



The Court of Justice dismisses the appeals lodged by Slovak Telekom and Deutsche Telekom against the judgments of the General Court relating to anticompetitive practices on the Slovak telecommunications market

The fine of € 38 061 963, for which those two companies were found jointly and severally liable, and the fine of € 19 030 981, for which only Deutsche Telekom was found liable, therefore remain unchanged

Slovak Telekom a.s. (ST) offers, in its capacity as the incumbent telecommunications operator in Slovakia, broadband services on its fixed copper and fibre optic networks. ST's networks include also the 'local loop', namely, the physical lines which connect the subscriber's telephone jack with the main distribution frame of the fixed telephone network.

Following an analysis of its domestic market, the Slovak national regulatory authority for telecommunications adopted, on 8 March 2005, a decision designating ST as an operator with significant market power on the wholesale market for unbundled access to the local loop. Consequently, ST was obliged, under the EU regulatory framework,¹ to grant alternative operators access to the local loop owned by it, thus allowing new entrants to use that infrastructure with a view to offering their own services to end users.

On 15 October 2014, the Commission adopted a decision in which it found that ST and its parent company, Deutsche Telekom AG (DT), had abused its dominant position on the Slovak market for broadband internet services, by limiting the access of alternative operators to its local loop between 2005 and 2010 ('the decision at issue'). The Commission found, more specifically, that ST and DT had infringed Article 102 TFEU by setting unfair terms and conditions in its reference offer concerning unbundled access to its local loop and by applying unfair tariffs which did not allow an equally efficient competitor to replicate the retail services offered by ST without incurring a loss. As a result, the Commission imposed a fine of € 38 838 000 on ST and DT, jointly and severally, and a fine of € 31 070 000 on DT.

By judgments of 13 December 2018, *Deutsche Telekom v Commission* and *Slovak Telekom v Commission*,² the General Court of the European Union partially annulled the decision at issue, setting the fine for which ST and DT had been found jointly and severally liable at € 38 061 963 and the fine for which DT alone had been found liable at € 19 030 981.

The appeals lodged by ST and DT are dismissed by the Court of Justice which clarifies, in that context, the scope of its judgment in *Bronner*³ as regards the classification as abusive, for the purposes of Article 102 TFEU, of a refusal of access to infrastructures owned by a dominant undertaking. In that judgment, the Court of Justice had set a higher threshold for a finding that a

¹ This includes Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

² Judgments of the General Court of 13 December 2018, *Deutsche Telekom v Commission*, [T-827/14](#), and *Slovak Telekom v Commission*, [T-851/14](#); see also Press Release [No 196/18](#).

³ Judgment of the Court of Justice of 26 November 1998, *Bronner*, [C-7/97](#); see also Press Release [No 72/98](#).

practice consisting in a refusal, on the part of a dominant undertaking, to make available infrastructure it owns to competitor undertakings, is abusive.

Assessment of the Court of Justice

The Court of Justice emphasises, first, that any undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure that it has developed for its own needs. Imposing on a dominant undertaking, as a result of its abusive refusal to conclude a contract, an obligation to conclude a contract with a competing undertaking with a view to allowing that competing undertaking access to its own infrastructure is therefore especially detrimental to the freedom of contract and the right to property of the dominant undertaking. Thus, where a dominant undertaking refuses to give access to its infrastructure, the decision to oblige it to grant its competitors access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

The Court notes, next, that the application of the conditions laid down by the Court of Justice in the judgment in *Bronner*, and in particular the third condition, allows it to be determined whether a dominant undertaking has a genuinely tight grip on the market by virtue of its infrastructure. In accordance with that judgment, a dominant undertaking may be forced to give access to an infrastructure that it has developed for the needs of its own business only where, first, refusing that access is likely to eliminate all competition on the part of the competing undertaking requesting access, second, that refusal cannot be objectively justified, and third, such access is indispensable to the business of the competing undertaking, that is to say, there is no actual or potential substitute for that infrastructure.

By contrast, **where a dominant undertaking gives access to its infrastructure but makes that access subject to unfair conditions, the conditions laid down by the Court of Justice in the judgment in *Bronner* do not apply.** While such practices can be abusive, in that they are able to give rise to anticompetitive effects on the markets concerned, they cannot be equated to a refusal by the dominant undertaking to give access to its infrastructure, since the competition authorities will not be able to force that undertaking to give access to its infrastructure, as that access has already been granted. **The measures to 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 it for the needs of its own business.

In view of the EU regulatory framework, which requires ST to give competing undertakings access to its local loop, the Court of Justice recalls that that Slovak telecommunications operator could not and did not actually refuse to give access to that local loop. On the contrary, it was pursuant to its decision-making autonomy in respect of the configuration of that access that ST set the terms and conditions for access called into question in the decision at issue. Since those terms and conditions did not constitute a refusal of access comparable to the one at issue in the judgment in *Bronner*, **the conditions set out by the Court of Justice in that regard do not apply in the present case.** Contrary to the arguments put forward by ST and DT, **the Commission was therefore not required to demonstrate that access to ST's local loop was indispensable for competitor undertakings to enter the market, in order to be able to classify the terms and conditions for access called into question as an abuse of dominant position.**

Since the other grounds of appeal relied on by ST and DT, relating inter alia to the assessment of ST's tariff practice which resulted in a margin squeeze and to the imputability of the infringement to DT as the parent company, are also rejected, **the Court of Justice dismisses the appeals in their entirety.**

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case.

Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The full text of the judgments ([C-152/19 P](#) and [C-165/19 P](#)) is published on the CURIA website on the day of delivery.

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