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The end of access to essential facilities in Germany in practice?

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On June 10, 2010, the Düsseldorf Court of Appeals issued a decision that increased the hurdles for obtaining access to essential facilities in Germany in practice (see WuW/DE-R 2941 *et seq.*). The case concerns interim proceedings against a FCO decision.

The FCO had found that Scandlines, the owner and operator of the ferry port Puttgarden, abused its dominant position by refusing access to the port infrastructure, and ordered Scandlines to negotiate access modalities with the complainants. The port was considered an essential facility necessary for the complainants to offer ferry services between Puttgarden (Germany) and Rødby (Denmark), a route that so far only Scandlines offered. Scandlines appealed and in parallel successfully requested interim measures against the FCO's decision (namely granting the appeal suspensive effect).

(The case is quite a saga: the FCO had already ordered access to the same port in 1999. The case went on appeal, but *inter alia* because one of the complainants at the time went insolvent, the case was ultimately settled. The new proceedings mark the second attempt to gain access to the port via the FCO.)

While the current case concerned both Article 102 TFEU and national law, the Court focused on the national provision. Section 19(4) ARC contains a specific provision on access to essential facilities: a dominant player abuses its dominant position when refusing another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor on upstream or downstream market(s). There is an exception if the dominant undertaking demonstrates that for operational or other reasons the concurrent use is impossible or cannot reasonably be expected.

The Court ruled that the FCO's decision was likely illegal because the exception applied to the case at hand. The Court found that the refusal to grant access to its port infrastructure did not constitute an abuse as the concurrent use was impossible for (i) legal and (ii) factual reasons. The Court stated that the obstacles for the concurrent use do not need to originate from the sphere of the dominant undertaking.

Regarding legal reasons, the Court found that there were obstacles for the complainants to obtain the necessary public permits to use and reconstruct the premises situated on the landside behind the

port for requisite parking and pre-embarking space. (The FCO had referred to similar aspects in its decision when analyzing and rejecting the possibility to duplicate the port facility, which is part of the essential facility test.)

On the factual reasons, the Court concluded that the complainants could not profitably start offering competing ferry services and would thus likely refrain from using the port premises and from making the requisite investments. The Court analyzed the incentive to invest in general from the perspective of a “prudent business man”, and did not consider the complainants’ economic considerations in detail. The Court stated that because a bridge across the same sea route between Germany and Denmark was planned and to be completed by 2018, the operating time for the new ferry services, which would realistically remain (because of the estimated duration of the main judicial proceedings, the necessary preparations, *etc.*), would be too short to allow amortization of the investment. (Again, the FCO had referred to similar aspects in its decision when rejecting the possibility to duplicate the port facility.) The Court thus ruled that the conditions for concurrent use were no longer met. The FCO did not challenge this decision in summary proceedings. The main appeal proceedings continue.

The decision is rather unusual. The FCO had examined the relevant aspects in order to find that duplication of the port facilities would be impossible and thus, that Scandlines generally had to offer access to the port facilities. The Court now recycled the same aspects for testing the possibility of concurrent use of the port in order to reject the claim for access to the essential facility. This raises issues of consistency, also with the applicable law. The exception contained in Section 19(4) ARC is intended to cover capacity shortage reasons, or other reasons that render concurrent use unacceptable for the owner. It is not clear that the likelihood of the concurrent use by the party to seek access (here because of alleged lack of profitability) is a sound criterion in this respect, in particular given that exceptions should be interpreted in a narrow way. (For the same reasons, the approach raises doubts as to its compatibility with Article 102 TFEU.)

If the Court’s approach is confirmed, this may well mark the end of access to essential facilities in Germany in practice (unless the Court of Justice reviews the approach under Article 102 TFEU in a preliminary ruling and comes to a different conclusion). In any event, the case illustrates the enormous practical difficulties in such cases: the second official FCO proceedings started in 2006, and the Court tells the complainants now that they can no longer profitably operate the planned ferry line, essentially because time has run out...

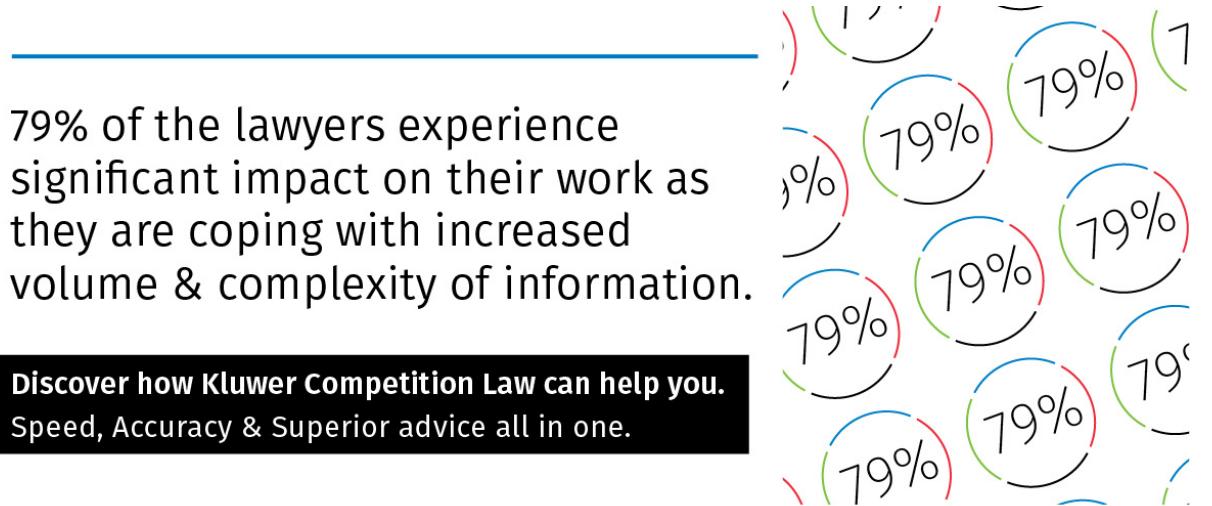
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