JUDGMENT OF THE COURT (Sixth Chamber)

26 November 1998

([Article 102 TFEU] Abuse of a dominant position Refusal of a media undertaking holding a dominant position in the territory of a Member State to include a rival daily newspaper of another undertaking in the same Member State in its newspaper home-delivery scheme)

In Case C-7/97,

REFERENCE to the Court under [Article 267 TFEU] by the Oberlandesgericht Wien (Austria) for a preliminary ruling in the proceeding spending before that court between

Oscar Bronner GmbH & Co. KG

and

Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG,

Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG,

Mediaprint Anzeigengesellschaft mbH & Co. KG,

on the interpretation of [Article 102 TFEU],

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray, H. Ragnemalm, R. Schintgen (Rapporteur) and K.M. Ioannou, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Oscar Bronner GmbH & Co. KG, by Christa Fries, Rechtsanwältin, Baden,

— Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, MediaprintZeitungsvertriebsgesellschaft mbH & Co. KG and MediaprintAnzeigengesellschaft mbH & Co. KG, by Stephan Ruggenthaler, Rechtsanwalt, Vienna,

— the Commission of the European [Union], by Klaus Wiedner and Wouter Wils, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Oscar Bronner GmbH & Co. KG, MediaprintZeitungs- und Zeitschriftenverlag GmbH & Co. KG, MediaprintZeitungsvertriebsgesellschaft mbH & Co.

KG, Mediaprint Anzeigengesellschaftmbh & Co. KG and the Commission at the hearing on 10 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 May 1998,

gives the following

Judgment

1. By order of 1 July 1996, received at the Court on 15 January 1997, the Oberlandesgericht Wien (Higher Regional Court, Vienna), in its capacity as the Kartellgericht (court of first instance in competition matters), referred to the Court for a preliminary ruling under [Article 267 TFEU] two questions on the interpretation of [Article 102 TFEU].

2. The questions were raised in connection with an action brought by Oscar Bronner GmbH & Co. KG ('Oscar Bronner) against Mediaprint Zeitungs- undZeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaftmbh & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG (hereinafter

collectively referred to as 'Mediaprint) under Paragraph 35 of the Bundesgesetzüber Kartelle und andere Wettbewerbsbeschränkungen (Federal Law on Cartelsand other Restrictive Practices; 'the Kartellgesetz) of 19 October 1988 (BGBl.1988, p. 600), as amended in 1993 (BGBl. 1993, p. 693) and 1995 (BGBl. 1995,p. 520).

3. Paragraph 35(1) of the Kartellgesetz provides:

'The Kartellgericht shall, upon application, order the undertakings concerned to bring the abuse of a dominant position to an end. Such abuse may consist, in particular, of:

1. directly or indirectly imposing unfair purchase or selling prices or other trading conditions;

2. limiting production, markets or technical development to the detriment of consumers;

3. placing other trading parties at a competitive disadvantage by applying dissimilar conditions to equivalent transactions;

4. making the conclusion of contracts subject to the acceptance by other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject-matter of such contracts.

4. The objects of Oscar Bronner are the editing, publishing, manufacture and distribution of the daily newspaper *Der Standard*. In 1994, that newspaper's share of the Austrian daily newspaper market was 3.6% of circulation and 6% of advertising revenues.

5. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG publishes the daily newspapers *Neue Kronen Zeitung* and *Kurier*. It carries on the marketing and advertising

business of those newspapers through two wholly-owned subsidiaries, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.

6. In 1994, the combined market share of *Neue Kronen Zeitung* and *Kurier* was 46.8%of the Austrian daily newspaper market in terms of circulation and 42% in terms of advertising revenues. They reached 53.3% of the population from the age of 14in private households and 71% of all newspaper readers.

7. For the distribution of its newspapers, Mediaprint has established a nationwide home-delivery scheme, put into effect through the intermediary of Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG. The scheme consists of delivering the newspapers directly to subscribers in the early hours of the morning.

8. In its action under Paragraph 35 of the Kartellgesetz, Oscar Bronner seeks an order requiring Mediaprint to cease abusing its alleged dominant position on the market by including *Der Standard* in its home-delivery service against payment of reasonable remuneration. In support of its claim, Oscar Bronner argues that postal delivery, which generally does not take place until the late morning, does not represent an equivalent alternative to home-delivery, and that, in view of its small number of subscribers, it would be entirely unprofitable for it to organise its own home-delivery service. Oscar Bronner further argues that Mediaprint has discriminated against it by including another daily newspaper, *Wirtschaftsblatt*, in its home-delivery scheme, even though it is not published by Mediaprint.

9. In reply to those arguments, Mediaprint contends that the establishment of its home-delivery service required a great administrative and financial investment, and that making the system available to all Austrian newspaper publishers would exceed the natural capacity of its system. It also maintains that the fact that it holds a dominant position does not oblige it to subsidise competition by assisting competing companies. It adds that the position of *Wirtschaftsblatt* is not comparable to that of *Der Standard*, since the publisher of the former also entrusted the Mediaprint group with printing and the whole of distribution, including sale in kiosks, so that home-delivery constituted only part of a package of services.

10. Taking the view that, if the conduct of a market participant falls within the terms of [Article 102 TFEU] it must logically constitute an abuse of the market within the meaning of Paragraph 35 of the Kartellgesetz which is analogous in content, since under the principle of the primacy of [Union] law conduct which is incompatible with the latter cannot be tolerated under national law either, the Kartellgericht decided that it first needed to resolve the question whether the conduct of Mediaprint infringed [Article 102 TFEU]. Referring subsequently to the fact that [Article 102 TFEU] applies only if trade between Member States is capable of being affected by the conduct of traders in breach, the Kartellgericht found that condition met in the main proceedings, since refusal of access to the home-delivery scheme could have the effect of completely excluding Oscar Bronner from the daily newspaper market and Oscar Bronner, as publisher of an Austrian daily newspaper also sold abroad, participated in international trade.

11. In those circumstances, the Kartellgericht decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [Article 102 TFEU] 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 nationwide 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 102 TFEU], 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?

Admissibility

12. Mediaprint and the Commission contend that the dispute in the main proceedings concerns solely Austrian competition law, and in particular Paragraph 35 of the Kartellgesetz. They maintain that the Kartellgericht is specialised in the application of national competition law and does not have jurisdiction to apply [Article 102 TFEU], which moreover it could not apply directly.

13. They also argue that, in principle, national law applies in parallel with, and independently of, [Union] law, and that, in accordance with the judgment in Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, it is only when the implementation of national competition law threatens the uniform application of [Union] competition rules throughout the common market and the full effectiveness of measures taken on the basis of those rules that it is necessary to bring the rule on the primacy of [Union] law into operation. They maintain that that does not apply in a situation such as that in the main proceedings, where, first, only the national authority is seised of the matter, and, secondly, even a decision favourable to Mediaprint in the main proceedings, based on Article 35 of the Kartellgesetz, would not prevent the Commission from applying [Article 102 TFEU].

14. Mediaprint and the Commission conclude that the interpretation of [Union] law requested by the national court bears no relation to the actual facts of the case or

to the subject-matter of the main action, so that there is no need to reply to the questions.

15. They add that the hypothetical nature of the questions referred is further reinforced by the consideration that, in this case, one of the requirements for applying [Article 102 TFEU], the function of which, moreover, is to define the respective areas of application of national and [Union] competition law, is unlikely to have been met, namely the

requirement that trade between Member States be significantly affected. The Commission argues in that respect that the facts of the main proceedings are confined to Austria, inasmuch as an Austrian daily newspaper wishes to be included in a home-delivery scheme which is operated by an Austrian undertaking and is in any event geographically limited to Austria. Mediaprint points out that Oscar Brunner distributes fewer than 700 copies of *Der Standard* abroad daily, amounting to less than 0.8% of the newspaper's total circulation.

16. This court finds that, in accordance with established case-law, it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where the questions put by national courts concern the interpretation of a provision of [Union] law, the Court is, in principle, bound to give a ruling (Joined CasesC-297/88 and C-197/89 *Dzodzi* v*Belgian State* [1990] ECR I-3763, paragraphs 34and 35; Case C-231/89 *Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] ECRI-4003, paragraphs 19 and 20).

17. It should also be noted that [Article 267 TFEU], which is based on a clear separation of functions between national courts and this Court, does not allow this Court to review the reasons for which a reference is made. Consequently, a request from a national court may be rejected only if it is quite obvious that the interpretation of [Union] law or review of the validity of a rule of [Union] law sought by that court bears no relation to the actual facts of the case or to the subject-matter of the main action (Case C-446/93 *SEIM v Subdirector-Geral das Alfândegas* [1996] ECR I-73, paragraph 28).

18. In the main proceedings, as stated in paragraph 10 of this judgment, the national court expressly stated as the reason why it needed to make a preliminary reference its concern to ensure compliance with the rule of the primacy of [Union] law and, consequently, not to tolerate a situation in national law contrary to [Union] law.

19. It is clear from the judgment in *Walt Wilhelm*, cited above, that it is not impossible for the same situation to fall within the scope of both [Union] and national competition law, even if they consider restrictive practices from different points of view (see also Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la Républiquev*

Giry and Guerlain [1980] ECR 2327, paragraph 15; Case C-67/91 *Dirección Generalde Defensa de la Competencia* v*Asociación Española de Banca Privada* [1992] ECRI-4785, paragraph 11).

20. In those circumstances, the fact that a national court is dealing with a restrictive practices dispute by applying national competition law should not prevent it from making reference to the Court on the interpretation of [Union] law on the matter, and in particular on the interpretation of [Article 102 TFEU] in relation to that same situation, when it considers that a conflict between [Union] law and national law is capable of arising.

21. Finally, the circumstances relied upon by Mediaprint and the Commission in disputing whether trade between Member States was genuinely affected concern the applicability of [Article 102 TFEU] to the factual situation forming the subject-matter of the main proceedings. They therefore fall within the scope of the assessment by the national court and are irrelevant for the purposes of verifying whether the questions referred to the Court are admissible.

22. It follows from the foregoing considerations that it is necessary to reply to the questions referred by the national court.

The first question

23. In its first question, the national court effectively asks whether the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration constitutes the abuse of a dominant position within the meaning of [Article 102 TFEU].

24. In that respect, Oscar Bronner argues that the supply of services consisting in the home delivery of daily newspapers constitutes a separate market, inasmuch as that service is normally offered and requested separately from other services. Oscar Bronner also argues that, under the doctrine of 'essential facilities as established by the Court of Justice in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP*v *Commission* [1995] ECR I-743 (the '*Magill* judgment), the service performed by placing a facility at the disposal of others and that supplied by using that facility in principle constitute separate markets. It therefore maintains that, as the owner of such an 'essential facility, in this case the only economically viable home-delivery scheme existing in Austria on a national scale, Mediaprint is obliged to allow access to the scheme by competing products on market conditions and at market prices.

25. Oscar Bronner also refers in this context to Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission*[1974] ECR 223, at paragraph 25, which, in its submission, demonstrates that the refusal by an undertaking in a dominant position to supply undertakings immediately downstream is lawful only if objectively justified. Referring to the judgment of the Court of Justice in Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261, in which it held that an abuse within the meaning of [Article 102 TFEU] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group 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, Oscar Bronner maintains that that consideration applies equally to the case of an undertaking holding a dominant position in the market for a given supply of services, which is indispensable for the activity of another undertaking in a different market.

26. Mediaprint objects that, in principle, undertakings in a dominant position are also entitled to the freedom to arrange their own affairs, in that they are normally entitled to decide freely to whom they wish to offer their services and, in particular, to whom they wish to allow access to their own facilities. Thus, as the Court expressly held in *Magill*, an obligation to contract, to which an undertaking holding a dominant position would be subject, can be based on [Article 102 TFEU] only in exceptional circumstances.

27. In Mediaprint's submission, the judgments in *Commercial Solvents v Commission* and *CBEM*, cited above, show that such exceptional circumstances exist only if the dominant undertaking's refusal to supply is likely to eliminate all competition in a downstream market, which is not the case in the main proceedings, where, in parallel

with home delivery, other distribution systems enable Oscar Bronner to sell its daily newspapers in Austria.

28. Mediaprint adds that, even if such exceptional circumstances did exist, a dominant undertaking's refusal to contract is not abusive if it is objectively justified. That would be the case in the main proceedings if the inclusion of *Der Standard* were likely to compromise the functioning of Mediaprint's home-delivery scheme or were to be shown to be impossible for reasons relating to the capacity of that scheme.

29. The Commission points out that it is for the national court to assess whether the conditions for applying [Article 102 TFEU] are met, and maintains that it is only if a separate market in home-delivery schemes exists and Mediaprint holds a dominant position in that market that it needs to be examined whether its refusal to include Oscar Bronner in that network constitutes an abuse.

30. Emphasising that in this case the order for reference shows that a third undertaking was admitted to Mediaprint's home-delivery scheme, the Commission states that such an abuse, within the meaning of [Article 102 TFEU], might consist, in the wording of subparagraph (c) of that provision, in applying dissimilar conditions to equivalent transactions with other trading parties. The Commission does not, however, consider that to be the case in the main proceedings, since the services ought by Oscar Bronner was not made subject to conditions other than those applicable to other trading parties, but was not offered at all if other services were not entrusted to Mediaprint at the same time.

31. In order to assist the national court it should be recalled at the outset that [Article 102 TFEU] prohibits the abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States.

32. In examining whether an undertaking holds a dominant position within the meaning of [Article 102 TFEU], it is of fundamental importance, as the Court has emphasised many times, to define the market in question and to define the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition (Case C-242/95 *GT-Link v DSB* [1997] ECR I-4449, paragraph 36).

33. It is settled case-law that, for the purposes of applying [Article 102 TFEU], the market for the product or service in question comprises all the products or services which in view of their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services(Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, paragraph 25; CaseC-62/86 *AKZO v Commission*[1991] ECR I-3359, paragraph 51).

34. As regards the definition of the market at issue in the main proceedings, it is therefore for the national court to determine, *inter alia*, whether home-delivery schemes constitute a separate market, or whether other methods of distributing daily newspapers, such as sale in shops or at kiosks or delivery by post, are sufficiently interchangeable with them to have to be taken into account also. In deciding whether there is a dominant position the court must also take account, as the Commission has emphasised, of the possible existence of regional home-delivery schemes.

35. If that examination leads the national court to conclude that a separate market in home-delivery schemes does exist, and that there is an insufficient degree of interchangeability between Mediaprint's nationwide scheme and other, regional, schemes, it must hold that Mediaprint, which according to the information in the order

for reference operates the only nationwide home-delivery service in Austria, is *de facto* in a monopoly situation in the market thus defined, and thus holds a dominant position in it.

36. In that event, the national court would also have to find that Mediaprint holds a dominant position in a substantial part of the common market, since the case-law

indicates that the territory of a Member State over which a dominant position extends is capable of constituting a substantial part of the common market (see, to that effect, Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 28;Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph17).

37. Finally, it would need to be determined whether the refusal by the owner of the only nationwide home-delivery scheme in the territory of a Member State, which uses that scheme to distribute its own daily newspapers, to allow the publisher of a rival daily newspaper access to it constitutes an abuse of a dominant position within the meaning of [Article 102 TFEU], on the ground that such refusal deprives that competitor of a means of distribution judged essential for the sale of its newspaper.

38. Although in *Commercial Solvents v Commission* and *CBEM*, cited above, the Court of Justice held the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with raw materials (*Commercial Solvents v Commission*, paragraph 25) and services (*CBEM*, paragraph 26) respectively, which were indispensable to carrying on the rival's business, to constitute an abuse, it should be noted, first, that the Court did so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking.

39. Secondly, in *Magill*, at paragraphs 49 and 50, the Court held that refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse.

40. In *Magill*, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56).

41. Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of [Article 102 TFEU] in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable

to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.

42. That is certainly not the case even if, as in the case which is the subject of the main proceedings, there is only one nationwide home-delivery scheme in the territory of a Member State and, moreover, the owner of that scheme holds a dominant position in the market for services constituted by that scheme or of which it forms part.

43. In the first place, it is undisputed that other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist and are used by the publishers of those daily newspapers.

44. Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.

45. It should be emphasised in that respect that, in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.

46. For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.

47. In the light of the foregoing considerations, the answer to the first question must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of [Article 102 TFEU].

The second question

48. In its second question, the national court asks whether the refusal by that undertaking, in the circumstances mentioned in the first question, to allow the publisher of a rival daily newspaper to have access to its home-delivery scheme where the latter does not at the same time entrust to it the carrying out of other services, such as sale in kiosks and printing, constitutes an abuse of a dominant position within the meaning of [Article 102 TFEU].

49. Given the reply to the first question, there is no need to answer the second.

Costs

50. The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Wien by order of 1 July 1996, hereby rules:

The refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of [Article 102 TFEU].

Kapteyn Murray

Ragnemalm Schintgen Ioannou

Delivered in open court in Luxembourg on 26 November 1998.

R. Grass — P.J.G. Kapteyn

Registrar — President of the Sixth Chamber