

(b) ST artificially reduced the scope of its unbundling obligation, by:

(i) refusing to provide access to the lines over which no service was provided but which were covered by ST’s network (‘passive lines’), therefore reserving to itself potential customers.

(ii) refusing to provide shared access to the lines over which telephone social calling plans such as ‘ST Mini’ were provided, with the consequence that ST abusively reserved for itself these potential customers for DSL.

(iii) refusing to provide access to 75% of the lines covered by its unbundling obligation due to a safety spectrum management rule allegedly meant to prevent interferences and cross-talk problems likely to appear when several services are used in the same telephone line.

(c) ST deterred AOs from unbundling by setting other unfair terms and conditions in its RUO. In particular:

(i) ST rendered the collocation process⁽¹⁾ unnecessarily burdensome and expensive and failed to provide upfront pricing information on collocation;

(ii) ST rendered the ‘qualification’ procedure⁽²⁾ mandatory and subject to fees even when not needed;

(iii) ST applied disadvantageous forecasting⁽³⁾ terms and conditions such as the fact that ST established a penalty fee for failure to comply with the forecasted amounts.

(iv) ST applied unfair terms and conditions regarding repairs, such as the possibility of shifting unilaterally its responsibility to AOs in case of insufficient cooperation in repairs;

(v) ST requested a bank guarantee whose amount was out of proportions with ST’s risks and costs for providing access to the local loops.

4.3.2. Margin Squeeze

(13) The calculations in the Decision take account of the data of ST and show that an equally efficient competitor using ST’s ULL wholesale access was facing significant negative margins and could not replicate profitably the retail broadband portfolio of ST on a lasting basis. This holds true even if additional services (voice services, IPTV, multi-play services) in a downstream portfolio are taken into account. The inclusion of voice services (voice access, voice usage) serves as a sensitivity check because these markets are not addressed by the present Decision.

4.4. Likely impact on competition and consumers

(14) ST’s behaviour deprived AOs of the possibility to compete effectively with ST and other players by relying on ULL access and engaging in the competition on the retail mass market for fixed broadband services. In line with ST’s strategy, its behaviour foreclosed AOs from the key ULL based xDSL segment of the retail market. By doing so, it artificially raised barriers to entry on the retail market by making more difficult and therefore less effective competition on the retail market, including competition based on AOs’ own networks (infrastructure-based competition).

(15) The local deployment of AOs’ networks cannot outweigh these negative effects. Absent ST’s exclusionary behaviour it is likely that competition would have been more effective throughout the whole territory of Slovakia and even in the densely populated areas, where infrastructure-based competition existed. Such entry and the competitive response that it would in turn have triggered from ST and other broadband providers would likely have benefited consumers through greater choice, lower prices and higher quality of services.

⁽¹⁾ Collocation refers to the placement of the AOs’ equipment at the level of the incumbent’s Main Distribution Frame (MDF).

⁽²⁾ ‘Qualification’ refers to the process whereby ST ascertained whether a particular line was fit for unbundling.

⁽³⁾ AOs have an obligation to submit forecasts of their intended requests for qualification of the local loop.
4.5. **Liability of DT**

(16) The Decision finds that DT is liable for the infringement as a parent company. Concerning the ability to exercise decisive influence over ST, the Decision refers mainly to the fact that (i) DT is the majority shareholder with 51 % and that the Slovak State, which owns the remaining 49 %, has no particular minority rights; and (ii) that DT can nominate the majority of the Board of Directors (BoD). The exercise of decisive influence is shown in particular by setting out (i) overlaps in senior management personnel between DT and ST; (ii) evidence of DT’s influence over the decision-making process at ST’s BoD; and (iii) of upstream reporting from ST to DT. The evidence constitutes a body of consistent evidence establishing the existence of an economic unit between DT and ST.

5. **FINES AND REMEDIES**

(17) To the extent that any of the identified abusive practices are still ongoing, ST and DT are required to bring such infringement to an end, and henceforth to refrain from any practices which would have the same or similar object or effect as described in the Decision.

(18) The Decision imposes a fine of EUR 38 838 000 jointly and severally on DT and ST, and a fine of EUR 31 070 000 on DT. This fine is established taking into account the value of sales in the relevant market, the degree of gravity of the infringement and the period of the infringement that was 5 years and 4 months, the fact that DT has already committed a similar infringement in 2003 and the need to ensure deterrence.