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Case AT.39523 Slovak Telekom

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*Disclaimer (EN): the views expressed are those of the author and cannot be regarded as stating an official position of the European Commission

Main procedural steps

- *Ex officio* case after market research and analysis of market structure
- 2009 - inspections in Bratislava
- May 2012 - Statement of Objections , November 2012 - Oral Hearing
- October 2014 - Adoption of the prohibition decision
- 5 November 2015 – Publication of the decision

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Theory of harm

- ST owns the only fixed nationwide copper access network.
- ST has a regulatory obligation to give alternative operators (AOs) access to the unbundled local loops within its network.
- The Commission's theory of harm in the present case is that ST made entry by AOs via ST's copper network artificially more difficult and negatively impacted the competitive structure of the market.
- ST abused its dominant position by pursuing a refusal to supply and a margin squeeze strategy, in breach of Article 102 TFEU.

Relevant markets 1/4

- Wholesale market: Access to ST's unbundled local loops
  - In line with previous Article 102 TFEU cases (Deutsche Telekom, Telefónica, Telekommunikacja Polska), the decision defines a wholesale market for access to ST’s ULL.
  - There are no substitutes to ST's ULL readily available (access to fibre, TV-cable, bitstream, FWA, mobile broadband are no substitutes to ULL).
- Retail market: Mass market for broadband services offered at a fixed location
  - Comprises broadband connections over xDSL copper lines, fibre lines, TV cable and FWA networks.
  - Mobile broadband connections are excluded.
    - Quality, Data usage, Prices, Switching
- The geographic markets at wholesale and retail level are national.

Relevant markets 2/4

- ST's econometric study - mobile broadband should be included in the retail product market
  - Critical loss analysis
    - The estimated elasticity of 1.99 for all fixed broadband technologies
    - Assumption on a retail operating margin
    - Conclusion: a SSNIP would not be profitable for a hypothetical monopolist of all fixed broadband technologies

- The Commission - the study does not allow a meaningful conclusion on market definition
  - Data issues
  - Cellophane fallacy
  - Implications of the study

Relevant markets 3/4

- "Generally,…, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account." *(Notice on market definition, 1997, point 19)*

- "As a correct application of the SSNIP-test also involves some knowledge of the demand curve at the competitive price, this method is rather difficult to apply in practice." *(Discussion paper on the application of Article 82, 2005, point 16)*

Relevant markets 4/4

- The available pricing evidence, together with the Commission's other findings on the likely impact of ST's behaviour on competition and thereby consumers, suggest that in the absence of ST's conduct, broadband prices could have been lower *(paragraph 1170)*
- The results of the study suggest that even a hypothetical monopolist of all fixed and mobile broadband technologies would not find it profitable to increase the prices by 10% *(paragraph 164)*
- According to ST's estimates:
  - ST's margin would be close to the optimal margin of a monopolist in a wide market comprising all (fixed and mobile) broadband technologies (paragraph 166)
  - The prices of fixed broadband in the Slovak Republic would be above the price a hypothetical monopolist of all fixed broadband technologies (but without an interest in mobile broadband) would charge *(paragraph 167)*

ST's dominance 1/2

Wholesale ULL market:

- ST is the only owner of a nationwide broadband access infrastructure and holds a monopoly position on the wholesale ULL market.
- No indirect constraints

Retail broadband services market:

- ST is dominant on the relevant retail market.
- Market share of ST: [40-50%].
- UPC (the second largest AO), had in 2010 a market share almost five times lower (and decreasing).
- Orange's market share was about ten times lower in 2010, despite its investments into fibre.

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ST's dominance 2/2

- The Commission notes that a snapshots of prices provided by ST show that ST's DSL prices were significantly higher than prices of comparable or even superior products of its competitors (in particular fibre- and cable-based operators) *(paragraph 345)*

- The Commission is of the view that data on prices presented by ST would rather illustrate that AOs and other technologies did not exercise sufficient competitive constraint on ST's DSL pricing and that ST was able to behave to an appreciable extent independently of its competitors when setting its DSL retail prices *(paragraph 346)*

1st. Abuse: Refusal to supply

- Despite its regulatory obligation, ST gave access to its local loops under unfair and disadvantageous conditions.

- ST withheld from AOs network information necessary for ULL.

- ST reduced the scope of its regulatory obligations regarding ULL.

- ST set other unfair terms and conditions regarding collocation, forecasting, qualification, repairs and bank guarantee.

2nd. Abuse: Margin squeeze

- The methodology for calculating the margin squeeze test
  - Equally efficient competitor test was applied (costs of the dominant undertaking).
  - The relevant cost measure is LRAIC.
  - The margin squeeze test has been conducted on the basis of an aggregated approach.
  - Both a year-by-year and a multi-period analysis (covering the whole infringement period) were applied.
- Calculations showed negative margins with respect to broadband access via ULL throughout the infringement period as a whole.
- An equally efficient competitor could not have entered the market profitably on a lasting basis.