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Article 82 EC and Access to Essential Facilities in EC Telecommunications: The Interaction between Competition Rules and Sector-specific Regulation

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Department of Law

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Master of Jurisprudence

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Nikola Stephanie Frankenberg: Article 82 EC and Access to Essential Facilities in EC Telecommunications: The Interaction between Competition Rules and Sector-specific Regulation.

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Abstract

The liberalization of the EC telecommunications market has, from the beginning, been based on a dual-regime of sector-specific regulation and competition law. One of the areas where the interrelation between these two sets of rules is most obvious is that of access to telecommunications networks.

The material in this thesis is up to date as of the 31st July, 2004. This thesis examines the Essential Facilities Doctrine (EFD) as the competition law principle which deals with access of new market entrants to established facilities and, in the case of telecommunications, networks. This examination leads to the conclusion that if there is an EFD in EC law, it should be applied with extreme caution.

The thesis then examines the New Regulatory Framework for Electronic Communications, with a particular emphasis on the framework for access and interconnection, and concludes that EC competition law has acquired a prevailing role in the context of regulation of telecommunications.. The reform of regulation of electronic communications that is so profoundly inspired by competition law principles, marks a previously unattained level of mutual interaction between regulation and EC antitrust law.

Concerning the viability of this dual regime of competition law and regulation, the thesis comes to the conclusion that before sustainable competition has been established, a certain degree of sector-specific regulation has to be upheld. Phasing-out sector-specific regulation too early by relying solely on competition law would create considerable risks for both new entrants and incumbent operators.

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| Dir.88/301 | Commission Directive on competition in the markets in telecommunications terminal equipment (Terminal Equipment Directive)
(1988) OJ L131/73 |
| Dir.90/387 | Council Directive on the establishment of the internal market for telecommunications services through the implementation of open network provisions (ONP Framework Directive)
(1990) OJ L192/1 |
| Dir.90/388 | Commission Directive on competition in the markets for Telecommunications services (Services Directive)
(1990) OJ L192/10 |
| Dir.92/44 | Council Directive on the application of open network provision to leased lines (ONP Leased Lines Directive)
(1992) OJ L165/27 |
| Dir.94/46 | Commission Directive amending Directive 88/301 and Directive 90/388 in particular with regard to satellite communications (Satellite Directive)
(1994) OJ L268/15 |
| Dir.95/47 | European Parliament and Council Directive on the use of standards for the transmission of television signals (Advanced Television Standards Directive)
(1995) OJ L281/51 |
| Dir.95/51 | Commission Directive amending Directive 90/388 with regard to the abolition of already liberalised telecommunications networks (Cable Directive)
(1995) OJ L256/49 |
| Dir.95/62 | European Parliament and Council Directive on the application of open network provision to voice telephony
(1995) OJ L321/6 |

- Dir.96/2 Commission Directive amending the scope of the Service Directive with a view to opening up the mobile and personal communications market to competition (Mobile Directive) (1996) OJ L20759
- Dir.96/19 Commission Directive amending Directive 90/388 with the regard to implementation of full competition in telecommunications markets (Full Competition Directive) (1996) OJ L74/13
- Dir.97/13 European Parliament and Council Directive on a common framework for general authorisations and individual licenses in the field of telecommunications services (Licensing Directive) (1997) OJ L117/15
- Dir.97/36 European Parliament and Commission Directive amending Directive 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (1997) OJ L202760
- Dir.97/51 European Parliament and Council Directive amending Council Directive 90/387 and 92/44 for the purpose of adaptation to a competitive environment in telecommunications (1997) OJ L295/23
- Dir.97/33 European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of open network provision principles (ONP Interconnection Directive) (1997) OJ L199/32
- Dir.98/10 European Parliament and Council Directive on the application of open network provision to voice telephony and on universal service for telecommunications in a competitive environment (ONP Voice Telephony Directive) (1998) OJ L101/24
- Dir.2002/19 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (2002) OJ L108/7
- Dir.2002/20 on the authorisation of electronic communications networks and services (Authorisation Directive) (2002) OJ L108/21
- Dir.2002/21 European Parliament and Council Directive on a common regulatory framework for electronic communications networks and services (Framework Directive)

(2002) OJ L 108/33

Dir.2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)
(2002) OJ L198/51

Dir.2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (E-Privacy Directive)
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(2000) OJ L336/4

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[1988] OJ L317/47, *London European Sabena*

Interim measures [1992], not published in the Official Journal, but in [1992] 5 CMLR 255, *Sealink/B&I Holyhead*

[1992] OJ L96/34, *British Midland/Aer Lingus*

[1994] OJ L15/8, *Sea Containers Ltd./Stena Sealink*

[1994] OJ L55/52, *Port of Rodby*

[1994] OJ L259/20, *European Night Services*

[1995] 5 CMLR 177, *Morlaix (Port of Roscoff)*

[1997] OJ C335/3, *La Poste/SWIFT*

Interim measures OJ L059 (28 February 2002), *NDC Health/IMS Health*

European Court of Justice

6,7/73, *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission*, [1974] ECR 223

27/76, *United Brands v. Commission*, [1978] ECR 207

77/77, *Benzine en Petroleum Handelsmaatschappij BV v. Commission*, [1978] ECR 1513

22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission*, [1979] ECR 1869

44/79, *Hauer v. Land Rheinland-Pfalz*, [1980] ECR 3727

41/83, *Italy v. Commission*, [1985] ECR 873

311/84, *Centre Belge d'Etudes du Marché-Télémarketing v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA*, [1985] ECR 3261

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C-202/88, *France v. Commission*, [1991] ECR I-1259

C- 271/90 , C-281/90 and C-289/90, *Spain v. Commission*, [1992] ECR I-5833

C-241 to 241/91P, *RTT&ITP v. Commission (Magill)*, [1995] ECR I-743

C-333/94P, *Tetra Pak International SA v. Commission*, [1996] ECR I-5951

C-7/97, *Oscar Bronner GmbH&CoKG v. Mediaprint*, [1998] ECR I-7791

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US v. Colgate &Co, 250 US 300, [1919]

US v. Grinnel Corp, 384 US 563 (1966)

US v. Terminal Railroad Association, 224 U.S. 383 [1912]

Verizon Communications, Inc. V. Law Offices of Curtis V. Trinko, LLP, No. 02-682, 540 U.S. (January 13, 2004)

Abbreviations

Antitrust L.J.	Antitrust Law Journal
Berkeley Tech.L.J.	Berkeley Technology Law Journal
C.L.I.	Competition Law Insight
C.M.L.Rev.	Common Market Law Review
C.T.L.R.	Computer and Telecommunications Law Review
E.B.O.R.	European Business Organization Law Review
E.C.L.R.	European Competition Law Review
EFD	Essential Facilities Doctrine
E.L.Rev.	European Law Review
E.I.P.R.	European Intellectual Property Review
EuR	Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts&Steuerrecht
Fordham Corp.L.I.	Fordham Corporate Law Institute
Fordham Int´L.J.	Fordham International Law Journal

GYIL	German Yearbook of International Law
Int'l J.Comm.L.&Pol'y	International Journal of Communications Law and Policy
I.P.Q.	Intellectual Property Quarterly
K&R	Kommunikation und Recht
L.Rev.M.S.U-D.C.L.	Law Review of Michigan State University-Detroit College of Law
MMR	Multimedia und Recht
NRA	National Regulatory Authority
Telecoms	Telecommunications
Va.L.Rev.	Virginia Law Review
Y.E.L.	Yearbook of European Law
ZUM	Zeitschrift für Urheber- und Medienrecht

Declaration

No part of this thesis has previously been submitted for the award of a degree in the University of Durham or any other university. The thesis is based solely on the author's research.

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Chapter 1: Introduction

The deadline for the implementation of the new regulatory framework for electronic communications expired on 25th July 2003. This has been the latest step in the evolution of the telecommunications sector into a highly competitive and dynamic market.

The liberalization of EC telecommunications (telecoms) has been successful and has contributed to an accelerated growth rate, reduced tariffs and market entry by a considerable number of new entrants. Telecoms services have become the fastest growing sector of the European economy. The estimated growth of the telecoms sector in 2003 was between 3.7% and 4.7%, compared to a forecast rate of EU GDP growth of 0.8% (3% in nominal terms).¹ The combined national markets of the then 15 Member States were worth an estimated 251 billion euros in 2003.²

In an information-based service economy such as the EU, the quick and efficient transfer of information is essential. Fixed or mobile telephones and the Internet all reduce distance, enabling everybody to access information. Similarly, telecoms make it possible for companies to be more efficiently managed and to access consumers more effectively. After an exceptional 'boom' in 1998-2000, the telecoms sector underwent a major crisis at the beginning of the new century. Because of heavy investments at the end of the preceding decade, many new market entrants simply disappeared, and established market operators were left with huge debts.³ However, according to the Commission's latest Report on the Implementation of the EU electronic

¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: 9th Report on the Implementation of the EU Electronic Communications Regulatory Package, COM (2003) 715 final (9th Implementation Report). The new report has not been published yet.

² *ibid.*

³ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Electronic Communications: The Road to the Knowledge Economy, COM (2003) 65 final



Communications Regulatory Package,⁴ the sector is now on its way to recovery.⁵ Improved financial conditions, combined with continued growth in the revenue from services, have created the conditions for the sector to recover.⁶ In 2003, the sector experienced a modest rate of expansion with revenues having increased by 2.6%, most of which can be attributed to the services sector: in particular, mobile services as well as broadband⁷ and Internet services.⁸

The information and communication sectors had previously begun converging rapidly. The new regulatory framework for electronic communications tries to adapt telecoms regulation to the changed economic environment. In its communication, "Connecting Europe at High Speed", the Commission pointed out that the late or incorrect transposition by Member States of the new regulatory framework is holding back competition and creating uncertainty, so full implementation remains a top priority for 2004.⁹ This is particularly true for the new Member States, which must bring their telecoms sectors, and their wider economies, more closely into line with those of the existing Member States.¹⁰ In early October 2003, the Commission launched infringement proceedings under Article 226 EC against several Member States for late transposition of the new regulatory framework.¹¹

In January 2004, the Commission proposed a Directive on services in the Internal Market.¹² While not specifically dealing with issues covered by the new regulatory framework, the removal of barriers to service provision will benefit all users of services, including those in the telecoms sector.

⁴ in the interest of clarity, the following nomenclature will be used consistently throughout this thesis: The Commission (the EC Commission); the ECJ (the European Court of Justice); the CFI (the Court of First Instance)

⁵supra n.1, p. 4

⁶Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions- Connecting Europe at High Speed: Recent developments in the Sector for Electronic Communications, COM (2004)61 final, p.4

⁷By October 2003 there were nearly 20 million broadband connections in Europe, however broadband growth in the best performing Member States shows signs of levelling off. (supra n.5, p. 4-5)

⁸ibid., p.4

⁹ibid.

¹⁰ibid.

¹¹see Press Release, IP/03/1750, 17 December 2003

¹²COM (2004)2, see also Commission Press Release IP/04/37

The implementation of the new regulatory framework has rekindled the debate concerning how best to achieve sustainable competition in the telecoms market: either through the application of sector-specific regulation or the usage of general EC competition rules, in particular Articles 81 and 82 EC. This debate has occupied telecoms policies from the beginning.

The EU has been regulating the telecoms sector since the late 1980s, with full liberalization of services and infrastructures achieved in January 1998. From the start, the liberalization process has been based on a close interaction between sector-specific regulation and competition law. General competition rules and principles, developed by the Commission or the Community Courts under competition law, have had significant influence on sector-specific regulation in the telecoms sector. These general competition rules, complementing sector-specific regulation, are fully applicable, especially to dominant operators. This approach has been highly successful and has ensured the establishment of effective competition in EC telecoms markets. However, the liberalization process has not yet reached the stage where it is possible to forego sector-specific regulation altogether and rely solely on competition rules. Some markets are still not fully competitive and some may never reach the stage of full competition. Nevertheless, the application of sector-specific regulation has to be adjusted, preparing the sector for a time when markets are fully competitive, sector-specific regulation can be phased out, and the competition rules alone will be applicable. Thus, the new regulatory framework for electronic communications was established, marking a new step in the relationship between sector-specific regulation and competition law, with the latter taking a predominant role for the first time. The new framework applies *ex ante* regulatory intervention, using concepts and principles taken directly from standard competition law theory and practice.

One area of the telecoms sector in which this interaction between competition law and regulation is particularly apparent is that of access to and interconnection of networks. Despite the full liberalization of the telecoms sector from January 1998, incumbent operators still occupy dominant positions in most areas of the sector. This is particularly true for the area of local access, also called the "local loop". As duplication of these infrastructures is not, in most cases, viable, new entrants into the market are

dependent on access to the incumbents' networks to provide (new) services to end-users. As the incumbents' have no inherent interest in sharing their networks with potential competitors, a certain degree of regulation is indispensable to allow the telecom market to become competitive. The question is, whether such issues should be resolved under Article 82 EC, and in particular the Essential Facilities Doctrine, or whether they should better be dealt with under a sector-specific regime.

This thesis will analyse the relationship between Article 82 EC (as one of the major rules of general competition law) on the one hand, and sector-specific regulation in the EC telecoms sector on the other. It will focus on the area of network access.

The thesis consists of six chapters. Chapter 2 will give a general introduction to the telecoms industry and telecoms policies in the EC. It will start with a summary of the main stages of the liberalization process, pointing out the influence of general competition law on this process. It will then explain the importance of access policies and give a brief summary of some of the economic features of the telecoms sector which may make a certain degree of sector-specific regulation indispensable. Chapter 3 analyses the Essential Facilities Doctrine (EFD) as the major concept in EC competition law dealing with access issues under Article 82 EC. In Chapter 4, the thesis will deal with the Commission's 1998 Access Notice, in which the competition law concept of essential facilities has found its most explicit formulation and is applied to access issues particular to the telecoms sector. Chapter 5 will examine the new regulatory framework for access and interconnection and will determine how far this has been influenced by competition law principles developed under Article 82 EC. The final chapter will conclude on the interrelation between competition law and sector-specific regulation, and on whether one should prevail over the other in the EC telecoms sector.

Chapter 2: General Introduction to EC Telecommunications

1. The term “telecommunications”

The telecommunications market is characterized by the provision of telecommunications services on the one hand and the provision of telecommunications networks on the other.

Commission Directive 90/388/EEC on competition in the markets for telecommunications services¹ defined “telecommunications services” as “services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.”²

“Public telecommunications network” was defined as “the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means.”³

The new Framework Directive⁴ uses the broader terms “electronic communications network” and “electronic communications services”.

The “electronic communications network” is defined as “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting, networks used for radio and television

¹Commission Directive 90/388/EEC of June 28, 1990 on competition in the markets for telecommunications services (Services Directive) (1990) O.J. L192/10

²ibid., Art.1

³ibid.

⁴European Parliament and Council Directive 2002/21/EC of March 7, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002) O.J. L108/33

broadcasting, and cable television networks, irrespective of the type of information conveyed.”⁵

“Electronic communications service” is defined as “a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not exist wholly or mainly in the conveyance of signals on electronic communications networks.”⁶

2. Telecommunications in the EU: From legal monopoly to full competition

The liberalization of the EU telecommunications market, compared to that of other countries such as Japan⁷ and the US,⁸ has been relatively slow, and has been conducted in a piecemeal fashion. It was only in 1987 that the Commission, in its Green Paper on Telecommunications,⁹ set out a comprehensive policy framework for EU action in the telecommunications sector. Until then, telephone companies were government-owned monopolies.

The EU telecommunications liberalization process can be divided into a number of stages, starting with the above-mentioned 1987 Green Paper (1988-1996), that foresaw at the time full liberalization of equipment,

⁵ *ibid.*, Art. 2(a)

⁶ *ibid.*, Art. 2(c)

⁷ In Japan, the Telecommunications Business Law of 1985 liberalized most telecommunications markets (see T. Kiessling / Y. Blondeel, *The EU regulatory framework in telecommunications*, (1998) 22(7) Telecommunications Policy ,571, p.571)

⁸ In the US the first license to compete for public switched long-distance services was granted to MCI in 1969, and in 1980 the market for long distance service was effectively liberalized (see Kiessling/ Blondeel, p. 571)

⁹ “Towards a Dynamic Economy - Green Paper on the Development of the Common Market for Telecommunications Services and Equipment”(1987 Green Paper) COM (1987) 290

terminals and “value-added services”.¹⁰ This was followed by a transitional review period of the 1992 Review¹¹ and the 1994 Green Paper¹² (1996-1997) which led to the full liberalization of the telecommunications market on 1 January 1998. By the end of the 1990s, building on the Information Society concept¹³ developed in the EU during the mid-1990s, the EU had started a convergence debate that resulted in the new package of Directives on Electronic Communications adopted in February 2002. This current framework is characterised by a previously-unattained level of mutual interaction between regulation and competition law as the basis for future regulation of the sector, particularly with regard to the use of market definitions and the concept of dominant positions as developed under competition law.

There follows a brief summary of the development of EU telecommunications (telecoms) markets and regulation, from before the 1987 Green Paper to the present. As indicated, this development has resulted in a dual regime based on sector-specific regulation and the application of EC competition rules.

2.1 Pre-1987: The time of state monopolies

Until the early 1980s, the importance of the telecoms sector was not reflected in Community law. The telecoms markets in almost all Member States were monopolies, usually consisting of one service and infrastructure provider (Public Telecoms Operator or ‘PTO’): the PTO was either wholly or partly owned by the Member State, or fully integrated within the government, as an administrative department or agency.¹⁴ The only exception at the time was

¹⁰“Value added services” or “enhanced services” are, for example, email, voice mail, online information and database services.

¹¹1992 Review of the situation in the telecommunications sector, (1992 Review), SEC (92) 1048 final.

¹²Published in two parts: Part I - Principles and Timetable, , COM (94) 440 final and Part II- A common approach to the provision of infrastructures for telecommunications in the European Union, , COM (94) 682 final (the Infrastructure Green Paper)

¹³The general idea underlying the concept of the Information Society required new legal measures for the information sector. An Action Plan (COM (94) 347 final) established a framework for necessary action, by developing the concept of the Information Society, at the centre of which stood the accelerated liberalisation of telecommunications.

¹⁴P.Larouche, *Competition Law and Regulation in European Telecommunications*, (Oxford 2000), p.2

the UK, which had partially liberalized its telecommunications market in 1983.¹⁵

The only alternative to using services provided by PTOs was the 'in-house' provision of telecoms services: this was only possible for the largest telecoms customers (multinational corporations, banking and insurance sector companies, government departments etc.). As PTOs usually held a monopoly over the infrastructure, 'in-house' provision involved first leasing the required capacity from PTOs, and then installing a customer's own equipment in order to provide the desired telecoms services. In practice, the cost of leasing lines, in particular cross-border lines, was so high within the EC that 'in-house' provision was a very costly alternative.¹⁶

It was generally assumed that the telecoms sector was an instance of a natural monopoly, i.e. it was assumed that a single entity could offer all modern communications at a lower cost than a number of competing suppliers.¹⁷ A monopoly was assumed to result in a larger supply of innovation, due to economies of scale and scope in research and development. A more competitive market structure was thought to result in a slower rate of technological innovation. Several networks were thought to cause confusion and duplication of resources. Telecoms regulation was advocated as a method of achieving certain broad social benefits, such as universal services, which would not otherwise be available or easily achievable. The market was characterized by vertical integration between PTOs and equipment suppliers, which made it difficult for new competitors to enter the market.¹⁸

2.2 The inception of the EU telecommunications liberalization process: The 1987 Green Paper

However, it soon became apparent that legal monopolies in the area of telecoms prevented the development of a sector which was of growing

¹⁵ibid.

¹⁶V.Jerónimo, *Telecommunications and competition in the European Union*, Third ECSA World Conference, A Selection of Conference Papers, p.2

¹⁷ibid.

¹⁸ibid.

economic importance. The European telecoms industry was suffering from market fragmentation, which in turn prevented it from reaping the benefits of economies of scale. Lagging behind the US and Japan, which had liberalized their telecoms markets, it became obvious that deregulation and introduction of competition were indispensable factors to encourage innovation and investment in the sector and to make sure that consumers could benefit fully from the technological revolution taking place worldwide.¹⁹ In particular, the transformation of the US market as a result of the AT&T divestiture agreement could be felt in Europe.²⁰ The liberalization of the telecoms sector in the UK, with the privatization of British Telecom, also made Europe more open to the idea of liberalization and deregulation.²¹ In addition, the recognition of significant direct and indirect costs to society from government regulation pushed the sector towards a competitive approach, as well as increasing the demand for telecommunication services from large customers.²²

Irreversible forces, such as technological advancements, contributed the most to the dismantling of the regulated monopoly paradigm. By the end of the 1980s, the growing digitalisation began to transform European telecommunications networks into "multipurpose information infrastructures".²³ The traditional technical distinction between voice and data networks could no longer be upheld as, in most cases, they actually occupied the same physical facilities. This growing interdependence of computers and telecommunications brought companies such as IBM, Siemens and Apple to the telecoms industry.²⁴ As a result, non-voice services could be provided at lower cost through a variety of access mediums, such as cable television, the Internet, private networks, satellite etc. and by a corresponding variety of service providers.

The opening up of the telecoms market to competition was unavoidable. This was confirmed and facilitated by the landmark ECJ judgement in *British*

¹⁹J.-D.Braun/R.Capito, *The Emergence of EC Telecommunications Law as a New Self-Standing Field within Community Law*, Chapter 2 in Koenig/Bartosch/Braun, *EC Competition and Telecommunications Law*, (The Hague, 2002), p.51

²⁰H. Ungerer, *Ensuring efficient access to bottleneck facilities. The case of telecommunication in the European Union* (Florence 1998), p.3

²¹ibid.

²²ibid.

²³H. Ungerer, EU competition law in the telecommunications, media and information technology sectors, (1995) Fordham Corp. L. I., 465 ff., p.471

²⁴ibid.

Telecommunications,²⁵ in which the Court confirmed that EC competition rules applied to the telecoms sector. The combination of these factors led the Commission to issue, in 1987, its Telecommunications Green Paper,²⁶ which envisaged a number of changes in EU telecoms, including:

- The progressive opening of the market for telecommunications services, especially value-added services, with the exception of public voice telephony. As will be seen later, EU competition law played an essential role in this area.
- The promotion of European-wide services through standardization.
- The development of a Community-wide market for terminal equipment.
- The development of conditions permitting competition on an "equal footing", including, for example, the separation of regulatory and operational functions where these were under a single administration.²⁷ As a result, the telecoms sectors of the Member States underwent a profound organizational reform, leading to the transformation of state PTO companies into normal companies, and finally privatization.
- Most importantly, in the context of the present discussion, the Green Paper envisaged harmonized access conditions.

The Commission's policy proposals were largely approved by the Council of Telecommunications Ministers, which adopted a resolution voicing its general support for the Commission's strategy.²⁸ Two separate strands of legislative initiatives followed: Commission-initiated measures aimed at the liberalization of telecoms equipment and services and (later) infrastructure; and Council-initiated measures aimed at the harmonization of laws and regulation in Member States, to ensure open access to telecommunications services and networks. This dual approach, involving liberalization and harmonization, has been described as the "basic dualism" of EC telecoms law.²⁹

²⁵C- 41/83, *Italy v. Commission*, [1985] ECR 873

²⁶*supra* n. 19

²⁷Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992, OJ C 257, p. 1

²⁸*ibid.*

²⁹Braun/ Capito, Chapter 2 in Koenig/ Bartosch, /Braun ,p.64

2.3 On the way to full competition

2.3.1 Regulation

There are basically two different types of regulation. One type aims to protect public interests, such as universal service, safety, protection of privacy, protection of the environment etc. These rules are of a non-economic nature and therefore have little in common with competition rules. They are, more or less, applied independently of competition law.³⁰

On the other hand, there is economic regulation, which deals with matters such as price control and network access regulation. Its function is twofold: firstly, it seeks to abolish monopolies and introduce competition; secondly, it has to make sure that competition continues to exist. The latter function interacts with competition law.³¹ In this thesis, the term “regulation” will refer to economic regulation.

a. Liberalization

The objective of liberalization is to abolish monopoly and other special rights of incumbent operators and to introduce competition in those monopolized markets.³² The liberalization of the EC telecommunications market was a gradual process, starting in 1988 with the Telecommunications Terminal Equipment Directive 88/301/EEC,³³ which opened the market for telecoms equipment to competition. According to the Directive, special or exclusive rights for the importation, marketing, connection, bringing into service and maintenance of telecoms terminal equipment must be withdrawn by the

³⁰ K.W. Grewlich, *“Cyberspace: Sector-specific regulation and competition rules in European telecommunications”*, (1999) 36 CMLRev, 937, p.983

³¹ L. Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law & Regulation*, (London, 2003), p.538

³² Jerónimo, p.5

³³ Commission Directive 88/301/EEC of May 16, 1988 on competition in the markets in telecommunications terminal equipment, (Terminal Equipment Directive) (1988) OJ L 131/73, amended by Commission Directive 94/46/EC amending Directive 88/301/EEC and Directive 90/308/EEC in particular with regard to satellite communications [1994] OJ L268/15

Member States.³⁴ This brought an end to the monopolies enjoyed by incumbent operators over the attachment of equipment to their networks. The reasons for imposing conditions on the provision of terminal equipment were limited to a small number of essential requirements. These essential requirements were : user safety; the safety of employees and of public telecommunications network operators; protection of public telecommunications networks from harm; and the interworking of terminal equipment.

This was followed in 1990 by the Services Directive 90/388/EEC³⁵ which provided for the withdrawal of all exclusive rights from telecommunications operators, except for voice telephony³⁶, telex, mobile, paging and satellite services - the so-called "reserved services". It was argued that a sudden opening of the market would have threatened the financial stability of the incumbent national telephone organisations and their ability to provide universal service, as they relied on voice telephony as their major source of income.³⁷

Member States were required to ensure that operational and regulatory functions would be carried out by separate, independent entities. The Directive provided that the power to grant operating licences, to control type approval and mandatory interface specifications, to allocate frequencies and to monitor the conditions of use should be vested in bodies independent of the incumbent national operators, so-called National Regulatory Authorities ("NRAs").³⁸ There was a fear that the continued exercise of regulatory functions by the incumbent operators would lead to discrimination against new market entrants, in favour of the incumbent's operations, constituting a major obstacle to the introduction of competition in the telecoms market. Again, restrictions on the provision of services could only be imposed if they constituted so-called "essential requirements".³⁹

³⁴ *ibid.*, Art. 6

³⁵ *supra* n.1

³⁶ "Voice telephony" was defined as "the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point" (Services Directive, *supra* n.1, Art. 1)

³⁷ Garzaniti, (2003), p.4

³⁸ *supra* n.1, Art. 7

³⁹ Security of network operations, maintenance of network integrity, interoperability of services, data protection

The scope of the Services Directive has been gradually enlarged by: new directives dealing with satellite communications (Directive 94/46/EC or “the Satellite Directive”⁴⁰); the use of cable television networks for the provision of telecommunications services (Directive 95/51/EEC or “the Cable Directive”⁴¹); and mobile and personal communications (Directive 96/2/EC or “the Mobile Directive”⁴²). The Services Directive did not initially address the ownership of infrastructure, which remained in most countries the preserve of the incumbent national operator.⁴³ However, a Review⁴⁴ carried out in 1992, led to an agreement on full liberalization of the EU telecoms market, including public voice telephony and telecoms network infrastructure. The Review provided for, inter alia, the full liberalization of public telephone services by 1 January 1998 and the publication of a Green Paper on Network Infrastructure Liberalization. The Infrastructure Green Paper⁴⁵ led to the inclusion of the liberalization of telecoms network infrastructure within the 1 January 1998 schedule.

Finally, Directive 96/19/EC (the “Full Competition Directive”⁴⁶) extended the scope of the Services Directive to public voice telephony services, and required Member States to fully liberalize the provision of network infrastructure by 1 January 1998 (with transition periods for some Member States⁴⁷).

⁴⁰Commission Directive 94/46/EC amending Directive 88/301 and Directive 90/388 in particular with regard to satellite communications, (1994) OJ L268/15

⁴¹Commission Directive 95/51/EC amending Directive 90/388/EEC with regard to abolition of restrictions in the use of cable TV networks for the provision of already liberalised telecommunications services, (1995) OJ L256/49

⁴²Commission Directive 96/19/EC amending Directive 90/388/EEC with a view to opening up the mobile and personal communications market to competition, (1996) OJ L20/59

⁴³The Cable Directive (Directive 95/51/EC) began the process of infrastructure liberalisation by abolishing restrictions on the use of cable networks for the provision of already liberalised telecommunications services

⁴⁴supra n. 11

⁴⁵supra n.12

⁴⁶Commission Directive 96/19/EC of March 13, 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, [1996] OJ L 74/13

⁴⁷until 2000 for Luxembourg and 2003 for Greece, Spain, Portugal and Ireland. Luxembourg agreed to introduce full competition by 1 July 1998, Spain by 30 November 1998, Portugal by 1 January 2000 and Greece by 31 December 2000

b. Harmonisation

The liberalization measures were accompanied by complementary harmonization measures, adopted by the Council. These harmonization measures provided for the gradual harmonization, on a Community-wide basis, of the conditions for access and use of public telecommunications networks and services. The first harmonization directive, the Open Network Provision ('ONP') Framework Directive,⁴⁸ was adopted on the same day as the Services Directive,⁴⁹ which underlines the "basic dualism" on which the EU telecoms regulatory system is based (see above). It aimed to preventing the national incumbent telecoms operators from using their monopoly control of infrastructure to inhibit the liberalization of the services market. The ONP Framework Directive stipulated that access to public telecommunications services had to be provided on the basis of non-discriminatory, objective and transparent conditions published in an appropriate manner.⁵⁰ Furthermore, it was explicitly stated that ONP conditions must not restrict access to public telecommunications networks or services, except for reasons based on "essential requirements", similar to those set out in the Services Directive.⁵¹

The ONP Framework Directive was supplemented by a series of subsequent harmonization directives, applying ONP principles to specific areas, such as leased lines⁵² and voice telephony.⁵³ In order to take account of the newly competitive environment, the ONP Framework Directive and the Leased Lines Directive were amended in 1997 by a European Parliament and Council Directive (Directive 97/51/EC or "the ONP Amending Directive"⁵⁴).

⁴⁸Council Directive 90/387/EEC of June 28, 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP Framework Directive) (1990) OJ L192/1

⁴⁹ *supra* n.1

⁵⁰ *supra* n.48, Art.3 (1)

⁵¹ *ibid.*, Art.3(2)

⁵²Council Directive 92/44/EEC on the application of open network provisions to leased lines, [1992] OJ L295/23 (ONP Leased Lines Directive)

⁵³Directive 95/62/EC of the European Parliament and Council on the application of open network provision to voice telephony, [1995] OJ L321/16 (ONP Voice Telephony Directive)

⁵⁴Directive 97/51/EC of the European Parliament and Council amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, [1997] OJ L 295/23 (ONP Amending Directive)

Similarly, Directive 95/62/EC on voice telephony has been replaced by Directive 98/10/EC.⁵⁵

In response to the changing competitive environment in the sector, the Review carried out in 1992 led, inter alia, to an agreement by the Council to adjust the ONP framework to fully-liberalized market conditions and to establish a regulatory framework for interconnection and access to services and networks.⁵⁶ Since the telecoms infrastructure in Europe had developed as a set of interconnected networks, owned and operated by many different organisations, the importance of interconnection was increasing rapidly.⁵⁷ The aim of the ONP Interconnection Directive was to secure the interconnection of networks and the interoperability of services.⁵⁸ Member States were required to remove all restrictions on the ability of service providers to negotiate interconnection.⁵⁹ Organizations authorised to provide networks and/or publicly available telecommunications services had a right and an obligation to negotiate interconnection with other operators or service providers.⁶⁰ Operators with Significant Market Power⁶¹ (SMP) were required to meet all reasonable requests for access to their networks, including access at points other than network termination points offered to the majority of users (so-called "special network access").⁶² The Directive was amended in 1998,⁶³ requiring the introduction by 1 January 2000 of fixed-link number portability⁶⁴

⁵⁵ Directive 98/10/EC of the European Parliament and Council on the application of open network provision to voice telephony and on universal service in a competitive environment, [1998] OJ L 101/24

⁵⁶ Directive 97/33/EC of the European Parliament and the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision, [1997] OJ L199/32 (ONP Interconnection Directive)

⁵⁷ G.Knieps, *Regulatory reform of European telecommunications: Past experience and forward-looking perspectives*, (2001), 2 E.B.O.R., 641, p.648

⁵⁸ *supra* n.56, Art.1

⁵⁹ *ibid.*, Art.3(1)

⁶⁰ *ibid.*, Art.4(1)

⁶¹ According to Article 4 (3) of the ONP Interconnection Directive (*supra* n.56), SMP was presumed for any operator with a market share greater than 25% of a particular telecoms market in a given geographic area of a Member State within which it is authorised to operate.

⁶² *supra* n. 56, Art.4(2)

⁶³ Directive 98/61/EC of the European Parliament and the Council amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, (1998) OJ L 268/37

⁶⁴ Art.1(2) of Directive 98/61/EC provides: "National Regulatory Authorities shall encourage the earliest possible introduction of number portability whereby subscribers who so request can retain their number(s) on the fixed public telephone network and the integrated services digital network (ISDN) independent of the organisation providing service ..."

and, in the case of SMP operators, carrier pre-selection.⁶⁵ In 1997, a common framework was also established for the granting of telecommunications service authorisations and individual licences.⁶⁶

Although an initial attempt was made to establish a clear distinction between harmonization and liberalization measures, this distinction has become increasingly blurred. An example of this is Article 4a(3) subsection 2 of the Services Directive 90/388/EEC,⁶⁷ which sets up comparatively detailed requirements for the decisions that National Regulatory Authorities can adopt in an interconnection dispute. The more natural place for such a provision would have been the ONP Interconnection Directive.⁶⁸

c. Legal Basis

One of the main reasons for the liberalization process is the EU aim of the establishment of an internal market: “a market based on competition and free circulation of goods, services, people and capital is at odds with systems based on national monopolies.”⁶⁹ However, the principle of undistorted competition (Article 3(g) EC) has also contributed considerably to the liberalization process.⁷⁰ The justification provided in the recitals of both the Terminal Equipment Directive⁷¹ and the Services Directive⁷² built on the provisions of the Treaty concerning the freedom to provide services as well as the competition rules. In the Terminal Equipment Directive, for example, the Commission argued that special or exclusive rights for the provision of

⁶⁵ Art.1(3) of Directive 98/61/EC provides: “National Regulatory Authorities shall require at least organisations operating public telecommunications networks... and notified by national regulatory authorities as organisations having significant market power, to enable their subscribers ... to access the switched services of any interconnected provider of publicly available telecommunications services. For this purpose facilities shall be in place by 1 January 2000 at the latest ... which allow the subscriber to choose these services by means of pre-selection with a facility to override any pre-selected choice on a call-by-call basis by dialling a short prefix.”

⁶⁶ Directive 97/13/EC of the European Parliament and Council on the common framework for general authorisations and individual licences in the field of telecommunications services, (1997) OJ L 177/15

⁶⁷ *supra* n. 1

⁶⁸ *supra* n. 56; Braun/Capito, Chapter 2, Koenig/ Bartosch/ Braun, p.59

⁶⁹ A. Bavasso, , *Communications in EU Antitrust Law: Market Power and Public Interest*, , (The Hague, 2003), p.43

⁷⁰ *ibid.*

⁷¹ *supra* n. 33

⁷² *supra* n. 1

terminal equipment prevented users from choosing the equipment that best suited their needs, thus constituting an infringement of Articles 30 and 37 EC (now Articles 28 and 31 EC).⁷³ Equally important, special or exclusive rights for the maintenance of terminal equipment are necessarily restrictive of the freedom to provide cross-border services, contrary to Article 59 EC (now Article 49 EC).⁷⁴ In addition, the Commission stated that special or exclusive rights for the provision of terminal equipment would be incompatible with Article 86 EC (now 82 EC), particularly, because such rights would "limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited, and will not be the best available to meet the requirements of a significant proportion of the users."⁷⁵ Similarly, in the Services Directive, the Commission stated that special or exclusive rights regarding the provision of telecommunications services constituted a restriction on the freedom to provide services and therefore Article 59 EC (now Article 49 EC).⁷⁶ Regarding Article 86 EC (now Article 82 EC), the Commission held that special or exclusive rights granted to telecoms organizations led to the abuse of a dominant position. In particular, such rights prevent or restrict access to the market for telecoms services provided by their competitors, thus limiting consumer choice.⁷⁷ In *British Telecommunications*⁷⁸ the ECJ held that EU competition rules were applicable to the European telecommunications sector. This landmark judgment did not only open the door for the liberalization of the sector: it also clarified a number of issues concerning the application of Article 86 EC (then Article 90 EC), which were of significance for the subsequent development of the sector. The Court held that it was for the Commission, not the Member States, to determine the legality of any derogation granted from the application of the competition rules on the basis of Article 86(2) EC (then Article 90(2)).⁷⁹ The Court also made clear that the derogation should be interpreted narrowly.⁸⁰ Since then, competition rules, and in particular Article 86 EC (ex Article 90 EC) have played an important role in the liberalization of

⁷³supra n. 33, recital 5

⁷⁴ibid., recital 7

⁷⁵ibid., recital 13

⁷⁶supra n.1, recital 5

⁷⁷ibid., recital 13

⁷⁸supra n. 25

⁷⁹ibid., para.30

⁸⁰ibid.

the sector. Article 86 EC deals with the application of the Community competition rules to public undertakings and those granted special or exclusive rights.

Article 86(1) EC⁸¹ submits public undertakings to the Treaty rules. Article 86(2) EC⁸² provides Member States with some authority to derogate from the application of the Treaty rules, in so far as this is necessary for the fulfilling of the particular tasks assigned to public undertakings operating services of a general economic interest or having the character of revenue-producing monopolies. Article 86(3)⁸³ provides that the Commission may address decisions or directives to Member States to ensure the observance of Article 86 EC.⁸⁴

The overall liberalization of the telecoms market was based to a large extent on the systematic use of Article 86(3)EC. The important aspect of Article 86(3) EC is that it confers legislative power upon the Commission without granting the Member States the right to interfere. When the Commission passed the Terminal Equipment Directive⁸⁵ and the Services Directive⁸⁶ on the basis of Article 86(3) EC (then Article 90(3)), both Directives were challenged by a number of Member States before the Court of Justice.⁸⁷ However, the Court largely confirmed the legality of the Directives.⁸⁸ The

⁸¹Article 86(1) EC reads: "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89."

⁸²Article 86 (2) EC reads: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

⁸³Article 86 (3) reads: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

⁸⁴For a more detailed discussion of Article 86 EC in the telecommunications sector, which would go beyond the scope of this thesis, see Bartosch, *The Liberalization of European Telecommunications and Broadcasting Markets- The Road from Monopolies to Competition and Universal Service*, Ch. 3 in Koenig/Bartosch/Braun

⁸⁵supra n. 33

⁸⁶supra n. 1

⁸⁷Case C-202/88, *France v. Commission*, [1991] ECR I-1259 (the Terminal Equipment Ruling)

Joined Cases C- 271/90, C-281/90 and C-289/90, *Spain v. Commission*, [1992] ECR I-5833 (the Services Directive Ruling)

⁸⁸The ECJ declared the Directives void as far as the provisions on special rights were concerned, holding that the Directives did not specify the rights concerned and did not specify in what respect the existence of such rights is contrary to the Treaty. Also the

principal contentious issue was that of whether the Commission could use Article 86(3) EC to abolish special and exclusive rights. In *France v. Commission*,⁸⁹ France submitted that the Terminal Equipment Directive could not provide for the abolition of monopoly rights since special or exclusive rights *per se* were not prohibited by the Treaty. It argued further that the Commission had encroached upon the Council's legislative powers, and that the Directive should have been adopted as an harmonization directive on the basis of Article 83 (then Article 87) EC and Article 95 (then Article 100a) EC.⁹⁰ The ECJ opined that state monopolies, although recognized under Article 86 EC (then Article 90), must be regarded as a derogation from the rules of the Treaty in general, and from the competition rules in particular.⁹¹ As far as the second argument is concerned, the Court found that the Commission in principle did not lack the power to enact the Directive as the subject-matter of the power conferred on the Commission by Article 86(3)EC is different from, and more specific than, that of the powers conferred on the Council by either Article 95 EC (then Article 100a) or Article 83 EC (then Article 87).⁹²

Subsequently, as dealt with above, the Commission adopted a series of Directives based on Article 86(3) EC. When adopting measures with predominantly harmonizing functions, such as the ONP Directives and the New Regulatory Framework, Article 95 EC was used as the legal basis. The Council and Commission had already agreed on a compromise approach of the usage of Articles 86 EC and 95 EC respectively in 1989,⁹³ and in 1993 the Council finally officially approved the Commission's liberalization approach, but stated that future directives should be passed with the full participation of Council and Parliament.⁹⁴

provisions contained in both Directives concerning the termination of long-term contracts were declared void.

⁸⁹supra n. 87

⁹⁰ibid., para. 20

⁹¹ibid., in para. 20, the Court stated that "even though that article (Article 86 EC) presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all special or exclusive rights are necessarily compatible with the Treaty."

⁹²ibid., paras.25-27

⁹³so-called compromise of 1989, summed up by the Council in Council Press Release 235/89 of 7 December 1989

⁹⁴Council Resolution 93/1 of 22 July 1993 on the Review of the Situation in the Telecommunications Sector and the Need for Further Development in that Market, [1993] OJ C213/1; and Council Resolution 94/3 of 22 December 1994 in the principle and timetable for the liberalisation of telecommunications infrastructures, [1994] OJ C379/4

2.3.2 Competition rules

Apart from constituting a legal basis for regulatory measures, European competition law also applies independently to the telecoms sector, as it does to other sectors of the economy. In particular, the competition rules ensure that the liberalization process is not undermined by unilateral or co-ordinated market conduct and concentrations, protecting market players from competition. Its role is to make sure that legal monopolies are not replaced by de facto ones. Thus far, it has constituted an “indispensable complement” to sector-specific regulation.⁹⁵ The Commission has frequently emphasised the important role competition law plays in the telecoms sector. For example, in its Infrastructure Green Paper⁹⁶, the Commission stated that:

“In a market which will for many years be characterised by the presence of dominant operators controlling bottleneck facilities, a level playing field will only be possible by reinforced scrutiny of compliance with the competition rules. Otherwise the emergence of competition will be stifled.”⁹⁷

A comment by Sir Leon Brittan on the subject of air transport and competition policy is also relevant to the role of general competition rules in the telecoms sector:

“One should...keep in mind that an industry emerging from a long period of regulation is usually dominated by a few oligopolists. Most Member States have for many decades organised their air transport policies as a function of the needs of their flag carrier, with the result that these normally have a dominant position on their home market. Hence there is a need for strict vigilance in order to avoid abuses of those dominant positions, in particular where dominance would be used in order to prevent the development of competition...The move from regulation to competition will be successful only if there are competitors able to take advantage of new opportunities.”⁹⁸

⁹⁵Garzaniti, (The Hague, 2003),p. 243

⁹⁶supra n.12

⁹⁷ibid., section VII.8

⁹⁸Address by Sir Leon Brittan to the Centre of European Policy Studies, *Competition Policy and International Relation*, (Brussels, 1992)

Since a liberalized telecoms market is a relatively new phenomenon, the Commission has published guidelines within the “1998 package” on the application of EC competition law to the telecoms sector.⁹⁹ These guidelines seek to clarify, specifically in relation to telecoms, the types of behaviour that may fall foul of the competition rules, i.e. Articles 81 EC and 82 EC. The Commission has also issued a Notice on the application of competition rules to access agreements,¹⁰⁰ as the Commission considered that the control exercised by incumbent telecoms operators over access to end-users could generate competition problems. In the Access Notice, the Commission specifies that one purpose of the Notice is “to set out access principles stemming from EU competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors”.¹⁰¹ From the beginning, the liberalization process has been based on the interrelation of sector-specific regulation and EC competition rules. The New Regulatory Framework constitutes a new step in this relationship.

2.4 The New Regulatory Framework

In December 2001, the European Parliament adopted a compromise text for a New Regulatory Framework in Electronic Communications. This completed legislative proceedings which had begun with the adoption of four communications on 10 November 1999,¹⁰² including the so-called 1999 Communications Review, and the adoption of seven proposals by the Commission in July 2000.¹⁰³ Together, those proposals led to the New

⁹⁹Guidelines on the Application of EC Competition Rules in the Telecommunications Sector (the 1991 Competition Guidelines) O.J.1991 C233/2

¹⁰⁰Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (1998 Access Notice) O.J.1998 C265/2

¹⁰¹supra n.100, preface

¹⁰²The four communications are the following: the Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM(1999)537; the Communication on the Consultation on the Radio Spectrum Green Paper, COM(1999)538; the Communication “Towards a New Regulatory Framework for Electronic Communications Infrastructure and Associated Services” (The 1999 Communications Review), COM(1999)539; a Report on the Development of the Market for Digital Television in the European Union, COM(1999)540

¹⁰³COM(2000)393

Framework for the Regulation of Electronic Communications Networks and Services.

The Commission observed that, despite the introduction of competition into the telecoms market through the then current framework, entailing falling tariffs and a growing number of operators, there was still insufficient competition. Incumbent operators continued to occupy dominant positions in a still fragmented telecoms market. In addition, the trend towards convergence between carriage and content functions called into question existing arrangements under which telecommunication and broadcasting were regulated under different regimes.¹⁰⁴

The 1999 Communications Review¹⁰⁵ introduced the key elements of the Commission's policy for the new regulatory framework designed to cover all communications infrastructure and associated services. The main objectives of the new framework are:

-Adjustment to convergence

There is widespread agreement that convergence is occurring at the technological level. Digital technology allows both traditional and new communications services - whether voice, sound or pictures - to be provided over many different networks, such as traditional wired telephone networks, satellite, cable television etc. The Commission's Green Paper on Convergence defines the term "convergence" as follows: "the ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and the personal computer."¹⁰⁶ As a result, the formerly independent sectors of telecommunications, media and IT technology converge.¹⁰⁷

COM(2000)386

COM(2000)384

COM(2000)392

COM(2000)407

COM(2000)385

COM(2000)394

¹⁰⁴Statement of Erkki Liikanen, Commissioner for the Information Society, press release, 10 November, 1999, IP/99/825

¹⁰⁵supra n.110

¹⁰⁶Commission's Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation: Towards an Information Society Approach, COM(97)623

¹⁰⁷for further details on the phenomenon of convergence, see in particular the Commission's Green Paper, *ibid.*

In order to adapt the existing regulatory conditions to an increasingly converged communications environment, the new framework is based on the principle of “technological neutrality”.¹⁰⁸ This means that sector-specific regulation applies to any network or service permitting the transmission of signals, including satellite networks, fixed and mobile terrestrial networks, and broadcasting networks regardless of the type of information conveyed.

- Gradual phasing out of sector-specific regulation

Under the new regulatory framework, competition law is meant to be the prime instrument for regulating the electronic communications market. The framework provides for a gradual phasing-out of sector-specific regulation. Ex-ante regulation should be limited to the minimum necessary¹⁰⁹ to achieve clearly defined policy objectives, such as the promotion of competition and consumer protection as well as the completion of the internal market in electronic communications. However, until markets become genuinely competitive, some sector specific ex-ante rules continue to be appropriate.

-Increased harmonization

Harmonisation of legislative procedures must ensure the development of the market in a consistent manner at EU level.

The 1999 Communications Review introduces eight key proposals, which can be summarized as follows:

- (1) The new framework should cover all communications infrastructure and associated services. However, the framework does not cover content regulation. It is therefore based on the distinction between the regulation of transmission and the regulation of content.¹¹⁰
- (2) Internet transmission services should be treated in the same way as other transmission services.
- (3) The new framework should introduce a system of general authorisations instead of individual licences, with the exception of the use of radio spectrum and numbering resources.

¹⁰⁸for further details on the influence of convergence on regulation, see C. R. Blackman, *Convergence between telecommunications and other media*, Telecommunications Policy 1998, 22(3), 163; B. Clements, *The impact of convergence on regulatory policy in Europe*, Telecommunications Policy, 1998, 22(3), 197

¹⁰⁹supra n.14, recital 27, sentence 1

¹¹⁰COM(2000)239 final, p.20

- (4) It should establish a coherent Community approach to the allocation of radio spectrum.
- (5) It should extend the scope of universal service by means of market-based analysis of demand for and availability of services.
- (6) It should encourage the unbundling of the local loop throughout the EU, applying the EC competition rules.
- (7) The Commission does not introduce a European Regulatory Authority for communications services. It wants to improve cooperation between the Commission and the national regulators.
- (8) Regardless of the communications infrastructure, the same principles for regulation would apply to access and interconnection.

A wide-ranging debate ensued,¹¹¹ having regard to which the Commission published, in July 2000, its proposal for a package of measures¹¹² which were to form the basis for the new EU regulatory framework for electronic communications. The main areas of contention, that had arisen before the full adoption of the new regulatory framework, centred on: the NRAs and appeal mechanisms; cost orientation principles for operators with SMP; slow implementation of the Regulation on local loop unbundling;¹¹³ the request for more stringent reporting obligations; and transparency from new entrants in relation to leased line interconnection. The European Parliament supported discretion for the Member States to determine whether e-mails sent for commercial purposes should be authorised with the preliminary consent of the subscriber ("opt-in") or whether the subscriber should have the right to require removal of the lists of e-mails ("opt-out").

Other issues that were debated included:

- the definition of SMP,
- rights of way, facilities sharing and co-location,
- interconnection rights anywhere in the Community, and
- the net cost financing of universal service obligations.¹¹⁴

¹¹¹The results of the public consultation are summarised in the Commission Communication dated 26 April 2000, COM(2000)239

¹¹²supra n.103

¹¹³ Commission Regulation 2658/2000/EC of December 18, 2000 on unbundled access to the local loop (ULL Regulation), (2000) OJ L336/4

¹¹⁴supra n.111

The new regulatory framework reduces the number of legal texts from 26 to eight, significantly increasing simplicity and clarity. The new framework consists of five harmonization directives, including a framework directive and four specific directives concerning:

- authorization,
- access and interconnection,
- universal service and users' rights and
- data protection.

There is also a Regulation on Unbundled Access to the Local Loop (adopted in December 2000).¹¹⁵ In addition, a Commission liberalization directive¹¹⁶ (also called the 'Competition Directive') consolidates the original Liberalization Directive 90/388/EC, but does not add any new obligations. A decision on Community Radio Spectrum Policy¹¹⁷ has also been adopted.

The directives were published in the Official Journal of the European Community. All Member States were required to adopt national legislation implementing them by 24 July 2003, with the exception of the Data Protection Directive for which the deadline was 31 October 2003.

A detailed discussion of the various measures of the new regulatory framework would go beyond the scope of this thesis. However, in order to understand the new regulatory regime on access, it is important to mention some general issues which are contained in the Framework Directive (Directive 2002/21/EC).¹¹⁸

The Framework Directive provides the overall structure for the new regulatory regime, and sets out fundamental rules and objectives which apply across all the new directives. As its name suggests, it is the directive that establishes the new framework

¹¹⁵Framework Directive, Directive 2002/21/EC of 7 March 2002, OJ L 108, ,p.33
 Authorisation Directive, Directive 2002/20/EC of 7 March 2002, OJ L 108, , p.21
 Access and Interconnection Directive, Directive 2002/19/EC of 7 March 2002, OJ L 108, 2, p. 7

Universal Service Directive, Directive 2002/22/EC of 7 March 2002, OJ L 108, 2, p. 51
 Data Protection Directive, Directive 2002/58/EC of 12 July 2002, OJ L 201, , p. 37
 Regulation on Local Loop Unbundling, Regulation (EC) No 2887/2000 of 18 December 2000, OJL336, p.4

¹¹⁶Directive 2002/77/EC of 16 September 2002, OJ L 249, 17.9.2002, p..21

¹¹⁷Decision No 676/2002/EC of 7 March 2002, OJ L 108, 24.04.2002, p.1

¹¹⁸supra n.4

2.4.1 Scope and aim

According to Article 1(1), the Framework Directive establishes a harmonized framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. Article 2 sets out the relevant definitions for the new regulatory framework, in particular the definition of “electronic communications network”, “electronic communications service” and “associated facilities”.¹¹⁹

The Framework Directive, and therefore the new framework, is based on the principle of “technological neutrality”, taking into account the increasing convergence of telecoms, broadcasting and information technology. This means that the new framework covers any communications network or service permitting the transmission of signals, regardless of the type of information conveyed. This is in contrast to the old regulatory regime, which did not take account of network or service convergence and consequently established definitional boundaries between telecommunications and broadcasting. Different networks were associated with the delivery of a specific type of message or signal. This meant that similar services were subject to different regimes depending on the network on which they were carried.¹²⁰

However, as far as communications services are concerned, the new framework distinguishes between the regulation of transmission and the regulation of content. The latter continues to fall under Directive 89/36/EC¹²¹ as amended by Directive 97/36/EC¹²² (the “Television without Frontiers Directive”). The new framework, therefore, does not cover the content of services delivered over electronic communications networks or services, including audiovisual content, financial services and certain information society services.¹²³

¹¹⁹For the definition of “electronic communications network” and “electronic communications service”, see Chapter 2, 1; “associated facilities” are defined as “facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides.

¹²⁰Garzaniti (2003), p.10

¹²¹Council Directive 89/552 of October 3, 1999 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, (1999) O.J. L298/23

¹²²Directive 97/36, (1997) O.J. L202/60

¹²³supra n 4, Article 2(c)

2.4.2. Re-definition of Significant Market Power (SMP)

One of the objectives of the new regulatory framework is to reduce sector-specific regulation in favour of the application of general competition principles.¹²⁴ An example of the movement towards greater reliance on competition law principles is the change in the way in which operators with significant market power are to be identified and regulated. Significant market power (SMP) is the key concept used to identify those undertakings upon which regulators can impose sector-specific regulation. Under the old regulatory regime, operators having more than a 25% market share of a specific market were presumed to have SMP, but the relevant NRA enjoyed some discretion to take other factors into account.¹²⁵ This arbitrary presumption of market power was criticised as going against competition law principles and resulting in obligations being imposed that were greater than those which could be imposed under Article 82 EC.¹²⁶ A share of 25% would generally not be considered sufficient to indicate market dominance under Article 82. The original concept of SMP was developed with the incumbent ex-monopoly operator in mind, and has been a major tool in facilitating market entry for new operators. Now that these market-entry objectives have largely been achieved, the concept of SMP is being re-defined in line with the general competition law concept of market dominance. According to Article 14 of the Framework Directive, an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to appreciable extent independently of competitors, customers and ultimately consumers. Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power in a closely related market, where the links between the two markets are such as to allow the market power held in one

¹²⁴ibid., Recital 27

¹²⁵supra n.56, Article 4(3)

¹²⁶A. Tarrant, *Significant market power and dominance in the regulation of telecommunications markets*, (2000) 21 ECLR 320. p.320

market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

Thus, the new form of significant market power is designed to embrace single company dominance, joint dominance and the leverage of a dominant position on to an associated market. To summarize, one can say that in terms of opening up the market there are three instruments which have been used to liberalize the telecoms market in the European Community:

- the progressive liberalization of a former monopoly sector,
- the accompanying harmonization measures, and
- competition rules.

One of the areas in which the interrelation between regulation and competition law is particularly apparent is the issue of access to telecoms networks, which has always played an important role in the opening-up of the telecoms sector.

3. Access to telecommunications networks: Why access matters

Our "western" economies are developing into so-called "information economies", in which the emphasis of economic activity has shifted from manufacturing industries to services industries, many of which process and trade information.¹²⁷ Information and communication systems, and particularly the Internet, are at the centre of this change. Whether an individual can profit from these developments or not depends on his or her ability to access the relevant information, and therefore his or her ability to access the relevant communication systems. A failure to access the necessary information can lead to social failure and exclusion. Nowadays, Communication systems are often a gateway "to finding jobs, or taking part in civic organisations, to learning about new life opportunities."¹²⁸ The landmark

¹²⁷C. Murrioni/N. Irvine, *Access Matters*, Institute for Public Policy Research, London, 1998., p.1

¹²⁸Murrioni/Irvine, quoting from G. Mulgan and J. Coulthard, *Virtually Social Information Exclusion*, p.6

document concerning the Information Society, the Bangemann Report,¹²⁹ emphasised the importance of economic and social measures to ensure equal participation to the information revolution: "Fair access to the infrastructure will have to be guaranteed to all, as will the provision of universal service, the definition of which must evolve in line with the new technology."

Access to information is inseparable from access to communications.¹³⁰ This comprises access at the technical as well as at the market level, i.e.: access to networks and essential facilities as well as interconnection; access for consumers to the network and content; and access of market actors to consumers. Access for consumers is dealt with under the concept of Universal Service. This thesis, however, will deal with access of telecoms operators and service providers to the networks of their competitors, in order to enable them to reach their customers. Access in this sense is therefore a generic concept covering any situation in which one party is granted the right to use the network or facilities of another party.

It should be noted that access and its relationship to competition law featured in the telecoms sector as early as *British Telecommunications*,¹³¹ in which the Court confirmed the requirement to give access to a "value-added" service provider, and specifically addressed the issue that development of new technologies in this context was in the public interest.¹³² The importance of access to telecoms networks and their components has increased substantially in recent years. Liberalization has brought about a vast number of new entrants who sell retail telecoms services using both the incumbent's network and their own network. In addition, an increasing number and range of non-telecom services are distributed through telecommunications networks. Due to the convergence of media, telecoms and computing, a growing number of services are being delivered over telecommunications networks, and are thus dependent on a few competing delivery systems.¹³³ For example, the growing success of the Internet as a marketplace testifies to

¹²⁹ Commission of the European Communities, Europe and the Global Information Society, Report of the high level group on the information society, Brussels, May 1994

¹³⁰ Murroni/Irvine, p.1

¹³¹ *supra* n.25

¹³² Ungerer, (Florence, 1998), p. 5-6

¹³³ *ibid.*, p. 23

the increasing reliance on telecoms networks for the sale of services and goods.

Access of telecoms operators to their competitors' networks or facilities can be described as third-party access. Basically, there are two types of third-party access: "one-way access"¹³⁴ or "indirect access"¹³⁵ on the one hand, and "two-way access"¹³⁶ or "interconnection" on the other.

The term "interconnection" covers the physical and logical linking of networks. It refers to a situation where two or more operators require mutual access to each others' networks in order for their customers to be able to communicate with each other, or to access services provided on other networks.¹³⁷ In this scenario, competition is developed only among rival networks. Mobile telephony presently works that way. There are numerous mobile subscribers, but there is no competition for reaching the subscribers to a network, and a network provider can charge other parties to reach its own subscribers.¹³⁸ Interconnection is of increasing importance with the number of alternative networks rising steadily. These alternative networks often do not have the same coverage as the incumbents' networks and are therefore dependent on access to these networks to offer maximum network benefits to their customers.¹³⁹

"One-way access", in contrast, covers the situation where an entrant does not own his own network, and therefore needs access to an infrastructure owned by an incumbent operator, usually the former state-owned monopolist. One-way access allows service providers without physical connections to the end-user to reach customers. It is a one-sided dependence of the new entrant on the incumbent operator.¹⁴⁰ Duplicating the network is either impossible or at least not feasible for financial or other reasons. In some cases, for example, other networks find it difficult to gain a position within the market if another network already exists ("first mover advantage"). These facilities or networks are called "bottlenecks" or "gateways", because entire industries rely on only

¹³⁴ M.Canoy/P. Bijl/ R.Kemp, , *Access to telecommunications networks*, TILC Discussion Paper (2003) , p.5

¹³⁵ Murroni/ Irvine, p. 55

¹³⁶ Canoy/ Bijl/ Kemp, p. 5

¹³⁷ Canoy/ Bijl/ kemp, p. 14

¹³⁸ Murroni/ Irvine, p. 55

¹³⁹ J.M Bauer/S.S. Wildman, Third annual Quello Communication Policy and Law Symposium; Rethinking access, (2002) L.Rev.M.S.U.-D.C.L.605 p. 607

¹⁴⁰ Canoy/ Bijl/ Kemp, p.5

one facility provider, or very few providers. The incumbent operator is vertically integrated most of the time, which means not only that it owns the network but also that it is active in the services market and therefore reluctant to give new service providers access to its network. Network sharing therefore helps to create and maintain competition in the retail market.

Examples of one-way access are “access to the unbundled local loop” and “Carrier Select”.¹⁴¹ Access to the unbundled local loop means that the new entrant gains access to the copper-cable pairs of the incumbent’s local network which enables him to offer broadband services directly to the consumer.¹⁴² At the moment, the roll-out of broadband services in the EU is relatively limited.¹⁴³ This is why the Commission has put the unbundling of the local loop on top of its agenda:

“Unbundling of the local loop aims to foster competition in local access networks, currently dominated by incumbent operators. New entrants do not have the investment capacity to duplicate the local network. Therefore, they must be allowed to use the incumbents’ local loop.”¹⁴⁴

Carrier Select means that an entrant has originating and terminating access to the incumbent’s local network.¹⁴⁵ This example of one-way access seems to be working well.¹⁴⁶

The policy of promoting competition in telecoms proved to be very successful in many areas, as it brought increased choice for customers¹⁴⁷ and drastically reduced tariffs¹⁴⁸ for telecoms services. However, liberalization did not

¹⁴¹Canoy/ Bijl/ Kemp, p. 5

¹⁴²Access to the local loop will be discussed in more depth later in the thesis

¹⁴³The number of new unbundled lines has increased by 828 000 between July 2002 and July 2003. This is double the number compared to the previous year but still low as a proportion of total subscriber lines and the development of local loop unbundling is still rather unbalanced across the EU and has not yet taken off. (see 9th Commission Report on the Implementation of the EU Electronic Communications Regulatory Package, p. 5)

¹⁴⁴Erkki Liikanen, “Is there a third way for the Internet in Europe”, speech delivered at Global Internet Summit Barcelona, 22 May 2000

¹⁴⁵By dialling a prefix, consumers can indicate that they want the entrant instead of the incumbent to carry a telephone call.

¹⁴⁶See, inter alia: Organisation for Economic Co-operation and Development: Working Party on Telecommunication and Information Services Policies: Developments in Carrier Selection and Pre-Selection, DSTI/ICCP/TISP(2001)4/Final, p.4ff.

¹⁴⁷In August 2003 there were in the EU a total of 1202 operators authorised to offer public voice telephony and 1484 public network operators. However, after the massive entry into the market that characterised the first stage of liberalisation (+113% between 1998 and 2001), the number of operators authorised to offer public telecommunications services in Europe has started to decrease. (9th Commission Implementation Report, supra n.1, p. 14)

¹⁴⁸In the five-year period since the opening of the voice telephony markets (1 January 1998), the EU weighted monthly expenditure for national calls by residential users decreased by

automatically coincide with the end of dominant positions. More than fifteen years after the 1987 Green Paper,¹⁴⁹ incumbent operators still have strong positions in many aspects of their business, and infrastructure competition has not matured in all parts of the industry.¹⁵⁰ As mentioned above, competition is only developing hesitantly and to a very limited extent in the central sector of fixed local access.¹⁵¹ This, in principle, would justify the application of regulatory open access requirements to local loop infrastructures. Such regulation is seen as an essential requirement for stimulating effective service-based competition. However, a significant number of commentators have remarked that a too-stringent access regulation may benefit consumers in the short term, but in the long term may have a negative effect on infrastructure competition. New entrants have no incentive to establish new networks as they have access to an incumbent operator's network, and the incumbent has no incentive to invest in a new infrastructure if it must share it with competitors.¹⁵²

One of the main issues in telecoms policy is whether such access issues should be resolved by sector-specific regulation, or whether it is sufficient to apply the EC competition rules, particularly Articles 81 and 82 EC, building on the evolving concept of essential facilities. So far, access policies have been characterised by an interplay between sector-specific regulation and competition law. Since the beginning of the liberalization process with the 1987 Green Paper,¹⁵³ a comprehensive sector-specific framework has been established, dealing in particular with access and interconnection. In parallel, the telecoms sector is to date the one sector in which the Commission has developed the most consistent position concerning the application of EC

13.5 %. The overall reduction for the period 1998-2003 of the average cost of an international call has been 42% for residential users. (9th Report, supra n.1, p. 20-21)

¹⁴⁹supra n.9

¹⁵⁰The incumbents' share of the international voice telephony market stood at 62% in December 2000, of the long distance call market at around 70% and of the mobile market at 69%. In the local call market there was a small reduction of the incumbents' share, during the period December 2001-2002, from 87% to 81%. One of the reasons for this is probably the introduction of carrier pre-selection in all the Member States. (9th Report, supra n.1, p. 15) In short, however, it can be said that the market share of incumbents remain fairly high.

¹⁵¹As at August 2003, 33% of EU subscribers used an alternative provider to route long-distance and international calls, while only 25% were using alternative providers for local calls. (9th Report, supra n.1, p. 16)

¹⁵²This aspect will be discussed in more detail below

¹⁵³supra n.9

competition law to access issues, with the adoption of the Access Notice.¹⁵⁴ It is in the Access Notice that the competition law concept of essential facilities has been given its most explicit formulation. Although the essential facilities doctrine (EFD) has been established as part of ex-post application of competition rules, it has also had a significant influence upon ex-ante regulatory action, in particular upon the regulatory framework for access and interconnection.

Convergence of the computing sector, which developed in the absence of specific regulation, with the broadcasting and telecoms sector, which are both highly regulated, has called into question the need for continued sector-specific regulation in the communications sector altogether. The new regulatory framework, recognising that the new environment has made a number of traditional regulatory concepts out of date, advocates a gradual phasing-out of sector-specific regulation.

4. Overview of economic features of the telecommunications sector

In order to be able fully to understand and evaluate the necessity of the “dual regime” of sector-specific regulation on the one hand and general competition law on the other, it is essential to note briefly a number of economic features which distinguish the telecoms industry from other economic sectors.¹⁵⁵

The telecoms sector is affected by certain economic features which, by their very nature, involve market failure, in that market forces such as competition cannot be expected to operate. The main role of general competition law is to prevent incumbents from excluding (potential) competitors from the market, through, for example, predatory pricing or a refusal of access to essential

¹⁵⁴ H. Ungerer, *Access issues under EU regulation and anti-trust law - The case of telecommunications and internet markets*, (2000) 5 *Int'l J. Comm.L. & Pol'y* 1, p.5

¹⁵⁵ This is only a brief overview; for more detail, see: M. Armstrong: *Competition in Telecommunications*, Oxford Review of Economic Policy, Vol. 13, No.1, (1997), p. 64; M. Katz/ C. Shapiro, *Network Externalities, Competition and Compatibility*, The American Economic Review, Vol.75, No. 3 (1985), p. 424

assets.¹⁵⁶ These features often result in first-mover advantages in the newly liberalized telecoms market which in turn constitute considerable barriers to entry¹⁵⁷ for potential new market entrants. As these barriers to entry are structural, i.e. inherent in the market, and do not result from strategic exclusionary behaviour by incumbent dominant operators, competition law will find it difficult to deal with them timely and effectively. Sector-specific rules regulating prices and access seem to be better suited, in particular whenever access disputes are likely to be repeated.¹⁵⁸

These economic features include elements of natural monopoly, sunk costs and network externalities. Although it is generally recognised that the 'natural monopoly' argument can no longer be used to justify state monopolies in the telecoms sector (see above), there are still areas in telecommunications which have features of a natural monopoly.¹⁵⁹ This is particularly true for local access networks (the so-called "local loop") due to the high infrastructure costs of the network. In contrast to other areas of the telecoms sector, such as long-distance or international networks, in which the introduction of competition may lead to higher quality of service and lower prices, the local loop is most cost-effectively run by a single undertaking.¹⁶⁰ This is due to so-called "economies of density", whereby it is more cost-effective to have a single local network in a certain local area than to have several.¹⁶¹ Duplication of the local network would be economically inefficient and prohibitively expensive.¹⁶² This leads to other service providers being dependent on the incumbents' networks to reach their customers. As the incumbent has no inherent interest to provide access to its network, it must be required to do so by appropriate sector-specific regulation.

¹⁵⁶ T. Van Dijk, *General of specific competition rules for network utilities?*, (2001) 2 Journal of Network Industries, 93, p.100

¹⁵⁷ "A barrier to entry may be defined as a cost of producing which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry", Knieps, p. 12 quoting from Stigler: *Barriers to Entry, Economies of Scale and Firm Size*, in Stigler (Ed.), *The Organization of Industry*, Irwin, Homewood, Ill (1968), p. 67, at 67

¹⁵⁸ Van Dijk, p. 100

¹⁵⁹ As mentioned above, a natural monopoly is an activity which is most cost-effectively carried out by a single firm rather than by several

¹⁶⁰ K.W. Grewlich, *Access to global networks - European Telecommunications Law and Policy*, (1998) 41 GYIL, 9, p.95

¹⁶¹ Armstrong, p. 66

¹⁶² M. Holzhäuser, *Essential Facilities in der Telekommunikation: Der Zugang zu Netzen und anderen wesentlichen Einrichtungen im Spannungsfeld zwischen sektorspezifischer Regulierung und allgemeinem Wettbewerbsrecht*, (Munich, 2001), p.108

In addition to problems caused by natural monopoly, some parts of the sector involve large fixed costs (investments) which are sunk. These can represent significant barriers to entry, as a market can only sustain a limited number of competitors which possess sufficient market power to be able to recover these costs.¹⁶³ In contrast to the incumbent operators, new entrants have to decide whether or not to build additional network infrastructure and spend irreversible costs.¹⁶⁴ However, due to increasing convergence and a decrease in costs in some infrastructures, duplication may become less expensive, which would make competition at the level of infrastructure a more feasible option.¹⁶⁵

Another economic phenomenon which has a considerable impact on the potential competitiveness of telecommunications is that of positive and negative "network externalities". "Network externalities" in the telecoms sector are predominantly positive, and arise if existing subscribers benefit when new subscribers join in.¹⁶⁶ The more subscribers a network has, the more useful it becomes to the individual subscriber as his possibilities of communication increase. A network with small coverage is of little interest to the consumer. These externalities enhance the importance of interconnection (see above), as they lead to considerable first-mover advantages which may act as a barrier to entry. Without interconnection, small network operators would be severely disadvantaged relative to large network operators. Interconnection allows new entrants to compete without requiring them to duplicate the network.¹⁶⁷

¹⁶³Van Dijk, p. 102

¹⁶⁴Knieps, p. 12

¹⁶⁵Van Dijk, p. 103

¹⁶⁶Armstrong, p. 76

¹⁶⁷Holzhäuser, p. 26

Chapter 3: Antitrust Law and Access to Essential Facilities

This chapter deals with the issue of ensuring access to facilities on the basis of the EC competition rules. The first part outlines a number of cases involving issues of access to infrastructures and other facilities. Because of the absence of cases in telecommunications, it focuses on the transport sector, in which rules regarding third-party access have principally been developed on the basis of competition rules. The general discussion of the essential facilities case law under Article 82 EC should serve as a basis for the following section, which concerns the application of EC competition rules, in particular the essential facilities doctrine (EFD), to the telecommunication sector.

More than a decade ago the US Federal Communications Commission (FCC) adopted the 'Open Network Architecture' (ONA) principle, to ensure that enhanced services providers and information service providers had non-discriminatory access to the network. This ONA approach reflects the essential facilities doctrine, derived from case law interpreting the prohibition on monopolisation or attempts to monopolise under S. 2 Sherman Act.¹

In EC telecommunications law, the EFD has also been used as an 'inspiration' for ex-ante regulation, in cases where the ex-post application of competition rules may be insufficient: for example, in rapidly expanding markets, delay in granting access or interconnection may impair competition.²

¹K.W. Grewlich, (GYIL, 1998) ,p.32

²ibid., p.34

1. Introduction to the Essential Facilities Doctrine (EFD)

“The transposition of the ‘essential facilities doctrine’ like its predecessor, the fast-food hamburger, to Europe is viewed with some trepidation by many commentators anxious to protect the integrity of home-grown Community competition law principles.”³

The EFD originated in commentary on United States antitrust case law. It has featured prominently in a number of decisions made by competition authorities around the world. In essence, the doctrine states that where a monopoly or a dominant company owns or controls something, access to which is essential for its competitors to compete on a “derivative” or downstream/upstream market, it may be pro-competitive to oblige the company in question to give access to a competitor. That is said to be the case if the monopoly’s or dominant company’s refusal to grant access has sufficiently serious effects on competition, and if the refusal is not objectively justified. An essential facility can be a product, such as a raw material, or a service, including access to a place such as a harbour, or to a distribution network such as a telecommunications network.

The doctrine may be applied to a number of sectors, even to facilities protected by intellectual property rights. As more utility and regulated markets open up throughout the world, the scope for applying the doctrine increases, thereby creating potential to free up essential resources that are fundamental to economic growth and development.

The EFD can be seen as a limitation of the general rule that a firm is allowed to deal with whom it chooses, known as the “freedom to contract”.⁴ The motivation behind the doctrine is the elimination of the unfair competitive advantage that ownership or control of an essential facility may give to a competitor. The dominance of the owner of an essential facility is often not due to its greater efficiency, but rather to externalities which make it impossible for the firm’s competitors to duplicate the facility.⁵

³L. Hancher, Case comment: *Oscar Bronner*, (1999) 36 CMLRev, 1289

⁴A.Jones/B.Sufrin, *EC Competition Law*, (Oxford, 2001), p.377

⁵J.T. Soma/D.A. Forkner /B. P.Jumps, The essential facilities doctrine in the deregulated telecommunications industry, (1998) 13 Berkeley Tech.L.J. 565,p.566

This is particularly true in the telecommunications sector where, despite full liberalization as of January 1998, the control of infrastructures and other facilities continues to confer a dominant position on incumbent telecommunications operators in the market for network provision. This is mainly due to the extensive investment that is required to build a network which can provide the same comprehensive geographical coverage as the incumbents' networks:

"In the fixed network field the new entrants are faced with a situation where the incumbents hold fixed network assets built over one hundred years of monopoly. None of the new entrants can, in the short term, build parallel networks in the local loop which could rival these assets worth 200-300 billions of euros of investment."⁶

Therefore, in a number of Member States, incumbent operators continue to control the only nation-wide, fixed-line telecommunications infrastructure. The result can be felt, inter alia, in the market for access to the local loop, which is far from competitive despite ex-ante regulation.

In parallel with sector-specific regulation, the EFD (applied within the framework of Article 82 EC) can be regarded as a useful tool to ensure third-party access to telecommunications infrastructure and to tackle distortions of competition (re-)emerging during the liberalization process:

"In the communications sector in particular, the doctrine now constitutes an important element as the backbone of sectoral regulation and represents one of the most interesting points of interaction between antitrust and regulatory provisions."⁷

The European Commission itself has used the EFD to promote competition in services by obliging dominant incumbent operators to grant third-party access to their networks and other facilities. In its Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector,⁸ the Commission states that a refusal to provide reserved services (i.e. services for which, at the time, a telecommunications company would still have had a monopoly) would be unlawful when it would make it impossible or

⁶H. Ungerer, *The arrival of competition in European telecommunications*, 3rd European Forum in the Law of Telecommunications, Information Technologies and Multimedia: Towards a common framework, (Luxembourg, 1998), at 7-8

⁷A. Bavasso, *Essential facilities in EC law: The rise of an 'epithet' and the consolidation of a doctrine in the communications sector*, (2002) 21 Y.E.L 63, p.63

⁸see Ch.2, fn.99

difficult to provide non-reserved services. In its more recent 1998 Notice on the application of the competition rules to access agreements in the telecommunications sector ('the Access Notice'),⁹ the Commission dedicates ample space to the application of the EFD to scenarios in which a network operator refuses access to potential competitors. However, the restrictive approach towards the EFT adopted by the ECJ in its *Bronner* judgment¹⁰ may make it necessary to review the principles set out by the Commission in its Access Notice, and may draw attention to both the sector-specific access regime in the new regulatory framework and the complex relationship of the latter with EU competition rules.

This chapter reviews the conditions under which access restrictions to essential facilities may constitute an abuse of a dominant position in violation of Article 82 EC, in light of the Access Notice, the decisional practice of the Commission, and the case law of the ECJ and CFI.

2. The Essential Facilities Doctrine in US antitrust law

2.1 Introduction

As mentioned above, the EFD originated in US antitrust law, in which it addresses a particular type of refusal to deal under the Sherman Act.¹¹ It is therefore useful to retrace the development of the doctrine in US law before attempting an analysis of its application in EU competition law.

In *United States v. Colgate & Co.*,¹² the Supreme Court held that in the absence of any purpose to create or maintain a monopoly, a private trader is free to choose the parties with whom he will deal. As a consequence, US

⁹ See Ch.2, fn.100

¹⁰ Case C-7/97, *Oscar Bronner GmbH & Co KG v. Mediaprint*, [1998] ECR I-7791

¹¹ US antitrust law consists of several acts, namely the Sherman Act (Act of July 2, 1890, Chap.647, 26 Stat.209, as amended, 15 U.S.C., Sec.1-t), the Clayton Act (Act of October 15, 1914 Chap.323, 38 Stat.730, 15 U.S.C., Sec.12-27) and the Federal Trade Commission Act (Act of September 26, 1914, Cap.311, 38, Stat.717-721, 15 U.S.C., Sec.41-58). In the above context, the Sherman Act is of primary importance.

¹² 250 US 300, 39 S Ct.465 [1919]

courts have been generally reluctant to condemn refusals to deal. However, two exceptions to the *Colgate* principle have been established in US case law which might be referred to as the “intent test”¹³ and the “monopoly leveraging test”¹⁴. The former refers to cases in which the refusal was intended to eliminate competition in the monopolized market without any business justification. The latter deals with situations in which the monopolist uses his power in one market to gain a competitive advantage in a vertically related market. The main difference between the two tests is that in the “intent test”, the focal point of inquiry is the market in which the defendant has monopoly power, whereas the “leveraging test” focuses on the related market.¹⁵

US courts have evidently been prepared to make an exception to the *Colgate* principle whenever an essential facility was at issue.¹⁶ In contrast to the intent doctrine, the so-called EFD seems to focus on more objective factors, by shifting the focus of inquiry onto the mere existence of a bottleneck facility.¹⁷ However, although several Supreme Court decisions have been quoted in support of the existence of an EFD, since none of those judgments expressly refers to an EFD, the existence of this doctrine is only supported by implication.¹⁸ An EFD has been explicitly adopted, but only by lower courts. Commentators cannot agree concerning which US cases actually illustrate the scope of application of any EFD.¹⁹

¹³Jones/Suffrin, p.387

¹⁴ibid.

¹⁵Hancher, p. 1302

¹⁶There is a dispute in US antitrust law whether the essential facilities doctrine should be regarded as a mere variant of the classic *Colgate* exceptions, or whether it constitutes an independent principle. See: L. Hancher (1999) 36 CMLRev 1289; P. Areeda, Essential Facilities: An epiphemeral in need of limiting principles, (1990) Antitrust LJ 841

¹⁷Larouche, (Oxford 2000), p. 175

¹⁸In *AT&T Corp. et al v. Iowa Utilities Board et al.* (Supreme Court 25 Jan. 1999) Justice Breyer calls it “an antitrust doctrine that this court has never adopted”

¹⁹G.J. Werden, The law and economics of the essential facilities doctrine, (1987) St. Louis University Law Journal, vol. 32, no.2, 433,p.441

2.2 Supreme Court cases

2.2.1 Horizontal combination cases: Concerted action in violation of S.1 Sherman Act

The earliest two cases usually cited by US commentators in support of the EFD concerned multifirm combinations, in which several competitors jointly controlled an essential facility. According to Gerber, the courts are more willing to impose a duty to deal in these cases: as the *Colgate* rule applies only to unilateral action by monopolists, courts typically dispense with the intent requirement for cases of concerted action.²⁰

The origin of the EFD is often traced back to the 1912 Supreme Court decision in *US v. Terminal Railroad Association*.²¹ The defendant railroad association's members controlled most of the railways of the city of St. Louis, and controlled the only possible railway crossings over the Mississippi. The Supreme Court held that it was improper for Terminal Railroad Association to deny their competitors access to the only existing railway crossings, as it was geographically and economically impossible for its competitors to build an alternative railway bridge.²² As access to the railway crossings was, therefore, essential for the competitors to be able to compete, the Court required the defendant association to admit non-member competitors to the association. The Court therefore considered the only railway crossing in St. Louis to be an "essential facility", although that precise term was not used by the Court.

Another case in this context was *Associated Press v. United States*.²³ The decision of the Supreme Court met with severe criticism, particularly as it extended the application of the EFD, from cases dealing with the efficient use of purely physical infrastructure to a case concerning an information-

²⁰D.J. Gerber, Rethinking the monopolist's duty to deal: a legal and economic critique of the doctrine of "essential facilities", (1998) 74 Virginia Law Review 1069, p.1078

²¹224 U.S. 383 [1912]

²²ibid. para. 397: "The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company."

²³326 U.S.1 [1945]

providing facility.²⁴ In the telecommunications sector, competitors do not only require access to the incumbents' infrastructure, but also to information concerning, for example, customers and numbers. *Associated Press* concerned an association of newspapers which collected news for members of the association. However, it prohibited members from selling news to non-members. New members could join easily as long as they were not competitors. The Supreme Court held that Associated Press had violated S.1 of the Sherman Act by discriminating against competitors in its admission policy. Yet the court did not say that Associated Press had to admit everyone. The court put particular emphasis on the concerted nature of the discrimination:

"Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible - the collective power of an unlawful combination." (emphasis added)²⁵

An interesting aspect of this case is that the Court required Associated Press to deal. Although the information service provided by it was not regarded as 'essential'; the court only held that "the exclusive right to publish news in a given field, furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals."²⁶

Justice Frankfurter's concurring opinion offers the only clear support for the EFD. Frankfurter's use of the EFD compared Associated Press to a public utility, a business infused with the public interest in a free press in a democratic society ("the need for the maximum flow of information and opinion to preserve our democracy and our Constitution").²⁷ The remaining Justices expressly disclaimed Frankfurter's public utility rationale for the opinion. Whilst the opinion has been regarded as adopting an "exceedingly

²⁴ J.S. Venit/ J.J.Kallaugher, The essential facilities doctrine: A comparative approach, (1994) Fordham Corp. Law Inst., 315,p. 336 ff.

²⁵ 326 U.S.1,15 (1945)

²⁶ *ibid*, para. 26

²⁷ *ibid*, para.29

limited” approach,²⁸ some commentators regard it as an interesting approach to invoking the EFD.²⁹

2.2.2. Single firm conduct in violation of S.2 Sherman Act

*Otter Tail Power Co. v. United States*³⁰ was the first case, quoted in support of an EFD in US law, which concerned a unilateral refusal to deal. Areeda provides a list of arguments why a unilateral refusal to deal should be treated differently from the above-mentioned concerted action in *Terminal Railroads*³¹ and *Associated Press*.³² First, he points out that concerted action is the exception, whereas single firm action is the rule. It should not be possible to force any firm to share one of its assets with a competitor simply because it might be called an “essential facility”. Furthermore, in cases of concerted refusal to deal, access terms are defined more easily and the refusal is therefore easier to remedy. In addition, the remedy in concerted action cases is a ‘once-and-for-all’ remedy, which neither requires constant control nor the rationing of an existing resource. Finally, the mere fact that competitors have taken concerted action in the first place might be an indication of the essentiality of their venture, as it implies not only its importance but also that it is beyond the individual capacity of the collaborators.³³

This is why most US courts limit the application of the EFD, in cases concerning unilateral action, to those which involve firms that compete on a lower level than the plaintiff. In such cases, there is a danger that the monopolist may use its power in one market to gain an advantage in another.³⁴ Courts usually permit unilateral refusal by a defendant who does not compete with the plaintiff in an ancillary market.³⁵ The application of the

²⁸ Areeda, p.842

²⁹ Bavasso (YEL 2000) p. 72; Soma/Forkner/Jumps, p.586

³⁰ 410 U.S.366 [1973]

³¹ supra n.21

³² supra n.23

³³ Areeda, p. 842

³⁴ The Supreme Court first proscribed such “leveraging” in *United States v. Griffith* (334 U.S.100), declaring that “the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.” (at para. 107)

³⁵ Gerber, p.1076, see for example: *Official Airline Guides* (630 F.2d at920)

EFD to single firm conduct has to take notice of the conduct requirement necessary to constitute monopolization under s.2 Sherman Act.³⁶

In *United States v. Grinnel Corporation*³⁷ it was held that:

“the offence of monopoly under Sec.2 Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of (monopoly) power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident.”

Monopolization, under S.2 Sherman Act, requires some element of impropriety in the achievement or maintenance of monopoly power. This is usually found in conduct that excludes a rival (so-called “exclusionary conduct”).³⁸

In *Otter Tail*³⁹ the plaintiffs were municipalities which asked Otter to sell electricity wholesale or, alternatively, to carry electricity bought from other suppliers over its network, so that they could provide local distribution of electric power to their residents. Otter refused to do so. The Supreme Court considered Otter’s refusal to supply to be a violation of S.2 Sherman Act and held that “the Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.”⁴⁰ It ordered Otter to distribute power over its grid, holding that its actions “had the purpose of delaying and preventing the establishment of municipal electricity systems.”⁴¹ It had used its monopoly power to foreclose competition and to gain a competitive advantage (the *Griffith* formula⁴²).

Therefore, since *Otter Tail*, one of the main criteria for the application of the EFD can be seen in the danger of the monopolization of an ancillary market.⁴³ However, the language in the case suggests that it was purely

³⁶Section 2 Sherman Act reads:

“Every person, who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.” (15 U.S.C.a 2 (1997))

³⁷384 US 563 (1966)

³⁸Areeda, p.842

³⁹supra n.30

⁴⁰ibid, para. 130

⁴¹ibid, para. 379

⁴²supra n. 34

⁴³A.Kezcsbom/ A.V.Goldmann, No shortcut to antitrust analysis: the twisted journey of the essential facilities doctrine, (1996) 1 Columbia Business Law Review 1, p.6

decided as a case of monopolization and the order of distribution can be seen as a logical consequence thereof. Although it has been referred to as an essential facilities case,⁴⁴ the Court treated the essential facility only as a tool by which the power company engaged in predatory behaviour.⁴⁵

However, some commentators suggest that *Otter Tail* cannot be seen as establishing a general duty to deal. The unique circumstances surrounding the case provide a premise for this argument. Not only was Otter a natural monopolist, but also the conditions in the distribution market were already regulated by federal law. Otter may, therefore, have evaded that regulation, to the prejudice of consumers. As there was already a regulatory agency to supervise prices, "the Court could airily require Otter Tail to deal but never burden itself with the details."⁴⁶

*Aspen Skiing*⁴⁷ can be seen as offering even stronger support for imposing a duty to deal on a monopolist who competes with the plaintiff on an ancillary market.⁴⁸ It concerned a case in which the owner of three ski mountains, Aspen Highlands Skiing Corp., refused to continue a cooperation with the plaintiff, owner of one ski mountain, over selling a joint lift ticket.

The Supreme Court expressly stated that it was not going to address the issue of the essential facilities doctrine.⁴⁹ It solely relied on its previous case law within the framework of the intent theory, by holding that the defendant had acted with anticompetitive purpose and therefore violated S.2 Sherman Act. It said that there was no absolute duty to deal, but refusals to deal may have "evidentiary significance".⁵⁰ If it was found that as the defendant acted "with exclusionary or anticompetitive purpose or effect"⁵¹ it may be obliged to deal with the plaintiff. Areeda criticises this verdict as too far-reaching: he

⁴⁴see eg. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 n.13 (10th Cir.1984), 472 U.S. 585 [1985]

⁴⁵Gerber, p.1080; D.E. Troy, Unclogging the bottleneck: A new essential facility doctrine, (1983) 83 Columbia Law Review, 441,450 ; other: Werden, p.441

⁴⁶Areeda, p. 847; also M. Furse, The essential facilities doctrine in Community law, (1995) 8 ECLR 469,470

⁴⁷*Aspen Skiing Co. v. Aspen Highland Skiing Corp.*,472 U.S. 585 [1985]

⁴⁸Gerber, p.1081

⁴⁹supra n. 47, at 611

The Court of Appeals for the 10th Circuit had found in favour of the plaintiff on two grounds:

(1) the multimountain ticket was an essential facility which the defendant was obliged to share

(2) there was sufficient evidence that the defendant intended to create or maintain a monopoly

⁵⁰supra n. 47, at 601

⁵¹ibid. at 603

claims the reason to refuse to deal is usually that the business wants to improve its position on the market place, which means to exclude the competitor in some sense, and asks “[w]ould that be enough to support a monopolization verdict?”⁵²

In a later case, based on *Aspen*, the Supreme Court held that “...if *Aspen* stands for any principle that goes beyond its unusual facts, it is, that a monopolist may be guilty of monopolisation if it refuses to cooperate with a competitor where such cooperation is indispensable to effective competition...”⁵³

However, the Court stressed that there was no duty to deal where the defendant could show a “legitimate business purpose” for the refusal to deal.⁵⁴ “This shows that a monopolist may sometimes refuse to share its property, but the Court did not elaborate further”.⁵⁵

2.3 Lower court cases

As mentioned above, so far it has only been the lower US courts which have expressly referred to the term “essential facilities doctrine”.⁵⁶ It has been maintained by commentators that the EFD has been an attempt by lower courts to “make sense of the Supreme Court precedent(s)...for analysing unilateral refusals to deal under section 2.”⁵⁷

The term ‘EFD’ was first used⁵⁸ in *Hecht v. Pro Football Inc.*,⁵⁹ where the court held that access to the Robert F. Kennedy Stadium in Washington was essential to the operation of a professional football team. Recognizing the EFD and referring to its fundamental principles, the court found that there

⁵² Areeda, p. 841

⁵³ *Olympia v. Western Union Telegraph*, 480 U.S.934 [1987]

⁵⁴ *supra* n.47, at 608-10

⁵⁵ B. Doherty, Just what are essential facilities? (2001) 38 C.M.L.Rev.397, p.401

⁵⁶ Alternatively also referred to as “bottleneck principle”, (Troy, p. 441)

⁵⁷ K.L. Glazer / A.B. Lipsky, Unilateral refusals to deal under Section 2 of the Sherman Act, (1995) 63 Antitrust Law Journal 749, p.753

⁵⁸ *Venit / Kallaugher*, 319 ftn.12

⁵⁹ 570 F.2d 982, 992-993 (DC Cir 1977) cert.den. 436 US 956 [1978]. The judgment contains a definition of EFD by Sullivan. “If a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom or restriction of scale it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.” (992)

were no reasonable alternatives, the stadium could not easily be duplicated by potential competitors, and there was sufficient capacity for an order of access to be reasonable. It was stated that:

“To be ‘essential’ a facility need not be indispensable; it is sufficient if the duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap in potential market entrants.”⁶⁰

The most commonly-quoted definition of the EFD in US case law can be found in the 1983 case of *MCI Communications Corp. v. AT&T*,⁶¹ a decision in the field of telecommunications, concerning interconnection. The case concerned AT&T's refusal to interconnect MCI with their nation-wide telephone network, thus limiting MCI's ability to compete in the long-distance market.

The Court of Appeals, 7th Circuit, expressly based its decision on the EFD, holding that the decisive factor was the transfer of market power from the monopolized market to an ancillary, competitive market:

“A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a ‘bottleneck’) can extend monopoly power from one stage of production to another, and from one market into another. Thus the antitrust laws have imposed on firms controlling an essential facility the obligation of making the facility available on non-discriminatory terms.”⁶²

Famously, the Court identified four criteria necessary to establish liability under the EFD:

- (1) control of the essential facility by a monopolist;
- (2) a competitor's inability practically or reasonably to duplicate the essential facility;
- (3) the denial of the use of the facility to a competitor; and
- (4) the feasibility of providing the facility⁶³.

The Court stated that the fundamental criterion for a facility to be essential is that the potential competitor is not able to duplicate it, both in physical and economic terms. With regard to the economic feasibility of duplication, it was

⁶⁰supra n. 59, at 992.

⁶¹708 F.2d 1081, 1132 (7th Cir.1982), cert.denied, 464 U.S. 891 [1983]

⁶²ibid., at para.31

⁶³ibid.

held, in another case, that: “(a)s the word ‘essential’ indicates, a plaintiff must show more than inconvenience or some economic loss; he must show that an alternative to the facility is not feasible.”⁶⁴

The court emphasized that there may be legitimate reasons to deny access to an essential facility, but could not find any in the present case:

“MCI produced sufficient evidence at trial for the jury to conclude that it was technically and economically feasible for AT&T to have provided the requested interconnections, and that AT&T’s refusal to do so constituted an act of monopolization.”⁶⁵

Since *MCI*, the doctrine has been applied in a variety of cases by the lower US courts, often widening the application of the EFD to an appreciable extent.⁶⁶ Such extensive application of the EFD has been widely criticised,⁶⁷ but it seems that the Supreme Court is reluctant to intervene and “will let the lower courts muddle on”.⁶⁸

2.4 Telecommunications cases

The liberalization of the telecommunications sector in the US commenced with the break-up of AT&T in 1984, and was followed by the adoption of the 1996 Telecommunications Act. Any further analysis of this process, however, would go beyond the scope of this thesis.⁶⁹

However, with regard to the application of the EFD in telecommunications cases, *AT&T Corp. v. Iowa Utilities Board*⁷⁰ is interesting. The Supreme Court was asked to interpret certain provisions of the 1996

⁶⁴ *Twin Labs v. Weider Health & Fitness*, 900 F.2d 566, 570 (2nd Circ, 1990)

⁶⁵ *supra* n.233, para.33

⁶⁶ See e.g. *Twin Laboratories Inc v. Weider Health & Fitness*, 900 F.2d 566 (2nd Circ, 1990); *Jefferson Parish Hospital District No.2 c. Hyde*, 466 U.S.2,80 L.Ed.2d 2,104 S.Ct.1551 (1984); *Florida Fuels Inc. v. Belcher Oil Co.* 717 F.Supp.1528 (SD Fla.1989)

⁶⁷ See Areeda who suggests further limitations of the EFD, according to which the following principles should be taken into account: there is no general duty to share; no-one should be forced to deal unless doing so is likely to substantially improve competition in the market place; and no-one should be forced to deal if that could chill desirable activity. Even when all these conditions are satisfied, denial of access should never per se be unlawful, legitimate business purposes may justify not sharing a facility (p.841)

⁶⁸ Glazer/ Lipsky, pp. 233 -235

⁶⁹ A useful summary can be found in J. Hausman / G. Sidak, A consumer-welfare approach to mandatory unbundling of telecommunications, (1999) *Yale Law Journal*, 417, 426-434

⁷⁰ 525 US 366 [1999]

Telecommunications Act.⁷¹ The Court had to decide, *inter alia*, under which conditions an incumbent telephone company could be compelled to share its network at cost-based rates with its competitors. Both Justice Scalia, in his majority opinion, and Justice Breyer, in his separate opinion, referred to the EFD. Both emphasised the importance of competition law principles in the interpretation of the Telecommunications Act. In particular, Justice Scalia stated that, even in a regulatory context, it was necessary to take into account economic considerations such as supply-substitutability.⁷²

Justice Breyer observed that :

"Although the provision describing which element must be unbundled does not explicitly refer to the analogous "essential facilities" doctrine (an antitrust doctrine that this court has never adopted), the Act in my view, does impose related limits upon the Federal Communications Commission's powers to compel unbundling. In particular I believe that, given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or "unbundled") where a new entrant could compete without the facility, or where practical alternatives to that facility are available."⁷³

He also referred to the two main concerns usually raised in connection with a duty to supply access in the telecommunications industry, namely the huge administrative and social costs that an obligation to share facilities may entail, and the effect such an obligation may have on investment in the sector (concerns also raised in EU legal commentary):

"[A] sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research or labor." He concluded that:

"Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle."⁷⁴

⁷¹Section 251 (d)(2) of the 1996 Telecommunications Act provides that: "In determining what network elements should be made available for purposes of subsection C (3) of this section, the Commission shall consider at a minimum, whether: (A) access to such network elements as are proprietary is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

⁷²*supra* n. 70, at 742

⁷³*ibid.*, at 753

⁷⁴*ibid.*, at 754

These considerations should be taken into account when applying the EFD to the European telecommunications markets. As Bavasso put it:

“This statement expresses in clear, lucid and powerful terms a concern that, on the other side of the Atlantic, should guide the debate over essential facilities in communications and the importance of consumer welfare in regulation.”⁷⁵

Another very recent case concerning the application of the EFD in the area of telecommunications is *Verizon Communications v. Trinko*,⁷⁶ in which the Supreme Court repeated and clarified its position concerning a duty to deal and the EFD.

The facts in *Verizon Communications* can be summarized as follows: New entrants into the US telephone industry benefited from detailed federal regulations requiring “incumbent” carriers to share their networks. Rates charged for access had to be reasonable, and separate pieces of the incumbent’s network had to be offered “unbundled”. One of the incumbents (Verizon) had been subject to fines and to regulatory orders as a remedy for certain violations of those rules. Trinko, a law firm suing in the capacity of a customer for telephone services, alleged that: “Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive Local Exchange Carriers (LECs), thus impeding the competitive LECs’ ability to enter and compete in the market for telephone services.”⁷⁷ Trinko alleged that Verizon’s conduct constituted “monopolization”, prohibited by S.2 Sherman Act. The trial court dismissed the suit, but on appeal the claim was reinstated for trial on theories of, inter alia, violation of the EFD.

The Supreme Court held that although “under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate S.2” , it has been “very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”⁷⁸ The Court referred to its earlier decision in *Aspen Skiing*⁷⁹ and characterised that

⁷⁵Bavasso (YEL 2000) 84

⁷⁶*Verizon Communications, Inc. V. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, 540 U.S. (January 13, 2004)

⁷⁷*ibid.*, at 4

⁷⁸*ibid.*, at 8

⁷⁹*supra* n.47

case as being “at or near the boundary of S.2 liability”.⁸⁰ There, the Court “found significance in the defendant’s decision to cease participation in a cooperative venture” because “[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end”.⁸¹ By contrast, the Trinko complaint:

“does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant’s prior conduct sheds no light upon the motivation of its refusal to deal - upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice.”⁸²

The Supreme Court seems to rely thereby on the doctrine of intent.

The Court distinguishes *Verizon Communications* from the earlier cases of *Aspen Skiing*⁸³ and *Otter Tail*⁸⁴ by observing that, in the present case, “the services allegedly withheld are not otherwise marketed or available to the public”.⁸⁵ In *Aspen Skiing*, by contrast:

“what the defendant refused to provide to its competitor was a product that it already sold at retail...Similarly, in *Otter Tail Power Co. v. United States*...the defendant was already in the business of providing a service to certain customers.”⁸⁶

The Court concluded “that Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedent.”⁸⁷ The Court stated that “[t]his conclusion would be unchanged even if we considered to be established law the “essential facilities” doctrine crafted by some lower courts...”⁸⁸. The Court refused either “to recognize or to repudiate” the “essential facilities doctrine” because, according to the Court, the Trinko complaint failed to allege all the elements of such a claim.⁸⁹ An “essential facilities” claim requires “unavailability of access to the ‘essential facilities’”, whereas in the

⁸⁰supra n.76, at 9

⁸¹ibid.

⁸²ibid.

⁸³supra n.47

⁸⁴supra n.30

⁸⁵supra n.76., at 10

⁸⁶ibid.

⁸⁷ibid., at 11

⁸⁸ibid.

⁸⁹ibid.

circumstances of *Verizon Communications* “[t]he 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access.”⁹⁰ The Court concluded by saying that “essential facility claims should...be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”⁹¹

Again, the Supreme Court refused to endorse the EFD. The Court previously declined to uphold a verdict on this basis in *Aspen Skiing*⁹² and Justice Breyer pointedly noted the doctrine’s lack of Supreme Court endorsement in the above-discussed decision in *AT&T Corp. v. Iowa Utilities Board*.⁹³ In addition, in *Verizon Communications*, the Court did not merely seem to sidestep the doctrine as in the previous two decisions but expressed strong reservations, in particular concerning the difficulty of finding a balance between the fundamental antitrust concept of independence of competitors and the concept of enforced sharing of assets:

“Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”⁹⁴

The Court also emphasized the relative institutional superiority of administrative agencies over antitrust courts, when it comes to regulating in a timely fashion and at the level of detail required for effective intervention in a fast-moving industry such as telecommunications.

2.5 Conclusion

The question is whether it can be concluded from the above that there is an independent concept of EFD in US antitrust law, particularly bearing in mind the fact that the US Supreme Court has never explicitly endorsed the doctrine as such. The Supreme Court decisions commonly quoted as a support of an essential facilities concept in US antitrust law deal, above all, with the

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *supra* n. 47

⁹³ *supra* n. 70

⁹⁴ *supra* n. 76., at 8

interpretation of monopolization under Sec.2 Sherman Act. Indeed, more recent case-law seems to indicate a return to past principles such as the intent test.⁹⁵ However, examples can also be found in more recent case-law which point to a perception of the EFD as an independent legal concept: For example in *Alaska Airlines v. United Airlines et.al*⁹⁶ the Court held that “Stated most generally, the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”

In some cases, the EFD seems to be regarded as a mere variant of the classic *Colgate*⁹⁷ exceptions, rather than an independent concept. For example, in a case in the telecommunications sector, *Southern Pacific Communications Co. v. American Telephone and Telegraph*,⁹⁸ the court actually examined the elements of an EFD established in *MCI*,⁹⁹ but based its decision on the anticompetitive intent - or lack thereof - of the defendant undertaking.

It seems, therefore, that not even US case law points unequivocally to the EFD as an independent legal concept. Areeda refers to it as the “so-called” essential facilities doctrine:

“so-called because most Supreme Court cases invoked in support do not speak of it and can be explained without reference to it. Indeed the cases support the doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival.”¹⁰⁰

However, there is agreement that, if there is an independent concept of an EFD, this should be applied as narrowly as possible, as it might have a significant effect on innovation in a market economy.¹⁰¹

The Supreme Court’s deep scepticism of the EFD is the opposite of the reception given to the doctrine in Europe: the perception of the EFD, in

⁹⁵For a number of case examples ,see M. Holzhaeuser, *Essential Facilities in der Telekommunikation* ,Beck 2001, p.178, fn.798

⁹⁶948 F.2d 536 (9th Circ 1991)

⁹⁷supra n.12

⁹⁸740 F.2d 980 (DC 1984)

⁹⁹supra n.61

¹⁰⁰Areeda, p. 841

¹⁰¹ibid., p.852 ; Werden ,p.479

particular on the part of the European Commission, seems to be far more positive. However, the ECJ, in its recent ruling in *Bronner*,¹⁰² has tried to curb the application of the EFD significantly.

3. The development of an Essential Facilities Doctrine in EC law

The question is one of whether, and to what extent, the EFD principles can be applied in EC competition law. In EC competition law the development of the EFD is necessarily based on the interpretation of the existing legislative provisions and the case law concerning abuses of a dominant position under Article 82 EC.¹⁰³ Pursuant to Article 82 (b) EC, an abuse of a dominant position may consist of “limiting production, markets or technical development to the prejudice of consumers”. This provision has generally been held to cover refusals by dominant undertakings to supply a customer or competitor.¹⁰⁴ In EC competition law, the EFD is often traced back to a number of decisions of the ECJ dealing with refusal to deal with or to supply a competitor.

There is one main difference between Article 82 EC and S.2 Sherman Act. Whereas S.2 focuses on the manner in which a firm acquires, expands or maintains monopoly power, the focus of Article 82 EC is on the *abuse* of a dominant position. Therefore, S.2 sanctions the mere intention to gain a dominant position with inappropriate means, whereas the application of Article 82 EC presupposes the existence of a dominant position.¹⁰⁵ However, once an undertaking has achieved a dominant position, it will be subject to fairly close scrutiny for any abuse. In US law the EFD is construed as an

¹⁰²supra n.10

¹⁰³Article 82 EC provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States...

¹⁰⁴R.Whish, *Competition Law*, (London, 2001),p. 614

¹⁰⁵C. Koenig/S. Loetz, Bedeutung der Essential facilities- Doktrin für den Zugang zu Netzinfrastrukturen im europäischen Telekommunikationsrecht, (2000) 9 EWS 377,p. 379

exception to the general principle of freedom to trade, and is therefore narrowly interpreted and applied by the courts.¹⁰⁶ In EC law the EFD has been construed as a special application of the duty to supply, which partially explains why the Community courts have only rarely and only recently referred to the EFD.¹⁰⁷ Article 82 EC and S.2 Sherman Act go in different, if not opposite directions:

"Principally, US antitrust law proscribes only that which artificially lowers output and raises prices; even a dominant firm has the right to compete hard and may do so even if it excludes competitors. EC competition law, among other things, protects small and middle-sized business firms from unfair exclusions and has a broader sweep against abusive practices."¹⁰⁸

Although the ECJ has never imposed a general duty to supply upon dominant undertakings under Article 82 EC, in cooperation with the Commission it has established that, under certain circumstances, for the sake of competition, the freedom to contract should be limited. Under certain circumstances, the obligations of a dominant undertaking do not only consist of refraining from abusive practice but might extend to a duty to actively promote competition.¹⁰⁹ In 1984, the Commission stated that "as a general principle an objectively unjustifiable refusal to supply by an undertaking holding a dominant position on a market constitutes an infringement of Article 86 (now Art.82 EC)."¹¹⁰ The Commission has been very active in the transport industry, and has cited some of its rulings as "evidence of the determination to act against companies holding dominant positions", aimed at providing undertakings with a "fair chance to develop and sustain the challenge to established carriers."¹¹¹ The impact of this policy is of paramount importance in the telecommunications sector, which has been and still is subject to

¹⁰⁶Venit / Kallaughner, p. 315

¹⁰⁷See, eg. Jones / Suffrin, p.386; A. Capobianco, The essential facility doctrine: Similarities and differences between the American and the European approach, (2001) 26(6) E.L.Rev. 548,p.550. For Temple Lang, who does not distinguish between EFD cases and refusal to supply cases, the EFD "may merely be a useful label for some types of cases rather than an analytical tool" (p.437) and therefore "[w]hat the Commission now calls essential facility cases were simply merged with what was regarded as the general class of cases in which dominant companies have a duty to supply..." (J. Temple Lang, Defining legitimate competition: Companies' duties to supply competitors and access to essential facilities, (1994) 18 Fordham Int. L.J. 437,p.446)

¹⁰⁸E. Fox, Toward world antitrust and market access, (1997) 91 AJIL 1, 12

¹⁰⁹AG Opinion in *Bronner*, supra n.182

¹¹⁰13th Report on Competition Policy (1984), p.157

¹¹¹22nd Report on Competition Policy (1992), p. 218

liberalization, and in which new technology continuously creates new markets which are closely related to each other.¹¹²

An underlying theme in these cases on refusal to supply has been the notion that a dominant undertaking should not use its dominance in one market to strengthen its position and eliminate competition in a related market - so-called "monopoly leveraging".¹¹³ This has caused difficulties for companies trying to integrate vertically, or simply trying to operate on a downstream market, and has laid the foundations for the EFD in EC law.

The following outline of EC case law will start with the main EC cases on unilateral refusal to supply and will then lead to the definition of "essential facilities" in the decisions of the Commission as well as in the judgments of the ECJ.

The leading case in this area is *Commercial Solvents*,¹¹⁴ which is also widely regarded as the foundation of the EFD in EC law.¹¹⁵ In this case, Commercial Solvents refused to continue to supply an Italian subsidiary, Zoja, with a raw material necessary for the production of an anti-TB drug. It tried to justify its refusal with its intention to become active in the downstream market for the derivative drug itself. The ECJ held that:

"...an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86."¹¹⁶

¹¹²Bavasso, (YEL2000), p. 65

¹¹³See, eg. Case 311/84, *Centre Belge d'Etudes du Marché-Télémarketing v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA*, [1985] ECR 3261 ; see also : N.T. Nikolinaikos, Access agreements in the telecommunications sector - Refusal to supply and the essential facilities doctrine under EC competition law, (1999) 20(8) E.C.L.R. 399, p.400 ; other Doherty, who distinguishes between refusal to supply cases and "extension of monopoly" cases, however he concedes that "this category of cases can overlap with the 'refusal to sell' cases" (p.413)

¹¹⁴Cases 6,7/73, *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp.v. Commission*, [1974] ECR 223

¹¹⁵Temple Lang (Fordham Int'l L.J., 1994) p.438, Venit/ Kallaugher p. 315, D. Ridyard, Essential facilities and the obligation to supply competitors under the UK and EC competition law, (1996) 17(8) E.C.L.R. 438, p.438 ; R.F. Subiotto, The right to deal with whom one pleases under EEC competition law: A small contribution to a necessary debate, (1992) 13(6) E.C.L.R. 234, p.23

¹¹⁶supra n.114., para.25

However, the duty to supply in this case did not arise from the fact that the raw material could be regarded as an “essential facility”. The defendants produced expert reports stating that it would have been possible for Zoja to receive the raw material from another manufacturer or to change its production methods so as to produce the raw material itself. However, the ECJ rejected these arguments and stated:

“The question is not whether Zoja, by adapting its installations and its manufacturing processes, would have been able to continue its production...based on other raw materials, but whether Commercial Solvents had a dominant position in the market in the raw material...It is only the presence on the market of a raw material which could be substituted without difficulty...which could invalidate the argument that Commercial Solvents has a dominant position within the meaning of Article 86 (now Article 82 EC).”¹¹⁷

The case of *United Brands*¹¹⁸ also dealt with a refusal to supply an existing customer. United Brands refused to continue to supply Oelsen, one of its distributors/ripeners, because Oelsen had taken part in an advertising and promotion campaign for a rival brand. The ECJ held that United Brands had abused its dominant position on the banana market, and stated that

“an undertaking in a dominant position for the purpose of marketing a product - which cashes in on the reputation of a brand name known to and valued by consumers - cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.”¹¹⁹

This seems to suggest that in *United Brands* the ECJ went further than in *Commercial Solvents*,¹²⁰ as it did not determine whether the refusal to supply would have led to the elimination of Oelsen on the market.¹²¹ However, it acknowledged that United Brand's actions were “designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependent upon the dominant undertaking to stay in business”.¹²²

¹¹⁷ *ibid.*

¹¹⁸ Case 27/76, *United Brands v. Commission*, [1978] ECR 207

¹¹⁹ *ibid.*, para.292

¹²⁰ *supra* n.114

¹²¹ Subiotto, p. 235

¹²² *supra* n118, para.194

Importantly, the ECJ stated that a dominant firm may be justified in refusing to supply in order to protect its commercial interests, but not if “its actual purpose is to strengthen its dominant position and abuse it.”¹²³

However, “even if the possibility of a counter attack is acceptable that attack must still be proportionate to the threat...”¹²⁴ According to Temple Lang, this suggests that the duty to supply a customer or distributor may be less strict than the duty to supply a competitor, as the above formula “would not be appropriate to a refusal to supply a competitor”.¹²⁵

United Brands seems to be the first case in which “essential facilities” were mentioned. The ECJ held that:

“the effect of this withdrawal of supplies was to...discourage [the distributor] from selling bananas under a competing brand name...In this way UBC succeeds in keeping its principal distributor/ripeners within its own marketing network and in preventing its competitors from having access to them, thus denying to such competitors the *essential facility* which they may require in order to ripen their bananas before sale and therefore in fact from having access to the market...” (emphasis added)¹²⁶. Although this seems to indicate that a dominant company commits an abuse if it refuses competitors access to an essential facility, the issue was not discussed in detail. It only arose indirectly from the Commission’s main action for discriminatory pricing.¹²⁷

Both decisions can be interpreted as providing a broad duty to supply by firms in a dominant position. Whish writes: “Dominant firms must therefore be aware that they may not justify any refusal to supply. It is not enough that the refusal was in the firms’ best commercial interests; it must be objectively justified if it is to escape condemnation under Article 86.”¹²⁸

One of the rare cases in which a refusal to supply was considered to be justified is *BP v. Commission*.¹²⁹ The Commission had found BP had acted unlawfully by supplying its regular, long-term customers, instead of occasional customers, when a petrol shortage occurred during the oil crisis in

¹²³ibid., para.189

¹²⁴ibid., para.190

¹²⁵Temple Lang (1994 Fordham Int. L.J.). p.447

¹²⁶supra n.118, para.192

¹²⁷M. Cave / P. Crowther, Competition law approaches to regulating access to utilities: The essential facilities doctrine, (1995) Rivista Internazionale Di Scienze Sociali e Discipline Ausiliarie 141, p.151

¹²⁸Whish, p.619

¹²⁹Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV v. Commission*, [1978] ECR 1513

1974. However, the ECJ annulled the Commission's decision, holding that BP's supply strategy was reasonable in the circumstances. The refusal to supply AEG, which was only an occasional customer, was justified. The ECJ found that there were other sources of supply available:

"..it is clear, thanks to that support and the supply opportunities offered by the market apart from supplies coming from BP, that AEG was able during the crisis to find supplies which, although limited by reasons in particular of general scarcity of products, nevertheless did put it in a position to overcome the difficulties created by the crisis."¹³⁰

The principles established in *Commercial Solvents*¹³¹ and *United Brands*¹³² were later applied by the ECJ in *Telemarketing*.¹³³ This case is of particular interest as it is the first to deal with a refusal to supply an essential *service*.¹³⁴ It also played an important role in the Commission's liberalization of the telecommunications market.¹³⁵

Telemarketing concerned a television broadcaster which would only accept advertisements for telemarketing¹³⁶ on its television station if the phone number used was that of its own subsidiary. The plaintiff could therefore not use its own number. The Court held that

"...an abuse within the meaning of Article 86 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."¹³⁷

¹³⁰ibid., para.42; this is in contrast with the Commission's decision in *Napier Brown v. British Sugar* (OJ L 284/41, 1988) where British Sugar held a monopoly in the production of beet sugar and refused to supply Napier Brown, the largest sugar merchant in the UK. The Commission found in that case that shortages may not be used as a pretext for refusing to deal for unlawful reasons.

¹³¹supra n. 114

¹³²supra n. 118

¹³³supra n.113

¹³⁴Holzhaeuser, p. 183; see also para.26 of the judgment: "that ruling (*Commercial Solvents*) also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market"

¹³⁵M. Naftel Does the European Commission's Telecommunications Access Notice send the correct economic signals to the market?, (1999) 5 Phoenix Center Policy Paper 1,1,p.9

¹³⁶Telemarketing is the provision in television advertisements of the telemarketing company's telephone number enabling viewers to call in orders to obtain more information concerning the products advertised.

¹³⁷supra n113, para.27

For the first time, the Court established an “indispensability” test to a claim by a customer that a facility was essential. Referring to *Commercial Solvents*,¹³⁸ the ECJ held:

“[Commercial Solvents] also applies to the case of an undertaking holding a dominant position in the market in a service which is *indispensable* for the activities of another undertaking on another market...” (emphasis added).¹³⁹ However, *Telemarketing* seems to go further than *Commercial Solvents* as for the first time it deals not with a refusal to supply, but with a refusal of access, therefore invoking the “indispensability” test, which was absent in *Commercial Solvents* and *United Brands*.¹⁴⁰ Also, the Court seemed to be relying less on the behaviour of RTL to establish an abuse, but rather more on structural factors: there had been no previous dealings between RTL and CBM.¹⁴¹

The case of *RTT v./GB-Inno-BM*¹⁴² is interesting for this thesis as it concerns a decision in the telecommunications sector. This case, similar to *Telemarketing*,¹⁴³ does not deal with an actual refusal to supply but rather with an extension of monopoly power to an ancillary market. However, the decision is often referred to in legal literature as an example of the problem of access to facilities in EC law.¹⁴⁴ It also differs from the cases quoted above as it does not deal with the termination of supplies to an existing customer, but with the entrance of a new competitor into the market.¹⁴⁵

The *RTT* case concerned the Belgium telecommunications administration (RTT) which had a legal monopoly on operating the public telecommunications network, as well as the power to adopt specifications and approve its competitors’ products. Citing *Telemarketing*,¹⁴⁶ the ECJ held that:

“an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a

¹³⁸supra n.114

¹³⁹supra n.113, para. 26-27

¹⁴⁰supra n.118

¹⁴¹Larouche, (Oxford 2000), p. 170

¹⁴²Case C-18/88, [1991] ECR I-5973

¹⁴³supra n.113

¹⁴⁴Temple Lang, Forh.Int.p.469, K. Markert, Die Verweigerung des Zugangs zu “wesentlichen Einrichtungen” als Problem der kartellrechtlichen Mißbrauchsaufsicht, (1995) WuW, 560, p.562

¹⁴⁵Nikolinaikos, (ECLR 1999) p.401

¹⁴⁶supra n.113

neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 82 of the Treaty.”¹⁴⁷

Despite the abolition of special and exclusive rights in the telecommunications market, this prohibition will still apply as long as incumbent telecommunications operators remain dominant in those markets that were formerly reserved to them, or in any new developing markets such as the internet service markets.¹⁴⁸ In the EC telecommunications market today, incumbent operators still hold dominant positions in the majority of relevant markets.¹⁴⁹

In its 1998 Access Notice,¹⁵⁰ the Commission announced that it would apply the *Tetra Pak*¹⁵¹ precedent, which concerned closely related horizontal markets, to closely related vertical markets.¹⁵² In *Tetra Pak*, the Court had held that under “special circumstances”, Article 82 EC can be applied to conduct by a dominant undertaking on a distinct, non-dominated market. Accordingly, any unjustified extension of its upstream dominance onto a downstream service market by a dominant network services provider is likely to be prohibited by Article 82 EC.

In *France v. Commission*,¹⁵³ the so-called *Telecommunications Terminal* case, the Court, in analysing the Terminal Equipment Directive¹⁵⁴ (see above) which abolished the exclusive rights of the national telecommunications monopolist to import, sell, put into service and maintain telecommunications terminals, said that the Treaty requires conditions in which competitors have equal chances. These conditions do not exist when one competitor has the power to lay down technical specifications for, and to approve products of, other competitors.¹⁵⁵

The case law of the ECJ on refusal to supply has been severely criticised. One of the main points of criticism is that the Court does not take into account

¹⁴⁷supra n.142, para.19

¹⁴⁸Garzaniti (2003), p.304

¹⁴⁹see Ch.2, fn.149

¹⁵⁰see Ch.2, fn.100

¹⁵¹Case C-333/94P, *Tetra Pak International SA v. Commission*, [1996] ECR I-5951

¹⁵²see Ch.2, fn.100, paras.65-67

¹⁵³see Ch.2, fn.87

¹⁵⁴see Ch.2, fn.33

¹⁵⁵see Ch.2, fn.87, para.55

the effects the refusal to supply has on competition in general and thus on consumer welfare, but rather considers the interests of small and medium-sized undertakings. This seems to indicate that every suppression of competitors *per se* is unlawful under Article 82 EC. As Kauper states: "these decisions come very close to condemning the use of particular means without regard to its ends...The Court of Justice comes close to holding it *prima facie* unlawful because it was a refusal to deal."¹⁵⁶ And Korah points out that "the competition rules are not being used to enable efficient firms to expand at the expense of the less efficient, but to protect smaller and medium-sized firms at the expense of efficient or larger firms...The interest of the consumers, and the economy as a whole, in the encouragement of efficiency by firms of any size, is being subordinated to the interests of smaller traders."¹⁵⁷

4. Access to essential facilities

4.1 The introduction of the EFD into EC competition law by the Commission

The EFD found its way into EC law mainly through the Commission's actions and decisions. However, it appears that the Commission had initially been more cautious than the ECJ in developing a broad duty to supply.¹⁵⁸ For example, it stated that in order for a refusal to sell to be abusive, it should be directed at existing customers and "gravely affect maintenance of conditions of effective competition in the Common Market"¹⁵⁹ or "cause competition to be gravely restricted".¹⁶⁰ In *BBI/Boosey & Hawkes*,¹⁶¹ a case similar to *United Brands*,¹⁶² the Commission even went so far to declare that "there is

¹⁵⁶T.E.Kauper, *Whither Article 86? Observations on excessive prices and refusals to deal*, in Annual Proceedings of the Fordh. Corp.L.I, (1992), 675, 676

¹⁵⁷V.Korah, *An introductory guide to EC competition law and practice*, (Oxford, 1997), p. 106

¹⁵⁸Subiotto, p. 236

¹⁵⁹supra n. 284, at 244

¹⁶⁰Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission*, [1979] ECR 1869, para. 31

¹⁶¹Interim measures [1987] OJ L 286/36, at 19

¹⁶²supra n. 118

no obligation placed on a dominant producer to subsidize competition to itself.”¹⁶³

In more recent decisions, the Commission found that there was a duty to assist competitors in certain circumstances. These decisions did not concern the supply of products but the granting of access to some kind of facility under the control of a dominant undertaking. A large number of these decisions concern the transport sector. However, some of these decisions might prove to be useful precedents in the telecommunications sector, in particular considering the absence of case law concerning access and interconnection in telecommunications under the competition rules.

The Commission is the only European institution which has expressly referred to the term “essential facilities”. It first used the term in its decision in *Sealink/B&I Holyhead*.¹⁶⁴ Nevertheless, proponents of the EFD claim that the doctrine manifested itself in earlier Commission decisions¹⁶⁵ such as *Sabena*¹⁶⁶ and *British Midland/Aer Lingus*.¹⁶⁷ However, none of these decisions rely on the EFD, even implicitly.

In *Sabena*,¹⁶⁸ the Commission found that Sabena’s refusal to grant a competing airline access to its computer reservation system violated Article 82 EC, in particular because the refusal was likely to prevent the competitor from operating on the London-Brussels route. The fact that the Commission considered that such access was of “capital importance...for all companies seeking to operate competitively on the Belgian market”¹⁶⁹ might indicate that the Commission regarded the CRS as an “essential facility”. Nevertheless, the market situation at the time seemed to indicate differently (for example, at least two airlines operating from Brussels were not listed on Sabena’s CRS), and no reference was made to essential facilities when the Commission concluded that Sabena’s conduct was considered abusive, since it “could have resulted in London European abandoning its plan to open a route between Brussels and Luton.”¹⁷⁰ As Larouche said, “...there is no indication that London European *would* of necessity have refrained from flying between

¹⁶³supra n.161, para.19

¹⁶⁴Interim measures [1992], not published in the Official Journal, but in [1992] 5 CMLR 255

¹⁶⁵Temple Lang, (1994 Fordham Int’L.J.), p. 437

¹⁶⁶*London European Sabena*, [1988] OJ L317/47 4 CMLR 662

¹⁶⁷[1992] OJ L96/34

¹⁶⁸supra n.166

¹⁶⁹ibid, para. 26

¹⁷⁰ibid

Brussels and Luton without access to Sabena's CRS, only that it *could* have done so."¹⁷¹

In *British Midland / Aer Lingus*¹⁷² the Commission stated that dominant undertakings should not "withhold facilities which the industry traditionally provides to all other airlines."¹⁷³ The decision concerned a refusal by Aer Lingus to continue to interline¹⁷⁴ with British Midland, when the latter, a strong competitor, began to compete with Aer Lingus on the Dublin-London route. The Commission declared that whether a refusal to interline is unlawful depends on its effect on competition:

"...it would exist in particular when the refusal or withdrawal of interline facilities by a dominant airline is objectively likely to have a significant impact on the other airline's ability to start a new service or sustain an existing service on account of its effects on the other airline's costs and revenue in respect of the service in question, and when the dominant airline cannot give any objective commercial reason for its refusal...other than its wish to avoid helping this particular competitor."¹⁷⁵ In the instant case the Commission could not find any such objective reason. It elaborated that:

"Aer Lingus had not been able to point to efficiencies created by a refusal to interline nor to advance any other persuasive and legitimate business justification for its conduct. Its desire to avoid loss of market share, the circumstance that this is a route of vital importance to the company and that its operating margin is under pressure do not make this a legitimate response to new entry."¹⁷⁶ Again, there was nothing to indicate that interlining was an essential facility. British Midland had begun to operate successfully on the Heathrow-Dublin route even without interlining with Aer Lingus.¹⁷⁷

As mentioned above, in *Sealink/ B&I Holyhead*¹⁷⁸ the Commission used the term "essential facilities" for the first time and defined an essential facility as "a facility or infrastructure without access to which competitors cannot provide

¹⁷¹Larouche,(Oxford, 2000),p. 181 fn. 274

¹⁷²supra n. 167

¹⁷³ibid.,para.35

¹⁷⁴Interlining is an International Air Travel Association (IATA) practice by which almost all airlines agree to issue tickets on behalf of one another so that, for example, one airline issues a ticket for a journey, part of which will be made on another airline. Interlining also allows a passenger to use a ticket issued by one airline for a return journey on another.(ibid at 35, 36)

¹⁷⁵ibid. ,para. 26

¹⁷⁶ibid., para.30

¹⁷⁷Larouche (Oxford 2000),p. 181

¹⁷⁸supra n.164

services to their customers.”¹⁷⁹ The decision dealt with a complaint by B&I, which operated a ferry service out of Holyhead Harbour, against Sealink which was both a car ferry operator and the owner of Holyhead Harbour. Sealink instituted timetable changes to the detriment of B&I and in favour of its own activities. The Commission adopted a decision providing for interim measures, ordering Sealink to return to its previous timetable. The matter never went to a final decision as the dispute was settled. The Commission stated that:

“A dominant undertaking which both owns or controls and itself uses an essential facility...and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 82, if the other conditions of that Article are met ...”¹⁸⁰

As a footnote to the decision shows, this statement was expressly based on the case law of the ECJ: *Commercial Solvents*,¹⁸¹ *Telemarketing*,¹⁸² *Renault*,¹⁸³ *Volvo*,¹⁸⁴ *Magill*¹⁸⁵ and *GB-Inno*.¹⁸⁶

Furse suggests that the above test is more strict than that used in US case law and in *British Midland/Aer Lingus*,¹⁸⁷ as those cases concentrated mainly on the fact that the primary motivation of the defendant had been the detriment of the competitor, whereas such detriment was only a side-effect in *Sealink/B&I Holyhead*.¹⁸⁸

One of the criticisms raised against the decision was that the Commission did not examine whether B&I could have operated its ferry service from an alternative port.¹⁸⁹ Venit and Kallaugher indicate that the case was one of monopoly leveraging, which could have been decided without relying on the EFD. They considered that Sealink was dominant on the market for ferry

¹⁷⁹*ibid.*, para 41

¹⁸⁰*ibid*

¹⁸¹*supra* n.114

¹⁸²*supra* n. 113

¹⁸³Case 53/87, *CICRA v. Renault*, [1988] ECR 6039

¹⁸⁴Case 238/87, *Volvo AB v. Erik Veng*, [1988] ECR 6211

¹⁸⁵Cases C-241 to 241/91P, *RTT&ITP v. Commission (Magill)*, [1995] ECR I-743

¹⁸⁶*supra* n.142

¹⁸⁷*supra* n.167

¹⁸⁸*supra* n164; Furse, p.472

¹⁸⁹Ridyard, p.442

services, and that it had extended that dominance from ferries to harbours.¹⁹⁰ The Commission, however, did not examine whether Sealink was dominant on the ferry market.¹⁹¹

The Commission developed the idea that an owner of an essential facility may have to provide access to it to a competitor in three further decisions concerning ports, *Sea Containers Ltd./Stena Sealink*,¹⁹² *Port of Rodby*¹⁹³ and *Morlaix (Port of Roscoff)*.¹⁹⁴

The *Sealink II* decision (*Sea Containers Ltd./Stena Sealink*¹⁹⁵) concerned a request by Sea Containers to operate a new service from Holyhead Harbour. Sealink refused to grant access to the port under reasonable and non-discriminatory conditions. The Commission followed its first decision, but added that the principle of essential facility applies "when the competitor seeking access to the essential facility is a new entrant into the relevant market."¹⁹⁶

Venit and Kallaugher point to a passage in the decision which seems to expand the doctrine further: "[i]t is the Commission's view that in the circumstances of the present case an independent harbour authority, which would of course have an interest in increasing revenue at the port, would at least have considered whether the interests of existing and proposed users of the port could best be reconciled by a solution involving modest changes in the allocated slot times or in any plans for the development of the harbour."¹⁹⁷ However, this aspect is not found in any of the other Commission's decisions concerning ports, and does therefore not seem to be a necessary part of the Commission's legal analysis.¹⁹⁸

¹⁹⁰Venit / Kallaugher, p.331

¹⁹¹Doherty, p. 415

¹⁹²[1994] OJ L15/8

¹⁹³[1994] OJ L55/52,

¹⁹⁴[1995] 5 CMLR 177

¹⁹⁵supra n. 192

¹⁹⁶ibid., para.67

The Commission referred to the Court's judgement in *Hoffmann-La Roche* (Case 85/76, [1975] ECR 461,541):

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of an undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

¹⁹⁷supra n. 192, para.75

¹⁹⁸Doherty, p.415

In *Port of Rodby*,¹⁹⁹ a decision adopted under Articles 82 EC and 86 (formerly Art. 90) EC, the Commission stated that neither the Danish government's refusal to allow Stena to build a private commercial port near Rodby, nor to allow it to operate from Rodby itself, was a violation of Articles 82 EC and 86 EC. The Commission found the port to be an essential facility as there was no alternative to that port for sea transport from Denmark to Germany. According to the Commission, such a refusal:

"has the effect of eliminating a potential competitor on the Rodby-Puttgarden route and hence of strengthening the joint dominant position of DSB and DB (publicly owned companies) on that route...Thus an undertaking that owns or manages and uses itself an essential facility...and refuses to grant them (the competitors) access to such facility is abusing a dominant position. Consequently, an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a ship owner wishing to operate on the same maritime route access to that facility without infringing Article 86 (now Article 82 EC)."²⁰⁰

As far as an objective justification was concerned, there was no evidence that the port's capacities had been exhausted and Stena was willing to finance any necessary alterations. With regard to the first point, the Commission held that:

"even on a saturated market, an improvement on the quality of products or services offered or a reduction in prices as a result of competition is a definite advantage for consumers; this could lead to an increase in demand which, in the present case, could be met by expanding the port."²⁰¹

This calls into question whether the Commission accepts the lack of capacity as an objective justification for a refusal to grant access to an essential facility.²⁰²

The last of the above-mentioned port decisions of the Commission, *Morlaix*,²⁰³ differs from the others in so far as the defendant, the owner of the

¹⁹⁹supra n.193

²⁰⁰ibid., para.12

²⁰¹ibid., para.16

²⁰²Holzhaeuser, p.192

²⁰³supra n. 364

Port of Roscoff, CCI Morlaix (a French administrative body) did not operate ferries itself. Nevertheless, the Commission found that:

“CCI Morlaix occupies a dominant position in the provision of an essential facility...Its refusal, without objective justification, to grant access to these facilities to a company wishing to compete with a company active in a secondary market constitutes an abuse of its dominant position, even leaving aside any economic interest held by CCI Morlaix in Brittany Ferries.”²⁰⁴

Consequently, the Commission does not only seem to apply the EFD in cases where a dominant undertaking interfered with competition on a secondary market on which it competed itself, but rather sets out more broadly how an undertaking with a statutory monopoly must conduct itself.²⁰⁵

Finally, in *La Poste/SWIFT and GUF*,²⁰⁶ the Commission dealt expressly with the EFD in a case concerning access to a telecommunications network. SWIFT, a union of banks, held a dominant position in Europe on the market for data transmission and data processing services. SWIFT denied other banks access to the concerned telecommunications network. The Commission considered the network to be an essential facility and SWIFT's refusal to grant access to be a violation of Article 82 EC. The Commission's view was that to refuse any entity access to such a network is tantamount to a de facto exclusion from the market for international transfer.²⁰⁷

4.2 Intellectual Property Rights and essential facilities

Although not directly relevant to this thesis, the case law on a duty to licence an IP right is closely linked to that developed on the EFD. As this thesis deals with access to tangible property in general, and access to telecommunications networks in particular, only those aspects of IPR cases that are significant in this respect will be analysed. The ECJ relied on cases involving access to IP rights (in particular *Magill*²⁰⁸) to reach its decision in

²⁰⁴ibid., para.59.

²⁰⁵Jones/Suffrin, p.394

²⁰⁶[1997] OJ C335/3

²⁰⁷Bavasso, (YEL 2000), p. 89

²⁰⁸supra.n.185

Bronner,²⁰⁹ the leading ECJ judgement on essential facilities. *Bronner* is the only ECJ case which deals directly with access to infrastructure (in this case, a newspaper delivery scheme) and is therefore of particular interest in the telecommunications sector. Access to the incumbent operators' infrastructure is essential for new services providers to reach their customers and therefore for the competitiveness of the downstream market. In *Bronner*, the Court and the Advocate General refer in detail to their earlier decision in *Magill*, dealing with the licensing of IP rights. The Commission relied heavily upon *Bronner* in its recent decision in the *IMS Health*²¹⁰ case, also dealing with a duty to licence an IP right.

Although this thesis deals with access to tangible property, the refusal to licence an IP right can play a significant role in the telecommunications sector. The refusal to licence of the holder of an IP right becomes particularly acute when the IP right has become a standard for the industry: this is often the case in the telecommunications sector in which European standardisation institutions create such industrial standards. Therefore, such standardisation of technologies may create a need to obtain a license to this technology.²¹¹

As regards the delicate balance between the duty to give access and property rights, the ECJ held in *Hauer*²¹² that property rights might be limited by EC legislation provided that the limitation responds to a Community objective and the objective cannot be obtained by a less restrictive measure. As Bavasso points out, the situation is easier in the telecoms sector and in particular in the case of access to networks. Requiring the network owner to provide access to the network does not amount to an expropriation. Because of the de-materialized nature of the network, "the right to access is better analysed in terms of fair return for its use rather than in terms of confiscation."²¹³ Due to the inherent differences between tangible property rights and IP rights, the relatively broad duty to supply developed by the

²⁰⁹supra n. 10

²¹⁰Case C-418/01, *IMS Health v. NDC Health*, Judgment of the Court of 29 April 2004 (not yet reported)

²¹¹A. Bartosch, *Essential Facilities: The Access to Telecommunications Infrastructure and Intellectual Property Rights under Article 82 EC*, Chapter 4 in Koenig/Bartosch/Braun, p. 151, for more details on refusal to licence in the telecoms sector, and in particular the mobile communications market, see M. Hyland/J. Dumortier, 'The Ericsson/Qualcomm Dispute and the essential facilities doctrine in the mobile telecoms sector', (1999) CTLR 150-157

²¹²Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1980] ECR 3727

²¹³Bavasso, (YEL 2000), p. 95

Commission and the Community courts was not automatically extended to a general duty to grant a license.

To date, the only time the ECJ has considered a refusal to license to be an abuse under Article 82 EC was in *Magill*.²¹⁴ As mentioned above, this case is of importance for this thesis, as it was relied on by the ECJ in *Bronner*.²¹⁵ The case concerned the Irish and British broadcasters BBC, RTE and ITP, which each respectively held a copyright on their weekly programme listings. Each published a weekly TV guide containing only their own individual weekly programme listings. When Magill, an Irish publisher, started producing a comprehensive weekly TV guide, the three TV companies obtained injunctions against it in national legal proceedings and refused to licence to reproduce their programme information.

In response to a complaint by Magill, the Commission found that the three television stations had abused a dominant position and ordered them to licence the information. The decision was upheld by the CFI, the judgment of which was, in turn, confirmed by the ECJ.

The ECJ emphasised that the mere ownership of an IP right does not as such confer a dominant position.²¹⁶ It stated, however, that the television companies held a de facto monopoly over the information about programmes required by Magill. They constituted the only source of such information for third parties, as they undertook the task of programming.²¹⁷

The ECJ stressed that the exercise of an exclusive right by the proprietor may only in "exceptional circumstances"²¹⁸ involve an abuse under Article 82 EC. Nevertheless, it obliged the three TV companies to license the TV listings to Magill and identified three sets of "exceptional circumstances".

Firstly, there was a potential demand for a comprehensive weekly programme guide, which the three companies did not meet. Viewers were obliged to buy three individual programme guides for each of the respective channels:

".. the appellants - who were, by force of circumstances, the only source of the basic information on programme scheduling which is the indispensable

²¹⁴supra n.185

²¹⁵supra n. 10

²¹⁶supra n.185, para.46

²¹⁷ibid.

²¹⁸ibid., para.50

raw material for compiling a weekly television guides - gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty."²¹⁹

This "new product" aspect is also of some interest for the question of whether competitors should gain access to infrastructure in the telecoms sector. Rapid technological development means that new products could potentially enter the market at any time and improve consumer choice. However, due to the still-dominant position of the incumbent operators, there is a danger that these will foreclose the market to such technological development. This can be seen in the development of broadband in the EU. Incumbents try to keep sole control of the local loop, but are also reluctant to establish broadband services themselves, fearing that these may compete with their established services.

Secondly, the refusal was not justified.²²⁰

Finally, the refusal was regarded as eliminating all competition in the downstream market, as the broadcasters "by their conduct reserved to themselves the secondary market of weekly television guides by excluding all competition on that market".²²¹ This last of the three exceptional circumstances prompted many commentators to state that the ECJ in fact endorsed the EFD, even if it did not mention it.²²²

The judgment met with severe criticism. It was suggested that "Magill proves the truth of the old legal adage that bad facts make bad law".²²³ The copyright in question, in weekly programme listing, was seen as a

²¹⁹ *ibid.*, paras 53-54

²²⁰ *ibid.*, para. 55

²²¹ *ibid.*, para. 56

²²² W. Deselaers, Die "Essential Facilities"-Doktrin im Lichte des Magill-Urteils des EuGH, (1995) *EuZW*, 563, p. 563

²²³ *Naftel*, p. 9

particularly weak IPR.²²⁴ However, the ECJ could do nothing about this, because, as a matter of national law, a national court had already determined that the listings were protected by copyright.²²⁵

The CFI seemed to have broadened²²⁶ or at least refined²²⁷ the conditions set out in *Magill* in its decision in *Ladbroke*.²²⁸ The CFI also seemed to use 'essential facilities' language in the case.²²⁹ Ladbroke wanted to show French horse races live on television in its Belgium betting shops, but the owners of the copyright in the pictures, the French société de courses refused to sell. Ladbroke explicitly referred to *Magill* and argued that the refusal prevented the appearance of a new product on the market. The Commission rejected Ladbroke's complaint, and the CFI confirmed its decision.

The CFI defined the relevant geographic market as Belgium,²³⁰ which meant that the French société de courses had not discriminated against Ladbroke by selling the pictures to bookmakers in Germany and Austria.²³¹ As Ladbroke was not active in the Belgium market it could neither discriminate between operators on the Belgium market, nor was there a danger of it monopolising the Belgium downstream market in horse betting.²³² Distinguishing *Magill*,²³³ the Court observed that Ladbroke was active in the Belgium betting market for which it claimed to need the pictures and that the

²²⁴ see also AG Jacobs in *Bronner*, supra n.10, para. 63

²²⁵ When faced with a similar claim for copyright in telephone directory listings, the US Supreme Court decided that such listings were not worthy of copyright protection (*Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 US 340, 363 (1991))

²²⁶ Korah, V, The interface between intellectual property and antitrust: The European experience, (2002) 69 Antitrust I.J. 801, p. 814

²²⁷ E. Derclaye, Abuses of dominant position and intellectual property rights: A suggestion to reconcile the Community courts case law, (2003) 26(4) World Competition 685, p. 689

²²⁸ Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923

²²⁹ Jones/ Suffrin: „the CFI's judgment was couched in an essential facilities type of terminology." (p.408)

Capobianco goes further in stating that *Ladbroke* was " the first case where the right to access an essential facility was explicitly recognized as part of the European legal order." (p.551)

²³⁰ supra n.228, para. 123

²³¹ *ibid.*, para. 128

²³² *ibid.*, para. 129: „ ... neither the absence of technical barriers to the transmission of French sound and pictures in Belgium nor the fact that the applicant might be regarded , from an overall perspective, as a potential competitor of the *société de courses* is sufficient for the refusal to supply sound and pictures to be regarded as constituting an abuse of a dominant position since the *société de courses themselves are not present in the separate geographical market on which the applicant operates, and, secondly they have not granted any licence to other operators on that market.*"

²³³ supra n.185

owner of the rights itself was not present on that market.²³⁴ This seems to indicate that a refusal to supply does not constitute an abuse if the dominant company is not present on the downstream market for which access to the facility is said to be essential.²³⁵ The same can be said of an owner of telecommunications infrastructure who does not provide telecoms services himself, i.e. is not active in the downstream market. In this scenario, the owner has no interest in reserving the infrastructure to himself and would in fact benefit from sharing it. The CFI added that:

“Even if it were assumed that the presence of the société de courses on the Belgian market in sounds and pictures were not, in this case, a decisive factor for the purposes of applying Article 82 of the Treaty, that provision would not be applicable in this case. The refusal to supply the applicant could not fall within the prohibition laid down by Article 82 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers...”²³⁶

In defining the above test, the CFI went further than *Magill*²³⁷ and broadened the duty to licence an IP right: “...this adds a statement of the essential facilities doctrine to a summary of the *Magill* judgment.”²³⁸ The CFI held that the pictures were not indispensable for Ladbroke to operate on the betting market, as he had entered the betting market and was successfully operating on it without them.²³⁹

4.3 The reaction of the ECJ and CFI to the EFD

*European Night Services (ENS)*²⁴⁰ is another important, non-intellectual-property decision which contains statements concerning an EFD in European

²³⁴supra n. 228., para.130

²³⁵This issue is going to be discussed below

²³⁶supra n.228, para.131

²³⁷supra n.185

²³⁸Doherty, p.410

²³⁹supra n.228, para.132

²⁴⁰Cases T-374-375,384 & 388/94, *European Night Services v.Commission*, [1998] ECR II-3141

antitrust law. In this case the CFI expressly referred to essential facilities. It is of relevance for the application of the EFD in the telecommunications sector as it deals, *inter alia*, with access to infrastructure. The case is based on Article 81 EC. However, the CFI's judgement relies on Article 82 EC case law, in particular the above mentioned *Magill*²⁴¹ and *Ladbroke*.²⁴²

The case concerned a joint venture (ENS) between the main railway companies in the UK, Germany, the Netherlands and France, which wanted to provide overnight rail services between the UK and continental Europe via the Channel Tunnel. The Commission²⁴³ found that the agreement infringed Article 81 (1) EC, but granted an exemption on condition that the companies undertaking the joint venture should provide locomotives, train crews and train paths to their competitors.

The CFI quashed the Commission decision for insufficient reasoning. *Inter alia*, the Commission had failed to perform a thorough analysis of the market in question, and had not supplied adequate reasoning demonstrating that the locomotives and crew were necessary or essential. It was not shown that competitors could not buy them from manufacturers, or rent them.²⁴⁴ The CFI stated that a facility can only be essential if there are no substitutes:

"A product or service cannot be considered necessary or essential unless there is no real or potential substitute.

Consequently, with regard to an agreement ... which falls within Article 85(1) (now Article 81(1)) of the Treaty, the Court considers that neither the parent undertaking nor the joint venture thus set up may be regarded as being in possession of *infrastructure*, products or services which are 'necessary' or 'essential' for entry to the relevant market unless such *infrastructure*, products or services are not 'interchangeable' and unless, by reason of their special characteristics - in particular the prohibitive cost of and/or time reasonably required for reproducing them - there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market." (emphasis added.)²⁴⁵

²⁴¹ *supra* n.185

²⁴² *supra* n.228

²⁴³ [1994] OJ L259/20,

²⁴⁴ *supra* n.240, para.215

²⁴⁵ *ibid.*, paras 208 -209

The first part of the quotation restates previous case law, i.e. *Magill*²⁴⁶ and *Ladbroke*,²⁴⁷ but it elaborates upon this on in the second part. For the first time, the question of how reasonable it would be for the competitor requiring access to recreate its own alternative facility is addressed.²⁴⁸ The test of “interchangeability” seems to refer to the test of the relevant product market. Although it might seem to be unnecessarily confusing to link the test for essentiality with a seemingly unconnected area of competition law (i.e. market definition), this may be regarded as a way for the CFI to state the importance of analysing the economic position of the alleged essential facility before ordering access to it.²⁴⁹ The second part of the test seems to refer to the impossibility of duplicating the facility. The CFI seems to regard this as an objective test, as reflected by the notion “potential competitor”.²⁵⁰ It also sets the threshold for duplication fairly high, as there must be no “viable alternatives”²⁵¹.

The CFI’s approach in *Ladbroke*²⁵² was confirmed by the ECJ in its 1998 *Bronner*²⁵³ judgment. So far, it has been the only case in which the ECJ has had to examine the essential facilities doctrine directly and intensively, as the plaintiff, Bronner, expressly relied on it in the initial proceedings.²⁵⁴ Importantly, for the analysis of access to telecoms infrastructure, the case deals with access to infrastructure in the shape of a newspaper delivery scheme.

The matter arose by way of an Article 234 EC (then 177) reference from the Oberlandesgericht Wien, acting in its capacity as the Austrian Court of First Instance in competition matters (Kartellgericht). The defendant, Mediaprint, the largest national newspaper publisher in Austria, refused to give Bronner, a much smaller publisher, access to its highly developed newspaper delivery scheme. Bronner contended that this constituted an abuse of a dominant position, contrary to Article 82 EC, and claimed in particular that access to the

²⁴⁶supra n. 185

²⁴⁷supra n. 228

²⁴⁸J. Scherer, *Das Bronner-Urteil des EuGH und die Essential facilities - Doktrin im TK-Sektor*, (1999) 6 MMR 315, p. 317

²⁴⁹Furse, p. 472

²⁵⁰supra n. 245

²⁵¹ibid.

²⁵²supra n. 228

²⁵³supra n. 10

²⁵⁴According to Doherty, it is “the case in which the Court of Justice came closest to pronouncing on the existence of an essential facilities doctrine in EC law.”

scheme was essential for it to compete with Mediaprint at a national level. He argued that available alternatives, such as postal delivery or starting his own delivery system, were either not entirely satisfactory or unduly expensive.

The Opinion of Advocate General Jacobs,²⁵⁵ in which he emphasises the need to confine the essential facilities concept within strict limits, is particularly noteworthy. Although the opinions of Advocates General only have persuasive weight in the judgments of the ECJ, the opinion is worth a close review. It contains a thorough analysis of the EFD as applied under US antitrust law and EU Commission decisions.

The Advocate General (AG) did not deal with the issue of dominance in any detail, but considered that the key issue was whether Mediaprint's refusal to allow access to its delivery scheme was an abuse of a dominant position. Bronner had referred extensively to the essential facilities doctrine in submissions to the Court.²⁵⁶ Jacobs explained the doctrine as follows:

"...a company which has a dominant position in the provision of facilities which are essential for the supply of goods or services on another market abuses its dominant position where, without objective justification, it refuses access to those facilities. Thus in certain cases a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities which it has developed."²⁵⁷

The Advocate General observed that although the ECJ had not used the term 'essential facility' in its case law, it had dealt with a number of cases concerning refusal to supply goods or services. He pointed out that the Court had found such a refusal to be an abuse only where "aggravating" circumstances were present. After discussing many of the relevant cases,²⁵⁸ he concluded that

"It is clear from the above rulings that 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

²⁵⁵ Opinion of Advocate General Jacobs delivered on 28 May 1998, *supra* n.10

²⁵⁶ *supra* n.10., para.33

²⁵⁷ *ibid.*, para.34

²⁵⁸ *Commercial Solvents, United Brands, Télémarketing, GB-Inno-BM, Volvo v. Veng, Magill, Ladbroke*, *ibid.* paras.35-42

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."²⁵⁹

After examining the use of the essential facilities doctrine in US law,²⁶⁰ he turned to examine the Commission's decisions on essential facilities. He stated that the Commission had expressly used the term 'essential facilities'²⁶¹ and observed that the term had played an important role in the Commission's decisions on refusal to supply.²⁶² He concluded that:

*"...the Commission considers that refusal of access to an essential facility to a competitor can of itself be an abuse even in absence of other factors, such as tying of sales, discrimination vis-à-vis another independent competitor, discontinuation of supplies to an existing customer or deliberate action to damage a competitor (although it may be noted that in many of the cases with which it has dealt such additional factors are to a greater or lesser extent present)."*²⁶³ (emphasis added.)

After considering the position in the Member States,²⁶⁴ the Advocate General made a number of general observations. First, he stated that the laws of the Member States generally recognize the right to choose one's trading partners and the right to dispose of one's property freely. He added that this right was not to be interfered with lightly.²⁶⁵ Secondly, he pointed out that any competition policy argument for interfering with the freedom of contract calls for "a careful balancing of conflicting considerations".²⁶⁶ He stated that allowing competitors access to essential facilities of dominant firms might

²⁵⁹supra n. 10,para.43

²⁶⁰ibid.,para.47: "The US essential facilities doctrine has developed to require a company with monopoly power to contract with a competitor where five conditions are met. First, an essential facility is controlled by a monopolist. A facility will be regarded as essential when access to it is indispensable in order to compete on the market with the company that controls it...Secondly, a competitor is unable practically or reasonably to duplicate the essential facility. It is not sufficient that duplication would be difficult or expensive, but absolute impossibility is not required. Thirdly, the use of the facility is denied to a competitor. That condition would appear to include the refusal to contract on reasonable terms. Fourthly, it is feasible for the facility to be provided. Fifthly, there is no legitimate business reason for refusing access to the facility. A company in a dominant position which controls an essential facility can justify a refusal to enter a contract for legitimate technical or commercial reasons. It may also be possible to justify a refusal to contract on grounds of efficiency." Doherty observed that the AG seemed to have taken the validity of the doctrine for granted as summarized in *MC/*. (Doherty, p.416)

²⁶¹ibid., para.48

²⁶²ibid.,para.52

²⁶³ibid.,para.50

²⁶⁴ibid.,para.53

²⁶⁵ibid., para.56

²⁶⁶ibid.,para.57

seem to be pro-competitive by enabling competitors to enter the market. However, in the long-term, it might discourage the dominant firms from investing in the facility in the first place as well as discourage competitors from making the effort to duplicate the facility.²⁶⁷

One of the main issues in telecoms policy is whether to support the development of an alternative infrastructure, or whether to promote access by new market entrants to existing infrastructure. Both the 1998 Access Notice²⁶⁸ and the new Access Directive²⁶⁹ seem to favour service competition (i.e. access to existing infrastructure) over the promotion of infrastructure competition. This is in line with certain public policy considerations, such as the protection of the environment. Without question, it will enhance consumer choice, at least in the short term.

Thirdly, AG Jacobs stressed that Article 82 EC existed to protect competition, and ultimately the consumer, not competitors.²⁷⁰ Even the Commission in its 1998 Access Notice agrees that the alleged necessity of an individual competitor for access to upstream facilities should not be sufficient to force access.²⁷¹

The AG added that in assessing conflicting interests, particular care is required where the services or facilities to which access is demanded represent the fruit of substantial investment. He said that this might be particularly true in relation to a refusal to license intellectual property rights. Where such exclusive rights were granted for a limited period, that in itself involved a balancing of the interest in free competition with that of providing an incentive for research and development. Therefore, it was with good reason that the Court has held that a refusal to license does not in itself, in the absence of other factors, constitute an abuse.²⁷²

Having laid down those preconditions which severely curtail the scope of an essential facilities doctrine, AG Jacobs turned to explain the ECJ's judgment in *Magill*,²⁷³ which seemed to have been a departure from previous jurisprudence inasmuch as the copyright owners in that case were obliged to

²⁶⁷ *ibid.*

²⁶⁸ See Ch.2, ftn 100

²⁶⁹ See Ch.2, ftn.115

²⁷⁰ *ibid.*, para.58

²⁷¹ see Ch.2, ftn.100, para. 91(a)

²⁷² *supra* n.10., para.62

²⁷³ *supra* n. 185

license their copyright. He stated that *Magill* was a case with very special circumstances which “wing the balance in favour of an obligation to license”.²⁷⁴

Although the Advocate General seems to accept that in certain circumstances it is justifiable for competition law principles to intervene in the conduct of a dominant undertaking or IP owner, he stressed that such intervention “whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has *a genuine stranglehold on the related market*. (emphasis added)”.²⁷⁵ Such interference would only be justifiable where the facility was “impossible or extremely difficult to duplicate due to physical, geographical or legal constraints” or such duplication “is highly undesirable for reasons of public policy.”²⁷⁶ Cost alone might be a barrier to entry but only if the cost were such as to “deter any prudent undertaking from entering the market.”²⁷⁷ In particular, this may be the case where such costs have been largely paid out of public funds.²⁷⁸ This, as Korah points out, would especially apply to recently deregulated industries, such as in the communications or energy sector. In these cases, the argument that intervention would stifle investment is less strong, as nationalized undertakings are less dependent on financial incentives for investment.²⁷⁹ However, with increasing liberalization and the privatisation of the telecommunications market, the advantages gained by incumbents during the era of monopolisation are disappearing and the question of preserving incentives to invest gains more and more importance.

Turning to the case in hand, the AG stated that Bronner had numerous ways of distributing the newspaper, and his business had even prospered without access to the distribution system. He concluded that there was no obligation on Mediaprint to allow Bronner access to its home delivery network.²⁸⁰ He observed that it had not been established that the level of investment

²⁷⁴supra n. 10, para.63

²⁷⁵ibid.,para.65

²⁷⁶ibid.

²⁷⁷ibid.,para.66

²⁷⁸ibid.

²⁷⁹Korah,p. 14

²⁸⁰supra n.10.,para 67

necessary to set up a nation-wide home delivery system would be such as to deter any entrepreneurial publisher, who was convinced that there was a market for another daily newspaper, from entering the market.²⁸¹

Finally, he added that the requirement to supply would lead the Community and national authorities into detailed regulation of Community markets.²⁸² He therefore concluded that the doctrine should be used with great care and should be restricted to special circumstances, none of which seemed to have been met in the present case.

The judgment of the ECJ was much briefer than the AG's Opinion, but it followed the Opinion's main reasoning. As Naftel puts it: "[i]t can be viewed as an endorsement of the AG's opinion, but given the consensus nature of the ECJ's judgements, it is not surprising that the judgment is rather terse and cryptic at times."²⁸³ The judgment does not explicitly refer to the essential facilities doctrine, except in summarizing the parties' arguments, but rather reformulated the first question referring to it as an issue of refusal to supply. The Court puts the notion "essential facilities" in quotation marks, which leaves it open as to whether the ECJ accepts the doctrine as such.²⁸⁴

Considering its previous decisions in *Commercial Solvents*²⁸⁵ and *Magill*²⁸⁶ the ECJ concluded that for a refusal to grant access to be an abuse, three conditions would have to be met:

- (1) the refusal must be likely to eliminate all competition in the newspaper market on the part of the person requesting the service; and
- (2) the refusal must not be objectively justified; and
- (3) the product in question must be indispensable to carrying on the plaintiff's business, inasmuch as there is "no actual or potential substitute on existence".²⁸⁷

Applying those cumulative conditions, the ECJ rejected Bronner's claim simply on the ground that there were alternatives to the home-delivery of

²⁸¹ *ibid.*, para. 68

²⁸² *ibid.*, para. 69

²⁸³ Naftel, p. 12

²⁸⁴ *ibid.*

²⁸⁵ *supra* n. 114

²⁸⁶ *supra* n. 185

²⁸⁷ *supra* n. 10, para. 41

newspapers, such as delivery by mail or sales in shops or at kiosks, even though other methods of distribution “may be less advantageous”.²⁸⁸

As far as the telecoms sector is concerned, the Commission stated in its Access Notice that there are not yet sufficient alternatives for certain kinds of telecoms infrastructure: “Although...alternative infrastructure may as from 1 July 1996 be used for liberalised services, it will be some time before this is in many cases a satisfactory alternative to the facilities of the incumbent operator. Such alternative infrastructure does not at present offer the same dense geographic coverage as that of the incumbent TO’s network.”²⁸⁹

The ECJ continued in *Bronner* that if actual substitutes were insufficient, it was feasible for the plaintiff to create a delivery system himself. The ECJ held that there were no “technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of a daily newspaper to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme...”²⁹⁰ It was therefore not enough to argue that it was not economically viable for Bronner to duplicate the system because of the small circulation of his newspaper:

“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.”²⁹¹

Therefore, in determining indispensability, the question was whether an undertaking in the position of Mediaprint could be expected to establish a second system, not an undertaking in the position of Bronner.

Commentators have welcomed the fact that the AG emphasized in his Opinion that the function of Article 82 EC was to protect competition in the downstream market, rather than competitors.²⁹² The AG also referred to the economic considerations which make a narrow application of the essential

²⁸⁸ *ibid.*, para.43

²⁸⁹ See Ch.2, fn.100, para.91(a)

²⁹⁰ *supra* n.10, para.44

²⁹¹ *ibid.*, para.46

²⁹² P.Treacy, *Essential facilities - Is the tide turning*, (1998) 19(8) E.C.L.R. 501, p.504; F.Wooldridge, *The essential facilities doctrine and Magill II: The decision of the ECJ in Oscar Bronner*, (1999) 2 I.P.Q. 256, p.264

facilities doctrine indispensable, namely the danger that an over-zealous application of the doctrine would stifle necessary investment. In its judgment, the ECJ did not consider any of those points. However, it interpreted its previous case law in a very restrictive way, and added the new criterion of “indispensability.” Although the judgment did not explicitly accept or reject the essential facilities doctrine²⁹³ (the ECJ confined itself to a traditional “refusal to supply” approach), it can at least be read as correcting the ECJ’s traditionally broader approach to the issue of refusal to deal under Article 82 EC.²⁹⁴ The more restricted conditions which must be established, before a refusal to grant access can be regarded as an abuse, call into question some of the earlier decisions of the Commission regarding either refusal to deal or the application of the essential facilities doctrine. In its decisions in *United Brands*²⁹⁵ and *BP*,²⁹⁶ the Commission did not consider whether there were any substitutes for the goods in question.²⁹⁷ Neither did it consider, in *British Midland*,²⁹⁸ *SABENA*²⁹⁹ nor *Sealink*³⁰⁰, the competitive conditions on the relevant downstream market. The dose of economic reality afforded by the recognition that economies of scale do not automatically indicate an abuse of a dominant position has also been received positively.³⁰¹ This is in contrast to the 1998 Access Notice,³⁰² in which the consideration of economic principles has not been given any priority. According to Hancher, the Commission may need to refine its approach in cases concerning access to telecommunications networks.³⁰³ The test laid down in *Bronner*³⁰⁴ is probably more exacting than that which the Commission had in mind when it included the EFD in the 1998 Access Notice. The conditions put up by the ECJ underline the importance of sector-specific access regulation, which provides more specific and far-reaching access rights than competition law.³⁰⁵ Although the judgment can be seen as a significant contribution to the

²⁹³Doherty, p. 422

²⁹⁴Hancher, p.1304

²⁹⁵supra n. 118

²⁹⁶supra n.129

²⁹⁷Doherty, p.423; Hancher, p. 1304

²⁹⁸supra n. 167

²⁹⁹supra n. 166

³⁰⁰supra n. 164

³⁰¹Naftel,p.13

³⁰²see Ch.2, fn.100

³⁰³Hancher, p.1304.

³⁰⁴supra n. 182

³⁰⁵Scherer,p. 318

clarification of the principles that apply to an essential facilities doctrine, or at least to a duty to supply or license, a large number of questions still remain unanswered.

4.4 An unusual case: *IMS Health*³⁰⁶

IMS Health is another case concerning a refusal to license an Intellectual Property Right. However, it is of particular interest for this thesis as it deals with the so-called “two-market paradigm”, an issue of general importance in EFD cases.

The cases dealt with so far have all been based on a two-tier market-structure: a dominant undertaking uses its position on a primary or upstream market, which in turn has an effect on the competitive structure of a secondary or downstream market. *IMS Health*³⁰⁷ is an unusual case in this respect as it concerns the application of the essential facilities doctrine in the area of intellectual property rights. It is very complex, and only recently decided by the Court of Justice. In the following, only those aspects of the case relevant to this thesis will be discussed.³⁰⁸

IMS Health is the acknowledged world leader in providing pharmaceutical information services. In order to comply with German data protection law, IMS's services in Germany are based on a so-called “1860-brick structure” which divides the whole territory of Germany into artificially designated geographic areas (the so-called ‘bricks’), that are used both to report on and measure sales of individual pharmaceutical products. This brick structure is protected by copyright under German law and has become the de facto

³⁰⁶ *NDC Health/IMS Health*, Interim Measures, Case COMP D/338.044 (July 3, 2001), OJ L059 (February 28, 2002) 18-49; Case T-184/01 R, Order of the President of the Court of First Instance of 10 August 2001: *IMS Health Inc. v. Commission*, [2001] ECR II-2349; Order of the President of the Court of First Instance of 26 October 2001: *IMS Health Inc. v. Commission*, [2001] ECR II-3193; Case C-418/01, *IMS Health v. NDC Health*, Judgment of the Court of 29 April 2004 (not yet reported)

³⁰⁷ *supra* n.210

³⁰⁸ For further details on *IMS Health*, see for example: D. Aitman/ A. Jones: Competition Law and Copyright: Has the Copyright Owner Lost the Ability to Control his Copyright?, EIPR 2004, 26(3), 137; F. Fine, NDS/IMS: A Logical Application of Essential Facilities Doctrine, ECLR 2002, 23(9), 457; D.W.Hull, Competition Law and IP: Compulsory Licensing of IP rights: The ECJ's Judgment in the IMS case, Competition Law Insight 2004, 10 A. Narciso, IMS Health or the Question whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy, I.P.Q.2003, 4, 445

industry standard. IMS refused to license the 1860-brick structure to competitors. The case was launched when, on 3 July 2001, the Commission adopted interim measures requiring IMS to do so.³⁰⁹ At the same time, IMS brought copyright infringement proceedings against NDC in the German courts, because NDC had continued to use the 1860-brick structure. In the course of these proceedings the German court referred a number of questions to the ECJ concerning the extent to which a refusal to license the use of a data bank protected by copyright constituted an infringement of Article 82 EC.

Two points of the Commission decision are of particular interest. First, the Commission considered that it was not necessary for it to show that the refusal to supply had prevented the emergence of a new product. It held that the “1860-brick structure” created by IMS was “essential” as it had become a *de facto* industry standard and there were no actual or potential substitutes for it. In this sense it seems to extend the ECJ’s decision in *Magill*.³¹⁰ There, one of the “exceptional circumstances” used to justify the order to license an intellectual property right was the fact that the refusal would have prevented a new product, for which there was potential consumer demand, from entering the market. The other interesting and heavily disputed point in the Commission’s decision was that it did not consider it necessary to establish that IMS had tried to control a downstream or related market. As mentioned above, all previous relevant case law had dealt with cases involving an upstream as well as a downstream market. Here, NDC requested access to IMS’s IP right, not in order to enter a downstream market, but in order to be able to compete with IMS in the primary market itself. NDC therefore tried to enter the very market which was protected by IMS’s copyright.

The fervently awaited judgement of the ECJ, which was finally delivered on April 29, 2004, does not, against all hopes and expectations, shed much light on the position of the ECJ regarding the recognition of the EFD within EC law. Again, the Court does not use the term at all. The judgment lacks any kind of detailed analysis and seems fully to endorse the opinion of AG

³⁰⁹ *supra* n. 210; The Commission has now withdrawn its decision, following a decision by a German court according to which IMS’s competitors would be able to use a structure similar to the one developed by IMS.

³¹⁰ *Supra* n. 185

Tizzano.³¹¹ Referring to the summary of the *Magill*³¹² judgment made by the Court in *Bronner*,³¹³ it states that three conditions have to be satisfied in order for a refusal to licence to constitute an abuse under Article 82 EC:

“It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative decisions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.”³¹⁴

The Court therefore clarifies that the conditions in *Magill*³¹⁵ should be applied cumulatively. It leaves it to the national courts to decide whether the facility is in fact ‘indispensable’,³¹⁶ i.e. whether in this case the 1860-brick structure constituted an indispensable factor in the downstream supply of German regional pharmaceutical sales data. On these facts, the ECJ reformulated the test: it asked whether the refusal to licence reserved to IMS the market for the supply of pharmaceutical sales data in the Member States concerned, by eliminating all competition on that market.

Regarding the so-called “two-market paradigm”, the ECJ, referring to its judgment in *Bronner*,³¹⁷ held that, for the assessment of whether the refusal to grant access was an abuse, it was necessary to distinguish between an upstream market (in *Bronner* the market for home delivery of daily newspapers) and a (secondary) downstream market (in *Bronner*, the market for daily newspapers itself).³¹⁸ However, the Court then followed points 56 to 59 of the Opinion of AG Tizzano, stating that: “for the purposes of the application of the earlier case-law, it is sufficient that a potential market or even hypothetical market can be identified”.³¹⁹ This means a market in which the inputs in question are not actually independently marketed, but are only

³¹¹For a detailed analysis of AG Tizzano’s Opinion, see M.Domans/D.Ilan, Competition and IP- A health warning for IP owners: The Advocate General’s Opinion in IMS and its implications for compulsory licensing, (2003)11 CLI 12

³¹²supra n.185

³¹³supra n.10

³¹⁴supra 210, para.38

³¹⁵supra n.185

³¹⁶ibid., para29

³¹⁷supra n. 10

³¹⁸supra n. 210, para.42

³¹⁹ibid., para.44

used to monopolize the secondary, downstream market. AG Tizzano points out, for example that in *Magill*³²⁰ the ECJ identified a market for television listings even where these were not marketed independently by the television broadcasters, but merely offered free of charge to certain newspapers. According to the AG such a market can always be identified where:

“(a) the inputs in question are essential (since they cannot be substituted or duplicated) to operate on a given market; (b) there is an actual demand for them on the part of the undertakings seeking to operate on the market for which those inputs are essential.”³²¹

Applied to the facts of *IMS Health*, the AG concluded that the upstream market was the market for access to the brick structure and the downstream market was the market for the sale of market studies.³²² Even if the brick structure was not sold as a separate product, it would be sufficient if it was an indispensable factor in the downstream supply of German regional sales data for pharmaceuticals.

The Court also adopted the same qualification of the ‘new product’ criterion as the AG. A refusal to licence can only be regarded as abusive:

“...where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is potential consumer demand.”³²³

It was then for the Frankfurt District Court to determine the matter based on the facts of the case. In summary, both the AG and the ECJ seem to have confirmed the conditions in *Magill*,³²⁴ with a slight reformulation of the ‘prevention of a new product’ condition. They also made clear that the conditions should be applied in a cumulative manner. Both stated that the application of the EFD requires the existence of two separate markets, but broadened the definition of the upstream market significantly.

This broad definition of the upstream market as including a potential primary market has met with significant criticism. It means that a competitor can

³²⁰supra n. 185

³²¹supra n.210, para.59

³²²ibid., para.60

³²³ibid., para.49

³²⁴supra n. 185

require access to the market which had so far been protected by the IP right. This could have a serious effect on the incentive to invest and innovate, since it deprives the IP owner of his expected reward. Another issue concerns the vague terms “different product” or “new goods or services”, which raise a number of practical questions, and which may lead to a painful process of defining these terms.³²⁵

The judgment also provides yet another example of a divergence between the approaches in the EU and the US in cases involving unilateral infringements. First, the US Supreme Court in *Verizon Communications Inc. v. Trinko*³²⁶ makes it clear that the courts should rarely impose upon a monopolist a duty to deal with its rivals. Secondly, no US court has found that a refusal to license IPRs violates antitrust laws: on the contrary, the US courts have generally held that such a refusal is lawful. Of course, given that the Supreme Court expressed concerns that forced sharing in *Verizon Communications* will apply with equal, if not greater, force to IPR, it appears even less likely that a US plaintiff could succeed in challenging a unilateral refusal to license IPR.

The judgment also puts a new light on the appeal against the Commission's decision of 24 March 2004 in the *Microsoft*³²⁷ case, as it gives increased importance to the question of whether Microsoft's refusal to licence interface specifications has a negative impact on innovation, and whether Microsoft is right to insist that its competitors are merely seeking to “duplicate” or “clone” its products.³²⁸

In view of the potentially far-reaching consequences of the judgment, it is possible that, when the European Courts next have the opportunity to consider the above issues, they may choose to provide some clarification. The judgment may therefore not represent the last word on the subject.

³²⁵Aitman/Jones, p. 142

³²⁶*supra* n. 76

³²⁷Commission decision of 24 March 2004 relating to a proceeding under Article 82 EC (Case COMP/C-3/37.792 Microsoft)

³²⁸For further details on the implications of *IMS* on *Microsoft*, see D.W. Hull, *Competition Law and IP: Compulsory licensing of IP rights: The ECJ's judgment in the IMS case*, 10, 13

5. Conditions of an Essential Facilities Doctrine in EC law

Although the ECJ has never expressly referred to the EFD in any of its judgments, it seems that it has acknowledged the EFD as part of Community law since *Bronner*.³²⁹ Even when not actually calling it 'the EFD', it seems to be clear from the case law of the ECJ that a refusal to provide access to an indispensable facility can, under certain circumstances, constitute an abuse of a dominant position under Article 82 EC.

But what are the actual conditions for an application of the EFD or an obligation to grant access in EC law? These appear to be less clear. As discussed above, there are three main cases in which the ECJ and the CFI elaborated on the conditions under which the owner of an essential facility, or the holder of an IPR, will be obliged to grant access or to grant a licence: *Magill*,³³⁰ *Ladbroke*³³¹ and *Bronner*.³³²

In *Magill*³³³ the ECJ held for the first time that, in 'exceptional circumstances', the holder of an IPR might be forced to grant a license. It stated three conditions: 1. the prevention of the appearance of a new product which the IPR holder did not offer and for which there was a potential consumer demand; 2. the refusal is not justified; 3. the IPR holder reserves to himself a secondary market, thereby excluding all competition on that market.³³⁴

In *Ladbroke*,³³⁵ the CFI added a new, *alternative*, condition: a refusal to licence is contrary to Article 82 EC if it concerns a product or service which is essential for the activity in question as there was no real or potential substitute.³³⁶

In *Bronner*,³³⁷ dealing with access to tangible property, the ECJ set out three conditions:

³²⁹supra n.10

³³⁰supra n.185

³³¹supra n.228

³³²supra n. 10

³³³supra n. 185

³³⁴ibid., paras.54-56

³³⁵supra n.228

³³⁶ibid., para.131

³³⁷supra n. 10

1. the refusal to grant access to the delivery scheme must be likely to eliminate all competition in the daily newspaper market on the part of the party requesting the service; 2. the refusal is not objectively justified; 3. the service must be indispensable to carrying on that party's business, inasmuch as there is no actual or potential substitute for the home delivery scheme.³³⁸

As can be seen from this brief summary, the conditions applying to an EFD in EC law are less than clear. Did the *Bronner*³³⁹ judgement overrule the earlier judgement in *Magill*?³⁴⁰ This seems to have been the assumption of the Commission in *IMS*,³⁴¹ in applying the *Bronner*³⁴² criteria to a refusal to licence. However, from the fact that the ECJ dealt with the interpretation of *Magill*³⁴³ in its *Bronner* judgement, it should be relatively safe to deduce that *Bronner* did not overrule *Magill*.

Other issues which arise are, firstly, whether different conditions apply to a refusal to grant a license and a refusal to grant access to tangible property, and secondly, whether the conditions are to be applied cumulatively or alternatively.³⁴⁴

It has been suggested that the differences between intellectual property and other forms of property justify a difference in treatment by competition law of refusals to grant a licence and refusal to grant access to tangible property.³⁴⁵

Advocate General Tizzano seems to distinguish between tangible and intellectual property in his Opinion in *IMS Health*.³⁴⁶

"...it is not sufficient that the intangible asset forming the subject-matter of the intellectual property right be essential for operating on the market and that therefore, by virtue of that refusal, the owner of the copyright may eliminate all competition on the secondary market."³⁴⁷ The ECJ followed this in para. 49 of its judgment.

This leads to another issue relevant to this thesis, arising in the context of access to an essential facility: the so-called two-market paradigm. In all

³³⁸ibid., para.41

³³⁹supra n.10

³⁴⁰supra n. 185

³⁴¹supra n. 210

³⁴²supra n. 10

³⁴³supra n. 185

³⁴⁴An interesting analysis concerning this issue can be found in E. Derclaye, Abuses of dominant position and intellectual property rights: A suggestion to reconcile the Community Courts case law, *World Competition* 2003, 26(4), 685

³⁴⁵Aitman/Jones, pp.137 ff., Narciso, pp.445 ff.

³⁴⁶supra n. 210

³⁴⁷ibid, para.61

cases in which the Court has acknowledged that the refusal to supply or grant access to certain facilities might constitute an abuse of a dominant position, it has distinguished between the market for such facilities (the upstream market) and a derivative market (the downstream market) in which they are used as inputs for the production of other goods or services. The abuse in these cases consisted of a leverage of market power from the upstream market to the downstream market in order to limit or restrict competition in that market. This was relied upon by IMS in its arguments against the Commission decision which obliged it to grant a licence to its competitors:

“It is, however, the notion of what constitutes an essential facility that has been relied upon in the contested decision. According to the applicant, that notion only applies where two distinct markets are involved and the product or service supplied in one (usually an upstream) market is a necessary input for the production of goods or services in the second (usually downstream) market.”³⁴⁸ The classic case in this sense was *Commercial Solvents*,³⁴⁹ in which there was a primary market (for the raw material) which was clearly distinguishable from a secondary market (for the derivative drug). There was a clear abuse of a dominant position in that the dominant company used its dominant position in the raw material market to eliminate competition in the derivative market for the drug. However, it has been argued that the Court has failed to recognize that the “*Commercial Solvents* paradigm” does not fit all essential facilities cases.³⁵⁰ In particular cases, which concern essential facilities such as communications networks or energy infrastructure, there is no real upstream market, as there is usually no trade in the essential facility itself. Telecommunications operators do not “deal” in networks. In these cases, the facility is part of a firm, and often not very clearly identified as a separate item, for instance the home-delivery network in *Bronner*.³⁵¹ Nevertheless, the Court has construed, somewhat artificially, the essential facility itself as the relevant upstream market: “[i]n such cases, there is no leveraging of a dominant position from one market into another – there is only

³⁴⁸ Order of the Court of First Instance of 26 October 2001, *supra* n. 306, para.80

³⁴⁹ *supra* n. 114

³⁵⁰ Fine, p.7

³⁵¹ *supra* n.10

prevented access to an essential facility by the party dominating the relevant market in which the facility is used.”³⁵²

In its 1998 Access Notice, the Commission stated that “liberalization of the telecommunications sector will lead to the emergence of a second type of market, that of access to facilities which are currently necessary to provide these liberalized services.”³⁵³ According to Larouche, this “amounts to saying that in the automotive industry, there is a market for the use of a given manufacturer’s car making plant.”³⁵⁴ However, he points out that network industries such as telecommunications, in contrast to other industries, have a geographic component, in that a competitor must be in control of a network in order to reach customers with its services. As a result, some kind of wholesale market might develop, in which operators agree to be allowed to use each others’ networks, in order to reach customers outside the range of their own networks. This market may be considered a relevant market for the purposes of applying competition law. However, if there is no indication that third-party access has been given, it would be artificial to construe a market for access “to what is in the end a piece of property”.³⁵⁵

The Commission did not consider a “two -market” situation to be necessary for the application of the essential facilities doctrine in *IMS Health*,³⁵⁶ nor did the Advocate General, who considered that a potential upstream market was sufficient as long as the inputs in question were essential and there was an actual demand for them.³⁵⁷ AG Tizzano in *IMS Health* even seemed to indicate that two markets have never been required by EC law for the essential facilities doctrine to apply. He pointed out that in cases such as *Magill*³⁵⁸ and *Bronner*³⁵⁹ there had actually been no real separate market in the essential facility.³⁶⁰ The ECJ held in *IMS Health*, referring to *Bronner*, that:

“[t]he fact that the delivery service was not marketed separately was not regarded as precluding, from the outset, the possibility of identifying a

³⁵² *ibid.*

³⁵³ See Ch.2, ftn100,, para. 44

³⁵⁴ Larouche (Oxford 20009,p. 205

³⁵⁵ *ibid.*,p. 206

³⁵⁶ *supra* n. 210

³⁵⁷ *ibid.*, para.59

³⁵⁸ *supra* n. 355

³⁵⁹ *supra* n.182

³⁶⁰ *supra* n. 472, para56

separate market.”³⁶¹ After stating that it was sufficient that a potential or even hypothetical market could be identified, the Court added that “...it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product.”³⁶² The problem inherent in the two-market approach was also recognized by Venit and Kallaugher:

“The essential facilities doctrine may be of assistance, as a formal matter of antitrust analysis, with respect to cases in which the essential facility comprises something that cannot be characterized as a market. In such cases, invocation of the essential facilities doctrine can correct an analytical anomaly that has resulted from treatment of these cases as market leveraging cases.”³⁶³

It seems, therefore, that the two-market approach is not an indispensable condition for the application of the EFD in EC law.

Even if it is considered to be established that the conditions set out in *Bronner*³⁶⁴ constitute the applicable test (at least in relation to essential facilities cases dealing with tangible property) the interpretation of those conditions themselves is far from clear.

5.1 What is an “essential facility”?

A useful starting-point is the definition adopted by the Commission in its 1998 Access Notice, whereby an essential facility is “a facility which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.”³⁶⁵

³⁶¹ *ibid.*, para. 43

³⁶² *ibid.*, 45

³⁶³ Venit/ Kallaugher, p.339

³⁶⁴ *supra* n. 182

³⁶⁵ See Ch.2, fn.100, para. 68: in the footnote, the Commission refers to the definition of essential facilities included in the ‘Additional commitment on regulatory principles by the European Communities and their Member States’ used by the Group on basic telecommunications in the context of the World Trade Organization (WTO) negotiations: “Essential facilities mean facilities of a public telecommunications transport network and service that: a. are exclusively or predominantly provided by a single or limited number of

Since *Bronner*,³⁶⁶ it must be shown that a product or service is “indispensable”. It seems to be clear from the judgment that this is an objective test, which means it is not based on the specific circumstances and needs of the undertaking requiring access. The Court held, in para.44 of the judgment, that it could not find any obstacles which made it impossible “for *any other publisher of daily newspapers* to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme (emphasis added).” It added that for the delivery system to be indispensable, it was not sufficient to show that its duplication was not economically viable for a small-circulation newspaper like Bronner’s. Instead, it had to be shown that it was not economically viable for a newspaper “with a circulation comparable to that of the daily newspapers distributed by the existing scheme”³⁶⁷ to duplicate the system. Advocate General Jacobs was more direct in his endorsement of an objective test: “However, the test in my view must be an objective one: in other words, in order for refusal of access to amount to an abuse, it must be extremely difficult not merely for the undertaking demanding access but for *any other undertaking* to compete (emphasis added)”³⁶⁸

Temple Lang supports the use of such an objective test. It is in line with the assumption that the underlying function of Article 82 EC is to protect competition and not individual competitors. The dominant undertaking, which may have a legal duty to provide access, cannot be expected to know the needs of an individual undertaking. However, it can be assumed that it has sufficient knowledge of the general market situation, and therefore of the general needs of its competitors. There is no duty upon a dominant undertaking to subsidize a competitor.³⁶⁹ In an earlier article, published before the *Bronner* judgement, Temple Lang puts it this way: “[t]he fact that one particular competitor needs access to a facility in order to enter the market is irrelevant if other more normally situated competitors do not. If

suppliers; and b. cannot feasibly be economically or technically substituted in order to provide the service.”

³⁶⁶ *supra* n.10

³⁶⁷ *ibid.*, paras 45-46

³⁶⁸ *ibid.*, para.66

³⁶⁹ Temple Lang, (Journal of Network Industries,2000), pp. 381-382

competition necessitates access for all except exceptional competitors, then access may be made compulsory.”³⁷⁰

Another question to be answered is what makes a facility “indispensable” and therefore “essential”. In *Bronner*, the ECJ held that in order to demonstrate that a product or service is “indispensable” it must be shown that there is “no actual or potential substitute in existence”.³⁷¹

As Ridyard pointed out, it is not sufficient that the refusal of access to the facility would result in a mere disadvantage to a competitor, for a facility to be regarded as “essential”. If that were the case, any company which obtains an “envied advantage” could be required to provide access to its competitors.³⁷²

The same is true for a disadvantage to consumers as a criterion for access, as “the tension between static and dynamic incentives for efficiency within a market economy” will always leave scope for unrealised consumer gains.³⁷³

The actual substitutes to the home-delivery system considered in *Bronner* were delivery by post and sales in shops and kiosks. The ECJ emphasised that such substitutes could not simply be discarded because they were “less advantageous”.³⁷⁴ As far as the existence of a “potential” substitute is concerned, the test seems to be whether it is possible to duplicate the service or product in question. Commentators have pointed out that only in very exceptional circumstances is it absolutely impossible to duplicate a facility, although this would often entail very large expenses. Therefore, the duplicability of a facility depends rather on economic considerations than on actual physical conditions.³⁷⁵ Both the Court and the AG accepted that cost considerations can be a factor. In para. 45, the ECJ held that in order to demonstrate that a facility cannot be duplicated, it must be shown that it is not “a realistic potential alternative” and that it is not “economically viable”. AG Jacobs did not rule out that “the cost of duplicating the facility might alone constitute an insuperable barrier to entry.”³⁷⁶

³⁷⁰ Temple Lang, (Fordh.Int.Law.J,1994),p.489

³⁷¹ supra n. 10, para.41 - similar to the wording in *Ladbroke* (supra n. 228): “no real or potential substitute” (para.131)

³⁷² Ridyard, p. 448

³⁷³ *ibid.*, p.439

³⁷⁴ supra n.10.,para.43

³⁷⁵ M.A.Bergman, The *Bronner* case - A turning point for the essential facilities doctrine, (2000) 21(2) E.C.L.R. p.61; Doherty, p. 424

³⁷⁶ supra n.10, para.66

This has led some commentators to believe that the essential facility is only applicable in the presence of a so-called “natural monopoly”, i.e. a market in which two or more firms can never be economically viable on their own unless the essential facilities doctrine is applied.³⁷⁷ However, according to Bergman and Doherty, earlier case law shows that this cannot be so. For example, in *Commercial Solvents*³⁷⁸ and *Sabena*,³⁷⁹ products were regarded as essential, which can hardly be defined as a natural monopoly.³⁸⁰

The applicable test seems thus to be that the duplication of the facility has to be economically unfeasible for competing firms. AG Jacobs in *Bronner* puts it the following way: “...it would be necessary to establish that the level of investment required to set up a nation-wide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market.”³⁸¹

5.2 Objective justification

According to the case law, a dominant company can refuse to provide access if this refusal is objectively justified. However, the same case law sheds little light on the circumstances under which a refusal can be justified. It is therefore likely that dominant companies will try to rely on this defence because, to date, it has not been fully explored by the Court's case law.

Nevertheless, it seems to be clear that the concept of objective justification is subject to the principle of proportionality.³⁸² According to this principle, a public authority may not impose obligations on a citizen except where they are strictly necessary to the end that is to be achieved. There is no exhaustive lists of reasons which might constitute objective justification, although the following points out some examples.

³⁷⁷ See for example Werden, at 476

³⁷⁸ *supra* n. 114

³⁷⁹ *supra* n.166

³⁸⁰ Bergman, p.62; Doherty, p.424

³⁸¹ *supra* n. 10, para.68

³⁸² C. Stothers, Refusal to supply as abuse of a dominant position: Essential facilities in the European Union, (2001) 22(7) E.C.L.R. 256, p.260; Temple Lang (Journal for Network Industries 2000), p.386

According to Stothers, analogies may be drawn from other areas of European law, such as mandatory requirements used to justify restrictions of the free movement of goods under Article 28 EC. One issue which might be put forward as an objective justification is that of efficiency considerations. If granting access to the applicant would cause the facility to be used uneconomically, or would reduce the value or efficiency of the facility, this may justify a refusal to give access.³⁸³ AG Jacobs lists some justifications from the US case law at para.47 of his opinion: “[a] company in a dominant position which controls an essential facility can justify the refusal to enter a contract for legitimate technical or commercial reasons. It may also be possible to justify a refusal to contract on grounds of efficiency”.³⁸⁴ However, the ECJ has rejected several business justifications. For example, in *United Brands*³⁸⁵ it considered actions taken by the dominant company, which were aimed at punishing a dealer who had promoted a different brand, to be disproportionate. In certain cases it may be a defence that the intended use by the applicant is not consistent with safety or technical standards of the facility, or that the applicant is not creditworthy.³⁸⁶

Temple Lang points out that genuine advantages of vertical integration could justify a refusal to grant access: “[a] dominant company never has the duty to offset a competitive advantage that it has lawfully obtained, although it cannot use exclusive access to an essential facility to obtain such an advantage.”³⁸⁷ However, this will only very rarely be the case as the advantage must outweigh by far the competitive disadvantages caused by the refusal. Temple Lang quotes *Hugin*³⁸⁸ as an example in which the Court was reluctant to prevent a company from protecting its reputation by having its products serviced only by employees it had trained itself.

As established by the ECJ in *Volvo*³⁸⁹ and *Renault*,³⁹⁰ ownership of an IPR does not provide absolute protection against access demands. However,

³⁸³ Temple Lang, (Journal for Network Industries, 2000) p.386

³⁸⁴ The scope of legitimate business justifications may be narrower in EC than US law. In *City of Anaheim*, the Federal Court held that a gas pipeline operator was not obliged to supply a rival's gas through its network if this threatened its ability to supply its own customers.

³⁸⁵ *supra* n. 118

³⁸⁶ Temple Lang (Journal of Network Industries, 2000), p.386

³⁸⁷ Temple Lang (Fordham Int'l L.J.1994), p. 512

³⁸⁸ *supra* n. 160

³⁸⁹ *supra* n. 184

³⁹⁰ *supra* n. 183

following *Magill*,³⁹¹ such access can only be required in exceptional circumstances.

Dominant companies might argue that their large investments in tangible property should deserve a similar protection to that of IPRs.³⁹² However, it should be pointed out that under Community law, property rights are not absolute.³⁹³

The lack of spare capacity may possibly, but not necessarily, be a justification. If there is spare capacity, or the nature of the facility is such that there is unlimited capacity, a refusal to grant access is hard to justify, in particular when the owner of the facility is dominant in the downstream market.³⁹⁴ Incumbents should not be required to scale down or reorganise their existing activities unless an identifiable increase in competition can be expected as a result.³⁹⁵ It is necessary to assess whether the capacity, which the owner claims is fully utilised, is not in fact being inefficiently used, or whether the apparent use is not real, or whether the purpose of long term contracts is primarily to make the facility unavailable to new entrants.³⁹⁶

It is questionable whether the owner of an essential facility is obliged to increase supply, or even to alter its facility in order to meet increased demand. According to Nikolinaikos, the fact that a new entrant will offer a new product which will significantly enhance competition could justify a reduction of supplies to existing customers.³⁹⁷ Similarly, Temple Lang states that: "[i]ncumbents should not be required to scale down or reorganize their existing activities unless an identifiable increase in competition can be expected as a result."³⁹⁸ This is likely to be of significance in the communications sector, where the issue of transmission capacity is key to the assessment of possible justifications. To increase capacity can require

³⁹¹ *supra* n. 185

³⁹² Doherty, p.429

³⁹³ "While the right to property forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed." Case C-293/97, *R. v. Secretary of State for Environment, ex p. Handley*, [1999] ECR I- 2603, para.54

³⁹⁴ Temple Lang (Fordham Int'l L.J. 1994), p. 493

³⁹⁵ *ibid.*

³⁹⁶ *ibid.*

³⁹⁷ Nikolinaikos (ECLR, 1999) p. 408

³⁹⁸ Temple Lang (Forham Int'l L.J.1994), p. 494

huge investments on the part of the dominant undertaking. Doherty rightly points out that one should be circumspect in requiring such investments, as in the long term they may have a significantly negative effect on the incentive for other companies to enter the market.³⁹⁹

5.3 Elimination of competition on the downstream market

One of the three conditions cited in *Bronner*,⁴⁰⁰ as necessary for a duty to supply to arise (or for the EFD to be applicable) was that the refusal was “likely to eliminate competition” from an undertaking. However, the term “elimination” is less than clear. There are several statements by the ECJ in its *Bronner* judgment referring to the effect of the refusal on competition on the downstream market.

Referring to *Commercial Solvents*,⁴⁰¹ the Court stated that the refusal to supply an indispensable raw material was an abuse “to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking”.⁴⁰² Referring to *Magill*,⁴⁰³ it held that one of the exceptional circumstances which made the refusal to licence unlawful was the fact “that it was likely to exclude all competition in the secondary market of television guides”.⁴⁰⁴ Finally, the ECJ declared that, in order to be abusive, the refusal had to “eliminate all competition in the daily newspaper market on the part of the person requesting the service”.⁴⁰⁵

It therefore seems to be clear that the EFD does not apply if the downstream market is competitive.⁴⁰⁶ The fact that the refusal to grant access would prevent one particular competitor from entering the market is not sufficient, if there are other competitors already operating on the market or able to

³⁹⁹Doherty, p. 431

⁴⁰⁰supra n.10

⁴⁰¹supra n. 114

⁴⁰²supra n.10, para.38

⁴⁰³supra n. 185

⁴⁰⁴supra n. 10, para.40

⁴⁰⁵ibid.para.41

⁴⁰⁶This seems also to be the case in US law: In *Alaska Airlines v. United Airlines* (948 F.2d 536, 9th Circuit 1991, Cert. Denied, 112 S.Ct. 1603, 1992) it was held that, even if an airline was dominant in the computerised reservation systems market, it would be obliged to provide access to its CRS under the EFD only if its refusal to supply would lead that airline to create or hold a dominant position in a downstream market (i.e. the market for airline services).

operate on the market. This appears to be in line with the AG Jacob's statement, that the primary function of Article 82 EC is to protect competition rather than a particular competitor.

Consequently, for the EFD to apply, there must be insufficient competition on the downstream market, which means that the undertaking controlling or owning the essential facility must have a strong or even a dominant position on the downstream market. This is confirmed by a statement of AG Jacobs in *Bronner*.

"It may therefore ... be unsatisfactory ... to focus solely on the latter's (the dominant undertaking's) market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power."⁴⁰⁷ In para. 65, he states that the dominant undertaking must have "a genuine stranglehold on the related market".

Venit and Kallaugher call this a "dual role" situation in which the owner of the essential facility has a "dual role as both administrator of an infrastructure and an operator on a market utilizing that infrastructure".⁴⁰⁸ They assume that, for the EFD to apply, the owner of the essential facility must also occupy a dominant position on the downstream market. According to Venit and Kallaugher, this distinguishes essential facility cases from monopoly leveraging cases: "in contrast to monopoly leveraging cases, the essential facilities rule comes into play only where denial of access has its effect in a market where the defendant has market power."⁴⁰⁹ Temple Lang similarly refers to this "dual role" situation as a "conflict of interests" situation,⁴¹⁰ but in contrast to Venit and Kallaugher, does not require the owner of the facility to be dominant on the downstream market: Temple Lang considers it to be sufficient that "there is little significant competition in the downstream market".⁴¹¹ Nikolinaikos believes that, in connection with the *Tetra Pak*⁴¹²

⁴⁰⁷supra n. 10, para.58

⁴⁰⁸Venit /Kallaugher, p. 331

⁴⁰⁹ibid., 319

⁴¹⁰Temple Lang, (Journal for Network Industries, 2000), p. 376

⁴¹¹Temple Lang, *Licensing block exemptions and essential facilities*, Annual Proceedings of the Fordham Corp. L. I.(1994) ,363-364. However, in a later article on the subject, Temple Lang writes that the right test seems to be "whether there is a dominant position in the

ruling, it is sufficient for the EFD to apply if the owner of the essential facility is dominant on the upstream market and there is no effective competition on the downstream market.⁴¹³ He points out that the Commission, in its 1998 Access Notice, seems to follow the same position. In para. 65 of the Access Notice the Commission states that it is common in the telecoms industry to find that “a particular operator has an extremely strong position on infrastructure markets and on markets downstream of that infrastructure.” Then in para. 67 it points out, referring to *Tetra Pak*, that even if the undertaking only has a dominant position in one of those closely related markets, it could be found “in a situation comparable to that of holding a dominant position in the markets in question as a whole.”⁴¹⁴

To deduce a common denominator from the above discussion, there seems to be no room for the application of the EFD if there is effective competition on the downstream market. According to Temple Lang, this should even be the case if there is sufficient capacity available.⁴¹⁵ However, according to some commentators, the situation is different if the new entrant wants to introduce a new product or service into the market. Then, there will be a duty to provide access, even if there is insufficient capacity and even if the downstream market is competitive.⁴¹⁶

Temple Lang suggests that another condition has to be fulfilled before the EFD can be applied: “[t]o justify a duty of contract, there must be a substantial scope for added-value competition in the market for which access is required. If this is correct, it is extremely important: it means that access to a product for mere distribution or resale ... can never be an essential facility.”⁴¹⁷ A similar position seems now to have been adopted by the ECJ in *IMS Health*,⁴¹⁸ at least as far as a refusal to license IPRs is concerned. The ECJ held that refusal to licence can only be regarded as abusive “where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the

downstream market: in other words, the company must be dominant in both markets (or would be able to become so as a result of the refusal)” (Temple Lang, *Journal for Network Industries*, 2000, 384)

⁴¹²supra n. 151

⁴¹³Nikolinaikos (ECLR, 1999), p.407

⁴¹⁴See Ch.2, fn.100

⁴¹⁵Temple Lang (*Journal for Network Industries*, 2000) p. 388

⁴¹⁶ibid. p. 392, Nikolinaikos, (ECLR, 1999) p. 408

⁴¹⁷Temple Lang (*Journal for Network Industries*, 2000), 380

⁴¹⁸supra n. 472

secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.”⁴¹⁹

No matter which position we follow, the above discussion indicates that the EFD only applies when the dominant undertaking is present on the downstream market, i.e. the two parties must be actual or potential competitors. White points out that where the owner of an essential facility is not competing in the downstream market, his interest in denying access will be limited, as increased utilisation of capacity could maximise the owner's profits. However, he specifies that this might not be the case in the telecommunications sector, which is characterized by a high rate of technological development and in which both incumbents and new entrants constantly compete for new markets and opportunities.⁴²⁰ The CFI's decision in *Ladbroke*⁴²¹ seems to confirm this: the court did not find an abuse of a dominant position because the dominant undertaking, the French racetrack owners, were not present on the Belgian market. This appears to contradict *United Brands*,⁴²² in which the two parties were not competitors, but Olesen was merely a dealer for United Brands bananas. In an article written before the decision in *Bronner*,⁴²³ Temple Lang had already pointed out that “the duty to supply a customer or distributor may be less strict than the duty to supply a competitor.”⁴²⁴ Therefore, if *Bronner*⁴²⁵ only protects competitors, it is not clear whether the *United Brands*⁴²⁶ principle still applies.⁴²⁷

5.4 Determination of access terms

Once it has been determined that the owner of an essential facility is obliged to provide access, the terms under which such access should be granted

⁴¹⁹ibid., para. 49

⁴²⁰S. White, Is there a role for an “essential facilities” doctrine in Europe, (1995) 1(4) C.T.L.R. 110, p.110

⁴²¹supra n. 228

⁴²²supra n. 118

⁴²³supra n. 10

⁴²⁴Temple Lang (Fordham Int'l L.J. 1994), p. 447

⁴²⁵supra n. 10

⁴²⁶supra n. 118

⁴²⁷Doherty, p.426



have to be stipulated. Venit and Kallaugher contrast two philosophies of access terms in EFDs:

"Insofar as the principal role of the essential facilities doctrine as articulated in *Sealink* is to impose a stricter requirement of non-discrimination and certain procedural obligations (the independent operator standard) on the company controlling the essential facility, the emerging EC doctrine may be at odds with the essential facilities doctrine as it has developed in the United States because there is no suggestion in the US cases that a firm controlling an essential facility is under an obligation other than to provide [the] facility, where feasible, on reasonable terms."⁴²⁸ Thus, under EC law a dominant company has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition, or to prevent the emergence or growth of new or existing competitors.

However, this approach does not deprive a dominant company, owning the essential facilities, of the benefits of ownership, including making a profit. This raises the issue of setting a fair access price. As free negotiation between the parties will often be unsatisfactory (particularly if there is only one provider of the essential facility), courts or competition authorities may be required to engage in price calculations.⁴²⁹ The Commission has often been criticised because its decisions on essential facilities do not give any guidance on pricing issues: "[i]n *Sealink* and other cases, when it comes to the thorny question of access terms, the Commission has relied on the assertions that access prices should be 'fair and non-discriminatory'. This gives the impression that detailed regulation of access pricing, if it is a problem at all, belongs to someone else."⁴³⁰ The Commission has stated that it does not normally, in its decision-making practice, control or condemn the high level of prices which a dominant company may charge. However, in the telecommunications sector, the Commission has acted several times on complaints of excessive pricing.⁴³¹ Moreover, there is now detailed regulation on pricing and access in the telecommunications sector.

⁴²⁸Venit /Kallaugher, p. 333

⁴²⁹Ridyard, p.450

⁴³⁰National Economic Research Associates (NERA), Competition Brief No.4, January 1999, *Oscar Bronner. Legitimate refusals to supply*, p.3, cited in Doherty, p. 432

⁴³¹ITT Promedia, IP/9/292 of 11.4.97: Deutsche Telekom business customer tariffs, IP96/975 of 4.11.96, and the Commission's inquiry into fees for carrier pre-selection, IP98/430 of 13.5.98

There has been intense discussion concerning how to determine fair access prices, but that would go beyond the scope of this thesis.⁴³² To sum it up in Ridyard's words: "Access pricing to the essential facility should be set such as to provide a revenue stream that will remunerate the appropriate value of the asset, but not more".⁴³³ AG Jacobs in *Bronner* pointed out that the owner of an essential facility should be allowed to pass on "an appropriate proportion of its investment costs and to make an appropriate return on its investment having regard to the level of risk involved."⁴³⁴ It should be kept in mind that there is a danger in assuming that "essential facilities problems can be 'solved' simply by imposing an obligation to supply on the owner, but without specifying the details surrounding that obligation."⁴³⁵

6. Conclusion

It has been suggested that the cases treated under the essential facilities doctrine are nothing more than 'normal' refusal to supply cases. Therefore, there is no need for the doctrine to be introduced into Community law, as already-established legal principles under Article 82 EC are adequate to deal with these cases.⁴³⁶

Compared to the Commission, the ECJ has been very reluctant to use the term "essential facilities". That, however, does not mean that it denies the existence of an essential facilities doctrine in EC law. AG Jacobs in *Bronner*⁴³⁷ conducted a comprehensive analysis of the development and reception of an EFD in EC law, and certain parts of the ECJ's *Bronner* judgment indicate that the Court has recognised this doctrine in EC law. Nevertheless, that does not mean that the EFD constitutes a new and independent concept of law which widens the scope of Article 82 EC. All EFD cases require all elements of Article 82 EC to be fulfilled, before the refusal to

⁴³²For further details concerning access pricing in EC telecommunications, see? [editorial note - see what????]

⁴³³Ridyard, p. 451

⁴³⁴supra n. 10, para.57

⁴³⁵Ridyard.,p. 441/442

⁴³⁶Furse, pp.469 ff.: M. Mueller, Die "Essential Facilities"- Doktrin im Europäischen Kartellrecht, (1998) EuZW, 232, p.237

⁴³⁷supra n.10

grant access can be regarded as an abuse. If the refusal to supply has little or no effect on competition, it is not illegal, even if the competitive disadvantage suffered by the competitor is immense.⁴³⁸ It could be said that the EFD occupies a special position within the refusal to supply category.⁴³⁹

Two major conditions for the application of the EFD in EC law can be deduced from the case law:

- (1) elimination of all competition from the downstream market; and
- (2) the principle of indispensability, i.e. the lack of actual or potential substitutes on the primary market (the market of the essential facility) This includes, in particular, the issue of whether duplication of the facility is economically viable. This is highly relevant in the telecommunications sector, in which the initial investment costs, usually for the establishment of infrastructures necessary to provide services, often constitute a considerable barrier to entry into the relevant market.

The ECJ made clear that the test of the duplicability of a facility is an objective one, i.e. it is independent of the situation and abilities of the competitor demanding access. This takes account of the function of Article 82 EC which is to protect competition rather than a single competitor. This follows from the fact that Article 82 EC serves, according to Article 3(1)(g) EC "a system ensuring that competition in the internal market is not distorted". This goal of Article 3(1)(g), therefore, simultaneously defines and limits the application of the EFD in EU law.⁴⁴⁰ As long as there is undistorted competition in the derivative market, there is no obligation for the owner of an essential facility to provide access to a competitor, even if there is no objective justification for the refusal. This leads to a very restricted and careful application of the EFD in EC law: an obligation to grant access is only legitimate if it serves the preservation of undistorted competition. Such a restrictive application should be approved, as this is the only way to prevent the dangers connected with a too-broad policy of granting access to essential facilities.

⁴³⁸ Temple Lang I (Journal for Network Industries), p. 404

⁴³⁹ H. Fleischer/ H. Weyer, *Neues zur „essential facilities“-Doktrin im Europäischen Wettbewerbsrecht - Eine Besprechung der Bronner-Entscheidung des EuGH*, (1999) WuW, 350, p.354

⁴⁴⁰ Deselaers, p. 566

The EFD has been subject to much criticism, both in the EU and the US.⁴⁴¹ One of the main arguments advanced against the EFD, or at least against a too-liberal application of the EFD, is that it reduces the incentive to invest, both on the part of the owner of the essential facility as well as on the part of potential competitors. AG Jacobs picks up on this point in his Opinion in *Bronner*:

"In the long term it is generally pro-competitive and in the interest of the consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. ... Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits."⁴⁴²

Bergman suggests that when applying the EFD one should try to distinguish between situations in which the incentive to invest may be discouraged and others where this risk is comparatively low.⁴⁴³ In particular, in formerly nationalized industries, where the exclusive control over the essential facility is the result of a legal monopoly, the incentive to make the original investment may have been less important.⁴⁴⁴ The negative dynamic effect of mandating access is diminished, as a negative return on investment may be recoupable elsewhere. Venit and Kallaugher recommend a different EFD for different types of property:

"Ultimately, the area where an essential facility analysis may prove of greater value concerns cases under Art.90 (now Article 86 EC). As a practical matter, many facilities in Europe that are at least arguably "essential" are either controlled by the state or state-owned undertakings or are operated subject to regulation by the state. As a result, many of the general points made above regarding the application of the essential facility doctrine may have direct application in Article 90 (now Article 86 EC) cases, particularly in respect of telecommunications or transport infrastructure. Moreover, in the case of

⁴⁴¹ See for example: Areeda; Gerber; Hancher; Ridyard; A. Overd /B.Bishop Essential facilities: The rising tide, (1998) 19(4) E.C.L.R., 183

⁴⁴² *supra* n. 10, para.57

⁴⁴³ Bergman, p.62

⁴⁴⁴ *ibid.*, p.63

state-owned monopolies, application of the essential facilities doctrine to deregulate and open up markets may prove less controversial than application of that doctrine to private company conduct.”⁴⁴⁵

However, as such former legal monopolies lose their exclusive rights and become privatised, incentives to invest become increasingly important.⁴⁴⁶

The other main argument against a too-ready application of the EFD is that the administrative costs of enforcing this aspect of competition law, in particular the costs of price regulation, are too high. AG Jacobs states in para.69 of the *Bronner* Opinion:

“To accept Bronner’s contention would be to lead the Community and national authorities and courts into detailed regulation of Community markets, entailing the fixing of prices and conditions for supply in large sectors of the economy. Intervention on that scale would not only be unworkable but would also be anti-competitive in the long term and indeed would scarcely be compatible with a free market economy.”⁴⁴⁷

⁴⁴⁵Venit / Kallaugher, p. 343

⁴⁴⁶Korah, p.23

⁴⁴⁷supra n. 10, para.69

Chapter 4: The application of the Essential Facilities Doctrine in the telecommunications sector: The Commission's Access Notice¹

1. Introduction

On 22 August 1998, the Commission published its Notice on the application of the competition rules to access agreements in the telecommunications sector (the Notice).² The Notice remains in effect, in parallel with the New Regulatory Framework.³

The Notice builds on the Commission's previous guidelines published in September 1991 (Guidelines on the application of EEC competition rules in the telecommunications sector),⁴ since those guidelines did not deal specifically with access agreements.⁵ The Notice has no formal legal effect, and should be regarded as a "statement of policy"⁶ on the part of the Commission, concerning EU telecommunications competition policy.

The purpose of the Notice is threefold:

(1). "...to set out access principles stemming from Community competition law as shown in a large number of Commission decisions in order to create

¹ Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, (1998) OJ C265/2; see also Ch.2, ftn.10

² *ibid.*

³ See the reference which is taken to the Access Notice in the SMP Guidelines (Commission Guidelines of July 11, 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. 2002 C165/06), para.24.

⁴ See Ch.2, ftn.99

⁵ *supra* n.1, para. 3

⁶ *Naftel*, p. 1

greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors”;⁷

(2). “...to define and clarify the relationship between competition law and sector specific legislation under the Article 100a framework”;⁸ and

(3). “...to explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context”.⁹

As noted above, one core issue for the telecommunications markets is that of whether, under Article 82 EC, new competitors should be granted access to existing facilities, such as networks, which cannot feasibly be replicated and which may originally have been developed with public money. Even where replication is possible, it may be against the public interest on other grounds, such as environmental considerations. The Notice is the Commission's attempt to deal with this issue.

The concept of access in the Notice covers not only access to physical networks, such as interconnection to the public switched telecoms network or the ability to obtain leased lines, but also access to customer information and other data, or to facilities necessary for a potential competitor to enter a telecommunications market.¹⁰ If a potential service provider is refused access, a remedy may be sought from either the established National Regulatory Authority (NRA), or national courts under national or EC competition law, or the Commission to which a complaint may be made.¹¹

In the Notice, the Commission explicitly applies the EFD to access scenarios, i.e. scenarios in which a network operator refuses access to independent service providers. The EFD features when the Commission details instances in which a refusal to grant access to telecommunications facilities might trigger the application of Article 82 EC.¹² The following part of the thesis will elaborate on this use of the EFD in the Notice, and on the extent to which the Commission's use of the doctrine is compatible with the principles discussed above and developed in the later *Bronner*¹³ judgment.

⁷supra n. 1, preface

⁸ibid.

⁹ibid.

¹⁰ibid., para. 71

¹¹ibid., part I

¹²ibid. paras 87-98

¹³See Ch.3, ftn.10

2. The EFD in the Access Notice

The Commission envisages three scenarios with regard to essential facilities in telecommunications:

- “(a.) a refusal to grant access, for the purposes of a service where another operator has been given access by the access provider, to operate on that services market;
- (b.) a refusal to grant access, for the purposes of service where no other operator has been given access by the access provider, to operate on that services market; and
- (c.) a withdrawal of supply of access from an existing customer.”¹⁴

The Commission refers to scenarios (a) and (c) as, respectively, “discrimination”¹⁵ and “withdrawal of supply”.¹⁶ They constitute the classical refusal-to-supply scenarios under EC competition law. Only the second scenario, in which no third party access has been granted at all, relates to the concept of essential facilities.

In scenario (a), different treatment of certain customers may constitute an abuse under Article 82 EC, except where such discrimination would be objectively justified, e.g. on the basis of cost or technical considerations or the fact that the users are operating on different levels.¹⁷ Discrimination may relate to elements such as pricing, or restrictions, or delays in making network connections, routing, numbering or restrictions on the use of customer network data.¹⁸ Issues of discrimination may also arise in respect of: the technical configuration of access, e.g. in relation to the degree of technical sophistication of the access, the number and/ or location of access points; and equal access, i.e. the possibility for customers of the party requesting access to obtain the services provided by the access provider,

¹⁴supra n. 1, para. 84

¹⁵ibid., paras. 85-86

¹⁶ibid., paras. 99-100

¹⁷ibid., para. 120

¹⁸ibid., para. 125

using the same number of dialled digits as are used by the customer of the latter.¹⁹

It should be pointed out that the notion of "another operator" in scenario (a) does not include the dominant operator's own downstream operations, i.e. the situation in which the dominant operator grants access to its own downstream operations, but to no other third party, must be assessed under the essential facilities scenario (b). This can be inferred from the notion of "restriction of competition on the downstream market" in para. 85, which restriction would not be possible if the incumbent operator was not also dominant, or at least had a strong market position on the downstream market: i.e. it must be present on that downstream market.²⁰

In contrast to the jurisdiction of the Court, the Commission, as already shown in its *Sealink*²¹ decision, considers it sufficient for there to be an abuse that the competition on the downstream market has been "restricted",²² and not "eliminated". Unfortunately, it does not elaborate any further on this criterion.²³

To a certain degree, discrimination by dominant undertakings in the telecommunications sector has already been dealt with by ex ante regulation. Under the new Access Directive, an operator which is considered to have Significant Market Power (SMP) is subject to non-discrimination obligations regarding access and prices.²⁴ Therefore, future cases may predominantly concern discriminatory practices by operators outside the actual core of ex ante regulation, such as cable operators discriminating between broadcasters, or producers of set-top boxes discriminating between content and service providers.²⁵

According to scenario (c), withdrawal of access from an existing customer will be abusive if it leads to a restriction of competition on the market for downstream services. Again, the refusal may be objectively justified, but any such justification must be proportionate to the effects of the withdrawal on

¹⁹ibid., para. 127

²⁰Bartosch, Chapter 2, in Koenig/Bartosch/Braun, p. 150

²¹See Ch.3, fn.164

²²supra n. 1, para. 85

²³Nikolinaikos, (ECLR, 1999), p. 401

²⁴Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Art. 10

²⁵Garzaniti, (Oxford 2003), p. 308

competition.²⁶ In citing *Commercial Solvents*²⁷ as the authority in this area, the Commission states its intention to apply the same principles to both withdrawal of a product and withdrawal of access.²⁸

Referring to scenario (b), which, as mentioned above, deals with the concept of essential facilities, the Notice sets out a number of elements that the Commission will take into account, on a cumulative basis, when determining whether access to an essential facility should be granted:

- (a). access to the facility in question is generally essential in order for companies to compete on that related market. The refusal must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic. It will not be sufficient that the position of the potential or alternative competitor would be more advantageous if access were granted.²⁹
- (b). the existence of sufficient capacity;³⁰
- (c). the failure to satisfy consumer demand on an existing service or product market, the blocking of the emergence of a potential new service or product or the impediment of competition on an existing service or product market;³¹
- (d). the payment, by the undertaking seeking access, of a reasonable and non-discriminatory access price and acceptance of non-discriminatory access terms and conditions;³² and
- (e). the lack of objective justification.³³

These elements more or less correspond to the conditions developed by the US Court of Appeals in *MCI*,³⁴ concerning the application of the essential facilities doctrine to the telecommunications sector:³⁵

- control of an essential facility by a monopolist;
- competitor's inability, practically or reasonably, to duplicate the essential facility;
- denial of use of the facility to a competitor; and

²⁶supra n. 1, para. 100

²⁷see Ch.3, fn.114

²⁸supra n.1, paras., 99-100

²⁹ibid., para. 91 a

³⁰ibid., para. 91 b.

³¹ibid., para. 91 c.

³²ibid., para. 91 e

³³ibid., para. 91 d

³⁴see Ch.3, fn.61

³⁵Holzhaeuser, p. 218

- the feasibility of providing the facility.

However, in one aspect the Commission seems to go further. Under the US EFD, a monopolist is only obliged to grant access to his facilities at retail prices. In contrast, under the Commission's EFD, a successful claimant has the right to access the facility at the dominant undertaking's own price, which is not necessarily the commercial price it would charge on the open market:

"...the dominant company's duty is to provide access in such a way that the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, *including its own corresponding downstream operations*." (emphasis added).³⁶

Therefore, the gist of the EFD, as set out in the Notice, is that if the above conditions are fulfilled, the dominant undertaking has a duty to contract, even if the facility in question was not previously offered to any third party. The potential competitor gains a right of access to the facility in question.

The Notice refers to a number of practices which may have the same effect as a straightforward refusal to deal, such as unjustified delays in responding to a request for access, technical configuration or excessive pricing.³⁷ Some of the elements constituting the EFD under the Notice will be analysed in more detail below.

2.1 What is an "essential facility"?

In telecommunications, there is a wide variety of facilities to which the EFD might potentially apply (e.g. the local loop, billing systems etc.). With the convergence of the telecommunications and media sectors, this number will expand dramatically.³⁸

However, having regard to the rapid technological change in the telecommunications markets, it is impossible to set up a comprehensive list of "essential facilities" for the sector.³⁹ What can be regarded as an essential facility today, may well be substitutable with an alternative facility tomorrow.

³⁶supra n. 1, para. 86, see also Naftel, p. 7

³⁷supra n. 1, paras. 95-98

³⁸Larouche, (Oxford, 2000), p. 167

³⁹K. Coates, EU competition rules and access problems in the telecoms sector, (1997) International Business Lawyer, 310, p.315

The question of what is an essential facility therefore deserves a careful economic case-by-case analysis.

In its *Bronner*⁴⁰ judgment, the ECJ set out a two-fold, objective test for the "essentiality" or "indispensability" of a facility: a facility was regarded as "essential" if there were no actual and no potential substitutes, i.e. the facility could not be duplicated. The ECJ summarizes its position, as developed in *Bronner*, in its *IMS Health*⁴¹ judgment as follows:

"...in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible, or at least, unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services."⁴²

This test is reflected by the wording of the Notice, which provides that for a facility to be essential, its duplication by the requesting party must be "either impossible or seriously and unavoidably uneconomic".⁴³ Although the Commission rightly remarks that it is not sufficient that access would simply be "advantageous" for the potential competitor, for the EFD to be applied, its Notice unfortunately lacks the detail that the *Bronner*⁴⁴ test provides.⁴⁵ In this context, the Commission seems to consider that, although alternative infrastructures such as cable networks are available, it will be a long time before these constitute a satisfactory alternative to the facilities of incumbent operators. In particular, they do not offer the same density of geographic coverage.⁴⁶ For example, at present, there seems to be no satisfactory actual or potential alternative for the local loop. However, considering the rapid technological development in the telecommunications sector, a dynamic application of the EFD will be necessary. This will constantly have to review whether the traditional fixed telephone network still constitutes a 'bottleneck',

⁴⁰See Ch.3, ftn.10

⁴¹See Ch.3, ftn.210

⁴²*ibid.*, para.28

⁴³*supra* n. 1, para. 91 a

⁴⁴See Ch.3, ftn.10

⁴⁵Bartosch, Chapter 4, in Koenig/ Bartosch/Braun, p.144; Holzhaeuser ,p.216

⁴⁶*supra* n. 1, para. 91 a

access to which is essential for competitors, or whether the market could be regarded as competitive because of the use of alternative connection methods, such as cable television networks or the wireless local loop.⁴⁷ For example, mobile networks, due to the increasing presence of alternative network providers, can no longer be regarded as bottlenecks or essential facilities.⁴⁸

Another rather confusing aspect of the EFD as applied in the Notice, is that the Commission uses the notion of "essential facility" both in the context of its explanation of dominance, and when describing an abuse. When dealing with a finding of dominance, the Access Notice reads:

"In the telecommunications sector, the concept of 'essential facilities' will in many cases be of relevance in determining the duties of dominant TOs. The expression 'essential facility' is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means. A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 86 (now 82)."⁴⁹

Regarding its interpretation of abuse, the Notice reads:

"The key issue here is, therefore, what is essential. It will not be sufficient that the position of the company requesting access would be more advantageous if access were granted - but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic."⁵⁰

This may lead to the dangerous assumption that the determination of a behaviour as abusive may automatically lead to the company in question being regarded as dominant. However, the test of dominance should come before the test of abuse.⁵¹ The ECJ seemed to have similar problems in distinguishing the tests for dominance and abuse in its *Bronner*⁵² judgment, as it used the notion of "actual substitutes" both in the determination of dominance and of abuse (see above). Regardless of these deficiencies, the ECJ clearly regards the notion of "duplicability" of the facility, i.e. the question

⁴⁷Holzhaeuser, p. 216

⁴⁸G.Knieps, Wettbewerb auf dem Mobilfunkmarkt, (2000) 2 MMR, 1, pp. 4ff.

⁴⁹supra n. 1, para. 68-69

⁵⁰ibid., para. 91 a

⁵¹Doherty, p. 426

⁵²See Ch.3, fn.10

of whether the party requesting access is able to build such facility of its own, as part of the abuse test. In contrast, in its Access Notice the Commission seems to have applied this test already in the determination of dominance.

To this confusion is added a rather broad definition of abuse under the EFD in the Notice: "[a] refusal to grant access for the purpose of a service where no other operator has been given access by the access provider on this services market."⁵³ It should be noted that the Commission does not positively define behaviour which is to be considered abusive. Instead, it merely describes the basic conditions under which a refusal to grant access could be considered an abuse. This is in contrast to the case law, referred to in the Notice, and often quoted in the literature on refusal to supply and monopoly leveraging, such as *Commercial Solvents*,⁵⁴ *United Brands*,⁵⁵ *Telemarketing*⁵⁶ and *Tetrapak*.⁵⁷ *Commercial Solvents* and *United Brands* concerned a withdrawal of supply to an existing customer, *Telemarketing* dealt with tying and *Tetrapak* concerned two related horizontal markets. Loetz and Koenig believe that the reason for the lack of differentiation concerning the notion of abuse in the Access Notice is the Commission's indiscriminate adoption of the US essential facilities test in *MCI*: in contrast to Article 82 EC, s.2 Sherman Act concentrates more on how the dominant position or the monopoly has been acquired rather than on what the holder of such a position does once it has achieved dominance (see above). It seems that the Notice already sanctions the control of the infrastructure itself, and not the abuse of that control, which will again lead to a lack of differentiation between dominance and abuse.⁵⁸

2.2 Effect on competition in the downstream market

In the *Bronner* judgement, the ECJ required that the refusal to provide access must be likely to "eliminate all competition" on the part of the person

⁵³supra n. 1, para. 84 b

⁵⁴See Ch.3, ftn.114

⁵⁵See Ch.3, ftn.118

⁵⁶See Ch.3, ftn.113

⁵⁷See Ch.3, ftn.151

⁵⁸Koenig/Loetz, p.381

requesting access.⁵⁹ In one respect, the Access Notice therefore seems to adopt a broader view, as it suggests that the refusal must have an effect on competition in general, not only on the party requesting access. This is in line with the view expressed by AG Jacobs in *Bronner* and various commentators, that the role of competition law is to protect competition, not individual competitors.⁶⁰ On the other hand, however, the Access Notice does not speak of “elimination” of competition but uses a rather softer and narrower formulation: “the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market”.⁶¹ The element of the prevention of the emergence of a new product seems to be in line with the ECJ's judgment in *Magill*.⁶² However, the Access Notice fails to consider the further requirement of the ECJ's judgement in *Magill*, that was essential for a finding of abuse in that case: the refusing parties “reserved to themselves the secondary market of weekly television guides by excluding all competition on that market.”⁶³ The Notice completely ignores the competitive situation on the downstream market. This is not in line with the jurisdiction of the Court which requires that, for the EFD to be applicable, the owner of the essential facility must at least enjoy a strong position on the downstream market. If the downstream market is competitive, there is no room for the EFD to apply (see above). The Commission's approach in the Access Notice has therefore been criticized as “over-interventionist”.⁶⁴

2.3 Objective justification

According to para. 91e of the Access Notice, the EFD does not apply if the refusal to grant access is objectively justified. The Notice seems to lay down

⁵⁹ See Ch.3, fn.10, para. 41

⁶⁰ *ibid.*, para. 58

⁶¹ *supra* n. 1, para. 91c

⁶² See Ch.3, fn.185

⁶³ *ibid.*, para. 56

⁶⁴ Bartosch, Chapter 4, in Koenig/Bartosch/Braun, p.147

a number of non-exhaustive examples (para. 91e uses the phrase "could include") of what may constitute an objective justification for a refusal to provide access in the telecommunications sector. These include, for example, the overriding difficulty of providing access, or the need for a facility owner, which has undertaken investment aimed at the introduction of a new product or service, to have sufficient time and opportunity to use the facility in order to place that new product or service on the market.⁶⁵ The possibility of a return on investment therefore appears to be a legitimate justification for a refusal to grant access.⁶⁶ The Commission thus seems to recognize that, alongside its aim of promoting service competition by enabling new entrants to access the incumbents' networks, it is also important, for the telecommunications industry and consumers, not to undermine incentives for firms to invest and innovate. Although it should be borne in mind that the incumbent operators obtained their dominant positions in a regime of exclusive rights, as the telecoms markets have become increasingly competitive, room for undertakings to invest and innovate has increasingly gained importance. It must also be pointed out that the rapid technological development in telecommunications progressively undermines advantages gained by the incumbent operators in the times of monopolisation.⁶⁷

Two further objective justifications mentioned in the Access Notice are 'hidden' in the conditions which must be fulfilled before the EFD can apply: a dominant undertaking is not obliged to provide access if there is insufficient capacity to provide access,⁶⁸ or if the party seeking access is not prepared to pay a reasonable and non-discriminatory access price and/or accept non-discriminatory access terms and conditions.⁶⁹

This enumeration of possible justifications for a refusal to grant access seems to conflict with para. 87 of the Access Notice, which states that where capacity constraints are not an issue "it is not clear what other objective

⁶⁵supra n. 1, para. 91e

⁶⁶This seems to be in contrast to the Commission's decision in *British Midland/Aer Lingus* (see Ch.3, fn.167), where the Commission refused to recognize a loss in revenue as a legitimate justification

⁶⁷Bavasso, (YEL 2002),p.99

⁶⁸supra n. 1, para. 91 b

⁶⁹ibid., para. 91 d

justifications there could be." The Notice therefore seems to contain contradictory statements.⁷⁰

3. Conclusion

Generally speaking, on the one hand the Access Notice aim of creating more clarity (as to the application of the competition rules in the telecommunications sector) should be seen in a positive light, in particular with regard to the immense room for manoeuvre that the Commission has in this area.⁷¹

On the other hand, the Notice has been criticized as an "over-zealous and over-interventionist approach".⁷² A number of the Notice's requirements do not seem to be in line with the Court's case law. Regarding the effect that the refusal of access should have on competition, the Notice sets out a number of criteria which are considerably weaker and less detailed than those developed in the Court's jurisprudence (see above). The same can be said about the criterion of the "duplicability" of the facility in question, upon which the Access Notice does not elaborate any further. It completely fails to comment on how competitive or uncompetitive the downstream market should be in order for the EFD to apply. By using the notion of "essentiality" in both the determination of dominance and of abuse, there is a danger of automatically inferring an abuse from a certain dominant position, and vice versa.

In addition, there are a number of general reasons why the duty of network operators to provide access should be treated carefully. Following a policy of too-easy access to established networks will have a negative effect on infrastructure competition in the sector. It will significantly lower the incentive to invest in new and/or alternative infrastructure, for both established and new competitors in the market. This one-dimensional approach, of supporting service competition over infrastructure competition, might lead to a perpetuation or even strengthening of the dominant position of incumbent

⁷⁰Bartosch, Chapter 4, in Koenig/Bartosch/Braun, p. 148

⁷¹Koenig/ Loetz, p.384

⁷²Nikolinaikos ,(ECLR, 1999), p. 410

operators. The increasing demand for access to established infrastructures may lead to an extension of the essential facilities and thus to an increase in barriers to entry. This undermines the liberalization measures which try to weaken the position of incumbent operators.⁷³ This is closely connected with the concept that Article 82 EC protects competition and not competitors. The Commission seemed to have acknowledged that concept when it stated, in its draft Access Notice (in a footnote to paragraph 91), that "Community law protects competition and not competitors, and therefore, it would be insufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory."⁷⁴ Unfortunately, the first part has been left out in the final draft, which reads as follows: "It would be insufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory."⁷⁵ Naftel criticises the Commission's concept of competition which becomes apparent in the footnote. The Commission does not define competition as a maximization of consumer welfare, which should be the primary aim of any competition policy. It considers that the term 'competition' implies a number of competitors, in contrast to one single competitor.⁷⁶ The Commission seems to ignore the fact that, under certain circumstances, it may be more efficient, and therefore more advantageous for the consumer, to have only one undertaking operating in a certain market. Instead, it seems to require efficient, if dominant, operators to subsidize less efficient competitors by providing access to facilities at artificially low costs.

Another problem, which was encountered in *Magill*,⁷⁷ is that of finding the right balance between the national property rights enjoyed by network operators in relation to their infrastructure, and EC competition law. This

⁷³Koenig/ Loetz, p. 383

⁷⁴Draft Access Notice on the application of competition rules to access agreements in the telecoms sector, framework, relevant markets and principles, COM (96) 649 final., para 79, ftn 58)

⁷⁵supra n. 1, para. 91 a, ftn. 67

⁷⁶Naftel, p.17

⁷⁷See Ch.3, ftn.185

particular issue will arise if the Commission, as announced in para. 6 of the Access Notice, applies the EFD to digital communications.⁷⁸

Granting access under Article 82 EC would also mean that the Commission would have to deal with access issues, such as the determination of access prices. However, it is questionable whether the Commission, as an antitrust authority, is suited for such ex ante regulatory control or whether that should rather be left to specialist regulatory authorities.⁷⁹ Articles 12 and 13 of the new Access Directive⁸⁰ deal with such access issues.

In addition, it is questionable whether, in an environment of convergence and platform independence, a certain network constitutes an essential facility in all circumstances. Grewlich therefore suggests that the application of the EFD in the telecommunications sector should be confined to natural monopolies, i.e. facilities that nobody has an economic incentive to duplicate.⁸¹

⁷⁸Koenig/ Loetz, p.384

⁷⁹Bartosch, Chapter 4, in Koenig/Bartosch/Braun, p.137

⁸⁰supra n.24

⁸¹Grewlich, (GYIL, 1998),p. 34

Chapter 5: The Regulatory Framework for Access and Interconnection

As we have seen above, obligations for dominant undertakings to provide access in certain circumstances have been developed in antitrust law under the label of the “essential facilities doctrine” (EFD). Although these rules have been established as part of the ex-post application of competition rules, the principles of the EFD have also had significant influence on ex-ante regulation, notably the regulatory framework for access and interconnection.

1. The old regulatory framework for access and interconnection (the ONP Framework)

Originally developed to secure access for value-added services to the monopolists’ networks, the ONP (Open Network Provision) framework¹ was adjusted to a more competitive environment with the adoption of the Interconnection Directive,² to create a general framework providing basic principles for the regulation of access to public telecommunications networks in the EU.

The old framework did not constitute a dedicated framework for network access, but rules for access and interconnection were scattered over various directives: the Interconnection Directive (97/33/EC)³; certain provisions of the Voice Telephony and Universal Service Directive (98/10/EC)⁴; certain elements of the Leased Line Directive⁵; and the Advanced Television Standards Directive (95/47/EC).⁶

¹The ONP framework consists of a series of directives, see Chapter 2

²See Ch.2, fn.56

³ibid.

⁴See Ch.2, fn.55

⁵See Ch.2, fn.52

⁶ Directive 95/47, European Parliament and Council Directive on the use of standards for the transmission of television signals (Advanced Television Standards Directive), [1995] O.J. L281/51

This regime is replaced by the new Access and Interconnection Directive,⁷ Article 7 of which carries over the obligations under the current ONP Directives and the Local Loop Regulation,⁸ but requires NRAs (National Regulatory Authorities) to review all obligations regularly, in particular in the light of the new framework and the new threshold for SMP (Significant Market Power). In particular, it maintains most of the provisions of the TV Standards Directive,⁹ including the obligation to provide additional access to broadcasters on fair, reasonable and non-discriminatory terms.

2. The new Access and Interconnection Directive¹⁰

2.1 Scope and aim

The Access Directive, as the new regulatory framework in general, marks a move away from the focus on fixed voice networks to the regulation of communications networks generally. It establishes arrangements for regulating access to electronic communications networks and services, and interconnection between networks. The Directive deals with the wholesale relationship between the providers of networks and services and associated facilities. It sets the regulatory framework for the relationships between suppliers and services that should result in sustainable competition, interoperability and user benefits.¹¹

There are two major aspects to the Directive:

(1) Details of the rights and obligations for operators seeking access and /or interconnection. These general rights and obligations apply to all operators that come within the scope of the Directive.

⁷ Directive 2002/19/EC of March 7, 2002 on access to, and interconnection of, electronic communications networks and services, (2002) OJ L108/7

⁸ Regulation 2887/2000, Commission Regulation on unbundled access to the local loop (LLU Regulation), [2000] O.J. L336/4

⁹ *supra* n. 6

¹⁰ *supra* n. 7

¹¹ *ibid.* Art. 1(1)

(2) Arrangements for the imposition of specific obligations on operators designated as having Significant Market Power (SMP), following market analysis in the relevant market.

Recital 1 of the Access Directive specifically limits the provision of the new access framework to those networks used for the provision of *publicly* available electronic communications services. The definition of “Public Communications Network”, as set out in the Framework Directive, states that such a network is “used wholly or mainly for the provision of publicly available electronic communications services.”¹²

The Directive does not cover services providing content¹³ (Recital 2 Access Directive and Recital 10 Framework Directive). It also excludes Information Society services, as defined in Article 1 of Directive 98/34/EC¹⁴, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. The main difference between such services is considered to be that content and Information Society services are triggered by an individual request (e.g. booking a flight online) and therefore relate to information rather than signalling.¹⁵

The Access Directive includes provisions that require ex-ante rules to be withdrawn in the event that a relevant regulated market segment becomes competitive (Recital 13). It was drafted with the aim of providing clear boundaries within which ex-ante regulation is necessary and proportionate. It balances the need for regulatory certainty and consistency against the need for a sufficiently flexible framework, which is able to address new access issues as they emerge. The new flexible approach stipulates that National Regulatory Authorities (NRAs) are to impose specific ex-ante access obligations, if such obligations are necessary to ensure adequate access and interconnection in a concrete market situation.

¹²Framework Directive (see Ch.2, ftn.4), Art. 2(d)

¹³Defined as “services providing or exercising editorial control over content (Art. 2(c) Framework Directive, see Ch.2, ftn.4)

¹⁴Information Society Services are defined in Directive 98/34/EC as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request or a recipient of the service”; Directive 98/34/EC of the European Parliament and the Council of 22.6.1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, [1998] OJ L 204/37, as amended by Directive 98/48/EC of 5.8.1998, [1998]OJ L217/18

¹⁵C. Koenig/ S. Loetz, *Framework for Network Access and Interconnection*, Chapter 8, in Koenig/Bartosch/Braun, p.427

2.2 Definitions

Under the new regulatory framework, the same rules will apply to both access and interconnection with an operator's network.

For the purposes of the Directive, "access" means making available facilities or services to another undertaking for the purpose of providing electronic communications services.¹⁶ This includes physical infrastructure, such as buildings, ducts and masts. "Access" in the sense of the Access Directive does not refer to access by end users (i.e. users not providing publicly available electronic communications networks or services¹⁷). "Interconnection", for the purposes of the directive, is a specific type of access implemented between public network operators,¹⁸ in order to allow users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking.¹⁹

2.3. General provisions

Article 3 carries forward the provisions of the old Interconnection Directive²⁰ in requesting that Member States take all necessary measures to remove restrictions which prevent the negotiation of access/interconnection agreements between undertakings. It also contains a type of 'one-stop-shop' principle, in that an operator requesting interconnection does not need to be authorised/licensed in the Member State where the request is made, if it is not providing services in that Member State.

Article 4 sets out the so-called 'primary interconnection rule',²¹ which gives all service providers, authorised to operate a network providing publicly-

¹⁶supra n. 7, Art. 2a

¹⁷Art. 2(n) Framework Directive (see Ch.2, fn4)

¹⁸"Operator", for the purposes of the Directive, is "an undertaking providing or authorised to provide a public communications network or an associated facility." (supra n. 7, Art. 2(c))

¹⁹ibid. Art. 2b

²⁰See Ch.2, fn.56

²¹Bavasso, (CMLRev,2004), p. 100

available services, a right and an obligation to negotiate interconnection with each other. This obligation applies to all operators, not only SMP operators. Commercial negotiation therefore remains the first step for any service provider seeking to gain access to networks or service.²² However, because of the strong market position of the incumbent operators of fixed public telephone networks (see above), and the risk of them engaging in anti-competitive behaviour, it was considered that interconnection could not be left entirely subject to commercial negotiation, and that a regulatory framework was needed to ensure regulation of operators with market power. Furthermore, operators shall offer “interconnection to other undertakings on terms and conditions consistent with obligations imposed by the NRAs pursuant to Articles 5,6,7 and 8.” These obligations set out: powers and responsibilities of the NRAs with regard to access and interconnection; arrangements for conditional access systems and other facilities; review of former obligations for access and interconnection; and arrangements for the imposition, amendment or withdrawal of obligations. Article 4 also imposes obligations of confidentiality on undertakings negotiating interconnection. According to Article 5(1), NRAs may, in certain circumstances, impose obligations on operators that do not have SMP. In doing so, the NRAs must comply with their obligations under Article 6 Framework Directive²³ (consultation and transparency mechanism) and Article 7 Framework Directive (consolidating the internal market for electronic communications). They must ensure that all conditions imposed are objective, transparent, proportionate and non-discriminatory (Article 5(3)). Some of these obligations may be imposed on undertakings that control access to end-users, whenever that is necessary to ensure end-to-end connectivity.²⁴ This is particularly the case in markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services.²⁵

²²As in ONP Interconnection Directive (see Ch.2, ftn.56): Article 4(1) gives priority to commercial negotiation of interconnection

²³ Framework Directive, see Ch.2, ftn.4

²⁴ *supra* n.7, Art. 5(1)(a)

²⁵ *ibid.*, Recital 6

2.4. Obligations of operators with SMP²⁶

The Access Directive incorporates two sets of rules that deal with bottleneck issues at infrastructure level. Article 6 deals specifically with broadcasters' access to an established conditional access system, while Articles 9-13 deal more generally with access to electronic communications networks and associated facilities,²⁷ i.e. they comprise all facilities that can be involved in the process of transmitting signals.

In Article 6, the Access Directive provides that access to Conditional Access (CA) Systems (CASs),²⁸ and associated facilities, will continue to be regulated (as they are under the TV Standards Directive²⁹), and that the scope of such regulation will be extended if this is found to be necessary after a market review. It exclusively refers to CA services for digital television and radio broadcasting services. The mere fact of having control over a CA facility triggers an unconditional and absolute access obligation.

Articles 8 to 13 impose additional obligations on operators designated as having SMP. According to Art. 16(4) Framework Directive,³⁰ once the NRA has decided that an operator has SMP, it must at least impose one ex-ante obligation on that operator. According to the Access Directive, the NRAs can impose the following types of obligation on such operators at the wholesale level³¹:

- a requirement to meet reasonable requests for access to, and use of, specific network elements and associated facilities (Article 12);

²⁶For the concept of SMP in the New Regulatory Framework, see Chapter 1, 1

²⁷For the definition of "electronic communications networks", see Chapter 1; "associated facilities" are defined in Art. 2 (e) Framework (see Ch.2, ftn.4) as "facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service."

²⁸Art. 2(f) of the Framework Directive (supra n.14) defines "conditional access" as "any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other forms of prior individual authorisation." This includes a combination of hardware (set-top box, smartcard) and software devices (encryption system, subscriber management functions). CA has traditionally been associated with pay-TV services.

²⁹supra n. 6

³⁰Framework Dir., see Ch.2, ftn.4

³¹The Universal Service Directive (Directive 2002/22 on universal services and users' rights relating to electronic communications networks and services, [2002] O.J. L108/51) sets the obligations which may be imposed at the retail level, such as tariff regulation (Article 16), provision of the minimum set of leased lines (Article 18), carrier selection and/or pre-selection services (Art.19).

- requirements in relation to transparency including accounting information, technical specification, network characteristics, terms and conditions for supply and use, prices (Article 9);
- obligations in relation to non-discrimination (Article 10);
- requirements in relation to accounting separation to ensure that cross-subsidies are not being made (Article 11); and
- price control and cost accounting obligations (Article 13).

Therefore, a service provider deemed to have SMP may be required to provide access and interconnection services to a wide range of potential competitors. According to Article 12 Access Directive, access obligations may be imposed on operators to ensure that they “meet reasonable requests for access to, and use of, specific network elements and associated facilities.” Article 12 specifically mentions the competitive development of retail markets to justify the imposition of access obligations upon operators with SMP. The meaning of “access” is extended by the list of examples set out in Article 12(1), including, *inter alia*, access to services on a wholesale basis, as well as general obligations such as the duty to negotiate in good faith.

As to the actual access obligation, Article 12 of the Access Directive leaves it to the NRAs to determine what initiatives are actually needed to ensure the openness of a certain facility. Unlike the ONP Interconnection Directive,³² the Access Directive does not contain a focus on access to facilities relevant to voice telephony, which enables an NRA to mandate access to a much greater range of network elements and services. This means that Articles 8-13 do not automatically label certain facilities as bottleneck facilities, as was done under the ONP concept, but NRAs are entitled to determine the circumstances under which particular facilities are to be regarded as potential bottlenecks to market entry and competition (with the exception of Article 6).

The Access Directive continues the proportionality approach (“essential requirements”) of the ONP framework. According to Article 12(2), when imposing access obligations, NRAs must balance all interests involved and take into consideration not only such technical aspects as systems integrity and security, interoperability and capacities, but also competition policy aspects, such as: the need to recoup initial investments; the long-term effects

³² See Ch.2, fn.56

on competition of access denial; the economic risks involved in setting up certain facilities; and any property interests of the provider of the facility. In exceptional circumstances, and with prior agreement of the Commission, a Member State may impose ex-ante obligations, which are in excess of those described above, on operators with SMP. (Article 8(4)).

3. Regulation 2887/2000/EC on Unbundled Access to the Local Loop³³

Regulation 2887/2000/EC (the ULL Regulation), although published at the same time as the Directives of the new regulatory framework, became law in all Member States at the beginning of 2001. The reason for this special treatment is that access to the last mile remains the least competitive segment of the liberalized telecommunications market as incumbents still dominate the local access market.³⁴

New entrants do not have widespread alternative network infrastructures and are unable, with traditional technologies, to match the economies of scale and the coverage of operators designated as having SMP. This results from the fact that these operators rolled out their metallic local access infrastructures over significant periods of time, protected by exclusive rights, and were able to cross-subsidise investment costs through monopoly rents.³⁵ Furthermore, it is usually not economically viable for new entrants to duplicate an incumbent's metallic local loop access infrastructure in its entirety and within reasonable time, and alternative infrastructure (such as upgraded cable TV networks, satellite, wireless local loop, fibre optic networks) do not generally offer the same functionality or universality.³⁶ One

³³supra n.8

³⁴Commission: 5th Report on the implementation of the telecommunications regulatory package, [1999] COM 537

³⁵supra n. 8, Recital 3

³⁶Commission Communication of 26 April 2000, Unbundled Access to the local loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet, COM (2000)final, p.6

of the main deficiencies of cable television networks is, for example, their limited coverage.³⁷

The incumbent's copper pair is the key infrastructure for providing:

- (a). access to voice telephony services, which includes call termination;
- (b). local call (originating) services (except where carrier pre-selection allows the delivery of local call services); and
- (c). high bandwidth services to end users.³⁸

There is a danger that the incumbents will lever their dominant position in the former two markets into the latter market of broadband internet access. Incumbents are already rolling out their own broadband high speed bit stream services for Internet access in their copper loops, but may delay the introduction of some types of DSL (digital subscriber technologies) and services in the local loop, where these compete with the incumbents' own current offerings.³⁹ It is therefore considered crucial to grant new entrants access to the local loop, both to meet users' needs (in particular those for high speed Internet access) and, more generally, "to create an inexpensive, world-class communications infrastructure and a wide range of services", as envisaged by the European Council of Lisbon on 23 and 24 March 2000.⁴⁰ High connection speeds between content-providers and users are essential for new Information Society services, such as: video and music on demand; voice over Internet; video conferencing, etc. ⁴¹ Using the traditional copper local loop for these services makes them available to the normal consumer.

³⁷ *ibid.*, p. 6

³⁸ *ibid.* p. 8; until recently, the copper pair of the local loop has not permitted high speed network connections - digital subscriber line (DSL) technologies make it now possible to use the wire local loop for high speed internet connections. For this, a DSL access multiplexer (DSLAM) must be connected directly to the copper pairs (see Annex of Commission Communication, 15).

³⁹ Commission Recommendation of 25 May 2000 on unbundled access to the local loop: enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed internet, [2000] OJ L156/44

⁴⁰ *supra* n. 8, Recital 1

⁴¹ T.C. Vinje and H. Kalimo: Does competition law require unbundling of the local loop?, *Journal of World Competition* (2000) 23(3), 49

3.1. Scope and definitions

“Local loop” is defined in Recital 3 and Article 2(c) of the Regulation as “the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility.” Local loops that are not based on metallic circuits, e.g. fibre systems, are therefore excluded from the Regulation’s scope of application.⁴² “Unbundled access to the local loop” means, according to Article 2(e) of the Regulation, “full unbundled access to the local loop and shared access to the local loop;⁴³ it does not entail a change in ownership of the local loop.”

3.2. Relation to Access Directive⁴⁴

Recital 15 of the ULL Regulation provides that the new regulatory framework for electronic communications should include appropriate provisions to replace the Local Loop Regulation. It is presently unclear whether the ULL Regulation will be repealed, once the new regulatory framework and the specific provisions regarding the local loop contained in the Access Directive have been fully implemented at national level. Under the new regulatory framework, the regulation is incorporated in the Access Directive,⁴⁵ providing an annexed list of items to be included in the offer for sufficiently unbundled access under conditions that are transparent, fair and non-discriminatory, and based upon cost orientation, identical to the list in the ULL Regulation.⁴⁶ Article 2(a) of the Access Directive makes clear that any definition of access should also encompass local loop unbundling and facilities and services

⁴²supra n. 8, Recital 5

⁴³“Full unbundled access to the local loop” means “the provision to a beneficiary of access to the local loop or local sub loop of the notified operator authorising the use of the full frequency spectrum of the twisted metallic pair” (Art. 2(f)). “Shared access to the local loop” means “the provision to a beneficiary of access to the local loop of the notified operator, authorising the use of the non-voice band frequency spectrum of the twisted metallic pair; the local loop continues to be used by the notified operator to provide the telephone service to the public” (Art. 2(g)). Full unbundled access was not covered by the ONP framework, although shared access to the high frequency spectrum was covered by Art. 16 of the ONP Voice Telephony Directive and Art. 4 of the ONP Interconnection Directive.

⁴⁴supra n. 7

⁴⁵ibid. Art. 12(1)(a)

⁴⁶ibid., Annex II

necessary to provide services over the local loop. Under Article 12(1)(a) of the Access Directive, operators designated as having SMP in the market for wholesale local access may be required to provide unbundled access to their local access network.

3. 3 Unbundled Access

Article 3(2) of the Regulation requires incumbent operators, designated by their NRAs as having SMP⁴⁷ ("notified operators"), to meet all reasonable requests for unbundled access to their local copper loops - on the basis of both exclusive and shared use - on fair, reasonable and non-discriminatory terms. This includes the right for competitors to have access on the same terms as those offered to the operators themselves or their associated companies. It also includes the right for the new entrant to co-locate its own network equipment with that of the incumbent. The price for unbundled access to the local loop must be cost-oriented, so long as competition is not sufficient to prevent excessive pricing (Articles 3(3) and 4(4)). Operators must publish a reference offer for unbundled access to the local loop, including prices, terms and conditions (Article 3(1)). Requests for access to the notified operator's local loop may only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity (Article 3(2)). As in the Access Directive⁴⁸ above, the regulation focuses on the commercial negotiation of network access, whilst simultaneously setting conditions for agreements.

⁴⁷For the purpose of the ULL Regulation, the old concept of SMP applies, i.e. that an operator is rebuttably presumed to have SMP when it has market shares of 25% or more in the market for the provision of fixed public telephone networks and services.

⁴⁸supra n. 7

4. Access/Interconnection and Unbundling of the Local Loop: Interrelation between competition law and regulation

EC competition rules in general, and the EFD in particular, have had a significant impact on regulation of access and interconnection in EC telecommunications. Two of a number of examples of the influence of antitrust law and principles in this area are: access to network facilities, and the unbundling of the local loop.⁴⁹

4.1 Access to network facilities

Article 12(1) of the Access Directive⁵⁰ reads:

“A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having similar effect would hinder *the emergence of a sustainable competitive market at the retail level*, or would not be *in the end-user's interest* (emphasis added).”

The Article provides that when the national authority deals with access requests, it must take into account the competitive situation of the market, in that it has to ensure that the refusal to provide access would not “hinder the emergence of a sustainable competitive market.” This seems to be in line with the ECJ's case law on refusal to deal, which requires, for there to be an abuse of a dominant position under Article 82 EC and therefore a duty to deal, that the behaviour in question must have a negative impact on competition in the downstream market.⁵¹

⁴⁹ Another area of regulation where the influence of competition law is very obvious is that of digital broadcasting

⁵⁰ *supra* n.7

⁵¹ See case law of the ECJ, above Chapter 2

It should also be noted that the Commission takes account of the interests of the consumer, emphasising the impact of the denial of access “at the retail level” and considering the “end-user’s interest”. This seems to be supported by AG Jacobs in his Opinion in *Bronner*, where he stated that “the primary purpose of Article 86 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors.”⁵² In particular, the earlier case law of the ECJ has often been criticised as being too competitor-orientated.⁵³

In the second paragraph of Article 12, the Commission seems to rely heavily on principles developed in relation to essential facilities case law as well as the Access Notice.⁵⁴ Article 12(2) provides that NRAs, when considering whether to impose an obligation to provide access, shall take account of the following factors:

“(a) the technical and economic viability of using or installing competing facilities...;

(b) the feasibility of providing the access proposed, in relation to the capacity available;

(c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;

(d) the need to safeguard competition in the long term;

(e) where appropriate, any relevant intellectual property rights;

(f) the provision of pan-European services.”

4.2. Unbundling of the Local Loop

Regarding the unbundling of the local loop, the Commission’s Communication on unbundled access on the local loop,⁵⁵ setting out guidelines on the application of the existing Community law in this respect, seems in particular to rely heavily on the concept of essential facilities. The

⁵²See Ch.3, ftn.10, para. 58

⁵³See above Chapter 2

⁵⁴See Ch.2, ftn.100

⁵⁵supra n.36

Communication expressly refers to the *Bronner*⁵⁶ precedent when justifying a general obligation to unbundle the local loop, and states that:

“Given the size of the investments required, the absolute cost of nation-wide duplication of the incumbents’ network with a similar population coverage is likely to be a barrier to entry for any competitor. This infrastructure appears to be with present technologies economically unfeasible, or unreasonably difficult to duplicate at a nation-wide level in a reasonable time period, even for the most important competitors of existing incumbents, in particular incumbent operators from other Member States which develop their activities in neighbouring European countries, alone or in cooperation with others.”⁵⁷

However, the Commission seems to ignore the fact that the ECJ in *Bronner* did not regard it as sufficient for there to be a duty to provide access where duplication of the facility had to be unfeasible for any kind of competitor. Duplication had to be unfeasible for a competitor with a similar customer base as that possessed by the dominant operator:⁵⁸

“For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish...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.”⁵⁹

Competitors requiring access would therefore have to establish that alternative networks would be unfeasible on a nation-wide scale, serving a similar number of customers as the current incumbent.

The Commission starts the essential facilities test in its Communication by justifying an obligation to unbundle with the fact that the incumbent operators have gained an unfair advantage through their former monopoly position. This seem to mirror a statement of AG Jacobs in his Opinion in *Bronner*, where he declared that “the cost of duplicating a facility might alone constitute an insuperable barrier to entry. That might be so particularly in cases in which the creation of the facility took place under non-competitive conditions, for example, partly through state funding.”⁶⁰

⁵⁶ see Ch.3, fn.10

⁵⁷ supra n. 36, p. 8

⁵⁸ Naftel M./Spiwak, L.J., *The telecoms trade war*, (Oxford, 2000) p. 315

⁵⁹ see Ch.3, fn.10, para. 46

⁶⁰ ibid, para. 66

According to Naftel and Spiwak, the fact that public funds were used to construct networks cannot by itself justify an obligation to provide access to the local loop by the incumbent operators in subsequently liberalized and privatized economic environment, as investors have reimbursed the state for its network construction.⁶¹

5. Conclusion

In summary, it can be said that EC regulatory measures on access and interconnection have been influenced by competition law in general, and by the Community courts' interpretation of competition law. The competition rules have been transformed into bases for ex-ante regulation.

On the other hand, it is also possible that this codification of competition law under a regulatory measure will, in turn, provide guidelines for the application of competition law and the EFD in areas of the communications sector which are outside the scope of a regulated environment.⁶²

However, the relatively slow progress in the unbundling of the local loop in the Member States, even after the introduction of the ULL Regulation, shows that the interrelation between competition and regulation, which has been successful in some areas, might not work in others. This highlights the importance of complementing regulatory action with *ex post* application of Article 82 EC. The Commission has launched infringement proceedings against Member States that have not fully implemented the ULL Regulation. It has also expanded its sector enquiry to the local loop,⁶³ and investigated anti-competitive behaviour through several competition cases. The two main examples are *Wanadoo*⁶⁴ and *Deutsche Telekom*.⁶⁵

⁶¹Naftel/ Spiwak,p.315

⁶²Bavasso, (The Hague, 2003) p. 79, quoting Case 66/86, *Ahmed Saeed Flugreisen*, [1998] ECR 803

⁶³See Press Release IP/02/849, June 12, 2002. Further information on the Local Loop sector inquiry can be found at:

www.europ.eu.int/comm/competition/antitrust/others/sector_inquiries/local_loop/

⁶⁴See Press Release IP/01/1899, December 12 2001 and Press Release IP/03/1025, July 16 2003

⁶⁵Commission Decision [2003] O.J. I263/9, October 14, 2003; Press Release IP/03/717, May 21 2003

Therefore, the question remains whether, in a liberalized market environment, it would be better to phase out sector-specific regulation and let competition law rule on its own.

Chapter 6 : Conclusion

In line with Article 3(1)(g) EC, the ultimate aim of the liberalization process is to achieve a state of undistorted and sustainable competition in the EC telecommunications market. There are basically two ways to achieve that goal: via sector-specific regulation on the one hand and via general competition rules (in particular Articles 81 and 82 EC) on the other. From the beginning, the liberalization of the telecommunications sector has been based on a dual regime of sector-specific regulation and EC competition rules. Both sets of rules are based on a common origin: the quest for the internal market.¹ However, the competition rules have become increasingly independent from this common market origin and have had a significant influence on sector-specific rules.² One of the most recent examples of this trend is the New Regulatory Framework for Electronic Communications, which contains a previously unattained level of mutual interaction between regulation and competition law, giving a position of prominence to competition principles within the regulatory regime. To the extent that communications activities are subject to both specific regulation and competition rules, the issue of the relationship and interaction between these different set of rules arises.³

1. Competition law versus sector-specific regulation

Both set of rules pursue the policy goal of effective competition., but have different characteristics and partly apply to different market situations. The

¹A. Bavasso, *Electronic communications: A new paradigm for European regulation*, (2004) 41 C.M.L.Rev.87, p. 111

²*ibid.*

³The issue of the relationship between sector-specific regulation and competition law has attracted extensive commentary. See, in particular, OECD: *Relationship between Regulators and Competition Authorities*, DAF/CLP(99)8; and Grewlich, *Cyberspace: sector-specific regulation and competition rules in European Telecommunications*, (1999) 36 CMLR 937

general competition rules are broadly formulated and apply across a comprehensive range of industries. This makes them automatically less predictable for market actors, but on the other hand more flexible than sector-specific rules.⁴ They are essentially reactive in nature, i.e. they apply ex post to market conduct.⁵ However, it has been argued that if the application of competition rules is backed by sanctions, they can fulfil a certain ex-ante function in that they could work as a deterrent for anticompetitive behaviour.⁶ This seems to be a reasonable approach in economic sectors where the competitiveness of the market is sustained by actual or potential competition between undertakings, i.e. in most industries.⁷ Competition rules therefore start with the presumption that markets are competitive to begin with, and their role is to protect competition by eliminating anti-competitive behaviour. However, the main drawbacks of relying on competition law are the limited scope for intervention and the time and costs involved in resolving disputes.⁸ Sector-specific rules, in contrast, pursue a wider range of objectives, including effective competition, and can take account of specific technical or economic characteristics. Thus, they are capable of achieving specifically defined social and political objectives.⁹ They apply ex ante, defining a narrow range of acceptable conduct, and therefore provide considerable legal certainty for long-term investors. In contrast to competition rules, sector-specific rules apply in market situations where competition is absent, or at least not optimal, by imposing controls which substitute for competition.¹⁰ Sector-specific rules are therefore particularly applied in sectors which have been regarded as too politically or economically sensitive to be opened to free competition. Until the beginning of the liberalization process in 1987, telecoms services in the EU were mostly monopolized and under state control. Even after the telecoms markets were liberalized, due to the specific economic features of the telecoms sector (dominant incumbent operators, high costs of entry, technical externalities) the Commission decided that competition rules alone were not sufficient to deal with the various problems

⁴J.-D. Braun/ R. Capito, *The Emergence of EC Telecommunications Law as a New Self-Standing Field within Community Law*, Chapter.2, in Koenig/Bartosch/Braun, p.65

⁵With the exception of merger control, see for example OECD report p. 26

⁶Murroni, /Irvine, p.53

⁷van Dijk, p. 96

⁸van Dijk, p.109

⁹Garzaniti, (Oxford, 2003), 538

¹⁰van Dijk, p. 96

in the telecoms sector.¹¹ Ex ante rules were therefore considered to be necessary, at least in the short- to medium-term, to ensure efficient and timely access to networks and other facilities that would otherwise constitute bottlenecks for market entry, and to control tariffs for services that were not subject to effective competition. Thus, a comprehensive framework of sector-specific regulation developed in the telecoms sector. One of the main questions in telecoms policy today is whether these sector-specific circumstances still justify the continued use of sector-specific regulation.

In principle, EC competition law and sector-specific regulation apply in parallel. Competition rules are thus fully applicable even when sector-specific rules have been adopted.¹² NRAs must therefore ensure that actions taken by them within the regulatory framework are consistent with EU competition law.¹³ They may not approve arrangements which are contrary to EU competition rules.¹⁴ According to the Access Notice,¹⁵ sector-specific regulation will generally take precedence with regard to action under competition law, if such sector-specific action is pro-competitive and efficient.¹⁶

The competition rules thus have the function of a "safety net"¹⁷ in the event that certain abusive behaviour by an operator is not covered by the specific regulations, or in cases where Member States have failed to implement Community legislation.¹⁸ It is the role of competition rules to ascertain that the goals which have been achieved through sector-specific regulation are not undermined by the anticompetitive behaviour of undertakings: in particular, the incumbent undertakings which still occupy dominant positions in the market. Competition rules have also had a significant influence on sector-specific regulation. For example, from the beginning, competition

¹¹See Ch.2, fn.100, para. 14

¹²Grewlich,(GYIL,1998), p. 40

¹³See cases 66/86, *Ahmed Saeed*, [1989] ECR 838; Case 153/93, *Federal Republic of Germany v. Delta Schiffahrtsgesellschaft*, [1994] ECR-2517; Case 267/86, *Van Eycke*, [1986] ECR 4769

¹⁴Case 13/77, *GB-Inno*, [1977] ECR 2155, at para. 33: "...while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure that could deprive the provision of its effectiveness."

¹⁵See Ch.2, fn.100

¹⁶The Access Notice refers to the old ONP framework when referring to sector-specific regulation. However, the Notice remains in effect in parallel with the New Regulatory Framework: see reference made to the Access Notice in SMP Guidelines, *ibid.*, para. 24

¹⁷Grewlich,(GYIL,1998), p. 40

¹⁸*ibid.*

rules have been used as a legal basis for sector-specific regulation. Competition rules, and in particular Article 86 (ex 90), have played a decisive role.

2. Practical example of interaction between competition law and sector-specific regulation: Access to “essential facilities”

One area in the telecommunications sector in which the interrelation between regulation and competition law is particularly apparent is that of access to, and interconnection of, networks: this has always played an important role in the opening-up of the telecoms sector. As the liberalization process did not coincide with the end of dominant positions, access policies are necessary to enable new competitors to enter the market. On the one hand, providing access and interconnection for new competitors seems to be the inevitable way to achieve competition regarding the network externalities which characterize the telecommunications sector. On the other hand, requiring operators to provide access for their competitors could undermine competition, as it is a deep intervention in the market mechanism.¹⁹ One of the main issues in telecoms policy is whether such access issues should be resolved by sector-specific regulation, or whether it is sufficient to apply EC competition rules (particularly Articles 81 and 82 EC), building on the concept of essential facilities.

Access to networks is one of the areas in which sector-specific regulation and competition law converge and, to a certain extent, overlap. If a competitor requires access to an incumbent's network, this could be dealt with under competition law, in particular under the essential facilities doctrine, or under the Access and Interconnection regulatory regime. The EFD, and competition

¹⁹Grewlich calls this the “interconnection paradox” (CMLRev, 1999, p. 962), quoting from Arlandis, “Concurrence et dominance: Le problème de la boucle locale”, 23 Communications & Strategies (1996), 79, p. 93

law in general, is one way of dealing with bottlenecks affecting telecommunications. Until now the telecommunications industry has been shaped instead by industry specific regulation.

The Commission considered that ex post application of competition rules to access and interconnection was insufficient: in rapidly-expanding markets, delay in granting access or interconnection may impair competition. In its 1998 Access Notice,²⁰ the Commission deals extensively with the relationship of competition law and sector-specific regulation in the area of network access. According to the Access Notice, sector-specific regulation will generally take precedence with regard to action under competition law, so long as the sector-specific regulation is pro-competitive and efficient. Thus, since the beginning of the liberalization process with the 1987 Green Paper, a comprehensive sector-specific framework dealing with access and interconnection has been established, both at EU level and at the level of EU Member States.

Within the framework of sector-specific regulation of access, the NRAs can act in a substantial ex-ante manner and mandate, in substantial detail, interconnection provisions concerning pricing, accounting and the technical details of access. However, the competition law concept of essential facilities has had a significant influence on this sector-specific access regime. In the Access Notice, the EFD has found its most explicit formulation. However, the EFD has always been viewed with a certain degree of scepticism. Although it owes its origins to US antitrust law, the Supreme Court has never officially recognised the doctrine. In a very recent case in the telecoms sector, *Verizon Telecommunications*,²¹ the Supreme Court again refused to endorse the EFD and expressed strong reservations, in particular concerning the difficulty of finding a balance between the fundamental antitrust concept of independence of competitors and the concept of enforced sharing of assets. To date, only the lower US courts have expressly referred to the term 'EFD'. Similarly, the ECJ has never recognized the doctrine as such, but has dealt with access cases under its 'refusal-to-deal' jurisdiction. Despite the quite broad application of the doctrine by the Commission since the ECJ's

²⁰See Ch.2, fn.100

²¹See Ch.2, fn.76

judgment in *Bronner*,²² the application of the EFD in EC competition law has been severely restricted. Many of the provisions in the Access Notice should be revised, as they are not in line with this case law. The test laid down in *Bronner* is probably more exacting than that which the Commission had in mind when it included the EFD in the 1998 Access Notice.

This restricted application of the EFD has been welcomed by most commentators. It underlines the importance of sector-specific access regulation, which provides more specific and far-reaching rights than competition law. Too broad an application of the doctrine could have a severe effect on the incentive to invest in the telecoms sector, on the side of the incumbents as well as on the side of new entrants. Although it should be borne in mind that the incumbent operators in the telecommunications sector will have obtained their dominant position in a regime of exclusive rights, with the telecoms market becoming progressively competitive, room for undertakings to invest is becoming increasingly important. Rapid technological development in telecoms undermines the advantages gained by the incumbent operators during the time of monopolization. In addition, a broad access policy could even strengthen the position of the incumbents, and therefore undermine the goals achieved by the liberalization process. This inherent conflict between a broad access policy and innovation has often been phrased as a debate between, on one side, those advocating infrastructure competition and, on the other side, those advocating a model of competition based on access, i.e. services competition. However, the question is not necessarily whether one should prevail over the other. It is important to take into account the time dimension. In order for competition to develop in the short term, new competitors have to be given access to incumbents' networks. However, in the long term, telecoms regulation should reward operators which base their competitive advantage on building their own infrastructure.²³

It should also be noted that granting access under Article 82 EC would mean that the Commission would have to deal with access issues, such as the determination of access prices. However, it is questionable whether the Commission, as an antitrust authority, is suited for such ex ante regulatory

²² See Ch.3, fn.10

²³ M.Monti, Competition Law and Regulation in the Telecoms Industry: The way forward, ECTA Conference Brussels, December 2003, p. 3

control, or whether that should be left to specialist regulatory authorities (the NRAs, in EC telecommunications). Articles 12 and 13 of the new Access Directive²⁴ deal with such access issues.²⁵

This leads to a very restricted application of the EFD in EC law: in line with the goal of Article 3(1)(g)EC an obligation to grant access is only legitimate if it serves the preservation of undistorted competition. As mentioned above, competition law and sector-specific regulation apply in parallel under EC telecommunications law. However, with the New Access and Interconnection Regime covering a wide range of access issues, it is questionable to what extent general competition law, and in particular the EFD, continue to play a practical role in the regulation of access. A number of issues formerly addressed by the EFD are now covered by the New Access and Interconnection Regime.²⁶ Thus far, the EFD has at least influenced the regulation of access, in that actions taken by NRAs under the access regulatory regime are required to be consistent with competition law, i.e. the principles established under Article 82 EC by the Commission or the ECJ with regard to access to essential facilities. Furthermore, as Article 82 EC is directly effective in the Member States, third parties may continue to use Article 82 EC and the EFD to gain access in private litigation. This will be of particular importance whenever Member States have not, or have not fully, implemented sector-specific rules.²⁷ The EFD could also be used as an instrument to gain access in cases which are not covered by the New Regulatory Framework. For example, as the New Regulatory Framework does not cover content services, cases concerning access to radio and TV broadcasting content, or web-based content, may still be dealt with under the EFD.²⁸

²⁴ See Ch.5, fn.7

²⁵ See also the US Supreme Court in *Verizon Communications* (see Ch.3, fn.76) where it held that "essential facility claims should...be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms".

²⁶ Garzaniti quotes as an example the right of mobile operators to install microwave links on their competitors' base station, which has traditionally been viewed as an essential facilities problem, but which may today fall under the regulatory regime (see Garzaniti, Oxford 2003, p. 313)

²⁷ Garzaniti, (Oxford, 2003), p. 544

²⁸ *ibid*, p. 314

3. Assessment of the “dual regime”

For the liberalization of the telecoms sector in the 1990s, the dual regime of sector-specific regulation and competition law applied by the Commission had proved very successful, giving a general precedence to sector-specific regulation. In most cases, the sector-specific regulation seems to have been sufficient to deal with the issues that have arisen. In major cases where proceedings had been opened under competition rules, the Commission has tended to stay those proceedings whenever sector-specific proceedings at EU or national level were likely to resolve the issue.²⁹ The 1990s have been characterized by an exceptional boom in the telecommunications sector.³⁰ Most of the goals set in the policy papers underlying the 1998 liberalization package have been reached, namely: successful liberalization and market restructuring; increased efficiency; and innovation. The sector has witnessed an unprecedented expansion in the markets for mobile services and within the Internet market, which has attracted substantial support from capital markets for the restructuring of telecoms markets.³¹ Since 1 January 1998, prices for international and long-distance calls have fallen by an average of 35%. Consumer choice and quality of service have increased dramatically.³² However, in 2000 and 2001, the sector seemed to be undergoing a major crisis, or, as the Commission put it, “a severe adjustment process”.³³ Many of the new market entrants simply disappeared, and established market operators were saddled with huge debts. When economic growth slowed, expected revenues did not materialize. This led to a decline in stock market valuations and to the postponement of investment, at a critical time both for the sector and the wider economy.³⁴ These difficulties were also felt in

²⁹See *Mobile Interconnect* proceedings: Press Release IP/98/707, 27.7.1998, which concerned an inquiry by the Commission into interconnection charges between fixed and mobile operators. See also *Accounting Rate* proceedings: Press Release IP/98/763, 13/08/1998 which concerned accounting rates charged to terminate international calls

³⁰Larouche, P., *What went wrong: The European Perspective*, (TILC Discussion Paper 2003), p.4

³¹H. Ungerer, *Introduction of competition in the communications market - The European Experience*, (Rio de Janeiro, 2001), p.4

³²*ibid.*, p.4

³³Commission Communication: *The Road to the Knowledge Economy* (see Ch.1, ftn.2)

³⁴*ibid.*, p. 1

neighbouring sectors, such as that for communications equipment and media content, and in the financial sector, which had heavily invested in the communications industry. The high licence fees paid by operators for frequencies reserved for third-mobile services (UMTS) worsened the operators' financial situation.³⁵ Another cause of the dire state of the communications sector seems to have been the unexpected resilience of the incumbent communications operators. With respect to fixed local communications in particular, incumbents usually hold more than 90% of the market, whereas in other areas their share is usually around 50%.³⁶ Delays in the unbundling of the local loop have given incumbents a comfortable head start in the provision of broadband Internet access.³⁷ The development of broadband services constitutes an important source of revenue growth, both for fixed line communication companies and for cable operators, who are facing stagnating demand for their other services.³⁸ However, according to the Commission's latest Report on the Implementation of the EU electronic Communications Regulatory Package, the sector is now on its way to recovery.³⁹ Improved financial conditions, combined with continued growth in the revenue from services, have created the conditions for the sector to recover.⁴⁰ In 2003, the sector experienced a modest rate of expansion with revenues having increased by 2.6%, most of which can be attributed to the services sector: in particular, mobile services as well as broadband⁴¹ and Internet services.⁴²

The deadline for implementing the new regulatory framework expired on 25 July 2003. Both the implementation process in the Member States, and the economic crisis suffered by the sector at the beginning of the new millennium, have once again triggered a controversial debate about the "best possible way" to reach the commonly-shared objective of sustainable competition. Predictably, most operators call for an end to sector-specific

³⁵ *Ibid.*

³⁶ "Eighth Report from the Commission on the Implementation of the Telecommunications Regulatory Package" COM (2000) 695 (3 December 2002), 15-17

³⁷ *Ibid.* 29-32

³⁸ See Ch.1, fn.2, p.4

³⁹ Ninth Report on the Implementation of the EU Electronic Communications Regulatory Package, *supra* n.1, p., 4

⁴⁰ Commission Communication: Connecting Europe at High Speed, see Ch.1, fn.6

⁴¹ By October 2003 there were nearly 20 million broadband connections in Europe: however, broadband growth in the best-performing Member States shows signs of levelling off (see Ch.1, fn.6, p. 4-5)

⁴² *Ibid.*, p.4

regulation, while regulators maintain that regulation is preferable to competition law. It has been argued that the specific characteristics that made sector-specific regulation necessary in the telecoms sector are no longer present, or at least exercise less influence. For example, due to digitalization, as non-voice services can be provided at lower cost over a variety of access mediums (such as cable TV, Internet or Satellite), the entry barrier of high sunk costs is no longer universally applicable.

The convergence of telecommunications and media (both highly regulated sectors) with the IT sector (which has developed in the absence of specific regulation), has called into question the need for continued sector-specific regulation in the communications sector altogether. As a result of this convergence, there could be an increasing number of cases which are not covered by the ex-ante regulatory regime. In particular, the convergence of once separate sectors may make market definition increasingly difficult.⁴³ Therefore, competition law, which applies across sectors, may have to deal with an increasing number of issues. In this sense, although the EFD has clear deficiencies, as explained above, it may again play an increasing role in the regulation of the sector.⁴⁴

The New Regulatory Framework tries to take account of these concerns, and provides for a gradual phasing-out of sector-specific regulation in relevant market segments which become fully competitive.⁴⁵ It was drafted with the aim of providing clear boundaries within which ex-ante regulation is necessary and proportionate. The framework is based on the principle of technological neutrality, taking into account the increasing convergence of telecoms, broadcasting and information technology. It covers any communications network or service permitting transmission of signals, regardless of the type of information conveyed. The new Framework, in an unprecedented manner, incorporates competition law principles into the sector-specific regulation. The new framework uses the concepts of dominance and market definition, developed under competition law, as a basis for the future regulation of the sector. In this sense, the traditional distinction between sector-specific regulation as being ex-ante and general competition law as being ex post has become blurred. The Framework gives

⁴³Grewlich, (CMLRev 1999),p. 950

⁴⁴ibid,p. 966

⁴⁵See, in particular, Recital 27 Framework Directive (see Ch.2, ftn.4)

the competition law concepts of dominance and market definition a quasi-regulatory character, by applying them ex ante as a basis for regulatory obligations on the part of specific undertakings. "This is an obvious hybrid, employing dominance without 'abuse', and market analysis which is not a-priori case-by-case (as in competition law)."⁴⁶ One of the risks of this reform is that, instead of introducing a more flexible competition law approach into telecoms regulation, the regulators will adopt a more formalistic approach to competition law enforcement in the sector.⁴⁷ Predetermined narrow market definitions may not be able to deal with the difficulties connected with competition law analysis, which should be considered on a case-by-case basis.⁴⁸ "The application of antitrust principles in the context of regulation runs a serious risk of falling victim to its own success."⁴⁹

Be that as it may, it seems to be clear that competition law has taken over the primary role within the regulation of the telecoms sector. There has been a clear move, from a mainly administrative approach to regulation, to an approach entirely based upon (and therefore clearly compatible with) competition law and practice.⁵⁰

Of late, the Commission has applied Article 82 EC to areas which are covered by sector-specific regulation. Article 82 EC can apply to such regulated areas if an undertaking has been left with a certain degree of entrepreneurial freedom, which it has abused in an anticompetitive way.⁵¹ In March and May 2002, the Commission instigated investigations relating to an alleged abuse of a dominant position against the German and Dutch incumbent telecom operators *Deutsche Telekom AG*⁵² and *Koninklijke NV*.⁵³ Both cases concern pricing issues. *Deutsche Telekom* is supposed to have abused its dominant position by charging unfair prices for access to its local loop. The *Koninklijke* case deals with prices charged for the termination of telephone calls.

⁴⁶J. Pelkmans, Making EU network markets competitive, (2001) 17 (3) Oxford Review of Economic Policy 432, p.447

⁴⁷Bavasso, (The Hague, 2004), p.116

⁴⁸*ibid.*, p. 118

⁴⁹*ibid.*

⁵⁰M. Monti (ECTA Conference Brussels 2003)

⁵¹Klotz, p. 307

⁵²For further details see Commission Press Release IP/02/686 of 8 May 2002

⁵³For further details see Commission Press Release IP/02/482 of 27 May 2002

This shows clearly that despite the existence of a sophisticated regime of sector-specific regulation, general competition law is able to deal with market failures in the telecommunications market. However, there are counter-examples.

One such example is that of the liberalization of the telecommunications market in New Zealand, which shows that negative consequences can arise if general competition law is mainly used in order to regulate a newly liberalized market. Endless antitrust litigation concerning the terms of interconnection, between the incumbent operator and new entrants, forced the New Zealand government to introduce a certain degree of sector-specific regulation covering network access and interconnection.⁵⁴

Another example is the unbundling of the local loop in the EC. Although Article 82 EC, and the EFD in particular, can be applied to gain access to the local loop,⁵⁵ competition law proved to be insufficient to deal with the incumbent dominance in the local access markets. The competitiveness of the local access market only increased when additional legislation requiring unbundling (the ULL Regulation) was introduced. According to Larouche, competition law cannot give a conclusive answer to the question of whether to favour service-or infrastructure-based competition, i.e. whether or not to support the full unbundling of the local loop: "...competition law cannot alone determine the appropriate mix of incentives that might achieve the desired balance between innovation and competitiveness."⁵⁶

It should also be noted that the use of competition law principles, such as the EFD in the area of access to networks, might prove to be as restrictive as, or even more restrictive than, sector-specific regulation. In addition, the question of what is an essential facility in the telecoms sector requires a careful economic case-by-case analysis. Due to rapid technological change, what can be regarded as an "essential facility" today, may well be substitutable with an alternative facility tomorrow. It is therefore questionable whether, in an environment of convergence and platform independence, a certain network constitutes an essential facility in all circumstances. At present, for

⁵⁴For more details see Webb and Taylor, Light-handed regulation of telecommunications in New Zealand: Is generic competition law sufficient?, (1998/99) 2 International Journal of Communications Law and Policy

⁵⁵for the application of the EFD to access to the local loop, see Vinje /Kalimo

⁵⁶Larouche,(Oxford 2000),p. 329

example, no satisfactory actual or potential alternative has been established for the local loop. However, it will be necessary to review, constantly, whether the traditional fixed telephone network still constitutes a 'bottleneck', access to which is essential for competitors, or whether the local access market should be regarded as competitive, because of the use of alternative connection methods with a similar coverage to the local loop.

As market structures become more competitive, with the market power of the incumbents subsiding, sector-specific regulation should be gradually phased out in favour of increased reliance on competition rules.⁵⁷

The establishment of a sector-specific regulatory regime in EC telecommunications was due to a number of economic factors. These factors require regular assessment in order to judge whether sector-specific regulation is still necessary. Convergence may open opportunities for network competition. In such a changing economic environment, the role of sector-specific regulation needs to be reviewed constantly.

However, it is important that any transition from sector-specific regulation to general competition law should occur gradually, and only in areas where sustainable competition has been achieved. Phasing out regulation too early by relying on competition law alone would create considerable risks for both new entrants and the regulated operators. Instead, it is important that competition law is applied alongside regulation and that both are being enforced in a consistent manner. As Commissioner Monti said:

"I believe that what really matters is not that regulation as an instrument is abandoned completely and too soon, but that the approach to regulation is consistent with the approach of antitrust analysis and enforcement."⁵⁸ He adds later that: "the only type of regulation which can foster the development of self-sustaining competitive market conditions is the regulation which is solidly grounded on the same set of principles of which competition policy makes use."⁵⁹

However, there is a distinction between economic regulation, which includes access regulation, and regulation to safeguard public interests (not only such interests as privacy, security and public safety, but also affordable pricing of,

⁵⁷other Larouche, who does not believe that the telecoms market can be governed solely by competition law, (Larouche, Oxford 2000, p.322-440)

⁵⁸M. Monti, (ECTA Conference, Brussels, 2003]

⁵⁹ibid., p. 3

and universal access, to communications services). Because of the non-economic nature of these issues, their protection cannot be fully achieved by the application of competition rules. Thus, even if economic regulation is gradually phased-out, social regulation must remain in place to protect public interests.⁶⁰

⁶⁰Bavasso, (CMLRev 2004),p. 87
Garzaniti, (Oxford, 2003),p. 548

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