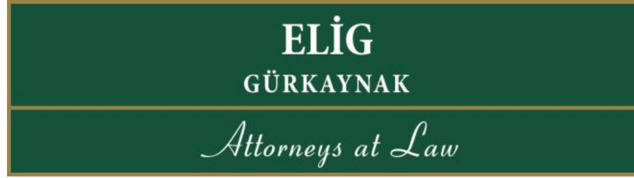

The Factors Affecting the Use of Essential Facilities Doctrine in Light of the Lithuanian Railway v Commission Decision: A Comparison with the Turkish Practice and Potential Implications

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1) Introduction

On November 18, 2020, the General Court of the European Union ("***General Court***") upheld[1] the European Commission's ("***Commission***") decision,[2] in which Letuvos geležnkela AB ("***Lithuanian Railway***") ("***LG***") was found to have abused its dominant position in the Lithuanian rail freight market by removing a section of a railway track used by its competitors. In its appeal to the General Court, LG had requested that the Commission's decision be annulled or in the alternative, the amount of the fine be reduced. While upholding the Commission's decision, the General Court did reduce the amount of the fine imposed by almost a third, taking into account the duration and gravity of the infringement.

In this article, we will briefly explain the decision of the General Court and analyze how it compares with the Turkish Competition Board's ("***Board***") practices with regard to the application of "essential facilities doctrine" ("***EFD***") particularly in the regulated sectors. We will also analyze the General Court's findings on (i) the role of the parties' subjective intention in establishing an abuse and (ii) how to determine remedies to bring the infringements of competition law to an end.

2) Background of the *Lithuanian Railway v Commission* Decision

LG is active in both the provision of railway infrastructure and rail transport services in Lithuania. Based on an agreement dated 1999, LG provided rail transport services to Orlen Lietuva AB ("***Orlen***"), for the carriage of oil products from one of Orlen's refineries located in Bugeniai, to the seaport of Klaipėda, the shipping hub in Lithuania from which these oil products were exported to Western Europe.

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[1] *Lithuanian Railway v Commission* (T-814/17, EU:T:2020:545)
[2] *Lithuanian Railway* (AT.39813, EU: 2017 OJ C 383)

In 2008, following a commercial dispute between LG and Orlen, the latter decided to shift its export business from Klaipeda to the seaports in Latvia, namely Riga and Ventspils, and concluded an agreement with Latvijas dzelzceļš, the national railway company of Latvia ("***LDZ***") for the transportation of oil from Bugeniai to the seaports of Riga and Ventspils. To provide that service, LDZ had to use the railway infrastructure provided by LG.

After Orlen's termination of its contract with LG, LG had suspended traffic on a section of the railway route ("***Track***") due to a deformation along the Track. This Track would have been used by LDZ for the provision of the relevant service to Orlen. One month later, the Track was entirely removed by LG, upon which Orlen made a complaint to the Commission.

In its decision, the Commission defined the relevant product markets as (i) the market for the management of railway infrastructure (upstream market) and (ii) the market for the provision of rail transport services for oil products (downstream market). The relevant geographic market for the management of railway infrastructure was defined as the Lithuanian national market, whereas the relevant geographic market for the rail transport services for oil products (on the basis of point of origin – point of destination approach) was deemed to be the market from the Orlen's refinery to the seaports of Klaipėda, Riga and Ventspils.

The General Court confirmed these definitions and the Commission's findings that (i) LG holds a legal monopoly on the upstream market and a dominant position on the downstream market, and (ii) LG abused its dominant position in the downstream market by removing the Track, thereby preventing the entry of LDZ into the market.

3) The Finding of the General Court on the Application of the Essential Facilities Doctrine in Regulated Sectors and its Implications

The General Court's decision underlines the restrictive approach of the European Court of Justice ("***ECJ***") to the application of EFD by citing its *Bronner* decision.[3] In the relevant decision, the ECJ sets out three cumulative conditions that must be met for a finding of abuse: (i) the refusal needs to eliminate all competition in the downstream market, (ii) the refusal must be incapable of objective justification, and (iii) the access to the service must be

[3] *Oscar Bronner GmbH & Co KG v Mediaprint* (C 7/97, EU:C:1998:569) ("***Bronner***").

indispensable to carrying on that business. For the last point, the service would be deemed indispensable if the duplication of the service is impossible or not economically viable.

Regarding the rationale behind the restrictive approach in relation to EFD, the General Court referred to the opinion of Advocate-General Jacobs in *Bronner,* in which he stated that:[4]

> *"(...) 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.* (…) *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."*

Advocate-General Jacob elaborated the point in following paragraphs:[5]

> *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.* (…)
>
> *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.*"

In this particular case, the General Court held that the rationale behind the restrictive approach in relation to EFD does not apply. Accordingly, the General Court rejected the argument that the Commission erred in law by not considering whether (i) the access was indispensable to provide the transport services and (ii) all competition in the market was eliminated. It decided that the Commission does not need to analyze the conduct under the case-law regarding refusal to supply and it is sufficient for the Commission to show that the conduct was *capable* of preventing entry into market by making access to market more difficult, thereby leading to anticompetitive foreclosure effect.

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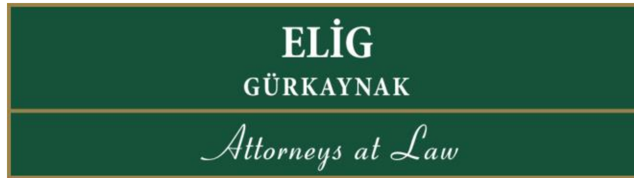
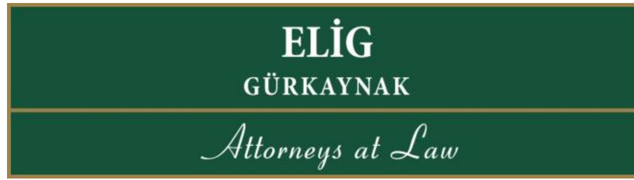
[4] *Bronner*, Opinion of AG Jacob, para 57.
[5] *Ibid.,* paras 61-62.



The General Court justified its holding by providing two reasons for why the relevant rationale is not valid for the case at hand. First, according to the General Court, the undertaking concerned does not enjoy an "*unfettered exercise*" of an exclusive property right, since the regulation applicable to the relevant undertaking's conduct already imposes a duty (i) to grant access to the public railway infrastructure, (ii) to ensure the good condition of the railway and safe traffic on it and (iii) to restore the normal situation of the railway in case of any disturbance. It argued that the analysis on the balance between promoting the incentive to innovate and invest, and the reduction of competition, has already been made by the legislature when the regulation was enacted, and obliges the undertaking to provide access to an essential facility. The second reason provided by the General Court was that the undertaking's dominant position derives from its legal monopoly. The General Court emphasized that it was not the investment of the LG but the public funds raised by the Lithuanian State that are used to create the Lithuanian railway network. Therefore, the General Court seems to focus on whether the right is a real "*fruit*" of the investment, as stipulated in the opinion Advocate-General Jacobs in *Bronner*. It may follow, *a contrario*, that the size of the investment may be considered as a factor to rule in favor of allowing a company to retain for its own use facilities since, such an allowance may be pro-competitive in the long run.

With respect to the corresponding regulatory practices under Turkish competition law, the case analyzed in *Türk Telekom Facility Sharing*[6] has some common features with the *LG v Commission* case that was scrutinized by the General Court. In *Türk Telekom Facility Sharing*, the Board found that Türk Telekom A.Ş. (which had been initially established as the state-owned telecommunications service provider) abused its dominant position by refusing to grant access to the elements used to build a physical infrastructure. First, Türk Telekom A.Ş. acquired (i) the physical infrastructure which is used to provide telecommunication services, and (ii) the elements such as conduits, ducts, sub-ducts, manholes, poles and towers that are used to build such a physical infrastructure, as a result of its privatization in 2005. Second, pursuant to the relevant legislation[7] and decisions of the Information and Communication

[6] The Board's *Türk Telekom Facility Sharing* decision dated 09.06.2016 and numbered 16-20/326-146.
[7] *See* The Law on Electronic Communication No. 5809, The Regulation on Access and Interconnection dated 08.10.2009, The Facility Sharing Communique dated 31.12.2003.



Technologies Authority,[8] Türk Telekom A.Ş. was obliged to grant access to those undertakings requesting to use the elements needed for building their own physical infrastructures.

Nevertheless, the Board's analysis deviates from the General Court's approach in the relevant case. After having found that Türk Telekom A.Ş. holds a dominant position both in (i) the market for the elements that are used to build a physical infrastructure such as conduits, ducts, sub-ducts, manholes, poles and towers and unlighted fiber (upstream) and (ii) the physical infrastructure market (downstream), the Board assessed Türk Telekom A.Ş.'s conduct under the EFD, as opposed to analyzing it as an uncategorized type of abuse. Accordingly, the Board held that (i) the relevant facility is indispensable because the replication is legally and physically difficult, if not impossible; (ii) the refusal to share eliminated effective competition in the downstream market where Türk Telekom A.Ş. holds a dominant position, and (iii) the refusal leads to consumer harm since if relevant undertakings accessed the facilities, they would be in a position to offer special products to consumers and develop their services in terms of variety and quality.

Therefore, unlike the approach of the General Court, the Board did not take into account the factors that (i) Türk Telekom A.Ş. obtained the facilities as a result of the privatization, (ii) Türk Telekom A.Ş.'s property right on the infrastructure was restricted under the relevant regulation and (iii) Türk Telekom A.Ş. already had the duty to improve and invest in the infrastructure under the applicable legislation. Furthermore, although the Board stated that it should consider whether the negative effect of refusal on the relevant market outweighs the long-term adverse effect of requiring Türk Telekom A.Ş. to share its facilities, it did not analyze the question on the relationship between promoting innovation and the protection of property rights in the relevant markets.

The approach of the General Court may have important future implications for both the EU and Turkish practice**,** especially with respect to the following issues**:**

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[8] *See e.g.*, The Information and Communication Technologies Authority's Decision dated 14.07.2010 and numbered 2010/DK-07/416.

First, while deciding that the Commission was right in refraining from applying the EFD in the case at hand, the General Court assumed that the additional requirements envisaged by the EFD have the exclusive aim of protecting dominant undertakings' incentives to invest and to innovate. Nevertheless, this conclusion may not be uncontroversial as one might argue that property rights deserve additional protection, even if such protection would not positively contribute to right-holders' relevant incentives. As such, depriving property rights from the additional protection brought about by the EFD on a case-by-case basis, solely by taking into consideration the concrete incentives in the case at hand, may raise questions regarding the proportionality of the remedies that lead to a restriction of the property rights of dominant undertakings. It may be argued that the imposition of more restrictive remedies (*e.g.,* duty to deal, as opposed to cease and desist) must be justified by proving that less restrictive alternatives would be ineffective, regardless of the effects of the more restrictive remedy, and that the only way to satisfy the required standard of proof is to apply the EFD.

Second, it should follow, *a contrario*, that a restrictive approach must come into play (*i.e.,* the EFD must be applied) in case the remedy that is required to terminate a breach involves imposing a restriction on the property rights of undertakings that do enjoy unfettered exercise of an exclusive property right. Hence, if the Commission and the Board adopt the General Court's reasoning, they may need to apply EFD in all cases whereby the remedy to be imposed could restrict relevant undertakings' previously unrestricted property rights, regardless of the characterization of the conduct in question (*e.g.,* even when the conduct being examined is not refusal to supply).

4) Abuse as an objective concept and the effect of intent on the analysis

The General Court's emphasis in *Lithuania Railways v Commission* on the objective nature of the abuse is also noteworthy. The applicant claimed that (i) the Commission should have proven that the applicant had acted in bad faith, to hinder LDZ`s entry into market at the time when it removed the Track, and (ii) the Commission cannot rely on its subjective intention after that time.

The General Court held that the Commission does not need to prove the anticompetitive intent of the party to identify the infringement; as the abuse is an objective concept relating to a

conduct which "*through recourse to methods different from those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition*."[9]

However, it also noted that the assessment of abuse must necessarily include the analysis on the business strategy of the undertaking, which, according to the General Court, legitimizes the Commission's reference to motives underlying the business strategy. By citing *Tomra Systems and Others v Commission*, where the ECJ considered the anticompetitive intent of the undertaking in its pricing strategy to decide whether it was abusive, the General Court further noted that the anticompetitive intent may be taken into consideration as one of a number of facts that shows the existence of abuse.

Finally, the General Court concluded that the Commission did not solely rely on the intent of LG, rather it established the finding of an abuse based on the analysis of objective factual circumstances, including the fact that LG had removed the Track, contrary to the practice in the sector, without having secured the necessary funds or taking any preparatory measures for its reconstruction.

As regard to the Turkish competition law, the provisions set forth under the Guidelines on Abusive Exclusionary Conduct by Dominant Undertakings ("***Guidelines***") enacted by the Board are in line with the General Court's aforementioned approach. Indeed, paragraph 26 of the Guidelines specifically provides that the intent of the undertaking when it engaged in the conduct may be taken into account as *one* of the factors to be considered when the Board assesses the anticompetitive foreclosure. The same paragraph states in its closing sentence, that, "*Direct and indirect evidence may be used in a complementary manner when analyzing the intent.*". It further explains that internal documents regarding an exclusionary strategy, such as a detailed plan to exclude the competitor or evidence of concrete threats of exclusionary action may establish direct evidence, and deductions from the conduct in question, may constitute indirect evidence to identify the intent. In addition, in line with the

[9] *Lithuanian Railway v Commission* (T-814/17, EU:T:2020:545) para 188. The General Court also referred to *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221 para 17; *Clearstream* v *Commission*, T-301/04, EU:T:2009:317, para 140; and the case law cited in these judgments.

Tomra Systems and Others v Commission decision, paragraph 55 of the Guidelines provides that it is possible to rely upon direct evidence such as a detailed plan to exclude a competitor, to establish that the pricing behavior of the undertaking is predatory and abusive.

5) Remedies Imposed to Bring the Infringement to an End

In its decision, as per Article 7 of the EC Regulation No 1/2003, the Commission had required Lithuanian Railway to restore the competitive situation that existed before the Track was removed, *either b*y reconstructing the Track itself, or by eliminating the disadvantages faced by potential competitors on the alternative routes to the seaports of Klaipėda, Riga and Ventspils, to put an end to the infringement. The Commission also set out several structural or behavioral remedies that could be relevant to achieve that end. In the case at hand, the General Court examined the applicant's argument that the remedy imposed was disproportionate and unprecedented.

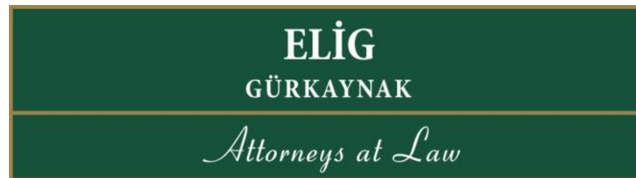
In its analysis the General Court used the relevant case-law to emphasize the principles of proportionality and demonstrate how the Commission would exercise them, such as:[10]

i) *"…when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"*

ii) *"…the Commission may impose on the undertakings concerned any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end"*

iii) *"…it was not for the Commission to impose on the parties its choice from among all the various potential courses of action which were in conformity with the Treaty, nor to decide on the precise arrangements for implementing the various courses of action*."

[10] *Lithuanian Railway v Commission* (T-814/17, EU:T:2020:545) paras 309-312. The General Court cited from and referred to the *MasterCard and Others v Commission*, T-111/08, EU:T:2012:260 para 323; *Commission v Alrosa*, C-441/07 P, EU:C:2010:377 para 39; *Automec v Commission*, T-24/90, EU:T:1992:97 para 52; *SIAE v Commission*, T-433/08 R, not published, EU:T:2008:520 para 37, and the case-law cited in these decisions.

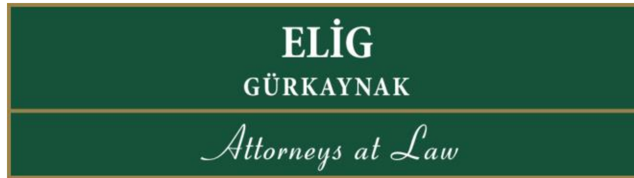


More importantly, the General Court analyzed whether the Commission had *in fact* left the undertaking free to decide on how to terminate the infringement, especially if it does not choose to reconstruct the Track. Accordingly, the General Court questioned whether, as the applicant argued, the elimination of the disadvantages that the competitors were facing on the alternative routes, would necessarily require the unbundling of ownership with a view to divest the functions of railway infrastructure manager to another entity, which would require a legislation to be adopted by the Lithuanian parliament and would not be economically viable for the applicant. It concluded that there are ways other than an unbundling, such as ensuring the full independence of the infrastructure manager.

Finally, LG also claimed that the remedy would be disproportionate if the potential beneficiaries of the new facility do not contribute to the costs of the reconstruction of the Track. The General Court dismissed that claim by stating that imposing such an obligation on the beneficiaries would allow the dominant undertaking to benefit from its abuse.

As to how these evaluations could provide assistance in the Turkish practice; the Board should take the General Court's analysis into account when imposing remedies under Article 9 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), which corresponds to Article 7 of the EC Regulation No 1/2003. Accordingly, the Board should not *de facto* choose among various remedies that could effectively put an end to infringement and allow the undertaking to make the final choice on which remedy would apply to terminate the infringement. As an additional note, the discretion of the undertakings would necessarily be more restricted while making a choice among potential remedies determined by the Board per Article 9 of the Law No. 4054, when compared to a situation whereby they design the appropriate commitments under Article 43 of the Law No. 4054, which corresponds to Article 9 of the of the EC Regulation No 1/2003.[11]

[11] Article 9 and Article 43 of the Law No. 4054 were amended on 16.06.2020 and remedies to be imposed by the Board as a result of investigations to terminate established violations (Article 9) along with the commitments to be offered by the undertakings to put an end to ongoing investigations (Article 43) were introduced thereunder. As of the end of 2020, the Board did not yet impose any structural or behavioural remedies to undertakings based on the recently amended wording of Article 9 of the Law No. 4054. The Board did accept the commitments offered by an undertaking in its *HAVAŞ* decision dated 05.11.2020 and numbered 20-35/460-M (reasoned decision not published as of 31.12.2020).



6) Conclusion

The General Court's Lithuanian Railway decision may have important implications as it (i) lowered the threshold for imposing remedies that restrict property rights of dominant undertakings in regulated sectors, and in cases where the undertakings' dominant position derives from the acquisition (especially via privatization) of an infrastructure built with public funds, (ii) emphasized that the Commission should not be in a position to choose (or force undertakings to choose) a specific remedy, among various remedies that are equally effective to terminate the infringement and (iii) reiterated the established case law which sets forth the objective nature of abuse of dominance.

The first and second points mentioned above may be instructive for the Board. Specifically, the Board may entertain the idea that the characteristics of relevant markets (e.g. existence of ex-ante regulations), dominant undertakings (e.g. their incentives to invest) and inputs in question (e.g. use of private and public funds in their establishment) could play a role in determining whether to apply the EFD or not. It may also benefit from the General Court's assessments when determining the right amount of discretion to be provided to undertakings in choosing between different remedies to be imposed by the Board to bring the infringement to an end.

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