
Refusal to Supply by a Dominant Undertaking : Burgess v OFT [2005] CAT 25

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"Competition Law ~ Recent Developments before the CAT and the European Courts"

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Background

1. There are a relatively small number of cases on refusal to supply, perhaps because if the refusal to supply succeeds in eliminating a competitor there may be inadequate funds to bring a case. The aim of competition policy is to encourage the market to self-regulate by unimpeded competition. The OFT's describes its aims as follows:

"The OFT's goal is to make markets work well for consumers. Markets work well when there is vigorous competition between fair-dealing businesses. When markets work well, good businesses flourish"

That requires that the position of newcomers, often small firms, is safeguarded against unlawful practices. Consideration of barriers to entry is incomplete without consideration of whether newcomers may be forced out, even if entry is otherwise easy.

Refusal to supply

2. There are a number of themes in refusal to supply. They may be summarised as follows:
 - a) The supplier has always supplied third parties, including the claimant
 - b) The supplier has supplied some third parties but not the claimant
 - c) The product or service benefits from intellectual property protection
 - d) The product or service is one in which the supplier is dominant, but the goods or services are not "essential"
 - e) The goods and services are "essential".

There are obviously a number of possible permutations of the above, and the authorities cover a number of them.

The facts of Burgess

3. The case of *Burgess (JJ Burgess v OFT [2005] CAT 25)* fits into the first category. The facts were simple. Burgess is a family firm of funeral directors in competition with another family firm, Austins, in the Stevenage area of Hertfordshire. The latter had built a crematorium which was used by all local funeral directors. After a few years the crematorium refused access to Burgess, with predictable effects on their business. The only small gloss on the simplicity of the facts is that dominance was found in both the market for funeral services and crematoria services, and the abuse in respect of the latter occurred in the adjacent market for funeral directing.

The law: dominance and "essential facilities"

4. A major review of the law can be found in the authoritative Opinion of Adv-Gen Jacobs in Case C-7/97 *Bronner v Mediaprint [1998] ECR I-07791*. That litigation had primarily concerned a quite different issue, the emerging concept of "essential facilities". An undertaking (a newspaper publisher) was refused the facilities of another undertaking (the distribution network of a competing publisher) in circumstances in which the latter had never intended to make those facilities available to third parties. The Advocate General distinguished those circumstances from those in the better established law, which he summarised as follows:

"...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..." (§43)

5. One result of *Bronner* has been that in both *Genzyme* and *Burgess* the parties have, in relying on *Bronner*, raised (directly or indirectly) the absence of an "essential facility" as a defence - in the first case it was raised by Genzyme against the OFT, and in the second by the OFT against Burgess. In so doing the newer doctrine of an "essential facility" was conflated by the parties with the older doctrine based on (mere) dominance. Clearly a firm can be dominant without having control of an "essential facility".
6. Thus an abuse may be found in a case of "essential facilities" where it might not be found if the undertaking is merely dominant. In *Bronner* the court indicated that the requirements of the former were that (a) all competition on the part of that competitor should be eliminated, and (b) there should be no actual or potential substitute for the service. In *Bronner* itself the court found that the competitor could survive - there were other, less convenient, methods of newspaper distribution.
7. In considering the relevant law in *Burgess* the CAT drew on its judgment in *Genzyme v OFT* [2004] CAT 4 (§§482-499 & 549-575) in which it had also summarised a number of the authorities. Genzyme produced a pharmaceutical product that had to be administered at home. It employed a "margin squeeze" preventing other suppliers from supplying the home service (it sold the product alone to third parties at the same price at which it sold to the NHS including the home service). The CAT was not as impressed by arguments concerning whether or not the supply of the product was an "essential service" as to whether or not competition with Genzyme was being eliminated (which it was).
8. In the case of *Burgess* no claim had been made that the crematorium was an "essential facility" - there were a number of other crematorium reachable by Burgess and their clients - but it *was* dominant (a number of clients wanted to use both Burgess and the local crematorium). Crucially the crematorium had been made available to all funeral directors, including Burgess. The CAT added a potential distinction between cases where the effect of the refusal to supply was to eliminate a competitor and those where (as in *Bronner*) it was not. It set out (§311) three scenarios in which an abuse would be found, sufficient to decide the case:
 - a) a dominant undertaking, without objective justification, refuses supplies to an established existing customer who abides by regular commercial practice, at least where the refusal of supply is disproportionate and operates to the detriment of consumers
 - b) in particular, if the potential result of the refusal to supply is to eliminate a competitor of the dominant undertaking in a neighbouring (e.g. downstream) market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods and services in question are indispensable for the activities of the latter undertaking and there is a potential effect on consumers
 - c) but it is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative.
9. It is therefore evident that in the first case, where a regular customer is refused supply, the test is a relatively weak one. It leaves open, however, whether a case may fail if consumers cannot be shown to suffer.

Objective Justification

10. Finally, in *Burgess* no defence of "objective justification" was raised by either the OFT or, strictly speaking, the crematorium, although various allegations had been made by the parties that would have had a bearing on such a defence. The CAT, referring to *United Brands*, commented (§§362-368) on the defence as follows:

- a) any failure on the part of a claimant must be proportionate
 - b) any "objective justification" must be *causally* linked to the refusal to supply
11. In many cases of a long commercial relationship it is likely that both parties could point to examples of poor performance on the part of the other. Indeed any evidence that such poor performance was one-sided might provide evidence of dominance itself. However a dominant firm cannot hold its customers *in terrorem* on the basis that any lapse might justify a refusal to supply.

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