one may ask whether, in the balance between certainty and discretion, Lord Hoffmann has placed too great an emphasis upon certainty?

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THE "ESSENTIAL FACILITIES" DOCTRINE IN EC COMPETITION LAW

IN *Oscar Bronner GmbH & Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others* (Case C-7/97, [1999] 4 C.M.L.R. 112), the European Court of Justice has clarified the scope of the application of the "essential facilities" doctrine to EC competition law. The Commission defined an "essential facility" as a "facility or infrastructure without access to which competitors cannot provide services to their customers" (*B&I Line plc* v. *Sealink Harbours Ltd.*, Commission Decision of 11 June 1992, [1992] 5 C.M.L.R. 255 at paragraph 41). Under the doctrine, a dominant undertaking that owns or controls such a facility and refuses, without an objective justification, to make it available to competitors—or makes it available on discriminatory terms—abuses its position of dominance.

Bronner, a small publisher in the Austrian daily newspaper market, brought an action before the national courts against Mediaprint, a newspaper group that had a large share of that market. Bronner argued that Mediaprint's refusal to allow it access to its nationwide home-delivery scheme for daily newspapers amounted to an abuse of its dominant position in the market of distribution of newspapers. In other words, Bronner contended that the home-delivery scheme operated by Mediaprint was an "essential facility" that had to be made available to competitors against the payment of reasonable remuneration. Bronner claimed that it could not afford to set up its own home-delivery service and that other means of delivery, such as postal delivery, were unsatisfactory alternatives. Mediaprint's main argument was based on the freedom of contract and on the fact that it had invested considerable resources and effort to build up its system of home-delivery of newspapers. The reference made by the national court to the European Court sought to ascertain whether a refusal to deal, such as the one carried out by Mediaprint, could be caught by Article 82 EC.

The Court dealt first with the objections to the admissibility of the reference. The Commission and Mediaprint argued that, since the parties had invoked Austrian competition legislation before the national court, the latter would not be competent to apply a ruling on Article 82 EC. Moreover, they claimed that one of the pre-conditions for the application of that provision, namely the effect on trade between Member States, had not been made out. The Court dismissed those arguments. As the Advocate General pointed out in his Opinion, a national court is *always* competent to apply

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Article 82 EC, given that the provision is directly effective (Case 127/73 *BRT* v. *SABAM* [1974] E.C.R. 51). Furthermore, the Court established early in its case law that it is possible for national and EC competition law to apply concurrently to the same factual situation (Case 14/68 *Walt Wilhelm* v. *Bundeskartellamt* [1969] E.C.R. 1). National courts are therefore at liberty to make a reference to the Court on the interpretation of the EC competition rules whenever they envisage that a conflict between both systems might arise. As for the supposed lack of effect on intra-Community trade, the Court took the view that the issue belonged to the substance of the case and not to the admissibility stage.

On the substance of the case, the Court followed closely the compelling Opinion of Advocate General Jacobs. It started by outlining the steps in the application of Article 82 EC, but focused its ruling on the interpretation of the notion of abuse in that provision. The Court had never so far made explicit reference to the doctrine of "essential facilities", but there was case law on refusal to supply as an instance of abuse. The Court sought to distinguish that case law from the facts at issue in *Bronner*. Thus, in *Commercial Solvents* v. *Commission* (Joined Cases 6 and 7/73 [1974] E.C.R. 223) the Court held that the refusal of a dominant undertaking to supply raw material to an erstwhile customer was caught by Article 82 EC. It was clear, however, that Commercial Solvents was trying to penetrate a new market and had the ultimate goal of driving its customer—who had become a potential competitor—out of that market. Indeed, a later case demonstrates that if there is an objective justification behind the refusal to supply (i.e. shortage of the product), Article 82 EC is not breached (Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV* v. *British Petroleum* [1978] E.C.R. 1513). Likewise, the Court referred to its controversial ruling in *Magill* (Case T-69/89 *Radio Telefis Eireann* v. *Commission* [1991] E.C.R. II-485, on appeal, Cases C-241P and 242/91P *RTE and ITP* v. *Commission* [1995] E.C.R. I-743) which is, to date, the closest that the Court has come to endorsing, albeit tacitly, the "essential facilities" doctrine. In those cases, three holders of copyright in weekly television programmes which published their own guide of programmes for their respective channels refused to licence an independent company (Magill) which sought to publish a new comprehensive guide of television programmes to be shown on *all* channels. The Court held that the copyright holders had abused their position of dominance. The Court justified its decision *inter alia* on the grounds that the refusal prevented the emergence of a new product beneficial to the consumer and was not objectively justified, and that it would otherwise be impossible for Magill to obtain the information protected by copyright. That information was *essential* for Magill to carry on its business. The Court explained that the situation in *Bronner* was not analogous for two reasons: first, because alternative, even if less advantageous, methods of distribution of newspapers existed, and secondly,

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because it was not *impossible* for Bronner to set up its own home-delivery scheme. The Court held, therefore, that a refusal to contract like Mediaprint's did not constitute an abuse of dominant position.

The ruling of the Court in *Bronner* deserves nothing but praise. The decision in *Magill* (above) sparked the debate on whether the Court was ready to support a new form of interventionism in EC competition policy that would force successful firms to share their facilities with their competitors. Moreover, the years that followed the judgment of the Court of First Instance saw the Commission applying the newly-found principle with some enthusiasm (*B&I Line plc* v. *Sealink Harbours Ltd.*, above; Commission Decision 94/19 of 21 December 1993, *Sea Containers* v. *Stena Sealink*, [1994] O.J. L15/8). The issue becomes even more acute when an intellectual property right is involved given that, in a sense, the idea or information protected by any such right could frequently be considered as an "essential facility". The *Bronner* judgment is important on three counts. First, the Court has confirmed that a refusal to deal by a dominant company does not *per se* constitute an abuse. This is consistent with the case law on refusal to supply (*Commercial Solvents*, above) and on refusal to license (Case 238/87 *Volvo* v. *Veng* [1988] E.C.R. 6211). Additional circumstances, such as the intention to eliminate competition, need to be present. Secondly, the Court has laid down clear limits to the application of the "essential facilities" doctrine in EC competition law. Thus only when the facility owned by the dominant company is *indispensable to* and *impossible to replicate by* a competitor would an unjustified refusal to grant access to it be rendered abusive. In doing so, the Court has struck a careful balance between the need to protect incentives to investment and property rights of large firms and the demands of a competitive economy. Finally, it has, in an incidental manner (see paragraphs 39–41 of the judgment), elucidated the nature of *Magill* as an exceptional case (see also Case T-504/93 *Tiercé Ladbroke* v. *Commission* [1997] E.C.R. II-923) and not one where the Court set out to upset the fragile equilibrium between the existence and the exercise of intellectual property rights.

ALBERTINA ALBORS-LLORENS

IN THE NAME OF THE FATHER?

WHERE, following divorce, a mother remarries, it is not uncommon for her to wish to change the surname of the children to that of the stepfather. In these cases the jurisprudence of the courts has established over a substantial period of time that a parent may not unilaterally change the name of a child but that, if the matter is brought before the court, the question of a proposed change must be determined on the basis of the welfare principle. The Children Act 1989 (section 13) had made this explicit where a

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