Kluwer Competition Law Blog

How Indispensable is the Indispensability Criterion in Cases of Refusal to Supply Competitors by Dominant Companies? (Slovak Telekom, C-165/19 P)

Jose Rivas (Bird and Bird, Belgium) · Thursday, April 1st, 2021

The recent judgment of the Court of Justice of the EU ("the CJEU") in *Slovak Telekom**[1]*** is a judgment with significant implications. This article, first, summarises the main lessons from *Slovak Telecom* as regards the *indispensability* criterion in cases of refusal to supply competitors by dominant companies and, second, speculates on some likely consequences for pending and future cases.

Lessons from Slovak Telekom

In essence, the CJEU has clarified that in cases of "constructive" or "implicit" refusal to supply[2] to a competitor of an infrastructure, facility, or service, etc. (hereinafter referred to as an "input"), the requirement of the *indispensability* of such input is not necessary for an abuse of dominance in breach of Article 102 TFEU to occur. Rather, the *indispensability* of the input is required for the application of Article 102 TFEU only in the narrow situation of outright refusal to supply an input to a competitor[3].

After *Slovak Telecom* it will be easier to prove a breach of Article 102 TFEU in cases where a dominant company supplies an input to its competitors but degrades such supply by any means. For example, by delaying the supply of the input, by applying unfair terms and conditions in its supply or by supplying spare parts, services, technical information, etc, but keeping the "magic dust" to itself.

In *Slovak Telekom* the CJEU has clarified the scope of its previous jurisprudence. In *Oscar Bronner**[4]*** the CJEU decided that a refusal to grant access to an input (in this instance, a nationwide home-delivery service for daily newspapers, which was the only nationwide service available) constituted an abuse of a dominant position only if:

(1) the refusal of the input (home-delivery service) was *likely* to eliminate all competition in another market (namely, servicing the daily newspaper market);

(2) such refusal was incapable of being objectively justified; and

(3) the input was *indispensable* to carrying out that service because there were no actual or potential substitutes to the input.

In practice, competitors seeking access to the input have most difficulty in demonstrating the third criterion, i.e. the *indispensability* of the input. In order to force a dominant company to share its input, it is not sufficient for the input to be merely "good to have" or "useful to have". The requirement is that the input must be *indispensable* to such an extent that there are no actual or potential substitutes for it. According to the CJEU, this third criterion allows the competent authority or national court to determine whether the dominant undertaking has a "genuinely tight grip" on the market concerned by virtue of the infrastructure it has created that its' competitors require access to. It is only in these circumstances that the decision to oblige that undertaking to grant access is justified.[5]

There is a twofold rationale (legal and economic) behind such a higher threshold under *Oscar Broner* for antitrust law to force a company to share its assets with others. The legal rationale is that forcing a dominant company to contract with a competitor is especially detrimental to fundamental rights such as the freedom of contract and the right to property. Even a dominant company should remain free, in principle, to choose whom to contract with and keep the assets it has developed for its own needs.[6] The economic rationale is that if access to an input were allowed too easily there would be no incentives for companies to develop such an input, in the first place. If dominant companies knew they could not retain fully the benefit of their innovative efforts because a competitor will afterwards be entitled to have access to it against their will, they would be less inclined to invest in efficient facilities. Similarly, those seeking access have no incentive to innovate if they know that they can request access and free-ride on the efforts of others.

However, the above legal and economic rationale do not apply to situations where the dominant company is already supplying its competitors and all it wants is to limit the degree of competition they represent by degrading the terms and conditions of their supply. As the CJEU puts it, the dominant undertaking will not have to be forced to give access to its infrastructure, as that access has already been granted and will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right of property.[7] The dominant company must have similarly taken into consideration the economic rationale at the time when it decided to grant (degraded) access to its competitors.

Crucially, according to the CJEU, the above applies also to situations where the supply to competitors is the result of a regulatory obligation upon the dominant company. Indeed, while it is true that such a regulatory obligation has the consequence that the dominant company could not and did not actually refuse to give access, nevertheless, it retained decision-making autonomy in respect of the conditions for such access. According to the CJEU, the conditions set out in *Oscar Bronner* do not then apply as the practices at issue did not constitute refusal of access to the input, but related to the conditions for such access[8].

Speculation as to some likely consequences of Slovak Telekom:

In this section, I speculate on the possible impact that *Slovak Telekom* may have on (i) the Google shopping case currently pending before the General Court[9], (ii) the Commission's Guidance on

enforcement priorities under Article 102, and (iii) aftermarkets, notably, those dependent on data.

1. Google Shopping

In *Telia Sonera**[10]*** and in *Telefónica**[11]*** the CJEU had already clarified that the indispensability criterion is not necessary for price predation cases (i.e. margin squeeze)[12]. In *Slovak Telecom* the CJEU has clarified that the indispensability criterion is not necessary in non-price predation cases (i.e. constructive refusal to supply).

The case of Google shopping is ultimately a case of unfair trading conditions consisting in self-preferencing being imposed by a dominant company upon its competitors. The abusive conduct consists of the more favourable positioning and display of Google's own comparison shopping services compared to competing for comparison shopping services.[13] As the Commission puts it, "*the Bronner criteria are irrelevant in a situation where bringing to an end the infringement does not involve imposing a duty to transfer an asset or enter into agreements with persons with whom it has not chosen to contract*".[14]

Accordingly, the Commission may likely prevail in its quest that in the Google shopping case it was not required to prove the indispensability criterion.

2. The Commission's Guidance on enforcement priorities under Article 102

Surprising as it may sound, the Commission has not always been as clear as one would expect on such a relevant issue as the different treatment in EU competition law between actual refusal to supply and constructive refusal to supply. The Commission may need to add its Guidance Paper on enforcement priorities under Article 102 TFEU[15] to its long list of current reviews of competition law and policy statements[16]. After *Slovak Telekon*, "Section D.- Refusal to supply and margin squeeze" of its Guidance Paper requires a reset.

In particular, paragraph 79 of the Guidance Paper states: "The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. Likewise, it is not necessary for there to be actual refusal on the part of the dominant undertaking; "constructive refusal" is sufficient".

Conversely, the statement in paragraph 84 of the Guidance Paper is noteworthy: "The [Oscar Bronner] criteria set out in paragraph 81 apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply)".

3. Aftermarkets

Finally, I will speculate on the impact that *Slovak Telekom* may have in aftermarkets or secondary market cases; notably, those heavily dependent on machine-generated data or IoT data.

There are myriad different circumstances in which a company may seek access to data controlled by another company. It is obvious that competitors who are either denied access to data or granted access only on less favourable terms (degraded access) may be foreclosed on the market.

Slovak Telekom contains an example of degraded access by the dominant data controller in order to

limit competition downstream. Indeed, Slovak Telecom withheld from alternative operators network information necessary for the unbundling of local loops.[17]

The following are further examples of degraded access to data that limit competition:

- An aviation Original Equipment Manufacturer develops a recorder of Aircraft Operational Data that feeds its digital service platform. Independent repair and maintenance operators (known in the aviation industry as "MRO") have more limited access to AOD than the OEM. As a result, MRO are limited in the provision of predictive maintenance of airplanes.
- A manufacturer of agricultural equipment limits access to certain levels of repair software which prevents farmers from self-repairing their agricultural equipment.
- Another manufacturer of agricultural equipment limits the access of farmers to digital agricultural data such as rate of use of sprayers and fertiliser applications, the moisture level of harvested products, the yield of fields, etc. Partnering with seed companies, the controller of the data and the data analytics can dictate what farmers plant, where they plant and how/when to harvest.

Some characteristics of data may facilitate antitrust intervention in data-dependent aftermarkets in the following circumstances.

First, in most legal orders data is not subject to a property right. Data is subject to lesser forms of a right, such as possession or control. Accordingly, antitrust intervention in data cases will not be as detrimental to the right of property as in other cases and the threshold for intervention may be lower.

Second, the specific data access scenario may be relevant in the balancing of interests between static and dynamic competition. In certain cases, maintaining the contestability of data aftermarkets may weigh above the protection of incentives to invest in data collection and storage. The following are examples of such cases: (i) the party seeking access to the data contributed to its generation (e.g. the user of the machine), (ii) data generation is a by-product of the machine that generates the data (e.g. IoT), or (iii) the cost for managing the access request is low for the data controller.

Finally, so-called "data lock-ins" may render the aftermarkets doctrine different for data because not only do they lead to foreclosure of secondary markets, but they may significantly reduce the contestability of the primary market.[18] Indeed, data can provide a competitive advantage not only in markets for secondary goods/services (e.g. predictive maintenance) but also in the primary market at the time of replacement of the original equipment. The reason for this is that competitors have less information on which to base their offers for the replacement of such machines.[19] Data lock-ins facilitate the existence of a dominant position for the purposes of Article 102 TFEU because a reduction of competition in the secondary market cannot be compensated by a sufficient level of competition in the primary market. On the contrary, as a result of data lock-ins, the lack of contestability of the secondary market reinforces the lack of contestability of the primary market.

In conclusion, the *indispensability* criterion is part of the legal test under Article 102 TFEU when a dominant firm refuses to make an input available because to order such a firm to share its input interferes with fundamental rights such as the right to property and the right to contract as well as with the incentives to invest. Where these rights and incentives are not at play, because the dominant firm has already granted access to the input but tries to limit competition by imposing

unfair terms to such access, the *indispensability* criterion is not an element of the legal test. This is going to be of some significance in cases involving digital markets, notably aftermarket.

This article was also published in Bird & Bird's newsletter *Competitive Edge.*

[1] Judgment of 25 March 2021 in Case C-165/19 P. This judgment was rendered the same day as its sister judgement in Deutsche Telekom AG, Case C-152/19 P.

[2] Constructive or implicit refusal to supply could, for example, take the form of unduly delaying or otherwise degrading the supply of the input or the imposition of unreasonable conditions in return for the supply.

[3] As the CJEU puts it: *"Nevertheless, as regards practices other than a refusal of access, the absence of such an indispensability is not in itself decisive for the purpose of the examination of potentially abusive practices on the part of a dominant company"* (*Slovak Telekom*, para. 50)

[4] Judgment of 26 November 1998, Case C-7/97, paragraph 41.

[5] See paragraphs 48 and 49 of *Slovak Telekom*. To the best of my knowledge this is the first time the CJEU uses the term "tight grip" on the market concerned.

[6] See paragraph 46 of *Slovak Telekom*

[7] See paragraph 51 of *Slovak Telekom*

[8] See paragraphs 57 to 59 of *Slovak Telekom*. The Advocate General in *Slovak Telekom* was even clearer (see paragraph 101 of his Opinion): *"It is irrelevant in this regard whether ST was compelled to grant access to the local loop by reason of regulatory obligations. The conclusion would have been the same if ST had chosen voluntarily to grant access to the local loop. The only factor that matters for the purpose of ruling out the relevance of the judgment in Bronner is that ST did not refuse access to infrastructure which it owns"*

[9] Case T-612/17

[10] Judgment of 17 February 2011, Case C-52/09

[11] Judgment of 10 July 2014, Case C-295/12 P

[12] As the Advocate General in *Slovak Telekom* puts it (paragraph 87): *"The Court also dismissed the relevance of the judgment in* Bronner *in relation to margin squeeze, which is a category of abusive pricing practice, in the judgments in [Telia Sonera -paragraphs 55 to 58] and [Telefónica – paragraph 96]"*.

[13] See paragraph 650 of Commission Decision of 27 June 2017, Case AT. 39740 – Google Search (Shopping)

[14] See paragraph 651 of Commission Decision of 27 June 2017, Case AT. 39740 – Google Search (Shopping)

[15] Guidance on the Commission's enforcement priorities in applying Article [102 of the TFEU] to abusive exclusionary conduct by dominant undertakings. OJEU C 45/7 of 24.2.2009 ("the Guidance Paper")

[16] The Commission is currently reviewing the following Competition Law Legislation and Guidelines: the Notice on Market Definition, the Block Exemption Regulation for Vertical Agreements, The Guidelines on Vertica Restraints, The Guidelines on Horizontal Co-operation Agreements, etc.

[17] See paragraphs 16 and 38 of *Slovak Telekom*

[18] "Competition Policy for the Digital Economy" by J. Crémer, Y-A de Montjoye and H. Schweitzer, page 88

[19] *Ibidem*, page 90

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