MARMARA UNIVERSITY
EUROPEAN COMMUNITY INSTITUTE
EUROPEAN UNION LAW

ESSENTIAL FACILITIES DOCTRINE IN THE COMPETITION POLICY OF EUROPEAN UNION
(MASTER OF ART)

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ABBREVIATIONS

AG	: Advocate General
Art.	: Article
CMLR	: Common Market Law Reports
CMLRev	: Common Market Law Review
EC	: European Community
ECJ	: European Court of Justice
ECLR	: European Competition Law Review
ELR	: European Law Reports
EFD	: Essential Facilities Doctrine
ELRev	: European Law Review
EU	: European Union
IP	: Intellectual Property
p.	: Page
Par.	: Paragraph
UBC	: United Brands Company
URD	: Unilateral Refusal to Deal
US	: United States
Vol.	: Volume

ESSENTIAL FACILITIES DOCTRINE
IN THE
COMPETITION POLICY OF EUROPEAN UNION

PART 1

1.1. INTRODUCTION

The essential facilities doctrine (the "doctrine"), as the concept has usually been understood, was designed to create liability under Section 2 of the Sherman Act. *As originally conceived, when a monopolist or near monopolist controlling what is deemed an "essential facility" denies an actual or potential competitor access to that facility, where the facility cannot reasonably be duplicated and where there is no valid technical or business justification for denying access, then the doctrine is applied.*[1]

According to the essential facilities doctrine; a company which controls facilities which are essential for another market, abuses its dominant position, where without objective justification, it refuses access to those facilities. This doctrine has been traced back to the formative years of the Sherman Act in the USA. It is considered by many commentators as being a significant restriction on the freedom of contract and private property of the undertakings. It is feared that it will chill the incentive to innovate and invest by the private undertakings. It therefore is argued that the doctrine should be disciplined by clear rules.[2]

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[1] KEZSBOM, A. & A.V.GOLDMAN. (1996), "No Shortcut to Antitrust Analysis: The Twisted Journey of the Essential Facilities Doctrine", Columbia Business Law Review. Vol:1 No:1, p.602

[2] Tekdemir Y. "Zorunlu Unsur Doktrini" Unpublished Expertise Thesis, p. 81.

The doctrine of essential facilities in its simplest form suggests that a monopolist can be forced to sell a product or service when another person needs it to do business. However, the legal status of the doctrine is remarkably unclear. Indeed, the novice entering the world of essential facilities rapidly finds that the doctrine has its believers and its doubters. The believers argue that the doctrine explains many judgments and decisions, even those that do not explicitly use the term "essential facilities". The doubters argue that these judgments – even those that do use the term – can be explained without referring to the doctrine. It has been said, " the doctrine has become an empty label, and, in turn, has fostered a misleading approach to antitrust analysis" and leads to "judging by catch phrase." Doubters in turn are accused of wishing to re-interpret decided cases so as to achieve the same conclusion by a more traditional analysis, so that their objection to the essential facility theory is as much psychological as legal.[3]

Access to essential facilities, (so called bottleneck facilities) has become a theme of central interest not only for the future evolution and interpretation of EU Competition Law but also for market and economic development in much broader framework in the European Union, as in the United States and elsewhere. With the current economic transformation and the growing importance of the "networked" sectors, a number of similar situations have emerged across these sectors which show common characteristics and are leading to the development of sector specific regulatory regimes, but also to a more sophisticated interpretation of general Competition Law.[4]

The doctrine (sometimes also called the "bottleneck" monopoly theory) is increasingly perceived as establishing liability by proof of something different from what is otherwise required under traditional "refusal to deal" or "monopolization" theories. One commentator has asserted that the doctrine represents a "streamlined technique" for proving actual monopolisation in violation of Section 2 of Sherman

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[3] SHEEHAN, E. (1999), "Unilateral Refusals to Deal and the Role of Essential Facilities Doctrine: A US/EC Comparative Analysis" World Competition Vol:22, No: 4 p. 67.

Act.[5] Not surprisingly, therefore, the doctrine is in vogue with plaintiffs who view it as a short-cut method for proving seeming "abuses" of "monopoly" power. The concept of an essential facility has been used by would-be competitors who do not have the skill or drive to "blaze their own path" but instead simply wish to appropriate, under the guise of requiring "fair" access to "essential" facilities, the capital investment and business efforts of their successful predecessors in the relevant market.[6]

Ironically, the courts have generally recognized the antitrust laws were never intended to serve the purposes of jealous competitors who merely seek to require a successful competitor even a monopolist to redistribute the wealth it has lawfully earned. The legitimate goals of antitrust are often said to be promotion of economic efficiency through protection of the competitive process itself, rather than of any individual competitor. As the U.S. Supreme Court has put it, the antitrust laws were enacted "for protection of competition not competitors." Nevertheless, because of misconceptions as to its proper meaning and scope, the essential facilities doctrine has been misapplied in the courts and has often been invoked in circumstances when it has resulted in findings of antitrust violations where there is no valid antitrust rationale for any finding of antitrust violations where there is no valid antitrust rationale for any finding of illegality.[7]

It is the object of this work (thesis) to trace the development of the essential facilities doctrine and examine the case law in an effort to put in perspective what cannot be validly covered under the rubric of an essential facilities analysis.

The subject has long been discussed in American and EU academic and legal environment. Despite the intense discussions on the subject it has not yet been defined clearly with its all aspects. There are many arguments about what 'essential facility' is, what makes a facility essential and what the limits of obligation to deal are.

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[4] UNGERER, H. (1998), Ensuring Efficient Access to Bottleneck Facilities: The Case of Telecommunication in the European Union, p. 1. http://europa.eu.int/comm/competition/speeches/text/sp1998_056_en.pdf
[5] See below p.6.
[6] DOHERTY B. (2001), Just What are Essential Facilities, C.M.L.R 38, 397-436, Kluwer Law International, Netherlands.

[7] KEZSBOM,&GOLDMAN p.610.

1.2. THE RATIONALE FOR AN ESSENTIAL FACILITIES DOCTRINE

Essential facilities cases invariably originate from a complaint by a firm that feels disadvantaged by a competitor's position. Unless a complete revolution in competition policy enforcement is envisaged, however, it does not make sense to treat 'disadvantage to a competitor' as a sufficient condition for the existence of an essential facility. This would lead to intervention as soon as any firm gained a competitive advantage that its rivals envied.

The key issue is that we do not normally think that it is a good idea to require third-party access to a private asset. The argument against such a requirement is that it might undermine the incentive to develop the asset in the first place. Moreover, the effect could extend beyond the asset in question and might affect the incentives of all firms that came to know that requests for such access were often granted. The argument for such a requirement is that it might increase competition in a downstream market to the benefit of consumers. In the majority of situations we believe that the argument against dominates and only in exceptional circumstances do we consider it appropriate to require such access to be made available. Four questions that need to be answered before such access should be required are:

1- Is there a downstream market, properly defined, in which competition is absent of substantially lacking?
2- Would entry by the firm seeking access improve the extent of competition in the downstream market to a material degree?
3- Is there no other route (including replication of the asset) whereby the firm could compete economically on the downstream market?
4- Are there no other, better placed, firms which could compete on the downstream market without requiring access to the relevant asset?

Only if the answer to all of these questions is "yes" there is an arguable case for requiring third-party access to private assets. If the answer to any question is

"no" then the costs in terms of damaged incentives to invest and innovate very likely outweigh the competition benefits of requiring such access.[8]

[8] OVERD& BISHOP (1998), "Essential Facilities: The Rising Tide", E.C.L.R. No:4, p.183.

PART 2

AMERICAN LAW REGULATION

2.1. Sherman Act and Essential Facilities Doctrine

In American Law the first and most important material about the essential facilities doctrine is 'The Sherman Act'. In the first hand we prefer to cite here the first and second Sections of the Act:

Sec. 1. - Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 2. - Monopolizing trade a felony; penalty

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, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The essential facilities doctrine in the United States is not so much a separate and distinct doctrine as an outgrowth and specific application of the theory and policy underlying section 2, and to a more limited extent, section 1 of the Sherman Act. Section 2 prohibits monopolization and attempted monopolization -- the acquisition, attempted acquisition, or maintenance of monopoly power through anticompetitive means. In certain circumstances, a monopolist's denial of access to a facility that is essential to effective competition when it would be feasible to provide such access constitutes a form of anticompetitive conduct. In at least some cases, such a denial impedes competition and thereby harms consumer welfare by making it substantially more difficult, or even impossible, for competitors to survive and succeed in the market, without sufficient countervailing pro-competitive justification. Similarly, an agreement between firms that has the effect of denying others' access to an essential facility can also be the basis for liability under section 1. As with most areas of antitrust law, however, difficult issues arise on both a theoretical and practical level in determining when liability should attach and, interrelatedly, what remedies are appropriate[9]

The United States Supreme Court has never actually recognized a distinct "essential facilities" doctrine. However, lower federal courts in the United States have found the Supreme Court's opinions consistent with the view that the denial of an essential facility can, under certain circumstances, constitute an antitrust violation. Indeed, a considerable body of case law has developed in the United States from lower court opinions regarding "essential facilities" claims, although not all of it is entirely consistent.

The United States Supreme Court has established a rule that there is no general duty on the part of a monopolist to cooperate with rivals and that in the vast majority of cases, a monopolist may "deal with whom he pleases."[10] Such a rule is

[9] OECD, http://www1.oecd.org/daf/clp/Roundtables, 01-05-2002.
[10] Aspen Highland Skiing Corp. v. Aspen Skiing Co., 738 F.2d. 1509, 1520-1522 (1985)

sound. A firm might want the monopolist to agree to terms allowing it to become a supplier, a customer, a producer of a complementary good, or even a competitor. The theory is that a monopolist should be permitted considerable latitude in making decisions as to with whom it will deal and how it will structure its dealings.

Nevertheless, the Supreme Court has also made very clear that "the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance or that it may not give rise to liability in certain circumstances."[11] In other words, in at least some cases in which a firm with monopoly power refuses to deal with an actual or potential rival, that refusal may give rise to, or provide evidence in favour of, antitrust liability. Similarly, in at least some cases where firms engage in a contract, combination, or conspiracy, the result of which is to refuse to deal with other firms, liability may attach.[12]

"Essential facilities" cases involve refusals to deal of a special type: in such cases, the defendant refuses to provide other firms with access to something that is vitally important to competitive viability in a particular market. Usually, the situation is one in which a vertically integrated firm owns an input (the "facility"), uses that input to compete in a relevant market, and denies requests for access to the input by other firms in the same market. A number of Supreme Court cases are commonly viewed as implicitly supporting liability based on the denial of access to an essential facility. In the first of these, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912), the Supreme Court approved an order requiring a group of railroads, which jointly controlled access and terminal facilities permitting traffic across the Mississippi River, to allow other railroads to join the combination or to use the facilities in a non-discriminatory manner.[13] In Associated Press v. United States, 326 U.S. 1 (1945), a sharply divided Court held that the defendant, an association of 1200 newspapers in which news generated by one member was distributed to the others, could not

[11] Eastman Kodak Co. v. Image Technical Services Inc., 504 US 451, 119 L. 2d 265, 112 S.Ct. 2072 (1992).
[12] OECD, http://www1.oecd.org/daf/clp/Roundtables
[13] United States v. Terminal RailRoad Association, 224 U.S. 383 (1912)

discriminate against competitors in its admissions policy. Both Terminal R.R. and Associated Press involved concerted action; two subsequent cases, however, reached the issue of a unilateral refusal to deal.

In Otter Tail Power Co. v. United States,[14] 410 U.S. 366 (1973), the Supreme Court held that a utility violated section 2 when, for the purpose of eliminating competition, it refused to allow municipalities to use its power lines in cases where the municipality was operating its own retail distribution facilities instead of relying on the defendant. More recently, in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985),[15] the Court upheld a jury finding of liability where the defendant who owned three ski mountains in Aspen, Colorado, discontinued offering a joint lift ticket with the plaintiff who owned a fourth. Although the Court of Appeals in Aspen Skiing upheld liability on an "essential facilities" theory as well as finding an "ordinary" refusal to deal of a type condemned by section 2, the Supreme Court affirmed solely on the basis of the latter theory. The Court looked at "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" It considered both the effect and intent of the practice and examined effects with respect to consumers, competitors, and the defendant itself. The Court found particularly probative the facts that there was strong consumer demand for the discontinued joint ticket, the defendant was apparently sacrificing "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival,"[16] and the defendant's purported justifications were particularly unconvincing. Although the Supreme Court in Aspen Skiing explicitly declined to address the issue of denial of an essential facility to a competitor by a monopolist, it did deal with the related issue of a monopolist's refusal to deal with a competitor.

Most essential facility cases considered by lower courts in the United States during the past decade rely on the four prong test enunciated in MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), cert.

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[14] Otter Tail Power Co. v. United States 410 US 366, 35 L. Ed. 2d. 359, 93 S. Ct. 1022 (1973).
[15] Aspen Highland Skiing Corp. v. Aspen Skiing Co 602
[16] Ibid. p. 610-11.

denied, 464 U.S. 891 (1983), a case challenging AT&T's use of local telephone networks to thwart competition in the long distance telephone service market. There, the court held that "to establish liability under the essential facilities doctrine [a plaintiff must show]: (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 facility." Id. at 1132-33. This formula highlights many of the key issues involved in "essential facilities" claims.

The first element in this four-prong test raises the significant questions of whether the defendant is a monopolist and whether the monopolist controls an "essential facility." The requirements for showing monopoly power are the same as for any monopolization claim under U.S. law.

What constitutes an "essential facility" is perhaps the most problematic question raised by the first element of the MCI test. The "facility" in litigated cases typically has been something requiring a substantial investment, and has historically usually been something large and tangible; there also has been a few cases involving intangible things like intellectual property. Accordingly, U.S. courts have not given much guidance on what may or may not be considered a "facility." *There has been substantially more consideration of whether a facility is or is not "essential" to effective competition.* There is no single accepted formulation as to how necessary or useful something must be to qualify as "essential"; however, courts are clear that the standard for essentiality is necessarily a high one as a monopolist will almost always possess something its competitors or potential competitors want. Generally, courts have agreed that the facility must be more than merely useful or helpful to be "essential."[17]

A closely related question to whether a facility is "essential" is whether the facility can be reasonably or practically duplicated -- the second part of the four-part

test employed by many U.S. courts. Obviously, if a competitor can duplicate the facility at a reasonable cost, it cannot be essential for the competitor to receive access to the facility from the monopolist.[18] For this reason, facilities found to be essential often have been utilities, natural monopolies, or some other sort of asset involving large sunk costs which would be expensive and inefficient to duplicate. Nevertheless, although in many cases the practicality of duplication may be clear, in many cases it is not, and difficult factual and theoretical issues arise. There is no clear answer as to how "reasonableness" or "practicality" should be measured. In particular, it is not clear under current U.S. law whether "reasonableness" should be evaluated in terms of whether it is reasonable for the complaining firm or firms to duplicate the facility or for <u>any</u> firm to duplicate the facility.

Establishing the third prong of the four-prong test -- that the monopolist denied the essential facility to a competitor -- is usually straightforward. However, difficult issues may arise in cases where a monopolist has not denied access to a facility outright, but rather granted access only under particular conditions and terms. A number of U.S. courts have suggested that a refusal to grant access to a facility on reasonable terms is equivalent to a denial of access. The theory is that a monopolist should not be permitted to circumvent liability simply by offering access on terms and conditions that it knows cannot be accepted. What constitutes "reasonable terms," however, is a very difficult and fact-specific determination. In particular, it may be difficult to distinguish an "unreasonable" denial of access from a case in which a monopolist simply reaps the benefits of a legitimate monopoly by charging the monopoly price.[19]

The last element in proving an essential facility claim is showing that the provision of the facility was feasible. This element expressly recognizes at least one form of the "legitimate business justification" defence that typically allows monopolists to avoid liability for challenged conduct. If sharing an essential facility "would be

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[17] Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568, 570 (2d Cir. 1990)
[18] City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992)
[19] OECD, http://www1.oecd.org/daf/clp/Roundtables

impractical or would inhibit the defendant's ability to serve its customers adequately," the defendant's refusal to grant access to the facility cannot provide the basis for a successful monopolization claim.[20] Although in many cases, the feasibility or infeasibility of providing access may be clear; in others it raises very difficult issues, largely because "feasibility" typically refers not only to technical feasibility but to feasibility as a business matter as well. As suggested by Aspen Skiing, a history of providing access may well be strong evidence that such access is feasible. However, in cases where there was no such prior access, or where conditions have changed, the quantitative and qualitative costs a monopolist can be reasonably expected to bear in providing access are typically open questions.[21]

2.2. The History of the Essential Facilities Doctrine

Section 2 of the Sherman Act provides that "every person who shall monopolize . . ."[22] any part of interstate commerce or foreign trade shall be deemed guilty of a felony. Although Section 2 expressly prohibits the offence of monopolization, that Section fails to define the offence, leaving it for the courts to determine. Courts commonly allow monopolization claims based on a monopolist's unlawful refusal to deal with another company. The essential facilities doctrine constitutes a form a refusal to deal claim.[23]

Although a company generally has no duty to deal with its competitors, or with particular downstream purchasers, the *"essential facility" doctrine qualifies the general rule and supports a limited duty to deal with competitors when the actual probability exists for enhancing competition.* The essential facility doctrine "refers to a unique remedy for Section 2 monopolization claims brought in a natural monopoly setting, often with network characteristics." The essential facilities doctrine enhances competition in two situations: (1) where a monopolistic consortium of competitors jointly controls an essential facility enabling the consortium to restrain trade;[24] and (2)

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[20] Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978).
[21] OECD OECD, http://www1.oecd.org/daf/clp/Roundtables
[22] See above p.6.
[23] BEHR, D. *"Learning How to Share: The Essential Facilities Doctrine Revisited"*, www.columbia.edu
[24] Such cases fall under Section 1 of the Sherman Act.

where a single monopolist controls an essential facility and through this control unilaterally forecloses competition in a relevant antitrust market.[25]

The United States Supreme Court first announced the "bottleneck" theory that inspired the essential facilities doctrine in United States v. Terminal Railroad Association.[26] In Terminal Railroad, the United States brought a claim under Section 1 of the Sherman Act, which prohibits concerted action to control a facility or restrain trade, against a group of railroads based on that group's joint ownership of two railroad bridges crossing the Mississippi River, a ferry capable of transferring railroad cars across the river, and the only railroad terminal in St. Louis. Originally, different companies owned one of the bridges and the ferry system, and made them available to all railroad users. When a group of railroads, which already owned one of the bridges, purchased the second bridge and the ferry system the government challenged the acquisition as a Section 1 violation. The Supreme Court recognized that access to the unified system of bridges, the ferry system, and the terminal were essential for rail access to St. Louis, and essential to competition. The Supreme Court imposed a duty on the owners of the bridges, the ferry, and the terminal to make them equally available to all users on reasonable terms rather than ordering the dissolution of the unified systems. From the Terminal Railroad decision, the lower courts developed the "essential facilities doctrine" and extended it to Section 2 cases.[27]

Despite doctrine's origin in Terminal Railroad, the Supreme Court has never expressly addressed the validity of the modern essential facilities doctrine. In Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,[28] the Tenth Circuit relied in part on the essential facilities doctrine in affirming the jury verdict against the owner of three ski mountains that refused to sell joint ski passes with the owner of the fourth mountain. In its review, the Supreme Court expressly noted that it did not have to consider the applicability of the essential facilities doctrine in affirming the decision.

[25] Such cases fall under Section 2. of Sherman Act.
[26] United States v. Terminal RailRoad Association, p. 383
[27] Ibid.
[28] Aspen Highland Skiing Corp. v. Aspen Skiing Co., 738

Regardless of the lack of treatment by the Supreme Court, lower courts often allow Section 2 claims based on the essential facilities doctrine, but the point at which a monopolist has a duty to provide access to an essential facility is not well settled. In fact, the essential facility doctrine rarely requires a monopolist to open access to its facility for several reasons, most of which have been cited by AT&T as arguments against mandated open access. First, commentators note that open access requirements encourage firms to refrain from significant investment because they anticipate the ability to utilize the investment of their competitors. Second, open access requirements discourage firms from risky and costly investments because they fear that they will not reap the economic benefits of the investments normally associated with risk-taking. Third, mandated open access fails to produce competitive benefits unless the terms and conditions of access are reasonable. Unless the terms and conditions of access are required to be reasonable, the monopolist can either permit access on terms that are so burdensome as to make access practically unavailable or charge monopoly rents for access, thereby eliminating price competition. Therefore, courts refrain from applying the doctrine except in limited circumstances.[29]

The doctrine originated in the United States, so it is appropriate to sketch the US law on the topic. Although no decision of the US Supreme Court has expressly applied the essential facilities doctrine,[30] and the Supreme Court has declined to examine the doctrine on occasion, certain lower courts have developed a general theory on when a "monopoly" can be required to sell against its will.[31] In doing so, they have been forced to interpret a number of ambiguous Supreme Court decisions applying section 2 of the Sherman Act.[32]

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[29] BRANNAN, J. (1999) "Open Broadband: An Essential Facility Doctrine Analysis", www.ukans.edu/-cybermom/CLJ/Broadband.htm. s.1-44

[30] Aspen Highland Skiing Corp. v. Aspen Skiing Co.

[31] This duty to deal is an exception to the principle laid down in Colgate& Co. 250, U.S.300, 307 (1919)

A brief discussion of the major American case, which will illustrate the development of the doctrine, will provide useful information about the operation, or potential operation of the doctrine in the U.S. market.

2.3. Cases About Essential Facilities

2.3.1. The Supreme Court's cases

2.3.1.1. Terminal Rail Road Case

The "essential facilities" doctrine is often traced back to the Supreme Court's Terminal Railroad Association judgment (1912).[33] There, the defendant association comprised most of the railways, which served the city of St. Louis. The association had bought the only three possible railway crossings across the Mississippi River. As summarized by the Supreme Court;

"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."[34]

The Court noted evidence of price discrimination in the charges for using these facilities.[35] However, aside form this discrimination; there was no evidence that the owners had actually been refusing access. In a prosecution under section 1 of the Sherman Act,[36] the Court required the association to open up its membership and abolish certain charges. The judgement followed the opinion of the testimony of an impartial railway engineer who stated that "such a terminal company should be the

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[32] See above p.6
[33] United States v. Terminal RailRoad Association, 507.
[34] Ibid., 224 US 383, 397.
[35] Ibid., 224 US 383, 407-408.
[36] See above p.6.

agent of every company, and, furthermore, that its services should not be for profit or gain."[37] The Court similarly held that the association should behave as " a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities."[38] The origin or scope of this duty were not explained, but it strongly echoed the rules developed in medieval England concerning "common carriers" who were obliged to contract with all comers because of their status.[39] The danger of this approach is obvious: the rules governing railways or telephone companies or port operators may be based on legislation specific to that sector, so that they should not be applied mechanically to other firms.

The Court held that it was improper for the railways that jointly owned the only terminal in St Louis to deny their competitors access to the terminal on reasonable terms *because such access was essential to their ability to compete*. Recognising that the combination had obtained a monopoly through joint purchase, the Supreme Court concluded that the most efficient remedy was to admit non-member competition to the consortium.[40] In this case both the junction infrastructure and the services related to it constituted the essential facility. [41]

2.3.1.2. Associated Press

The next case cited in support of the essential facilities doctrine was Associated Press.[42] An association of newspapers set up a joint body which gathered news for the members of the association. The news gathered was not available to non-members. New members could join the association easily (though it was harder for applicants who competed with existing members).

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[37] United States v. Terminal RailRoad Association
[38] Ibid.
[39] COWEN T. (1995) The Essential Facilities Doctrine in EC Competition Law: Towards A "Matrix Infrastructure", International Antitrust Law&Policy (Editor :B. Hawk) içinde, , Frodham University Law Institute, Fordham University, School of Law. s. 528-529.
[40] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", Antitrust Law Journal, Vol:58, No: 3, s.841-853
[41] GLASL, D. (1994), "Essential Facilities Doctrine in EC Antitrust Law: A Contribution to the Current Debate", E.C.L.R., No:6, s.306-314.
[42] Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945).

In Associated Press (AP) 1.200 newspapers created AP, granting access to news generated by one member to the others and enabling creation of their own reporting and news-granting staff in areas where they were not previously present. Existing members were allowed to block the admission of competitors. It was considered a violation of the Sherman Act, discriminating against competitors, but the Supreme Curt did not say that AP had to admit everyone. One judge used the essential facility doctrine comparing AP to a public utility, a business infused with the public interest that was required to serve all ('need for the maximum flow of information and opinion to preserve our democracy and Constitution').

The Supreme Court held that "AP news is to be furnished to competitors of old members without discrimination"[43] but " the Court's rationale was not stated with any clarity."[44] Douglas J (concurring with the majority decision) noted that there was no evidence that AP had a monopoly,[45] but the majority decision itself suggested that access to its news was vital for any potential entrant: "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."[46] The dissenting judgements noted that other agencies existed and that the newspapers they served (which were almost as numerous as AP's members) had prospered. Therefore, even if Associated Press had created a useful facility, there was no proof that it was essential. For the dissenters, AP was being punished simply because it was big.[47]

2.3.1.3. Griffith

The defendants in Griffith[48] owned a large number of cinemas and in some towns operated the only cinema. Distributors tended to sell the rights for several towns together, so that the defendants were better places to buy the first-run rights to

[43] Ibid.
[44] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", p. 841,844.
[45] Associated Press v. United States
[46] Ibid.
[47] Ibid.

a film even for towns where they did not own all the cinemas. The Supreme Court found that this extended the parties' monopoly from those towns where they controlled al the cinemas to towns where they faced competition.[49] The District Court had found that no competitors were harmed, but the Supreme Court surmised that some harm must have been done.[50] This case was not about access to facilities but "certain language in the opinion (as in so many others) has come to live a life of its own, quite apart from the circumstances, facts or reasoning behind it."[51] Thus it was with the Supreme Court's dictum that *"the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."*[52]

2.3.1.4. Otter Tail

The next judgment cited to support the essential facilities doctrine, Otter Tail,[53] "rested on little more than the Griffith formula."[54] Otter Tail was the first case to jump the gap from collective to unilateral refusal to deal.[55] The Otter Tail Company sold electricity in different towns to individual subscribers. After these contracts expired, some towns wished to establish their own systems. However, Otter Tail refused to sell them electricity at wholesale rates and refused to "wheel" electricity to them (that is, it refused to allow its lines to be used to carry electricity from more distant generating companies which did agree to sell at wholesale rates).

In Otter Tail,[56] municipalities were refused the opportunity to sell electricity purchased from another supplier to their residents through Otter Tail's electricity network. The Supreme Court held that the refusal violated section 2 of the Sherman Act. The essential facility consisted in the cables and technical installations

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[48] United States v. Griffith 334 US 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948).
[49] Ibid., 106.
[50] Ibid., , 109.
[51] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", 842.
[52] United States v. Griffith, 107
[53] Otter Tail Power Co. v. United States 410 US 366, 35 L. Ed. 2d. 359, 93 S. Ct. 1022 (1973).
[54] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles",
[55] GLAZER, K.L. ve A.B. LIPSKY (1995), "Unilateral Refusals to Deal Under Section 2 of The Sherman Act", Antitrust Law Journal, Vol:63, No:3, p.749.
[56] Otter Tail Power Co. v. United States, 143

necessary for the local distribution of electricity. The conditions in the distribution market were already regulated by federal law. Otter Tail, being on the one hand a competitor in the distribution business and on the other hand owner of the facility, had to grant access to the municipalities on equal terms.

For the Supreme Court, both refusals breached section 2. Of the Sherman Act. The only reasoning given was that Otter Tail had used its monopoly power to foreclose competition or to gain a competitive advantage (the Griffith formula).[57] Equally, it was guilty of using its power to destroy threatened competition. The Supreme Court rejected Otter Tail's argument based on business efficacy, without explaining whether such arguments could prevail in other circumstances. The Court has been criticized for not distinguishing among the distinct refusals to deal.[58] The dissenting minority noted that Congress had explicitly refused to enact a similar duty to sell.[59] 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."[60]

2.3.1.5. Aspen

In Aspen,[61] two rival ski resorts had operated a joint selling mechanism by which skiers could buy a single ticket and ski at either resort (and the resorts shared the revenues). One resort (ski Co.) was bigger than the other (Highland) and abandoned the scheme, refusing to accept passes issued by Highland. Highland lost revenue but " its competitive vitality was never in doubt",[62] suggesting that the combined ticket was not essential to its fortunes. The jury in the lower court was told to decide whether the monopolist "acted with exclusionary or anticompetitive purpose of effect". For Areeda, this catches too many types of behaviour which are not objectionable".[63] However, the Supreme Court approved this approach: Ski Co. had abandoned a previous arrangement without any normal business purpose, but it

[57] Ibid.
[58] GLAZER& LIPSKY p. 750.
[59] Otter Tail Power Co. v. United States.
[60] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", p. 848.
[61] Aspen Highlands Skiing Corp. v. Aspen Skiing Co.
[62] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", p. 848.
[63] Ibid., 849

might have been protected if it could offer an "efficiency justification."[64] This shows, more clearly than Otter Tail that a monopolist may sometimes refuse to share its property, but the Court did not elaborate further.

In Aspen,[65] the Supreme Court held that *an undertaking with monopoly power has –under certain circumstances- a duty to continue a joint marketing arrangement with a smaller competitor.* The defendant operated three of the four ski locations in Aspen, Colorado, the plaintiff one. For many years the parties had jointly offered an 'all Aspen' ski pass covering all four mountains. The defendant's refusal to continue this marketing co-operation and the absence of any valid business reasons for this conduct led to the defendant's liability. This judgment encouraged many attempts for an expanded application of the duty to deal. The Supreme Court reversed a jury decision based on Aspen by saying that:

> *If Aspen stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty or monopolisation if it refuses to co-operate with a competitor in circumstances where some co-operation is indispensable to effective competition...*[66]

2.3.1.6. Kodak

More guidance emerged in Kodak.[67] That case was largely about tying, but the Supreme Court also examined the duties of a monopolist who changes an existing business practice. Kodak sold equipment and provided repairs and replacement parts. Other businesses also serviced Kodak or from Kodak's own suppliers. Kodak began refusing to sell parts to customers who used other businesses for repairs. It also refused to sell parts to these independent businesses and made its own suppliers do the same. Without Kodak parts, the independent repairers lost substantial revenue and some were forced out of business. The Supreme Court cited

[64] Aspen Highlands Skiing Corp. v. Aspen Skiing Co. p. 608
[65] Aspen Highlands Skiing Corp. v. Aspen Skiing Co.1522.
[66] Olympia Equip. Leasing v. Western Union Tel. Co., 797 F2d. 370 (7th Circuit. 1986)
[67] Eastman Kodak Co. v. Image Technical Services Inc., 504 US 451, 119 L. 2d 265, 112 S.Ct. 2072 (1992).

Aspen as deciding that *a firm could only refuse to deal with its competitors "if there are legitimate competitive reasons for the refusal."*[68] It therefore examined whether "valid business reasons" could explain Kodak's action. The court rejected Kodak's explanation (other repairers could provide quality service so there was no risk to Kodak's reputation; Kodak claim that it needed to reduce inventory costs did not justify interfering with sales by other suppliers; the independent repairers were not free-riding on Kodak's investment in developing machines because they only serviced them). It is unclear how these justifications are to be assessed. Baker argues that the burden of proof is on the monopolist but notes that others disagree.[69] He also suggests that if the court considers the justification reasonable, this might be an absolute defence, or else the court might go on to weigh the benefits flowing form restriction against the harm to competition. Kodak was therefore a blow to American opponents of a general duty to deal. However, the doubters can cling to the fact that the Supreme Court has still not endorsed the essential facilities doctrine.[70]

2.3.1.7. Hect

In Hect,[71] the use of a stadium was considered essential to the operation of a professional football team in Washington. Based on the fact that a stadium of such size could not easily be duplicated by potential competitors and that the use of the stadium by another team was possible without interference to the existing team, the prohibition to share in the lease agreement was considered illegal by the Court.

2.3.2. DECISIONS OF THE LOWER COURTS

Until now, only the lower courts have explicitly adopted an "essential facilities" doctrine. The term was first used in a 1977 judgment,[72] but the definition most

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[68] Glazer&Lipsky, p. 751.
[69] Baker "promotin Inniovation Competition Trough the Aspen/Kodak Rule" speech delivered 16 October 1998, footnote 41. thext: http://www.ftc.gov/speeches/other/mason1098.htm cting Areeda and Hovenkap, Antitrust Law (revised edition 1996) Vol.III pra 658 f.1.
[70] GLAZER&LIPSKY p.752.
[71] Hecht v. Pro-Football, Inc. 570. F.2d 982, 992 (D.C. Circuit), (1977)
[72] VENİT, J.S. ve J.J. KALLAUGHER (1994), "Essential Facilities: A Comparative Law Approach", B. Hawk (der.), Fordham Corporate Law Institute International Antitrust Law and Policy, Kluwer Law International, The Hague, The Netherlands. p. 315, 319.

commonly cited is from a 1983 Court of Appeals judgment (making up in clarity what it may lack in authority).

A leading case in the US essential facilities doctrine is MCI Communications Corp. v. AT & T.[73] MCI claimed that AT & T should let it connect its telephone lines with their nation-wide telephone network in order to be able to compete in the long-distance business. Based on Otter Tail the Supreme Court acknowledged that it was technically and economically feasible for AT&T to have provided the interconnections and that AT &T's refusal constituted an act of monopolisation.** Four elements necessary to establish liability under the essential facilities doctrine have been identified:

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;
4- The feasibility of providing the facility.[74]

However, this decision has been criticised. Further limitations are suggested by Professor Areeda, 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 substantially to improve competition in the market-place; and not if it could chill desirable activity*. And *even when all these additional conditions are satisfied, denial of access should never per se be unlawful; legitimate business purposes may justify not sharing a facility.*[75]

The doctrine is widely criticized, but, in the absence of any authoritative Supreme Court decision, it will presumably continue to be invoked in the lower courts. It has been suggested that the Supreme Court is reluctant to intervene and

[73] MCI Communication v. AT&T Corp., 708 F.2d. 1081 (1983)
[74] The Essential Facility Test, see below p.24.
[75] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", Antitrust Law Journal, Vol:58, No: 3, s.841-853

will let the lower courts muddle on.[76] Thus the doctrine has been invoked in a variety of cases which push the meaning of "essential" to the limit:

"A rock impresario seeking admission to the local auditorium;[77] a maker of 'muscle building' food supplements demanding that a body building magazine accept its ads;[78] an anaesthesiologist insisting that the local hospital, using in-house anaesthesiologists, allow him to perform anaesthesiological services as well;[79] or the would-be oil seller, who has no storage tanks of his own, demanding to use those of an incumbent seller[80] -to say nothing of Berkey,[81] who wants to know the results of Kodak's research before Kodak markets its own innovations."[82]

The lower courts in the US have been more generous with holders of intellectual property rights than with other monopolists. One court of appeals has held that " an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any harm to consumers"[83] and one district court has even stated that " where a patent or copyright has been lawfully acquired, subsequent conduct permissible under the patent or copyright laws cannot give rise to any liability under the antitrust laws."[84] As refusing to license a patent is not a patent misuse, this effectively suspends the essential facilities doctrine in patent cases. Yet the economic effect on competitors is presumably the same whether they seek access to an intellectual property right or to some other "facility." These aspects may be clarified in the current Intergraph litigation where the plaintiff does not seek a licence but prior access to newly developed products.[85]

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[76] GLAZER, K.L. ve A.B. LIPSKY, 763.
[77] Flip Side Products Inc. v. Jam Products Inc. 843 F. 2d 1024 (7th Cir.).
[78] Twin Laboratories Inc. v. Weider Health&Fitness Corp. 780 F. Supp. 31 (SDNY 1989).
[79] Jefferson Parish Hospital district No. 2 v. Hyde 466 US 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984).
[80] Florida Fuels Inc. V. Belcher Oil Co. 717 F. Supp. 1528 (SD Fla. 1989).
[81] Berkey Photo v. Eastman Kodak 603 F. 2d 263 (2nd Cir. 1979) cert. Den. 444 US 1063 (1980)
[82] AREEDA, P.ve H. HOVENKAMP, (1996) *Antitrust Law (Supplement)*, Little, USA.
[83] Data General Corp. v. Grumman Systems Support Corp. 36 F.3d 1147, 1187 (1st Cir. 1994).
[84] Ibid.
[85] Intergraph Corporation v. Intel Corporation 3 F. Supp. 2d 1255 (N.D. Ala. 1998). In that case, a District Court applied the "essential Facilities" doctrine to require Intel, a coputer chip manufacturer, to provide technical data about newly-developed computer chips to a customer before hey were marketed. This injunction was reversed on appeal, and the District Court later Dismissed the case on the merits. Intergraph has Appealed. For more about this case look at http://intergraph .com/intel/ or http://techlawjournal.com/courts/intergraph/Default.htm.

2.4. The Essential Facility Test

Although the origin of the essential facility doctrine relate back to Terminal Railroad,[86] the Seventh Circuit, in MCI Communications Corp. v. American Telephone & Telegraph Co.,[87] developed the modern test for the application of the essential facility doctrine. In MCI, MCI challenged AT&T's refusal to allow it to connect its long distance telephone lines to AT&T's telephone network, claiming that interconnection was essential to MCI's ability to compete in the long distance market. The Seventh Circuit developed a four-part test based on prior case law to analyse essential facility doctrine claims. As stated above the MCI test requires an examination of the following factors: "(1) control of the essential facility by a monopolist; (2) a competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of use of the facility to a competitor; and (4) the feasibility of providing the facility."[88]

Applying the essential facilities doctrine, the Seventh Circuit concluded that: AT&T had *complete control* over the local distribution *facilities that* MCI *required*. The interconnections were essential for MCI to offer [long distance] service. The facilities in question met the criteria of "essential facilities" in that MCI could not duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such uneconomical duplication.[89]

Therefore, the Seventh Circuit found that because it would have been technically and economically feasible for AT&T to have provided interconnection and because AT&T offered no legitimate business or technical reasons for denial, the refusal to allow interconnection was an act of monopolization.[90]

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[86] Terminal RailRoad 383
[87] MCI Communication v. AT&T Corp., 1081.
[88] Ibid p.1132-33.
[89] Ibid. 1133.
[90] Ibid.

As previously noted, although the Supreme Court has never officially indorsed the MCI test or the essential facility doctrine, the lower courts generally have accepted the doctrine and consider the MCI test to be the correct statement of the doctrine. Therefore, each element of the MCI test is considered separately below.

2.4.1. Control of an Essential Facility by a Monopolist

The first element of the MCI test focuses on control of an essential facility by a monopolist. The satisfaction of this element depends the meaning of "essential," "facility," and "monopoly." This element tends to be the most complex of the four included in the MCI test.

First, the firm or company controlling the facility must be considered a monopolist.[91] The Supreme Court defined monopoly power as the power to control prices or to exclude competition. Courts consider various factors to determine *whether a firm exercises monopoly power including control over price, the ability to exclude competitors, a market share of greater than 70 to 80 percent, and high barriers to market entry*. The doctrine clearly applies to "natural monopolies," which are firms owning facilities the duplication of which is forbidden by law, and perhaps those that are publicly subsidized, and thus could not be practically rebuilt privately. "Control of a natural monopoly gives the facility holder a power to eliminate downstream competition that is permanent even in theory, as well as in practice."[92] Determination of monopoly power is a question of fact.

A firm can be a monopolist only with respect to a particular market. Therefore, in order to determine whether the owner of the facility is a monopolist, courts must define the *relevant market* as a threshold inquiry, and determine the *firm's power within* that market. The excluded firm must be a competitor in the market and seeking

[91]United States Football League v. National Football League, 842 F 2d 1335, 1368-69(2d Cir. 1988).
[92] Alaska Airlines Inc., 984 F. 2d 536, 544 n. 10 (9th Cir. 1991).

access in the market in which the owner of the facility exercises monopoly power. Analysis of the relevant market involves defining both the geographical market and the product or service market. Definition of the product or service market involves "an examination of which commodities are reasonably interchangeable by consumers for the same purposes." The antitrust plaintiff bears the burden of proving the relevant antitrust market.[93]

To be considered essential, access to the facility must be central or necessary to the plaintiff's ability to compete.[94] The term "facility" generally applies to tangible assets such as physical structures. Courts and commentators disagree on the degree of centrality required for the invocation of the essential facility doctrine. The Ninth Circuit concluded, *"[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market."*[95] Courts following the Ninth Circuit approach find that the essential facility doctrine exists to prevent a monopolist in control of a scarce resource from extending its power vertically from level of production to another. In addition, a facility cannot be considered essential if equivalent facilities exist, or if the benefits from access can be obtained from other sources.[96]

2.4.2. A Competitor's Inability to Practically or Reasonably Duplicate the Essential Facility

In order for a duty to deal with competitors to attach, the competitor must be practically unable to duplicate the function of the facility. The facility need not be indispensable, but it must be impossible or economically unfeasible for a competitor to recreate, and it must severely restrict market entry. Application of the doctrine is "most compelling where the monopolist's refusal makes it legally or physically

[93] BRANNAN, J. (1999) "Open Broadband: An Essential Facility Doctrine Analysis", www.ukans.edu/-cybermom/CLJ/Broadband.htm. p.17.
[94] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 1520-21.
[95] Alaska Airlines,Inc. v.United Airlines, Inc. 947 F. 2d 536 , 544-45 (9th Cir. 1991).
[96] BRANNAN, J. p.18.

impossible for its competitors to compete at all in the relevant market,"[97] although in most cases the effects of the refusal do not rise to that level.[98]

Courts consider several factors, including economic and regulatory considerations, to determine whether an alternative viable facility is impossible or unduly expensive to construct. For example, geographical and topographical conditions might prevent construction of alternatives, a legal license might prevent duplication, or a natural monopoly may exist. In addition, the unique physical characteristics of the resource might not be duplicable, a bottleneck may exist, the governmental regulatory environment may prohibit the construction, or any other factor may provide a substantial cost disincentive for the creation of a viable alternative. Regulatory requirements may result in cost delays, and, in some situations, may preclude duplication of the facility entirely.[99]

Although substantial reproductive cost might suggest that a facility is essential, the reproductive cost must be enormous.[100] It is insufficient for the plaintiff to show that access to the facility is more economical than other alternatives; the mere reduction of costs fails to make the facility essential. The existence of public subsidization generally indicates the requisite high costs. Although a competitor likely can replicate the facility in question at some price, the existence of technological, legal, or public subsidy impediments coupled with a natural monopolistic market condition factor into the determination of whether a facility is essential.[101]

This element also requires that a competitor in the market dominated by the essential facility owner be incapable of duplicating the facility. The theory behind this requirement is that monopolists have little incentive to restrain competition in an upstream or downstream market in which they do not compete. Nonetheless, some

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[97] MCI Communication v. AT&T Corp. 1081.
[98] BRANNAN, J. p.17.
[99] Ibid.
[100] AREEDA, P.ve H. HOVENKAMP, (1996) Antitrust Law (Supplement), Little, USA, p.736.
[101] BRANNAN, J.18.

courts, recognizing that a monopolist refusing to deal with a non-competitor may have a negative impact upon firms in competition in a downstream market, consider the applicability of the essential facilities doctrine in situations in which a monopolist has refused to deal with a non-competitor. However, commentators note that "this precedent ignores the fact that refusal to deal with non-competitors neither produces competitive dominance in a vertically related market, not bolsters the monopolist's power in the monopolized market."[102] Ultimately, this requirement confines the essential facility doctrine to situations in which the owner of an essential facility refuses to deal with a competitor or potential competitor.[103]

2.4.3. The Denial of Use of the Facility to a Competitor

In order for antitrust liability to attach, the owner of the essential facility must deny access to the facility to competitors. *The denial need not be a total denial. It is sufficient that the terms of access be unreasonable in price, profit margin, time obligation, or other substantive criteria.*

In addition, denying access does not automatically result in antitrust liability. Antitrust liability is premised on the enhancement of competition, and output as well as price-competition are unaffected so long as the monopolist is permitted to charge monopoly rents for use of the facility. Monopolistic behaviour in a regulatory environment differs in that when a regulated monopolist denies access to a competitor and this denial aids in the evasion of rate regulation or undermines the regulatory competition enhancement scheme, then an antitrust claim exists.[104]

2.4.4. The Feasibility of Providing the Facility

The existence of a legitimate business justification for denial of access further limits the scope of the essential facility doctrine. Generally, a business justification is

[102] Soma J.T., and B.P. JUMPS, The Essential Facilities Doctrine in the Deregulated Telecomminications Industry, 13 Berkeley Tech. L.J. p. 565.
[103] BRANNAN, J. p.18.
[104] Ibid. p.19

valid if it relates directly or indirectly to the enhancement of consumer welfare. Several open questions exist as to the criteria for determining whether a legitimate business justification defence exists. For example, it is unclear whether the fact finder has total discretion to determine the legitimacy of the proposed business justification.[105] In addition, the impact of the defendant's state of mind is unsettled.

Legitimate business justification defences exist on both a micro and macro level. At the micro level, the proper procedure for determining whether a legitimate business justification exists begins with the plaintiff's burden to persuade the fact-finder that the defendant's refusal to deal is unreasonable. The burden of persuasion then shifts to the defendant to provide evidence establishing a legitimate business justification. Because a firm is never obligated to sacrifice legitimate business objectives, once such an objective is proved by the defendant, the plaintiff must demonstrate that the offered business justification was merely pretextual. Claims of economic self-interest rarely serve as legitimate business reasons for denying access. Examples of legitimate micro reasons for refusals to deal include the fact that the defendant was fully utilizing the facility, the defendant's desire to limit liability or avoid added costs, and technical barriers to providing access.[106]

In contrast, macro business justifications involve "propositions of general policy,"[107] and are neither firm specific nor implicate the practicality of providing access. Legitimate macro business justifications may be predicated on social policy grounds such as the deprivation of lawful monopolist's legitimate rewards and the reduction of innovative activities. Commentators suggest that a judge rather than a jury should make determination of macro-level policy decisions because such decisions require development of consonant standards for similar firms in similar markets, and involve the determination of national economic policy.[108] For example, if a firm can demonstrate that providing access would violate an existing regulatory

[105] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", Antitrust Law Journal, Vol:58, No: 3, s.841-49.
[106] MCI Communication v. AT&T Corp.
[107] AREEDA, P. (1990), "Essential Facilities: An Epithet in Need of Limiting Principles", Antitrust Law Journal, Vol:58, No: 3, s.841, 851.
[108] Ibid.

scheme, then a legitimate business justification exists. The Seventh Circuit stated with respect to AT&T's denial of access to its local telephone exchanges to competing long-distance telephone competitors in MCI Communications v. American Telephone & Telegraph Company[109] that, notwithstanding any duty to interconnect, AT&T may deny interconnection if it had a "reasonable basis in regulatory policy to conclude, and in good faith concluded that denial of interconnection is required by concrete, articulable concerns for public interest . . .."[110]

[109] MCI Communication v. AT&T Corp.
[110] Ibid.

PART 3

EUROPEAN LAW REGULATION

3.1. Introduction

This part considers the European Community antitrust law rules on the duty to supply competitors with important goods or services. In general, competition law discourages competitors from cooperating with one another. However, if one competitor owns something, if access is essential to enable other competitors to do business, and if the competitors cannot be expected to provide this facility for themselves, then European Union (EU) competition law obliges the owner of the essential facility to give equal access to its competitors. This obligation is due to the effect of a refusal of access on competition. This principle must be treated with caution, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has legitimately acquired. Furthermore, companies are normally free to improve the bargains that they offer to customers by offering related goods or services as part of the bargain, even if this makes it difficult or even impossible for their competitors to offer comparable bargains. All the same, the principle that companies in dominant positions have a legal duty to provide access to genuinely essential facilities on a non-discriminatory basis is one of great and increasing importance in telecommunications transmission of energy, transport, and many other industries. It is often the principal or most crucial legal problem that arises after an industry is deregulated, but can arise in any industry.[111]

Although, in general, competition law discourages competitors from co-operating with one another, this part considers the development in European Community case law of competition law principles which, in certain circumstances, impose duties on companies to supply competitors with important goods or services.

In particular it reviews the more recent principle imposing a duty to grant access to an essential facility on non-discriminatory terms. *Essential facility cases are not exceptions to normal rules, but specialized examples of general rules about discrimination and handicaps created by dominant companies.*[112]

To ensure that companies are not deprived of the legitimate use of their competitive advantages, Community law has been cautious and pragmatic in its application of these general principles. Although their scope is not fully clarified, this paper seeks to identify from the cases the likely situations and conditions in which these principles will apply and the key issues which need to be examined.[113]

The principles concerning duties to supply and to grant access to essential facilities have evolved mainly from Article 86 cases involving an abuse of a dominant position, but also from Articles 85 and 90 cases as these also implement the fundamental objective of Article 3(f) of the EC Treaty, to ensure that competition in the common market is not distorted. Accordingly, *these principles apply to both State-owned and private enterprises.*[114] Although, different issues arise for jointly owned facilities, the Commission must reconcile the same policy objectives as when it insists on non-discriminatory behaviour under Article 86: ensuring access for other competitors to essential services, not unduly limiting the advantages of ownership or otherwise sought by the parties, and minimising administrative costs for all concerned.[115]

The development of such principles, which are not mutually exclusive, is shaped by other legal principles in accordance with which Articles 85 to 94 must be applied. These include the principles of proportionality, that is, action by the

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[111] Lang, p.450.
[112] OECD, http://www1.oecd.org/daf/clp/Roundtables
[113] Ibid.
[114] Article 90(1) prohibits Member States by means of laws, regulations or administrative measures, from placing public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86: Case C-18-88, RTT v. GB-INNO-BM 1991 ECR I 5941.

Community institutions should not exceed what is necessary to achieve the objective sought, of equality, and of non-discrimination.[116]

These rules apply both to state-owned and to private enterprises. They may be especially important if a company has been given a privileged position by a state, such as control over an essential facility – for example, an airport of a harbour. Where the parent companies of a joint venture have considerable market power, they may be required under Article 85 (3) of the Treaty Establishing the European Community[117] (the EC Treaty) to not discriminate in favour of their joint venture and to deal with its competitors on the same basis, even if it is not strictly essential for competitors to contract with them, and even if neither competitor is dominant. *A dominant company that discriminates selectively against a particular competitor – for example, to discourage it from overly vigorous competition by denying access to an important facility on the same terms as it gives to other companies – is likely to break the law even if the facility is not necessarily "essential"*[118]

If a dominant company owns intellectual property rights that enable it to prevent competitors from producing directly competing products, it is not necessarily an abuse for it to refuse to grant licenses to its competitors. Licenses may be necessary to give access to an essential facility, but only if unlicensed competitors cannot enter the market. Otherwise refusal to license infringes article 86 of the EC Treaty only if there is some related behaviour that constitutes an abuse, whether exploitative or exclusionary. In some cases, compulsory licensing of the intellectual property rights is the appropriate remedy.[119]

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[115] ECD, http://www1.oecd.org/daf/clp/Roundtables
[116] Ibid.
[117] Treaty Establishing the Eurapean Community, Feb.7, 1992.
[118] LANG, J.T., (1994), "Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities", ", B. Hawk (der.), Fordham Corporate Law Institute International Antitrust Law and Policy , Kluwer Law International, The Hague, The Netherlands. p.440.
[119] Ibid. p. 444.

3.2. Treaty Provisions and Case Law of The Court of Justice and the Commission

What are essentially issues of access to essential facilities have arisen frequently in Europe in connection with the liberalization of the gas, electricity and telecommunications industries. The Commission determined, however, that these industries could not be satisfactorily liberalized using only community anti trust law and that it was necessary to adopt general measures of which access to networks and grids would be only one aspect.

The case law, briefly summarized below, makes it clear that there is a duty to supply both competitors and costumers in a variety of circumstances. The case law uses a number of legal principles or theories, more ore less explicitly.

3.2.1. Treaty Provisions

Article 86 of the EC Treaty:

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 in so far as it may affect trade between member-states.

Such abuse may, in particular, consist in:

a- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b- Limiting production, markets or technical development to the prejudice of consumers;

c- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligation, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 86 of the EC Treaty states that an abuse of a dominant position may consist of, among other things, "applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage."[120] This prohibits second line discrimination between competitors downstream from the market in which the dominant position exists, placing one or more of the competitors at a disadvantage the others. It applies whether or not the favoured competitors are associated with the dominant company, but it does not impose a duty to supply on a non-discriminatory basis regardless of the effect on competition.

The Court has confirmed that Article 86 also prohibits discrimination between customers of the dominant company based on whether or not they deal exclusively with it. This behaviour creates a competitive disadvantage for competitors of the dominant company at the same level in the market. It is not within the narrow phrase just quoted, "placing them at a competitive disadvantage."[121] An unjustified refusal to deal is, of course, an extreme form of illegal discrimination.[122]

Article 86 also prohibits dominant companies from "tying," defined as "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[123] "Tying-in" is normally practiced by horizontally integrated companies selling different products to customers at the same level of industry or distribution. It is, in essence, an attempt by a

[120] See above p. 34.
[121] Ibid.
[122] LANG, p. 451.
[123] See above p.34.

company dominant in the market for one type of good to use its position in that market to strengthen its position in the market for other goods.

3.2.2. The Case Law of the Court

3.2.2.1. Commercial Solvents v. Commission

The leading case in this area is Commercial Solvents,[124] in which the Court held that the company had a dominant position for the production of a raw material used to produce a chemical because the company had a world monopoly. The abuse was the refusal to supply a downstream competitor, which Commercial Solvents had previously tried to acquire, with the raw material that it needed. The court ruled that a dominant company's plans to begin producing the downstream product itself did not justify its refusal to supply the raw material to its competitor and former customer when the refusal would eliminate the competitor from the market. The court confirmed the Commission's order to resume supplies. In its judgment, the Court said:

An undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition which, in the case in question would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the treaty and set out in greater detail in Articles 85 and 86, it follows 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[125].

[124] Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission Joined Cases 6-7/73, 1974 E.C.R. 223, 1974 C.M.L.R. 309.
[125] Commercial Solvents, 1974 E.C.R. at 250-51, 1974 1 C.M.L.R. at 340-41.

This passage from the judgment indicates that at least when the three stated conditions are fulfilled there is a general rule that a dominant company may not refuse to supply a competitor in the effect would be to put the competitor out of business, even if it plans to use the products in question itself.

It is notable that Commercial solvents is often cited by the Court of First Instance (the "Tribunal"), and the Commission, and is clearly regarded as an important case stating a broad principle. After Commercial Solvents[126] and United Brands[127] the first two important cases on Article 86, the principle of a general duty of dominant companies to supply was so well –established that it was not necessary later to distinguish essential facility cases from other cases of exclusionary abuse.[128]

What 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, and it was not thought necessary even to distinguish between supply to competitors and customers notion competition with the dominant supplier.

3.2.2.2. United Brands

In the United Brands case, United Brands had refused to supply Olesen, a distributor, because Olesen had taken an active part in a sales campaign for a competing brand of bananas.[129] The Court 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 the consumers- cannot stop supplying a long standing customer who abides

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[126] Ibid.
[127] United Brands Co. v. Commission, Case 27/76, 1978 E.C.R. 207, 1978 1 C.M.L.R. 429.
[128] LANG, J. T. (1979), "The Monopolization and the Definition of a Dominant Position under Article 86 EEC Treaty", C.M.L. Rev. Vol:16 p. 345.
[129] United Brands, P. 435.

by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.[130]

It was therefore necessary to see if the discontinuance was justified. In doing so, the court stated:

Although ... the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.

Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.

The sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise reasonably be contemplated as a sanction for conduct similar to that for which UBC blamed Olesen.

In fact UBC could not be unaware of that fact that by acting in this way it would discourage its other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market that much more effective.

Such a course of conduct amounts therefore to a serious interference with the independence of small and medium sized firms in their commercial relations with the undertaking a firms in their commercial relations with the undertaking in a dominant position and this independence implies the right to give preference to competitors' goods.

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[130] Ibid. p.496.

In that case the adoption of such a course of conduct is 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.[131]

Although less sweeping than Commercial Solvents[132] the language seems to imply that companies in dominant positions have a duty to supply in many cases. It also suggests, however, that the duty to supply a customer or distributor may be less strict than the duty to supply a competitor and that the duty to supply does not apply in every situation. A dominant company may not stop supplies in order to discourage competition. *A competitive reaction by a dominant company must be reasonable and proportionate to the threat.* This formula, which would not be appropriate to a refusal to supply a competitor, suggests that the rules on refusals to supply are different when competitors and other customers are involved. A dominant company must not interfere with its distributors' commercial independence, including their freedom to promote rival brands. The duty of a dominant company goes much further than merely refraining from trying to obtain exclusive purchasing arrangements.

3.2.2.3. BP/ABG

In the BP/ABG case, the Commission considered that BP had unlawfully reduced supplies to ABG when a petrol shortage occurred during the oil crisis in 1974.[133] ABG was a petrol distributor with which BP was in competition downstream. ABG had bought primarily from BP, and during the crisis oil companies were able to supply only their traditional customers. The court held that, as ABG no longer had a long-term contract with BP, BP was free, in times of scarce supply, to treat it less favourably than customers that had long-term contracts. The selective reduction of supplies to ABG was therefore justified. ABG was only an occasional buyer from BP

[131] United Brands, C.M.L.R. at 496
[132] Commercial Solvents, C.M.L.R. at 340-41
[133] Benzine an Petroleum Handelsmaatschappij BV v. Commisssion, Case 77/77, 1978 E.C.R. 1513, 1978 3 C.M.L.R. 174.

at the relevant time, though it had previously had long term arrangements.[134] There was no suggestion that the termination of ABG's long-term Contracts were open to criticism on competition grounds.

3.2.2.3. Maxicar v. Renault and Volvo v. Veng

A more sophisticated question of supply to downstream competitors was raised in Maxicar v. Renault[135] and Volvo v. Veng.[136] Specifically, when is the refusal to license intellectual property rights for replacement car body parts contrary to article 86? Design and similar rights were preventing independent producers of spare parts from producing replacement spare parts in competition with car manufacturers.[137] The court said that it was lawful for a dominant company to obtain exclusive rights under intellectual property legislation. However, the Court also stated that the exercise of these rights may be prohibited if it gives rise to abusive conduct by the dominant company, such as an "arbitrary" refusal to deliver spare parts to independent repairers, as occurred in Hugin v. Comission,[138] fixing prices for spare parts at unfair level, or a decision to cease producing spare parts for a particular model tough many cars of that model are still in use.[139] In other words, as the Advocate General said, the mere refusal to license is not in itself automatically contrary to Article 86.[140] There must be some additional element in the dominant company's behaviour. The judgment deals with possible abuse of a dominant position without discussing directly the needs of companies wishing to supply competing replacement parts.

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[134] Ibid.
[135] Consorzio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Regie Nationale Des Usines Renault, Case 53/87, 1988 E.C.R 6039, 1990 4 C.M.L.R 265 (hreinafter Maxicar)
[136] Volvo AB v. Erik Veng (U.K) Ltd., Case 238/87, (1988) E.C.R. 6211, (1989) 4 C.M.L.R. 122.
[137] Ibid.
[138] Hugin Kassareister AB v. Commission, Case 22/78, (1979) E.C.R. 1869, (1979) 3.C.M.L.R. 345.
[139] Ibid.
[140] Ibid., the opinion of the Advocate General Reischl, p.347.

3.2.2.4. Magil/RTE/BBC

Another complex set of cases involving intellectual property issues and supply to downstream competitors was Magill/RTE/BBC.[141] BBC and RTE (the Irish Television Authority) each published their own weekly guide to their respective television and radio programs, but both refused to give details of their programs to other magazines more than a day in advance. This made it impossible for anyone to publish a single independent weekly magazine giving all the BBC and RTE programs throughout the week.[142] The Court of First Instance held that the BBC and RTE held dominant positions in the markets for the supply of their weekly program lists and for the magazines in which were published.[143] The refusal of both television companies to provide details of their programs to a competing weekly magazine was an abuse contrary to Article 86 of the EC Treaty. Only restrictions on competition that are inherent in the protection of the actual substance of intellectual property rights are permitted in Community law. A dominant company is not free to exercise such rights to pursue an aim contrary to Article 86. Citing Volvo v. Veng,[144] the court said that by reserving to itself the exclusive right to publish their weekly program lists, BBC and RTE were preventing the emergence of a new product, a general TV magazine.* They were using copyright in the listing derived from broadcasting to secure a monopoly in the derivative market for weekly TV guides. This went beyond what was necessary to fulfil the essential function of copyright. The refusal was comparable to the arbitrary refusal of a car manufacturer to supply spare parts to an independent repairer in the derivative market of car maintenance and repair. Also, like a car manufacturer's decision to stop production of spare parts for a model still in use, the BBC's refusal failed to take consumers' needs into consideration.

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[141] Radio Telefis Eireann v. Commission, Case T-69/89, (1991) E.C.R II-48, (1991) 4 C.M.L.R. 586 (Ct. First instance) (hereinafter RTE); The Birtish Broadcasting Corporation and BBC Enterprises Ltd. v. Commission, c, Case T-70/89, (1991) E.C.R. II- 535, (1991) 4 C.M.L.R. 669 (Ct. First Instance) (hereinafter BBC); Independent Television Publications Ltd. v. Commission, Case T-76/89, (1991) E.C.R. II-575, (1991) 4 C.M.L.R. 745 (Ct. First Instance).

[142] Ibid. p.675.

[143] Ibid., p. 691-92.

[144] Volvo AB v. Erik Veng (U.K) Ltd., Case 238/87, (1988) E.C.R. 6211, (1989) 4 C.M.L.R. 122.

On appeal to the Court, Advocate General Gulman disagreed with the Court Of First Instance. In a long, careful option, he said that the central issue was whether, and if so, when, a refusal to license may be contrary to Article 86. Such a determination depends on whether there are:

> *Such special circumstances in connection with a refusal to license that it can no longer be regarded as a refusal to license in itself. If article 86 can apply where the dominant undertaking has done no more than refuse to grant licenses, but where there were special circumstances in connection with the refusal to license, the position will be that the infringement of article 86 can be terminated only by granting licenses.*

He went on to point out that, in some situations, the owner of the right can terminate the violation of Article 86 without licensing the right, either by resuming supplies to people improperly denied supplies or by lowering prices. In these situations, Article 86 does not lead to interference with the specific subject matter of the right. He said later:

> *I consider that in fact as the Commission has argued, unreasonable royalties and a discriminatory licensing policy are examples showing that it is possible pursuant to Article 86 to interfere with rights within the specific subject-matter where those rights are exercised in special circumstances. The dominant undertaking does not do anything more than exercise rights within the specific subject-matter, namely impose royalties and refuse to grant licenses. But the exercise of those rights takes place under special circumstances since the undertaking demands royalties, which are considerably higher than in other Member States or refuses a license at the same time as licenses are in fact given to others. Application of Article 86 to the two situations would signify interference with rights falling within the specific subject-matter since the possibility for the owner (of the registered design) to freely determine his remuneration would be restricted and since the owner would be required to grant a license to the person against whom he had discriminated. There is no reason to define the charging of unreasonable*

royalties to operation of a discriminatory licensing policy as conduct which in general is outside the specific subject-matter of copyright.[145]

He went on to further consider the Commission's argument that by refusing a license RTE was preventing the emergence of a new kind of product.

The Commission contends that in classifying a product as new it is not relevant whether it will compete with the copyright owner's own products.

I do not believe that the Commission's view is tenable.

I consider it appropriate to find that there is an abuse of a dominant position if a copyright owner by means of his copyright prevents the emergence of a product that does not compete with his product since it meets other consumer needs than those that are met by his product.

The contrary is true, in my view, if copyright is used in order to prevent the emergence of a product which is produced by means of the work protected by the copyright and which competes with the products produced by the copyright owner himself. Even if that product is new and better, the interests of consumers should not in such circumstances justify interference in the specific subject-matter of the copyright. Where the product is one that largely meets the same needs of consumers as the protected product, the interests of the copyright owner carry great weight. Even if the market is limited to the prejudice of consumers, the right to refuse licenses in that situation must b regarded as necessary in order to guarantee the copyright owner the reward for his creative effort.

Additionally, he said:

It is appropriate to draw an analogy with the situations at issue in Volvo v. Veng and COCRA v. Renault, namely that Volvo and Renault were entitled to refuse a license to market spare parts that had been produced without

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[145] Ibid.

Volvo's and Renault's approval. It should be noted that the Court of Justice did not see fit in that connection to distinguish between licenses for the purpose of competing on the market for the sale of spare parts and licenses for the purpose of competing on the market for repairing Volvo and Renault cars.

There is therefore no basis for treating the exercise by copyright owner of his copyright in order to prevent competitors from using the protected work differently according to the market on which such use takes place... The possibility of exploiting the copyright on what is described as a derivative market must be regarded as necessary in order to obtain sufficient reward for creative effort.

3.2.2.6. Hilti

The Hilti[146] case concerned the Commission's finding that a manufacturer of nail guns and the nails and cartridge strips that are used with them had abused its dominant position in the nail gun market by practices that prevented competitors from supplying nails for use with Hilti guns. The Court of First Instance upheld the Commission's decision, stating that nail guns, cartridge strips, and nails constitute three separate markets, and that there is a separate market for Hilti-compatible nails. Hilti had abused its dominant position by demanding excessive fees, needlessly prolonging proceedings for the grant of compulsory licenses to competitors, and by selective and discriminatory policies. These included reducing discounts to its customers when Hilti cartridge strips were bought without Hilti nails, and refusing to fulfil orders or to honour guarantees when non-Hilti products were used. Hilti had failed to ask the U.K. authorities to confirm its claim tat non-Hilti nails were dangerous, and thus, had no right to eliminate their use itself.

On appeal, the Court of Justice also found against Hilti. The Commission had found that Hilti had tied the sale of nails to sales of strips, refused to supply cartridges

[146] Hilti AG v. Comission, Case T-30/89, E.C.R. II-1439, 1992 4 C.M.L.R. 16 (Ct. Firts Instance); Hilti AG v. Comission, Cse C-53/92P, 1994 E.C.R. ,1994 4 C.M.L.R. 614; Commission Decision No:88/138/EEC, O.J.L 65/19 (1988) (Eurofix-Bauco v. Hilti)

for resale.[147] Hilti also gave more favourable discount to customers that agreed to buy only its products. Hilti's practices, therefore, though intended to exclude downstream competitors, involved both its customers and its competitors. Consequently, as in Commercial Solvents,[148] there was no question of the dominant company having difficulty in supplying sufficient quantities, there was little competition downstream, and the dominant firm provided no real justification for the refusal to supply.

3.2.3. THE CASE LAW OF THE COMMISSION

3.2.3.1. National Carbonising Company v. Commission

Apart form the specialized Commission decisions about telecommunications and performing rights, the first relevant Commission case is National Carbonising.[149] In that case, the National Coal Board (the "NCB") had a dominant position on the U.K. market both for coal, which is the raw material for making coke, and for coke. National Carbonising, a competing coke producer, claimed that the price at which the NCB sold coal for coke-making was too high, and the price of industrial coke sold by the NCB too low to enable National Carbonising to produce industrial coke and sell it at a profit in competition with the NCB.[150] Ultimately, the Commission rejected the complaint, essentially on the grounds that National Carbonising was unaffected in the market for domestic coke, and the case was finally dropped. However, the case illustrated the principle that a dominant company selling both a raw material and the downstream product made from it has a duty not only to supply the raw material to competitors, as in Commercial Solvents,[151] but also to do so at a price that, in all cases, enables its downstream competitors to remain in business if they are reasonably efficient. The Commission also considered that a dominant company in this situation has a duty to trade with its subsidiary on the same basis in all respects as it trades with its subsidiary on the same basis in all respects as it trades with its subsidiary's competitors. Any subsidy would be discriminatory.

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[147] Ibid.
[148] Commercial Solvents,1 C.M.L.R. at 340-41
[149] National Carbonising Co. Ltd. v. Commission, Case 109/75R, (1975) E.C.R. 1193; (1975) 2 C.M.L.R. 457; Commission Decision No. 76/185/ECSC, O.J. L 35/6 (1976) (National Carbonising).
[150] Ibid.

3.2.3.2. IBM

In the Commission's IBM case,[152] IBM had sold its large computer only with main memory and basic software, thus preventing competing suppliers of memory and software from selling these products to IBM customers, who wanted large IBM computers. Additionally, IBM had refused to supply certain software to users of non-IBM mainframe computers. IBM had also developed a practice of announcing new hardware and software products and taking orders for them from buyers long before the new products were delivered or the technical details of their interfaces were disclosed. This meant that competing suppliers of IBM-compatible hardware of software that needed to be used with IBM's new products, until long after IBM began to take orders.[153] IBM ultimately undertook to disclose, in good time, sufficient interface information to enable competitors to adapt their hardware and software to IBM's new products and to supply the software that it had previously refused to supply for use with non-IBM main frame computers. The case was settled on the basis of IBM's undertakings, so that that the Commission never had occasion to revise the position it adopted in its Statement of Objections to IBM or otherwise to elaborate on its legal analysis. The essence of the Commission's position was that by selling main memory and basic software with its large computers, IBM was in effect unnecessarily "trying" the two former products to the large computers. By refusing to supply certain software for use with non-IBM mainframe computers, IBM was denying users of non-IBM computers an important element in the IBM-based system, and thereby creating a disadvantage for its competitors selling IBM-compatible mainframe computers. By delaying disclosure of interface information on new IBM products while taking orders for them, IBM was creating an artificial advantage for itself and denying its competitors an opportunity to adapt their products to the new IBM products.

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[151] Commercial Solvents.
[152] Int'l Business Machines Corp. v. Commission, Case 60/81, (1981) E.C.R. 2639, (1981) 3 C.M.L.R. 635 (hereinafter IBM); IBM, 17 E.C. BULL., no. 10 at 3.4.1 (1984).
[153] Ibid.

3.2.3.3. BBI/Boosey & Hawkes

Boosey & Hawkes[154] was an interim measures decision of the Commission under Article 86. The decision required Boosey & Hawkes to resume supplies of musical instruments and spare parts to two companies, a repairer and a retailer of musical instruments, which had set up a joint venture to supply instruments directly to bands.[155] They needed Boosey & Hawkes products to have a complete product range, and they risked doing out of business if they could not get them. Boosey & Hawkes sold only to dealers. In its decision, the Commission said:

> *A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat. The fact that a customer of a dominant producer becomes associated with a competitor or a potential competitor of that manufacturer does not normally entitle the dominant producer to withdraw all supplies immediately or to take reprisals against that customer.*[156]

3.2.3.4. London European-Sbena and British Midland v. Aer Lingus

In the Sabena[157] case, Sabena was dominant in Belgium in the market for computer reservation services. The Commission declared the refusal by Sabena to give a competing airline access to its computer reservation system (CRS) to be contrary to Article 86. Sabena had refused to allow London-European access to its CRS in order to put pressure on the other airline to raise fares on the London-Brussels route or to withdraw from it. *The refusal was liable to prevent London-European from operating on that route*. The commission's decision refers expressly to the Commercial Solvents[158] case and treats Sabena's behaviour as a refusal, for

[154] BBI/Boosey & Hawkes, O.J. L 286/36 (1987).
[155] Ibid.
[156] Ibid.
[157] Commission Decision No. 88/589/EEC, O.J. L 317/47 (1988) (hereinafter London European-Sebena).
[158] Commercial Solvents.

anticompetitive reasons, to supply an essential service. There was relatively little competition on the London-Brussels route and spare capacity on Sabena's CRS.[159]

The British Midland-Aer Lingus[160] case also concerned airlines. Aer Lingus had refused to "interline" with British Midland, which at the time of the decision was one of the only competitors of Aer Lingus on the Dublin-London route. Interlining 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.[161]

Aer Lingus terminated its agreement to interline with British Midland when the latter, a strong competitor, began to compete with Aer Lingus on the Dublin-London route.[162] The Commission held that Aer Lingus was dominant on that route and that the refusal to interline with its competitor was contrary to Article 86.[163] It is important to note that interlining arrangements are normally multilateral and that, although not restrictive themselves, they are the justification for restrictive tariff consultations which are subject to Article 85. Interlining is normal industry practice except where there are, for example, doubts as to credit-worthiness that did not arise in this case. Aer Lingus claimed that having to interline would cause it to lose some passengers to British Midland.[164] The Commission ruled, however, that this did not justify imposing a "significant handicap" on British Midland.[165] Whether refusal to interline is unlawful depends on its effects on competition. It is prohibited if objectively, it is likely to have a significant impact on the other airline's ability to start a new service or to sustain an existing service (in other words, when it causes a significant handicap or barrier to entry). Denial of interlining forces a new entrant either to operate infrequent flights,

[159] London European-Sebena
[160] Btitish Midland v Aer Lingus, Commission Decision 1992.
[161] Ibid.
[162] Ibid.
[163] Treaty Establishing the Eurapean Community, Feb.7, 1992.
[164] British Midland v. Aer Lingus,[1992]OJ.L 96/34
[165] Ibid.

which results in a long, unprofitable start-up period, or to offer frequent flights at once, attracting passengers who want a choice of flights, but accepting low capacity utilization. Either alternative means higher start-up costs. In other words, for a new entrant, an interline agreement with the dominant airline, if there is one, or with the other lines operating on the routes in question, may be essential. *The Commission imposed a duty to interline for two years.*[166]

3.2.3.5. Two Holyhead Harbour Cases

3.2.3.5.1. B&I Line v Sealink:

Another recent Commission decision on access to essential facilities was B&I Line V. Sealink,[167] an interim measures decision under Article 86. Sealink is both a car ferry operator and the owner of Holyhead Harbour, which B&I also use in competition with Sealink. B&I's Berth was in the mouth of the Harbour, which is so narrow that when a Sealink vessel went by, the B&I ship had to stop loading or unloading and to lift the ramp connecting the ship to the dock. Sealink altered its schedule of sailings in such a way that a B&I's loading was interrupted more frequently. This improved Sealink's schedule, but harmed B&I. The Commission drew a distinction between Sealink as harbour owner and Sealink as a competing car ferry operator, and said that as a dominant harbour owner it was not free to discriminate in favour of its own car ferry activities. At the time of the decision, B&I was the only competitor of Sealink on the route and B&I's requirements did not add to the demands on the capacity of the harbour.[168] In its decision the Commission stated that

> *A dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable*

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[166] Ibid.

[167] B&I Line plc v. Sealink Harbours Ltd.and Sealink Stena Ltd. (Eur. Comm'n June 11,1992), cited in (1992) 5 C.M.L.R. 255 (hereinafter B&I); Sealink and B&I, Holyhead,25 E.C. BULL., no. 6, at 1.3.30 (1992).

[168] Ibid.

than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that Article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market (Case C-260/89, Elliniki Radiophonia. 37-38). The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article 86 where a competitive disadvantage is imposed upon its competitor without objective justification.[169]

This was the first statement by the Commission of a general principle using the phrase "essential facility," and it was explicitly based, as a footnote to the decision makes clear, on the case law of the Court, beginning with Commercial Solvents.

Was Holyhead port an essential facility? Yes, concluded the Commission on the grounds that the relevant market was the 'central corridor' of ferry journeys between Great Britain and Ireland, within which market Holyhead was the only available British port. This is a narrow market definition, and one whose justification is at least arguable. Among the questions left unanswered are whether B&I could have found (perhaps with some investment) an alternative port from which to operate services in the central corridor, and whether the evident physical and geographical differences between the northern, central and southern corridors really were sufficient to justify the definition of separate markets for each. [170]

Under this narrow market definition, Sealink's port services are as essential to B&I's operations on the market as BG's pipes are to the provision of competing gas trading services.[171] The commission's decision imposed interim measures on Sealink

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[169] Ibid.

[170] RIDYARD, D. "Essential Facilities and The Obligation to Supply Competitors Under UK and EC Competition Law", E.C.L.R. Vol:17, No: 8 p. 438.

[171] Gas, and British Gas, MMC 1993.

that forced it to return to its original schedules thus removing the damage to B&I's service.[172]

3.2.3.5.2. Sea Containers v Sealink:

The second Sealink case involved sea containers as the complainant, an operator who had no track record of operating from Holyhead port. In the light of the B&I case, Sea Containers complained that Sealink should have an obligation to supply it with port facilities at Holyhead so that Sea Containers could start up a new high-speed service on the central corridor route between Great Britain and Ireland. The case was resolved by the Commission's insistence that Sealink should provide port facilities to Sea Containers on conditions no more or less favourable than those which its own services enjoyed.[173]

Sea Containers had requested Sealink to allow it to use the harbour for a new ferry service.[174] Sealink delayed and caused difficulties, but finally under pressure from the Commission, made an offer that the Commission regarded as reasonable and non-discriminatory, which Sea Containers accepted. The Commission adopted a decision to clarify its view of the legal position for all the interested parties. The Commission again stated the general principle in almost exactly the same terms as in the B&I/Sealink decision, but added: "This principle applies when the competitor seeking access to the essential facility is a new entrant into the relevant market."[175]

It is unclear whether the Commission would have taken up Sea Containers' case had it not previously investigated the B&I complaint. It appears that the obligations placed on Sealink to accommodate competitors following the B&I

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[172] RIDYARD, D. p. 440.
[173] Ibid.
[174] Sea Container v. Stena Sealink, [1992] 5 CMLR. p.255.
[175] Ibid., p.17.

case put Sealink in a more vulnerable position than would otherwise have been the case.[176]

3.2.3.6. Port of Rodby

In the Port of Rodby[177] decision, under Article 90 of the EC Treaty, the Commission was concerned with the refusal by the Danish Minister for Transport to allow Stena to build a private commercial port near Rodby, and to allow Stena to operate from Rodby itself. The commission ruled that there is no real alternative to the port of Rodby for sea transport between eastern Denmark and Germany, and that the volume of traffic through Rodby made it a "substantial part" of the common market.[178] The Danish railway, as the port authority of Rodby, was therefore in a dominant position. The refusal to allow Stena to build a harbour or to use Rodby strengthened this dominance. Because it would have been an abuse if the state-owned Danish railways refused a competitor access to the port, it was contrary to Article 90 for the state to do the same thing. No technical constraints existed. There was no evidence that Rodby could not handle more traffic, there were only two competitors on the sea Routa and Stena was willing to finance any necessary alternations.

3.3. General: The duty to supply competitors on non-discriminatory terms

The minimum that can be deduced from Community case law so far is that *there is a broad principle that companies in dominant positions must not refuse to supply their goods or services to either competitors or customers if the refusal would have a <u>significant</u> effect on competition which cannot be legitimately justified.*[179] The leading authority is the Court's judgement in *Commercial Solvents*, which resembled a rule of reason analysis and the principle has been subsequently applied by the Court, Tribunal of First Instance and Commission in many cases. *Where there is a*

[176] RIDYARD, D.
[177] Commission Decision No. 94/119/EEC, O.J. L 55/52 (1994) (hereinafter Port of Rodby)
[178] Ibid. 54
[179] Commercial Solvents

duty to supply, Article 86 itself requires a duty not to discriminate if the buyers are in competition with one another.[180]

Assessing the effect on competition in each case requires factual analysis and is subject to the principle of proportionality, weighing any justifications submitted by the dominant company for its conduct against the effect on competition. When the customer is also a competitor of the dominant company in some market (usually downstream) the effect on competition depends largely on whether the buyer can obtain the goods or service elsewhere, on whether there are other downstream competitors, and on how important the goods or services are to the buyer's business.

If the buyer has another satisfactory source of supply or if the goods or services are not essential, or if one more competitor will not add significantly to competition, antitrust law should not oblige the dominant company to supply. The case law shows that if, in practice, the refusal by the dominant company to supply means that one of very few competitors is forced out of the market and there is spare capacity, there is a duty to supply and only strong business reasons can justify the refusal.[181]

3.4. The duty to provide access to "essential" facilities on non-discriminatory terms

The broad principle, imposing a duty to supply where there is a significant and unjustified effect on competition, initially made it unnecessary to develop a special category for essential facility cases. "*Essential facility" cases are not exceptions to normal rules, but specialized examples of general rules about discrimination and handicaps created by dominant companies*; the concept may be merely a useful label for some types of cases rather than an analytical tool. In brief, *the principle is that dominant companies must make facilities available when this is essential to enable competitors to compete.* In the Commission's first statement of a general principle

[180] See Above Article 86, p. 34.

using the phrase "essential facility", explicitly based on the case law of the Court, beginning with *Commercial Solvents,* it said:

> "A *dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, 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 86, if the other conditions of that Article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market ... without objective justification."*
>
> *"Specifically where...the competitor is already subject to a certain level of disruption from the dominant undertaking's activities, there is a duty on the dominant undertaking not to take any action which will result in further disruption. That is so even if the latter's action make, or are primarily intended to make, its operations more efficient."*[182]

This principle applies when the competitor seeking access to the essential facility is a new entrant into the relevant market.[183] A decision on interim measures may be necessary, to ensure that any final decision of the Commission is effective.

Determining what essential facilities are is a question of estimating the extent of the handicap to competitors, and whether it would be permanent or merely temporary. There are no specific legal rules to resolve these cases; it requires application of basic principles of antitrust economics. <u>The duty to provide access to a facility arises if the effect of the refusal to supply on competition is objectively serious enough: if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be</u>

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[181] OECD http://www1.oecd.org/daf/clp/Roundtables.

[182] Sealink/B&I - Holyhead 1992 (9) <u>Common Market Law Reports</u> 255.

[183] Sea Containers v. Stena Sealink O.J. N° L 15/8 Jan. 18, 1994 at para. 67, relying on Hoffmann La Roche 1979 ECR 461.

subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic.[184] Hence, access to a facility is "essential" when refusal to supply would exclude all or most competitors from the market.

In most cases, the dominance will be largely due to owning or controlling the essential facility. *Although the company need not be dominant on both markets, if it is dominant also on the downstream market,* the arguments for a duty to provide access are very much stronger.[185]

The test of whether there is a duty to deal is an objective one such that a particular competitor cannot plead that it was especially vulnerable, whether or not that fact was known to the dominant company. Community law protects competition, not competitors and the dominant company should be able to assess the lawfulness or otherwise of its decision to deny access at that time without any confidential information about its competitor's business or intentions.

It might be a defence to argue that some companies seeking access are already in a position to provide the facility for themselves. However, the reasons as to why they cannot may be physical (e.g. harbour), political (environmental objections) or economic (insufficient economies of scale). It is not necessary to show that what is called a "natural monopoly" is involved.[186]

3.4.1 Situations raising issues concerning essential facilities

The duty requiring access to be granted to an essential facility can arise in any industry but is of increasing importance in telecommunications, the transmission of energy, transport and is a crucial legal problem arising after an industry is deregulated. However, it should be noted that the Commission has considered that

[184] London European Sabena
[185] OECD, http://www1.oecd.org/daf/clp/Roundtables
[186] Ibid.

these industries could not be satisfactorily liberalized using only Community antitrust law, and that it is necessary to adopt general measures of which access to networks and grids would be only one aspect. As the EU is not yet in fact one uniform market and has many national regulated monopolies or State-owned companies with their own facilities which are essential for all or most of their downstream competitors, the essential facilities principle is, in effect, the follow-up of Article 90 EEC Treaty. It is also important where technical developments or new forms of co-operation, or both combined, may create new essential facilities which no competitor previously had, or needed to have, in order to compete. As illustrated by case law, *an essential facility may be either a product, for example a raw material, or a service or access to a physical thing or place such as a harbour or an airport.*

Cases which may raise issues concerning essential facilities include, for instance:

- car ferry companies which provide harbours for other ferry companies;

-companies which provide separate but related services;

- railways which both transport goods and provide haulage for other companies which transport goods;

- banks which control cheque clearing facilities;

- airlines which own or control Computerised Reservation Systems which are essential to enable travel agents to obtain flight information and make reservations;

- airlines which operate airports;

- telephone companies which provide mobile telephones, and long-distance wire telephone lines;

- companies which own electricity grids and power lines and gas pipelines;[187]

- performing rights societies which are needed to collect royalties on behalf of owners of rights in musical and other works;

[187] The Commission in its Twenty-Third Competition Policy Report (1994) paras. 80, 223-224, cited Disma as an important case example of the need to ensure non-discriminatory access to infrastructure, which in that case, consisted of underground pipelines for supplying fuel to aircraft from the airport, installed by the airport and certain oil companies

- television companies which sell magazines giving TV programs.

This last example involves the use by a dominant company of its intellectual property rights to prevent competitors from producing directly competing products.[188] Although a refusal by the owner of an intellectual property right to grant a license cannot in itself constitute an abuse of a dominant position, "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct".[189] The remedy of compulsory licensing may be imposed if necessary but in accordance with the principle of proportionality.

The cases on telecommunications show that, in general, a company in a dominant position in one market may not use its power to extend its dominance or monopoly into other markets.[190] This principle is relevant to, but not to be confused with, the principle that dominant companies must make facilities available when this is essential to enable competitors to compete. Access issues have arisen in many recent Commission cases concerning the newly liberalised markets in the telecommunications, media and information technology sectors. In the field of media, the central issue in several cases has been access to program content. With the development of pay-TV and the convergence toward multi-media, conditional access systems and access to set top boxes have begun to play a major role. This was the case in two recent decisions in the fields of telecommunications and media, in which the Commission prohibited the creation or strengthening of a dominant position which would foreclose a market before it had begun to develop.

3.4.2. When does the duty to grant access arise?

Key questions in determining whether there is a duty to give access to facilities in refusal cases are (apart from whether the company in question is dominant in the upstream market):

[188] Case 238/87 Volvo v. Veng 1988 ECR 6211, RTE and another v European Commission (joined cases C-241-242/91P) judgment of 6 April 1995. Case C 260/89.
[189] RTE and another v European Commission (joined cases C-241-242/91P) judgment of 6 April 1995, at paragraph 50.
[190] In Telemarketing , Case 311/84, 1985 ECR 3261, the Court said that although monopolies are not prohibited, they remain subject to Article 86 and that the Commercial Solvents' principle applies to a dominant company on a market in a service which is indispensable for the activities of another company in another market

- is the facility created or established jointly by competitors, or unilaterally by a single dominant enterprise?

- is the facility one with unlimited capacity or, if not, has it unused or spare capacity?

- how many competitors, if any, are there in the downstream market, in addition to the company associated with the dominant owner of the essential facility?

- does competition in the downstream market significantly affect the price paid or the value for money obtained by the buyer in the downstream market?

- what legitimate business justification is suggested for the refusal to supply?

It is useful to distinguish between cases in which access to the facility can be given to an unlimited number of competitors (e.g. interlining air tickets, collection of fees for performing rights, patent licences, access to information), and those in which physical or other constraints (e.g. the size of a harbour) mean that only a limited number of companies can use the facility, and the facility may or may not be fully utilised.

Several difficult questions arise: what are the dominant company's duties to its competitors in granting access to its facility, in granting licences of intellectual property rights to enable them to compete with its products or in enabling its competitors to adapt their products to make them compatible with the dominant company's new or altered products? These require a distinction to be drawn between the legitimate use of its legitimately obtained competitive advantages, which a dominant company may exclusively enjoy, and advantages which are contrary to Article 86 to use exclusively or which competition law should not allow to be used exclusively. A further difficulty with imposing a duty to contract is the administrative costs for the companies and for the authorities responsible for enforcing the principle.

3.4.3. Duties which arise in granting access

Commission case law has recognised that *in situations in which access to a facility is essential, the rule to supply on non-discriminatory terms to competitors is to be strictly observed.* There will be few exceptions to this rule where it applies. The terms of this rule and its exceptions need to be clarified as far as possible and this can only be done by case law and analysis.

A dominant owner of a facility is not entitled to operate the facility or improve its services to buyers in such a way that the goods or services offered by its downstream competitors are made less satisfactory or less readily available unless there is some sufficient overriding benefit to consumers or some reason based on the dominant company's objective interests as the owner of the facility, but not merely those of its own downstream operation.[191] Difficult questions about business justification would arise if it was possible to improve the dominant company's service greatly at the cost of a small deterioration in its competitor's service, producing a net benefit for users. If it chooses to change the use of the facility such that it is no longer available to either its own or its competitors' downstream, *the dominant company has a duty to provide users in time with the information they need to exercise their rights, and to consult with them to make the necessary arrangements; this is a duty to negotiate in good faith.*[192]

When a dominant company owns or controls a facility, access to which is essential for its competitors, and also uses that facility itself, it has a conflict of interest which would not arise if the facility was owned by an independent public utility which would have a duty of impartiality, or by a separate owner which, even if dominant, would be entitled to protect its interests as owner. It is not easy to see how any standard lower than that of an independent owner could be justified or

[191] Sealink/B&I - Holyhead 1992 (9) Common Market Law Reports 255.
[192] Sea Containers v. Stena Sealink

T.C. YÜKSEKÖĞRETİM KURULU DOKÜMANTASYON MERKEZİ

formulated satisfactorily.[193] Thus, the Court of Justice's case law on the duties of state enterprises with regulatory powers is relevant, particularly where these bodies have conflicting interests in operating a public infrastructure and also offering competing goods and/or services in a related market.

While the essential legal principle is that the dominant company must not discriminate, other legal principles may also apply such as its charging "unfairly" high prices for access to the essential facility, contrary to Article 86, which is discussed in more detail below.

3.5. Key issues arising in essential facility cases

3.5.1. Scope of the duty to provide access

A company has a duty under Article 86 to provide access to an essential facility *only if it is dominant in at least "a substantial part"* of the Community market. This may be an important question where the dominance is partly or wholly due to the ownership of the facility and where the facility is physical (e.g. a harbour or airport) on a particular route. The economic importance of the geographic market concerned must be considered to see if it is "substantial". In the context of ports and transport services, several ECJ and Commission decisions show that a route or port which carries a quantity of goods which is economically significant in relation to a Member State or an important region of the Community, can be considered a "substantial" part of the Community market.

Competition law does not oblige a dominant company to share, on a non-discriminatory basis, non-essential advantages which it has obtained or developed through its own efforts, such as when access to the facility is not essential but merely advantageous. As outlined above, access to a facility is essential to competition if the handicap resulting from denial of access is such that it can reasonably be expected to make a competitor's activities in the relevant market either impossible or permanently, seriously and unavoidably uneconomic, thereby creating an

[193] Ibid.

insuperable barrier to entry. However if competitors have an economic alternative, no such barrier to entry has been created or raised, and there is no duty to provide access.

A company has a duty to provide access to competitors only if it is in the business of providing services they need. A vertically integrated company is not necessarily obliged to provide access to a facility which other companies wish to use if it is not providing them to any independent users. The key test seems to be whether its upstream or downstream operations are merely part of the same business or separate in nature.

The practice of the industry concerned and the expectations of buyers or users may make it essential to have access to a facility which in other circumstances might not be essential (e.g. banks and cheque clearing facilities, airlines and computerised reservation systems, performing rights societies). However, it is essential that the co-operation between competitors is not itself significantly anti-competitive. The duration of any long-term contract between the owner and a particular user of the facility must be reasonable and this will depend, *inter alia*, on whether either party has invested substantial sums primarily on the basis of the agreement.

This approach does not deprive a dominant company owning the essential facility of the benefits of ownership, including making a profit. However the net charges to its own operations must not be less than those it charges to its competitors. *Regarding the question of the legal level of pricing, Article 86(a) expressly prohibits a dominant undertaking from imposing "unfair" prices or "unfair trading conditions", including low prices which are exclusionary (i.e. below cost) and high prices which are exploitative.* The Court regards prices as unfair when they are excessive in relation to the economic value of the service actually provided.[194] To determine whether a dominant company is imposing unfair conditions, the Court has

[194] General Motors v Commission [1975] ECR 1367 at para.12; United Brands v Commission [1978] ECR 207 at para. 250.

compared the dominant company's rates to those applied by similar companies in other Member States; if these are significantly higher, without objective justification, its imposition of such rates will infringe Article 86.

The Commission has stated that it does not normally in its decision-making practice control or condemns the high level of prices which a dominant company may charge. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrant who would normally bring about effective competition and the price level associated with it. *A dominant company therefore has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition or to prevent unfairly the emergence and growth of new or existing competitors.* It is not the Commission's task to decide either the level of prices or which criteria should govern the setting by the dominant firm of its prices; its duty is to ensure that these are applied in a non-discriminatory and objective way.

3.5.2. The need for an effect on competition - the character of the downstream market

In single firm cases, there is no duty to supply if the downstream market is competitive, even if there is spare capacity, unless the company seeking the supply can show that:

(a) it will provide a significantly different product or service not provided by existing competitors, or

(b) it is being discriminated against to discourage it from competing vigorously.

Except in selective refusal cases, he rules about the duty to supply downstream competitors do not apply to distributors since a refusal to supply a particular distributor does not have a significant effect on competition.

3.5.3. The significance of spare capacity

Economics and the Community law principle of proportionality require a distinction to be made between cases where there is spare capacity and where there is none. If the capacity of the essential facility is not fully used, or if by its nature its capacity is unlimited, the justification for refusing access is harder to find, especially where the owner of the facility or its associated company has a strong or dominant position in the downstream market. 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. 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 use or whether the purpose of long term contracts is primarily to make the facility unavailable to new entrants (which would be contrary to Article 85).

3.5.4. Access for how many competitors?

When the dominant company has a duty to provide access to its facility for competitors, it must objectively decide what is the optimum or maximum number of users which can satisfactorily use the facility, and then allocate them in a non-discriminatory way, without giving preference to its own operations. The duty to provide access applies to a new entrant[195] and also to new entrants in new markets on the ground of the "development" of competition.[196] New entrants must be given access where there is spare capacity but where there is no or insufficient spare capacity, the legal position will depend on existing contractual commitments. Provided that these are of reasonable duration, the new entrant must be given an opportunity to compete with other users or potential users for access when the contracts expire.

[195] Sea Containers v. Stena Sealink.
[196] RTE and another v European Commission (joined cases C-241-242/91P) judgment of 6 April 1995 at paragraph 54, relying on Article 86(b) EC Treaty

A company cannot claim the rights of a new entrant user in order to sell them to others; a proposed dealer is not fulfilling the same function as a buyer who buys essential raw materials or components for its own use. A new entrant dealer is entitled to buy only if there are other companies similarly placed to whom the dominant company sells. The owner of the essential facility cannot be obliged to invest in new capacity to provide facilities for more competitors.

3.5.5. New kinds of services or products

The fact that either the existing competitors or the proposed new entrant may be about to introduce a new substantially altered product may be important for determining whether a right to access arises, even if there is effective competition downstream and there is no spare capacity. This will be so in the following situations:

- if the entrant cannot launch its new product or service at the same time as the incumbents, it will never catch up on them; interim measures (i.e. interlocutory injunctions) may be necessary to ensure that the final decision of the Commission is effective;[197]

- the new entrant will provide goods or services significantly different from and more competitive than those provided by the incumbents;

- the new entrant plans to provide obviously useful goods or services which do not yet exist at all.[198]

3.5.6. Temporary duties to provide access - selective refusal

It must be decided whether the provision of an essential facility is a barrier to entry which the competitor must itself surmount from the beginning, or should be helped, temporarily or permanently, to surmount. Whether or not a competitor cannot

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[197] E.g. IGR Television, EC Commission Eleventh Competition Policy Report (1982) p. 63 and Sea Containers v. Stena Sealink O.J. N° L 15/8 Jan. 18, 1994, relying on Hoffmann La Roche, Case 85/76 [1979] ECR 461

[198] RTE and another v European Commission (joined cases C-241-242/91P) judgment of 6 April 1995.

ever be expected to provide for itself may depend on the economies of scale involved or whether a second facility would create real competition between the two facilities. It may be that temporary duties to provide access to facilities arise only when a dominant enterprise has refused normal industry arrangements selectively to handicap or discourage an active competitor.[199]

3.5.7. Duopolies and joint dominance

A jointly held dominant position can be abused, contrary to Article 86, by one duopolist or oligopolist even if the others have not acted unlawfully. It would therefore be unlawful for one jointly dominant company to refuse access unjustifiably. In the case involving the two big European computer reservation systems, each had a dominant position in part of the Community rather than joint dominance in a single market. As they were jointly owned by several European airlines which were users of both facilities and some of the airlines were dominant in their national markets, they each had duties under both Articles 85 and 86 not to discriminate in favour of the CRS in which they had shares. Community legislation says that the duty may be on the basis of reciprocity; discrimination by one jointly dominant company may relieve the other of its duty not to discriminate against the first.

3.5.8. Cross-subsidising

Community law has not yet fully answered the question of when a dominant company is allowed to charge low prices for products for which there is competition, and high prices for products for which there is none. Under Article 86, cross-subsidising will be unlawful when the low price is exclusionary (i.e. below cost) or the high price is exploitative,[200] regardless of whether or not the products need to be used in combination. A dominant enterprise with a duty to provide non-discriminatory access necessarily has a duty not to cross-subsidise in this way. It must ensure that it

[199] Sealink/B&I - Holyhead 1992 (9) Common Market Law Reports 255; in Aer Lingus - British Midland O.J. N° L 96/34 April 10 1992, the duty of the dominant company to interline was not permanent since any competitor could be expected to increase its own flight frequency in due course. It was important that interlining is general industry practice based on arrangements between competitors and that an effective competitor had begun operating on an important route.

can prove that it treats its own operations no more favourably than it treats those of its competitors using the facility, paying the same net charges as other users.

Selective price reductions are probably not prohibited under Article 86 unless they are below cost. It may be unlawful for a dominant company to cross-subsidise selective price cuts targeting a particular competitor, if it was objectively likely that the competitor would be forced out of the market, or if there were circumstances which indicated that the price cuts were intended to discourage aggressive competition. The key issue seems to be whether the dominant company's action is a rational competitive response or goes further than is likely to be profitable and amounts to a demonstration of the dominant company's determination to ensure that the new competitor cannot establish itself.

Under Community competition law, customers forced to pay "unfairly" high super-competitive profits, prohibited by Article 86, can claim compensation. If such profits are used to cross-subsidise predatory prices, competitors can also claim compensation.

3.6. Selective refusal of access to discourage aggressive competition

A dominant company must not selectively discriminate against a particular customer or competitor to discourage or penalise competition.[201] If it denies access to an important and not necessarily essential facility in order to handicap or injure a particular competitor, it is likely to infringe Article 86, especially if it is acting contrary to industry practice. In contrast to normal essential facility cases, in cases involving selective refusal of access, any special characteristics of the victim are relevant, at least if they are or are likely to be known to the dominant company, because they show how far it is likely to be discouraged from entering the market or from competing vigorously, or forced out of the market entirely.

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[200] See Article 86(a) and (c) above p. 35.

[201] United Brands. Another example is Aer Lingus British Midland.

3.7. Multi-company and joint venture cases under Article 85

In joint venture cases, the duty not to discriminate is similar to that in Article 86 cases, but arises under Article 85(3) in a wider range of situations. The Commission may impose an obligation on the parents not to discriminate in favour of their joint venture if they have large market shares (even if they are not dominant) and even if they are not controlling an essential facility in the strict sense if:

- the existence of the joint venture would otherwise mean that the parents would deal in the goods or services in question only with the joint venture; or

- if the existence or operations of the joint venture would otherwise impose a serious handicap on competitors excluded from access to it.

Under Article 85, it may be useful in analysis to distinguish between the following types of cases:

- co-operation between competitors is essential to carry out the operations in question e.g. banks' arrangements for clearing cheques, airlines' arrangements to interline (mutual horizontal co-operation);[202]

- the joint venture owning the essential facility is essentially in a dominant position, and this position is not significantly affected by the fact that the downstream users are also its shareholders;

- an essential facility has been developed by a company for its own use, and later shared with other companies as owners and not merely as users;

- co-operation is essential to provide some service for all the participants as, for example, the necessary economies of scale could not have been achieved otherwise (e.g. performing rights societies);[203]

- the facility (ice cream cabinets,[204] petrol pumps etc.) are provided by one party to be used exclusively for the sale of its products. Such an agreement gives rise to the

[202] British Midland v. Aer Lingus.
[203] Case 127/73 BRT v SABAM 1974 ECR 51 and 313.
[204] Langnese and Schöller OJ N° L 183/1 and O.J. N° L 183/9, July 26 1993 and T-24/92 and T-28/92, Order dated June 16, 1992.

problems discussed here only if other suppliers cannot in practice provide their own facilities.

Although the result is similar whether the case is analysed under Article 85 or Article 86, it is easier to justify an obligation to grant access under Article 85. Under Article 85, the Commission can if appropriate impose an obligation to submit day-to-day discrimination issues to arbitration. It is administratively simpler under Article 85 to require an outsider to be licensed or otherwise given access on the same terms as existing members than to draw up the terms for a kind of contract not previously made.

3.8. Horizontally integrated dominant companies

Horizontally integrated companies supply two or more products or services which have to be bought or used together by their customers. Access for competitors or for their customers to the product or service of the dominant company can raise issues which are at least similar to essential facility issues. These cases include companies which sell equipment in modules, selling both components and complete products; computers, software and peripherals, sound reproducing equipment and tapes, videos and cassettes, cameras and films, radio transmitting and receiving equipment; equipment and the consumables to be used with it.

Article 86 prohibits horizontally integrated dominant companies from tying-in unrelated products as this is an effort to use power in the market to strengthen the company's position in other markets. This may apply also when the two products, though in separate markets, <u>need</u> to be used together. If so, the basic rules apply for imposing a duty to supply the competitor or its customers and the duty not to discriminate against users who choose to combine products. The dominant company may not put a user who chooses to combine its product with its competitor's in a less satisfactory position than if the user used both of its products. It also has a duty not to

refuse its competitors compulsory licences or alter the interfaces of its products without improving them.[205]

The main problem arises over disclosure of interface information. It is not normally necessary for a dominant company to give its competitors information about its forthcoming products, even if its competitors' products may have to be used with them. However, in the IBM case[206] the Commission took the view that disclosure of interface information would not have unreasonably disclosed the non-interface characteristics of IBM's new products. Although it did not explicitly choose the essential facility theory (i.e. that access to interface information was essential for competition) as the basis of a final position, it seems to be one of the best rationales. It is only when two products must be used together that it can be argued that one is an essential facility for the use or sale of the other.

Horizontally integrated dominant companies are able in effect to deny access to an essential facility in the course of their relations with their customers, and they need not have contractual arrangements with their competitors in order to provide access to essential facilities if they are willing or are obliged to do so.

3.9. Possible justifications for discrimination or refusal of access to essential facilities

The case law so far has done little to clarify the circumstances in which discrimination or a refusal can be justified. However *it is still open for a dominant company to use genuine advantages of vertical integration either to give itself an advantage over its downstream competitor or to argue that it was not obliged to give the competitor access because the result would be less consumer welfare rather than*

[205] The Hilti and Decca cases are authorities for these rules.
[206] IBM

more. There are probably not many cases in which such advantages of vertical integration could be shown.[207]

It would certainly be a defence in a refusal of access case that the proposed use is inconsistent with the safety or technical standards of the facility or would otherwise interfere with its proper use, or would interfere with the efficient use of the facility by the existing users. *If the use of the facility by a new entrant would genuinely cause serious congestion, access can be refused temporarily*, and the question whether the available places should then be auctioned or otherwise reallocated would arise.[208]

3.10. Scope of Commission's role and practical consequences

Factual disputes as to whether in day-to-day operations, the dominant company has discriminated are more suited to national courts than to the Commission - the Commission has no power to award compensation. In some cases, the Commission has ensured that an arbitration system is set up to resolve these kinds of cases, especially where the disputes concern primarily technical issues. It is likely that in the future the Commission will say that essential facilities cases, for example involving individual harbours or airports, when the defendants are not public authorities should be dealt with increasingly by national authorities or courts.

The owner of a facility which gives rise to a duty to grant access to competitors may be required to separate its management of the facility from its own use of it in order to satisfactorily fulfil its legal duty to provide non-discriminatory access. If it licenses its own use of the facility, the terms should be formalised so that the same terms can be given to competitors. Companies in these situations should seek sound legal advice. The Commission could help by warning the dominant company of its

[207] The Commission has in one case informally taken the position that the dominant owner of an essential facility could not be criticised for taking advantage of economies of scale in the construction of several new facilities (if they were available only to it) and refusing to allow a downstream competitor to develop a single facility for itself on the dominant company's land

[208] In Port of Rødby OJ N° L 55/52, Feb. 26 1994.

duty not to discriminate, by suggesting open competitive tendering, or objecting to an agreement where necessary and requiring it to be renegotiated. It has also been willing to discuss potential complaints with complainants.[209]

[209] OECD, http://www1.oecd.org/daf/clp/Roundtables.

PART 4

COMPARISON OF THE EU AND AMERICAN REGULATIONS

4.1. General

In comparing the cases applying the essential facility principle under U.S. and EC law, several points emerge that raise questions over whether the essential facility doctrine, as understood in the United States, can or should play a role under Article 86. *In the United States the essential facility doctrine creates an exception to a broad general rule that allows firms to deal with whom they choose, even if that choice limits competition, provided that their choice has some business justification.* Article 86, *in contrast,* imposes broad duties to deal on dominant firms. In the United States the essential facility doctrine focuses on effects in markets where a firm holds market power subject to control under section 2. The Article 86 cases, in contrast, appear to apply the concept in a monopoly-leveraging context without extensive consideration of the extent to which the dominant firm holds a dominant position in a downstream market.[210]

This comparison is well illustrated by the example of cases involving access to (CRS) computerized reservation systems facilities for airlines. In LEA/Sabena[211] the Commission found that Sabena had a dominant position in the market for providing CRS services and, thus, had an obligation to provide such services to its airline competitors, without any consideration of whether Sabena had a dominant position in the airline market. In Alaska Airlines,[212] in contrast, the Ninth Circuit found that even if an airline had market power in the CRS market, it could only be required to allow

[210] VENİT, J.S. ve J.J. KALLAUGHER (1994), "Essential Facilities: A Comparative Law Approach", B. Hawk (der.), Fordham Corporate Law Institute International Antitrust Law and Policy , Kluwer Law International, The Hague, The Netherlands. P.333.
[211] London European Sabena
[212] Alaska Airlines v. United Airlines 948, F.2d. 536(6th Circuit 1991)

access to its CRS under an essential facility test if refusal would allow that airline to create or maintain market power in a market for airline services.[213]

Insofar as the role of the essential facility concept under Article 86 to impose a greater duty on a dominant firm to justify its refusal, the ferry port cases do perhaps reflect an approach similar to the U.S. cases, insofar *U.S. law applies a stricter standard to reliance on legitimate business justification in an essential facility context.* Here again, however, it may be argued that the ferry port cases come within the tradition of the proportionality analysis for justifying refusals to deal under United Brands. If this is the case, it is not clear how the essential facility label adds to the analysis.[214]

Insofar as the principal role of the essential facility 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 an essential facility is under any obligation other than to provide facility, where feasible, on reasonable terms. Seen from this perspective, use of the term "essential facility," with its unavoidable innovation of the U.S. doctrine, may cause some confusion, if under EC law, the doctrine gives rise to duties regarding a dominant firm's ongoing conduct.[215]

4.2. Analytical Tool or Label?

The essential facility doctrine may not actually describe a particular method of analysing antitrust cases which, at bottom, are concerned with refusals to deal. Rather, it seems more likely, as both EU and U.S. commentators have observed that it is a label which provides a handy way to characterize the factual setting of a case that is in any event susceptible to conventional legal analysis.[216] Early Article 86

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[213] VENİT, J.S. and J.J. KALLAUGHER, p. 330.
[214] Ibid. P.333.
[215] Ibid.
[216] Lang, p. 843.

cases[217] had established a "general class of cases in which dominant companies have a duty to supply"[218] without reference to an essential facilities doctrine.[219] Likewise, in the United States, early leading cases did not use the term.[220] In both jurisdictions, the concept of leverage is applicable in other antitrust contexts.[221]

In the United States, however, the doctrine may not be merely descriptive; some recent U.S. cases hold that in order to find a duty to deal in essential facilities cases when vertical leveraging is alleged, the defendant must have market power or a monopoly in both the upstream and downstream markets.[222] Such a finding is not required in the European Union, although if power in both markets is found, the case becomes that much stronger.[223]

4.3. Parameters of the Essential Facility Doctrine

Broadly speaking, essential facility doctrine may be implicated when a dominant party or group controls an asset (the essential facility) that is necessary for participation in a market and refuses to permit another party to use or have access to the asset.[224] A finding that the refusal of access to an essential facility has significant anticompetitive effects in a downstream market may impose a duty on the dominant owner to provide access on a non-discriminatory basis to customers who are also its competitors; that duty may be avoided only by strong business reasons justifying the refusal.[225] The doctrine, however, must be carefully applied so as not to deny a dominant owner any legitimately acquired rights and advantages arising from

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[217] Joined Cases 6-7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, 1974 E.C.R. 223, 1 C.M.L.R. 309 (1974); Case 27/76, United Brands Co. v. Commission, 1978]E.C.R. 207, 3 C.M.L.R. 83 (1978).
[218] Temple Lang, p. 446.
[219] Ibid.
[220] Very early cases, such as United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912), and Associated Press v. United States, 326 U.S. 1 (1945), dealt with combinations under Section 1 of the Sherman Act (15 U.S.C. § 1). This Comment's focus is on single-firm monopoly behavior, which is illegal, if at all, under Section 2 rather than Section 1. Therefore it will refer to Section 1 cases only if appropriate.
[221] Venit & Kallaugher, p. 316-19.
[222] AREEDA & HOVENKAMP, p. 650-51.
[223] Venit & Kallaugher, 316.
[224] Lang, p. 439.
[225] However, there is very little published EU case law accepting legitimate business justification for a refusal to deal. Venit & Kallaugher, p. 317.

ownership of the essential facility;[226] the boundaries of legitimate competition normally encompass gaining and keeping exclusive access to assets that confer a competitive advantage. [227]

On the other hand, when such an asset is an essential facility, the duty to provide access may arise if lack of access raises insurmountable barriers to competitors that make entry into the market impossible or subject them to a handicap so severe that their participation would be uneconomical.[228] In such cases involving anticompetitive effects, the dominant company may not use its ownership of the essential facility in ways that create advantages for itself as a competitor in the downstream market.[229] Also, EU case law demonstrates that rights to exclude, such as those found in intellectual property rights, may have to yield to larger societal concerns, regardless of the legitimacy of their acquisition.[230]

Many essential facility cases involve vertical relationships, wherein the facility owner provides the controlling product or service to its own downstream operations as well as to its customers, and dependent products or services produced by its downstream operations and competitor-customers are provided to third parties.[231] However, horizontal relationships, wherein the owner provides both controlling and dependent products and services directly to both customers and competitors, also give rise to essential facility cases.[232] This discussion is limited to the class of cases involving vertical relationships.[233]

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[226] Temple Lang, p. 439.
[227] Ibid. p. 486.
[228] Ibid. p. 487.
[229] Ibid. p. 486.
[230] HARZ, M.H. (1997), "Dominance and Duty in The European Union: A Look Through Microsoft Windows at The Essential Facilities Doctrine", p.19 www.law.emory.edu
[231] Lang, p. 478.
[232] Ibid.

4.4. *The Essential Facility Owner Who Has a Dual Role*

The Commission's decision in *Sea Containers v. Stena Sealink*[234] is notable on two points. It is the first Commission case that explicitly articulated an essential facility theory,[235] and it can be read to stand for the proposition that a firm which owns an essential facility, and which both administers that facility as well as competes in downstream markets using that facility, has a heightened duty to deal on a non-discriminatory basis with downstream competitors.[236]

In *Sea Containers*, respondent Stena Sealink (Sealink) owned an essential facility, the port at Holyhead in Wales, as well as a ferry service operating from that port.[237] Complainant Sea Containers desired to initiate a new fast-ferry service between Holyhead and Ireland, and though ultimately able to do so, it was initially thwarted in its efforts by delays and difficulties imposed by Sealink. Sealink was thereby able to initiate its own fast-ferry service in advance of Sea Containers, consequently accruing to itself the "goodwill and commercial reputation which [Sea Containers] wished to build up . . . ."[238] According to the Commission, an

> *undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e., a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an*

[233] HARZ, p. 22.
[234] Sea Containers v. Stena Sealink.
[235] Venit & Kallaugher, p. 330.
[236] Ibid p. 333.
[237] Sea Containers v. Stena Sealink

essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86.[239]

The Commission was particularly influenced by the dual role occupied by Sealink as both essential facility owner and user.

[238] Ibid. p.69.
[239] Ibid., p. 66.

PART 5

DIFFICULTIES IN IMPLEMENTATION OF THE DOCTRINE

5.1. MARKET DEFINITION

5.1.1. The Importance of Market Definition

Several courts have either stated or implied that market definition is a necessary element in an essential facilities case. The more striking - and untenable - notion, however, is that there could be any serious doubt that *the fact finder in an essential facilities case must define a market* or at least explain why market definition is unnecessary under the case's particular circumstances.[240]

A number of different approaches can be adopted when determining the relevant market in a case. A given market definition inevitably leads to conclusions which are relevant only to that defined market; an alternative market definition based on a different analysis of barriers to entry and market power may produce different findings. In the majority of cases more than one possible market definition may face the authorities. As a general comment on market definition, some observed that *monopoly power does not exist in relation to a product, but to a relevant product market*, and the definition of this relevant product market must meet two criteria: *it must be sufficiently narrowly drawn to exclude non-substitutes* and *it must be sufficiently broadly drawn to include all substitutes.*

In the EC, ports have been the principal vehicles for the development of the essential facilities doctrine by the Commission. In Sealink/B&I - Holyhead (1992 (9) CMLR 255), B&I's operation of a ferry service out of Holyhead was said to be compromised by the itinerary adopted for its own ferry services by Sealink, who also owned the port facility. In another case involving Holyhead in 1992 (*Sea Containers v Stena Sealink: OJ No L 15/8, 18 January 1994*), Sea Containers had requested use of the harbour for a new ferry service; under pressure from the EC Commission,

Sealink made an offer which Sea Containers accepted. John Temple Lang noted in a paper that Sea Containers was only the third competitor on the route, with B&I and Sealink itself, and that the Commission considered that the capacity of the harbour would permit a third competitor without undue inconvenience.

However, Derek Ridyard of NERA has commented on the decision relating to Sea Containers that the Commission had defined the relevant market as the "*central corridor*" of ferry journeys between Great Britain and Ireland, within which Holyhead was *the only available* British port. He considered that this was a narrow market definition, and one, which arguably was not justified. He pointed to the possibility that Sea Containers might have found an alternative port to operate in the central corridor and raised the question of whether there were sufficient differences between the central, northern and southern corridors to justify the definition of separate markets for each. In his view, it was the narrowness of the market definition that led to Holyhead being held to be an "essential facility". This highlights the importance of market definition in substantiating the essential nature of the facility. Commenting on the Port of Genoa case (Case C-179-90, [1991] ECR I-5889), Daniel Glasl said that the Court had implicitly applied the essential facilities doctrine. He went on to say "...this approach might indeed replace the definition of the relevant geographical and product market".

More recently market definition has been at issue in the EC Commission decisions was that relating to the Channel Tunnel Usage Contract. The contract between Eurotunnel and BR and SNCF provided for BR and SNCF to have entitlement to 50 per cent of the capacity of the fixed link, per hour, in each direction, to operate international passenger and goods trains. They were required to surrender part of their entitlement if requested, any withholding of such agreement requiring justification. The term of the contract was 65 years. The Commission decided that the usage contract breached Article 85(1) of the EC Treaty, but nevertheless promoted economic progress. The contract was therefore exempted under Article 85(3) EC, but subject to conditions designed to ensure that the parties did not eliminate possible future competition.

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[240] BLUMENTHAL, W., (2000) "Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illstration", Antitrust L.J. No:58 p.855.

The Commission's decision is subject to appeal. The railway companies have argued that the Commission defined the market so narrowly that the Channel Tunnel became self-evidently an essential facility.

These two examples illustrate the important role played by market definition in assessing the static welfare effects of mandating access. The role of market definition is clear in the first element of the MCI formulation -- that the firm be a monopolist -- because that status can occur only in a market. The second element seems to refer to a degree of non-substitution even greater than that used in defining the boundaries of a market -- that the facility be impractical and unreasonable to duplicate, as compared with, in the U.S. Merger Guidelines, not substitutable with a small but significant non-transitory price increase The ECJ decisions on the broad duty to supply refer to dominant firms, which implies a defined market. However, the Commission decision in Sealink refers to an "undertaking which occupies a dominant position in the provision of an essential facility." Whether this implies that an essential facility is, by definition, a market is not clear. Finally, the formulation offered in the Hilmer Report refers to facilities, rather than markets.

The above dealt only with static situations. A key issue in formulating an efficiency-enhancing EFD, however, is the effect of mandating access on dynamic efficiency. Imagine a purely private, unregulated, non-aided firm contemplating a sunk investment, such as a port. Assume that the future demand for that port is unknown until after it is built. Then the firm may face three possible outcomes: a negative return on investment in the port in any case (low demand), a negative return if access is mandated but positive if it can exclude competitors (medium demand), and a positive return even when access is mandated (high demand). It may be the case that if the firm expects access to be mandated, then it would not build the port, but if it expects access not to be mandated, then it would build the port. Hence, *a duty to provide access can deter initial investment in such a facility.*

5.1.2. Arguments on Market Definition

Any person may apply to the National Competition Council for a recommendation as to whether a service should be declared. The Council must be satisfied on a number of matters before it can recommend the declaration of a service. One of these conditions is that access to the service would promote competition in a market (other than a market for the service). Here, "market" is interpreted in a competition context rather than an engineering meaning, e.g., if natural gas were considered to be a relevant product market then access to a natural gas pipeline might be mandated, but this would not be so if natural gas were simply part of a wider energy market. Another of the conditions is that it would be uneconomical for anyone to develop another facility to provide the service. Here, there could be more than one incumbent. A third but not final condition is that access to the service would not be contrary to the public interest. One of the considerations here would be whether further investment by the owner or a potential infrastructure competitor might be deterred.[241]

An American view is that; it is not possible to define an essential facility without reference to the market for which access to the facility is essential. The first step is to define the downstream market. The second step is to define the upstream market, the market in which the essential facility lies.[242]

The EU Commission has, over the past few years, developed jurisprudence on essential facilities via a series of cases dealing with airports and ports and one railway case in Germany. The Holyhead case[243] was the first use of the term, "essential facility," although this was used in reference to prior case law. *In EC law, essential infrastructure is a sub-category of a more general principle of a requirement to grant access to certain essential goods,* under Art. 86 as well as Art. 85. In that

[241] OECD (1996), "Essential Facilities Concept", Series Roundtables on Competition Policy No:5, Vol:4, No: 61.
[242] Ibid, The Delegate of The United States Opinion.
[243] Sealink/B&I – Holyhead.

case, the port belonged to Sealing Harbour. Sealink Ferries and B&I[244] were the two users of that port. Sealink Harbour and Sealink Ferries had common ownership. To perhaps oversimplify, Sealink boats arrived when there were trains in the port; B&I boats arrived when there were no trains in the port. There was not an issue of "access" -- B&I had it -- but rather an issue of discrimination. An expert found that it would be technically feasible for B&I to schedule its sailings to be present during the periods when the trains were also in the port. B&I was willing to carry out the additional investments to facilitate its access to the port. Given there were only two ferry companies at this port, hindering the activities of one of them had a large effect on competition.[245]

Geographical market definition was an important aspect of the case. In the Holyhead case, the important aspects were the time of crossing and the users of the ferry service. The location of Holyhead was an important feature as it meant that the crossing took only three hours, which was two hours less than the next fastest crossing. The service was primarily for food. For food and especially for vegetables, the timing was critical in order to get them delivered to the markets. Hence, the short time of crossing implied that Holyhead was a relevant market.[246]

In the Port of Rødy (Denmark) case, there was no other crossing with such a short crossing time between Denmark and Germany. However, these points on geographic market definition are not specific to the issue we are discussing today.[247]

If an essential facility is defined in terms of its physical characteristics -- a port, for example -- then it is important to know "what is next door." Then geographic market definition becomes critical.[248]

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[244] Sealink/B&I – Holyhead.
[245] OECD
[246] Ibid.
[247] Ibid.
[248] Ibid, The Chairman's Opinion.

The Magill case is a very narrow decision. In that case, the intellectual property created was necessary for the work of the television companies. *Most commonly, countries are concerned about the disincentive effect of treating intellectual property as an essential facility.* However, that effect was not relevant in this case, given the characteristics of the intellectual property.[249]

The relevant market must be identified first, before an asset can be assessed as being an essential facility or not.[250]

In its evaluation of Mid-Kent Buses, the Monopolies and Mergers Commission found that access to the Pentagon Bus Station in Chatham was *not essential but merely desirable*. Land use planning constraints and the availability of land made impractical the duplication of the bus station at a suitable location. In considering the public interest, the MMC mandated access. This decision did not rest on an "essential facilities doctrine." Further, the MMC concluded that, "if equal access for all operators were held to be desirable, it might be necessary in some circumstances to provide access even at the cost of ejecting some of the incumbent's operations."[251]

With respect to the importance of geographic market definition in determining whether a facility is essential, the delegate from the United Kingdom contrasted the market definition in one case involving a port, in which there were found to be three corridors and three markets for crossing the Irish Sea but, in another case involving a port, there was found to be one corridor and one market for the crossing between Britain and the Continent. Here, it is clear that the geographic market definition plays a vital role in identifying substitutes.[252]

One must keep in mind the upstream/downstream distinction, where the alleged essential facility is an input into the downstream market. Then one would not

[249] Ibid The Opinion of The Delegate from Irelend
[250] Ibid The Opinion of The delegate from the United Kingdom
[251] OECD http://www1.oecd.org/daf/clp/Roundtables.
[252] Ibid

define an essential facility in terms of a technical installation or specific location but rather would look at the effects in the downstream market of having access to that facility (such as cost advantage as a percentage of downstream price) to evaluate the "essentiality" of the facility.[253]

5.2. Legitimate reasons for refusal to deal

Once a facility has been found to be essential, the next question is, what sort of refusal of access is anticompetitive? That is, what is a legitimate business reason to refuse to provide access? Are these limited to technical reasons or economic or efficient reasons?

If an essential facility has been found and if a refusal to provide access has been found to affect competition, *then the refusing firm may offer, in its defence, a legitimate business reason for its refusal*, which is in itself pro-competitive. Reasons that might be offered include that the firm makes higher profits if it refuses to provide access (this would not be accepted as a legitimate business reason); that granting access results in a return on investment which is lower than the level that would have made the investment worthwhile (absent showing that the return on investment was moderate would not be accepted as a legitimate business reason); that there is limited capacity; and that the firm's reputation or quality may suffer (this might be accepted as a legitimate business reason but is very fact-specific). Another important factor in deciding whether a refusal of access is legitimate is whether there is a history of dealing and then there is a change in policy and withdrawal of supply. This issue was raised both in the *Aspen Ski* case and the *Kodak* case. [A history of supply indicates that sharing is feasible. Further, withdrawal of supply may result in "stranding" of assets.] A related question is whether a refusal to deal, except on the offered terms and conditions, is justified?

An "objective reason" can be either technical or commercial. In the *Commercial Solvents* case, the fact that the upstream firm intended to vertically

[253] Ibid

integrate into the downstream activity was not considered to be an "objective reason" for it not to continue to supply the downstream firm.

In the IBM case at the beginning of the 1980s, the interface was considered to be an essential facility for providers of peripheral devices. As a remedy, IBM was asked to commit to provide interface information of new products in advance to manufacturers of peripheral devices.

There is no European jurisprudence on whether a vertically-integrated firm could be forced to sell its intermediate product to a downstream competitor, even though it has never before sold the intermediate product. In such a case, an important question would be whether the two activities were "distinct."

The obligations to offer access terms and conditions by a firm that is dominant in the upstream market and active both in the upstream and downstream markets may be no greater than those obligations of an owner of an essential facility that is active only in the upstream market.

A difficulty arises if a denial of access to a facility results in a small decrease in consumer surplus and a large increase in the welfare of the downstream competing firms. This sort of trade-off has not yet been dealt with at the Commission.

In the nail guns case, in which the producer of the guns alleged that it must also sell the nail cartridges in order to ensure the safety of the system, the Commission said that it was not for the private firm to set safety standards.

5.3. Remedies, access terms and conditions

If the parties do not reach an agreement and arbitration is used, there are various aspects that must be considered by the arbiter. Among these is that, *if the owner has a reasonable use or if there is a contractual user*, then these have priority over another firm's use. As noted earlier, if capacity must be expanded then the user pays the cost of such expansion. The price at which access should be mandated is, in theory, indeterminate. Should one use an efficient component-pricing rule or an avoidable cost rule? or some level in between? *There is increasing interest in not letting new entrants get a continuing free ride from the incumbent but rather to give the entrants incentive to make their own investments and provide competition in the provision of other services,* so some adjustment to the pricing rule is being made.

The extremes of pricing terms can be avoidable costs (incremental costs imposed on the facility owner by providing access, including the costs of providing additional capacity) and fully compensatory costs (including the loss of monopoly profits). Setting these prices would entail looking at cost and revenue data and has a "regulatory flavour." Non-price terms and conditions of access are messier and there is a need for an arbitration process, perhaps a court, especially in industries where there is rapid technological change. For example, the Federal Communications Commission will determine local network interconnection terms and conditions, which will consist largely of detailed technical terms of inter. In another example, computer interfaces, one might require the disclosure of technical information and specify the timeliness of that disclosure. In each of these cases, there would be continuing oversight in addition to the initial determination to ensue that the access terms and conditions change as technology changes.

It may be difficult to identify who should engage in these essentially regulatory activities, a regulator or the competition agency either itself or acting through the judiciary. Hence, some consideration should be given to a structural solution.

Basically, the refusal to deal is judged comprehensively according to whether or not the action substantially restrains competition in the market or impedes fair competition. The market share of the party concerned, the existence of competitors, the market structure, the characteristics of the facility and the reason behind the refusal to allow access to the facility are considered.

One must not get lost in the concept of a "doctrine." Nor should one engage in further legal formalism with simple rules. Rather, one must rely on economic analysis with a clear understanding of the economic goals of the policy. We should explore the boundaries of the "doctrine."

It is notable that this discussion has focused on vertical integration. Within the European Communities, there is a clearly established doctrine on abuse of a dominant position and a concept of a "conflict of interest" of a firm that is dominant in the upstream market and is a downstream user of the intermediate input. A lot of the cases go to that issue, but firms are not necessarily vertically integrated, i.e., the dominant firm may not be active downstream. A question is whether the same principles apply in both sets of cases. In the European Communities, they are treated the same because it operates from a broad system of abuse of dominance and essential facility is just a subset, not being a separate doctrine at all.

One should focus on the question not only of "What is an essential facility" but on the question "For whom is the facility essential? Some claims seem to be attempts to expropriate the legatee competitive advantage of the incumbent. *It is not relevant if an asset is essential to an entrant, but rather the issue should be whether the entrant is essential to increasing consumer welfare or achieving another policy goal.*

From an economic perspective, there should not be different rules or a distinction between unilateral and joint ownership of a facility. However, the relevant legal rules --- sections 1 and 2 of the Sherman Act in the United States and articles

85 and 86 of the Treaty of Rome -- are different. Would it be rational for the differing legal rules to result in different treatment of unilateral and joint ownership?

A legitimate business justification is critical to business. *Competition authorities need to distinguish between new entrants and incumbents in utilities in terms of legitimate business justifications.* For example, does a party who builds a new railway line over which to operate its own trains have an obligation to build enough capacity for competitors' trains? Must it permit competitors to run trains over that line immediately, or after a period of time, or ever? When is it legitimate to constrain entry in such a situation? In the United Kingdom, sector-specific regulators have the duty to promote competition

5.4. The Effective Reversal of Burdens

The essential facilities doctrine is attractive to plaintiffs precisely because a court's adoption of the assumptions implied by the catchword effectively shifts onto defendants the burden of justifying its denial of access. Of course, "feasibility" of providing access is, apparently, the fourth "element" of plaintiff's claim under the doctrine's formulation in MCI. *Nonetheless, courts have often required defendants to demonstrate, by affirmative defence that the denial of access was justified once some "essential facility" has been identified.* Professors Areeda and Hovenıkkamp have long recognized that this improperly shifts the plaintiff's burden.

As with most no-per se claims, the plaintiff bears the burden of persuasion that the challenged conduct is unreasonable. Of course, the defendant should bear the usual burden of coming forward with some evidence of justification. But once he does so, it should be the plaintiff's obligation to persuade the judge of jury that the justification should be rejected. That seems especially appropriate here where the warrant for requiring owners of goods or facilities to share them with competitors is somewhat questionable to start with, where the imposition of such a duty is

exceedingly intrusive, and compel dealing with reasonable predictability, with reasonably effective administration, and without chilling desirable activities.

In practice, however, we believe that a defendant cannot safely rest on and assumption that the ultimate “burden of persuasion” remains with plaintiff.

Of course, such an affirmative defence is similar to the business justification defences under traditional “refusal to deal” law. Usually, however, such justification is only required after the plaintiff has satisfied the elements of a traditional monopolization claim, including possession of monopoly power in the relevant market and showing an act of monopolization, in an actual monopolization case, proof of which sometimes is improperly omits in essential facilities cases.

Conclusion

This work has illustrated the various approaches that have been taken to the issue of when a monopolist or dominant firm can be mandated to provide access to a facility. The economic analysis suggests that, *where there is no price regulation, the static welfare effects of mandating access can be positive or negative*. On the other hand, *private investment is discouraged when there is a threat of mandatory access. Where there is price regulation, there appear to be more circumstances in which mandating access would have positive effects*. Hence, *the relationship between an essential facilities doctrine and economic regulation is important to an efficient formulation.* Finally, *the objectives of competition laws and the incidence of dual regulator/commercial actor roles greatly influence the nature of an essential facilities doctrine.*

The essential facilities doctrine provides the competition authorities with a tool that can be used to force a dominant firm to allow competing firms to use its facilities. This requirement is a relatively far-reaching infringement of the firms' property rights. Clearly, *an excessive use of the doctrine can reduce incentives for investment.* However, *the pro-competitive effects can, in exceptional cases, outweigh the negative effects.* [254]

Under the EC competition rules, the essential facilities doctrine can be seen as a special case of the prohibition of abuse of a dominant position by limiting markets. From an economic point of view, the mandated duty to deal under the doctrine includes a form of indirect price regulation, in that discriminatory terms of access are seen as abusive. This will, in turn, have an effect on downstream consumer prices. In contrast to direct price regulation or challenges of illegal excessive prices in the downstream market, application of the essential facilities doctrine might have structural effects, since entry into the downstream market is facilitated.

Additional advantages, relative to direct price regulation, are that the competing firms provide the expertise needed to find the non-discriminatory price and that price regulation is limited to critical stage of production only. According to some observers, stronger inferences as to the intentions of the dominant firm can be drawn from the fact that customers (downstream competitors) are excluded, than from situations where a monopolist charges high prices. Although not necessarily incorrect, it appears that no solid general justification for this claim has yet been presented.

The doctrine is often applied to infrastructural facilities of services related to such facilities. On justification for this is that such industries are more likely to be natural monopolies. Arguably, the doctrine can equally well be applied to network industries. Indeed, it has often been applied to such industries. In this context, network industries are industries characterized by network effects. In practice, the doctrine has often been applied to "windfall" monopolies, e.g., monopolies caused by geographic idiosyncrasies or previous or current legal monopolies. In the legal doctrine, a number of criteria have been developed for establishing when a facility can be considered as "essential." The aim of these criteria is to prevent the doctrine from being applied where its application would be contrary to long-run efficiency.

However, these criteria have been difficult to apply in practice, which has the negative effect of increasing the firms' uncertainty. The EC Court's preliminary ruling in the Bronner case introduced an interesting new criterion, which can be formulated as a requirement for the monopolized market to be unable to sustain more than one firm. Although this criterion is conceptually better defined than the corresponding previous (that "competing firms lack a realistic ability" to enter that market) and hence reduces uncertainty, it appears to be neither a sufficient, nor a necessary condition for concluding that mandated access is efficiency improving. A more satisfactory criterion would mandate access only when such an action would be efficiency improving from an ex ante perspective, i.e., before the investment that would potentially be discouraged by applying the doctrine. Another weakness of this criterion is that it is not clear why this indirect form of price regulation is more

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[254]BERGMAN M. A. "The Role of the Essential facilities Doctrine" The Antirust bulletin 2001, p.433-434.

efficiency improving when a duopoly is not a feasible out come. Further more, this criterion rules out the possibility that the essential facilities doctrine can be used to promote entry into bottleneck markets.

Finally, this work argues that *the essential facilities doctrine can be justified as a safety valve for exceptional situations*. In particular, *it can be used to promote competition* in markets where a physical property cannot be duplicated and/or where its value does not depreciate over time this in turn, could be due to the facility being a natural monopoly –part of- a network or a legal monopoly.

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