

## **New coordinates regarding the indispensability criterium**

Analysis of the Judgment of the Court of 25 March 2021. Deutsche Telekom AG v European Commission. Case C-152/19 P.

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### **The Case**

Deutsche Telekom AG (DT) is the incumbent telecommunications operator in Germany and the company that leads the Deutsche Telekom group. One of the most important members of that group is the incumbent telecommunications operator in Slovakia, Slovak Telekom a.s. (ST) which is the largest telecommunications operator and broadband provider in Slovakia. During the period between 12 August 2005 and 31 December 2010, DT held 51% of ST's capital.

In 2005, following a Slovak national regulatory authority for telecommunications (the TUSR) decision, ST was designated as an operator with significant power in the wholesale market for unbundled access to the local loop. With this ruling, the TURS clearly determined that ST, as a “notified operator” with significant market power in the Slovak telecommunications market within the meaning of Regulation (EC) no 2887/2000 (articles 2(a) and 3), should accept 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 offer their own services on the mass retail market for broadband internet access services. As the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame (article 2(c)), the local loop is an important infrastructure for companies that wish to provide high bit-rate data transmission services for Internet access.

Following an investigation, opened on its own initiative, into the conditions for unbundled access to ST's local loop, the Commission adopted a decision and imposed fines on DT and ST. According to the Commission, the undertaking comprising ST and DT had committed a single and continuous infringement of European Competition Law concerning broadband internet access services in Slovakia between 12 August 2005 and 31 December 2010. This infringement committed by the undertaking comprising these two companies consisted in withholding information necessary for the unbundling of local loops from alternative operators' networks and applying unfair tariffs which did not allow a competitor as efficient as ST to rely 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 (margin squeeze).

Not agreeing with the Commission's decision, DT brought an appeal before the General Court (GC), which partially annulled the decision and reduced the fine amount for the payment of which ST and the appellant were held jointly and severally liable. This ruling did not fulfil DT's interests that brought a new appeal before the Court of Justice (CJ), claiming that the Court should set aside the judgement of the GC of 13 December 2018 (T-827/14). In its judgment of 25 March 2021, C-152/19 P, the CJ dismissed the appeal.

### **The Court's Ruling**

The main issue discussed in this judgment was an abuse of dominant position with the appellant disagreeing with the Commission on whether there was a genuine case of refusal of access to essential infrastructure.

With its first ground of appeal, DT claimed an incorrect interpretation and incorrect application of Article 102 TFEU, stating that the GC committed an error of law in considering that the Commission was not required to prove that access to ST's local loop was indispensable to alternative operators in order to classify that company's restrictions on such access as 'abusive' for the purposes of that article. This was the main issue in this judgement since, according to the criteria laid down in paragraph 41 of the judgement in *Bronner* (C-7/97), there can only be an abusive refusal of access to infrastructure if that access is considered indispensable to alternative operators carrying on their business.

The CJ rejected the first ground of appeal, stating that the GC did not err in law when it considered 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*.

According to the CJ, the application of the conditions laid down by the judgment in *Bronner*, allows it to determine whether a dominant undertaking has a genuinely tight grip on the market by virtue of its infrastructure. The decision to oblige a dominant undertaking to grant its competitors access to its infrastructure can only be justified if that undertaking has a tight grip on the market concerned. Under *Bronner*, the condition relating to the indispensability of access to the dominant undertaking's infrastructure allows the competent authority or national Court to determine whether that undertaking has a genuinely tight grip on the market.

As the CJ noted, this was not the case in this judgment because the dominant undertaking did give access to its infrastructure but subjected that access to unfair conditions. Despite these practices being abusive on their own, in that they are able to give rise to anticompetitive effects on the markets concerned, they cannot be equated to a simple refusal to allow a competitor

access to the infrastructure. The relevant 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 shall be taken in such a context are thus 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.

Therefore, and for the aforementioned reasons, the Court decided that the conditions set out in paragraph 41 of the judgment in Bronner did not apply in the present case.