BRUSSELS À JOUR

Gaslighting by Any Other Name…

Markus Röhrig, Christoph Sielmann and Laura Stoicescu report on the latest developments from the European capital of competition law.

As Jon Snow would put it, winter is coming. And with it, a new Article 102 TFEU General Court judgement in the field of gas (fittingly enough). In *Bulgarian Energy Holding*[1], the General Court delves into the *Bronner* criteria and builds upon its assessment in cases such as *Servizio Elettrico Nazionale* and *Lithuanian Railways* (for more details on these, check out our June 2022 and August 2022 issues, respectively).

Overview of the Case

The addressee of the Commission decision – Bulgarian Energy Holding ("**BEH**") – is a Bulgarian state-owned company; its subsidiary Bulgargaz is the country's public gas supplier, while its subsidiary Bulgartransgaz was, at the time of the alleged infringement, the operator of the gas transmission network and of the only natural gas storage facility in Bulgaria (the Chiren storage facility).

At the time, Bulgaria mainly relied on gas imports from Russia transported via Ukraine and Romania through three pipelines. Among them, Romanian Transit Pipeline 1 ("**Transit Pipeline 1**") was the pipeline through which most of Bulgaria was supplied with gas. Transit Pipeline 1 was not owned by BEH, but by the Romanian system operator Transgaz. Transgaz had granted Bulgargaz the exclusive right to use the pipeline until the end of 2016, for which Bulgargaz paid a fixed annual fee. Under the agreements, Bulgargaz was also able to control third-party access to Transit Pipeline 1.

Overgas, another gas supply operator in Bulgaria, sought access from BEH to Transit Pipeline 1, the Bulgarian gas transmission network, and the Chiren gas storage facility. In 2010, Overgas lodged a complaint with the Commission, claiming that BEH had denied its access request. In 2018, the Commission held that BEH had indeed abused its dominant position, and thus infringed Article 102 TFEU, by refusing third-party access to those three facilities between 2010 and 2015, and imposed a fine of EUR 77 million.

1 General Court, Judgement of 25 October 2023, Case T-136/19, *Bulgarian Energy Holding et al. v European Commission et al.*

BEH appealed the Commission decision before the General Court, which, on 25 October 2023, annulled the Commission decision. The Court held that the Commission was right to apply the *Bronner* test (i.e., the essential facilities doctrine) in order to determine whether or not BEH's conduct was abusive within the meaning of Article 102 TFEU, but that it had failed to factually establish several of its requirements.

To Have or Not to Have: The Revival of Bronner?

The first take-away of *Bulgarian Energy Holding* is that *Bronner* is here to stay.. and – possibly – even to apply to a broader set of cases.

First, the Commission used the *Bronner* criteria in the contested decision in order to assess Bulgargaz's conduct on the market for capacity services on Transit Pipeline 1. The Court followed suit, confirming that the *Bronner* case-law is the principal framework to assess cases that concern access to, in the Court's words, infrastructures or services "*that are often described as an 'essential facility'*". This, in itself, is noteworthy since in the recent past, it seemed that the courts had more and more narrowed down the scope of application for *Bronner* (*see*, for example, the ECJ's *Deutsche Telekom* and *Lithuanian Railways* judgements, and the General Court's *Google Shopping* judgement). In passing, the Court also explicitly confirmed that the *Bronner* criteria **apply to services**, not only to infrastructure.

Second, the Court assessed whether *Bronner* was applicable even though the Commission's decision was not addressed to the owner of Transit Pipeline 1, but to the company that had an exclusive right to use it, namely Bulgargaz. In other words, the case raised the question whether a dominant company that is not the owner of the essential facility can be held responsible under Article 102 TFEU to grant access to that facility. The Court affirmed, holding that legal ownership was not required. Instead, according to the Court, a dominant company that had an exclusive right comparable to "***a situation of control***" over the essential facility could be obligated to grant access.

Third, the extension of *Bronner* to dominant companies which are not the essential facility's legal owner raised another question. The *Bronner* criteria are rather narrow, therefore "privileging" the dominant company compared to other circumstances involving a potential abuse of market power. This is because the owner has usually made significant investments to build the essential facility, and the incentives to make such investments should not be undermined by the antitrust laws. It is in this context that the Court of Justice decided, in *Lithuanian Railways*, that the *Bronner* doctrine did not apply where the infrastructure was financed by public funds and where the dominant undertaking was not the owner of the infrastructure. However, in *Bulgarian Energy Holding*, the General Court now held that, although Bulgargaz was not the owner of the facility, its exclusive right was comparable to the control exercised by an owner, and although it had not developed the facility, the fixed annual fee it had paid amounted to an investment in the said infrastructure. Therefore, according to the Court, the *Bronner* criteria did apply. This is particularly remarkable since the Court did not analyze, in detail, whether that fixed annual fee was equivalent, or at least came close to, an investment that called for the "privilege" afforded by *Bronner* – let alone to the amount that would have been needed to establish the facility from scratch. *Bulgarian Energy Holding*, therefore, suggests

quite a broad reading of *Bronner*, unfortunately without setting out the legal test as to when usage fees paid by the non-owner qualify as investments within the essential facility doctrine's framework.

How to (Not) Deny Access

One of the main reasons for the Commission's case to ultimately fail in front of the General Court was evidentiary. This, first, concerned the requirements for requesting and denying access. When discussing whether Overgas had in fact made a request for, and BEH had in fact refused, access to Transit Pipeline 1, the General Court set rather high standards, providing some valuable practical guidance.

As regards **requesting access**, the Court held that any requests that were addressed to Transgaz (the pipeline's operator), and not Bulgargaz, could not be attributed to Bulgargaz, at least if these requests were not forwarded to them. Furthermore, the Court held that only raising the "*question of possibly providing part of the unused capacity*" on the pipeline merely qualified as a "*preliminary request*" (read: not an actual request, although the Court ultimately left this question open).

As regards **denying access**, the Court explored the requirement of the reasonable period of time within which access must be granted after a request: The Court found that the Commission did not prove that Bulgargaz had delayed access to the pipeline, arguing that the parties concluded an *ex novo* agreement within less than ten weeks in spite of a complex legislative landscape that needed to be observed. The Court compared this to the periods of negotiation of similar agreements between the parties, which had lasted longer. The Court also highlighted Bulgargaz's "*constructive*" attitude towards Overgas, arguing that Bulgargaz had replied to Overgas' letters within days, organized several meetings within a short period, and granted Overgas provisional access to the pipeline even before finalizing the agreement.

Yes, But Can You Prove It?

The General Court then went on to discuss the Commission's assessment of the conduct's (potential) competitive effects. In particular, the Court built upon *Servizio Elettrico Nazionale* (and *Intel*), confirming that the Commission had the burden of proving that the undertaking's conduct constituted a refusal of access capable of eliminating all competition. Such exclusionary capability cannot be purely theoretical. On the contrary, the Commission had to demonstrate that the potential new entrant had the **firm determination**, the very **capacity to enter** the markets, and that it had **taken sufficient steps** to enable it to enter those markets within such a period of time as would impose competitive pressure on Bulgargaz. The Commission, the Court found, failed to do so.

The Court thus confirmed the high evidentiary standard when it comes to the enforcement of the *Bronner* doctrine – an aspect already highlighted by Advocate General Rantos in his opinion in *Lithuanian Railways* – but also the fact that essential procedural requirements are gaining more and more traction in the Court's practice.

Riding Into the Sunset

This latest judgement confirms not only that the *Bronner* doctrine is here to stay, but also that the Court is still fine-tuning its details, which might offer further interesting reads in the future.

Until next time, check your gas bill and don't forget to follow us on LinkedIn for your favorite EU Competition Law topics!

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