Kluwer Competition Law Blog

# EU Court of Justice Clarifies the Scope of the Essential Facilities Doctrine in Lithuanian Railways

Katarzyna Czapracka, Jérémie Jourdan, James Killick, Assimakis Komninos (White & Case) and Peter Citron (Editor) (White & Case, Belgium) · Saturday, January 21st, 2023

On 12 January 2023, the EU Court of Justice upheld the EU General Court's judgment imposing a fine on Lithuanian Railways for dismantling a section of the railway track. While reaffirming its essential facility case law (*Bronner*), the Court confirmed that the *Bronner* case law did not apply to the deliberate destruction of State-owned infrastructure managed by a dominant company which was obliged to grant access to that infrastructure.

**The fine on Lithuanian Railways**

On 2 October 2017, the European Commission (EC) fined Lietuvos geležinkeliai AB (Lithuanian Railways) EUR 28 million for abusing a dominant position by dismantling 19km of railway track connecting Lithuania and Latvia. Lithuanian Railways managed the track, but the track was constructed and owned by the Lithuanian State. According to the EC, this track removal prevented one of Lithuanian Railways' major customers, the Polish State-owned oil company Orlen Lietuva AB (Orlen), from switching to a new entrant competitor, Latvian Railways, since there were no viable alternative routes from Lithuania to Latvia (the alternative route being much longer), and therefore harmed a competitor.

**General Court ruling**

Lithuanian Railways brought an action before the EU General Court seeking an annulment of the fine. A central plea was that the EC should have assessed the case through the framework of the essential facilities doctrine (*Bronner* conditions), which imposes a higher threshold for imposing an obligation to deal with dominant companies.

Under *Bronner*, the following three conditions must be fulfilled before the refusal by the dominant company to grant access to a service constitutes an abuse under Article 102 TFEU. It is necessary that:

- The refusal is likely to eliminate all competition in the market on the part of the person requesting the service;

- The refusal be incapable of being objectively justified; and
- The service in itself be indispensable to carrying out that person's business, *e*. there is no actual or potential substitute to the requested input.

The General Court ruled that the removal of the track should not be assessed under the *Bronner* conditions and dismissed the appeal. According to the General Court, it was sufficient, as the EC had done, to show that the conduct was (subject to any objective justification) such as to restrict competition and, in particular, to constitute an impediment to market entry. However, despite finding no illegality in the EC decision, the General Court reduced the amount of the fine to EUR 20 million in the exercise of its unlimited jurisdiction in view of the infringement's duration and gravity.

Lithuanian Railways brought an appeal of the General Court's judgment before the Court of Justice. The EC did not appeal the General Court's judgment in so far as it reduced the fine despite the lack of legal errors in the decision. In his opinion, the Advocate General criticised the General Court for providing little reasoning on how it calculated the new fine imposed on Lithuanian Railways.

**Court of Justice ruling – no analysis required under *Bronner***

Following largely the Advocate General's Opinion, the ECJ ruled that the removal of track should **not** be analysed as a refusal of access under the *Bronner* conditions, but as an independent form of abuse of a dominant position under Article 102 TFEU. The Court reasoned as follows:

- The destruction by a dominant undertaking of infrastructure must be distinguished from a refusal of access.
- The *Bronner* case law concerns "*a refusal of access to infrastructure, whereby, ultimately, the dominant undertaking reserves the infrastructure which it has developed for its own use*".
- By contrast, "*destroying infrastructure entails sacrificing an asset*". "*As a result of the destruction, the infrastructure inevitably becomes unusable by competitors but also by the dominant undertaking itself*". The case thus did not involve a refusal to provide access, but a situation where the dominant company incurs a cost to dismantle an asset apparently with the view to preventing market entry.
- The *Bronner* criteria are "*intended to strike a fair balance between, on the one hand, the requirements of undistorted competition and, on the other hand, the freedom of contract and the right to property of the dominant undertaking. In that sense, those criteria are intended to be applicable in the event of refusal of access to infrastructure which the dominant undertaking owns and which it has developed for the needs of its own business by means of its own investments*".
- The *Bronner* criteria could not apply in this case "*where the infrastructure in question was financed by means not of investments specific to the dominant undertaking, but by means of public funds and that undertaking is not the owner of that infrastructure*".
- Referring to its recent Deutsche Telekom judgment, the ECJ noted that the *Bronner* criteria would not be applicable in any event, given that the Lithuanian Railways was subject to a regulatory obligation to give access to its infrastructure. [1]

Finally, the ECJ rejected the appeal on the fine, finding that, contrary to what the appellant argued,

the General Court had not set the new fine in consideration of an anticompetitive intent on the part of Lithuanian Railways.

**Key takeaways**

- Destruction of State-owned infrastructure managed by a dominant company, which is capable of restricting competition, and in particular preventing market entry, and cannot be objectively justified, can be regarded as an independent form of abuse of a dominant position.
- The essential facilities doctrine under *Bronner* (establishing a high threshold for imposing an obligation to deal with dominant companies) remains fully applicable to refusal to grant access to infrastructure developed by the dominant company for the purpose of its own business and owned by it. The application of that high threshold results from the balancing of competition law principles and fundamental rights, such as the freedom to contract and the right to property, as well as the need to protect the incentives to invest in the development of such essential facilities. However, the same high standards cannot apply to the destruction of State-owned infrastructure managed by a dominant undertaking, or where there are regulatory obligations to provide access to this infrastructure.
- A dominant company managing State-owned infrastructure has a special responsibility not to allow its conduct to impair competition. In this case, this meant that Lithuanian Railways should have maintained the asset so it could be returned to service in the short term, in particular where the delay in doing so was capable of having anticompetitive effects.

---

[1] Lithuanian Railways was responsible under both EU and national railway regulatory law for granting access to public railway infrastructure and ensuring the good technical condition of that infrastructure, as well as ensuring safe and uninterrupted rail traffic and, in the event of disturbance to rail traffic, taking all necessary measures to restore the normal situation.

---

This entry was posted on Saturday, January 21st, 2023 at 9:00 am and is filed under Source: OECD“>Abuse of dominance, European Court of Justice, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.