

Herbert Smith Freehills Competition Law Moot 2024**Problem Question**

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**RURITANIA IS A FICTIONAL MEMBER STATE OF THE EUROPEAN UNION
REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION UNDER
ARTICLE 267 TFEU FROM THE RURITANIAN HIGH COURT IN THE CASE OF:**

Denture Ltd v Ruritanian Competition Authority

Introduction

1. The following paragraphs set out the factual and legal background to the questions referred to the Court of Justice of the European Union, as provided below, together with a summary of the parties' submissions to the Ruritanian High Court.
2. The case raises a number of issues relating to the interpretation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and it is these issues that form the subject matter of the reference.

Background*Denture Ltd*

3. Denture Ltd (Denture) is the parent of an independent group of companies active on a global scale, including in the European Union. Denture is engaged in the production of a number of dental prosthesis devices (to replace or repair missing or damaged teeth), including dental implants, artificial teeth (dentures) and dental crowns, bridges, and veneers. Denture manufactures approximately 60% of all dental implants sold in Ruritania. Until recently, it has not sold more than 30% of the other dental prosthesis devices it manufactures in Ruritania although it has been steadily gaining sales in these markets.
4. In 2018, Denture set up a wholly-owned subsidiary, to operate dental practices across the EU, including in Ruritania. Denture's Ruritanian dental practices have been operating since the end of 2021

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and are rapidly expanding, especially in the Ruritanian capital.

Ruritania Dental Co

5. Ruritania Dental Co (RDC) is a Ruritanian company which operates dental practices across the whole of Ruritania, and is a leading operator of dental practices in Ruritania's capital city.

6. RDC started purchasing dental prosthesis devices from Denture in 2000. Until recently, it has had a good and strong working relationship with Denture. Indeed, until 2022 it purchased dental implants exclusively from Denture as RDC considered that the quality, and reputation, of Denture's products in this sphere was hard to match. It always has, however, purchased a fraction of its requirements for other dental prosthesis devices from other manufacturers, especially Denture's main rival in Ruritania, the Ruritanian company, White Teeth Ltd (White Teeth).

7. Since the end of 2021, however, the relationship between Denture and RDC has become more strained. For example, the following events occurred:

- From the beginning of 2022 Denture became a much less reliable trading partner. Not only did it raise the prices of the dental implants sold to RDC considerably, but it frequently failed to deliver the dental implants ordered by RDC on time, or in the exact quantities ordered. On many occasions this meant that RDC had to cancel procedures and appointments scheduled for its customers.
- As a result, RDC sought to acquire stock of Denture's dental implants from other dental practices, especially those run by Denture's subsidiary. These dental practices always had a plentiful stock of dental implants which they were able to acquire at significantly lower prices than those paid by RDC. They, however, always declined to sell the dental implants to RDC stating that their contract with Denture precluded them from selling dental implants to other dental practices.
- When its attempt to source a more reliable supply of Denture's dental implants failed, RDC started to acquire part of its dental implant requirements from White Teeth and, in addition, to purchase greater amounts of its other dental prosthesis devices from White Teeth. However, White Teeth, which is a much smaller manufacturer than Denture, has limited capacity and was unable always to fulfil the full quantity of dental implants ordered by RDC. RDC has also been less impressed with the quality of White Teeth's current dental implants compared to Denture's, although it understands that White Teeth has been investing heavily in this sphere and is in the process of trying to develop new and improved products. As soon as Denture found out that RDC had increased its purchases of dental prosthesis devices from White Teeth, Denture contacted RDC stating that in the future it would refuse RDC supply of dental implants if RDC

purchased *any* dental prosthesis devices from another manufacturer. Following RDC's decision to continue to purchase other dental prosthesis devices (namely, dentures, dental crowns, bridges, and veneers) from White Teeth, Denture wrote to RDC on 1 August 2022 stating that as RDC was in breach of Denture's terms and conditions for supply, it would refuse RDC all supply of dental implants from 1 September 2022 unless RDC started to comply with its policies. As a result, RDC felt it had no choice but, from 1 September 2022, to stop purchasing from White Teeth and to purchase all of its dental prosthesis devices from Denture.

The Ruritanian Competition Authority's Decision

8. Following a complaint lodged by RDC with the Ruritanian Competition Authority (the RCA), the RCA investigated and issued a decision under its administrative procedure finding that Denture had abused its dominant position in the Ruritanian market for dental implants contrary to Article 102 TFEU. It also held that Denture had breached Article 101 TFEU, and Sections 1 and 2 of the Ruritanian Competition Act (modelled on Articles 101 and 102, respectively). It imposed fines of EUR 500,000 on Denture. In summary, the RCA decided that:

- a) Denture's actions in 2022, in raising the prices of the dental implants sold to RDC and making consistently late or incomplete deliveries, resulted in the imposition of unfair prices and trading conditions on RDC by Denture which were capable of giving rise to anticompetitive effects in the market for dental services in Ruritania. As a result, the conduct was prohibited under Article 102 TFEU and Section 2 of the Ruritanian Competition Act.
- b) Denture's distribution agreements with its subsidiary restricted competition and infringed Article 101 TFEU and Section 1 of the Ruritanian Competition Act.
- c) Denture had bound RDC to purchase dentures, dental crowns, bridges, and veneers from it through unlawfully tying their purchase to the purchase of its dental implants. As EU case-law establishes that tying arrangements are by their very nature liable to foreclose competition, the conduct was prohibited by Article 102 and Section 2 of the Ruritanian Competition Act, without it being necessary for the RCA to demonstrate actual or potential anticompetitive effects.

The Appeal before the Ruritanian High Court

9. On 1 November 2023, Denture brought an action for annulment of the RCA's decision before the Ruritanian High Court.

10. Before the High Court Denture did not dispute the finding that it was dominant in the market for dental implants in Ruritania. However, Denture argued that:

- In relation to finding (a), the RCA had wrongly failed to consider whether access to Denture's dental implants was indispensable to compete downstream and would eliminate all effective



competition in the dental practice market. The conduct should have been analysed as a refusal to deal and the same principles and standards should have been applied as those laid down in Case C-7/97, *Oscar Bronner* EU:C:1998:569. Indeed, logic suggests that if Denture has no duty to supply RDC because the *Bronner* criteria are not satisfied, it cannot have a duty to supply it in a timely fashion or at particular prices or on particular terms. The RCA's decision would, conversely, incentivise Denture to refuse supply to RDC outright. In any event, even if the *Bronner* criteria were not applicable, the RCA had failed to provide sufficient proof of abusive conduct and anti-competitive effects on the dental practice market.

- In relation to finding (b), the RCA had wrongly failed to recognise that Denture and its subsidiary formed part of a single economic unit and a single undertaking, so that an agreement between Denture and its wholly-owned subsidiary fell outside the scope of Article 101 altogether.
- In relation to finding (c) the RCA had wrongly considered that tying by a dominant undertaking constituted an automatic abuse of a dominant position. Rather, as Denture had argued during the administrative procedure that the conduct was not capable of restricting competition in the denture, dental crowns, bridges, and veneers markets, the RCA should have considered in more detail the anti-competitive effects of the conduct.

11. In reply, the RCA argued:

- Situations of outright refusal to supply are distinguishable from situations where the dominant company makes access subject to unfair pricing or other trading conditions. As the conduct at issue in this case could not be equated to an outright refusal to supply, the criteria set out in *Bronner*, and especially the criterion of indispensability of the product or service in question, do not apply. When establishing an abuse, the RCA was not required to show concrete anticompetitive effects, only that the conduct is capable of foreclosing competitors from the market and so harming consumers.
- The single economic unit doctrine does not apply to exclude an agreement from the scope of Article 101 where a subsidiary is engaged in economic activities that are not connected, or linked to, that conducted by its parent. As Denture and its subsidiary operate in completely different markets (the manufacture of prosthetic dental products and the provision of dental services respectively), agreements concluded between them do not fall outside of Article 101.
- EU case-law clearly establishes that where customers of one (tying) product are required to purchase another (tied) product from the dominant firm, the conduct constitutes an abuse contrary to Article 102 unless objectively justified.

Questions Referred

12. Faced with such fundamental differences in interpretations and readings of the law, the Ruritanian High Court has decided to stay the proceedings before it and refer the following questions relating to the interpretation of the EU competition laws to the Court of Justice of the European Union:

Question 1. When considering whether an abuse of a dominant position under Article 102 TFEU has been committed, are situations where a vertically integrated dominant company makes it practically extremely difficult for its rival to operate downstream (for example, by increasing prices and failing to deliver products on time or in the quantities ordered) to be equated with situations of outright refusal to supply? Specifically, when determining whether such conduct constitutes an abuse of a dominant position, must the criteria set out in Case C-7/97, *Oscar Bronner* EU:C:1998:569, and especially the criterion of indispensability of the product or service in question, be applied?

Question 2. If the *Bronner* criteria are not to be applied in situations where a vertically integrated dominant company makes it practically extremely difficult for its rival to operate downstream, but does not refuse the rival supply outright, how is potentially abusive conduct to be identified? In particular, must it be established that anticompetitive effects:

- a. have actually occurred;
- b. are likely to occur; or
- c. is it sufficient to establish merely that anticompetitive effects are plausible?

Further, what standard of proof must be met by a competition authority in establishing that conduct is abusive, in circumstances where significant fines (of up to ten per cent of the infringing undertaking's world-wide turnover) can be imposed by the authority where it finds conduct to be in breach of EU and national competition law in an administrative procedure?

Question 3. When considering whether an agreement between a parent and a wholly-owned subsidiary falls outside the scope of Article 101 on the grounds that it is concluded between entities within the same economic entity, is it necessary that the subsidiary is engaged in activities connected, or linked, to those of the parent? If so, what factors should be applied in determining whether such activities are connected or linked?

Question 4. Is tying by its very nature abusive under Article 102 and, if so, is the presumption that tying is abusive, a rebuttable one? If the presumption that tying is abusive is rebuttable (a) how is a dominant firm to rebut the presumption; and, in this case (b) what factors must be considered or analysed by a competition authority when determining whether abusive conduct has taken place?



13. The request for a preliminary ruling arrived at the Court of Justice on 15 December 2023. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the claimant and defendant and has invited them to submit written observations to the Court. The deadline for submission is on 5 April 2024. Oral hearings are provisionally scheduled for 14-15 June 2024.

Note: Article 267 TFEU provides a procedure where a national court may request the Court of Justice to give a preliminary ruling on a question on the interpretation of EU law, where a decision on the question is necessary to enable the national court to give judgment. The Court of Justice does not therefore deal with questions of fact. Rather, it is for the national court to apply the interpretation of EU law to the facts of the case in front of it.