Case C-327/24 [Lolach] [i]

Request for a preliminary ruling

Date lodged:

3 May 2024

Referring court:

Verwaltungsgericht Köln (Germany)

Date of the decision to refer:

2 May 2024

Applicant:

Telekom Deutschland GmbH

Defendant:

Bundesrepublik Deutschland

Verwaltungsgericht Köln (Administrative Court, Cologne)

Order

[…]

In the administrative proceedings

Telekom Deutschland GmbH, […] Bonn,

applicant,

[…]

v

Bundesrepublik Deutschland […],

defendant,

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

concerning telecommunications legislation,

the 21st Chamber of the Administrative Court of Cologne

on 2 May 2024

[…]

hereby orders:

The proceedings are stayed.

The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

> Must Articles 72 and 73 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 be interpreted as meaning that, when considering the question of 'whether' to impose an obligation to provide access to civil engineering assets that are not part of the relevant market in accordance with the market analysis, the national regulatory authorities
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> must examine *solely* whether the non–imposition of this obligation would hinder the emergence of a sustainable competitive market and would not be in the end-user's interest,
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> *or*
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> may, when considering the imposition of an obligation to provide access to such assets, take into account not only the conditions mentioned above but also, *on an equal footing* as part of a 'bundle of objectives', the other objectives of Article 3 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 and, if applicable, further objectives.

Grounds

I.

The dispute essentially concerns the issue of the legality of imposing access obligations on the applicant.

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ('the EECC') regulates the imposition of access obligations in Articles 72 and 73 according to the German-language version – there being, at least as regards Article 73, differing language versions – as follows:

Article 72

Access to civil engineering

(1) A national regulatory authority may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, civil engineering including, but not limited to, buildings or entries to buildings, building cables, including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes, and cabinets, in situations where, having considered the market analysis, the national regulatory authority concludes that denial of access or access given under unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market and would not be in the end-user's interest.

(2) National regulatory authorities may impose obligations on an undertaking to provide access in accordance with this Article, irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet the objectives of Article 3.

Article 73

Obligations of access to, and use of, specific network elements and associated facilities

(1) National regulatory authorities may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in situations where the national regulatory authorities consider that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, and would not be in the end-user's interest.

National regulatory authorities may require undertakings inter alia:

(a) to give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop;

(b) to give third parties access to specific active or virtual network elements and services;

(c) to negotiate in good faith with undertakings requesting access;

(d) not to withdraw access to facilities already granted;

(e) to provide specific services on a wholesale basis for resale by third parties;

(f) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;

(g) to provide co-location or other forms of associated facilities sharing;

(h) to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks;

(i) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;

(j) to interconnect networks or network facilities;

(k) to provide access to associated services such as identity, location and presence service.

National regulatory authorities may subject those obligations to conditions covering fairness, reasonableness and timeliness.

(2) Where national regulatory authorities consider the appropriateness of imposing any of the possible specific obligations referred to in paragraph 1 of this Article, and in particular where they assess, in accordance with the principle of proportionality, whether and how such obligations are to be imposed, they shall analyse whether other forms of access to wholesale inputs, either on the same or on a related wholesale market, would be sufficient to address the identified problem in the end-user's interest. That assessment shall include commercial access offers, regulated access pursuant to Article 61, or existing or planned regulated access to other wholesale inputs pursuant to this Article. National regulatory authorities shall take account in particular of the following factors:

(a) the technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection or access involved, including the viability of other upstream access products, such as access to ducts;

(b) the expected technological evolution affecting network design and management;

(c) the need to ensure technology neutrality enabling the parties to design and manage their own networks;

(d) the feasibility of providing the access offered, in relation to the capacity available;

(e) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment, with particular regard to investments in, and risk levels associated with, very high capacity networks;

(f) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and innovative business models that support sustainable competition, such as those based on co-investment in networks;

(g) where appropriate, any relevant intellectual property rights;

(h) the provision of pan-European services.

Where a national regulatory authority considers, in accordance with Article 68, imposing obligations on the basis of Articles 72 or of this Article, it shall examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest.

(3) When imposing obligations on an undertaking to provide access in accordance with this Article, national regulatory authorities may lay down technical or operational conditions to be met by the provider or the beneficiaries of such access, where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall comply with the standards and specifications laid down in accordance with Article 39.

The German legislature has implemented those two provisions in a single provision, Paragraph 26 of the Telekommunikationsgesetz (Law on telecommunications) of 23 June 2021, in the version of 10 September 2021, last amended at the material time in the present case by the Law of 20 July 2022 (BGBl. I, p. 1166), ('the TKG'), as follows:

Paragraph 26 Access obligations

(1) The Federal Network Agency may impose on an undertaking with significant market power obligations to grant other undertakings access if, otherwise, the emergence of a sustainable competitive retail market would be hindered and the end-user's interest harmed.

(2) In considering whether and which access obligations are justified according to subparagraph (1) and whether these are proportionate and commensurate with the objectives according to Paragraph 2, the Federal Network Agency shall examine whether

1. obligations already imposed or likely to be imposed under this Part or commercial access agreements already concluded or offered in the relevant or in a related wholesale market and

2. the imposition alone of obligations pursuant to point 10 of subparagraph (3)

are sufficient to safeguard the objectives referred to in Paragraph 2. In that regard, the Federal Network Agency shall take into account in particular

1. the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved, including the viability of other upstream access products;

2. the feasibility of providing the access proposed, in relation to the capacity available;

3. the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment, in particular the risks associated with investments in very high capacity networks;

4. the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and innovative business models;

5. industrial property rights or intellectual property rights;

6. the provision of services throughout the Union; and

7. the expected technological evolution affecting network design and management.

(3) The Federal Network Agency may, having regard to subparagraph (1), impose, inter alia, the following obligations on undertakings with significant market power:

1. to grant access to specific physical network elements and associated facilities, including physically unbundled access to the local loop;

2. not to withdraw access to facilities already granted;

3. to grant access to specific active or virtual network elements and services, including virtual unbundled broadband access;

4. to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks;

5. to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services, while ensuring the efficiency of existing facilities;

6. to provide access to associated services such as identity, location and presence service;

7. to allow the interconnection of public telecommunications networks;

8. to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or for virtual telecommunications network services;

9. to provide co-location or other forms of associated facilities sharing and to grant access seekers or their agents access to these facilities at any time;

10. to grant access to civil engineering including buildings or entries to buildings, building cables including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes, and cabinets, even if these are not part of the relevant market pursuant to Paragraph 10, provided that the access obligation is necessary and appropriate with regard to the problem identified in the market analysis as defined in Paragraph 11.

(4) If an undertaking demonstrates that using the service would jeopardise the maintenance of network integrity or the security of network operation, the Federal Network Agency shall not impose the access obligation concerned or shall impose it in a different form. The maintenance of network integrity and security of network operation must be assessed according to objective criteria.

(5) When imposing an obligation on an undertaking to provide access, the Federal Network Agency may lay down technical or operational conditions to be met by the operator or the beneficiaries of such access, where necessary to ensure normal operation of the telecommunications network. Obligations to follow specific technical standards or specifications shall comply with the standards and specifications laid down in accordance with Article 39 of Directive (EU) 2018/1972.

(6) In the context of compliance with access obligations, the use of access services and cooperation between undertakings entitled to access should be permitted, unless an undertaking demonstrates in an individual case that a use or cooperation is not possible or is possible only to a limited extent for technical reasons.

II.

The applicant is an undertaking offering telecommunications services and which, in the context of the market definition of 10 October 2019, was designated as an undertaking with significant market power in the single relevant market as regards access to the local loop at a fixed location. However, a market relating to access to civil engineering was *not* the object of the market definition.

Subsequently, by decision dated 21 July 2022, the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks ('Federal Network Agency')) required the defendant, inter alia;

> '1.1.: to grant other undertakings access to cable duct systems as well as to masts and carrier systems for overhead lines existing at the time of demand, for the development and operation of very high capacity networks at fixed locations or for access to the local loop at the cabinet or Multi-Service Access Node (MSAN) (point 1.2 or 1.3) within the limits of the available capacity, allowing the (applicant) to maintain an adequate operating reserve and to prioritise its own use. In so far as the access is not used to access the local loop, the performance obligation and the further associated obligations under points 2., 4. and 5. shall commence on 1 January 2024.
>
> 1.2. to grant other undertakings physically unbundled access to the copper local loop at the main distribution frame or at a point situated closer to the local loop unit than the main distribution frame (in particular cable or subscriber distribution interface/termination point) unless, under the provisions of Annex 1 hereto – Refusal of access to the local loop outside the immediate vicinity of the main distribution frame; and Annex 2 – Refusal of access to the local loop within the immediate vicinity of the main distribution frame, it may or is required to refuse access …'

In the grounds for its decision, the Federal Network Agency states, inter alia, the following:

> 'Access obligations
>
> The Ruling Chamber […] has maintained or amended the access obligations imposed on the (applicant) on the market at issue by regulatory order BK3g-09/085 of 21 March 2011 (in the version of regulatory order BK3g-15/004 of 1 September 2016) as follows:
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> 1. Review programme under Paragraph 26 of the TKG
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> The imposition of access obligations follows from Paragraph 26 of the TKG.
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> Pursuant to the first sentence of Paragraph 26(1) of the TKG, the Federal Network Agency may require operators of public telecommunications networks with significant market power to provide other undertakings with access, including demand-side unbundling, in particular if, otherwise, the

emergence of a sustainable competitive downstream retail market would be hindered or the end-user's interest harmed. In considering whether and which access obligations are justified and whether they are proportionate and commensurate with the regulatory objectives under Paragraph 2 of the TKG, the Federal Network Agency is to take into consideration in particular the criteria set out in points 1 to 7 of the second sentence of Paragraph 26(2) of the TKG. It is apparent from the provision cited and its reference to the regulatory objectives (and principles) defined in Paragraph 2 of the TKG that the measures imposed must meet an extensive bundle of objectives and are simultaneously subject to certain constraints (with regard to Paragraph 21 of the TKG 2004, BVerwG, see judgment of 21 September 2018 – 6 C 50/16 – paragraph 48, BVerwG, judgment of 21 September 2018 – 6 C 8/17 – BVerwGE 163, 181-232, paragraph 51). The relevant bundle of objectives in the present context consists of four basic objectives which, in part, have various further nuances.

The first basic objective is to ensure connectivity and the promotion of access to and use of very high capacity networks by all citizens and undertakings (first sentence of Paragraph 26(2), read in conjunction with point 1 of Paragraph 2(2) of the TKG). The second basic objective is the promotion of competition. Competition on the retail market in particular is of interest here (Paragraph 26(1) of the TKG). Sustainable competitive telecommunications markets and the associated investment in infrastructure and innovation are to be promoted (Paragraph 26(1); point 4 of the second sentence of Paragraph 26(2); first sentence of Paragraph 26(2), read in conjunction with points 2 and 3(e) of Paragraph 2(2) and point 4 of Paragraph 2(3) of the TKG). Competition is also required to be fair (first sentence of Paragraph 26(2) in conjunction with point 2 of Paragraph 2(2) and point 2 of Paragraph 2(3) of the TKG). In the context of promoting competition, due account must be taken both of the interests in the area (first sentence of Paragraph 26(2) in conjunction with point 2, *in fine*, of Paragraph 2(2) of the TKG) and of the diverse conditions in connection with competition prevailing in the various geographical areas of the Federal Republic of Germany (first sentence of Paragraph 26(2) in conjunction with the second alternative in point 5 of Paragraph 2(3) of the TKG). According to the third basic objective, users, in particular the interests of consumers in the telecommunications field, must be protected (Paragraph 26(1), *in fine*; first sentence of Paragraph 26(2) in conjunction with point 3 of Paragraph 2(2) of the TKG). Maximum benefits are to be sought for users in terms of choice, price and quality (first sentence of Paragraph 26(2), read in conjunction with point 3(b) of Paragraph 2(2) of the TKG). In particular, the interests of users and consumers are to be promoted by again ensuring the connectivity, widespread availability and accelerated development of very high capacity networks and promoting their use (first sentence of Paragraph 26(2), in conjunction with points 1 and 3(a) of Paragraph 2(2) of the TKG). In addition, equivalent standards of living must be ensured in urban and rural areas (first sentence of Paragraph 26(2), in conjunction with

point 3(b) of Paragraph 2(2) of the TKG). Here too, due account must be taken of the diverse conditions relating to consumers that prevail in the various geographical areas of the Federal Republic of Germany (first sentence of Paragraph 26(2), in conjunction with the third alternative in point 5 of Paragraph 2(3) of the TKG). Fourthly, the development of the internal market of the European Union is to be promoted (first sentence of Paragraph 26(2), in conjunction with point 4 of Paragraph 2(2) of the TKG). This also includes the provision of pan-European services (point 6 of the second sentence of Paragraph 26(2) of the TKG).

The attainment of this bundle of objectives is subject to various constraints. In general, Paragraph 2(3) of the TKG provides that, in pursuing the objectives set out in subparagraph (2), the Federal Network Agency is to apply objective, transparent, non-discriminatory and proportionate regulatory principles. Those principles are further defined in Paragraph 2(3) and the second sentence of Paragraph 26(2) of the TKG. As part of the necessity test, in particular the technical and economic viability of using or installing competing facilities must be assessed in the light of the rate of market development (point 1 of the second sentence of Paragraph 26(2) of the TKG) and it is necessary to consider whether obligations already imposed under Part 2 of the TKG or commercial access agreements already concluded or offered in the relevant or in a related wholesale market (point 1 of the first sentence of Paragraph 26(2) of the TKG) and the imposition alone of access obligations regarding cable duct systems and masts and carriers for overhead lines (point 2 of the first sentence of Paragraph 26(2) of the TKG) are sufficient to safeguard the regulatory objectives referred to in Paragraph 2 of the TKG (first sentence of Paragraph 26(2) of the TKG).

When considering appropriateness, the fundamental rights of the persons concerned as regards freedom to pursue a professional activity, and protection of property (Article 12(1) and Article 14(1), respectively, of the Grundgesetz (German Basic Law)) must be borne in mind. That applies in particular to the feasibility of providing access, in relation to the capacity available (point 2 of the second sentence of Paragraph 26(2) of the TKG) and also as regards the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment (point 3 of the second sentence of Paragraph 26(2) of the TKG) and, in general, as regards the risks associated with the investment by the investing undertaking and in the context of cooperation between investors and their access seekers (first sentence of Paragraph 26(1), *in fine*; point 4 of the second sentence of Paragraph 26(2); first sentence of Paragraph 26(2) read in conjunction with the first sentence of point 2 of Paragraph 2(2) and point 4 of Paragraph 2(3) of the TKG). The principles of legitimate expectations and legal certainty may also be relevant. For example, regulatory predictability is to be promoted as a result of the Federal Network Agency maintaining a standardised regulatory approach for reasonable periods (first sentence of Paragraph 26(2) in conjunction with point 1 of

> Paragraph 2(3) of the TKG). The effects on other legal interests, such as industrial property rights, intellectual property rights and the provision of pan-European services (points 5 and 6 of the second sentence of Paragraph 26(2) of the TKG), as well as the interest in maintaining network integrity and ensuring the security of network operation (Paragraph 26(4) and (5) of the TKG) may also be relevant in specific cases.'

On that basis, the Federal Network Agency went on to examine the imposition of the abovementioned access obligations, including the obligation to provide access to civil engineering.

On 19 August 2022 the applicant brought an action against the Federal Network Agency decision of 21 July 2022 before the referring court, seeking, inter alia, the following:

> '1. the defendant's decision of 21 July 2022 (BK3i-19/020) to be annulled in part in so far as the following obligations are imposed on the applicant:
>
> (a) the obligation, laid down in point 1.1 of the operative part, to give other undertakings access to cable duct systems as well as to masts and carrier systems for overhead lines for the purpose of the development and operation of very high capacity networks at fixed locations;
>
> in the alternative to point (a),
>
> (b) the obligation, laid down in point 1.1 of the operative part, also to give other undertakings access to those cable duct systems as well as to masts and carrier systems for overhead lines for the purpose of the development and operation of very high capacity networks at fixed locations which the applicant has newly erected for the development of its Fibre to the Building (FTTB)/Fibre to the Home (FTTH) network;
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> in the further alternative to (a) and (b),
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> (c) the obligation, laid down in point 1.1 of the operative part, to give other undertakings access also to those cable duct systems as well as to masts and carrier systems for overhead lines for the purpose of the development and operation of very high capacity networks at fixed locations which were completed less than seven years ago;
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> (d) the obligation, laid down in point 4 of the operative part, to publish a reference offer for access services for cable duct systems as well as to masts and carrier systems for overhead lines for the purpose of the development and operation of very high capacity networks at fixed locations;

(e) the obligation, laid down in point 5.1 of the operative part, to have the charges for granting access to cable duct systems as well as to masts and carrier systems for overhead lines for the purpose of the development and operation of very high capacity networks at fixed locations approved in accordance with Paragraph 39 of the TKG;

(f) the obligation, laid down in point 4 of the operative part, to publish a reference offer for access services for virtual unbundled access in the form of a layer 2 access product at the switch/Broadband Network Gateway (BNG) for mass marketable FTTB/H infrastructures;

2. in the alternative to the applications under point 1 above, the defendant's decision of 21 July 2022 (BK3i-19/020) to be annulled in its entirety if the court does not deem the decision to be severable'.

As regards the relevant question in the present case, it was stated that the Federal Network Agency had based the imposition of access obligations under Paragraph 26(1) of the TKG on a misunderstanding of the provision. In the presentation of the review programme, it was contended, the reasons for the regulatory order reflected the superseded wording of the first sentence of Paragraph 21(1) of the TKG 2004, when in fact there had been changes in Paragraph 26(1) of the TKG, now in force. Notably, the words 'in particular' had been deleted from the text and the conditions as to 'hindering competition in the retail market' and 'harm to the end-user's interest' were now linked by the word 'and' instead of the word 'or'. The Federal Network Agency had, it was argued, disregarded both factors as a result and based its decision on an erroneous review programme. Those amendments were not only of an editorial nature, but, as was evident from the explanatory memorandum, had been deliberate legislative decisions. An interpretation in conformity with the directive was out of the question. First, that would founder on the intention of the German legislature as expressly laid down in the legislative texts. Secondly, there was ultimately no difference between the law of the directive and national law. Consequently, it should have been established first of all in the context of Paragraph 26(1) of the TKG that the conditions set out therein were cumulative, before a review of Paragraph 26(2) of the TKG and the exercise of discretion could proceed. Due to the different approach taken by the Federal Network Agency, the primary regulatory objectives regarding access expressly highlighted by the legislature had, it was contended, been improperly qualified, creating an imbalance in the assessment. Ultimately, the regulatory order refrains from carrying out any cumulative examination of the conditions laid down in Paragraph 26(1) of the TKG.

The defendant contends, with regard to the relevant questions in the present case, that the Federal Network Agency did not base the regulatory decision on a misinterpretation of the relevant provisions; in particular, it did not take as a basis the conditions of the first sentence of the former Paragraph 21(1) of the

TKG 2004. Paragraph 26(1) of the TKG should be interpreted in line with the directive to the effect that the word 'and' between the conditions was not intended to serve as a cumulative link but to indicate a list. Furthermore, it was not the key position of the presentation of the review programme that was relevant to the lawfulness of the assessment decision, but the actual assessment decision itself: both of the conditions of Paragraph 26(1) of the TKG had been taken into account in the assessment decision. The wording of Paragraph 26(1) of the TKG did not, it was argued, lead to the conclusion that the Federal Network Agency was limited in the context of its review of the two conditions. Rather, with respect to Paragraph 26(2) of the TKG, it could include further aspects in the assessment; the case-law of the Federal Administrative Court relating to the 'review of the bundle of objectives' as regards the first sentence of Paragraph 21(1) of the TKG 2004 should be applied to Paragraph 26 of the TKG.

[…] [additional request for interim measures]

III.

The question of Community law submitted to the Court of Justice is decisive for the outcome of the dispute. The principle of interpretation in conformity with directives applies here (1). The results of the dispute vary depending on the interpretation of Articles 72 and 73 of the EECC (2).

1. The principle of interpretation in conformity with directives applies here. Admittedly such an interpretation can be ruled out where there are *unequivocal* national provisions. However, that is not the case here. In national law, there are aspects that militate in favour of interpreting Paragraph 26 of the TKG as meaning that the defendant should have undertaken a review 'at the outset' based solely on the constituent elements of Paragraph 26(1) of the TKG (a), and also aspects that militate in favour of the defendant having – as before – to decide on the imposition of access obligations having regard to a 'bundle of objectives' (b).

(a) First of all, the wording of the provision appears to militate *in favour* of Paragraph 26 of the TKG needing to be interpreted as meaning that the defendant should have undertaken a review 'at the outset' based only on the constituent elements of Paragraph 21(1) of the TKG ('…if, otherwise, the emergence of a sustainable competitive retail market would be hindered and the end-user's interest harmed'). In Paragraph 26(1) of the TKG, in a departure from the first sentence of Paragraph 21(1) of the TKG of 22 June 2004, repealed by Article 61 of the Law of 23 June 2021 (BGBl. I, p. 1858), the words 'in particular' have been deleted. In support of that interpretation of Paragraph 26(1) of the TKG, it can also be argued that the legislature deleted the words 'in particular' deliberately in order to illustrate 'the focus of access regulation at wholesale level on eliminating the competition problem in the retail market' (see BT-Drs. 19/26108, p. 263). It may perhaps be inferred from this that the legislature intended the feasibility of the imposition of access obligations (expressed in terms of 'whether' to impose) to be restricted to specific regulatory grounds, unlike the previous procedure. It may

also be mentioned in that regard that, from a systematic perspective, the legislature divided the former Paragraph 21(1) of TKG 2004 into two subparagraphs in Paragraph 26 of the TKG. The following also militates in favour of the autonomy of Paragraph 26(1) of the TKG: from a systematic perspective, Paragraph 26(1) of the TKG, which exhaustively sets out individual regulatory grounds, would not be necessary if, through Paragraph 26(2) of the TKG, a broad-based combined examination ultimately had to or might take place. The autonomous scope of Paragraph 26(1) of the TKG can only be identified using a step-by-step examination.

(b) However, there are *also* strong factors that militate *in favour of* the defendant having to take the decision on imposing access obligations in the context of a 'bundle of objectives'. While, according to the drafting history, the reason for the deletion of the words 'in particular' was to highlight 'the focus of access regulation at wholesale level on eliminating the competition problem in the retail market', *at the same time*, the reason for the deletion of the words 'in particular' was also that account was taken, in that regard, of the corresponding deletion in the first subparagraph of Article 73(1) of the EECC. That reference is incomprehensible. The first subparagraph of Article 73(1) of the EECC does not contain the words 'in particular' (*insbesondere*), but the enumerated list of regulatory grounds is, also in the version in force, introduced by the words 'unter anderem wenn'. This introduction also appears in other language versions: Dutch ('onder andere wanneer'), French ('notamment lorsqu'elles'), Italian ('in particolare qualora'). However, in the English version ('in situations where') there does not appear to be an introduction to the enumerated list. It can only be speculated whether the English version was regarded as the 'correct version' in the German explanatory memorandum to the TKG. Thus the only conclusion to be drawn from the drafting history of Paragraph 26(1) of the TKG is that the drafting history raises more questions than it answers. Above all, however, that second argument is supported by the fact that the case-law of the Federal Administrative Court relating to the possibility of forming a 'bundle of objectives' in the context of the review of Paragraph 21(1) of the TKG 2004 was not attributed to the first sentence of Paragraph 21(1) of the TKG 2004 and the words 'in particular', which at that time were still included as an introductory point, but derived directly from the second sentence of Paragraph 21(1) of the TKG 2004, which, through the words 'in considering whether', established a link to the first sentence (BVerwG, judgment of 21 September 2018 – 6 C 8.17 – juris paragraph 43 and 6 C 50.16 paragraphs 41 and 47). On that basis, Paragraph 26(2) of the TKG, which is introduced by the same wording as the second sentence of Paragraph 21(1) of the TKG 2004, may possibly still be interpreted as the provision imposing the (uniform and combined) review programme. On the other hand, however, it may be contended that the first sentence of Paragraph 26(2) of the TKG goes beyond the first sentence of the former Paragraph 21(1) of the TKG 2004 (according to the wording) in containing first and foremost what is known as the 'sufficiency test' in the first sentence of Paragraph 26(2) of the TKG, and the examination initiated by reference to the objectives of Paragraph 2 of the TKG apparently relates only to that test. However, the second sentence of Paragraph 26(2) of the

TKG mentions further aspects for consideration, whose link to the 'sufficiency test' is not entirely clear and, moreover, whose autonomous meaning (without the second part of the first sentence being read in conjunction with it) is not comprehensible.

2. In the context of the possibility of an interpretation in conformity with the directive, the outcome of the dispute depends on the reply to the questions raised. If Article 72 or Article 73 of the EECC precludes a provision in national law or its interpretation according to which, when considering *ex officio* the question of 'whether' an obligation to provide access to civil engineering is to be imposed by the regulatory authority, in addition to the conditions set out in Article 72(1) (hindering the emergence of a sustainable competitive market and not being in the end-user's interest), the objectives of Article 3 of the EECC and, if applicable, further objectives may also be taken into account in a bundled examination, the applicant's action would succeed (a). If, however, Article 72 or Article 73 of the EECC does not preclude a provision in national law or its interpretation according to which, when considering *ex officio* the question of 'whether' an obligation to provide access to civil engineering is to be imposed by the regulatory authority, in addition to the conditions set out in Article 72(1) of the EECC (hindering the emergence of a sustainable competitive market and not being in the end-user's interest), the objectives of Article 3 of the EECC and, if applicable, further objectives may also be taken into account in a bundled examination, the applicant's action would not succeed (b).

(a) If Article 72(1) or Article 72(2) of the EECC, each read in conjunction with Article 68(1) of the EECC, precludes a provision in national law or its interpretation according to which, when considering *ex officio* the question of 'whether' an obligation to provide access to civil engineering is to be imposed by the regulatory authority, in addition to the conditions set out in Article 72(1) of the EECC (hindering the emergence of a sustainable competitive market and not being in the end-user's interest), the objectives of Article 3 of the EECC and, if applicable, further objectives may also be taken into account in a bundled examination, the action would succeed. In that case, Paragraph 26(1) and (2) of the TKG would have to be interpreted as meaning that the defendant would have had to undertake the review 'at the outset' based solely on the constituent elements of Paragraph 21(1) of the TKG ('if, otherwise, the emergence of a sustainable competitive retail market would be hindered and the end-user's interest harmed'). That would mean that the contested decision would probably be unlawful; this applies regardless of whether the examination of 'whether' to impose an access obligation is initially to be carried out 'globally', in the sense of 'any' access obligation as defined in point 74 of Paragraph 3 of the TKG, or 'specifically' with regard to one of the access options referred to in Paragraph 26(3) of the TKG. That is already clear from the fact that, as regards the substance, the defendant did not cite the provision of Paragraph 26(1) of the new version of the TKG, but that of Paragraph 21 in the old version of the TKG, although there are relevant amendments; this alone is indicative of an error. Also as regards the substance, at no point did the defendant consider independently

whether a refusal to grant access generally would hinder the emergence of a sustainable competitive retail market and harm the end-user's interest. The defendant's 'sporadic' examinations of those characteristics cannot remedy those deficiencies: in so far as promotion of competition and protection of consumer interests are mentioned in the context of a 'bundle of objectives' on pages 106 and 107 of the contested measure (public version), that is clearly not sufficient to satisfy the requirements as thus understood of Paragraph 26(1) of the TKG. First, the question as to whether the emergence of a sustainable competitive retail market would be hindered and the end-user's interest harmed if no access were granted is not considered; 'promotion' or 'protection' of specific interests and 'hindering' or 'harming' are different criteria. Secondly, further interests were taken into account in addition to the two interests referred to. The same applies to the statements on pages 117, 119, 129, 134 and 135 of the contested measure (public version). The position is the same even if the word 'and' in Paragraph 26(1) of the TKG were to be replaced by the word 'or' (as in Paragraph 21(1) of the old version of the TKG) on the basis of an interpretation that is consistent with Community law. The defendant did not sufficiently consider either whether, if no access were granted, the emergence of a sustainable competitive retail market would be hindered or whether the end-user's interest would be harmed (see above).

(b) If, however, Article 72(1) or Article 73 of the EECC does not preclude a provision in national law or its interpretation according to which, when considering *ex officio* the question of 'whether' an obligation to provide access to civil engineering is to be imposed by the regulatory authority, in addition to the conditions set out in Article 72(1) of the EECC (hindering the emergence of a sustainable competitive market and not being in the end-user's interest), the objectives of Article 3 of the EECC and, if applicable, further objectives may also be taken into account in a bundled examination, the applicant's action would not succeed. In that case, Paragraph 26(1) and (2) of the TKG would not have to be interpreted as meaning that the defendant would have had to undertake a review 'at the outset' based solely on the constituent elements of Paragraph 21(1) of the TKG ('if, otherwise, the emergence of a sustainable competitive retail market would be hindered and the end-user's interest harmed'). The contested decision would probably be lawful, since the defendant would have been able – as in fact happened – to undertake a 'review of a bundle of objectives'.

The fact that the outcome of the dispute depends on the answer to that question applies irrespective of whether the contested decision should be annulled on other grounds. In so far as the applicant contested the Federal Network Agency decision using arguments other than those referred to above, those arguments are unlikely to succeed (see the decision in the expedited proceedings).

IV.

The question raised cannot be answered by the referring court on the basis of an 'acte clair'. In the opinion of the referring court, the question raised is not directly

answered by the first subparagraph of Article 73(1) of the EECC (1.) nor by Article 72(1) of the EECC (2.). However, it is not clear how Article 73(2) of the EECC should be applied (3.).

1. In the opinion of the referring court, the question raised is not directly answered by the first subparagraph of Article 73(1) of the EECC. This is because, according to the referring court, first of all, Article 72 of the EECC alone is relevant for the imposition of access to civil engineering (*lex specialis*). However, should that not be the case, Article 73 of the EECC raises three issues with regard to the question raised: first, the language versions of the provision differ (a); secondly, the content of Article 73(2) of the EECC is unclear (b). Lastly, the relationship with point (c) of Article 68(4) of the EECC is problematic (c).

(a) First, the language versions of the first subparagraph of Article 73(1) of the EECC differ with regard to the question raised: the German version of the first subparagraph of Article 73(1) of the EECC does not contain the words 'in particular' (*insbesondere*), but the enumerated list of regulatory grounds is, also in the version in force, introduced by the words 'unter anderem wenn'. That introduction also appears in other language versions: Dutch ('onder andere wanneer'), French ('notamment lorsqu'elles'), Italian ('in particolare qualora'). However, in the English version ('in situations when') there does not appear to be an introduction to the enumerated list. The position is different, however, in Article 72(1) of the EECC. In all the language versions understood by the members of the Chamber, the content of that provision is the same.

(b) Secondly, Article 73(2) of the EECC raises the question as to whether it is apparent from that provision that, in addition to the aspects mentioned in the first subparagraph of Article 73(1) of the EECC, further aspects should be taken into account. In that regard, that provision raises, first of all, the question as to whether it contains more than the so-called 'sufficiency test'. The express wording of Article 73(2) of the EECC militates in favour of its being limited to a 'sufficiency test', however the contrary is indicated by the criteria listed in points (d), (e), (f) and (h) of the third sentence of Article 73(2) of the EECC, in which the link to a 'sufficiency test' is not particularly clear. Recital 188 et seq. of the directive seems rather to militate in favour of the content of the provision not being limited to the 'sufficiency test' (see, effectively, also Broemel, in: Geppert/Schütz, Beck'scher TKG-Kommentar, 5th edition 2023, introduction B, paragraph 30). If it is assumed that the conditions set out in Article 73(2) of the EECC must not only be taken into account in the context of the sufficiency test, the provision also raises the question of whether the objectives listed in Article 3 of the EECC also need to be considered in addition to the criteria set out in points (a) to (h) of the third sentence of Article 73(2) of the EECC.

(c) Finally, the relationship with point (c) of Article 68(4) of the EECC is problematic. Under that provision, obligations imposed in accordance with Article 68 must be justified in light of the objectives laid down in Article 3 of the EECC; that provision must also be complied with when imposing obligations

under Article 73 of the EECC (Article 68(2); Article 68(3), first subparagraph; Article 73(1), first subparagraph). Now the first subparagraph of Article 73(1), just like Article 72(1) of the EECC but unlike Article 72(2) of the EECC, contains no reference to the objectives under Article 3 of the EECC. Irrespective of that scheme, must the objectives under Article 3 of the EECC be taken into account even when considering the question of 'whether' an access obligation is to be imposed? Or is the scheme under the first subparagraph of Article 73(1) or Article 72(1) of the EECC to Article 72(2) of the EECC to be interpreted as meaning that, in the context of the first two provisions referred to above, the objectives under Article 3 of the EECC should not be taken into consideration when considering the question of 'whether' an access obligation is to be imposed? Only when the question of 'whether' an access obligation is to be imposed is answered in the affirmative in this first step should reference be made back to point (c) of Article 68(4) of the EECC in a second step when considering the specific measures.

2. The referring court takes the view that the question raised is also not answered directly by Article 72(1) of the EECC. That provision would appear to require that the civil engineering assets be part of the relevant market according to the market analysis. This is indicated by the reference in the provision to Article 68 of the EECC (see also Neumann, N&R 2019, 152 <158>) and Article 72(2) of the EECC (*argumentum e contrario*). This is not the case here. It is therefore irrelevant first of all that, according to the wording of the provision, Article 72(1) of the EECC – in all the aforementioned language versions understood by the members of the Chamber – provides for a closed or exhaustive list of regulatory grounds, which militates against the lawfulness of a 'review of a bundle of objectives'. Nor does any consideration need to be given to the fact that the relationship between Article 72(1) of the EECC and point (c) of Article 68(4) – as well as the first subparagraph of Article 73(1) of the EECC – is unclear (IV 1 c).

3. According to the referring court, *sedes materiae* for resolving the problem might be Article 72(2) of the EECC. According to the wording of the provision – which refers to the objectives of Article 3 of the EECC – the question raised seems to be answered clearly to the effect that, when considering the question of 'whether' to impose an obligation to provide access to civil engineering assets that are not part of the relevant market according to the market analysis, the national regulatory authorities could, in any event, also examine whether the obligation is necessary and proportionate with regard to achieving the objectives of Article 3; to that extent, there is also parity with point (c) of Article 68(4) of the EECC. However, the provision is to that extent also only seemingly clear, because both the relationship with Article 72(1) of the EECC (a) and the relationship with Article 73 of the EECC (b) are unclear:

(a) First, it is unclear how the relationship between Article 72(1) and (2) of the EECC is to be understood: on the one hand, according to the wording of the provision, Article 72(1) of the EECC, in the light of Article 68 of the EECC, can

only be understood in relation to an undertaking with significant market power on a possible market for civil engineering assets (see above). That would mean that Article 72(2) of the EECC could be conceived as a separate regulatory instrument with separate conditions where, as in the present case, such a market was not specifically taken as a basis. That would mean, however, that access obligations relating to civil engineering assets could be imposed on the undertaking with significant market power on a civil engineering assets market only under more stringent conditions than would be the case under Article 72(2) of the EECC; in any event, the purpose of any such differentiation is not particularly clear. On the other hand, Article 72(1) of the EECC may, if appropriate, also be read as a basic rule, to which Article 72(2) of the EECC gives concrete expression only in specific cases. Such an interpretation is supported by the fact that, according to the wording of the provision, Article 72(2) of the EECC refers to 'access in accordance with this Article', thus obviously assuming that access is provided under uniform basic conditions, and that, if interpreted in this way, Article 72(1) and (2) of the EECC could be regarded as unitary in terms of substance.

(b) Secondly, it is unclear how the relationship between Article 72(2) and Article 73 of the EECC is to be understood. It is difficult to clarify whether the conditions of the first subparagraph of Article 73(1) of the EECC can also be applied to measures pursuant to Article 72(2) of the EECC when deciding as part of a 'package of measures' (aa). Further problems arise when a 'unitary' interpretation of Article 72(1) and (2) of the EECC, as mentioned under IV 3(a) above, is presumed (bb).

(aa) It is unclear whether the conditions of the first subparagraph of Article 73(1) of the EECC can also be applied to measures pursuant to Article 72(2) of the EECC when deciding, as is the situation here, as part of a 'package of measures'. Admittedly, also as regards Article 72(1) of the EECC, the absence of the assessment criteria (hindering the emergence of a sustainable competitive market and not being in the end-user's interest) in Article 72(2) of the EECC may, in principle, be explained by the fact that the Community legislature assumed that the measures provided for in Article 73 and Article 72 of the EECC would be imposed in a 'package of measures', in which case the restrictions defined in the first subparagraph of Article 73(1) of the EECC also apply to the imposition of obligations under Article 72(2) of the EECC; that would mean 'parity' of the conditions defined in the first subparagraph of Article 73(1) and Article 72(2) of the EECC. The second subparagraph of Article 73(2) of the EECC may militate in favour of that proposition, and that also seems to have been the understanding of the German legislature. That would mean that the difficulties in interpreting the first subparagraph of Article 73(1) of the EECC (IV 1.) also 'apply' to Article 72(2) of the EECC.

However, the wording of the provisions does not support that interpretation of an action in a 'package of measures' – resulting in the conditions laid down in the first subparagraph of Article 73(1) being applied to action pursuant to Article 72(2) of the EECC. Rather, the notion of any 'synchronicity' of the

conditions for action pursuant to Article 72(2) and action pursuant to Article 73 of the EECC is countered by the fact that the second subparagraph of Article 73(2) of the EECC and in particular the expression ‘bloße Auferlegung’ (imposition alone) used in the German version would indicate that the EU legislature considers the obligation to provide access to civil engineering assets to be, in principle, less intrusive; recital 187 of the EECC also points in that direction (see Neumann, N&R 2016, 262 <267> and N&R 2018, 204, <206 and 207>; Scherer/Heinickel, MMR 2017, 71 <75>). Should that be the case, this would militate in favour of action being taken pursuant to Article 72(2) of the EECC to impose lesser – not parallel – conditions.

(bb) Further problems arise when a ‘unitary’ understanding of Article 72(1) and (2) of the EECC, as mentioned above under IV 3(a), is presumed. If one considers the relationship between Article 72(1) and Article 73 of the EECC then – possibly depending on the language versions of Article 73 of the EECC – compared to the first subparagraph of Article 73(1) of the EECC, Article 72(1) of the EECC represents a narrower review programme. On the other hand, the existence of the second subparagraph of Article 73(2) of the EECC suggests, however, that the EU legislature regards the obligation to provide access to civil engineering assets, in principle, as less intrusive (see above). This, in turn, conflicts to a certain degree with Article 72(1) of the EECC, which defines the regulatory grounds introduced in that regard more narrowly compared to the first subparagraph of Article 73(1) of the EECC – in the German version, see above – and, in particular, may not allow for further concerns to be taken into consideration. Significantly, in the context of the second subparagraph of Article 73(2) of the EECC, the question is not raised as to whether the imposition alone of obligations under Article 72 of the EECC is a proportionate means of avoiding any ‘[hindering of] the emergence of a sustainable competitive market’, but whether the obligation in accordance with Article 72 of the EECC would be a proportionate means by which to ‘promote competition and the end-user’s interest’. Whether something is hindered or is simply promoted are two different criteria.

[…]