Case C-245/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 April 2024

Referring court:

Administrativen sad Sofia-oblast (Bulgaria)

Date of the decision to refer:

5 April 2024

Applicants:

‘LUKOIL Bulgaria’ EOOD

‘LUKOIL Neftohim Burgas’ AD

Defendant:

Komisia za zashtita na konkurentsiata

Subject matter of the main proceedings

Action brought by ‘LUKOIL Bulgaria’ EOOD and ‘LUKOIL Neftohim Burgas’ AD against Decision No 332/04.04.2023 of the Komisia za zashtita na konkurentsiata (Commission on Protection of Competition; ‘the KZK’) establishing an infringement of Article 21(2) and (5) of the Zakon za zashtita na konkurentsiata (Law on the Protection of Competition) and of point (b) of the second paragraph of Article 102 TFEU and imposing a financial penalty.

Subject matter and legal basis of the request

Interpretation of EU law pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

1. Where the national competition authority has identified different types of behaviours, some of which have been classified as a refusal to grant access to an essential facility and others as a restriction of trade, but which have been combined into an overall strategy of the undertaking, is it permissible to find there to have been a single infringement under Article 102 TFEU or must separate infringements, classified respectively as a refusal to grant access to an essential facility and a restriction of trade, be found to have been committed?

2. Must the competition authority exclude the application of the *Bronner* test to the alleged infringement under Article 102 TFEU in the form of a refusal to supply in all cases where the undertaking in a dominant position in relation to the essential facility has received public funding (on the basis of a privatisation contract/a concession), or is it necessary to assess the amount of the investment, the performance of the privatisation contract/concession (on the basis of which the essential facility was acquired) and whether the investment was made in connection with the performance of the investment contract/concession or on that undertaking's own initiative?

2.1 If the foregoing question is answered in the affirmative, is observance of the principle of proportionality set out in [paragraph 75 of the] Guidance on the enforcement of Article 102 … TFEU (Section ['IV.][D. Refusal to supply and margin squeeze']) ensured, where the dominant undertaking has invested in the essential facility, by applying restrictive criteria determined on the basis of the principle of 'that which is most necessary' for preserving competition, with proportionate account being taken of the interests of the dominant undertaking?

Provisions of European Union law and case-law relied on

Treaty on the Functioning of the European Union, in particular point (b) of the second paragraph of Article 102 and Article 267

Charter of Fundamental Rights of the European Union ('the Charter'), in particular Articles 41 and 47

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules laid down in Articles [101] and [102] of the Treaty, in particular Article 3 and Article 27

Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, in particular paragraphs 13 to 15, 75, 82

Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

Commission Decision of 15 October 2014, AT.39523 Slovak Telekom

Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569

Judgment of the General Court of 18 November 2020, *Lietuvos geležinkeliai* v *Commission*, T-814/17, EU:T:2020:545

Opinion of Advocate General Rantos of 7 July 2022 in *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2022:537

Judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12

Judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746

Judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598

Provisions of national law relied on

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria), in particular Articles 17 and 18

Administrativnoprotsesualen kodeks (Code of Administrative Procedure; 'the APK'), in particular Articles 6 and 168

Zakon za zashtita na konkurentsiata (Law on the Protection of Competition; 'the ZZK'), in particular Articles 8 and 20 and Article 21(2) and (5)

Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax; 'the ZDDS'), in particular Articles 13 and 16

Zakon za aktsizite i danachnite skladove (Law on excise duties and tax warehouses; 'the ZADS')

Pravilnik za prilagane na Zakona za aktsizite i danachnite skladove (Rules on the implementation of the Law on excise duties and tax warehouses; 'the PPZADS')

Zakon za zapasite ot neft i neftoprodukti (Law on petroleum and petroleum products stocks; 'the ZZNN')

Metodika za izvarshvane na prouchvane i opredelyane na pazarnoto polozhenie na predpriatiata na saotvetnia pazar (Methodology for conducting a market investigation and determining the market position of undertakings on the relevant market), adopted by KZK Decision No 393/21.04.2009.

Succinct presentation of the facts and procedure in the main proceedings

1 Acting in accordance with its Decision No 268/16.04.2020, the KZK initiated a procedure, under reference number KZK-255/2020, to determine whether there were any infringements of Article 15 and Article 21 of the ZZK and/or of Article 101 and Article 102 TFEU in the setting of the prices of common automotive fuels along the production/import-storage-wholesale-retail chain, both at the individual horizontal levels and vertically, by 11 undertakings (including 'Lukoil Neftohim Burgas' and 'Lukoil Bulgaria'), following a complaint from the Varhovna administrativna prokuratura (Supreme Administrative Public Prosecutor's Office; 'the VAP') concerning the incongruity between the significant fall in the global price of crude oil (by 47.4%) in March 2020 and the fall in retail automotive fuel prices in Bulgaria (by some 11%) in the same period. The VAP also submitted data on the average prices of fuels placed on the market from tax warehouses, including excise duty and VAT, and a complaint from a member of the public claiming that there was speculation with the retail price of fuel in Bulgaria, in the light of the fall in crude oil prices on the world market.

2 According to a market analysis by the Agentsia 'Mitnitsi' (Customs Agency), the average daily prices of petrol and diesel fell by an average of BGN 0.07 or 4.5% in the period from 30 March to 5 April 2020. Fuel prices at distribution points for end consumers (petrol stations) reacted to the change in the price of crude oil on the stock market a week later (around 12 March 2020). That analysis also shows that, in the last two weeks of March and the first week of April 2020, during which there was a gradual fall in the prices of energy products in Bulgaria, all of the leading fuel retail chains reacted.

3 The subject matter of the review conducted in the procedure before the KZK was the conduct of 'Lukoil Neftohim Burgas' and 'Lukoil Bulgaria' in restricting access to tax warehouses and transport infrastructure, liable to restrict the import of fuels into Bulgaria.

4 Since 10 December 2018, the capital of the company 'Lukoil Neftohim Burgas' has been divided into 99 397 192 shares, of which 'Lukoil Europe Holdings' B.V. holds 89.97% and PAO 'Lukoil' 9.88%. The ultimate controlling entity is PAO 'Neftianaia kompania LUKOIL' [in the] Russian Federation. The shares are subdivided into two classes: class A – a share which is held by the Republic of Bulgaria and gives it special rights, and class B – the remaining shares. The general meeting of the company may not, without the prior written consent of the State as holder of the class A share, take any decision to cease or substantially restrict the processing of petroleum or the production of fuels, or refuse access to port facilities and product pipelines in return for appropriate consideration, in relation to: (a) State authorities in connection with the performance of the tasks imposed on them by law in respect of quantities notified by them in accordance with a pre-agreed schedule; (b) undertakings or entities determined by decision of the Government of Bulgaria or an authority expressly designated by it, where: • that lies within the spare capacity of the product pipeline; • the technical

possibilities of the product pipeline permit that; and • the undertaking’s normal production capacity is not impeded.

5 The company ‘Lukoil Neftohim Burgas’ acquired almost all of its oil depots and associated pipeline infrastructure in the course of the privatisation of the State undertaking ‘Neftohim’ EAD in the late 20th and early 21st centuries. The group’s transport and logistics infrastructure was built by the State using public funds in the 1970s and is unique in the country and the region. It enables automotive fuels from the Black Sea coast to be transported to the capital and fuels from oil depots to be stored and transported to Bulgaria’s largest cities (Burgas, Stara Zagora, Plovdiv, Sofia). Following the privatisation of the State-owned undertaking ‘Neftohim’, the infrastructure became the property of the Lukoil Group.

6 With its own refinery for primary petroleum processing, the company ‘Lukoil Neftohim Burgas’ is the most significant producer of petroleum products in Bulgaria. The undertaking imports petroleum and fuel oil, processes and produces petroleum products, sells them on the domestic market and exports petroleum products (wholesale, including as intra-Community supplies). That undertaking has sea, rail and road transport terminals. Petroleum unloaded from tankers and petroleum products are loaded onto the undertaking’s own tanks and transported to their destinations. The undertaking operates from two sites connected by pipelines: the ‘Lukoil Neftohim Burgas’ production site, which is owned by the undertaking itself, and the ‘Rosenets’ port terminal, a State-owned facility awarded by a decision of the Government of the Republic of Bulgaria in 2011 under a service concession contract. In the period from 1 January 2016 to 30 June 2020, ‘Lukoil Neftohim Burgas’ AD supplied petrol A-95H, diesel automotive fuel and the corresponding biofuels for export via various contractual partners.

7 In the period from 1 January 2016 to 15 December 2020, ‘Lukoil Europe Holdings’ B. V., based in the Netherlands, was the sole proprietor of the capital of the company ‘Lukoil Bulgaria’, sole proprietorship having passed thereafter to another company within the Lukoil economic group, namely ‘LITASCO’ SA, based in Switzerland.

8 The main business of ‘Lukoil Bulgaria’ includes the wholesale and retail trade in fuels and petroleum products, the blending of mineral fuel with bio-additives at petroleum supply depots, and transport and forwarding activities. In the period from 1 January 2016 to 30 November 2020, ‘Lukoil Bulgaria’ owned three excise warehouses in Bulgaria. The Burgas-Sofia pipeline and associated petrol depots are authorised as one tax warehouse.

9 On the basis of the economic and legal analysis carried out, the KZK found in its decision No 332/04.04.2023 that the Lukoil Group had infringed Article 21(2) and (5) of the ZZK and point (b) of the second paragraph of Article 102 TFEU, consisting in the abuse of a dominant position on the market for the storage of automotive fuels, by [not] granting importers and producers of fuels access to its

own tax warehouses, restricting imports by sea by blocking the tax warehouses linked to the 'Rosenets' and 'Petrol Varna' terminals, and refusing to grant access to the group's petroleum product pipelines for the transport of other producers' and importers' fuels, which is capable of preventing, restricting or distorting competition and adversely affecting the interests of consumers, inasmuch as it restricts the import of automotive fuels into Bulgaria.

The essential arguments of the parties in the main proceedings in connection with the first question referred for a preliminary ruling

10 For the purposes of its investigation, the KZK defined one product market, namely the internal market in fuel storage. Thereafter, the regulatory authority subdivided that market into two submarkets: fuel storage under the ZADS and fuel storage under the ZZNN. These are in turn subdivided into two further submarkets: diesel storage and petrol storage. The KZK found that the Lukoil Group had devised an overall strategy for abusing its dominant position on the market in fuel storage which was liable to restrict fuel imports and thereby to reduce competitive pressure on the wholesale market, and designed to maintain the group's leading position at the vertically connected market levels.

11 When examining the Lukoil Group's conduct, the KZK drew a distinction between two periods. In the first period, there was no legal obligation for authorised warehouse keepers to make part of their capacity available for use by independent third parties. That period extended from the beginning of the investigation period (1 January 2016) to 22 December 2020, the date of expiry of the three-month time limit for adapting the activities of warehouse keepers to the new requirements introduced under amendments made to the ZADS and the PPZADS in July and September 2020 and designed to strengthen control over tax warehouses. [Under those amendments,] authorised warehouse keepers are obliged to make at least 15% of their total maximum capacity for the storage of energy products available for use by independent third parties. The second period began on 23 December 2020, the point from which warehouse keepers were obliged to make that spare capacity available for use by third parties.

12 The KZK argues that an infringement has been committed in the form of several types of abuse of a dominant position that serve a common anti-competitive objective. On account of the different nature of the infrastructure in question and the different ownership relationships present, which together lead to differences in the ways in which the undertakings [forming the subject of the KZK's decision ('the addressee undertakings')] restrict competition, the KZK classified some of those behaviours as a refusal to grant access to an essential facility and others as a restriction of trade. The bundling of those behaviours into an overall strategy justifies their classification as a single infringement both of Article 21(2) and of Article 21(5) of the ZZK. The KZK found that Article 21(5) of the ZZK is a sub-category of Article 21(2) and is therefore, by extension, not a separate constituent element [for abuse] in Article 102 TFEU. In European practice, refusals to grant

access and other behaviours which hinder competitors, whether through a ‘constructive’ refusal (Commission Decision AT.39523, Slovak Telekom) or through the dilapidation of essential infrastructure (judgment of the General Court of 18 November 2020, T-814/17, *Lietuvos geležinkeliai* v *Commission*), are classified as a restriction of trade for the purposes of point (b) of Article 102 TFEU.

13 The undertakings submit that a claim of refusal to grant access such as that pursued here would in practice have the consequence of compelling the owner to allow a third party to use the owner’s property against its will (installations, technical infrastructure networks, patents, intellectual property rights). This is one of the most serious infringements of the right to property and the freedom to conduct a business. The standards of proof are therefore extremely strict and the assessment of such proof must be carried out with greater caution than in the case of any other type of infringement of Article 102 TFEU. In the present case, import volumes on the markets concerned, for the production and import of automotive fuels (according to the KZK, of petrol and diesel), are well above the European average, with petrol imports being among the highest. In the presence of such data for the market concerned, any interference with the rights of the accused persons is of exceptional [and] unprecedented seriousness.

14 The right to property and the freedom to conduct a business are expressly guaranteed by the Constitution of the Republic of Bulgaria. The right to property is also protected by the Charter of Fundamental Rights of the European Union. It is stated that the conditions laid down in Article 52(1) of the Charter are not theoretical provisions having no practical application but must be put into practice in the examination of the present case.

The essential arguments of the parties in the main proceedings in connection with the second and third questions referred for a preliminary ruling

15 According to the KZK, the fact that the Lukoil Group acquired almost all depots and pipelines in the course of the privatisation of the State-owned undertaking ‘Neftohim’ means that protecting the public interest in the development of competition on the automotive fuel markets takes precedence over protecting the interests of the infrastructure owner, since the latter did not invest in the construction of that infrastructure.

16 The applicants contend that the infrastructure was in very poor condition when acquired from the State and did not meet the state-of-the-art requirements as regards safety and maintaining the quality of the transported product. Both undertakings have made enormous investments in the infrastructure. Moreover, part of the infrastructure was not acquired in the course of privatisation, but was purchased.

17 According to the KZK, most of the infrastructure was acquired in the course of privatisation and was not built by the addressee undertakings. The infrastructure

itself, a collection of warehouses and pipelines, is unique in Bulgaria and is impossible to duplicate now that State ownership has been abolished. Ongoing repairs and maintenance of the group's existing assets are not uncommon features of the business of any undertaking managing an asset, be it a building or any other type of facility. It is clear that those costs are inherent in maintaining logistical infrastructures and installations and have to do primarily not only with the investment obligations entered into under the privatisation contracts but also with the management and maintenance obligations connected with the 'Rosenets' port terminal area awarded under the concession. The KZK concludes that the two circumstances that rule out the application of the *Bronner* test are not to be applied cumulatively. Rather, each individual circumstance is a sufficient ground for ruling out that test. The KZK claims that the application of the *Bronner* test in the present case is ruled out for the following reasons:

– acquisition of infrastructure built using public funds – for the entire period from 1 January 2016 to 31 March 2021 as regards certain storage depots, technical pumping stations and as regards all of the group's pipelines and product pipelines;

– existence of a legal obligation to grant access – for the period from 23 December 2020 to 31 January 2021 as regards the abovementioned infrastructure, with the exception of the Burgas – Sofia product pipeline.

Succinct presentation of the reasoning in the request for a preliminary ruling

18 According to the market analysis in the KZK's decision, the Lukoil Group is the largest authorised warehouse keeper for automotive fuels in Bulgaria and has unique transport and storage infrastructure that enables it to act as a market leader in the wholesale and retail trade in automotive fuels. It is assumed that, from the beginning of the investigation period (1 January 2016) until at least 31 March 2021, that group did not allow any fuels from importers into the tax warehouses which it operates. This means that the group did not accept from importers imported/intra-Community acquired fuels for the purposes of the ZADS, and, in cases where emergency stockpiling services were provided, the fuel quantities were purchased by 'Lukoil Bulgaria'. What is more, during the period in question, no goods with a consignee not belonging to the Lukoil Group were unloaded (delivered) at the 'Rosenets' port terminal either. It was found that the existence of sufficient spare capacity in the tax warehouse was established, this being a condition for the import/intra-Community acquisition of fuels.

19 In its decision, the KZK considered the two infringements together, without identifying the relevant and affected market in relation to each individual infringement.

20 In accordance with Article 41 of the Charter, the right to good administration is a fundamental right of natural and legal persons. The provision of a grant constitutes direct application of EU law and means that the authorities responsible for applying the law are under an obligation to comply with Article 41. That

article is an expression of a general principle of EU law the observance of which the Court of Justice has consistently required in its case-law because it is an element of the rights of the defence (judgments of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 37, and of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08R, EU:C:2009:598, paragraph 83). The Court of Justice has recognised the right of legal persons to be heard before a legal act adversely affecting them is adopted as a general rule of EU law, irrespective of whether that right is expressly provided for in the relevant EU act relating to the legal relationship in question. The Court of Justice has held that ‘the authorities of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement’ (judgments of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 38, and of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08R, EU:C:2009:598, paragraph 83).

21 In accordance with the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. This raises the question as to whether the guaranteed right of defence of the persons involved as persons who have infringed the law are violated by the fact that two infringements of Article 21(2) and (5) of the ZZK are alleged, but in the absence of any examination of the relevant markets in relation to each of the individual infringements claimed or of all of the circumstances relevant to each infringement. That question is also important in view of the fact that, if found to exist, an infringement in the form of a refusal to supply constitutes a sufficient interference with the right to property and the freedom to conduct a business of the person concerned, as guaranteed by the Constitution of the Republic of Bulgaria and the Charter.

22 The chamber seised must examine of its own motion whether the administrative authority complied with all of the procedural rules of administrative law when adopting the contested administrative act imposing a financial correction. In order to decide the present case correctly, it is necessary to examine whether the competition authority should have expressly, clearly and unambiguously defined for each individual infringement the relevant market, the market concerned, the specific unlawful acts adversely affecting competition, the anti-competitive effects and all other circumstances relevant to the factual constituent elements for each infringement of Article 21(2) and (5) of the ZZK and Article 102 TFEU – namely: (a) refusal to supply; and (b) restriction of production, sales and technical development to the detriment of the consumer. It is for these reasons that the Chamber refers the first question for a preliminary ruling.

23 By way of grounds for referring the second question, the referring court notes that a key factor in concluding that the factual constituent elements of an infringement of Article 21(5) of the ZZK are present is the fact that the two undertakings refused access to their essential infrastructure. It is common ground that, during

the first period of the alleged infringements, from 1 January 2016 to 22 December 2020, the owners of authorised excise warehouses were under no obligation to make some of their capacity available to their competitors. It was for this reason that the KZK found that there had been a 'constructive refusal' on the part of the addressee undertakings to grant access to third parties.

24 In its decision, the KZK states that the *Bronner* criteria are not applicable where the infrastructure concerned is financed not through the dominant undertaking's own investments but (as is the case here) from public funds and where the undertaking concerned is not the owner of that infrastructure but uses it under a concession or lease contract. Those criteria are intended to apply to the refusal of access to an infrastructure which is owned by the dominant undertaking and which that undertaking has developed for its own activities through its own investments.

25 In their practice, the European Commission and the courts rely on the *Bronner* test when assessing whether there is an infringement of competition rules in the event of a refusal to supply by the dominant undertaking. That test covers the following cumulative elements: the refusal is liable to lead to the elimination of all competition on the market concerned on the part of the person requesting the supply; the refusal cannot be objectively justified; the services/goods to which access is refused are indispensable to the carrying on of the business of the person requesting the supply as there is no actual or potential substitute in existence. Accordingly, the first and most important condition is that the essential facility must exist and be controlled by the monopoly holder, and that access to that facility must be indispensable to the ability of competitors to compete with the monopoly holder.

26 In the present case, given the exceptional circumstances (privatisation and concession) linked to the process by which the entire infrastructure at issue was acquired and is used by the Lukoil Group, account is also taken of the specific features of the privatisation contract concluded, with due regard for the public interest, under a particular administrative procedure. It is for this this reason that privatisation contracts often contain obligations that differ from those typical of a purchase agreement concluded under civil and commercial law. These include the purchaser's binding obligations additional to the obligation to pay the purchase price, such as to make investments, to maintain existing jobs and create new ones, to implement environmental protection measures, to maintain the object of the activity for a period of time laid down in the contract, a time limited ban on selling the undertaking or parts thereof, and so on. If a privatisation contract lays down an obligation to invest, such investments are precisely defined as to type, amount and duration and are not the result of an incentive to the undertaking acquiring the State-owned property. Since, in the present case, the undertaking's infrastructure was acquired as part of the privatisation of the State-owned undertaking, it is important to bear in mind that the group's transport and logistics infrastructure was built by the State using public funds. After the State-owned undertaking 'Neftohim' had been privatised, its infrastructure became the property of the Lukoil Group. According to the KZK, however, that fact does not make it

necessary to apply the *Bronner* test, since, in the present case, there are no economic investment incentives the protection of which outweighs the public interest in undistorted competition.

27 The KZK found that two reasons preclude the application of the *Bronner* test: (a) failure on the part of the dominant undertaking to meet a legal obligation to grant access to its infrastructure/service (typical of a statutory monopoly or stemming from a previous State monopoly); and/or (b) failure on the part of the dominant undertaking to invest in the construction of the infrastructure because that infrastructure was built and developed using public funds. The first reason is not the subject of the request for a preliminary ruling because, as explained above, the dominant undertaking was not under any legal obligation in the period from 1 January 2016 to 22 December 2020.

28 The KZK assumes that the *Bronner* test is not applicable where the dominant undertaking has received an essential facility from the State and the investments made do not outweigh the public interest.

29 The companies accused of the infringements in question have countered this by arguing that they have made substantial investments in the undertakings since the privatisation contracts were concluded, and evidence of investments made in the applicants’ essential facility has been gathered.

30 The question that must be answered in order to be able to conclude whether the *Bronner* test is not applicable where the dominant undertaking has acquired an essential facility from the State (privatisation and concession) is whether other circumstances – such as fulfilment of the obligations under the privatisation contract, the amount of the investment and whether the investment was made on that undertaking’s own initiative or in connection with the performance of the investment contract – should be taken into account, too.

31 The Opinion of Advocate General Rantos of 7 July 2022 in *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2022:537, does not answer these questions. In that Opinion, Advocate General Rantos provides an overview of the case-law on refusals to grant access and on the application of the *Bronner* test. In point 64, the Advocate General discusses the purposes of the *Bronner* test, which is regarded as the fundamental criterion for assessing whether an undertaking has an obligation to grant access to an ‘infrastructure it has developed for its own needs’, for the protection of the undertaking’s ‘initial incentive to construct such infrastructure’. Analysing the purposes of the *Bronner* test, Advocate General Rantos states that ‘the criteria set out [in the judgment in *Bronner*] apply to infrastructure of which the dominant undertaking is the owner and which, in principle, result from its own investment’. In the present case, the KZK found that, by converse inference, it follows from the view of Advocate General Rantos that the *Bronner* criteria are not applicable, since the investments by the dominant undertaking were not made out of its own funds. At the same time, the decision of the KZK was signed with dissenting opinions from two of its members, who, in their statement of reasons,

refer also to the judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, in which it was held that the infringement in question did not constitute a refusal to supply but another infringement altogether.

32 On the same grounds, the KZK found that the *Bronner* test was not applicable to the essential infrastructure acquired by concession during the period at issue.

33 In accordance with Article 6 of the APK, the principle of proportionality is to be applied where the public and private interests are commensurate.

34 In their practice and case-law respectively, the European Commission and the Court of Justice have established that a refusal to supply is an exceptional measure which worst affects the rights of the persons affected by it. The most important factor in the assessment is the interests of consumers. On the other hand, the interests of the owners of essential infrastructure must also be evaluated, in the light of respect for the right to property and promotion of the freedom to conduct a business, and with due regard for the principle of proportionality. *Bronner* is a milestone in the development of the European understanding of refusal to supply. That judgment sets out the conditions under which a dominant undertaking may be compelled to contract against its will. Ultimately, however, the Court of Justice held that a refusal to supply had not taken place.

35 Since the KZK did not apply the *Bronner* test to the alleged infringement of Article 102 TFEU in the form of a refusal to supply, on the ground that its application was precluded by the fact that the dominant undertaking's essential facility had been acquired using public funds/on the basis of a concession, it must be examined in the present case whether the application of the *Bronner* test is ruled out in all cases where the dominant undertaking has received public funding in connection with the essential facility or has acquired that facility on the basis of a concession, or whether it is necessary to assess the amount of the investment, performance under the privatisation contract or the concession (on the basis of which the essential facility was acquired) and whether the investments were made in connection with the performance of the investment contract/the concession or on that undertaking's own initiative.

36 The third question is raised against the background of the wording of paragraph 75 of the Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings (Section ['IV.] D. Refusal to supply and margin squeeze'): ' …. The knowledge that they may have a duty to supply against their will may lead dominant undertakings – or undertakings who anticipate that they may become dominant – not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers'.