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The EU General Court confirms the Commission's decision finding that the Lithuanian railway incumbent abused its dominant position by dismantling a rail track *(Lietuvos geležinkelai)*

UNILATERAL PRACTICES, DOMINANCE (ABUSE), ESSENTIAL FACILITY, REFUSAL TO DEAL, RELEVANT MARKET, ACCESS TO FACILITIES, SANCTIONS / FINES / PENALTIES, JUDICIAL REVIEW, EUROPEAN UNION, FINE MITIGATING, TRANSPORT (RAIL)

EU General Court, *Lietuvos geležinkelai*, T-814/17, 18 November 2020

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Comment

On 18 November 2020, the General Court of the European Union ('**GC**') delivered its ruling in the *Lietuvos geležinkeliai* [Lithuanian Railways] case and upheld the European Commission's decision in which the national railway company of Lithuania was found to have abused its dominant position in the Lithuanian rail freight market (the 'Judgment'). The GC confirmed that the Lithuanian railway incumbent dismantled a 19km-section of railway track connecting Lithuania and Latvia in breach of Article 102 TFEU. The GC however decided to reduce the fine imposed by the Commission from EUR 27.8 million to EUR 20 million, having regard to the gravity and the duration of the infringement. An appeal to the Court of Justice against the Judgment is currently pending.

I. The parties

Lietuvos geležinkeliai AB ('**LG**') is the state-owned national railway company of Lithuania. LG is a vertically integrated company as it is responsible for both managing the railway infrastructure and providing rail transport services (passengers and freight) in Lithuania.

Orlen Lietuva AB ('**Orlen**') is a fully owned subsidiary of the Polish oil company PKA Orlen SA. Orlen operates various facilities in Lithuania, including a large refinery located in Bugeniai, close to the border with Latvia.

II. The facts

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In 1999, LG and Orlen entered into a commercial agreement for the transportation of refined oil products from a refinery belonging to Orlen to a Lithuanian seaport for export to Western Europe. In 2008, following a financial dispute between LG and Orlen that arose with respect to the rates paid for the services covered by the agreement, Orlen considered shifting its export business from Lithuania to alternative seaports in Latvia and entrusting its transport services to the Latvian national railway company (**'LDZ'**), one of LG's main rival. Under this new arrangement, Orlen's products would reach the Latvian seaports through a railway line connecting Lithuania and Latvia.

Shortly after, LG – in its capacity as rail infrastructure manager – blocked the traffic on a 19km-section of the railway line due to alleged damages to the track, before completely dismantling the track in question. Given LG's inability to repair the track in the short term and the absence of viable alternative routes from Lithuania to Latvia, Orlen was forced to abandon its plans to use LDZ's services.

On 14 July 2010, Orlen filed a formal complaint with the Commission alleging that LG's sole purpose for removing the track was to prevent Orlen to enter into an agreement with another rail operator. In October 2017, following its investigation, the Commission fined LG EUR 27 873 000 for hindering competition on the rail freight market, in violation of Article 102 TFEU. LG appealed to the GC seeking the annulment of the Commission's decision.

III. The GC's ruling

The GC upheld the Commission's decision by concluding that LG had abused its dominant position in the market for the management of the railway infrastructure in Lithuania (upstream market), by preventing the entry of LDZ in the Lithuanian market for the provision of rail transport services for oil products (downstream market).

We summarize below the main takeaways of the GC's ruling.

Non-applicability of the essential facilities doctrine

On appeal, LG argued that the Commission should have assessed its failure to ensure access to the track through the well-established case-law on refusal to provide access to essential facilities, which sets a higher threshold for imposing an obligation to deal on dominant companies. [*1*] The GC dismissed this argument, holding that the Commission was correct in deciding not to analyze the conduct under the *Bronner* conditions but to demonstrate instead that LG restricted competition by hindering market access. [*2*]

The GC advanced two reasons for not applying the essential facilities doctrine in the case at hand. First, the GC noted that LG's dominant position derived from a legal monopoly and that its infrastructure was built with Lithuanian public funds (instead of its own investment). Second, the GC observed that LG was under a regulatory obligation to ensure the good condition of the railway infrastructure and safe rail traffic (which includes, in case of disturbance, the obligation to take all necessary measures to restore the normal situation). [*3*] The GC relied here on its *Slovak Telekom* ruling [*4*] in which it held that the essential facilities doctrine requirements only apply in the absence of a regulatory obligation to grant access to other companies. The GC justifies this by indicating that where there is a legal duty to supply, the necessary balancing of the economic incentives has already been carried out by the legislature at the point when such a duty was imposed.

It is striking that the GC refers to (i) the presence of a legal obligation to make available, and (ii) the origin of the essential facility and dominant position, in order not to apply the *Bronner* case law throughout its reasoning but when concluding it *only* refers to the former reason. [*5*]

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Contrary to LG's claims, the GC decided that the conduct should rather be assessed under the general framework for abuse, as a '*conduct capable of hindering market entry by making access to the market more difficult and thus leading to an anticompetitive foreclosure effect*'. [*6*]

The removal of a railway track as an abusive conduct

Another key point of discussion related to whether the removal of the track could amount to an abuse of a dominant position within the meaning of Article 102 TFEU. The GC recalled that this provision contains a non-exhaustive list of examples of abusive practices. Accordingly, any conduct by a dominant firm capable of restricting competition on a market may be categorized as abusive. [*7*]

The need to take actions in light of dominant companies' special responsibility

As the Lithuanian railway infrastructure manager, LG holds a statutory monopoly in Lithuania for the management of railway infrastructure and a *de facto* monopoly on the Lithuanian rail freight market. On this basis, the GC noted that LG holds a dominant position in the market for the management of railway infrastructure, which confers it a special responsibility to ensure undistorted competition on the market. [*8*]

Absence of objective justification

The GC also confirmed the Commission's assessment that LG could not objectively justify the entire removal of the track. It should be recalled that the Commission's investigation found that only 1.6 km out of km of track had to be repaired. Therefore, LG could not reasonably justify why it had dismantled the track fully and in great haste, without taking any of the normal preparatory steps for its reconstruction. [*9*]

In addition, the responses provided to the Commission's requests for information confirmed that the removal of the track was 'highly unusual' considering practice in the rail sector, as no other railway infrastructure manager within the Baltics had removed tracks in this way. The Estonian and Latvian railway infrastructure managers provided only a few examples where tracks had been removed (*i.e.*, the replacement of a closed road that was abandoned and the removal for repair after many years of closure) and these situations were handled in a very different manner. [*10*]

Abuse as an objective concept

According to LG, the Commission did not demonstrate that LG had acted in bad faith for the purpose of preventing its competitors (*i.e.*, LDZ) to enter the Lithuanian market and that it had no intention to repair the track.

The GC recalled previous case law [*11*] stressing that the concept of abuse of dominance is an objective concept relating to the conduct of a dominant company. Consequently, the conduct must be assessed on the basis of objective factors, with proof of intent of bad faith not required for the purposes of identifying an abuse. [*12*]

The Commission is however obliged to consider all the relevant facts surrounding the conduct. [*13*] In the case at hand, the GC observed that the Commission had taken into account the factual circumstances surrounding the removal of the track and analyzed their potential effects on competition before reaching the conclusion that LG abused its dominant position.

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Proportionality of the remedies imposed by the Commission

In its decision, the Commission offered LG two alternatives to restore the competitive environment that existed prior to the removal of the track: reconstructing the track or eliminating the disadvantages faced by potential competitors on the alternative routes to the Latvian seaports.

On appeal, LG considered the first remedy to be disproportionate as it would impose the construction of a completely new facility at its own costs. It also argued that the second alternative was not viable due to the specificities of the railway infrastructure's management.

The GC observed that the Commission provided LG with appropriate measures to bring the infringement to an end, without imposing a choice between them and held that the remedies were not disproportionate.

Reduction of the fine

Further on the GC decided to reduce the amount of the fine imposed by the Commission from EUR 27 873 000 to EUR 20 068 650. Exercising its unlimited jurisdiction, the GC considered the latter amount to be appropriate in light of the infringement's duration and gravity.

Despite the GC cutting the fine by a third, LG decided to appeal the GC's judgment before the Court of Justice. This appeal will be confined to points of law.

IV. Comment

With this ruling, the GC grasped the opportunity to recall that any type of conduct, even if atypical, which is capable of restricting competition, should be regarded as an abuse of dominance when adopted by a dominant company.

In addition, the Judgment provides important guidance on the application of the essential facilities doctrine in the railway sector (and broader any regulated sector). First, the GC held that the indispensability criterion should be disregarded in presence of a regulatory obligation to grant access to third parties. Second, it narrows the scope of the essential facilities doctrine to the protection of incentives to invest in such facilities. Therefore, one could assume that legal monopolies whose infrastructure is financed with public funds instead of their own funds cannot rely on the essential facilities doctrine against a claim of abuse of dominance.

[*1*] CJEU, C-7/97, *Oscar Bronner*, EU:C:1998:569 in which the Court of Justice introduced a strict legal test to find that a refusal to deal by a dominant company is abusive: (i) the refusal concerns input that is indispensable for carrying on the undertaking's business; (ii) the refusal is likely to eliminate all competition on the market in which the undertaking requesting the service operates; and (iii) the refusal is not objectively justified.

[*2*] Judgment, paragraphs 70-104.

[*3*] The GC ruled that '*where there is a legal duty to supply, the necessary balancing of the*

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economic incentives, the protection of which justifies the application of the exceptional circumstances developed in the judgement of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), has already been carried out by the legislature at the point when such a duty was imposed" (Judgment, paragraph 92).

[*4*] CJEU, T-851/14, *Slovak Telekom v Commission*, EU:T:2018:929 (currently under appeal before the Court of Justice).

[*5*] Judgment, paragraph 98.

[*6*] *Ibid*.

[*7*] Judgment, paragraph 85.

[*8*] Judgment, paragraph 223.

[*9*] Judgment, paragraph 164.

[*10*] Judgment, paragraphs 177-182.

[*11*] ECJ, C-549/10, *Tomra Systems and Others v Commission*, EU:C:2012:221, paragraph 17; GC, T-301/04, *Clearstream v Commission*, EU:T:2009:317, paragraph 140.

[*12*] Judgment, paragraphs 188-189.

[*13*] Judgment, paragraph 190.

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