OPINION OF ADVOCATE GENERAL JACOBS

delivered on 28 May 1998 *

1. In this case the Oberlandesgericht Wien (Higher Regional Court, Vienna), acting in its capacity as the Kartellgericht (Court of First Instance in competition matters), has asked the Court whether the refusal by a newspaper group holding a substantial share of the market in daily newspapers to allow the publisher of a competing newspaper access to its home-delivery network, or to do so only if it purchases from the group certain additional services, constitutes an abuse of a dominant position contrary to Article 86 of the Treaty.

The facts and national court's questions

2. Oscar Bronner GmbH&Co. KG ('Bronner') is the publisher of the daily newspaper *Der Standard*. In 1994 the newspaper's share of the Austrian daily newspaper market was 3.6% of circulation and around 6% of advertising revenues.

3. The first defendant in the main proceedings, Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, is the publisher of the daily newspapers *Neue Kronen Zeitung* and *Kurier* and carries on the marketing and advertising business of those newspapers through its wholly owned subsidiaries, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, respectively the second and third defendants in the main proceedings. In 1994 the combined market share of the two newspapers was 46.8% of total circulation and 42% of total advertising revenues. In addition, they reached 53.3% of the population from the age of 14 in private households and 71% of all newspaper readers.

4. In its application to the national court, made under Paragraph 35 of the Austrian Kartellgesetz, Bronner seeks an order requiring the Mediaprint group ('Mediaprint') to refrain from abusing its alleged dominant position on the market and to allow Bronner access to its nation-wide home-delivery service for daily newspapers against payment of reasonable remuneration. It appears that, while there are a number of regional or local networks, Mediaprint's network is the only nation-wide network in Austria. Bronner argues that only home delivery can ensure arrival of the daily newspaper to the subscriber in the early morning hours; postal delivery, which generally arrives later in the morning, does not represent an equivalent alternative. In view of its small number of

* Original language: English.

subscribers it would be unprofitable for Bronner to organise its own home-delivery service. Bronner argues further that Mediaprint has discriminated against it in so far as it allows another daily newspaper *Wirtschaftsblatt*, not published by Mediaprint, to have access to its home-delivery service.

5. Mediaprint contends that it has built up the home-delivery service at great financial and administrative cost. Even if it is in a dominant position, it is not obliged to afford assistance to its competitors. The situation of the *Wirtschaftsblatt*, admitted to its network, is not comparable to that of *Der Standard* because the publisher of the former also entrusted Mediaprint with printing and marketing; thus, access to the home-delivery network was only part of an overall package. Furthermore, the *Wirtschaftsblatt* is not a direct competitor of Mediaprint's daily newspapers since it does not contain essential features of a daily newspaper such as sport, culture and television. Finally, it would overtax the capacity of the home-delivery network if Mediaprint were required to make it available to all Austrian publishers of daily newspapers.

6. The national court regards itself as competent solely to apply national competition rules, and not to apply directly the competition rules of the Treaty. It reasons however that, if the conduct of a market participant falls within the terms of Article 86 of the Treaty, then it must logically constitute an abuse within the meaning of Paragraph 35 of the Kartellgesetz, which has an analogous content. Conduct forbidden under Community law cannot, on account of the supremacy of Community law, be tolerated under national law. Noting that the applicability of Article 86 of the Treaty presupposes that the abuse can affect trade between Member States, the national court refers to the concern expressed by Bronner that refusal of access to Mediaprint's home-delivery service would force it out of the market in daily newspapers and threaten its existence. Since Bronner, as the publisher of a national daily newspaper also available abroad, is an offeror in international trade and commerce, the national court concludes that the effect on intra-Community trade is established.

7. The national court therefore seeks a ruling from the Court on the following questions:

'(1) Is Article 86 of the EC Treaty to be interpreted in such a way that there is an abuse of a dominant position, in the sense of an abusive barring of access to the market, where an undertaking which carries on the publication, production and marketing of daily newspapers, and with its products occupies a predominant position on the Austrian market for daily newspapers (46.8% of total circulation, 42% of advertising revenue and 71% range of influence, measured by the number of all daily newspapers), and operates the only nation-wide home-delivery distribution service for subscribers, refuses to make a binding offer

to another undertaking engaged in the publication, production and marketing of a daily newspaper in Austria to include that daily newspaper in its home-delivery scheme, in the light also of the circumstance that it is not possible, on account of the small circulation and the consequently small number of subscribers, for the undertaking seeking inclusion in the home-delivery scheme to build up its own home-delivery scheme for a reasonable cost outlay and operate it profitably, either alone or in cooperation with the other undertakings offering daily newspapers on the market?

(2) Does it amount to an abuse within the meaning of Article 86 of the EC Treaty, where, under the circumstances described at (1) above, the operator of the home-delivery scheme for daily newspapers makes the entry into business relations with the publisher of a competing product dependent upon the latter entrusting him not only with home deliveries but also with other services (e.g. marketing through sales points, printing) within the context of an overall package?'

8. Written observations have been submitted by Bronner, Mediaprint and the Commission, all of which were also represented at the hearing.

Admissibility

9. Mediaprint and the Commission contend that the reference is inadmissible. In their view the national court is in effect a competition authority competent solely to apply national competition law.

10. However, in my view it is clear that the Kartellgericht is a court and is acting as such in the main proceedings. It must therefore be competent to apply Article 86.

11. That it is a court and is acting as such is confirmed by the Court's case-law on whether a body is a 'court or tribunal of a Member State' within the meaning of Article 177. There the Court has regard to a number of factors, such as whether it is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. [1] Moreover, the body must be acting in its judicial capacity. That will be so 'if there is a case pending before it and if it is called upon to give judg-

1 — See, for example, Case C-54/96 *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* [1997] ECR I-4961.

ment in proceedings intended to lead to a decision of a judicial nature ...'. [2]

12. Mediaprint and the Commission do not suggest that the Kartellgericht fails to meet those requirements. Indeed the Oberlandesgericht Wien is established by the Kartellgesetz as a permanent cartel court for the whole of Austria. [3] It is composed of a judge, who acts as chairman, and two lay members [4] whose technical qualifications and independence are assured [5] (interlocutory matters being dealt with by the chairman alone [6]). Its function is to apply the Kartellgesetz in accordance with the procedures therein laid down. [7]

13. While some of those procedures are more administrative than judicial in nature (for example, maintenance of the register of cartels) the main proceedings in this case are plainly of a judicial nature. They are brought by one private party against another under Paragraph 35 of the Kartellgesetz, which provides that the Kartellgericht shall, upon application, order an undertaking to cease abusing a dominant position. The language used in the provision, in particular the words 'hat auf Antrag ... aufzutragen' ('shall, upon application, order') makes it clear that the provision establishes a right of action, leaving no discretion upon the Kartellgericht whether to entertain the claim. In determining the action the Kartellgericht applies the rules and concepts, in particular the notions of dominance and abuse, laid down in Paragraphs 34 and 35 of the Kartellgesetz.

14. There seems little doubt therefore that the Kartellgericht is to be regarded as a court. In principle, therefore, since Article 86 of the Treaty has direct effect, an individual must be able to rely upon that article in the proceedings brought before it. [8] That is so notwithstanding the fact that he may be able to assert his rights under that article before the ordinary courts. The principle of the effectiveness of Community law requires that any court competent to hear a claim concerning facts to which a Community rule applies should be able to apply that rule. [9]

15. The Commission's reference to the Court's ruling in *SABAM* in support of the opposite view is puzzling. In that ruling the Court stated that even courts entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities were not exempt from giving effect to Article 86 where it was pleaded before them. [10]

2 — Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9 of the judgment.

3 — Paragraph 88.

4 — Paragraph 89(1).

5 — Paragraph 94.

6 — Paragraph 92.

7 — See, in particular, paragraph 43.

8 — Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 15 of the judgment.

9 — Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871.

10 — At paragraphs 19 and 20 of the judgment.

16. Nevertheless, it might be argued that *SABAM* does not settle the issue since the referring court in *SABAM* was in fact a civil court hearing an ordinary civil claim rather than a specialised competition court. In the Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, [11] the Commission accepts that the authorities of some Member States can apply exclusively national rules because they lack the procedural means for applying Articles 85 and 86. Since Articles 85 and 86 are directed at undertakings rather than Member States and since the Commission is designated as the authority primarily responsible for the enforcement of those provisions, it may well be that Member States are not obliged to entrust their national competition authorities (as distinct from their courts) with the task of enforcing those provisions. It may therefore be that the sole obligation of such authorities is to apply national competition rules in a manner which does not conflict with Articles 85 and 86.

17. If that is correct, then it might be considered anomalous if the grounds for review of their decisions by a national court or tribunal could extend to non-application or misapplication of the Community rules. A court or tribunal might in such cases have to be viewed as an extension of the purely national competition body.

18. It is however unnecessary to pursue that point here. No such issue arises where, as in the present case, a Member State organises its system in such a way that the specialised competition body is itself a court and the relevant proceedings are *inter partes* and judicial in nature. In such circumstances the principle of the effectiveness of Community law and the direct effect of Article 86 require that the court should be able to apply Article 86 directly to the case before it, thereby removing the need to bring separate proceedings based on Community law before another court.

19. It is also unnecessary to examine in the present case the question whether the Court should rule on Article 86 of the Treaty on the basis that it is not applicable as such but that a ruling might assist the national court to apply its national law. If the national court were not competent to apply Article 86, that question would arise; moreover that is the basis on which the reference to the Court has been made.

20. It is doubtful whether it would be appropriate for the Court to rule on that basis. As

11 — OJ 1997 C 313, p. 3.

the Commission points out, the Austrian provisions on competition are not based directly on Community competition law and do not refer to it. Austrian law gives an entirely different definition of dominance from that of Community law. An abuse is prohibited only after an order by the Kartellgericht that it should be terminated. Moreover there are special provisions on dominance in relation to the media. The present case is therefore different from those where there is a direct link between national law and Community law, as for example where national law consists of a direct transposition of Community law. [12]

21. It might however be argued that the field of competition law has special features which should lead the Court to give a ruling, at least in cases where there is an effect on intra-Community trade. As Community law stands at present, Community and national competition rules are applied concurrently in cases falling within the scope of Articles 85 and 86. [13] Thus, although in the main proceedings the referring court proposes to apply national law, the situation before it — and the context in which it has asked the Court to rule — is one to which Article 86 applies.

22. The limits placed by Community law on the divergent application of national law in cases falling within the scope of Articles 85 and 86 remain unclear, [14] and it has even been suggested that, in view of the difficulty in defining such limits coherently, the very principle of concurrent application should be reconsidered. [15] In practice it appears that the uncertainty in this area is partly overcome by close cooperation between the Commission and national competition authorities, the importance of which has been emphasised by the Commission. [16] Against that background it is understandable that a national court, even if it were competent solely to apply national law, should wish, especially where there is an effect on trade between Member States, to obtain guidance on the position under Community law with a view to achieving, where possible, an analogous result under its national rules. Although there may be no obligation on the national court under Community or national law to apply the Court's ruling, the ruling may well be decisive in such a case. Such a case is therefore entirely different from one in which the preliminary ruling procedure is used merely as an exercise in comparative law. [17]

23. There are therefore conflicting considerations which would have to be resolved if it

12 — Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161 and Case C-130/95 *Giloy* v *Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I-4291.

13 — Case 14/68 *Wilhelm* v *Bundeskartellamt* [1969] ECR 1.

14 — See *Wilhelm*, Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, the Opinion of Advocate General Tesauro in Case C-266/93 *Bundeskartellamt* v *Volkswagen and VAG Leasing* [1995] ECR I-3477 and the Commission Notice cited in note 11, paragraphs 16 to 22.

15 — Robert Walz, 'Rethinking *Walt Wilhelm*, or the Supremacy of Community Competition Law over National Law', 1996 ELRev, Vol. 21, p. 449.

16 — See generally the Commission Notice, cited in note 11.

17 — Case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

were necessary to reach a conclusion on that issue. However, the above discussion is in my view hypothetical since, as already stated, it is clear that a national court hearing a claim such as that in the main proceedings must be able to apply Article 86 directly. The fact that Article 86 has not been invoked before the national court in the main proceedings does not call in question the Court's jurisdiction to provide the ruling sought. The national court has requested a ruling on Article 86 and may need to apply it once its jurisdiction to do so is established.

24. Mediaprint and the Commission also contend that the reference is inadmissible because, contrary to the national court's finding, the requirement of an effect on trade between Member States is not met. The conclusion that *Der Standard* would be forced out of the market is implausible and, if it were correct, any effect on trade would not be appreciable in view of the small numbers of copies sold abroad.

25. However, the national court has made a preliminary finding that the requirement of an effect on trade is met and has put its questions on that basis. That is sufficient to make the reference admissible. While Mediaprint's claim in its written observations that copies of *Der Standard* sold outside Austria represent a minute proportion of total sales would, if substantiated, cast doubt on the national court's reasoning, that is not sufficient for the Court to conclude that the national court's questions are obviously unconnected with the dispute before it.

26. Moreover, as the Commission acknowledges, the national court's finding might be supported by another line of reasoning. If refusal of access to Mediaprint's network made it difficult to gain access to the Austrian market, that might have the effect of insulating the Austrian market from competition from publishers from other Member States wishing to publish or sell newspapers in Austria and thus interfering with the development of trade patterns in the Community. The Commission's argument that such an effect is unlikely in view of the other means of distribution available goes to the substance of the case. If Mediaprint's refusal to allow access to its distribution system were found to constitute an abuse because of its effects on the Austrian market in daily newspapers, there would on the above analysis also be a potential effect on intra-Community trade.

27. I therefore conclude that the reference is admissible.

Question 1

28. In order to determine whether an undertaking has abused a dominant position on the market contrary to Article 86, it is necessary first to define the relevant market, secondly to determine whether the undertaking concerned is dominant on the market so defined and, if so, finally to determine whether its conduct amounts to an abuse of that dominant position.

Relevant market

29. The national court's questions appear to assume that the relevant market is the market in daily newspapers, Mediaprint's highly developed distribution network being a factor in assessing whether it is dominant on that market. It seems to me however that, as Bronner and the Commission suggest, in this case the relevant market is more appropriately identified, not as the newspaper market as such, but as the distribution market or part thereof. An undertaking might be dominant on a product market but not control distribution or vice versa. The alleged abuse is refusal of access, or the imposition of unreasonable terms for access, to Mediaprint's distribution system. Thus the claim relates to an alleged abuse by Mediaprint of its market power in the area of newspaper distribution with a view to eliminating competition on the connected newspaper market.

30. It appears that in Austria there are, in addition to Mediaprint's nation-wide network, a number of local or regional networks; in addition there are other means of distribution such as postal delivery, shops, kiosks, newspaper stands or vending machines and so forth. Against that background, it is necessary to decide whether the relevant market is (a) distribution of daily newspapers in general, (b) regional and nation-wide home-delivery of daily newspapers, or (c) nation-wide home-delivery of daily newspapers. In that regard the essential question is the extent to which nation-wide home distribution is interchangeable with regional or local distribution services or with other means of distribution. Nation-wide home distribution will constitute a separate market if it has a limited degree of interchangeability with other forms of distribution. Of particular relevance is the extent to which it has particular characteristics influencing the choice of customers and the degree of cross-elasticity of demand between the service and other types of distribution. [18]

31. It is however unnecessary to consider that issue further here. As I shall explain below,

18 — See Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 22 to 35 of the judgment. See also the Commission Notice on relevant markets, OJ 1997 C 372, p. 5.

even on the narrowest definition of the relevant market, namely nation-wide home delivery of daily newspapers, Mediaprint's refusal to allow access to its network does not entail an abuse contrary to Article 86.

Dominant position

32. According to the traditional analysis the next step would be to determine whether Mediaprint has a dominant position on the relevant market. In *United Brands* the Court defined a dominant position as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. [19] The result may therefore differ according to the national court's determination of the relevant market. However, it is unnecessary here to consider the various possibilities since, as will become apparent, it is appropriate in the present context to consider the issue of dominance together with that of abuse.

19 — Paragraph 65 of the judgment.

Abuse

33. The key issue raised by the referring court's first question is whether refusal by an undertaking in Mediaprint's position to allow a competitor access to its nation-wide home-delivery system constitutes an abuse. Bronner, referring to what is known as the 'essential facilities' doctrine, considers that Mediaprint is obliged to grant such access since it is a prerequisite for effective competition on the market in daily newspapers.

34. According to that doctrine a company which has a dominant position in the provision of facilities which are essential for the supply of goods or services on another market abuses its dominant position where, without objective justification, it refuses access to those facilities. Thus in certain cases a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities which it has developed.

Relevant case-law and practice

35. The Court has not as yet referred in its case-law to the essential facilities doctrine. Nevertheless it has ruled in a number of cases concerning refusal to supply goods or services. In two early cases the Court made it clear that the cutting off of supplies to an existing customer could constitute an abuse. In *Commercial Solvents* [20] it held that an undertaking in a dominant position as regards production of a raw material could not cease supplying an existing customer who manufactured derivatives of the raw material simply because it had decided to start manufacturing the derivative itself and wished to eliminate its former customer from the market.

36. Similarly, in *United Brands* [21] a company (UBC) which had a dominant position in the production of bananas, which it marketed under the brand name 'Chiquita', cut off supplies to a Danish ripener-distributor when the latter, following a disagreement with UBC, began promoting a competitor's bananas and taking less care in the ripening of UBC's bananas.

The Court held that:

'an undertaking in a dominant position for the purpose of marketing a product — which cashes in on the reputation of a brand name known to and valued by customers — cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'. [22]

37. In *Télémarketing* [23] and *GB-Inno-BM* [24] the Court established the principle that 'an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking'. [25] In *Télémarketing* a broadcasting undertaking was held to abuse its dominant position on the broadcasting market where it required advertisers to use the services of its associated telemarketing undertaking. The tying of the two services amounted to a refusal to supply the services of the station to any other telemarketing undertaking, thereby eliminating all competition on an ancillary market for the benefit of its associate.

20 — Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223.

21 — Cited in note 18.

22 — Paragraph 182.

23 — Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261.

24 — Case C-18/88 [1991] ECR I-5941.

25 — *GB-Inno-BM*, paragraph 18 of the judgment.

38. In *GB-Inno* the Court, referring to *Télémarketing*, held that an undertaking holding a monopoly in the market for the establishment and operation of a telecommunications network infringed Article 86 where it, without any objective necessity, reserved to itself the neighbouring but separate market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings.

39. Finally, in two further cases the Court considered whether refusal to supply constituted an abuse in circumstances in which no other factors such as cut-off of supplies to an existing customer or tying of unrelated supplies were present. In *Volvo* v *Veng* [26] the Court held that it was not an abuse of a dominant position for a car manufacturer holding the registered designs for body panels for its cars to refuse to license others to supply replacement panels necessary for the repair of the cars. The Court held:

'It must also be emphasised that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.

It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.' [27]

40. More recently, however, in *Magill* [28] the Court upheld the finding of the Court of First Instance that broadcasters abused their dominant position by relying on national copyright in their programme schedules to prevent

26 — Case 238/87 [1988] ECR 6211.

27 — Paragraphs 8 and 9 of the judgment. See also Case 53/87 *CICRA and Another* v *Renault* [1988] ECR 6039.

28 — Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743.

the publication by a third party of weekly TV guides which would have competed with the television guides published by each broadcaster covering exclusively its own programmes. The Court noted:

'Thus the appellants — who were, by force of circumstances, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide — gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.' [29]

41. The Court of First Instance considered the *Magill* ruling in *Tiercé Ladbroke*. [30] In that case the Commission rejected the applicant's complaint against the refusal by undertakings holding the rights in televised pictures and sound commentaries on French horse races and the undertaking holding the exclusive rights to market such pictures in Germany and Austria to grant it the right to retransmit the pictures and sound commentaries in its betting shops in Belgium. Upholding the Commission's decision the Court of First Instance found first that the Commission had correctly identified the product market as retransmission of sound and pictures of horse races in general and the geographical market as the Belgian market. Turning next to the question of abuse, the Court of First Instance noted that the undertakings had not granted any licence for the territory of Belgium to date; their refusal to grant a licence to the applicant did not therefore entail discrimination between operators on the Belgian market. In addition, since the geographical market was divided into distinct markets it did not entail any partitioning of the markets.

42. The Court of First Instance held finally that the refusal to license did not, in the absence of such factors, constitute an abuse under the judgment in *Magill*. Whereas in *Magill* the refusal to licence prevented the applicant from entering the market in comprehensive television guides, in this case the applicant was not only present on, but had

29 — Paragraphs 53 and 54 of the judgment.

30 — Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923; appeal pending (Case C-300/97 P).

the largest share of, the main betting market on which the product in question, namely sound and pictures, was offered to consumers while the owners of the rights were not on that market. Moreover, even if it were assumed that the presence of the owners of the rights on the Belgian market was not decisive, Article 86 would still not be applicable:

'The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers ...' [31]

43. It is clear from the above rulings that a dominant undertaking commits an abuse where, without justification, it cuts off supplies of goods or services to an existing customer or eliminates competition on a related market by tying separate goods and services. However, it also seems that an abuse may consist in mere refusal to license where that prevents a new product from coming on a neighbouring market in competition with the dominant undertaking's own product on that market.

44. The European Commission has considered instances of refusal to supply in a long line of cases under Articles 85 and 86. Examples include the tying by IBM of sales of computers to sales of main memory and basic software and refusal to supply certain software for use with non-IBM computers, [32] refusal to supply instant film without any guarantee as to where the film would be resold, [33] refusal to supply industrial sugar to a producer of refined sugar by reducing the price difference between retail and industrial sugar to a point at which the margin for an independent producer of retail sugar was inadequate, [34] refusal by an airline to allow a competing airline access to a computer reservation system in order to put pressure on the other airline to raise fares or withdraw from a route, [35] refusal to interline, i. e. to issue tickets on behalf of another airline, when

31 — Paragraph 131.

32 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

33 — *Polaroid/SSI*, Thirteenth Report on Competition Policy (1984), p. 95.

34 — Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (*Napier Brown* v *British Sugar*), OJ 1988 L 284, p. 41.

35 — Commission Decision 88/589/EEC of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (*London European* v *Sabena*), OJ 1988 L 317, p. 47.

another airline began to compete on a route, [36] clauses in distribution and sales agreements preventing supermarkets from stocking other suppliers' brands of spices, [37] and limitation of access to underground pipelines used for refuelling aircrafts at an airport. [38] In addition the Commission has required access to certain facilities, such as computerised airline reservation systems [39] and landing and take-off slots at airports, [40] to be given on a non-discriminatory basis as a condition for exemption.

45. Commentators have seen the *Télémarketing* and especially the *Magill* rulings as an endorsement by the Court of the essential facilities doctrine, increasingly employed by the Commission in its decisions. Since that doctrine has its origins in US antitrust law, it may be helpful to give a brief account of the relevant US law.

46. Under US law the freedom to deal or not to deal is regarded as a fundamental aspect of freedom of trade. US antitrust law, embodied in section 2 of the Sherman Act 1890, essentially aims to protect competition by prohibiting the acquisition or maintenance of monopoly power, rather than by regulating the actions of companies in dominant positions. Nevertheless, the US courts have ruled that there will be an obligation to enter a binding contract where the essential facilities doctrine applies or a company is using monopoly power on one market to achieve dominance of another by anticompetitive means ('leveraging') or where a refusal to deal is intended to eliminate competition and create a monopoly. A refusal to deal by a monopoly is permissible where the intention is simply to choose the company's clients or improve efficiency. It will not be permissible where the refusal leads to reduced competition and higher prices, or reduces in any other way the quality of service or goods in relation to price to the consumer.

47. The US essential facilities doctrine has developed to require a company with monopoly power to contract with a competitor where five conditions are met. [41] First, an essential facility is controlled by a monopo-

36 — Commission Decision 92/213/EEC of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (*British Midland* v *Aer Lingus*), OJ 1992 L 96, p. 34 and *Lufthansa* v *Air Europe*, Twentieth Report on Competition Policy (1991), p. 83.

37 — Commission Decision 78/172/EEC of 21 December 1977 relating to a proceeding under Article 85 of the EEC Treaty (Spices), OJ 1978 L 53, p. 20.

38 — *Disma*, Twenty-third Report on Competition Policy (1994), p. 80.

39 — Commission Regulation No 3652/93 of 22 December 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computerised reservation systems for air transport services, OJ 1993 L 333, p. 37.

40 — Commission Regulation No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports, OJ 1993 L 155, p. 18 and Council Regulation No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ 1993 L 14, p. 1.

41 — See *MCI Communications* v *AT&T*, 708 F.2d 1081 (7th Cir. 1983), 464 US 891 (1983).

list. A facility will be regarded as essential when access to it is indispensable in order to compete on the market with the company that controls it. The following have for example been held to be essential facilities: railroad bridges serving the town of St Louis; [42] a local telecommunications network; [43] a local electricity network. [44] Secondly, a competitor is unable practically or reasonably to duplicate the essential facility. It is not sufficient that duplication would be difficult or expensive, but absolute impossibility is not required. [45] Thirdly, the use of the facility is denied to a competitor. That condition would appear to include the refusal to contract on reasonable terms. [46] Fourthly, it is feasible for the facility to be provided. Fifthly, there is no legitimate business reason for refusing access to the facility. A company in a dominant position which controls an essential facility can justify the refusal to enter a contract for legitimate technical or commercial reasons. [47] It may also be possible to justify a refusal to contract on grounds of efficiency. [48]

48. The Commission first referred to the essential facilities doctrine expressly in two interim measures decisions concerning the port of Holyhead, *B&I Line plc* v *Sealink Harbours Ltd and Sealink Stena Ltd* [49] and *Sea Containers* v *Stena Sealink*. [50] In the second of those cases the Commission concluded that, by refusing access to the port of Holyhead on reasonable and non-discriminatory terms to a potential competitor in the market for ferry services Sealink, as port operator, had abused its dominant position on the market in port services. In the decision the Commission, repeating and expanding what it had said in the first decision, stated:

'An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an

42 — *United States* v *Terminal Railroad Association of St Louis*, 224 US 383 (1912).

43 — *MCI Communications* v *AT&T*, cited in note 41.

44 — *Otter Tail Power Co.* v *United States*, 410 US 366 (1973).

45 — See, for example, *Fishman* v *Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

46 — *Eastman Kodak Co.* v *Southern Photo Materials Co.*, 273 US 359 (1927).

47 — See, for example, *Byars* v *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979).

48 — R. H. Bork, *The Antitrust Paradox*, 1978 (reprint 1993), p. 346. *Aspen Skiing Co.* v *Aspen Highlands Skiing Corp.*, 427 US 585 (1985).

49 — Commission Decision of 11 June 1992, [1992] 5 CMLR 255.

50 — Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (*Sea Containers* v *Stena Sealink* — interim measures), OJ 1994 L 15, p. 8.

essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitors, infringes Article 86.' [51]

49. The Commission based the above statement of the law on the Court's rulings in *Commercial Solvents*, [52] *Télémarketing*, [53] *GB-Inno*, [54] *ERT* [55] and the judgment of the Court of First Instance in *Magill*. [56] It then added: 'This principle applies when the competitor seeking access to the essential facilities is a new entrant into the relevant market.' [57]

50. It is therefore clear that the Commission considers that refusal of access to an essential facility to a competitor can of itself be an abuse even in the absence of other factors, such as tying of sales, discrimination *vis-à-vis* another independent competitor, discontinuation of supplies to existing customers or deliberate action to damage a competitor (although it may be noted that in many of the cases with which it has dealt such additional factors are to a greater or lesser extent present). An essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbour or airport or to a distribution system such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favour of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct products or services.

51. In deciding whether a facility is essential the Commission seeks to estimate the extent of the handicap and whether it is permanent or merely temporary. The test to be applied has been described by one commentator as 'whether the handicap resulting from the denial of access is one that can reasonably be expected to make competitors' activities in the market in question either impossible or permanently, seriously and unavoidably uneconomic'. [58] The test applied is an objective one, concerning competitors in general. Thus a particular competitor cannot plead that it is particularly vulnerable.

51 — Paragraph 66 of the Decision.

52 — Cited in note 20.

53 — Cited in note 23.

54 — Cited in note 25.

55 — Case C-260/89 [1991] ECR I-2925.

56 — Case T-69/89 *RTE* v *Commission* [1991] ECR II-485.

57 — Paragraph 67 of Commission Decision 94/19.

58 — J. Temple Lang, 'Defining legitimate competition: companies' duties to supply competitors, and access to essential facilities', *Fordham International Law Journal*, Vol. 18 (1994), 245 at 284 and 285.

52. Thus it appears that in the practice of the Commission in cases concerning refusal to supply the notion of essential facilities plays an important role.

53. The laws of the Member States generally regard freedom of contract as an essential element of free trade. Nevertheless, the competition rules of some Member States explicitly provide that an unjustified refusal to enter a binding contract may constitute an abuse of a dominant position. This is the case in Spain, [59] Finland, [60] France, [61] Greece [62] and Portugal. [63] As regards essential facilities in particular, in some Member States specific legislative provisions prohibit enterprises which control them from unjustifiably refusing to enter contracts to supply those facilities. Such is the case in Finland in respect of the telephone network, [64] electricity transmission network [65] and postal services [66] and in Austria in respect of the rail network, [67] energy production and distribution, [68] and tramway and bus services. [69] In other Member States the notion of essential facilities has begun to develop from more general principles to require enterprises controlling such facilities not to refuse access to them without justification. In Denmark, prior to the entry into force of a new law [70] this notion was applied in respect of the port at Elseneur and the electricity transmission network in Seeland. [71] In France the notion was applied in respect of a heliport. [72] In a Spanish case concerning access to supplies of tobacco [73] substantial reference was made to the essential facilities doctrine as developed in the Commission's Decision in *Sea Containers* v *Stena Sealink*. [74]

Appraisal of the issues

54. Against that background I turn to the issue raised by the national court's first question. It may be noted that, although one of Bronner's complaints is that in refusing access to its home-delivery network Mediaprint has discriminated between it and another publisher, the referring court has not put a question on that issue. The purpose of the national court's first question is to discover whether an undertaking in Mediaprint's position

59 — Article 6 of Law No 16/1989 on competition of 17 July 1989, Defensa de la Competencia (BOE No 170, 18 July 1989); Case 350/94 *3C Communications España* v *Telefónica de España* (Teléfonos en Aeropuertos) Decision of the Tribunal de la Defensa de la Competencia of 1 February 1995.

60 — Paragraph 7 of Laki kilpailunrajoituksista 27.5.1992/480.

61 — Article 8 of Order No 86-1243 of 1 December 1986, *Code de Commerce*, Dalloz (ed) (1990-91), p. 523.

62 — Article 2(c) of Law No 703/1977.

63 — Articles 3(4) and 2(f) and (g) of Decree-Law No 371/93.

64 — Paragraph 15 of Telemarkkinalaki 30.4.1997/396.

65 — Paragraphs 9.2 and 10.1 of Sähkömarkkinalaki 17.3.1995/386.

66 — Paragraph 4.2 of Postitoimintalaki 29.10.1993/907.

67 — Paragraph 3 of Eisenbahnbeforderungsgesetz 1988, BGBl. 180/1988.

68 — Paragraphs 6 and 8 of Elektrizitätswirtschaftsgesetz 1975, BGBl. 260/1975.

69 — Paragraph 8(2) of Kraftfahrlinienverkehrsgesetz 1952, BGBl. 84/1952.

70 — Law No 384 of 10 June 1997.

71 — Konkurrencerådet Dokumentation 1996-1, p. 60.

72 — Decision No 96-D-51 of 3 September 1996 of the Conseil de la concurrence, *SARL Héli-Inter Assistance*, BOCC 8 January 1997, p. 3.

73 — Case 21/97 *McLane España* v *Tabacalera*, Decision of the Tribunal de la Defensa de la Comptencia of 26 May 1997.

74 — Cited at paragraph 48.

commits an abuse, in the absence of any other factors such as cut-off of supplies, tying of sales or discrimination between independent customers, if it refuses to allow another newspaper publisher to have access to a distribution system which it has developed for the purposes of its own newspaper business.

55. It is clear from the above discussion that that question raises a general issue which can arise in a variety of different contexts. While it would not be appropriate, on the facts of the present case, to attempt to provide comprehensive guidance on that issue, a number of general points should be made before I turn more specifically to the present case.

56. First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.

57. Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.

58. Thirdly, in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article 86 is to prevent distortion of competition — and in particular to safeguard the interests of consumers — rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power.

59. It may be noted that in *Commercial Solvents* Advocate General Warner, in coming to the same result as the Court, also considered the position on the downstream market:

'I do not think that the question whether the market for the raw materials for the production of a particular compound is a relevant market can, logically, be divorced from the question whether the market for that compound is a relevant one. The consumer, after all, is interested only in the end product, and it is detriment to the consumer, whether direct of indirect, with which Article 86 is concerned.' [75]

60. The compound in question was the anti-tubercular drug ethambutol. On the facts the Advocate General considered that the Commission had correctly concluded that the market for ethambutol could properly be considered a market in itself because it was used in combination with other anti-tubercular drugs and was a complement of them rather than their competitor.

61. It is on the other hand clear that refusal of access may in some cases entail elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term. That will be so where access to a facility is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability.

62. In assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights. Where such exclusive rights are granted for a limited period, that in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity. It is therefore with good reason that the Court has held that the refusal to license does not of itself, in the absence of other factors, constitute an abuse. [76]

63. The ruling in *Magill* [77] can in my view by explained by the special circumstances of that case which swung the balance in favour of an

75 — P. 266.

76 — *Volvo* v *Veng*, cited in note 26.

77 — Cited in note 28.

obligation to license. First, the existing products, namely individual weekly guides for each station, were inadequate, particularly when compared with the guides available to viewers in other countries. The exercise of the copyright therefore prevented a much needed new product from coming on to the market. Secondly, the provision of copyright protection for programme listings was difficult to justify in terms of rewarding or providing an incentive for creative effort. Thirdly, since the useful life of programme guides is relatively short, the exercise of the copyright provided a permanent barrier to the entry of the new product on the market. It may incidentally be noted that national rules on intellectual property themselves impose limits in certain circumstances through rules on compulsory licensing.

64. While generally the exercise of intellectual property rights will restrict competition for a limited period only, a dominant undertaking's monopoly over a product, service or facility may in certain cases lead to permanent exclusion of competition on a related market. In such cases competition can be achieved only by requiring a dominant undertaking to supply the product or service or allow access to the facility. If it is so required the undertaking must however in my view be fully compensated by allowing it to allocate an appropriate proportion of its investment costs to the supply and to make an appropriate return on its investment having regard to the level of risk involved. I leave open the question whether it might in some cases be appropriate to allow the undertaking to retain its monopoly for a limited period.

65. It seems to me that intervention of that kind, whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has a genuine stranglehold on the related market. That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertaking's control over a facility should give it a competitive advantage.

66. I do not rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry. That might be so particularly in cases in which the creation of the facility took place under non-competitive conditions, for example, partly through public funding. However, the test in my view must be an objective one: in other words, in order for refusal of access to amount to an abuse, it must be extremely difficult not

merely for the undertaking demanding access but for any other undertaking to compete. Thus, if the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market. In that regard it seems to me that it will be necessary to consider all the circumstances, including the extent to which the dominant undertaking, having regard to the degree of amortisation of its investment and the cost of upkeep, must pass on investment or maintenance costs in the prices charged on the related market (bearing in mind that the competitor, who having duplicated the facility must compete on the related market, will have high initial amortisation costs but possibly low maintenance costs).

67. It is in my view clear that in the present case there can be no obligation on Mediaprint to allow Bronner access to its nation-wide home-delivery network. Although Bronner itself may be unable to duplicate Mediaprint's network, it has numerous alternative — albeit less convenient — means of distribution open to it. That conclusion is borne out by the claims made in *Der Standard* itself that 'the "Standard" is enjoying spectacular growth in terms of both new subscriptions (an increase of 15%) and placement of advertisements (an increase of 30% by comparison with last year)'. [78] Such a claim hardly seems consistent with the view that Mediaprint's home-delivery system is essential for it to compete on the newspaper market.

68. Moreover, it would be necessary to establish that the level of investment required to set up a nation-wide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market. It may well be uneconomic, as Bronner suggests, to establish a nation-wide system for a newspaper with a low circulation. In the short term, therefore, losses might be anticipated, requiring a certain level of investment. But the purpose of establishing a competing nation-wide network would be to allow it to compete on equal terms with Mediaprint's newspapers and substantially to increase geographical coverage and circulation.

69. To accept Bronner's contention would be to lead the Community and national authorities and courts into detailed regulation of the Community markets, entailing the fixing of prices and conditions for supply in large sectors of the economy. Intervention on that scale would not only be unworkable but would also be anti-competitive in the longer

78 — Issue of 28 February 1997, annexed to Mediaprint's observations.

term and indeed would scarcely be compatible with a free market economy.

70. It seems to me therefore that the present case falls well short of the type of situation in which it might be appropriate to impose an obligation on a dominant undertaking to allow access to a facility which it has developed for its own use.

73. It is true that in principle Question 2 might arise even in the event of a negative reply to Question 1. Even where a dominant undertaking's refusal to allow access to its distribution network is not in itself abusive, it may nevertheless commit an abuse if, without justification, it ties such access to the supply of other services and hence seeks to extend its market power in a related market. However, in the circumstances of the case such a question would be purely hypothetical. Mediaprint has refused to allow Bronner access to its delivery system on any terms. It has not, in its relations with Bronner, sought to tie access to the supply of other services.

Question 2

71. The purpose of the national court's second question is to ascertain whether, by tying access to its home-delivery service to the supply of other services such as marketing through sales points and printing, an undertaking in Mediaprint's position abuses its dominant position.

74. The purpose of Question 2 is rather, therefore, to establish whether, if refusal of access to the nation-wide home-delivery network does constitute an abuse, Mediaprint, in allowing such access, can require Bronner to purchase certain other services. That might be the case, for example, if it could be shown that, owing to the tight deadlines for daily newspapers, it would be impracticable for the printing and distribution functions to be handled by separate undertakings. In other words, the national court wishes to know, in the event of an affirmative reply to the first question, the terms on which it should order access.

72. Question 2 is not expressly limited to the event of an affirmative reply to Question 1. It seems to me however that it arises only in that event.

75. Since Question 1 must in my view be given a negative reply, Question 2 does not arise.

Conclusion

76. Accordingly I am of the opinion that the questions referred by the Oberlandesgericht Wien should be answered as follows:

It is not an abuse of a dominant position within the meaning of Article 86 of the EC Treaty for an undertaking which has a very substantial share of the market for daily newspapers in a Member State, and which operates the only nation-wide home-delivery distribution service for subscribers, to refuse to allow the publisher of a competing newspaper access to that home-delivery distribution service.