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The EU Court of Justice Advocate General Saugmandsgaard Øe recommends the Bronner legal test to be limited to 'refusals to make available' *(Slovak Telekom / Deutsche Telekom)*

UNILATERAL PRACTICES, DOMINANCE (ABUSE), ESSENTIAL FACILITY, REFUSAL TO DEAL, TELECOMMUNICATIONS, SANCTIONS / FINES / PENALTIES, MARGIN SQUEEZE, JUDICIAL REVIEW, EUROPEAN UNION

EU Court of Justice Advocate General, *Slovak Telekom / Deutsche Telekom*, AG Opinion, 9 September 2020 (French)

Simon Troch | Latham & Watkins (Brussels)
Cédric Nys | University of Liège

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Advocate General ('**AG**') Saugmandsgaard Øe recommends the European Court of Justice ('**ECJ**') to (i) rule that the test included in the *Bronner* Judgment – including the *indispensability* requirement – should only be applied in specific circumstances (*i.e.*, in case of 'refusals to make available'), and (ii) reject the introduction of the concept of 'implicit refusals to grant access' (or similar terms such as 'constructive refusals to grant access'). In this article, we set out the reasoning adopted by the AG to substantiate his recommendation as well as our analysis of the AG's Opinion.

In addition, the Opinion provides the ECJ guidance in relation to the liability of parent undertakings for the behaviour of their subsidiaries. We do not deal with this aspect of the Opinion.

1.The Parties

Slovak Telekom, a.s., ('ST') is Slovakia's incumbent telecommunications operator. ST is the largest telecommunications operator and broadband provider in Slovakia (being the indirect successor of the public post and telecommunications undertaking that ceased to exist in 1992). The legal monopoly it enjoyed on the Slovakian telecommunications market came to an end in 2000. It offers a full range of data and voice services, and owns and operates fixed copper and fibre optic networks as well as a mobile telecommunications network.

Deutsche Telekom AG ('DT') is Germany's incumbent telecommunications operator and Slovak Telekom's parent company. It is by revenue Europe's largest telecommunications provider and holds substantial shares in other telecom companies.

2.The facts

On 15 October 2014, the European Commission ('**Commission**') imposed a fine of EUR 38.8 million jointly and severally on DT and ST, and a fine of EUR 31 million on DT, for abusing their dominant position on the Slovak broadband services market ('**Decision**'). The Commission found that ST (i) withheld information from alternative operators about its network that was necessary for the unbundling of ST's local loop, 1 (ii) reduced the scope of ST's obligations regarding unbundled local loops, (iii) [*1*] set unfair terms and conditions in ST's reference unbundling offer with regard to collocation, qualification, forecasting, repairs and bank guarantees; and (iv) applied unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to ST's unbundled loops to replicate the retail broadband services offered by ST without incurring a loss ('margin squeeze').

DT and ST appealed the Decision before the General Court ('**GC**'). In its Judgments, the GC reduced the fines imposed on DT and ST but upheld the findings of the Commission. DT and ST appealed these Judgments before the ECJ. In summary, both entities' main substantive argument can be summarized as follows: to find a margin squeeze abusive, the conditions included in the *Bronner* Judgment have to be met, in particular the *indispensability* requirement. [*2*] In their view, the Bronner test should be applied both in case of explicit and implicit refusals to access. [*3*] The existence of the other practices (see i-iii above) was not contested by DT or ST before the GC.

3.The Opinion

In his Opinion, AG Saugmandsgaard Øe recommends the ECJ to rule that the legal test set out in the *Bronner* Judgment – including the *indispensability* requirement – is only applicable in case of 'refusals to make available'. To support his recommendation, the AG demonstrates that extending the application of the Bronner test would be both undesirable given the potential effects on the effectiveness of Article 102 TFEU (**section 3.i**), and incorrect in light of the rationale underlying the Bronner Judgment (**section 3.ii**). In addition, the AG sets out why the ECJ should reject the introduction of the 'implicit refusals to access' doctrine as not recognized in the ECJ's case law (**section 3.iii**).

Before starting his argumentation, AG Saugmandsgaard Øe recalls the specific circumstances of the Bronner case: *"a refusal by a dominant undertaking to make infrastructure which it owns [...] available to one or more competing undertakings"* (emphasis added). The AG qualifies such scenario as a 'refusal to make available'.

- 3.i. Undesirable given the impact on the effectiveness of Article 102 TFEU (paras. 61- 65)*

The AG continues by emphasizing the high legal standard set by the ECJ in *Bronner*, qualifying *Bronner* as a 'peak' in the regulatory landscape of Article 102 TFEU. Consequently, extending the application of the *Bronner criteria* – intended to only apply in exceptional circumstances – to other categories of abuses would negatively impact the effectiveness of Article 102 TFEU.

According to the AG, any extension of the application of the *Bronner test* would lead to only *'super abuses'* being prohibited (*i.e.*, abusive practices satisfying all conditions laid down in *Bronner*). For all types of abuses to which the *Bronner* standard would be extended, the Commission, or private claimants, would have to prove the fulfillment

of cumulative criteria that were intended to only apply in exceptional circumstances. *Vice versa*, for all these type of abuses, a dominant undertaking could avoid being caught by Article 102 TFEU by demonstrating that one of the *Bronner* criteria is not fulfilled.

*-*3.ii. Incorrect given the exceptional nature of the refusal to make available doctrine (para. 66-79 and 97-117)*

The AG proceeds by recalling why the ECJ has systematically set a higher legal standard to assess the abusive nature of 'refusals to make available' compared to other abusive practices relating to the *terms* of an agreement (*e.g.*, the setting of unfair prices, margin squeeze or other unfair contract terms).

According to the AG, the higher legal standard is justified as the remedy required to restore competition in case of a 'refusal to make available' has a considerably more detrimental impact on an undertaking's *freedom to conduct business*. That is to say, to remedy 'a refusal to make available', a dominant undertaking will be obliged to conclude an agreement. Imposing such an obligation entails a significantly further reaching restriction on the *freedom to conduct business* than the remedy required to restore competition in case of abuses concerning the terms of an agreement (*e.g.*, price). Given this further reaching impact on an undertaking's *freedom to conduct business*, the Bronner Judgment correctly set a higher legal standard – requiring *inter alia indispensability* – to assess the abusive nature of 'refusals to make available'.

Referring to AG Jacobs' Opinion in *Bronner*, [***4***] the AG indicates that such higher standard requiring *indispensability* is in essence justified as it allows to correctly balance the following sets of interests (a fundamental rights *and* free competition, *and* (b) short-term and long-term benefits for competition and, ultimately, consumers. When a remedy entails (a) a (more) serious restriction on an undertaking's fundamental rights, and (b) potentially has a negative impact on undertakings' incentives to invest, a balance is found by imposing additional conditions on the application of Article 102 TFEU.

Consequently, ST's conduct is not subject to the *indispensability* test as it relates to the *terms* of an agreement (and did not refuse access to infrastructure which it owns). This solution is in line with the *TeliaSonera* Judgment in which the ECJ already clarified that a margin squeeze, which does not constitute a 'refusal to access', can be abusive when the input is not indispensable. [***5***]

*-*3.iii. 'Implicit refusals to access' doctrine is not recognized in the ECJ's case law*

In addition, the AG strongly opposes the notion of an 'implicit refusal to access' or 'categorical refusal to access' as the ECJ has never applied the conditions laid down in *Bronner*, or any equivalent legal criterion, to unfair contract terms.

The AG's main criticism on the notion of an 'implicit refusal to access', on top of the above mentioned arguments, is that the notion potentially has such an elastic scope that its adoption could stretch the *Bronner*-doctrine to apply to every abuse of dominance-case. Any anticompetitive practice adopted by a dominant undertaking can indeed in some way constitute an 'implicit refusal to access' since any disadvantage imposed by a dominant undertaking is potentially liable to discourage potential customers from using the goods and services it offers. The AG illustrates this by asking what threshold would be used to determine when an unfair price – which would be a perfect example of an implicit refusal of access (if such a thing existed) – [***6***] becomes an implicit refusal of access, and notes that this distinction would be even more difficult to make for conditions not relating to pricing.

4.Comment

AG Saugmandsgaard Øe's Opinion is an important reminder that the test included in the *Bronner* Judgment – including the *indispensability* requirement – should only be applied in exceptional circumstances (i.e., in case of 'refusals to make available'). As stressed by the AG: "*the* ***principle*** *is that the conditions laid down in* ***Bronner are not applicable*** *for the purpose of assessing the existence of an infringement of Article 102 TFEU.*" (emphasis added).

While it remains to be seen whether the ECJ will confirm the recommendation of the AG, we welcome the approach suggested by the AG. In our view, the AG's Opinion clearly clarifies the following misinterpretations existing after the *TeliaSonera* Judgment. [*7*]

Required remedy to restore competition is the decisive factor to determine applicable legal test

Referring to the rationale underlying the *Bronner* Judgment, the AG suggests the ECJ to rule that the determining factor to decide whether the *Bronner* test is applicable is the nature of the remedy required to restore competition. This interconnection between the remedy and applicable legal test is highlighted by the AG and forms the premise of his argumentation.

According to the AG, the higher legal standard included in *Bronner* is justified because the remedy required in 'refusals to make available' cases – obliging an undertaking to contract – has a more far-reaching impact on an undertaking's *freedom to conduct business* than remedies required in other cases (*e.g.*, being obliged to amend to the *terms* of an agreement). Given this more far-reaching impact on an undertaking's rights, a higher legal standard requiring inter *alia indispensability* is justified as it allows to correctly balance the following sets of interests (a) fundamental rights and free competition, and (b) short-term *and* long-term benefits for competition.

Such a 'remedy-based approach' also addresses the critique from some authors which have indicated that the distinction between abuses related to 'refusals to access' and 'the terms of the agreement' seems to be less clear than the distinction between 'implicit' and 'explicit' refusals as certain types of behaviour (*e.g.*, tying or bundling) could be classified as both refusals to access and a term of an agreement. [*8*] The AG's Opinion demonstrates that such categorical labelling of abuses is not required to assess the applicability of the *Bronner* criteria. The AG's Opinion clarifies – referring to the rationale underlying the *Bronner* Judgment – that the applicable legal test is not determined by the label applied to the abuse but by the nature of the remedy required to restore competition.

Who can do more, can do less?

Some authors imply, referring to the *adage* 'who can do more, can do less', that if there is no obligation to grant access, undertakings are free to set the terms under which access is granted. That is to say, if an undertaking is free to not provide access at all, it should be *a fortiori* free to set terms under which it grants access. In their view, if the opposite were to be true, undertakings would be encouraged to refuse to grant access as the legal standard for such refusals is higher than the one for potentially abusive terms. [*9*]

However, such reasoning goes against the 'remedy-based approach' as it does not take into account the reasons underlying the higher legal standard applicable to 'refusals to make available'. Given that the higher legal standard is in essence justified by the need to balance the further-reaching impact an obligation to contract has on an undertaking's *freedom to conduct business*, extending this legal standard to cases where no such obligation can be imposed would be unjustified. Accordingly, dominant undertakings without indispensable infrastructure have the right to refuse access, which flows from their right to property. If they however do decide to voluntarily grant access, they must do so without violating competition law.

[1] As regards the supply of internet access, the *local loop* is the physical twisted metallic pair circuit that connects the network termination point at the subscriber's premises to the main distribution frame or any other equivalent facility in the fixed public telephone network. *Unbundled access* to the local loop allows new entrants, usually called 'alternative operators', to use the existing telecommunications infrastructure belonging to those incumbent operators in order to offer various services to end users, in competition with the incumbent operators. Local loop unbundling was organised at EU level, *inter alia*, by Regulation (EC) No 2887/2000 and Directive 2002/21/EC. In essence, that regulatory framework required the operator 'with significant market power', as identified by the national regulatory authority, to grant alternative operators unbundled access to its local loop and to related services under transparent, fair and non-discriminatory conditions, and to maintain an updated reference offer for such unbundled access.

[2] Case C–7/97, 26 November 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*.

[3] 'Implicit refusals' are also referred to as 'constructive refusals'.

[4] Opinion of AG Jacobs in Case C–7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG*.

[5] Case C–52/09, 17 February 2011, *Konkurrensverket v TeliaSonera Sverige*. See also C-295/12, 10 July 2014, *Telefónica and Telefónica de España v Commission*.

[6] In its case law on unfair pricing, the ECJ did not use legal criteria equivalent to the conditions laid down in *Bronner* (see for example Case 26/75, 13 November 1975, *General Motors Continental v Commission*; Case 226/84, 11 November 1986, *British Leyland v Commission;* Case 395/87, 13 July 1989, *Ministère public v Jean-Louis Tournier*; Case C-340/99, 17 May 2001, *TNT Traco SpA v Poste Italiane SpA and Others*; Case C-52/07, 11 December 2008, *Kanal 5 and TV 4* and Case C-385/07 P, 16 July 2009, *Der Grüne Punkt – Duales System Deutschland v Commission*. More recently, the ECJ confirmed this approach by refraining from applying the conditions laid down in Bronner in two Judgments concerning the pricing practices of copyright collecting societies, although it may reasonably be presumed that their services were indispensable to certain downstream activities (see Case C-351/12, 27 February 2014, *OSA* and Case C-177/2016, 14 September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*.

[7] A Judgment which sparked a debate on similar points, see D. Geradin (2010), "Refusal to supply and margin squeeze: A discussion of why the "Telefonica exceptions" are wrong", TILEC Discussion Paper, available at *http://ssrn.com/abstract=1762687*; K. Coates, "The Estoppel Abuse", Oct 28, 2013, 21st Century Competition: Reflections on Modern Antitrust, available at *http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/*.

[8] See Nicolas Petit, The EU Court of Justice AG Saugmandsgaard Øe issues opinion finding that a firm without an indispensable infrastructure can nonetheless abuse a dominant position by way of margin squeeze (Slovak Telekom / Deutsche Telekom), 9 September 2020, *e-Competitions* September 2020, Art. N° 97618.

[9] Ibid. and Assimakis Komninos, *Competition Stories: September & October 2020*, CONCURRENTIALISTE, (October 26, 2020).