Essential Facilities: A Doctrine Clearly in Need of Limiting Principles?

By Alain Georges and Matteo F. Bay

Two antitrust decisions from different European Union member states cast a new light on the debate on the essential facilities doctrine. Under this doctrine, a dominant firm using or controlling a facility or infrastructure that is essential for its rivals’ activity in a secondary market may be required to give them access to it. As a result of these recent decisions, companies with ownership or control over facilities such as telecommunications networks, set-top boxes, computer reservations systems, cross-border credit transfer systems, intellectual property rights (IPRs), etc., will face additional uncertainties with respect to the scope of their obligations vis-à-vis the rivals seeking access to their facilities. When considered together and also in the context of recent US and EU landmark rulings, the latest developments seem to struggle in the delicate balance between the need to stimulate competition in a secondary market by granting access to an essential facility and the risk of reducing the incentives for essential facility holders to invest ultimately to the benefit of consumers.

With decisions of June 15 and July 12, 2005, respectively, the Italian Antitrust Authority (Autorità Garante della Concorrenza e del Mercato or IAA) and the French Supreme Civil Court (Cour de cassation) have opined with markedly different approaches on the requirements under antitrust rules for a facility to be considered essential so that its holder must give access to it to its competitors in a secondary market.

The Italian Case

In Merck,1 the IAA decided on Merck’s refusal to grant Dobfar, a large Italian manufacturer of chemical and pharmaceutical products, a license to produce a key ingredient for carbapenem antibiotics for which Merck has patent rights in Italy expiring at the end of January 2006. As Merck’s patent rights have expired in all other European countries and outside the European Union, excluding Italy, Dobfar had requested a licence to produce the ingredient in Italy, where Merck still enjoys patent rights.

The IAA found that Merck was dominant in the market for carbapenem antibiotics. Moreover, it found that, besides Italy, Merck’s refusal to license affected the markets in several other EU member states, including Germany, France, Spain, and the United Kingdom, where Merck’s patent had already expired. Merck’s refusal delayed entry into these countries of generics produced outside Italy by the drug manufacturers that would purchase the key ingredient from Dobfar. In turn, the delayed entry of competing generics precluded the price decreases that typically follow the entry of a generic drug on the market. The IAA calculated that, in the absence of a license granted to Dobfar in 2005, the delay of entry into the market of generics competing with Merck’s carbapenem antibiotics would be of about one year, starting from January 2006 (i.e., the date of expiry of Merck’s patent in Italy).

Ultimately, relying on Article 82 of the EC Treaty (which, as of May 1, 2004, all EU member states’ competition authorities can also apply in parallel to their domestic antitrust provisions), the IAA ordered, by means of an interim measure decision, that Merck must grant Dobfar a license within seven days of a request from Dobfar. In the absence of an agreement between the parties, the IAA itself will determine with the assistance of an independent expert the terms of the license.

Despite objections from Merck, which had provided evidence to the contrary, the IAA found that Merck’s patent was an “essential facility.” More specifically, the IAA found that (1) there were no alternatives to Merck’s key ingredient because, even though it was produced elsewhere, the quantity and quality of the production outside Italy was insufficient to satisfy the demand of EU-based generics manufacturers; and (2) moving Dobfar’s production of the key ingredient outside Italy, that is, to countries in which the patent rights had expired and where Dobfar also had production plants, would have resulted in excessive costs and could therefore not be considered a viable alternative to the license. The IAA rejected as unfounded all justifications put forward by Merck.

Alain Georges and Matteo F. Bay are partners at Latham & Watkins, LLP, where they divide their time between Brussels, and Paris, and Milan. The authors thank their colleague Melissa Cacciotti for her invaluable assistance.

1
The French Case

On July 12, 2005, the Cour de cassation quashed and annulled a judgment of the Paris Court of Appeals that had confirmed a decision of the Competition Council (Conseil de la concurrence) ordering interim measures against NMPP, Nouvelles Messageries de Presse Parisienne, the largest press distributor in France.

This case concerns the refusal by NMPP to allow its competitor, MLP, Messageries Lyonnaises de Presse, direct access to its software system and data base called Presse 2000, designed and operated by NMPP. This system is used by the 200 wholesale press distributors active in France to exchange information on deliveries, sales, unsold items, proceeds of sales, etc. with press retailers and NMPP. Such information is used to adjust the volumes of press products to be delivered to each retailer. Certain data stored in Presse 2000 is shared by NMPP and MLP. However, failing a direct connection between Presse 2000 and MLP’s information system, wholesalers have to re-enter data manually into MLP’s system, which MLP considers costly, time consuming, and leading to errors. MLP claims that NMPP’s refusal to grant it automated access to Presse 2000 constitutes an abuse of dominance as such access would be “essential” to its activities.

In its initial decision of December 22, 2003, the Conseil de la concurrence ordered NMPP, as an interim measure, to grant MLP automated access to Presse 2000 on the grounds that it could not be ruled out that NMPP was abusing its dominant position by refusing MLP such access and that its refusal was likely to pose a serious and immediate threat to MLP and competition. The decision was based on MLP’s argument that, although it had the technical and financial resources to design a software system equivalent to Presse 2000, Presse 2000 had become a standard in the press distribution sector and that, as a consequence, wholesalers would object at using it in parallel with an equivalent software system. The Conseil de la concurrence then found that a software and database could constitute an “essential facility” as a result of the “competitive context,” whereas established European and French case law had not strictly necessary or indispensable for MLP to carry out its activities.

Although, as is usual for it, the Cour de cassation did not refer to any case law in its judgment, it clearly applied the conditions defined by the European Court of Justice (ECJ) in landmark cases such as Magill (1995), Bronner (1998), and IMS Health (2004).

In The Background: Recent US and EU Rulings

In a landmark 2004 ruling in the Trikko case, the US Supreme Court significantly limited the circumstances in which antitrust law may be used to force a firm to assist its competitors by providing access to its infrastructure. In Trikko, the Supreme Court expressed strong reservations about the essential facilities doctrine by noting that it had never recognized it and that it was crafted by “some lower courts.” Moreover, the Supreme Court showed skepticism as regards the proper role of antitrust authorities and courts when dealing with essential facilities cases. Mandatory access to (or licensing of) an infrastructure considered essential involves complex price-related questions for which these institutions, according to the court, seem poorly equipped.

In contrast, the ECJ, with its relatively settled case law under Article 82 that prohibits abusive conduct by dominant companies, has long recognized the essential facilities doctrine (even though it has never made an explicit reference to it). According to ECJ case law, a facility is essential and the dominant company owning it must therefore grant access to or license it only when a narrow set of cumulative circumstances exists:

1. The refusal of access to the facility must be likely to prevent all competition in the secondary market where the applicant is active;
2. The access must be indispensable (or essential) for carrying out the applicant’s business; a mere economic difficulty for the applicant to conduct business without access to such a facility is not sufficient;
3. The refusal is not objectively justified (the Bronner test).

lished that economically reasonable alternative solutions, even if less advantageous than those benefiting to NMPP, could not be implemented by MLP. The Cour de cassation noted that MLP had recognized that it had the technical and financial resources to design a software system equivalent to Presse 2000 and was already operating without the automated access that it claimed. It then concluded that automated access to Press 2000 could not be qualified as an “essential facility” as it was not strictly necessary or indispensable for MLP to carry out its activities.
The ECJ case law has further developed the approach as regards IPRs. A refusal to license an IPR can be abusive only in exceptional circumstances. These circumstances contain an additional element that is different from those described above. The IPR in question should be indispensable to the production of a new product for which there is unsatisfied consumer demand and not just a product duplicating that already offered in the secondary market by the IPR owner (the Magill test).10

**Comments**

In requiring Merck to licence its patent, the IAA explicitly relied on Bronner, Magill, and IMS Health. However, it would appear that the IAA only paid lip service to that case law. It favored a liberal application of the tests spelled out by the ECJ. In contrast, the Cour de cassation favored a seemingly rigorous application of the Bronner test, even though in its succinct reasoning it did not cite any judgment of the ECJ.

With respect to the first limb of the Bronner test, Merck’s refusal did not appear to result in the elimination of all competition. Manufacturers outside Italy were already producing, albeit in limited quantities, generics competing with Merck’s carbapenem antibiotics, including in EU member states. Moreover, denying Dobfar a license in 2005 would have at most delayed by about one year a larger production of generics. It is clear that it would not have prevented all competition, as is normally the case in a genuine essential facilities situation.

Concerning the second limb of the Bronner test, the IAA found that Dobfar’s alternative consisting in moving the production of the key ingredient to its plants outside Italy was economically burdensome but not impossible. Ultimately, therefore, the IAA considered that the alternative was not acceptable. In contrast, in NMPP the Cour de cassation favored a strict, more traditional reading of the second limb of the Bronner test. It found that access to the Press 2000 software system was not essential, because, even if the alternative was economically less advantageous, NMPP’s competitor had the technical and financial resources to develop an equivalent software of its own.

As to the Magill test and the specific requirement in IPRs cases that the refusal to license prevents the emergence of a new product for which there is an unmet consumer demand, the compulsory license ultimately imposed on Merck enables Dobfar to produce exactly the same ingredient that Merck already produces. In turn, the license allows for the production of generics that (1) will compete with the Merck’s existing antibiotics with identical therapeutic properties and (2) are already produced outside Italy, albeit in smaller, lower quality quantities. In this respect, the IAA approach echoes that of the European Commission in a well known decision from last year against Microsoft.11 In ordering Microsoft to supply its competitors with interoperability information for its server products, the Commission omitted to consider in full the new product prong of the Magill test. Arguably, by doing so the Commission failed to consider the impact on its analysis of the absence of unmet consumer needs for server products that rival producers were seeking to satisfy.12

Finally, in the absence of an agreement between the parties on the conditions for the license, the IAA will have to play the delicate role of a central planner; a type of intervention frowned upon in Trinko by the US Supreme Court and avoided by the Cour de cassation. This would appear to show that the IAA is more willing to take on such a role.

**Conclusion**

Unlike Trinko, both IAA and Cour de cassation recognized the existence and continued validity of the essential facilities doctrine. However, whereas in Merck the IAA showed a more liberal approach, in NMPP the Cour de cassation rigorously applied the principles laid down in the case law of the ECJ. The two cases seem to reflect a tension between authorities of different member states, even though they seemingly apply the same principles and precedents and pursue the same objectives.

The Merck case, in particular, seems to undermine the uniform application of Article 82 within the European Union. However, this is not the first time that an antitrust authority from the European Union has exercised its discretion in the application of the essential facilities doctrine. For instance, in Microsoft even the Commission has shown its willingness to stretch the outer boundaries of the doctrine.

The Merck decision would also appear to be a policy decision and at least in part a reflection of the peculiar facts of the case, including the national regulatory framework. This is all the more apparent taking into account that for the first time ever the IAA adopted an interim measure decision. According to the IAA, Merck’s refusal to license was so clearly a case of abuse of dominance that it satisfied the prima facie requirement for interim measures.

Strikingly, in applying Article 82 the IAA also appeared to be more concerned with the impact in other member states of Merck’s refusal than its impact in Italy. The extraterritorial effects of the IAA decision in application of EU antitrust law may be a sign that in the future another antitrust authority from one of the 25

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member states may adopt decisions whose effects are felt beyond its jurisdiction. This is an element that international companies active in more than one member state will need to consider when assessing their conduct.

Ultimately, the most worrying consequence of the Merck and NMPP cases, especially when considered together with the diverging US and EU approaches to the essential facilities doctrine as epitomized in the Bronner, IMS Health, and Trinko rulings, is that in global high-technology industries like pharmaceuticals and software the worldwide nature of the product and the typical multinational structure of the companies marketing them will inevitably face in different jurisdictions, including within the European Union, inconsistent standards of conduct and conflicting remedies.

Indeed, the current status of the law would appear to reflect different approaches to the same issue. However, in this respect it should be noted that, in relation to the Merck case, further developments can be expected from the Administrative Court of Rome on appeal\(^1\) whereas the French position, as defined by the Cour de cassation, should be considered final. Such developments could clarify at least some of the above issues.

Notes

2. Dobfar had requested the license on the basis of a provision designed to redress a purely Italian imbalance in patent duration in favor of future market entrants and competitors. Under this provision, would-be producers of the patented products are granted the right to request a license.
6. See infra nn.8 and 10 for full case citations.
9. In rejecting the argument that access to the facility (a nation-wide newspaper home-delivery network) was essential because its duplication by the applicant would not have been economically viable, in Bronner the ECJ emphasized that “in order to demonstrate that the creation of [an alternative nation-wide home delivery distribution 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 [for the applicant].” (¶ 45).
12. The new product prong of the Magill test is merely cited by the Commission at ¶ 551 of the decision, with no discussion of it based on the facts of the case.
13. An appeal lodged by Merck on 13 July 2005 is pending before the Tribunale Amministrativo Regionale (TAR) of Latium, Rome (case n. 6629/2005, Merck v. IAA). The TAR ruling is expected before the end of the year.