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ESSENTIAL FACILITIES DOCTRINE UNDER EC COMPETITION LAW AND PARTICULAR IMPLICATIONS OF THE DOCTRINE FOR TELECOMMUNICATIONS SECTORS IN EU AND TURKEY

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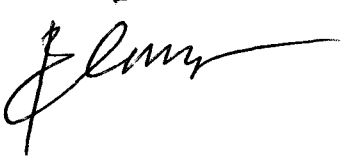
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ABSTRACT

**ESSENTIAL FACILITIES DOCTRINE
UNDER EC COMPETITION LAW
AND
PARTICULAR IMPLICATIONS OF THE DOCTRINE
FOR
TELECOMMUNICATIONS SECTORS IN EU AND TURKEY**

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In this study, the origin and main parameters of the Essential Facilities Doctrine are analysed through the case-law that developed out of the application of the EC Competition Rules. Besides putting forward the historical roots, the basic criteria and limitations that apply to the Doctrine are elaborated so as to clarify the legal and analytical foundations of the Doctrine in the EU context. In addition, the added value attributed to the Doctrine in realm of competition policies pursued in network-based industries is expounded with special emphasis on telecommunications sectors. With this regard, the potential role of EFD against the challenging effects of 'convergence' phenomenon and the technological changes is discussed. At last, the effects of EFD on the competitive dynamics of Turkish telecommunications sector which is undergoing a liberalisation process are also examined with the accompanied Turkish case-law.

Keywords: Essential Facilities, Refusal to Deal, Indispensability, Competition Policies, Access, Convergence, EC Competition Rules, Competition law remedies, Sector-Specific Regulation

ÖZ

AT REKABET HUKUKU'NDA ZORUNLU UNSUR DOKTRİNİ VE DOKTRİNİN AB VE TÜRKİYE TELEKOMÜNİKASYON SEKTÖRLERİNE YÖNELİK YANSIMALARI

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Bu çalışmada, AT Rekabet Kurallarını esas alan mahkeme içtihatları ışığında gelişen Zorunlu Unsur Doktrinin orijin ve temel esasları incelenmektedir. Doktrinin analitik ve hukuksal dayanaklarının açıklığa kavuşturulması amacıyla tarihi kökleri ile Doktrine uygulanacak sınırlamalar ayrıntılı olarak ele alınmıştır. Bunun yanında, şebeke endüstrilerinde takip edilen rekabet politikaları kapsamında Doktrinin uygulanması ile ortaya çıkan katma değer de özellikle telekomünikasyon sektörü kapsamında inceleme konusu yapılmaktadır. Bu çerçevede, Zorunlu Unsur Doktrininin sektörler arası 'yakınsama'nın sarsan etkileri ve teknolojideki değişiklikler karşısındaki potansiyel rolüne ilişkin olarak da tartışmaya yer verilecektir. Son olarak, Türk Rekabet Kurumu'nun kararları ışığında Doktrinin liberalizasyon sürecinden geçen Türk telekomünikasyon sektörünün temel dinamiklerine olan etkileri araştırma konusu yapılacaktır.

Anahtar Sözcükler: Zorunlu Unsur, Anlaşma Yapmayı Reddetme, Kaçınılmazlık, Rekabet Politikaları, Erişim, Yakınsama, AT Rekabet Kuralları, Rekabet Hukuku Tedbirleri, Sektöre Özgü Düzenleme

To my lovely wife who deserves forever love

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INTRODUCTION

The purpose of this study is to determine the principles that apply to the 'Essential Facilities Doctrine' under the EC Competition Law and on this basis to analyse the particular implications of the Doctrine towards telecommunications sectors in EU and Turkey, namely to investigate the historical and legal sources of the Doctrine, relevant case-law and multi-dimensional impacts of the Doctrine on networked industries with particular emphasis on telecommunications sectors.

The Essential Facilities Doctrine has its antecedents in US Antitrust Law. According to the Doctrine, an undertaking controlling facilities which are deemed essential for another market, abuses its dominant position, where without objective justification it refuses access to those facilities.

Most legal systems in countries with a market economy adopt the view that firms should be allowed to contract with whomsoever they wish. Despite this acknowledgement, forcing a dominant undertaking in order to make available of its own facilities to other parties is in exceptional circumstances deemed legally and economically acceptable. Essential Facilities Doctrine, having potential to be deemed one of these exceptions to the freedom to contract has so many impacts on the competitive dynamics of markets with monopolistic/dominant firms. From this point of view, the balance between exploitation of property rights and application of the Doctrine more precisely, the debate between policies promoting economic efficiency and those promoting more competition in the market is the leading theme of this thesis.

The thesis covers three main sections in compliance with the title of the thesis. While the first section deals with the nature and implementation of the Doctrine with general repercussions of the Doctrine in jurisdictional area, the second section of the thesis will focus on general implications of the Doctrine for networked industries, specifically towards telecommunications sectors. In this section, European

telecommunications sector is taken as a basis for telecom-specific analysis regarding the Doctrine. In the third section, relevant Turkish case-law on the Essential Facilities Doctrine and comparative analysis between the implementations of EU and Turkey will be discussed.

Within the first section, upon highlighting the most relevant cases in US Antitrust Law, the stress will be placed on the EC Competition Law. After reviewing nature of the Doctrine under EC Competition rules and the case-law, far-reaching results of the judgments and Commission decisions will be handled meticulously. In context of the this section, refusal to grant access to 'essential facilities', which is mostly deemed a kind of 'abuse of dominance', is going to be analysed in the light of EC Competition Law rules. In this framework, Doctrine-based benefits that might be added to the traditional 'refusal to supply' cases will be elaborated as a key point. Accordingly, the thesis is going to discuss how wide the Essential Facilities Doctrine should be applied, and what limitations have to be put upon it in general terms.

In the second section of the thesis, the above-mentioned discussions will be interrelated to the area of conflicting interests between competition law principles and sector-specific regulations. Moreover, the ways to solve a number of problems which concern access to the essential 'network' facilities and represent the most prevailing 'bottleneck' cases will be discussed in perspective of the Doctrine. Challenging effects of converging markets and future implications of the Doctrine for sector-specific regulation as well as competition law remedies will also be detailed therein.

Throughout the third section, it will be tried to examine the most interesting decisions developed out of the Turkish (Competition Board) case-law and deepen the unique parts of the decisions, thereby. In this regard, Community and Turkish case-law on EFD will be compared so as to reach some concrete suggestions for Turkey. The analysis then will be shifted to the current situation and future impacts of the Doctrine for Turkish telecommunications sector.

Having more complexities both in technical and economic terms in comparison to other competition law breaches, bottleneck problems or problems of access to essential network facilities are unavoidably threatening effective competition in relevant telecommunications markets. Even with perfect competition legislation, it is not simple to overcome such problems where networks of the particular dominant firms continue to exhibit natural monopoly characteristics such as scale and scope economies, strong network externalities, etc. Regarding the bottleneck problems, the Essential Facilities Doctrine in recent years has become a theme of central interest in respect of both future implementation of the EC Competition Law and sector-specific regulations in EU.

In order to evaluate the applicability of the Doctrine at the EU and national level, legal and economic developments particularly those observed with the introduction of the new EU Regulatory Framework will be given an important place in the thesis. Not only structural and network-related characteristics of telecommunications sector, but also the Community-wide regulations over this area will be handled in the thesis, namely in the second section. The so-called developments and regulations will be discussed in conjunction with their transformative effects on Turkish telecommunications sector, as well. Explicitly, one of the strands of thesis will be related to the problem of how Turkish telecommunications markets will cope with the abovementioned bottleneck problems whilst undergoing liberalisation and harmonisation processes along with the *Acquis*, in that application of the Essential Facilities Doctrine will be the principal constituent of the discussion.

All these discussions will be circumscribed around the theme 'third party access to essential facilities' and not only legal and historical but also economic and practical consequences of the Doctrine will be tried to be expounded in a coherent manner. It will be urged not to go beyond the scope and the purpose of the thesis outlined here in the context of the so-called discussions.

CHAPTER 1

ESSENTIAL FACILITIES DOCTRINE IN COMPETITION LAW

1.1 The Rationale and Parameters of the Essential Facilities Doctrine (EFD)

Competition Law serves many purposes, namely eliminating market imperfections and harmful effects of monopolies as the main policy objectives. Other important purposes such as promotion of consumer welfare and protection of small and medium-sized firms could be assessed supplementary objectives contingent upon the first ones. Main purposes of EC Competition Law could also be deducted from Article 2[1] and 3 of the EC Treaty which are detailed within Articles of 81 and 82 EC[2]. Article 3 of the Treaty establishes that the objectives set out in Article 2 would be achieved with the policy instruments envisaged, therein. The paragraph (g) of Article 3 specifically refers to 'a system ensuring that competition in the internal market is not distorted'.

[1] Article 2 EC reads as follows: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

[2] Article 82 EC, articulating the most common examples of abuse of dominance reads as follows:
"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.
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 obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

In establishing policy objectives of EC Competition Law, historical perspective should be embedded in legal and structural analysis. In the European context, socio-political concerns seemingly surpassed other objectives such as those related to the notion of 'economic efficiency', especially in the early days of implementation of EC Competition Law. This was the case, though having being regarded opposite due to the steady economic developments undergone through the integration process.

As a matter of fact, while aspiration of a peaceful and reliable supra-national system was the foremost factor stimulating post-war European integration, understandably the most apparent factor was economic reconstruction which initiated the member states to co-ordinate in many fields other than economic integration. Considering the 'integration' imperative over which political and social concerns were predominant, it is possible to say that, the notion of increasing 'economic efficiency' under EC Competition Law was insufficiently recognised at the time when the politics of market integration were in the ascendant.[3]

Having not faced with the market integration problem, the United States has become more concerned with efficient market operation. It is argued that even the original drafters of the Sherman Act were motivated by concerns of economic efficiency.[4] When we look at the spirits of the judgments as well as their wording, an economic theory would actually be observed as occupying a large share of the limelight in US antitrust enforcement.[5]

As a corresponding matter, free market economy encompassing the 'right to refuse to deal' had always a sound basis in US markets. This has been a rule of thumb unless otherwise envisaged in an injunction or a decree of a competent authority that requires a compulsory dealing in accordance with the US Antitrust Law. This also

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[3] Richard Whish, "Competition Law, *Fourth edition*", 2001, Butterworths, p. 1.

[4] M. H. Harz, "Dominance and Duty in the European Union: A look Through Microsoft Windows at The Essential Facilities", www.law.emory.edu, 1997, p. 4

[5] Ibid.

entails another fact that a general duty to deal is unacceptable in US system.[6] Not only US, but also most legal systems with a market economy adopt the view that firms should be allowed to contract with whomsoever they wish.

Essential Facilities Doctrine (hereinafter usually called 'EFD') is an important exception to this general proposition, namely a departure from freedom to contract in certain limited cases. That is to say, although in general, it is pro-competitive to allow firms to keep for their own exclusive use of assets which they have acquired or constructed, all or most developed competition laws create an exception to this general rule.[7] Explicitly, there are some exceptional circumstances in which a refusal on the part of a dominant firm to supply goods or services can amount to an abuse of dominant position under competition law rules.

As could be inferred here, there is a number of pre-requisites for application of Essential Facilities Doctrine. Among others, two principal requisites of EFD would have been met when an essential facility is owned by a dominant undertaking and a refusal of the dominant undertaking to provide with access to the so-called facilities takes place. Other essential requisite for application of EFD could be expressed as the 'investigation as to whether there is an objective justification to refuse the request for access'. Regarding the relevant criteria, how to assess that the facility concerned is 'essential' is the central pre-requisite for EFD and is therefore ought to be deemed the core of the EFD cases.

Summarising, the obligations regarding 'duty to deal' or 'duty to share essential facilities' arise only if the competitor cannot obtain the goods and services in question elsewhere and cannot build or invent them itself, and unless the facility

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[6] Under the US Sherman Act, 'refusal to deal' is deemed unlawful in exceptional circumstances. In *Colgate v. U.S.*, the Supreme Court held that "in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognised right of traders or manufactures engaged in an entirely private business, freely to exercise its own independent discretion as to parties with whom he will deal." [250 U.S. 300, 307 (1919)]

[7] J. T. Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner - Notes for a lecture", September 2000, Copenhagen, p. 2.

owner has legitimate business justification for the refusal.[8] Given this pre-assessment, it is possible to say that the 'essentiality' problem is the most controversial problem in EFD analysis, which adds some difficulties to the traditional 'dominant position' test. Beyond the definition of relevant market(s) and determination of dominance therein, are there numerous questions to be answered under EFD.

Another factor that makes EFD particularly important is the increase in number of cases in which a dominant firm depends on its power related to its economies of scope, scale and density as well as strong network externalities. In networked sectors many dominant undertakings have networks that have been subsidised through government expenditures, and this fact gives path for application of EFD in some respects. Actually in Europe, critical issues regarding 'access to essential facilities' have arisen in connection with the liberalisation of the gas, electricity and telecommunications industries which were in ascendant in 1990s. On the US side, since the early 20th century in a wider spectrum has EFD found a place for itself. A number of cases related to pipelines, power transmission networks, FM broadcasting facilities, e-mail servers, computer reservation system for airlines, a database of copyright invoked the Doctrine less or more.[9] A remarkable feature of these cases is presence of two markets. For instance, where respectively, CRSs (computer reservation systems),[10] wholesale electricity,[11] local telecommunications network[12] constitute *upstream* markets of an essential facility; airline passenger services, long-distance power transmission and transmission of telecommunications services are deemed *downstream* markets.[13]

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[8] J. T. Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner - Notes for a lecture", September 2000, Copenhagen, p. 2.

[9] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p.177

[10] *Alaska Airlines, Inc. v. United Airlines , Inc.*, 948 F 2d 536 (9th Circ 1991)

[11] *Otter Tail Power Co. v. United States* 410 US 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)

[12] *MCI Communications v. AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983)

[13] Though prototypical formulation of EFD describes two vertically-related markets frequently called 'upstream and downstream', there are some counterviews over this separation which will be dealt later. Generally saying, alike the situation in US Antitrust Law, the Essential Facilities Doctrine in EC Competition Law is usually traced to a number of decisions of Community Courts which were

It is generally accepted that the Essential Facilities Doctrine was inspired from the developments in US Antitrust Law, so it is worth starting with the discussion of the most relevant decisions of US Courts prior to analysis of EU case-law. The pertinent US cases would clear up the core elements of EFD and help the reader set the differences between Article 82 EC and the Section 2 of the Sherman Act, where somewhat different approach could be witnessed in respect of EFD.

1.2 The US Case-Law

Having a long and respected history as part of US Antitrust Law, EFD finds its origin in the 1912 *U.S. v. Terminal Railroad Association*[14] case. In this case, the defendant association comprised fourteen of the twenty-four railway companies serving the city of St. Louis. The so-called association had bought the only three possible railway crossings across the Mississippi River. The Supreme Court held that the refusal of the owner of a vital network such as a railway terminal, to make access available to non-owners may "restrain (...) commerce among the States and constitutes an attempt to monopolize commerce among the States (...)" and ordered the Association to "provide for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon a plane of equality in respect of benefits and burdens with the present proprietary companies".[15]

The Court seemed to have accepted, for purposes of its analysis, that the defendant railroad was a monopolist in the control of an 'essential facility', not having called as such, but as 'vital network'. Court also possibly avoided from acting as a regulatory agency, requiring the defendant pursuant to the Section 1 of the Sherman Act[16] to

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dominant undertaking is typically present on two markets and dominant at least in the upstream market thereby tries to exploit its dominant power on the upstream market in order to strengthen its position on the downstream market by refusing to supply its competitors with the upstream products.

[14] *U.S. v. Terminal Railroad Association* 224 US 383 (1912).

[15] Ibid. at 515-516.

[16] Section 1 of the Sherman Act, 15 USC § 1, reads as follows: 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

admit competitors to their Association rather than ordering dissolution of the Association and/or imposing detailed obligations thereupon.

The rationale behind the *Terminal Railroad* judgment was extended in *Associated Press v. United States*[17] case. The case concerned the collaboration named 'Associated News Organisation' (AP) where approximately 1,200 newspapers joined together in order for gathering, transmission, and exchange of news reports. Membership of AP was open to all newspapers except for those competing geographically with one of the existing members, for which more onerous membership conditions were imposed. Regarding this situation, the Supreme Court stated that "AP news is to be furnished to competitors of old members without discrimination."[18] In the Court decision, it was also held that "the exclusive right to publish news in a given field, furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals."[19] Holding that those more onerous membership conditions violated s. 1 of the Sherman Act, the Court did not seem to have set out a very clear rationale in its decision.[20]

The foundation of EFD within the single firm context has been formed with *The Otter Tail Power Co v. U.S.*[21] case. *The Otter Tail Power Co v. U.S.* is also the foremost case where the Supreme Court has conceived of the refusal to deal as having breached the Section 2 of the Sherman Act.[22] In the context of the case, the

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other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court".

[17] *Associated Press v. United States* 326 US 1 (1945).

[18] Ibid. at 21.

[19] Ibid. at 17.

[20] Barry Doherty, "Just what are essential facilities?" in Common Market Law Review, 38, no. 2, 2001, p. 404. See also, P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p.176, and M. H. Harz, "Dominance and Duty in the European Union: A look Through Microsoft Windows at The Essential Facilities", www.law.emory.edu, 1997, p. 8-9.

[21] *The Otter Tail Power Co v. U.S.* 410 US 366 (1973).

[22] Section 2 of the Sherman Act, 15 USC § 2, reads as follows: 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

Otter Tail Company sold electricity in different towns to individual subscribers. After the 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. The Supreme Court stated that "The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms."[23] The emphasis put on the role of intent by the Court is also eye-catching in *The Otter Tail Power Co v. U.S.* judgment. In fact, the Court here decided on the breach of the Section 2 of Sherman Act, due to the presumption of "attempt to monopolise" on the part the defendant. The Court explicitly said that Otter Tail's actions "had the purpose of delaying and preventing the establishment of municipal electric systems"[24] and ordered Otter Tail to distribute power over its grid, at rates which were compensatory. Here is revealed another form of violation of Sherman Act apart from monopolisation, specifically being emphasised not as action but in the form of specific intent.

Not only in the above case, but also in many other Supreme Court judgments[25] is inherent the fact that Sherman Act can be breached if the refusal to deal had been done with the 'intent of monopolise'. But 'intent theory' does not appear to have been objectively justified so as to constitute a sound basis for distortion of competition. According to P. Larouche, such an approach is more close to the arguments used in EC Competition Law.[26] As a factual point, in enforcement of Antitrust Law, US Courts so far have been prone to conduct a more economics-oriented analysis, in comparison to the Community Courts. Given the fact that US Antitrust Law starts from the principle that refusals to deal are permissible, the end-

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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"

[23] *The Otter Tail Power Co v. U.S.* 410 US 366 (1973), at 130.

[24] Ibid., at 379.

[25] See the following cases: Eastman Kodak Co. v. Image Technical Services Inc., 504 US 451 (1992); Lorain Journal Co. v. US., 342 US 143 (1951); City of Anaheim, 955 F.2d at 1381; Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,472 US 585 (1985); Intergraph Corp. v. Intel Corp., 195 F.3d 13346, 1358 (Fed. Cir. 1999) (*cited in* P. Larouche, p. 175-178).

[26] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p.176.

results under the s. 2 Sherman Act are able to be quite different than under Article 82 EC (ex 86).

On the other hand, the role of intent particularly emphasised in the US Antitrust Law could be found unsurprising when considered with its main purpose. From this point of view, one can make an observation that the language of Article 82 does not seek to prevent dominance or monopoly, while Section 2 of the Sherman Act prohibits monopolisation or attempted monopolisation. Under Article 82 EC, being in a dominant position would thus not create a concern as such, but once an undertaking has acquired a dominant position, it will be acceptably subject to scrutiny whether for any abuse of dominance.

Going back to the *Otter Tail* decision, we can speak out about some conflicting comments over the duty to deal. Some commentators suggest that *Otter Tail* does not establish a general duty of deal,[27] while some others conclude that for such an exceptional circumstance, a duty to deal is imposable under EFD.[28] Common critics regarding the *Otter Tail* decision are related to the limits of the Court's jurisprudence. In this regard, it is argued that the Court should have been reluctant to burden Otter Tail Power Co. with a detailed duty to deal as there existed a regulatory agency to regulate terms and prices of power transmission at that time.[29]

In a further decision, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[30] Supreme Court had clarified the essential facilities principles applied at *Otter Tail*, whereby somewhat restrictively. The parties to this case were competitors in offering ski

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[27] P. Areeda, "Essential facilites: an epithet in need of limiting principles", 58 *Antitrust Law Journal,* 1990, 841, no. 21, 1989, p. 844; Barry Doherty, "Just what are essential facilities?" in Common Market Law Review, 38, no. 2, 2001, p. 401 and J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L. J. 565, 1998, p. 573.

[28] M. Furse, "The 'Essential Facilities' Doctrine in Community Law", European Competition Law Review, 8, No. 8 1995, p. 470 and R. Pitofsky, D. Patterson, and J. Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law", Antitrust Law Journal, Vol. 70, 2002, p. 451.

[29] P. Areeda and B. Doherty Op.cit. in note 27. See also Abbott B. Lipsky, Jr. and J. Gregory Sidak, "Essential Facilities", Stanford Law Review, Vol. 51, No: 1187, May 1999, p. 1206.

[30] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 472 US 585 (1985).

services on Aspen's slopes, who had a long standing revenue-sharing agreement based on operation of a joint selling mechanism by which skiers could buy a single ticket and ski at either resort. The defendant, Aspen Skiing Co., who was a bigger company abandoned the agreement between themselves, refusing to accept tickets issued by Aspen Highland Skiing Corp. for the reason of incurring great costs. Having reached that the so-called rejection constituted a breach of Section 2 of the Sherman Act, the Supreme Court dealt with the case within the framework of the intent theory and business legitimacy perspective. The Court held that 'the monopolist did not merely reject a novel offer to participate in a cooperative venture but had instead elected to make an important change in a pattern of discrimination that had originated in a competitive market and had persisted for several years'.[31] Although the Supreme Court did not make an explicit reference to EFD, it upheld the decision of the Tenth Circuit Court of Appeals who described the multi-area ticket as an 'essential facility' to which the defendant was denying access with the intent to monopolize by putting the competitor ski resort out of business.[32]

An outcome can be inferred from the above judgment(s) that a monopolist has the right to deny access to provide particular goods, services and facilities with its competitors, if a legitimate business reason could be put forward as to justify the refusal. Therefore, if there exist no monopolisation, attempt to monopolize and/or combination or conspiracy to monopolize, refusals to deal are permissible under Sherman Act.[33] Hence, one can correlate presence of legitimate justification with lack of monopolisation for the purpose of antitrust law. Notably to say, the fact that monopolists have no a general duty to co-operate with its rivals could thus be regarded as an emanation point of US Courts in their analysis as was in *Aspen* decision. In this context, the reason why the Court departed from the freedom to contract in *Aspen* seems to have stemmed from the absence of objective justification.

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[31] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 472 US 585 (1985), at 603.

[32] R. Pitofsky, D. Patterson, and J. Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law", Antitrust Law Journal, Vol. 70, 2002, p. 448.

[33] See *supra* note 6.

The most significant US case regarding essential facilities is commonly accepted as *MCI Communication v. American AT & T Co.*,[34] where the Seventh Court (a lower court) set four conditions for the application of the Doctrine to unilateral refusals to deal. Until the *MCI* judgment, there was no clear-cut formulation of EFD and the phrase, 'essential facility' had not been used by the Supreme Court in refusal to deal cases, which also exhibits an avoidance of the Court from the formulating clear-cut rules of EFD.

The case concerned a dispute between MCI and AT&T, involving interconnection in telecommunications, where the latter company has a monopoly power. Before the Court dealing with the case, MCI brought many claims, among which the major one was towards the extent to which AT&T allowed MCI to interconnect with its local circuits. MCI alleged that AT&T imposed unreasonable conditions with regard to interconnection with its local network, and accused AT&T of unlawfully refusing multi interconnections.[35] The Court of Appeals, Seventh Circuit cited EFD as the legal basis of its decision, within the following paragraphs:[36]

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another. Thus the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.
>
> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

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[34] *MCI Communications v. AT&T*, 708 F.2d 1081, 1132-1133 (7th 1983).

[35] Ibid., at 1132-3.

[36] Ibid.

The most peculiar and outstanding aspect of the judgment is its bringing a four-part test in order to verify liability under EFD. As a matter of fact, the so-called test contributed to employ a theoretical framework for delineation of the boundaries of the Doctrine to a great extent and gave way for further discussions challenging the limits of the Doctrine's applicability in jurisdictional area. Considering far-reaching results of the so-called four-part test, it will be appropriate to discuss the conditions set in the MCI test and their implications. Though having been developed with some additional abusive elements, the pre-conditions for EFD set out in the MCI test are substantially valid in essential facility cases of EC Competition Law, as well.

1.2.1 Control of the Essential Facility by a Monopolist

The 'essential facility' concept is generally started from the premise that the owner of the facility has a 'monopoly' in the marketplace.[37] A conclusion that there is no place to interfere in a refusal to deal case unless the facility in question is owned by a monopoly/dominant undertaking can also be deduced upon analysing the relevant judgments.

A firm may be dominant for several reasons. The firm may have an exclusive license constituting a legal barrier to entry. The firm may also possess an asset which is uniquely situated geographically or has a natural characteristic which makes the asset a natural monopoly. Finally, a firm may gain dominance because it has operated more efficiently than its competitors.

Since the dominance is not *per se*[38] illegal, competent authorities or courts are usually concerned if the firm uses its dominance to deter entry of potential competitors or to substantially lessen competition in general, at least in the European

[37] The 'dominant position' in EC Competition Law corresponds to the term 'monopoly' in US Antitrust Law with some important differences in theory and practise. In the thesis, being dominant in relevant market rather than having monopoly is usually preferred, since the subject-matter of thesis is mainly directed to EFD analysis on the Community Law basis.

[38] *Per se* (illegal) means an automatic illegality on its own, not depending on any further arguments.

context.[39] However, this inherent principle has been replaced with the 'monopolisation' phenomenon in US Courts. As a corresponding matter, the cases in which the firm enjoying monopoly strengthened its position in another (downstream) market through refusal to grant essential facilities have so far been regarded as a breach of antitrust law in many instances.

As regards EFD cases, the foremost concern would rather be related as to whether the competitive structure has been affected in the relevant market or not, even if an obvious refusal to deal has taken place. Thus, it would be impossible to justify the application of EFD if the refusal to supply had little effect on competition in the downstream market.[40] In other words, even if owner of the facility is declared as being in a dominant position, this fact must not be sufficient for applying EFD without considering the said competitive concern(s).

In this respect, if a firm has a dominant position in two adjacent markets, a refusal to supply which strengthens that position would be unlawful because the refusal limits the production of a competitor.[41] However, in presence of effective competition, no harmful effect of refusal to supply could be observed in the relevant market. Therefore, whether there occurs elimination or lessening of competition by the dominant firm's refusal to grant access to essential facilities is one of the important tests under EFD analysis.

Another discussion is related to the extent to what reliance on traditional dominance test in conjunction with two separate markets (as downstream and upstream markets) is viable under EFD. Leaving the EU case so as to be detailed further, whether 'the facility must be controlled by a monopoly' constitutes a strict condition under MCI test needs to be analysed.

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[39] However, in case of legal monopoly or a firm subjected to sector-specific regulation, access to the essential facilities owned by the firm could be mandated under a specific form of regulation which is convenient to be called a *per se* or *ex ante* rule.

[40] J. T. Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner-Notes for a lecture", September 2000, Copenhagen, p. 12.

[41] Ibid., p. 13

US Courts sometimes treated the threat of downstream monopolisation as a fundamental pre-requisite for validity of an essential facility claim.[42] On the other hand, the lower court opinions in the *Aspen Skiing*[43] contradict the assertion that the Essential Facilities Doctrine only applies when a monopolist firm supplies a downstream product or service that competitors or customers must have in order to compete. The Lower Court confronted a claim by the defendant, who "argued that ... a duty to deal can arise only in different circumstances where, through vertical integration, one firm has come to monopolize or control the supply of a component necessary for production, distribution or sale of a rival's product or service".[44] The Court explicitly rejected such contentions: "We decline to adopt a narrow rule that would immunise an unintegrated monopolist from antitrust liability for refusing a competitor access of an essential facility in these circumstances. Vertical integration is not essential to finding a violation of the antitrust laws for a refusal to deal under the intent test."[45] Here, the Court emphasised the 'essentiality' rather than 'dominance in a vertically-related market'. Further, the Court was "not convinced that the essential touchstone of bottleneck cases is vertical integration."[46]

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[42] See in *Air Passenger Computer Reservations Sys. Antitrust Litig*, 694 F. Sup. 1443, 1455 (C.D. Cal. 1988), aff'd, 948 F. 2d 536 (9th Cir. 1991). "When applying the Essential Facilities Doctrine in the context of Section 2 of the Sherman Act, a facility should be deemed essential to the downstream market only where control of the facility by a competitor poses a danger of monopolisation of the downstream market."; see also Consolidated Gas Co. v. City Gas Co., 912 F 2d 1262, 1292 (11th Cir. 1990). As explained in *Consolidated Gas:* "The essential facilities doctrine is designed to deal with the danger that a monopolist in control of a scarce resource will extend its power vertically from one level of production to another ... A facility becomes essential if, in restricting competitors' access to that facility, a monopolist gains a competitive advantage in another level of the market-that is, a market downstream or upstream from the market containing the facility itself." (cited in R. Pitofsky, D. Patterson, J. Hooks, p. 458-461.) J. T. Lang who was the Director in the Competition Directorate General in European Commission also states that if a dominant firm is not present on the downstream market for which access to the facility is said to be essential, EFD does not apply, at least in intellectual property rights cases. (*cited in* J. T. Lang, p.14).

[43] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 472 US 585 (1985).

[44] Ibid., at 1518.

[45] Ibid., at 1519.

[46] Ibid. Similarly, an appellate court reinstated a plaintiff's essential facility claim after it was dismissed by trial court in *Delaware & Hudson Railway Co. V. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990).* The case involved a dispute between two rail companies. Because, the plaintiff had a more limited track system than the defendant, it required access to the defendant's tracks for portions of certain shipping trips – the end portion (or 'short haul') – to deliver to specific destinations. The defendant, who previously had acquiesced in such arrangements before the rival carriers having begun competing, refused to allow access on reasonable terms. The Court found that the plaintiff's essential facilities claim could proceed. (*cited in* R. Pitofsky, D. Patterson, J. Hooks, p. 459.).

In view of these judgments, favourably to say that the first condition of the MCI test must not be construed and applied as a required level of monopolistic control (i.e. vertical integration) for the application of EFD. Reinforcing this conclusion, a number of US courts have emphasised that the vital issue is whether plaintiff has a *competitive relationship* with the alleged monopolist in the relevant market or not.[47] Numerous lower court cases simply require that plaintiffs demonstrate that they are competitors being denied access to an essential facility controlled by the defendant-monopolist.[48] This fact is verified by the *Intergraph Corp. v. Intel Corp.*[49] judgment where the plaintiff has not shown an adequately competitive relationship between the parties. Hence, the competitive relationship between the parties (monopolist – undertaking requesting access) is sufficient for satisfying the request to be valid as a claim for EFD analysis. That is to say, in order for the criteria of a case to be assessed under the Doctrine, an allegedly essential facility must be owned by a monopolist / dominant undertaking, and there must be a competitive relationship, but not a required level of dominance along the adjacent markets.

1.2.2 A Competitor's Inability Practically or Reasonably to Duplicate Essential Facility

The analysis of this criterion constitutes the core of the term 'essentiality', thereby plays a major role in applying EFD. In advance of investigating further issues, whether a facility is essential or not is often regarded as the most important requisite to be clarified under the Doctrine-based analysis. Thus, this criterion (a competitor's inability practically or reasonably to duplicate essential facility) is vital for application of EFD.

A facility is essential when two conditions are satisfied: Firstly, it must be examined whether someone other than the owner of the facility in question is currently providing the same facility. Within this initial condition, there exists a further

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[47] R. Pitofsky, "The Essential Facilities Doctrine Under United States Antitrust Law", p. 23. http://www.ftc.gov/os/comments/intelpropertycomment/pitofskyrobert.pdf

[48] Ibid.

[49] *Intergraph Corp. v. Intel Corp.*, 195 F.3d 13346, 1358 (Fed. Cir. 1999).

implicit question with regard to the extent to what the alleged essential facility is equivalent with other products. The second condition consists of an evaluation as to whether the facility in question can be feasibly duplicated or not. This condition which can be called 'non-duplicability' entails an economic analysis as well as a technical one.

The first condition is relatively easy to investigate. The second one, however, would be harder as a determination has to be made taking into account the existing economic and technical conditions and possible changes over them. Therefore, it is possible to say that the analysis of the second condition is highly fact-specific.

Under the first condition, the facility in question must not be available from other sources. In the *Apartment Source of Philadelphia v. Philadelphia Newspapers*[50] judgment, the following sentence reveals important clues in terms of interpreting the first condition: "A facility will not be deemed essential if equivalent facilities exist or where the benefits to be derived from access to the alleged essential facility can be obtained from other sources." Given this sentence of the judgment, in examining first condition (whether someone other than the owner of the allegedly essential facility is currently providing the same facility), a competitor must demonstrate that any other facility is neither the same as nor equivalent with the facility which is sought access. The same competitor has not an obligation to demonstrate that the (upstream) market consists of the essential facility solely. In other words, definition of market does not always overlap the delineation of essential facilities in EFD analysis.

At this juncture, a distinction between the relevant product market and the market of essential facility has to be done. That is to say, other products which are substitutable with the product constituting the upstream market can be different from the allegedly essential facility. By opposite, an essential facility does not have to constitute the relevant market with any other products deemed substitutable with itself. As a conclusion, in order for the Doctrine to be applied in a case, the facility alleged to be

[50] *Apartment Source of Philadelphia v. Philadelphia Newspapers*, Civ. A. No. 98-5472, 1999 WL 191649, at 7.

essential for operating in downstream market is not necessarily deemed the product of the upstream market. However, a perception regarding the markets that consist of essential facilities as 'identical' with those of upstream products is accepted by a number of authors.[51]

Given the lack of requirement of an equivalence between the market of essential facilities and that of upstream products in EFD cases, identification of the said markets should be conducted cautiously. In this context, the term 'equivalent' used in the sentence extracted from the above judgment must be distinguished from the terms 'substitutable' or 'interchangeable' used for definition of markets. This is confirmed by the second part of the above sentence, where an effort of avoiding from definition of market is remarkable. In that part of the sentence, it is stated that unless benefits to be derived from the allegedly essential facility can be obtained from other sources, the facility in question is ultimately deemed 'essential', and there is no relevance between being 'essential' of the facility and definition of markets. Therein, the emphasis is cited upon the benefits of the facility in question and the possibility of derivation of such benefits from another source(s). In fact, a facility will not be deemed 'essential' if equivalent (but not constituting the relevant product market together with the essential facility) facilities exist. Therefore, under EFD analysis, there ought not to be a requirement for an overlap between the market of essential facility and the relevant product market.[52]

In this respect, the proposition that cases involving essential facilities therefore require definition of two different markets and essential facility itself constitutes one of these markets is difficult to agree upon. The cornerstone of the 'essentiality' lies at

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[51] Antonio Capobianco, "The essential facility doctrine: similarities and differences between the American and the European approach" in European Law Review, 26, no. 6, 2001, p. 556.

[52] For instance, in telecommunications markets local loop is deemed essential facility by many courts as well as public authorities. However, it can be substituted by wireless local loop and cable networks to a great extent, in particular for the aim of broadband access and high-speed internet. In this context, on the one side local loop is regarded as an essential facility, on the other side, it does not constitute a relevant product market. In the above case, local loops constitute only a unique part of the broadband access market, but not a separate market in its own. See below note 334 for detailed information as regards essentiality or uniqueness of the local loop(s).

other legal and economic characteristics pertaining to the facility in question, rather than those used in defining relevant markets.

Regarding the characteristics of essential facilities, both the examination that someone other than the owner of the facility is providing the same facility at the time of request (first condition) and investigating whether the facility in question can be feasibly duplicated (second condition) must be negatively concluded. A number of factors operate to satisfy these (the first and second) conditions: geographical and topographical conditions prevent construction of alternatives; a legal license precludes duplication; a natural monopoly exists; the unique physical characteristics of the resource are not duplicable; the governmental characteristics of the resource are not duplicable; the governmental regulatory environment prohibits the construction; the existing resource satisfies the minimum efficiencies of scale; public subsidies are necessary for construction and are lacking; a minimum market condition exists; natural fortuity disallows the construction of an alternative; lags in technology render the alternative infeasible or unduly expensive; or any other factor that provides a substantial cost disincentive for the creation of a viable alternative.[53]

The second condition, that duplication be impractical or unreasonable, is a higher standard when compared with being "more economic" among alternatives. This is explicitly recognised in the *Twin Labs v. Weider Health & Fitness*[54] judgment: "As the word, 'essential' indicates, a plaintiff must show more than inconvenience, or some economic loss; he must show that an alternative to the facility is not feasible." The most encountered issue in this regard is the reproductive cost which must be enormous in an essential facility case. Here, it is insufficient for the plaintiff to show that access to the facility is more economic than other alternatives; the mere reduction of costs fails to make the facility essential.[55] In evaluating 'non-

[53] J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L. J. 565, 1998, p. 573

[54] *Twin Labs v. Weider Health & Fitness*, 900 F.2d 569-570 (2d Cir 1990).

[55] J. Brannan, "Open Broadband: An Essential Facility Doctrine Analysis", 1999, p.16. Available at www.ukans.edu/-cybermom/CLJ/Broadband.htm

duplicability' under EFD, costs to duplicate the facility in question are presumed so high as to render a prohibitively high barrier before entering the relevant market.

In this context, 'indispensability' is not always the required threshold in order for an asset to be deemed essential. This evaluation seems to be close with the US system, where there are a number of precedents representing a matured application of EFD in jurisdictional area. In a US case, *Hecht v. Pro Football, Inc.*[56] the following quoted statement is noticeable in this respect: "To be essential a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."

In applying the threshold for non-duplicability test, there appear different attitudes in dealing with different cases. For instance, in cases which involve government-controlled facilities that constitute huge entry barriers such as the railway bridges,[57] sports stadiums,[58] electricity transmission networks,[59] nationwide telecommunications networks[60], the referred entry barriers render the test to a medium where indispensability is not queried because of the natural monopoly characteristics of the facility. In such cases, less strict rules enabling a wider interpretation of the MCI test are more favourable in applying EFD. The most peculiar character of such cases is existence of a reserved area with prohibitively high costs and technical obstacles preventing new entries, usually typified *via* public subsidization. Being a case for exemplifying the above-mentioned characteristics of essential facilities, *Hecht v. Pro Football, Inc*[61] judgment says something important for practitioners. In that decision, EFD was applied to a facility (a football stadium) not in competition with the dealers seeking access, and due to this fact the said judgment must not be generalised on its own. However, according to Lipsky and

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[56] *Hecht v. Pro Football, Inc.* 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (197).

[57] See *supra* note 14.

[58] Op.cit. in note 56.

[59] See *supra* note 21.

[60] See *supra* note 34.

[61] See *supra* note 56.

Sidak, the full analysis of *Hecht v. Pro Football, Inc.* judgment indicates that the Doctrine and the remedy of compulsory access may make particularly good sense in the rare circumstances of (1) a facility with clear excess capacity, and (2) public ownership of the facility permitting availability at marginal cost.[62]

Considering the huge cost of such (essential) facilities together with technological and legal impediments, it is possible to say that the courts and competent agencies must apply EFD following a less strident interpretation in such network industries with the aim of providing competition.

As a matter of fact, in such industries where pertinent services have been supplied on a monopoly basis or are subject to some degree of monopoly control, there is a situation in which dominant / monopolist undertakings hold 'gatekeeper' positions while new entrants depend on gaining access to essential facilities.[63] Therefore, if the firms acting in industries such as telecommunications, gas, electricity most of which are recently liberalised are allowed not to grant access, they would be able to control market developments by closing the gates and re-erecting the barriers which had been removed by the liberalisation process.[64] Given this problematic situation in a marketplace, deal with new entrants or other competitors on reasonable terms is of particular importance when the industry in question is of a statutory or natural monopoly, that is, even after liberalisation obligations regarding essential to facilities are necessarily required in such sectors. In absence of such obligations, as later will be discussed specifically for telecommunications sector, new *de facto* monopolies who can perpetuate their former positions and defeat the purpose of liberalisation could easily be created in a liberalised environment.

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[62] Abbott B. Lipsky, Jr. and J. Gregory Sidak, "Essential Facilities", Stanford Law Review, Vol. 51, No: 1187, May 1999, p. 1205.

[63] N. Nicolinakos, , Access Agreements in the Telecommunications Sector-Refusal to Supply and The Essential Facilities Doctrine under EC Competition Law", European Competition Law Review, No:8, 1999, p. 404.

[64] Ibid.

1.2.3 The Denial of the Use of the Facility to a Competitor

Under EFD, an essential facility claim could be taken into analysis only if the request for access to essential facility is denied. The denial needs not to be a total denial; rather, it is sufficient that the terms of access would be unreasonable in price, profit margin, time obligation or other substantive criteria.[65]

Even all conditions of the MCI test including 'denial of access' are met, one cannot conclude a *per se* violation of Antitrust/Competition Law. If denying access to a competitor or a new entrant has a little impact on the competitive structure of the relevant market, such denial may be considered negligible and granting access may not be mandated accordingly. However, if a refusal occurs in a regulated industry, concluding an adverse situation to regulatory scheme *inter alia* an anticompetitive conduct evading price regulation or a discriminatory act detrimental to regulatory decisions, the so-called refusal to deal gives rise to an explicit violation of Antitrust Law and can be regarded as a *per se* breach of law.[66]

1.2.4 The Feasibility of Providing the Facility

This condition makes evident that EFD is also delimited by legitimate business justifications beyond the tests such as essentiality, non-duplicability, elimination of competition, etc. That is to say, after presuming that other requisites have been met, access to essential facilities can still be inconvenient to be mandated due to unfeasibility of providing such facilities on the part of the owner of the facilities.

Hence, a liability under EFD is not enforceable where a defendant monopolist has a legitimate business or a technically or economically reasonable justification for declining access to the disputed assets to its competitor. In other words, the Antitrust Law does not require that an essential facility be shared if such sharing would be

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[65] J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L. J. 565, 1998, p. 576.

[66] In situations where an anticompetitive refusal to grant access have taken place in contrary to regulatory scheme in a substantive and explicit manner, the regulatory authorities might deem the so-called refusal *per se* unlawful. In fact, *per se* rules are rarely imposed by competition authorities, owing to their flexible statutory rules.

impractical or would inhibit the defendant's ability to serve its customers adequately.[67]

Determination of feasibility therefore must include an inquiry in order to verify any business justification put forward by the defendant, such as inability to satisfy all its customers' requirements with the supplies available, etc. In essential facilities cases, the justification must demonstrate that providing access would disrupt defendant's own business, rather than those of customers'. Therefore, a cautious evaluation of 'determination of feasibility' accompanied preferably with a case-by-case analysis is required to be conducted in EFD cases.

In the context of 'determination of feasibility', several questions arise as to the relevant criteria for determining under which circumstances a legitimate business reason exists. First, what constitutes legitimate business justifications and which criteria are used to assess 'legitimacy'. Second, to what extent, the monopolist in question has discretion to determine the legitimacy of a business justification.

The answers to these questions give way to different approach pertaining to different authors and courts which consist of mainly two categorical justifications; at macro and micro level.[68] The justifications at micro level consist of factual events and practical evidence. For instance, if a firm can demonstrate that providing access would violate an existing regulatory scheme, a legitimate business justification exists.[69] Statutory monopoly rights over local loops between subscribers and local exchanges, nationwide transmission networks, and similar reserved parts of telecommunications infrastructure could be demonstrated for illustration. Or even in absence of legal or monopoly rights, some technical impediments could be

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[67] R. Pitofsky, D. Patterson, and J. Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law", Antitrust Law Journal, Vol. 70, 2002, p. 450.

[68] See J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L., 1998, J. p. 578; J. Brannan, "Open Broadband: An Essential Facility Doctrine Analysis", 1999, p. 16. Available at www.ukans.edu/-cybermom/CLJ/Broadband.htm

[69] J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L.J. 565, 1998, p. 573.

confronted *inter alia* in cases where do exist a lot of dealers and scarce resources such in allocating of radio channels (spectrum). At the micro level, the burden of proof with regard to proving that the refusal to access to essential facility is unjustifiable is primarily relied upon the plaintiff.[70] The burden of proof then shifts to the defendant to provide evidence establishing a legitimate business justification.[71]

At the macro level, there exists no firm-specific reason for justification of refusal to grant access. Macro legitimate business justifications do not pertain to any particular firm, but constitute 'propositions of general policy'.[72] Such justifications are surrounded around social and public policies as well as competition policies and are designed irrespective of practical and individual reasons. National concerns over promotion of investments and innovations are seemingly one of the most influential factors in shaping macro legitimate business justifications. Besides, determining whether access to the alleged essential facilities deprives legal monopolies of their legitimate and public rights serves as another factor in the shape of macro level policies.

1.3 Assessment of the US Case-Law

The Essential Facilities Doctrine has a long and reasonably successful history in US Antitrust case-law. The Doctrine can be regarded as one of the long-standing limitations on the 'right to refuse to deal' in the US Antitrust Law. However, it is hard to say that EFD is a subset of the so-called 'refusal to deal' notion which puts some limitations on a monopolist's ability to act independently of its competitors, namely to distort competition in the market. This is why numerous US courts established antitrust liabilities after solely finding an anti-competitive 'refusal to deal' that exclude an actual or potential rival from competing, in many cases.[73] That

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[70] J. T. Soma, D. A. Forkner and B. P. Jumps, "The Essential Facilities Doctrine in the Deregulated Telecommunication Industry" 13, Berkeley Tech. L., 1998, J. p. 578; J. Brannan, "Open Broadband: An Essential Facility Doctrine Analysis", 1999, p. 16. Available at www.ukans.edu/~cybermom/CLJ/Broadband.htm

[71] Ibid.

[72] Ibid.

[73] R. Pitofsky, "The Essential Facilities Doctrine Under United States Antitrust Law", p. 9. Available at http://www.ftc.gov/os/comments/intelpropertycomment/pitofskyrobert.pdf

is to say, an unlawful refusal to deal could be found irrespective of EFD analysis in the US context. This seems valid in the opposite direction, considering the cases of monopolisation where the US Courts placed EFD at the centre of the cases, such in *MCI Communication v. American AT & T Co.*[74] case. Then, EFD is conceivable to be deemed a unique Doctrine having a stand-alone basis which constitutes an exception to the freedom to contract.

The recognition of the Supreme Court in *Aspen Skiing* decision that "the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified"[75] demonstrates that EFD in United States is recognised as an exception to the 'right to refuse to deal' and thereby to the 'freedom to contract'. Having been regarded as an exception to the general principle of 'freedom to contract', EFD is applied narrowly especially until the four-part 'MCI Test', which was set forth by a lower court in the *MCI Communication v. American AT & T Co.*[76] case.

The MCI Test for antitrust liability has been adopted by virtually every court to consider an 'essential facilities' claim.[77] Most probably due to the strictness of the requirements set forth in the MCI Test, United States courts did not find liability so frequently under EFD. Another reason for this attitude seemingly relates to the fact the United States courts also suggest that antitrust liability under EFD is properly justified when denial of access is motivated by an anticompetitive intention.[78]

According to R. Pitofsky, the reason why the Doctrine rarely resulted in antitrust liability lies at courts' analysis that primarily aim at determining whether the facility

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[74] See *supra* note 34.

[75] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985), at 601.

[76] See *supra* note 34.

[77] R. Pitofsky, "The Essential Facilities Doctrine Under United States Antitrust Law", p. 6. Available at http://www.ftc.gov/os/comments/intelpropertycomment/pitofskyrobert.pdf

[78] See the following cases: *Otter Tail Power Co. v. United States* 410 US 366, 35 L. Ed. 2d 359, 93 S.Ct. 1022 (1973); *City of Anaheim*, 955 F.2d 1373 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,472 US 585 (1985). The intent theory pertains to the US antitrust system, and is cited in many US courts' judgments as the fundamental point. However, under Article 82 of the EC Treaty, intent of a dominant undertaking is never sought in finding an abuse of dominance.

controlled by the defendant firm is truly essential to competition or not.[79] In order to prove this view, he cites some court decisions, one of which reads as follows: "A facility controlled by a single firm will be considered "essential" only, if control of the facility carriers with the power to *eliminate* competition ..."[80] Here exists no emphasis relating to an anti-competitive conduct (action) that is framed with clear-cut rules. Rather, 'the power to eliminate competition' is cited in this and many other court decisions in reaching a violation of Sherman Act.[81] Numerous US courts have held that a refusal to deal coupled with an anti-competitive intent may support a finding of antitrust liability even absent proof that the withheld input constitutes an 'essential facility'.[82]

From this point of view, though having a long and respected history, EFD seems far from being considered as an integral component or a stable principle of US Antitrust Law. In essence, several objections are raised by many commentators regarding the scope and boundaries of EFD in the US context.[83] Primarily, while the EFD cases are generally individualised so as to involve only unlawful attempts to create or extend monopoly power, invoking the Doctrine in such cases would be unnecessary because Section 2 (of the Sherman Act) already addresses such activities without requiring resort to EFD. Confirming this objection with another respect, it is sometimes asserted that application of the Doctrine may inhibit the incentives to create innovative and cost-reducing facilities.[84]

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[79] R. Pitofsky, "The Essential Facilities Doctrine Under United States Antitrust Law", p. 6. Available at http://www.ftc.gov/os/comments/intelpropertycomment/pitofskyrobert.pdf

[80] *City of Anaheim*, 955 F.2d 1373 at 1381 (9th Cir. 1992) (*cited in* R. Pitofsky).

[81] Similarly, in numerous cases, the Supreme Court reached its decisions upon considering defendants' power of eliminating competition rather than depending on concrete actions. See the following cases: *Alaska Airlines, Inc. v. United Airlines , Inc.*, 948 F 2d 536 (9th Circ 1991); Twin Labs v. Weider Health & Fitness, 900 F.2d 569-570 (2d Cir 1990).

[82] Op.cit in note 79, p. 9.

[83] See, P. Areeda, "Essential facilites: an epithet in need of limiting principles", 58 *Antitrust Law Journal* (1990), 841, , no. 21, 1989, p. 841-51; Antonio Capobianco, "The essential facility doctrine: similarities and differences between the American and the European approach" in European Law Review, 26, no. 6, 2001, p.556. and T. F. Cotter, "Intellectual property and the essential facilities doctrine", *The Antitrust Bulletine*, Vol. XLIV, No:1, 1999, p. 233.

[84] Prof. Areeda, one of the pioneers of the critical approach, drew a more analytical picture establishing supplementary restrictions to be attached to the Doctrine, in one of his articles. According to him, the following principles should be followed:

On the other hand, there are some counterviews such as those of M. Hirsh and G. Richeimer, advancing that the idea of 'limiting principles' does more harm than good if the principles limit EFD out of existence, even for circumstances in which those principles urge antitrust enforcement.[85]

In this picture of conflicting views, some commentators on the one side disagree with the application of the Doctrine on a particular set of facts (such as MCI test), some others on the other side premise that forcing a monopolist to deal in exceptional circumstances is properly justifiable under EFD.

At this juncture, necessarily saying, the 'essentiality' and the 'duplicability' tests envisaged under US case-law accompanied with the welfare-enhancing goals of US antitrust policy contributed to a reasonably and clearly defined basis for EFD. In fact, practitioners must apply the Doctrine to a case in consistent with the widely accepted principles of antitrust policies, which in essence aim at limiting the discretion of dominant undertakings in order to preserve and enhance competition.

As it can be inferred from the suggestions of P. Areeda,[86] if the criterion 'elimination of competition' is strictly added to the four-part MCI test and when existence of the so-called criterion is correctly verified in a case, likely harmful effects of EFD would

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• There is no general duty to share. Compulsory access, if it exists at all, should be very exceptional.
• A company's facility is 'essential' only when it is both
  (i) critical to the plaintiff's competitive vitality; and
  (ii) the plaintiff is essential for competition in the market-place.

'Critical to the plaintiff's competitive vitality' means that the plaintiff can not compete effectively without it and that duplication or practical alternatives are not available.

• No one should be forced to deal unless doing so likely substantially to improve competition in the market-place by reducing price or by increasing output. Such an improvement would be unlikely, in particular, when it would chill desirable activity. This is, of course, a very important point in the case of intellectual property rights.
• Even when all these conditions are satisfied, denial of access is never *per se* unlawful; legitimate business purpose may justify not sharing a facility with third parties.
• The monopolist's intention is irrelevant because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits. (P. Areeda, "Essential facilites: an epithet in need of limiting principles", 58 *Antitrust Law Journal* (1990), 841, no. 21, 1989, p. 852-3).

[85] Merril Hirsh and Gabriela A. Richeimer, "The essential Facilities Doctrine: Keeping the Word 'Epithet' from Becoming One", p. 42. Available at http://www.rdblaw.com/News/PressReleases/-Essentialfacilities.pdf

[86] P. Areeda, "Essential facilites: an epithet in need of limiting principles", 58 *Antitrust Law Journal* (1990), 841, no. 21, 1989, p. 853.

most probably be minimised. In any way, when compared with the EC case-law, it is possible to say that, a more characterised and a well-defined EFD approach has been developed in United States owing to its evolution from the very beginning.

1.4 Essential Facilities Doctrine under EC Competition Law

In the context of EC Competition Law, the Essential Facilities Doctrine was developed through Commission decisions primarily under Article 82 (ex-86) of EC Treaty. In contrast to the U.S. case-law, the debate over whether there is ever a duty to deal has not been echoed so much in the EC case law.[87] This stems from the fact that there is a broad area in Community rules where the suppliers have a duty to deal with their competitors. The Community case-law prior to the introduction of EFD into EC Competition Law makes it obvious that there are a lot of decisions underpinning the duty to supply (both competitors and customers) wide spectrum. In EC Competition Law, EFD therefore, - unlike the US system - is not an exception to the legal system, but is generally construed as a special application of the legal scheme 'duty to deal'. J. Temple Lang gives a variety of examples to rationalise the duty to supply, which originate from the decisions of Community Courts.[88] For the sake of illustration, pertinent types of abusive practises which contradict the 'duty to supply' are quoted here from his article:

- dominant companies may not discriminate if the discrimination has significant effects on competition,
- dominant companies may not refuse to supply competitors or customers if the refusal has significant effects on competition,
- dominant companies may not increase or extend their dominance in the same markets or use their power in one market to monopolise another,
- dominant owners of intellectual property rights commit an abuse only if they do something more than merely exercise those rights to prevent the monopoly given by them being infringed,

[87] Barry Doherty, "Just what are essential facilities?" in Common Market Law Review, 38, no. 2, 2001, p. 404.

- dominant companies may not selectively treat customers or competitors with which they deal less favourably to discourage or penalise competition,
- dominant companies may not make their willingness to supply conditional an acceptance of restrictive undertakings.

As could be realised from the above list, refusal to supply instances are judged under Article 82 (ex-86) of the EC Treaty as a type of abuse of dominance. However, there are some Commission decisions which evidence that Article 81 of the EC Treaty is also convenient to be a legal basis for 'duty to deal' with competitors or consumers.[89] In one decision of the Commission, Article 86 (ex-90) has been referred exceptionally, as well.[90] In this regard, the European Court of Justice has seemingly interpreted Article 82 of the EC Treaty in a rather broad manner in order to resort widely in refusal to deal/essential facilities cases.

Given the fact that evolution of EFD in EC Competition Law is associated with the 'refusal to deal' cases, the most important refusal to deal cases which are more central to the Doctrine in the European context will be focused on below.

1.4.1 Main Characteristics of 'Refusal to Deal' Cases

Article 82 EC articulates the four basic types of abuse of dominant position,[91] and did not mention about refusal by a dominant undertaking to supply a consumer or

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[88] J. T. Lang, "Defining legitimate competition: companies' duties to supply competitors, and access to essential facilities", Fordham Corporate Law Institute, International Law and Policy, 1994, p. 447.

[89] Decision of 12 December 1991, Case IV/M.102, *TNT/Canada Post, DBP Postdienst, La Poste, PTT Post & Sweden Post* [1991] OJ C 322/19, Decision 78/72 of 21 December 1977, *Spices* [1978] OJ L 53/20, Decision 93/405 of 23 December 1992, *Schöller* [1993] OJ L 183/1, Decision 93/406 of 23 December, *Langnese* [1993] OJ L 183/19. The last two decisions were brought before the CFI (Judgments of 8 June 1995, Cases T-7 and T-9/93, *Langnese-Iglo GmbH & Co. KG v. Commission* [1995] ECR II-1533 and 1611), which upheld them a far as they are relevant here. The ECJ dismissed the appeal against the first CFI judgment (Judgment of 1 October 1998, Case C-279/95, *Langnese-Iglo GmbH v. Commission*,) (*cited in* P. Larouche, p. 179)

[90] Decision 94/119 of 21 December 1993, *Port of Rødby* [1993] OJ L 55/52. (*cited in* P. Larouche, p. 183)

[91] See *supra* note 2.

competitor. The so-called four types of abuse constitute the major examples under Article 82 and are construed so as to cover 'unlawful refusal to deal' by the courts.[92]

However, pursuant to Article 82(b), an abuse of dominant position may be in the form of 'limiting production, markets or technical development to the prejudice of consumers' and with this perspective, unlawful refusal to deal is able to be associated with the so-called indent of Article 82.

The legal basis for a finding that Article 82 has been infringed by a 'refusal to supply', may also be Article 82(c) which prohibits discrimination through "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". However mostly encountered types of 'refusal to deal' do not always overlap the abusive conducts under Article 82 (b) and (c) of the EC Treaty. This fact is manifested under the Commission's Access Notice where the Commission sees three relevant scenarios:[93]

(a) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market;

(b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;

(c) a withdrawal of access from an existing customer.

Among these scenarios, the second one (b) does not make up a traditional abuse of dominance, i.e. a discriminatory conduct. It is a unique scenario under which 'refusal to supply' and thereby 'essential facility' cases could arise in a distinct manner. From this point of view, it is possible to say that 'refusal to supply' has thoroughly been

[92] After an analysis of Article 82, the four examples listed therein are convenient to be considered non-exhaustive, enabling increase of the range of abusive practices.

[93] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 84.

developed as a distinct kind of abuse of dominant position under the enforcement of Article 82.

In 'refusal to deal' cases, there are two related markets involved: the market for the supply of access to whatever is in question (upstream market), and the market for the goods or services for the production of which access is needed (downstream market).[94] For instance, a car manufacturer must have access to engines, and if there were a sole supplier of efficient engines then, this supplier would absolutely be in dominant position and the dominant supplier possessing the engines on its own might be forced to provide access to its engines with the car manufacturers. Here, the market for which access to engines is needed (presumably, car manufacturing market) is called 'downstream market' and the market for the supply of engines is called 'upstream market'.

1.4.2 EC Case-Law on 'refusal to deal'

The leading case on unilateral refusal to deal in EC Competition Law is *Commercial Solvents v. Commission*[95] where the Court of Justice condemned a dominant firm for its refusal to supply a downstream competitor with the raw material which is needed to perform its productive activities. *Commercial Solvents* is also the leading Article 82 case on refusal to supply downstream competitors by a vertically integrated firm.[96]

In this case, Commercial Solvents held a dominant position on the market for amino-butanol, a raw product used in the manufacture of ethambutol, an anti-tuberculosis drug. Zoja was an Italian producer of the ethambutol and was dependant upon supplies of amino-butanol, the dominant supplier of which was Commercial Solvents. Following a change in company policy, ICI, who is the subsidiary of Commercial Solvents began to manufacture ethambutol, and thereafter supplies to

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[94] J. T. Lang, "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner-Notes for a lecture", September 2000, Copenhagen, p. 5.

[95] Joined Cases 6,7/73, *Commercial Solvents v. Commission* [1974] ECR 223.

[96] M. H. Harz, "Dominance and Duty in the European Union: A look Through Microsoft Windows at The Essential Facilities", www.law.emory.edu, 1997, p. 14.

Zoja were cut. The Commission decided that Commercial Solvents had abused its dominant position by such a refusal to supply, and on appeal, the ECJ upheld the Commission decision in the following words:[97]

> However, an undertaking being in 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 amount 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) [now3(g)] of the Treaty and set out in greater detail in Articles 85 and 86 [now 81 and 82], 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 customer, is abusing its dominant position within the meaning of Article 86 (now 82).

The anti-competitive aspect of the Commercial Solvents' behaviour was particularly clear where the refusal to supply would exclude the only serious competitor that ICI would face in the downstream market.[98] At this juncture, it is possible to say that refusal to supply a competitor in a downstream market constitutes one of the infringements of Article 82 if its effects are of potential to eliminate all competition therein.

After a couple of years, in *United Brands*,[99] the Court of Justice stated that a dominant firm can not stop supplying a long standing client if the orders placed by such a customer are in no way out of the ordinary. Therein, a Danish ripener and distributor (Olesen) had been buying bananas from several suppliers, including United Brands. After Olesen began to promote the products of a rival supplier ("Dole" Bananas) and helped to advertise it, United Brands cut off deliveries of

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[97] Joined Cases 6,7/73, *Commercial Solvents v. Commission* [1974] ECR 223., at 25.

[98] Richard Whish, "Competition Law, *Fourth edition*", Butterworths, 2001, p. 611.

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

bananas with its "Chiquita" brand to Olesen. The Commission imposed a fine to United Brands for its refusal to supply Olesen. The Court agreed with the Commission and found that the unilateral refusal to deal in question was an abusive practise, establishing the following statement:[100]

> In view of these conflicting arguments it is advisable to assert positively from the outset that an undertaking in a dominant position for the purpose of marketing a product ... cannot stop supplying *a long standing customer* who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.

It is noteworthy here that ECJ in *United Brands*, focused on the conduct of a dominant company as it affected its *customer* in downstream markets, regardless of whether or not the dominant company is vertically integrated. In addition, from the Court's statement, it can be concluded that a dominant firm may stop supplies to a competitor if there exist legitimate business reasons.

Both in *Commercial Solvents* and *United Brands* judgments, did not arise any discussion as to whether raw materials or banana supplies from the owners were essential for the dealers. The ECJ, most probably having the concern of enhancing competition within the Community-wide market in its mind, put an end to the anti-competitive conducts of dominant undertakings, in both cases. Though having many common characteristics, the language in *United Brands* was in J. Temple Lang's view, less sweeping than *Commercial Solvents* and thus the duty to supply a customer or distributor may be seen less rigid than the duty to supply a competitor.[101] However, subsequent cases related to EFD have been logically built upon these judgments with further different arguments.

Telemarketing[102] is another judgment in which the ECJ confirmed that an undertaking holding a dominant position with regard to the production and/or supply of certain products that are necessary to compete in another market may not, without

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[100] Case 27/76, *United Brands v. Commission*, [1978] ECR 207, at 182.

[101] J. T. Lang, Defining legitimate competition: companies' duties to supply competitors, and access to essential facilities, Fordham Corporate Law Institute, International Law and Policy, 1994, p. 449.

[102] Case 311/84, *Cenbtre belge d'études du marché*, [1985] ECR 3261.

any objective justification, refuse to supply those products. In *Telemarketing*, RTL (the defendant) was a television broadcaster having a dominant position on the market for advertisements directed at the French-speaking community in Belgium. RTL would only accept advertisements for telemarketing[103] provided that one of its subsidiaries got the contract to answer viewers' calls. The Court held that this was an abuse of dominant position by reserving an ancillary activity (telemarketing services) for itself without any objective necessity:

> *Commercial Solvents* also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. If ... telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, ... to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply the services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86 [now 82], provided that the other conditions of that article are satisfied.
>
> It must therefore be held in answer to the second question that an abuse within the meaning of Article 86 [now 82] is committed where, *without any objective necessity*, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

[103] 'Telemarketing' involves giving the telemarketing company's telephone number in television advertisements, enabling viewers to call a particular telephone number, to place orders or get information concerning the products advertised.

Telemarketing is outstanding with its some different characteristics among refusal to deal cases. Firstly, the case concerns 'access' to broadcasting service of RTL which the Court deemed indispensable for another kind of service rather than a contract of 'supplying a good' breach of which results in a classical refusal to deal case. Secondly, *Telemarketing* is the leading case in the area of 'extending monopoly' among the refusal to deal cases.[104] Here does the RTL's attempt for reserving telemarketing activities for its subsidiary have an explicit effect to conclude such a conclusion. Such type of a refusal which is more 'structural and less behavioural' makes this case more different than others.[105] Thirdly, whereas *Commercial Solvents* and *United Brands* involved purely private parties, *Telemarketing* also involved exclusive rights over TV broadcasting granted to RTL, so that RTL was invested with some public authority, and therefore could be thought to be under a strict duty to behave fairly and without discrimination towards third parties in relation to those exclusive rights.[106]

From the refusal to deal cases respectively *Commercial Solvents*, *United Brands* and *Telemarketing*, the following inferences can be made.[107] First of all, in these cases the ECJ made clear that the refusal to supply an already existing competitor (or a customer) who decides to market a competing product amounts to an abuse of a dominant position when the refusal is not objectively justified. Another common point in these cases is that they involve practices by which a dominant company in one market is using its power in such a way in order to strengthen its position and at the same time, to eliminate competition in a related market.

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[104] The distinction between this "extension of monopoly" case and a "refusal to deal" case is clearer in *RTT v. GB-Inno-BM.* This concerned a supermarket chain prosecuted for selling telephone handsets which had not been approved by RTT, the Belgian telecommunications administration, as required in Belgian law. RTT had a legal monopoly in operating the public telecommunications network, and also laid down the technical specifications for equipment itself. Thus, RTT held a dominant position and was not entitled to extend its monopoly to an ancillary market without any objective necessity. Here, RTT was extending its monopoly from operating the network to selling telephone equipment, but it was not refusing to sell anything. (*cited in* B. Doherty, p. 413)

[105] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 170.

[106] Ibid.

[107] N. Nicolinakos, "Access Agreements in the Telecommunications Sector-Refusal to Supply and The Essential Facilities Doctrine under EC Competition Law", European Competition Law Review, No. 8, 1999, p. 400.

1.4.3 Relationship between Refusal to Deal / EFD Cases and Intellectual Property Rights

Along with the aim of encouraging competition in many fields of Community-wide services and remove the trans-national borders between Member States, the Commission made a great effort to accelerate liberalisation policies. In this regard, removal of special and exclusive rights in a wide range of markets which formerly represented reserved areas became one of the decisive policy tools in 1990s. The Commission decisions regarding refuse to deal / EFD cases made it obvious that a broad area on duty to supply including compulsory licensing occupied an important place in Community Law.

The *Magill*[108] judgment has a distinctly different character among the line of 'refusal to deal' cases, particularly for its implications to 'compulsory licensing' scheme. In *Magill*, three television broadcasters (companies) in Ireland (RTE, ITP, BBC,) each had been publishing weekly listing magazines, giving their own programme details for more than a few days in advance. Other publications such as daily newspapers were entitled to reproduce the listings, but these licenses only included programme details for a day or two in advance. A publisher (Magill TV Guide) wished to publish the listings of the three television broadcasters in UK and Ireland in a single weekly publication. The broadcasters refused to release their programme listings, claiming that the programme listings were copyrighted under Irish and UK Law.

The Commission found that the three television companies had abused their individual dominant positions with regard to their own TV listings by refusing to make those listings available to Magill. This finding of abuse appears in resemblance to the line of cases, *Renault* and *Volvo v Erik Veng*; where the possibility of compulsory licensing had been introduced under Article 82.[109] Upon concluding an

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[108] Joined Cases C-241 & 242/91P, *RTE and ITP v. Commission*, [1995] ECR I-743.

[109] In both cases, *Renault* (Case 53/87, *CICRA v. Renault* [1988] ECR 6039) and *Volvo v Erik Veng Renault* (Case 238/87, *Volvo AB v. Eric Veng, (UK) Ltd.* [1988] ECR 6211) a car manufacturer held intellectual property rights over car body parts and refused to license other manufacturers to make copies, even in exchange for a reasonable price. The Court adopted a compromise in those cases in which unfair prices for the parts in question were deemed abusive but the refusal of the owner of intellectual rights (i.e. design of the model) did not amount to an abuse. (*cited in* B. Doherty, p. 406-7).

abuse of dominance, the Commission required three television companies to supply advance information in order to enable comprehensive weekly TV guides to be published. The Commission's decision was brought before the CFI and the ECJ, both of which upheld the so-called decision. In upholding the Commission's decision, the ECJ identified three reasons. Firstly, there was a potential consumer demand for a single weekly multi-channel magazine, which the television companies were not meeting. This reason was conferred as follows:[110]

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

Secondly, there was no objective justification for their refusal.[111] Thirdly, the Court held that "the appellants, by their conduct, reserved to themselves the secondary market of the weekly television guides by excluding all competition on that market [with reference to *Commercial Solvents*], since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide."[112]

A dominant undertaking's 'reserving to itself the downstream market' having been emphasised many times in preceding decisions, the most prominent and debatable aspects of the *Magill* decision are different from this point. The most controversial point discussed among commentators has concentrated on application of the Doctrine to the area of 'intellectual property rights'.[113]

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[110] Joined Cases C-241 & 242/91P, *RTE and ITP v. Commission*, [1995] ECR I-743, at 54.

[111] Ibid., at 55.

[112] Ibid., at 56.

[113] See Romano Subiotto, "The Right to Deal with Whom One Pleases under EEC Competition Law – A Small Contribution to a Necessary Debate", 6 ECLR, 1992, p. 238-240 and Richard Whish, "Competition Law, *Fourth edition*", Butterworths, 2001, p. 700.

According to Subiotto, the *Magill* decision represents an extension of the existing case law and confirms that Article 82 forms a sufficient legal basis to impose on dominant undertakings a general duty to supply, such in cases of sharing proprietary assets with new customers, granting copyrighted materials to third parties, etc.[114] Criticising the decision with respect to licensing copyrights, he points out three issues: According to him, the Commission's arguments reveal that television listings did not deserve to be protected by copyright since the owners of the listings (broadcasters) seemingly had a natural monopoly over the preparation of television listings; but in spite of this rationale an inevitable conclusion that the broadcasters had abused their dominant position by refusing to permit Magill to use their television listings is unacceptable.[115] Under Subiotto's second concern raised towards the Commission's approach, the decision is criticised because it seems to go against the fundamental assumption made by the EC law regarding the copyright protection, that is, in the absence of harmonisation, Member States remain free to determine the subject-matter that they deem fit to be protected by intellectual property rights.[116] Thirdly, according to him, the Commission's approach would introduce legal uncertainty since the Commission would then arrogate property unto itself the role of determining the cases in which intellectual property right protection is or is not justified and, consequently the cases in which the owner of intellectual property rights would be under an obligation to share its assets with third parties in order to enable them to compete with it.[117]

In respect of Subiotto's concerns, it will be appropriate to state that since the intellectual property legislation is concerned with the creation and commercial exploitation of some legal proprietary rights which constitute an exclusive area, one should be cautious when reconciling competition law rules with intellectual property rights.

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[114] Romano Subiotto, "The Right to Deal with Whom One Pleases under EEC Competition Law – A Small Contribution to a Necessary Debate", 6 ECLR, 1992, p. 242. See also Christopher Stothers, "Refusal to Supply as Abuse of a Dominant position: Essential Facilities in the European Union", European Competition Law Review, 22, no. 7, 2001, p. 262.

[115] Romano Subiotto, "The Right to Deal with Whom One Pleases under EEC Competition Law – A Small Contribution to a Necessary Debate", 6 ECLR, 1992, p. 239.

[116] Ibid.

Though involving many controversial sides, the *Magill* judgment brought forth some contributions to the line of refusal to deal / EFD cases. For instance, in *Oscar Bronner* decision which will be expounded in following parts, the ECJ specifically referred to four criteria that were specified in *Magill* judgment: the information sought by Magill was *indispensable* for carrying on the business in question (the publishing of a general television guide); such refusal prevented the *appearance of a new product* for which there was *a potential consumer demand*; there were *no objective justifications* for the refusal to supply; and the refusal would exclude all competition in the secondary market of television guides.[118] Among the referred points in the *Magill* judgment, the first two ones are noticeable for their implications to EFD. As a matter of fact, the term 'indispensability' cited in *Oscar Bronner* is deemed equivalent with and sometimes more decisive than the term 'essentiality' in EFD analysis.

As a further development related to the core of the *Magill* decision, the conviction that dominant broadcasters' refusal to provide basic information by relying on national copyright provisions would either prevent the appearance of a new product or cause exclusion of competition in the secondary market had its repercussions in the Commission's Access Notice, as well. The paragraph 90 of the Access Notice reads as follows:[119]

> The Commission must ensure that the control over facilities enjoyed by incumbent operators is not used to hamper the development of a competitive telecommunications environment. A company which is dominant on a market for services and which commits an abuse contrary to Article 86 [now 82] on that market may be required, in order to put an end to the abuse, to supply access to its facility to one or more competitors on that market. In particular, a company may abuse its dominant position if by its actions it prevents *the emergence of a new product or service.*

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[117] Ibid.

[118] Joined Cases C-241 & 242/91P, *RTE and ITP v. Commission*, [1995] ECR I-743., at 40. In *Oscar Bronner,* the ECJ stressed the exceptional face of *Magill* decision, in this regard.

[119] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 90.

Similarly, 'the emergence of a potential new service or product' has been set forth as one of the cumulative conditions in order to impose a competition law remedy, namely to order an access obligation under the subsequent paragraph of the Access Notice.[120]

Whereas the emphasis is put on new products or services within such words, to what degree the 'emergence of a potential new service or product' will be taken as a precondition for a duty to deal under EFD is quite vague. Considering the fact that it does not seem possible to specify in detail the meaning of the so-called clause (emergence of a potential new service or product), such a precondition could constitute a problematic situation in the dynamic and fast-moving sectors such as telecommunications. In essence, while encouraging new entrants who can provide new products or services to compete as many services as possible, the Commission would not wish this to lead to inefficiencies which would be harmful to the market in the long term.[121]

In view of this assessment, reasoning of the *Magill* decision must be optimised such as not to chill desire for innovation and investments and surrounding circumstances around the emergence of a new service or product must be delineated more clearly.

1.4.4 The Introduction of Essential Facilities Doctrine into the EC Competition Law

Unlike the situation in US, the institutions delegated with the powers to enforce the competition rules in EC Law has until recent years, invoked EFD respectively in a broad manner, among which Commission has been the forerunner one.[122] Mostly, an implicit expression was used for finding abuses of dominance under EFD to date and

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[120] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 91.

[121] N. Nicolinakos, , Access Agreements in the Telecommunications Sector-Refusal to Supply and The Essential Facilities Doctrine under EC Competition Law", European Competition Law Review, No:8, 1999, p. 408.

[122] See Barry Doherty, "Just what are essential facilities?" in Common Market Law Review, 38, no. 2, 2001, p. 397, and P. Nihoul and P. Rodford, EU Electronic Communications Law, Oxford University Press, 2004, p. 471-2.

the proponents of EFD have often depended on those findings for proving that EFD is a part of the Community Law.

Two of the initial cases where the Commission resorted to EFD are *London European/Sabena*[123] and *British Midland/Aer Lingus*[124] decisions both of which did not include a reference to EFD. The *London European/Sabena* case concerned access to Sabena's computerised reservation system, owing to which Sabena occupied a dominant position in the Belgian market for computerised air travel reservations. In the case, Sabena refused to list London European's flights in its computer reservation system (CRS) if the latter did not raise fares on its Brussels-Luton route or accepted to procure groundhandling services from Sabena. The Commission stated that it is a misuse to impose a higher tariff level to a competitor as a precondition to get access to the reservation system. In Commission's statements, access to Sabena's CRS was of "capital importance ... for all companies seeking to operate competitively on the Belgian market." The Commission condemned Sabena's misconduct, presumably considering that the CRS constituted an essential facility for air travelling services.

In *British Midland/Aer Lingus*, Aer Lingus refused to interline with British Midland when the latter began to compete with the former on the Heathrow-Dublin route. The Commission found that Aer Lingus had abused its dominant position by terminating its interline agreement with British Midland. Moreover, the participation of Aer Lingus at IATA conferences on tariffs, not allowing British Midland to participate in the IATA system on interlining and tariffs, constituted an infringement of Article 85 [now 81] but not 86 [now 82] of EC Treaty. Interlining[125] facilities should on the one hand be made available to new entrants particularly in the initial stage of their business, on the other hand be limited to the time frame which is objectively necessary for a competitor to become established in the market.[126] In its 22nd report,

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[123] Decision 88/589 of 4 November 1988, *London European/Sabena* [1988] OJ L 317/47.

[124] Decision 92/213 of 26 February 1992, *British Midland/Aer Lingus* [1992] OJ L 96/34.

[125] Interlining is a standard facility essentially based on IATA agreement pursuant to which most of the airlines authorise other airline companies or travel agents to sell their services through a single ticket.

[126] D. Glasl, "Essential Facilities Doctrine in EC Antitrust Law: A Contribution to the Curent Debate", European Competition Law Review. No: 6, 1994, p. 309.

the Commission made it clear that this decision was taken within the context of a period when 'the European air transport industry was being liberalised' and argued that 'airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to established carriers'.[127]

In aftermath of these decisions related to air transport sector, Commission had taken highly important steps in two cases that concerned the port of Holyhead (in Wales). The decisions taken by the Commission regarding these cases [*B&I Line*[128] and *Sea Containers*[129]] condemned a dominant port owner for granting other competitors access to the port facilities with terms less favourable than those which it gave to their own services. In these cases, the port in question was owned and managed by Stena Sealink Ports who was a subsidiary of Stena Line AB, and another subsidiary of Stena Line, Stena Sealink Line was operating a ferry service between Holyhead and Dublin.

In *B&I Line,*[130] B&I complained that Stena Line's ferry schedule was such that its own ferries were forced to suspend loading or unloading when a Sealink ferry passed in the narrow harbour channel. B&I's complaint was triggered by a new timetable requiring B&I to interrupt its operations more often than before. Having suffered from this situation, B&I asked the Commission for interim measures to suspend the new timetable before it could come into effect.

The other Commission decision cited above is *Sea Containers*[131] the facts of which are similar to the *B&I Line*. Sea Containers desired to initiate a new ferry service between Holyhead and Dublin and though having been able to do so, could not begin its activities due to the delays and difficulties imposed by Stena Sealink Line (a subsidiary of Stena Line). Stena Line was therefore able to initiate its own ferry

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[127] Mark Furse, "The Essential Facilities Doctrine in Community Law", European Competition Law Review. Vol. 16, No: 8, 1995, p. 471.

[128] Decision of 11 June 1992, *B&I Line plc/Sealink Harbours Ltd.* [1992] 5 CMLR 255.

[129] Decision 94/19 of 21 December 1993, *Sea Containers/Stena Sealink* [1994] OJ L 15/8.

[130] Op.cit. in note 128.

[131] Decision 94/19 of 21 December 1993, *Sea Containers/Stena Sealink* [1994] OJ L 15/8.

service in advance of Sea Containers, consequently accruing to itself the economic interests thereof. According to the Commission,[132]

> ... 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 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.

The Commission's decision in *Sea Containers* is remarkable on two points: Firstly, it is the first Commission decision where an essential facility theory had been clearly articulated. Secondly, this decision can be read so as to stand for the proposition that a firm which owns an essential facility, and which both controls 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.[133] The so-called heightened duty seemed to pose a test stricter than those used in both previous Community and the US Antitrust cases.[134] In this respect, undertakings controlling a bottleneck might be considered to be 'super-dominant', implying that they have a higher responsibility than the obligations attaching to 'merely' dominant firms.[135] In M. H. Harz's view, the Commission in reaching such a conclusion, was particularly

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[132] Decision 94/19 of 21 December 1993, *Sea Containers/Stena Sealink* [1994] OJ L 15/8, at 16-17.

[133] M. H. Harz, "Dominance and Duty in the European Union: A look Through Microsoft Windows at The Essential Facilities", www.law.emory.edu, 1997, p. 15.

[134] Mark Furse, "The Essential Facilities Doctrine in Community Law", European Competition Law Review. Vol. 16, No: 8, 1995, p. 472.

[135] Richard Whish, "Competition Law, *Fourth edition*", Butterworths, 2001, p. 617.

influenced by the dual role occupied by Stena Line, being on the one hand an essential facility owner and on the other hand a downstream competitor.[136]

In later years, EFD was further used in a different sequence of cases which concerned railway services. In this sequence of cases, the most prominent one where the right of access to rail services on a non-discriminatory basis was recognised is *European Night Services*.[137] The case was related to an agreement between a number of railway companies planning to run services through the Channel Tunnel *via* a joint venture called ENS (European Night Services). Under the agreement which was brought before the Commission for exemption, ENS with its parent companies, would be in charge of the sleeper cars as well as distribution of tickets, while the parents would provide access to infrastructure and traction (locomotive and crew).[138]

Given that the rail services provided by the parents are 'necessary' for rail transport operators, the Commission granted an exemption for joint venture but attached a condition.[139] The parents of ENS were obliged to grant ENS's competitors with "the same necessary rail services as they have agreed to supply to ENS ... on the same technical and financial terms" according to the decision.[140] The parties challenged this condition before the Court of First Instance, while having not challenged the existence of an essential facility therein. Leaving further stages of the case to be detailed later, Larouche's original views are worth noting, here.

Larouche makes a distinction between EFD cases depending upon whether characteristics of the abuse reveal either behavioural or structural elements.[141] For instance, in *B&I Line* and *Sea Containers* cases are there behavioural elements, i.e. refusal to supply or a discriminatory treatment. In fact, in the so-called cases, the Stena Line, port owner was either refusing grant access to its downstream competitor

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[136] Mark Furse, "The Essential Facilities Doctrine in Community Law", European Competition Law Review. Vol. 16, No: 8, 1995, p. 472.

[137] Decision 94/663 of 21 September 1994, *European Night Services* [1994] OJ L 15/8.

[138] Ibid., at 11.

[139] Ibid., at 46 and 80.

[140] Ibid.

[141] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 183-187.

to the port facilites or granting access to those facilities with terms less favourable than those used for their own services. However according to P. Larouche, the condition imposed in rail services cases, i.e. *European Night Services* is more in the nature of structural relief, arising because of the source of concern than a response to any anti-competitive behaviour.[142]

This distinction is important particularly for distinguishing the essential facilities cases from refusal to deal cases. More explicitly, refusal to deal cases in general include behavioural elements, i.e. discrimination, discontinuation of supplies to existing customers; while EFD cases usually exhibit structural character involving facility sharing issues that stem from technical and structural imperatives. At this juncture, the instances where there is no other effective remedy than EFD for opening 'essential' resources to competition are of importance to reveal differences of EFD cases. That is to say, refusal to access to an essential facility can generate distinct problems where there usually occurs an insuperable entry barrier or a bottleneck situation at the infrastructural level, and in such cases, EFD is more capable with its structural remedies, comparing to other competition law tools, i.e. rulings on non-discrimination, tying prohibitions.

1.4.5 The Attitude of the ECJ and CFI towards the Essential Facilities Doctrine

The Commission is the first European institution to consciously introduce EFD into EC Competition law. However, Community Courts have in general been reluctant to explicitly use the term "essential facility" as the legal basis in their judgments.

Nevertheless, an observation can be made that in some decisions of ECJ and CFI are there important clues recalling EFD. In this regard, *Tiercé Ladbroke*[143] is deserved to be noted as the leading judgment of the CFI, where EFD has been recognised. Implying the existence of EFD as a part of Community Law, the Court of First Instance in *Tiercé Ladbroke* took a cautious stance towards the application of the Doctrine. In this case, Tiercé Ladbroke was the owner of betting shops in Belgium,

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[142] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 186.

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

operating on horse races held in Belgium, France and the UK. It sought to improve its coverage of French races by broadcasting TV pictures thereof and requested the copyright holders to provide itself with TV pictures and sound commentaries. Faced with a refusal from the right-holders, Ladbroke complained to the Commission on the ground that the racing associations (copyright holders) were collectively dominant over the supply of films of French horse-races and were required, according to the judgment in *Magill*[144] to grant a license. The Commission rejected Ladbroke's arguments, and the Commission decision was upheld by CFI. CFI agreed that the market was the Belgian market for sound and pictures.[145] The Court did not seriously consider whether the copyright holders were dominant over the supply of films of races to Belgium or the market should have been confined to transmissions of French races, considering that that market was ancillary to the national betting markets.[146]

CFI held that since the copyright holders had not yet granted any licences for Belgium, it was impossible for Ladbroke to argue that the refusal constituted a discrimination.[147] In this regard, the Court also distinguished the preceding cases, *Commercial Solvents,*[148] *Telemarketing*[149] and *London European/Sabena*[150] on the ground that the refusal in *T. Ladbroke* came from an undertaking which was not present on the same (downstream) market as the undertaking requesting the product in question.[151] In addition, CFI specifically refused to apply *Magill* due to the fact that the refusal to supply television listings prevented Magill from entering the downstream market for comprehensive television guides; however in the existing

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[144] See *supra* note in 110.

[145] Case T-504/93, *Tiercé Ladbroke SA v. Commission* [1997] ECR II-923, at 81-89 (product market) and 102-108 (geographic market).

[146] However; Valentina Korah, who analysed the *T. Labroke* case in an article with a detailed manner, states that the agreement alleged between the race course associations not to grant a license to Ladbroke might have restricted potential competition in Belgium, and should have been examined by the Commission. (See V. Korah, "The Ladbroke Saga", E.C.L.R. No: 3, 1998, p. 169-176)

[147] Case T-504/93, *Tiercé Ladbroke SA v. Commission* [1997] ECR II-923, at 123-124.

[148] See *supra* note in 97.

[149] See *supra* note in 102.

[150] See *supra* note in 123.

[151] Op.cit. in note 147, at 133.

case, the refusal to supply did not prevent Ladbroke from being present on the betting market. The Court held that,[152]

> ... the refusal to supply the applicant could not fall within the prohibition laid down by Article 86 (now Article 82) unless it concerned a product or service which was either *essential* for the exercise of the activity in question, in that there was *no real or potential substitute*, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of the consumers.

Taking the above excerpt into account, the most prominent point of the CFI's decision in *T. Ladbroke* might be seen in close relation to the 'essential' character of the facility. Explicitly, in the decision, it is queried if the facility in question is either essential for performing the existing activities or exhibit unique characteristics that pertain to a new product or service. Though having not applied the Doctrine as the necessary conditions were not fulfilled, the CFI agreed that essential resources must be shared in its ruling.[153] Given this point of view, this decision is conveniently to be called as a milestone that paved way for further development of the Doctrine in EC case-law.

When the *European Night Services*[154] case is re-examined in light of the above statements, one can see that the CFI has applied *Magill*[155] and *T. Ladbroke*[156] to that case. Annulling the Commission's decision mentioned above, CFI pointed out - among others - three points in *European Night Services*. Firstly, The Court found that the Commission had mistaken by advancing that ENS was a "transport operator" under Directive 91/440 and stated that ENS, being a railway undertaking for passenger transport was not a transport operator.[157] Secondly, the Court concluded

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[152] Case T-504/93, *Tiercé Ladbroke SA v. Commission* [1997] ECR II-923, at 123-124, at 131.

[153] P. Nihoul and P. Rodford, EU Electronic Communications Law, Oxford University Press, 2004, p. 479.

[154] Joined Cases T-374, 375, 384 & 388/94, European Night Services v. Commission, [1998] ECR II-3141. The decision of the Commission is discussed *supra*, p. 45.

[155] See *supra* note in 110.

[156] See *supra* note in 143.

[157] Op.cit. in note 154, at 185-187.

that traction (the supply of locomotives, crew) could not be an essential facility for some reasons that will be discussed below, whereas the Commission adversely had found that traction was an essential facility. In this regard, non-discrimination obligation imposed on transport operators under Directive 91/440 was considered invalid for ENS.[158] Thirdly, since Directive 91/440 guarantees non-discriminatory access to infrastructure for railway undertakings and international groupings (i.e., associations between railway undertakings), there is no need to include conditions based on EFD in a competition law decision.[159]

As P. Larouche points out,[160] the Commission intends to use EFD beyond the traditional line of cases involving anti-competitive behaviour, as it did in *European Night Services* by imposing additional obligations, i.e. non-discrimination in agreements. CFI's annulment was also a sound decision in this perspective, since there was a clear additional obligation in Commission decision, which extends competition law remedies to impractical *ex ante* obligation(s). Even for the liberalisation purposes, construing EFD in such a way overriding sector-specific regulations is absolutely detrimental to the diligence of the EU regulatory framework in the relevant sector.[161]

On the other hand, in *European Night Services*, the judgment of CFI revealed important consequences regarding EFD:[162]

> A product or service cannot be considered necessary or essential *unless there is no real or potential substitute* .
>
> Consequently, with regard to an agreement ... which falls within Article 85 (1) [now 81 (1)] of the Treaty, the Court considers that

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[158] Joined Cases T-374, 375, 384 & 388/94, European Night Services v. Commission, [1998] ECR II-3141, at 212-217.

[159] Ibid., at 221.

[160] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 191.

[161] The main reason for such an overriding problem is the existence of EU regulatory framework in that field, that is, Directive 91/440 guarantees non-discriminatory access to infrastructure for railway undertakings and international groupings, and such provisions envisaged under the so-called Directive would satisfy the access seekers in actual terms.

[162] Op.cit. in note 158, at 221.

> neither the parent undertakings nor the joint venture ... may be regarded as being in possession of infrastructure, products or services which are *'necessary'* or *'essential'* for entry to the relevant market unless such infrastructure, products or services are *not 'interchangeable'* and unless, by reason of their special characteristics – in particular the prohibitive cost of and/or time reasonably required for reproducing them – *there are no viable alternatives available* to potential competitors of the joint venture, which are thereby excluded from the market.

Although the CFI cited *Ladbroke* and *Magill* in its above statement, it went further than the *Ladbroke* formulation, itself a considerable gloss on *Magill.*[163] In order for a product or a service to be regarded as 'essential', two cumulative conditions must exist according to the above paragraph of the *European Night Services* judgment. First of these conditions is 'non-interchangeability', and the second one is 'unavailability of a viable alternative'. According to the first condition which might be deemed the main thrust of EFD, existence of an essential facility is related to the question as to whether the alleged essential facility is interchangeable or not, in that are inherent some important conclusions.

At the first glance, the term 'interchangeable' seems suitable to be considered in conjunction with the core element(s) used in defining relevant markets. But as mentioned above, a product is not *per se* 'essential' even if it constitutes the relevant product market, and as a corresponding matter under EFD, there is no overlap requirement between the market for provision of essential facility and the relevant product market.[164]

When *European Night Services* is examined, it would be seen that the Commission has determined the downstream market so broad as to cover all means of passenger transportation and advanced that the rail services provided at the upstream level are 'necessary' (deemed essential facility) for rail transport operators.[165] On the other

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[163] Barry Doherty, "Just what are essential facilities?" in Common Market Law Review, 38, no. 2, 2001, p. 412.

[164] The relationship between EFD and definition of relevant market(s) is discussed *supra* p, 19-20.

[165] Joined Cases T-374, 375, 384 & 388/94, European Night Services v. Commission, [1998] ECR II-3141, at 295. In P. Larouche's establishment, the Commission in *European Night Services* decision

hand, CFI made the implication that even if those markets exist, economic realities exhibit that rail services are interchangeable with other modes of transportation.[166] At this juncture, for a better understanding of CFI decision, examination should go beyond the technical features of the alleged essential facility to look its economic position.[167] Here CFI implied that other means of transportation than rail services are convenient for operation not in technical terms but also in terms of economic viability, then the transport operators can choose whichever they prefer among the transportation means in order to carry out their activities.

In general terms, CFI by referring 'interchangeability', would mean that when taking the relevant end-user (downstream) market into account, lack of access to the facility would affect competition on the relevant market, since such a facility is necessary in order for competitors to be active on that market.[168] In other words, practically, any competitor in that situation must be in a bottleneck position without the alleged essential facility. That is to say, what the term 'interchangeability' calls in *European Night Services* is different from the role of 'interchangeable' products in the context of market definition. Herein, the prevailing purpose of using the so-called term seems to refer the economic situations of competing firms, namely, economic viability of firms in presence of different options.

As to the second condition of *European Night Services* judgment, in order for a facility to be essential, we are faced an investigation for the availability of a viable alternative to the existing facility. Here is stressed a situation where duplication of the alleged essential facility is impossible (i.e. for considerably huge costs or technical obstacles). That is to say, in assessment of the CFI, in order for a facility to be essential, it must be non-duplicable by reason of its special characteristics. What's more, those special characteristics of the facility must be valid for any other

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determined at the outset that the relevant market was *intermodal* including all means of transportation (thereafter the CFI upheld this determination) whereas it could have determined an *intramodal* market only covering rail transportation. (See P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 191.)

[166] Hence, traction (locomotive and crew) is not able to be deemed an essential facility in light of the 'interchangeability' phenomenon.

[167] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 191.

competitor situated in such a condition that is deprived of access. In this perspective, in order to determine whether the product or service in question is a viable alternative (non-duplicable) or not, any competing firm in the same position as that of the claiming party must be taken into account objectively.

1.4.6 *Oscar Bronner* Case: A Turning point in EFD

Two months after the *European Night Services* decision of the CFI, the ECJ ruled on EFD in *Oscar Bronner v Mediaprint*,[169] with a preliminary judgment. When compared with other antecedents of the Doctrine, *Oscar Bronner* is paid a greater attention for its role of confining EFD into highly exceptional circumstances. After a brief history of the case, a detailed analysis of the Court ruling will be given below.

The defendant (Mediaprint Zeitungs- und Zeischiftverlag GmbH & Co. KG) was the leading publisher of daily newspapers and magazines, having dominance in the Austrian market for daily newspapers. It had established a nation-wide distribution network for the delivery of its publications in early morning of each day. The plaintiff (Oscar Bronner GmbH & Co. KG) was a rival publisher of a local newspaper with respectively a much smaller market share. Having advanced its inability to afford a new delivery system, Oscar Bronner asked to be included in the so-called distribution system and offered to pay a reasonable fee. When the Mediaprint rejected, Oscar Bronner brought the case before the Austrian Court which referred a question to the ECJ. Before the EJC, arguments of the plaintiff were primarily based on EFD.

Advocate General Jacobs delivered a detailed opinion, referring the case-law on refusal to deal and framed the conditions for applying EFD therein.[170] Upon examination of relevant decisions both in US and EC case-law, A. G. Jacobs divulged his thoughts regarding essential facility theory as follows:

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[168] Ibid., p. 193.

[169] Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112.

[170] Opinion of A.G. Jacobs in Case C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112 at 35-53.

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

This statement particularly establishes that a free-standing Essential Facilities Doctrine could exist. However, Advocate General Jacobs implied that the duty to share essential facilities must be delimited, attaching some pre-conditions:[171]

> ...for example where duplication of the facility is *impossible* or *extremely difficult owing to physical, geographical* or *legal constraints* or *is highly undesirable for reasons of public policy.* It is not sufficient that the undertaking's control over a facility should give it a competitive advantage. I do not rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry ... if the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering market ...

Furthermore, Advocate General Jacobs states that the dominant undertaking must have a "genuine strangehold on the related market" in order for an essential facility to be shared or granted access.[172] From the Opinion of Advocate General Jacobs, one can reach the conclusion that application of EFD depends on two major conditions: First of these conditions is regarding the position of any competitor who would enter in a market. According to this condition, a facility is essential if without it there would be an insuperable barrier to entry for competitors and competitors would suffer that such a deprivation would preclude them to operate in a fair competition. The second condition is whether the owner of the essential facility has a stranglehold or not, revealing a *sui generis* character. The term 'stranglehold' seemingly corresponds to the term 'bottleneck', which is used in describing a difficult position

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[171] Opinion of A.G. Jacobs in Case C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112, at 65.

[172] Ibid.

that a new entrant or a competitor faces when competing with the incumbent operator[173] already entered in the market and possessed the key technology, infrastructure or services.

Regarding the *Oscar Bronner v Mediaprint* case, Advocate General Jacobs concluded that there was no duty to grant access to the newspaper delivery system on the part of the dominant publisher, because new entrants had other alternatives and were capable to compete without access to the existing delivery system.[174]

The ECJ ruled in line with the Advocate General's Opinion.[175] Though having not referred to EFD, the Court in an implicit manner tried to provide restrictive conditions for application of the Doctrine, which once more exhibits a real inference for the existence of EFD in Community Law. In its judgment, the ECJ stated that the Austrian Court initially would determine whether there existed a separate market for the home-delivery of newspapers or a larger market including other distribution methods as the relevant market.[176] In conjunction with this point, the Court underlined the importance of an appropriate definition of relevant market in order to find whether there is an abuse of dominant position or not.[177] ECJ has also drawn the attention towards whether or not the refusal to access eliminates all competition in the relevant market. ECJ in its assessment cited a number of specific criteria which reminds the *European Night Services*[178] decision:[179]

> "Therefore ... it would still be necessary, for the *Magill*[180] judgment to be effectively relied upon ... not only that the refusal

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[173] The term 'incumbent' is used in such a way to encompass both dominant undertakings and monopoly firms, in the thesis.

[174] Opinion of A.G. Jacobs in Case C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112, at 68.

[175] P. Nihoul, who criticises harshly the restrictive approach of *Oscar Bronner* dedicates total responsibility of the judgment to A. G. Jacobs, who wrote the opinion in *Oscar Bronner* case. (See P. Nihoul and P. Rodford, EU Electronic Communications Law, Oxford University Press, 2004, p. 482)

[176] Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112, at 32-36.

[177] Ibid.

[178] See *supra* note in 162.

[179] Op.cit. in note 176, at 41.

[180] The Court referred the *Magill* judgment for its speaking out the exceptional circumstances that pertain to EFD. Having seemingly accepted EFD, the Court in *Oscar Bronner* deals to confine the

> of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be *incapable of being objectively justified*, but also that the service in itself be *indispensable* to carrying on that person's business, inasmuch as there is *no actual or potential substitute* in existence for that home-delivery scheme.

The above statement stipulates three issues that apply to essential facilities cases. In this framework, in order for a refusal to grant access to be unlawful the following conditions must be met:

1) The refusal must be likely to eliminate all competition in the relevant market on the requesting party,

2) The refusal must be incapable to be objectively justified,

3) The facility in question must be indispensable in order for business of the requesting person to be carried on (inasmuch as there is "no actual or potential substitute in existence.")

The last criterion seems to be more objective when compared with those set out in precedents under the application of EFD. Necessarily saying, in spite of its bearing an uncertainty, the term 'essential' has been used frequently in preceding cases and uncertain face of EFD which stems from the so-called term has been to a great extent removed with the clear-cut rules of the *Oscar Bronner* judgment.

In resemblance to the *European Night Services* decision, the Court has dealt with the 'non-substitutability' (that corresponds to 'non-interchangeability' used in *European Night Services*) and 'indispensability' (that corresponds to 'non-availability of a

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Doctrine to certain exceptional conditions as did in *Magill*. In Court's view, *Magill* was an exceptional case for four reasons:
"In *Magill*, ... without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56)." [See C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112 (*supra* note 110), at 53-56]

viable alternative' used in *European Night Services*)' phenomena.[181] The Court thereafter pointed out that postal delivery and kiosk sales were substitutable options, "even though they may be less advantageous for the distribution of certain newspapers".[182] Moreover, even if the existing distribution network had been insufficiently substitutable with postal delivery and kiosk sales, and a specialised delivery system was required, the Court would have been able to consider that a new delivery system was feasible (a viable alternative) for the plaintiff to create (alone or with others).[183] That is to say, even unless the alleged essential facility was substitutable, the second step whether access to the facility in question was indispensable (non-availability of a viable alternative to that facility) should have been ensured in the case. The two-fold *cumulative* requirements for applying EFD is quite similar with the pattern of the *European Night Services*.

Upon conferring the abovementioned 'indispensability' test as combined with the 'non-substitutability' test, the Court refined the so-called tests within the following paragraphs:[184]

> It should be emphasised in that respect, in order to demonstrate that the creation of such a system is not *a realistic potential alternative* and that access to the existing system is therefore *indispensable*, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.
>
> For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that

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[181] See *supra* note in 162. See also P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 194-6.

[182] Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112, at 43.

[183] In *Oscar Bronner*, the Court held that use of Mediaprint's home delivery system was not indispensable, since there were other means of distributing daily newspapers (such as through shops, kiosks and by post); furthermore, there were no technical, legal or economic obstacles that made impossible to establish home delivery systems of their own for other publishers of daily newspapers. [See Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112, at 44]

[184] Case C-7/97, *Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others* [1998] ECR I-7791, [1999] 4 CMLR 112, at 45-46.

> it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation *comparable to that of the daily newspapers distributed by the existing scheme.*

These two paragraphs demonstrate that it is not easy to prove that a product or service is indispensable in a case, after the abovementioned tests which were brought out by *T. Ladbroke* and *European Night Services* and matured by *Oscar Bronner.* As a matter of fact, the blank points in the criteria attributed to the term 'essentiality' which have not been resolved within the prior Court decisions have forcefully been fit up with the two paragraphs quoted above.

Although a number of questions remain open, the above two paragraphs are worth being appreciated and discussed for bringing an economic perspective which was unfamiliar in the context of the preceding case-law on EFD. According to the criteria set under the above paragraphs the relevant market must be such that only one firm is economically viable and, hence, it is impossible for two firms to operate simultaneously in the market unless at least one of them is unprofitable.[185] This view is preferable to any other approach when the first paragraph is considered together with the latter one. As Bergman suggests whilst the first paragraph says that " ... it is not enough to argue that it is not economically viable by reason of the *small circulation* of the daily newspaper or newspapers to be distributed.", the interpretation that a competing publisher must lack the ability to duplicate the home-delivery scheme even if it reaches the *same circulation* as does Mediaprint seems improper.[186] In fact, the part of the sentence "*economically* viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation *comparable to that of the daily newspapers distributed by the existing scheme.*" most probably takes the form of 'comparable market share' (i.e. half of the market) indicating the economic background for EFD (not to be applied).[187] That is to say, if there are two oligopolists competing effectively in a market, then one need not refer

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[185] Mats A. Bergman, "The Bronner Case-A Turning Point for The Essential facilities Doctrine?", European Competition Law Review, No: 2, 2000, p. 61.

[186] Ibid.

[187] Bergman elaborates economic analysis of the *Oscar Bronner* decision in his article with a detailed manner. (See op.cit in note 185., p. 59-63)

EFD and compulsory third party access, because the two competing firms most probably reached the same market shares *via* their respective already constructed networks. Contrarily, two firms possessing symmetric market shares but asymmetric infrastructures can not be considered in a marketplace where there is a serious need for access from one firm to another.

As a corresponding matter, the Essential Facilities Doctrine would only be applicable to markets in which two or more firms can never be economically viable on their own unless the Doctrine is applied.[188] At this juncture, the Doctrine as Bergman states is applicable if a symmetric duopoly with two vertically integrated firms is not economically viable in a relevant market.[189] Such markets correspond to the markets where natural monopolies existed even though two or more firms entered the market afterwards. However, this approach is far from the approach adopted in most essential facilities cases which were deprived of an economic analysis. Moreover, an over zealous approach for duty to share the essential facilities has been followed during the precedents since *Commercial Solvents* in EC case-law. In order to remove any inconsistency, a proper market analysis must be conducted prior to imposition of an obligation of 'third party access' to an owner of (allegedly) essential facility. Such a market analysis which indicates whether potential competition prevails in the market or not is indeed indispensable in any bottleneck problem in order to clarify what EFD calls for each case.

1.5 Assessment of the EC Case-Law

Among the controversial points discussed above, it is inferable from the duty to deal/essential facilities cases, in particular from the *Oscar Bronner* judgment that ECJ recognised EFD as a part of the European Competition Law. However, during such cases, the Community Courts (CFI and ECJ) consistently noted that more

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[188] Mats A. Bergman, "The Bronner Case-A Turning Point for The Essential facilities Doctrine?", European Competition Law Review, No: 2, 2000, p. 61. However, the straightforward reactions of many commentators differ from Bergman's view under a strict interpretation of the decision. After strict reading of the decision it is usually accepted that, for the EJC, access may be ordered only if no alternative distribution channel may be created for a newspaper of circulation equal to that owned by the controlling undertaking. (See P. Nihoul and P. Rodford, EU Electronic Communications Law, Oxford University Press, 2004, p.481)

[189] Ibid.

caution regarding the application of the Doctrine must be devoted. In this context, ECJ and CFI provided a significant contribution in defining and clarifying the principles that apply to EFD.

In such dealing for refining the surrounding conditions around EFD, 'enhancement of competition' must be premised as the foremost criteria to be taken into account. Other criteria such as essentiality, indispensability, etc. are to be deemed technical tools, which are sometimes needless when there is no competitive concern. As a matter of fact, if a 'refusal to deal' investigation is adequate in a competition law case, then a more technical EFD analysis can be ruled out therein. Correspondingly, all relevant cases must be remedied in the context of competition law principles, following an economics-oriented analysis. Such an approach dedicating much more attention towards competition law principles accompanied with an economic analysis would help the convergence of the legal attitude of the US and EC Courts, evidently.

The examination as to whether the duty to deal contributes enhancement of competition must be the primary concern in both 'refusal to deal' and 'essential facilities' cases. The distinguishing aspect of the essential facilities cases is attributed to the 'essentiality' term which has been reinforced by the 'indispensability' and 'non-substitutability' tests introduced with *Magill,*[190] *T. Ladbroke,*[191] *European Night Services,*[192] and *Oscar Bronner*[193] decisions. In fact, before *Oscar Bronner*, EFD has matured to an appreciable level and has been harmonised with the line of the competition law principles to some extent. Having dealt with the remaining questions under EFD, *Oscar Bronner* is thought of the closing case within the series of essential facilities cases. In essence, the difficulties surrounding the question 'whether the facility in question is essential or not' have been removed substantially, after *Oscar Bronner*.

In this regard, the concerns over investment initiatives and protection of property rights with regard to application of EFD have been eliminated, leaving behind little

[190] See *supra* note in 110.

[191] See *supra* note in 143.

[192] See *supra* note in 154.

[193] See *supra* note in 169.

reservations. In so far as the strict rules of the *Oscar Bronner* are applied, one need not actually concern about the legality of EFD under EC Community Law.

It can be drawn from the above line of case-law that the Courts made a considerable effort in order to assess EFD cases under the competition law tools, i.e. market definition, test for dominance, etc. This effort is observable in many decisions such as *Sea Containers,*[194] *European Sabena,*[195] and *Telemarketing*[196] where the Court referred the term 'essential'. This fact also helps doubters be convinced about the rationalisation and application of the Doctrine under competition law.

Another notable point can be inferred from the EC case-law is that EFD has proved to be a very effective instrument for liberalising monopolistic services and opening reserved markets to competition. Companies that are subject to regulation or run under government management for many times own facilities which are deemed essential in respective markets. Hence, EFD is of an important potential to contribute fostering competition in such markets, when applied in a clear and consistent manner.

A remaining question regarding EFD relates to the question as to whether the Doctrine must be abandoned or maintained in a liberalised environment or a competitive marketplace. A related issue comes after with 'overlap' problems between (general) competition law rules and sector-specific regulation in area of 'access to essential resources'. That is to say, after liberalisation, it could be asked if sector-specific rules must be confined or replaced with competition rules in dealing with access issues. Furthermore, 'what are the roles of the national regulatory authorities and competition authorities in this regard' are the other questions to be answered under the Doctrine. These open questions will be tried to be answered in the second Section of the thesis depending on the legal analysis of the Doctrine made here, with a special emphasis on telecommunications sector.

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[194] See *supra* note in 129.

[195] See *supra* note in 123.

[196] See *supra* note in 102.

CHAPTER 2

IMPLICATIONS OF THE ESSENTIAL FACILITIES DOCTRINE FOR TELECOMMUNICATIONS SECTORS

2.1 General Overview

Industries such as electricity, telecommunications, gas, railways are typical examples of network industries in the sense that a substantial part of the products they produce consists of transport from one destination to another *via* a network. Almost all the network industries have combination of multiple segments some of which are operated by incumbent undertakings who often perform as *de facto* monopolies, while some others are operated in a competitive sense. Competitive and non-competitive segments of the network industries are illustrated in the following table:

Table 1 (Source: Competition in Telecommunications, Jean-Jacques Laffont and Jean Tirole, The MIT Press, Fourth Ed., 2002, p. 98.)

Industry	Non-competitive Segment*	Competitive Segment
Telecommunications	Local Loop	Long-Distance; International
Electricity	Transmission grid	Generation
Gas	Pipelines	Extraction
Rail Transportation	Tracks, stations	Passenger and freight services
Postal Services	Local delivery network	Consolidations, presort bureaus, etc.

* Non-competitive segments of networks are potentially able to be deemed as an essential facility.

Telecommunications is a prominent example of network industries, which exhibit many different characteristics either monopolistic or competitive. Whereas many telecommunications services such as long distance, international callings have been offered by a number of competing firms, there have not existed sufficiently competitive markets at the wholesale (network) level, since the very beginning.

During a long time, not only some segments, but all telecommunications networks and services (the entire sector) were regarded as 'natural monopoly' by governments.[197] Gradually, governments came to realise that not all segments of the telecommunications sector exhibited characteristics of a natural monopoly while at the same time technological developments reduced costs of services and increases in demand required new service offerings such as voice messaging, video on demand or Internet services.

Given the market imperfections and the risks to competition, most governments have taken the decision to intervene directly in the sector in order to guarantee access to 'essential facilities' and networks controlled by the incumbent operators, to mitigate network externalities and large sunk costs, and to prevent anticompetitive behaviour.[198]

Consequently, telecommunications markets have been subjected to both sector-specific regulations and competition law remedies. On the one hand, comprising various access measures for achieving effective competition in a non-liberalised environment, on the other hand envisaging removal of the legal barriers such as special and exclusive rights progressively, wide-ranging reforms were pursued by governmental policies in telecommunications sectors.

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[197] Natural monopoly means a situation in which any amount of output is always produced more cheaply by a single firm: the cost of production is lowest when one firm serves the entire market. If the technology of a telecommunications network exhibits natural monopoly owing to the economies of scope, scale, etc. then a single firm presumably construct and operate that network at a lower cost than can two or more firms. Avoiding duplication of facilities particularly duplication of the fixed costs of the network system, has been an important component of the 'natural monopoly' argument for access regulation. The argument is that since costs are minimised by not duplicating transmission facilities, competent authorities should bar entry of competing firms. [*cited in* Daniel F. Spulber, "Handbook of Telecommunications Economics", Elsevier Science B. V., 2002, Amsterdam, The Netherlands, (Ed. by M. Cave, Sumit K. Majumdar, I. Vogelsang), p.486-7.]

[198] ITU (International Telecommunications Union), Competition Policy in Telecommunications, Document: CPT/04, Geneva, 20 - 22 November 2002, p. 32.

Among the so-called reforms, liberalisation of sector has well advanced almost all over the world. However, telecommunications policies after liberalisation are difficult to be said as efficacious as liberalisation policies. Even after liberalisation, there have appeared so many monopolistic structures perpetuating entry barriers in favour of incumbent operators. Though legal obstacles having been removed, bottlenecks problems have still prevailed and *de jure* monopolies have simply been replaced with their new *de facto* equivalents.

In the context of European telecommunications sector, it became apparent that the intensity and rapidity of changes in this sector necessitated a more active application of competition law and taking further steps towards effective competition at EU and national level. The remedies designed for ensuring efficient access to essential facilities have become the forerunner measures within the so-called steps. Particularly in 1990s, the Essential Facilities Doctrine has gained a key role in achievement of fair and reasonable access to infrastructure facilities deemed 'natural monopoly'. Many policy makers believed that duplication of essential facilities would be inefficient and incumbents' networks would rather be mandated for third party access either under EFD.

Both at the EU and national level, main characteristics of telecommunications sector, such as vertically integrated markets, non-duplicability of networks, advantages of state-ownership raises important questions to be solved. One of those questions regarding which telecommunications network resources constitute essential facilities has a great practical importance. This is so because, the delineation of essential network facilities is of direct relevance in shaping the access regulations and determining the duties of dominant operators. Too narrow a definition could impede competition by preventing competitors from being able to obtain necessary network components on reasonable terms. Too broad definition can stimulate uneconomic entry or provide insufficient incentives for competitors to invest in and develop alternative network infrastructure.

Both the applicability and the future implications of EFD in EU as well as Turkish telecommunications sectors will be discussed in this Section of the thesis. Priorly,

general characteristics of telecommunications sector and Community-wide regulations within the EU context will be examined.

2.2 General Characteristics of Telecommunications Sectors

The last decade saw unprecedented changes in the global telecommunications industry. Numerous state-owned telecommunications operators were privatized and a wave of policies arranging liberalisation programmes swept the world. Despite liberalisation trends; strong network externalities that are related to desire of customers to make and receive calls in a network, large sunk costs involved in the construction of 'essential facilities' such as local access networks, the long legacy of statutory public monopoly, vertically integrated markets, economies of scale and scope and the benefits reaped through the established networks such as wide subscriber base, have all favoured the incumbent operators. These characteristics of telecommunications sectors provide the incumbent operators with major advantages comparing to new entrants and other competing operators.

2.2.1 Network-Based Characteristics

Primarily, the key question "What distinguishes a networked industry from other industries" must be answered, before deepening the core of telecommunications. Briefly, networks are able to be defined as a collection of smaller entities connected with one another in order to function (at least part of the time) as a large entity.[199] Suppliers and customers of firms are significant parts of networks. In this regard, all relevant players in the networks consider networks crucial to their success and think themselves as a part of a larger, independent whole.[200]

P.H. Longstaff classifies network industries as generally falling into three categories: transportation, communications, and energy.[201] According to him,

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[199] P. H. Longstaff, "Networked Industries: Patterns in Development, Operation, and Regulation", Program on Information Resources Policy, Center for Information Policy Research, Harvard University, 2000, p. 3. Available at http://www.pirp.harvard.edu

[200] Ibid., p.6

[201] Ibid.

telecommunications system is a *two-way (point-to-point) network* over which any sender or receiver can reach any other sender or receiver with access to the network.[202] (See below, Figure 1) Therein, traffic is allowed to move in both directions in the network hierarchy. However *one-way networks* such as Cable TV networks[203] are organised as point-to-multipoint networks that typically do not send traffic two ways. (See below, Figure 2)

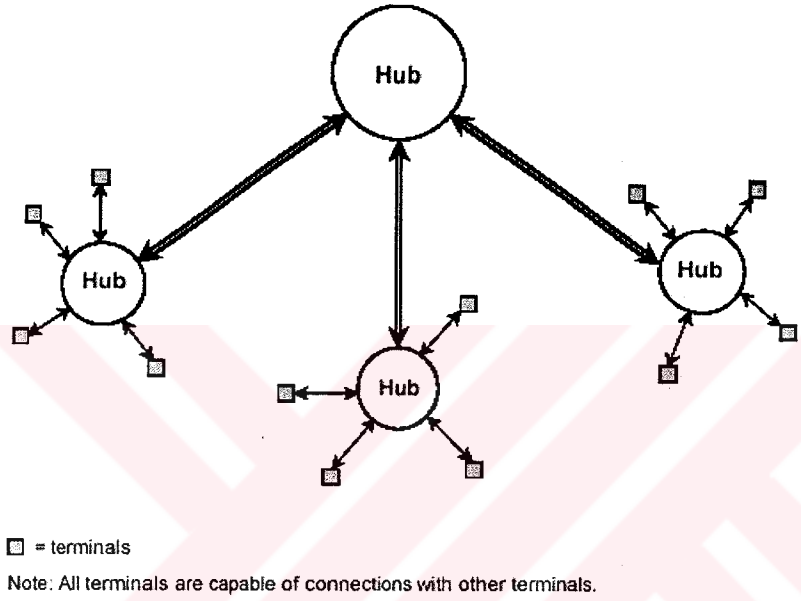


Figure 1: Point-to-Point Network

[202] P. H. Longstaff, "Networked Industries: Patterns in Development, Operation, and Regulation", Program on Information Resources Policy, Center for Information Policy Research, Harvard University, 2000, p. 60. Available at http://www.pirp.harvard.edu Under P. H. Longstaff's premises, most point-to-point networks include many point-to-multipoint hubs, where all points are not directly connected but are instead connected through a central controlling mechanism. Hubs become more critical to the operation of the system, because they *switch* traffic from one line to another and for that reason can become bottleneck.

[203] However, Cable TV networks have the potential of being upgraded to two-way networks and when upgraded for enabling two-way access, these networks are able to be used for (voice) telephony. That is explicitly to say, Cable TV networks historically have been used to transmit 'content', i.e. television services to the home, and usually have only one-way (access) capability. But once cable modems are set in place, they are able to provide two-way access.

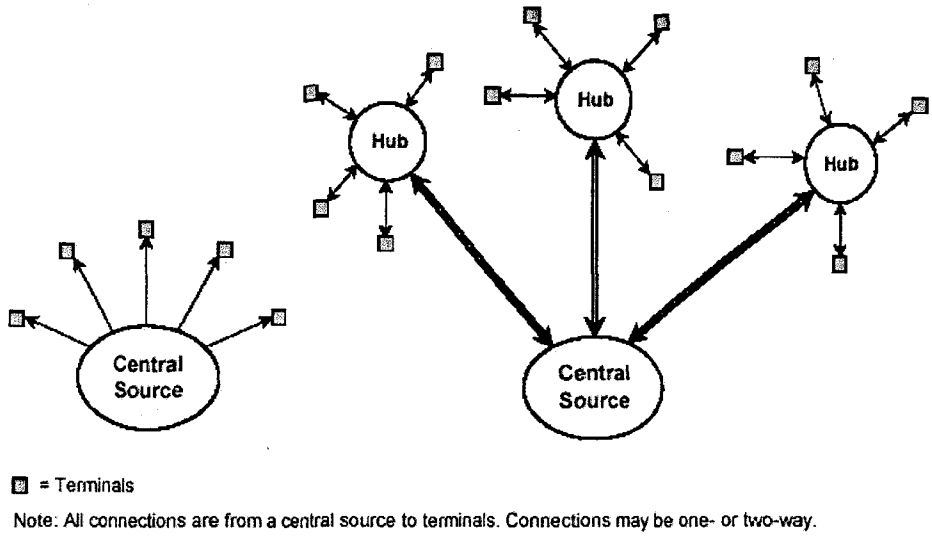


Figure 2: Point-to-Multipoint Network

(Source: P. H. Longstaff, "Networked Industries: Patterns in Development, Operation, and Regulation", Program on Information Resources Policy, Center for Information Policy Research, Harvard University, 2000, p. 4.)

Other examples for point-to-multipoint networks include broadcast, energy networks (gas and electric) and computer systems which have a central processing unit. Modern networks usually have many connections at many levels, some within the network (for example, two lower level hubs of the network that have direction connections to each other) and some connect to other hubs through an outside network (such as airports connected by bus routes.[204]

When telecommunications and telecommunications networks are the subject-matter, we face a hierarchical structure, including a wide range of services. Simply, telecommunications can be defined as the service of enabling electronic transfers of information from one point to another or from one point to multiple points.[205] Telecommunications involves two fundamental components: the *transmission* of a

[204] P. H. Longstaff, "Networked Industries: Patterns in Development, Operation, and Regulation", Program on Information Resources Policy, Center for Information Policy Research, Harvard University, 2000, p. 5. Available at http://www.pirp.harvard.edu Intensive interaction between different networks creates multi-functional capabilities and stimulates innovative services. Emerging interactive applications and innovations accelerate the 'convergence' between neighbouring markets such as 'broadcasting' and 'telecommunications', removing the traditional boundaries between these markets. The phenomena 'convergence' is going to be analysed in following parts.

[205] Ibid., p. 60.

signal between two distinct points, and a *switching* function which selects a specific transmission path for the desired communication.[206] More specifically, in a telecommunications network, calls go from customer premises equipment (terminals) to a local area, it may be routed through several layers of higher level switching centers before getting to the receiver's local hub.[207] The 'local access network' connects the customers to the national and international networks and thus constitutes the most significant part of telecommunications networks.

2.2.2 Network Externalities

When telecommunications networks are considered, all players in a marketplace act interdependently due to the hierarchical nature of the network. Thus, in order for a telecommunications network to function effectively, a high degree of co-operation is required from all parties involved. Investment in one part of the network creates potential benefits across the whole network and similarly, blockages and deficiencies in one part of the network can create bottlenecks, increased cost and reduced revenue in other parts of the network.[208] The so-called interdependence of the network components is observed in the form of 'network effects' or 'network externalities' in networked industries and is most frequently seen within the context of 'interconnection' of telecommunications networks.

'Interconnection' can be defined as the commercial and technical arrangements under which service providers can connect their equipment, network and services to enable customers to have access to the customers, services and networks of other service providers.[209] Interconnection is regarded as a special form of 'access', which

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[206] William W. Sharkey, "Handbook of Telecommunications Economics", Elsevier Science B. V., 2002, Amsterdam, The Netherlands, (Ed. by Mc. Cave, Sumit K. Majumdar, I. Vogelsang), p. 181

[207] Ibid.

[208] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.49. Available at http://www.itu.int/industry overview/.

[209] ITU(International Telecommunications Union), "TREG Interconnection self-training modules: Introducing Interconnection", 2003, p.1. http://www.itu.int/ITUD/treg/selftraining/module1.asp
In the Access Directive 2002/19/EC, interconnection is defined as "the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking." When operators agree in order to provide interconnection between their own networks, this agreement is called 'interconnection agreement', which is an

takes place not between a network provider and a user, but between two 'equal' party, i.e. two network providers.

Interconnection has been at the heart of the telecommunications regulation, since the beginning of the development of this sector. Central to interconnection agreements is the fact that interconnecting networks yield positive 'network externalities' in which the value of the network to each customer increases as the number of customers increases.[210] Therefore, the total value of a customer joining the network depends on not only the private benefits but the external benefits of being able to send and receive call(s) from any other parties within the network.

The dashed line in the figure below illustrates interconnection which allows customers on each network to contact each other as if they are in the same network.

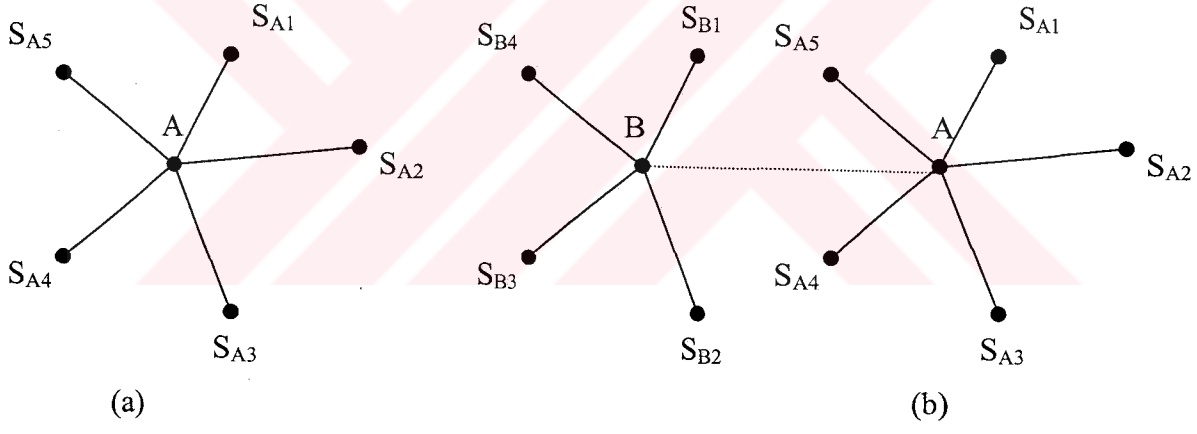


Figure 3: Interconnection

(Source: Jonas Holm, "Regulating Network Access Prices under Uncertainty and Increasing Competition: The Case of Telecommunications and Local Loop Unbundling in the EU", 2000, University of Copenghagen, Institute of Economics, p. 4.)

The larger traffic has the interconnecting networks between each other, the more network externalities emerge. This explains why interconnection is crucial between point-to-point (two-way) networks. From this point of view, in case of a dispute in

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agreement that stipulates the obligations and responsibilities of each contracting party with regard to interconnection.

[210] Ibid., p. 2.

reaching an interconnection agreement, always the larger network has more advantage, comparing to smaller network. This picture remains the same even in lack of interconnection between networks, because the value of subscribing to the larger network is higher than the value of subscribing to the smaller one.

With network externalities, adding a new customer to a network increases the surplus of other subscribers who are able to call and be called by the new customer, and therefore affects not only customers' demand for the service but also their demand for subscription.[211] However, network externalities described above represent direct network effects, in that consumer utility directly depends on the market size, independently of price system.[212] There also exist indirect network effects that are generated indirectly *via* market mechanisms such as economies of scale, scope and density.

2.2.3 Economies of Scale

Economies of scale reflects the opportunities for reduced unit costs with increased output.[213] Economies of scale provides efficiency advantages with firms using this opportunity and new entrants may find it difficult to compete with such firms who perform with large scale production.

Owing to the great economies of scale inherent in a market, smaller companies would tend to merge into larger units to remain competitive.[214] Economies of scope are sometimes lessened with administrative costs that are attributed to large

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[211] John-Hee Hahn, "Nonlinear Pricing of Telecomunications with Call and Network Externalities", November 2001, p.2. Available at http://www.keele.ac.uk./depts/ec/web/wpapers. The so-called article of John-Hee Hahn deals with call externalities as well as network externalities, where the 'call externality' is described as the benefit of incoming calls to a subscriber who does not have to pay for the calls, usually the party being called. John-Hee Hahn gives the following example for demonstrating this kind of externality. In mobile communications, an important reason to subscribe to a network is to be able to be reached by others. Some subscribers (i.e. students) often use their mobile phones for receiving incoming calls only without making any outgoing calls. For outgoing calls, they tend to use an alternative service, say a fixed-link (public) telephone.

[212] Ibid.

[213] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.111. Available at http://www.itu.int/industry overview/.

[214] Ibid.

production units, which are presumably related to increasing co-ordination of activities in a large organisation. Although degree of economies of scale differ according to features of the facilities or services, particularly in 'local access networks' is confronted considerable economies of scale.

Whereas new entrants face great economies of scale at 'local access' networks, the same firms are most times able to access to some other segments of the sector more freely due to less economies of scale. Markets for provision of terminals and handsets can be shown for sector segments exhibiting less economies of scale which include small independent suppliers competing with large operators in the supply of many kinds of terminals.[215] This is so, because state-owned operators have lost most of the terminal market to competitors, in many countries. Nevertheless, it is possible to say that for provision of many telecommunications services, economies of scale remains a significant barrier to new entries in many countries, especially in countries undergoing liberalisation process, such as Turkey.

2.2.4 Economies of Scope

A firm which produces telecommunications (i.e. toll and local) services is said to enjoy economies of scope, if it can produce these services at lower cost than would occur if each service were produced separately by a stand-alone firm.[216] Economies of scope are thus defined as cost savings related to supplying a number of different services by the same firm.[217] Economies of scope can be a barrier against smaller telecommunications operators only supplying a limited range of services.

Morten Falch describes 'economies of scope' as a theme having three different types:[218]

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[215] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.112. Available at http://www.itu.int/industry overview/.

[216] Melvyn A. Fuss, "Handbook of Telecommunications Economics", Elsevier Science B. V., 2002, Amsterdam, The Netherlands, (Ed. by Mc. Cave, Sumit K. Majumdar, I. Vogelsang), p. 153-154.

[217] Op.cit. in note 215.

[218] Op.cit. in note 215.

- economies of horizontal integration (i.e. telephony and data);
- economies of vertical integration within the network; (i.e. local and long distance); voice and value added network services (i.e. call forwarding); and,
- economies of vertical integration beyond the network (i.e. information production and distribution).

Before liberalisation was completed in EU countries, monopoly firms had been producing all telecommunications services, themselves. Liberalisation accelerated development of new services and the pace of technological changes in telecommunications sector. Technological developments interrelated with increasing 'digitalisation' have improved technical possibilities for vertical separation of different service elements as well as integration of transmission of different services in the same network.[219] As a consequence, decreasing costs of transmission give more flexibility for the location of value added services such as voice-mail and other intelligent network services, and all these facts give path for increasing each type of economies of scope.[220]

2.2.5 Economies of Density

Economies of density is related to the fact that network costs per connection decreases with increasing density of connections, the primary reason for which is shorter access lines and better capacity utilisation of the network.[221] Economies of density resemble economies of scale with the difference that the latter is related to the number of customers, whereas the former is related to density of customers – the number of customers within a given area.[222]

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[219] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.112. Available at http://www.itu.int/industry overview/.

[220] Ibid.

[221] Cable TV networks are worth noting here. The major cost of establishing such networks is to dig down the cables. Therefore, it is extremely expensive to deliver cable TV services to the first customer at a given road, as it is needed to dig up the entire road. But as soon as the main cable is in place, the cost of connecting more houses to the cable TV network amounts to laying down a cable from the house to the road. (*cited in* Jonas Holm, p. 5)

[222] Jonas Holm, "Regulating Network Access Prices under Uncertainty and Increasing Competition: The Case of Telecommunications and Local Loop Unbundling in the EU", 2000, University of Copenghagen, Institute of Economics (MSc Thesis), p. 5.

Established economies of density make very difficult for new entrants to compete with incumbent operators in a relevant market, where local networks with a high penetration already have been established. This is of course particularly important in the residential market, where the revenue per customer is much lower than in the business sector.[223]

A new entrant may either build its infrastructure on its own or access to the networks of the incumbent operator. In some instances, a network can be duplicated on top of other types of infrastructures i.e. local, cable TV or electric power networks. But even in these cases considerable investments must be made before sufficient economies of density in supplying interactive network services can be achieved.[224]

From a regulator's point of view, the entry barriers created through economies of density as well as by economies of scope and scale can be surmounted either by supporting the building of alternative infrastructures or resorting to access measures in order to ensure competitors fair access to existing network facilities. The first solution may promote competition in the long run, whereas it may be a costly solution, as it entails duplication of network facilities by incurring huge expenditures. Considering the fact that such a duplication is seriously uneconomic and inefficient, it would be more preferable to provide new entrants with access to the incumbents' facilities on reasonable terms.

Aiming at achievement of a pro-competitive environment, the Essential Facilities Doctrine could be invoked in sector segments where significant economies of density, scale and scope constitute a considerable entry barrier. However, even in invoking EFD, one must be cautious and take the 'efficiency' problem into account with the possible short & long term conflicts. That is to say, EFD should be applied in more or less strict conditions after investigating how to promote the competition under the parameters cited above.

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[223] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.111. Available at http://www.itu.int/industry overview/.

[224] Ibid.

2.2.6 Other Barriers to Entry

General characteristics of telecommunications networks provide strong advantages to well-established incumbent operators. Such advantages stem not only from the nature of network industries, but especially from the historical and governmental foundations of incumbent operators. As a matter of fact, many established incumbent operators have a long history of providing local access services at subsidised rates. Economies of scale, scope and density are all created upon these advantages and such strong advantages take the form of entry barriers for many times. Most prominent types of such entry barriers (other than those stated above) are able to be classified as follows:[225]

- Government restrictions such as monopoly franchises or restrictive licensing practices,
- High fixed/capital costs,
- Intellectual property rights such as copyright and patent protection (which may affect the availability to a competing supplier of key inputs or outputs),
- Control over network architecture and development of network standards
- Existence of a high degree of customer inertia
- Vertically integration alongside the upstream and down stream markets
- Application of cross-subsidised rates (between different service areas)

Here must be done a distinction between barriers to entry. Economies of scale, scope and density are inherent advantages already established from the scratch, which are able to be called 'natural' or 'structural' barriers to entry. Other advantages of incumbent operators given above are to a great extent, created upon economies of scale, scope and density, while those advantages also give rise to establishment of economies of scale, scope and density. There is a thus positive feedback effect

[225] H. Intven, J. Oliver, E. Sepulveda, "Telecommunications Regulation Handbook", 2000, Published by McCarthy Tetraultz, p. 5/11 Available at http://www.infodev.org/projects/314regulationhandbook/

between the so-called natural advantages (economies of scope, density, and scale) and unnatural ones (monopoly franchises, customer base, etc.). In addition, the lastly cited two entry barriers (vertically integration and cross-subsidisation) consist of 'behavioural' elements such as abusive practices that an incumbent operator engage in order to prevent new entries. That is to say, the so-called (two) barriers to entry are not naturally existed in the market and have strategic elements.

When dynamic nature of telecommunications markets is considered, entry barriers are potentially able to vary from time to time and from place to place. Barriers to entry in telecommunications sector are related to both size and lack of flexibility in investments.[226] In this regard, required level of investments against the demand for different services is potentially deemed to exclude new entrants in the telecommunications markets. This situation which requires considerable financial strength constitutes an important entry barrier. But of more important is the lack of flexibility in investments already made.[227] Investments in telecommunications sector are for a large part called 'sunk costs' – investments in relatively long-lived assets ear-marked for a specific activity.[228] That is to say, once the investment is made it will be very difficult to leave the market without major losses.

EFD has elements of both natural monopoly and barriers to entry.[229] As avoiding duplication of network facilities is deemed the primary concern under 'natural monopoly' notion, many policy makers are of the opinion that such a duplication in telecommunications sector would bear undesirable impacts in efficiency terms. Also, by virtue of their cost and difficulty of duplication, essential facilities resemble certain forms of barriers to entry.[230] In fact, an entrant can not presumably duplicate existing network facilities that are alleged 'essential' economically because, while an

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[226] William H. Melody, "Telecom Reform: Principles, Policies and Regulatory Practices", (2001), p.114. Available at http://www.itu.int/industry overview/.

[227] A fixed network cannot be moved and can only serve communication between certain specific locations. Many other industries can sell their products at different markets without major changes in a production equipment. However, in telecommunications this is not possible.

[228] Op.cit. in note 226.

[229] Daniel F. Spulber, "Handbook of Telecommunications Economics", Elsevier Science B. V., 2002, Amsterdam, The Netherlands, (Ed. by M. Cave, Sumit K. Majumdar, I. Vogelsang), p. 181.

[230] Ibid.

incumbent has already incurred high amounts of fixed costs, new entrants have to make an irreversible investment with all accompanying economic risks. Moreover, new entrants' costs of duplicating allegedly essential facilities usually surpasses those of incumbent operator.

2.3 European Telecommunications Sector

History and development of EU telecommunications sector is convenient to be examined within three phases. Although there appear some different approach, the said three phases are widely accepted as respectively liberalisation, harmonisation and convergence. These phases will be expounded below, as they are important achievements of the European Union in the global environment as well as in terms of development of information society.

Essentially, technological developments (including convergence) and rising demand for telecommunications services contributed to give increased significance to the telecommunications sector, both economically and socially.[231] As a consequence, a serious growth in economic activities in telecommunications and related sectors such as broadcasting, information technologies and multi-media services is confronted in the European context. Correspondingly, EC law and policy in field of telecommunications have been given a distinct role *via* a set of fundamental principles.[232]

As the economy is globalising, demand for telecommunications is growing massively and firms and individuals increasingly need to communicate with other firms and individuals. At the same time, technological advances over the past thirty years

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[231] European Commission, 1987 Green Paper (Towards a Dynamic European Economy: Green Paper on the development of a Common Market for Telecommunications Services and Equipment), COM(87)290, Presentation at 1-3.

[232] EC Telecommunications policy would be much like EC environmental policy, for instance, which is given a distinctive content and significance through a set of fundamental principles defined at EC level and anchored in the EC Treaty itself. The basis principles of EC environmental law are set out in Article of 174 EC, which states at para. 2 that "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." (*cited in* P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, Introduction.)

progressively enabled telecommunications operators to meet such consumer demands. Innovations such as fibre optics, digitalisation and packet-switching changed completely not only the technical, but also the economic environment of telecommunications.[233] Whereas most commentators used to agree that telecommunications was a natural monopoly, this traditional approach tended to be turned aside along with the abovementioned changes having taken place. The combination of these factors led the Commission to issue, in 1987, its Green Paper (on the development of a Common Market for Telecommunications Services and Equipment) which envisaged a number of changes in EU telecommunications policy towards progressive liberalisation. The Commission's Green Paper set out to develop a Community-wide program for action in this area that was based, generally, upon two complementary main themes. The first involved a process of liberalisation, which sought to create fully liberalised markets in telecommunications sector. The second involved a process of harmonisation of the conditions for the operation of telecommunications networks during and after the liberalisation period.

The fundamental basis for adoption of directives with the purpose of ensuring EU policy objectives was Article 86(3)[234] of EC Treaty that is integrated with Article 95 EC. On the one hand, Article 86 entrusts to the Commission a specific obligation of surveillance and of eliminating competition distortions and/or restrictions. This Article applies more precisely when the Commission acts in its function as the guardian of the Treaty to put an end infringement(s) of competition rules. On the other hand, Article 95 has a function of harmonisation in order to abolish barriers

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[233] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, Introduction.

[234] Article 86 EC reads as follows:

1. In the case of public undertakings and undertakings to which Member States grant special and exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Art. 12 and Art. s 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Art. and shall, where necessary, address appropriate directives or decisions to member states.

resulting from a divergence of national legislation or regulations. From this vantage point of view, Articles referred above (Article 86, 95) are complementary in nature and are not to be deemed substitutable between each other.

On the basis of the so-called Articles, the Commission put forward an action programme for implementation of the 1987 Green Paper, which the Council agreed by a Resolution of 30 June 1988.[235] The Community positions under this action programme can be outlined as follows:[236]

1. Member States may leave telecommunications infrastructure under monopoly, and must preserve network integrity in any event,

2. Amongst services, only public voice telephony may be left under monopoly,

3. Other services must be liberalised,

4. Community-wide interoperability must be achieved through harmonised,

5. An Open Network Provision (ONP) framework must be put in place to regulate the relationship between monopoly infrastructure providers and competitive service providers (including trans-border interconnect and access)

6. Terminal equipment must be liberalised,

7. Regulatory and operational functions of the PTOs (public telephone operator) must be separated,

8. Competition law must be applied to PTOs (public telephone operator), in particular as regards cross-subsidisation,

9. Competition law must be applied to new service providers as well,

10. The Common Commercial Policy must be applied to telecommunications, competition law must be applied to international telecommunications.

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[235] Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 [1988] OJ C 257/1.

[236] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 4-7.

As could be seen, EU telecommunications sector was envisaged to be liberalised according to the Community positions stated above. In order to ensure that the operation of the networks which was left under monopoly not affect the competitive services, some precautionary measures were needed to be adopted at that time. That is to say, some questions remained open, since there was no obligation to liberalise infrastructure (See above 1), while services were in principle liberalised. These questions with regard to the so-called complicated situation had been tried to be smoothed out with the adoption of the Open Network Provision (ONP) Directives afterwards. Below will be explained the historical processes until and after full liberalisation as well as technical characteristics of the ONP Directives, respectively.

2.3.1 Liberalisation

As pointed out above, the liberalisation of EU telecommunications markets has taken place largely upon the implementation of Article 86(3) with. Aiming at adopting liberalised telecommunications markets, the Commission interpreted Article 86(3) in a broader sense and abandoned the traditional view which was surrounded only by 'management of special and exclusive rights'.[237] This expansionist interpretation reveals the ambition of the Commission for rapid development of telecommunications sectors along with liberalisation. In confirming and clarifying its powers under Article 86(3), the Court of Justice considerably strengthened the Commission's position in the liberalisation process, and fears that an excessive use of the so-called Article might upset the institutional balance between the Community and the Member states proved to be unfounded.[238]

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[237] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 62.

[238] J. Braun and R. Capito, "EC Competition and Telecommunications Law" (International Competition Law Series, Vol. 6), Kluwer Law International, 2002 (Edited by C. Koenig, A. Bartosch, J. Braun), 2002, p. 55. After the adoption of the Commission Directives as regards liberalisation under Article 86(3), some Member States challenged such directives before the ECJ. However, the ECJ upheld the validity of those directives in its decisions, i.e. *France v Commission* and *Spain v Commission*. In the former judgment, the ECJ upheld the Commission's authority to require Member States under Article 86(3) to abolish exclusive rights regarding technical equipment. In the latter judgment, the Court similarly held that the Commission has the power on the basis of 86(3) to adopt a directive laying down general rules that specify Member States' obligations under the Treaty.

According to H. Ungerer, EC telecommunications liberalisation developed mainly as a consequence of three factors.[239] Firstly, by the end of the eighties, the growing digitalisation of European telecommunications networks began to transform them into multipurpose information infrastructures. The opportunities offered by telecommunications networks and services started to extend into markets substantially beyond the traditional telephone service, such as markets for value-added-services i.e. Internet services.

As a result, the access to the traditional monopoly networks in the telecommunications sectors became a major issue in all EU Member States, and there was a growing conviction that without a loosening of monopoly rights, it could neither be assured that new markets could develop nor that the new services offered could be made available to consumers. Secondly, in *British Telecommunications* judgment,[240] European Court of Justice confirmed that EC Competition Rules are applicable to the telecommunications sector. Thirdly, the impact of developments in the United States, in particular the AT&T divestiture consent decree and the resulting transformation of the US market, began to be felt in Europe. At the same time, the progressive liberalisation of the telecommunications sector and the privatisation of British Telecom in the United Kingdom since 1982 made Europe more receptive to the concept of market deregulation.

These and similar driving factors gave path for the Commission to set forth a comprehensive policy framework regarding liberalisation of EU telecommunications sector. The Green Paper 1987 has been the leading transformative tool on the part of the Commission and following the adoption of the Green Paper, many Directives has been enacted and implemented.

The first step following Green Paper in liberalisation process is the adoption by the Commission of the Terminal Equipment Directive 1988.[241] The 1988 Terminal

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[239] Herbert Ungerer, "Access Issues under EU Regulation and Anti-Trust Law - The Case of the Telecommunications and Internet Markets", July 2000, Research Paper, WCFIA Fellows Program 1999/2000, Harvard University (Weatherhead Center for International Affairs), p.10.

[240] Commission Decision 8/861/EEC, OJ L 360/36.

[241] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ 1988 L 131/73.

Equipment Directive obliged Member States to remove special or exclusive rights relating to the importation, marketing, connection, bringing into service and maintenance of telecommunication terminal equipment.[242] The Terminal Equipment Directive also obliged Member States to create an independent (regulatory) body responsible for drawing-up specifications for, and subsequently monitoring, a type-approval process for competitively-supplied equipment.[243]

The liberalisation of services continued with the enactment of the Services Directive.[244] It provides for removal of special and exclusive rights granted by member states for the supply of all telecommunications services other than voice telephony.[245] But, in doing so, the Directive implicitly permitted the continuation of monopoly with respect to telex, mobile, paging and satellite services.[246] Member States were repeatedly after the Terminal Equipment Directive, required to ensure that regulatory functions within the framework of the Directive 90/388/EEC be carried out by bodies independent of the telecommunications organisations.[247]

The above-mentioned exceptions to the liberalisation scheme set out under both Terminal Equipment and Services Directive have been seemingly emerged pursuant to the derogatory provision of Article 86 (2). Given the fact that one could not mention about fully competitive services in an environment equipped with such protectionist tools, the Commission took action for removing all special and exclusive rights, at last.

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[242] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ 1988 L 131/73, Art. 2 and 3.

[243] Ibid., Art. 6.

[244] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ 1990 L 192/10.

[245] Ibid., Art. 2.

[246] Ibid., Art. 1. The monopolies over the telecommunications services which continued to be deemed 'reserved service' after the Services Directive were lifted through legislative amendments *via* the adoption of further directives such as Satellite Directive (94/46/EC), Cable Directive (95/51/EC), and Mobile Directive (96/2/EC). In other words, with the adoption of these three Directives, special and exclusive rights over cable, satellite and mobile communications services were totally removed. Therefore, the so-called Directives (on cable, satellite and mobile services) that were enacted in a sequence can be seen as logical extensions of the original Services Directive.

[247] Ibid., Art. 7.

In this regard, the Commission took its final step towards liberalisation in 1996 with the adoption of the Full Competition Directive.[248] This Directive required Member States to ensure that any remaining restrictions on services competition as well as deployment of alternative infrastructure be removed by 1 January 1998.[249] Full Competition Directive also specified that remaining restrictions on the use of 'alternative infrastructure' should be lifted by 1 July 1996.[250]

2.3.2 Harmonisation: ONP Directives

The liberalisation process was complemented and reinforced by a series of Directives designed in order for gradual harmonisation of Member States regulations on a Community-wide basis. That is explicitly to say, Harmonisation (ONP) Directives essentially aimed at standardisation of the national measures as regards the conditions for access to and use of public telecommunication networks and services.

Harmonisation (ONP) Directives followed to a large extent the principles set out in the liberalisation directives.[251] However, this relationship is predominantly valid in the opposite direction, that is, a harmony exists between harmonisation and liberalisation directives. According to P. Larouche, liberalisation directives, i.e. Terminal Equipment and Services Directives (Directives 88/301 and 90/388) contain rules of precedence that seem to give priority to harmonisation (ONP) directives.[252]

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

[249] Ibid., Art. 1.

[250] Ibid. The term 'alternative infrastructure' refers to any telecommunications infrastructure owned by some other party than the local telecommunications operator, which then constitutes an alternative to the public telecommunications infrastructure.

[251] P. Nihoul, "Convergence in European Telecommunications: A case study on the relationship between regulation and competition (law)" IJCLP (International Journal of Communications Law and Policy), Issue.2, Winter 1998-99, p. 24-28. Available on the IJCLP Website at http://www.digital-law.net/IJCLP/index.html.
Here, the distinction must be established that whereas liberalisation directives were adopted by the Commission pursuant to Art. 86(3), harmonisation directives were adopted by the European Parliament (after 1993) and the Council pursuant to Art. 95 EC.

[252] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 66. Full Competition Directive (Directive 96/19/EC) sets out a general principle concerning the relationship between the harmonisation and liberalisation measures:
"The establishment of procedures at national level concerning licensing, interconnection, universal service, numbering and rights of way is without prejudice to the harmonisation of the latter by

This chain generally revealed as follows: when a liberalisation directive, i.e. Services Directive was adopted, this Directive was followed by relevant ONP Directives. Consonantly, when a harmonisation directive, i.e. 95/62/EC (Voice Telephony) Directive was enacted, the Commission undertook to review its (liberalisation) directive for ensuring consistency. Then, following adoption of a liberalisation directive, a new ONP regime considering the newly liberalised environment was to be set out by the European Council and Parliament, accordingly.

Harmonisation measures which deal with highly important policy objectives at EU level, have been carried out under the concept "Open Network Provision". Open Network Provision (ONP) is defined in the Open Network Provision Framework Directive as 'the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services'.[253] The ONP Framework Directive was adopted at the same time as the Commission's Services Directive, aiming at realisation of harmonisation objectives as well as facilitation of liberalisation process in an effective manner. The ONP Framework Directive provided that access to public telecommunications networks and already-liberalised public telecommunications services would be provided on the basis of non-discriminatory, objective and transparent conditions published in an appropriate manner.[254] It stipulated that access could be denied only on the basis of "essential requirements" which were also specified in the liberalisation directives, i.e. Services Directive.[255] The principles defined in the ONP Framework Directive were later refined and applied to various

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appropriate European Parliament and Council legislative instruments, in particular in the framework of open network provision (ONP)."

[253] Council Directive 90/387/EEC of 27 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192/1, Art. 2.

[254] Ibid., Art. 1 and 3.

[255] Council Directive 90/387/EEC of 27 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192/1, Art. 3. Article 4(1) of the Service Directive required the conditions of access to telecommunications networks to be objective, non-discriminatory and public. The Directive permitted Member States to make supply of services as well as the operation of networks subject to relevant procedures such as licensing conditions. However, such conditions are only permissible to the extent that they are aimed at securing compliance with 'essential requirements' which are defined as the "non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services".

telecommunications services, i.e. leased lines, voice telephony and interconnection with further ONP Directives.

One of the following ONP Directives is concerned with leased lines[256] and the other one is related to voice telephony.[257] The ONP Leased Lines Directive required each Member State to ensure that users within the Member State have access to a minimum set of analogue and digital leased lines with harmonised technical features from at least one organisation (in practical terms, such organisations have been the incumbent operators enjoying the exclusive and special rights) in that State and stipulated that, until effective competition has been achieved, prices for leased lines must be cost-oriented, non-discriminatory and transparent.[258]

Second of the further ONP Directives, ONP Voice Telephony Directive[259] was adopted in 1995. ONP Voice Telephony Directive laid down the minimum requirements pertaining to access to the fixed public telephone networks. In this regard, the Directive required Member States to ensure that public pay telephones be provided so as to meet the reasonable needs of users as well as to ensure that users have access to operator assistance and emergency and directory enquiry services.[260]

Whereas the ONP Voice Telephony (95/62/EC) and Leased Lines (92/44/EEC) Directives aimed at harmonisation measures relating to specific telecommunications

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[256] Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ L 165/27.

[257] Council Directive 95/62/EC of European Parliament and of the Council of 13 December 1995 on the application of open network provision to voice telephony, OJ L 131/6.

[258] Op.cit in note 256, Art. 7 and 10. The ONP Leased Lines Directive was amended in 1997 so that requirements which had originally been applicable only to bodies with 'special or exclusive rights' became applicable to any organisation (firm) with 'significant market power' (SMP) in the supply of leased lines within a particular geographic area in a Member State. SMP was presumed to exist where an operator had 25% or more of the relevant market.

[259] Council Directive 95/62/EC of European Parliament and of the Council of 13 December 1995 on the application of open network provision to voice telephony, OJ L 131/6. Subsequently, this Directive was replaced with the Directive 98/10/EC of European Parliament and of the Council of 26 February 1998 on the application of open network provision to voice telephony and universal service in a competitive environment, OJ L 101.

[260] 95/62/EC (ONP Voice Telephony) Directive prescribed some basic rules for the provision of universal service, as well. The concept 'universal service' could be summarised as "the obligation to provide access to the public telephone network and to deliver affordable telephone service to all users reasonably requesting it." (*cited in* the ONP Voice Telephony Directive.)

services; the Interconnection Directive[261] was adopted in order for interconnection of networks and interoperability of services through the application of ONP. Thereby, the main concern of the so-called Directive was the harmonisation of conditions for open and efficient interconnection of and access to the public telecommunications networks and publicly available telecommunications services. According to Article 4 of the Interconnection Directive, telecommunications operators shall have a right and an obligation to negotiate interconnection. Moreover, organisations with significant market power (SMP) were obliged to meet all reasonable requests for access to their networks.[262] Pursuant to the Interconnection Directive, the role of the national regulatory authorities is determined as monitoring and - if necessary - interfering with the interconnections agreements in order for ensuring the ONP objectives in each Member State.[263]

From this point of view, the harmonisation (ONP) measures have a thoroughly reinforcing as well as a transformative effect in ensuring competitive telecommunications services and markets at EU/national level. Given the fact that in a liberalised environment end-users as well as potential competitors could be affected in lack of harmonisation measures, one can easily understand the vitality of such measures. In this sense, the ONP framework could be deemed the cornerstone for telecommunications policies, because it is concerned with establishment of fundamental principles which have served as a blueprint for the future of Member States.

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[261] Directive 97/33/EC of the Parliament and the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service ad interoperability through application of the principles of Open Network Provision (ONP), OJ No L 199/32.

[262] Before the Interconnection Directive having provided SMP criteria, the organisations adressed for (access) obligations were the incumbent operators enjoying special and exclusive rights in the sector. Subsequent to entry into force of the Interconnection Directive, the SMP criteria have been given a central role for access obligations. According to Article 4 of the Interconnection Directive, operators having SMP were required to meet all reasonable requests for access to their networks, including access at points other than network termination points offered to the majority of users.

[263] Directive 97/33/EC of the Parliament and the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service ad interoperability through application of the principles of Open Network Provision (ONP), OJ No L 199/32, Art. 9.

2.3.3 Convergence

Being widely accepted as having the meaning of 'coming and meeting together' literally, convergence does not have a common definition in field of electronic communications. But it is generally acknowledged that the traditional boundaries between 'broadcasting' and 'telecommunications' are blurred by convergence. In Convergence Green Paper,[264] it is stated that "the term 'convergence' eludes precise definition, but it is most commonly expressed as:

- the ability of different network platforms to carry essentially similar kinds of services, or

- the coming together of consumer devices such as the telephone, television and personal computer"

Convergence between telecommunications and media is the most paradigmatic change in rapid evolution of converging markets. How the convergence between telecommunications and media takes place is able to be explained as follows.[265] Traditionally, these two sectors are operated in their respective isolation, from a technological, industrial, commercial and legal standpoint. The model of telecommunications was point-to-point communications on a two way switched network, with its own technology, its own firms, its own services and its own framework. Conversely, audiovisual media was based on point-to-multipoint (one-way) networks, with wireless technology, firms dealing with media only and specific services (radio and television) regulated under a specific legal framework. Convergence in this case means that the so-called clear boundaries between these two sectors are becoming blurred. (See the figures below.)

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[264] Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors, and the Implications for Regulation Towards an Information Society, COM(97) 623 (3 December 1997), p. 8. Available at http://europa.eu.int/ISPO/infosoc/telecompolicy/en/comm-en.htm

[265] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 204-206.

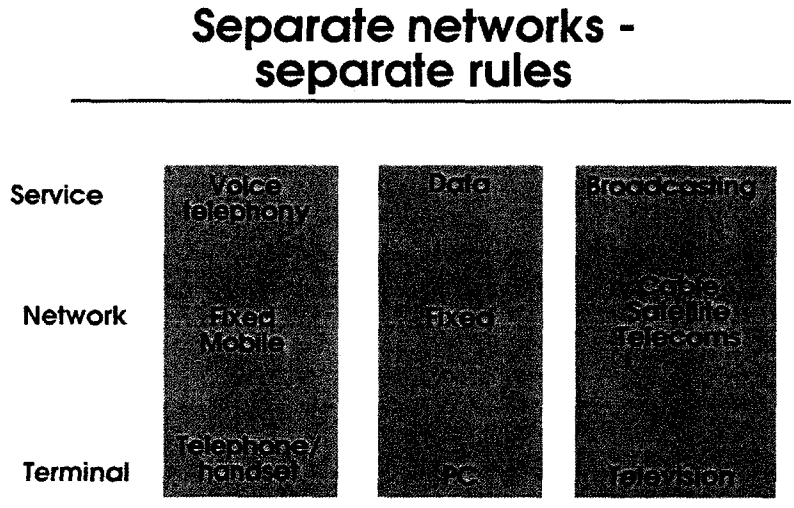


Figure 4: Before convergence

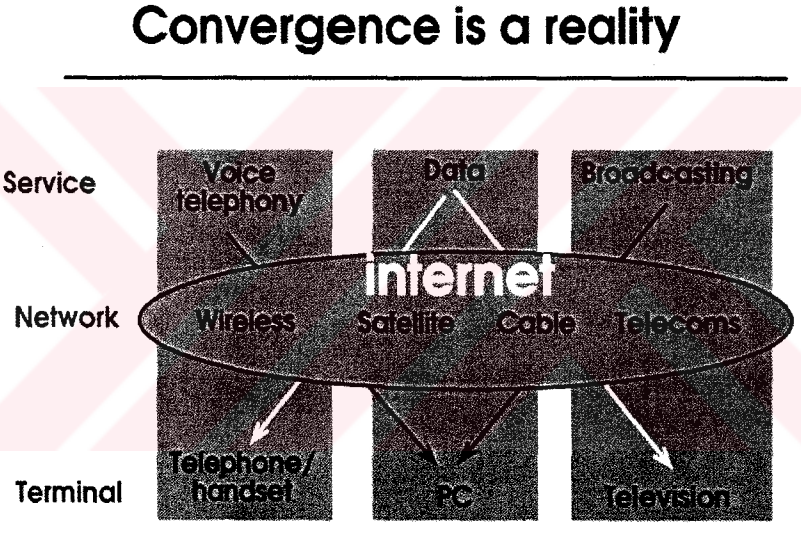


Figure 5: After convergence

(Source: Conference on "EU Telecommunications Regulations & Law", Brussels, 25th & 26th June 2002)

As is seen in the figures above, converging markets are undergoing dramatic changes towards a distinct platform including multi-functional networks, removing boundaries, wide-ranging problems all over the neighbouring sectors.[266] Although in the past, the commercial separation of telecommunications and broadcasting has

[266] The ability of different network platforms to carry essentially similar kinds of services is the most prevailing side of convergence. For instance, the 'audiovisual sector' convergence is characterised by digital television, Internet and many other services which are emerging somewhere between two. Digital television offers a new range of choice and interactivity and has the ability to be transmitted and understood by computers and therefore links the global reach of computers with content distribution by broadcasters.

been mirrored with separate regulatory authorities; with convergence, the commercial distinctions are being eroded and the rationale for multiple regulations is being questioned.

All the current and possible problems regarding 'convergence' phenomenon with their future implications were analysed in the Commission's 'Green Paper on the Convergence'.[267] Therein, the Commission suggested three possible methods for regulating converging markets.[268]

(i) remaining with the current approach, i.e. separate regulatory framework for telecommunications and media, extended to new converged activities as the case may require,

(ii) developing a new framework for converged activities alongside the existing ones and,

(iii) fusing all existing framework into a single new 'converged' framework

Final consultation over these possible solutions led to the conclusion that the regulation of infrastructure should be separated from that of content, and the sector-specific regulation should be phased out as markets become more competitive and can be left to competition law alone.[269] The consultations of the Commission gave way to the transformation of the existing Directives and introduction of a new Regulatory Package, which is going to be detailed later.[270]

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[267] Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors, and the Implications for Regulation Towards an Information Society, COM(97) 623 (3 December 1997), p. 8. Available at http://europa.eu.int/ISPO/infosoc/telecompolicy/en/commen.htm.

[268] Ibid. These methodological questions at EU level have found their respective answers in the 'Results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors' (10 March 1999, (COM) 99 108).

[269] Op.cit. in note 267, p. 49.

[270] Here, suffice to say that the convergence of the telecommunications, broadcasting and information technology sectors means that all transmission networks and services should be covered and operated under a single regulatory framework. This transformation has taken place to a great extent with the introduction of the 2002 EU Regulatory Framework at the EU level.

2.4 Dual Regime in EU Telecommunications Sector: Sector-Specific and Competition Law Rules

Like other network industries such as the postal, energy and rail transportation, telecommunications sector has always been and still is a heavily regulated sector. The EU telecommunications sector has also been characterised by an intensively interventionist policy, in that a more sophisticated application of general competition law played a crucial role. The need for competition law has evidently been echoed in the 1987 Green Paper, which envisaged a policy package that became the core of the EC telecommunications policy in 1990s.[271]

In the course of implementing EU telecommunications policy, application of EC Competition Law has been of primary importance from the scratch. In addition, especially with the acceleration of the liberalisation process, a comprehensive sector-specific regulation has also been developed, giving rise to a dual regime at EC/national level.[272]

Notably, since 1990s many 'networked' sectors had undergone many regulatory reforms depicting common characteristics, which are still under agenda of many countries particularly of EU candidate countries such as Turkey, Romania, etc. These different regulatory reforms were resulted in sector-specific regimes that are distinctly different from traditional competition rules.

In the context of a dual regime, telecommunications and related sectors such as information technology, Internet and multi-media services are controlled on the one hand through sector-specific regulation and on the other hand *via* general competition law rules. Within the European dual regime; the Directives, Regulations, Recommendations and Notices constitute the major EU sector-specific measures,

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[271] European Commission, 1987 Green Paper (Towards a Dynamic European Economy: Green Paper on the development of a Common Market for Telecommunications Services and Equipment), COM (87)290, p.16-17, 184-5.

[272] An exception to the dual regime rule in telecommunications sector is New Zealand, where national regulatory authorities have been abolished in favour of competition authorities.

whereas the Commission's Decisions under the oversight of the ECJ comprise the core of the EC Competition Law.[273]

The most advantageous and determinative aspect of general competition law rules is that they apply entirely sector independent. This makes them more flexible in comparison to sector-specific rules which include more complex and detailed regulatory principles that apply exclusively to one sector.[274] However, by and large, regulatory authorities have wider control rights than competition authorities, given the fact that competition law rules challenge the lawfulness of conduct, while regulatory authorities engage in detailed regulation of wholesale and retail prices, profit sharing, investments, etc.[275] Besides, regulatory authorities are more at ease with *quantitative* evidence, which they often use to set very detailed regulations, as in the case of cost-based pricing rules. In contrast, competition authorities are in shortage of detailed data, being usually more at ease with cases based on *qualitative* evidence (price discrimination, price fixing, vertical restraints, etc.).[276]

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[273] As regards application of EC Competition rules, on the one hand, the European Commission is empowered to apply Articles 81-89 EC and to take measures at the EU level (under the control of the European Court of Justice) on the other hand, national competition authorities have the authority to enforce the competition law rules, subject to the Community procedures, among which the Regulation 17 (Council Regulation No 1, implementing Articles 81 and 82 of the Treaty, OJ 13, 21.2.1962 and subsequent Notices) is deemed to be the main guideline. However, as regards sector-specific rules, EU model is based on a decentralised approach under which telecommunications regulation is carried out by the national regulatory authorities in accordance with the European Regulatory Framework(s), without a Community-wide regulatory body.

[274] Both the competition law rules and the sector-specific rules aim at ensuring competitive markets and eliminating market failures. From this point of view, the broader concept 'competition policy' is used so as to encompass all types of government policies *inter alia* sector-specific rules, competition law principles, etc. which are directed to enhance competition in field of telecommunications.
In economic terms, both sector-specific rules and competition law principles are based on common welfare foundations such as *allocative, productive* and *distributional efficiencies*. According to the first one (allocative efficiency), resources must be allocated so as to produce the maximum benefits to consumers, that is the economy must maximise allocative benefits. As to the productive efficiency, the resources must be produced at the minimum cost so that they can be released to satisfy other demands, that is the economy must maximise productive efficiency. In the context of distributional efficiency, the resources must be distributed to maximise distributional efficiency. In the light of these objectives, on the one hand (usually) *ex ante* and more detailed remedies are invoked under sector-specific regulation, on the other hand (usually) *ex post* and more flexible (sector independent) measures are applied under competition law.

[275] Jean-Jacques Laffont and Jean Tirole, "Competition in Telecommunications", The MIT Press, (Fourth Ed.), 2002, p. 277.

[276] Ibid., p. 278.

As widely accepted, sector-specific rules have a transitional character and are designed to ensure that the telecommunications markets would be more competitive. In this respect, after telecommunications markets have become more competitive, the Community's sector-specific regulation may thus be phased out and the sector may solely governed by the Treaty's competition law regime.[277] This is illustrated within the following figure:

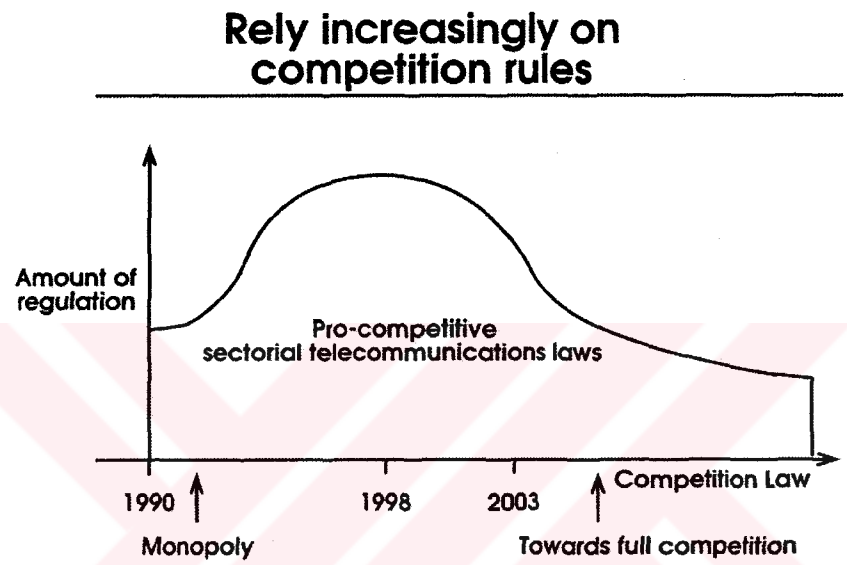


Figure 6: Transition from heavy-handed (sector-specific) regulation to reliance on competition law (Source: Conference on "EU Telecommunications Regulations & Law", Brussels, 25th & 26th June 2002)

However one might have doubts as to whether general competition law rules will replace sector-specific rules which are more complicated by nature. Since this discussion needs a detailed analysis, one must improve any argument advancing replacement of one type of measure with another, in a cautious manner.

In *Telia-Telenor*[278] case, European Commission drew the line between the two types of remedies (sector-specific rules and competition law rules), where the Commission pointed out that a merger control procedure yielding evidence for the creation or

[277] J. Braun and R. Capito, "EC Competition and Telecommunications Law" (International Competition Law Series, Vol. 6), Kluwer Law International, 2002 (Edited by C.Koenig, A. Bartosch, J. Braun), p. 64.

[278] Case No. IV/M.1439, *Telia/Telenor* (1999) OJ [2001] L 40/1, [2001] 4 CMLR 1226.

strengthening of a dominant market position can not be overruled by regulatory control.[279] At the same time, the European Commission required the two companies (Telia AB from Sweden and Telenor AS from Norway) to unbundle the local loops in their countries, and granted the parties a conditional clearance for merging.[280] Similarly in *Vodafone /Mannesman,*[281] the Commission only cleared the merger after the parties submitted commitments to de-merge Orange Plc and to give other mobile operators access to their inter-operator roaming tariffs and wholesale services.

These two cases exhibit a new form of regulation under general competition law rules which exclude sector-specific regulation to some extent. Here, we do face *ex ante* remedies under merger control as a non-typical competition law measure, in contrast to general nature of general competition law rules which basically include *ex post* measures. These (hybrid) measures take the form of either *structural* remedies that stimulate network competition or *behavioural* remedies which aim at ensuring reasonable access to key inputs such as content, local loop or set top boxes, under the merger.[282]

Such combinative usage reveals that the Commission perceives *ex post* and *ex ante* remedies as complementary tools in order for elimination of market failures in telecommunications markets.[283] Hence, it is possible to say that even if sector-

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[279] Georg Koopman, "Competition Policies and Telecommunications Regimes", p. 19-20. Available at http://www.hwwa.de/Projekte/Forsch_schwerpunkte/FS/Hande/Publikationen/Koopman%20edit.pdf

[280] The intended merger between Telia AB and Telenor AS was ultimately not realised although it was conditionally permitted. It was the first case to be considered under the EU's Merger Regulation involving the merger of two incumbent national telecommunications operators in EU. However, the Commission decision was debated with regard to the question whether the Commission should use merger control to advance its regulatory agenda. Such debate was developed for the reason that *Telia-Telenor* decision was rendered more than a year ahead of the Regulation 2887/2000 concerning unbundled access to the local loop.

[281] Case No. M. 1795 (2000) Vodafone/Mannesmann, IP/00/373 of 12 April 2000.

[282] Damien Geradin and J. Gregory Sidak, Seminar on "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", 22 January 2004, Maastricht, The European Institute of Public Administration (EIPA), p. 17.

[283] This seems so, because though being created for ensuring common objectives in general, competition law and sector-specific rules contain different types of measures which complement each other. More specifically, telecommunications regulations include (i) removal of barriers in order to promote new entry into respective markets and to define the conditions of entry, (ii) determination of procedures for number allocation, number portability, dial parity, and radio-electric spectrum allocation, (iii) setting forth access and interconnection conditions and prices, (iv) designation of price

specific regulations have reached their aims and were superseded by competition law rules, *ex ante* remedies are still going to be applied in telecommunications sector.

2.5 Establishment of the EU Access Regime: Policy Objectives and Legislative Tools

2.5.1 General Overview

In most countries, a combination of general competition law and sector-specific rules is generally deemed a mechanism improving the development of telecommunications sector. In parallel with the so-called mechanism, a theoretical paradigm relying upon a distinct perspective is sometimes used. According to that paradigm, two levels of competition, 'service-based competition' and 'facilities-based competition' are invoked in order for policy arrangements.

When the facilities of the incumbent operators are granted for access or shared with third parties, one can say about the existence of an access regime. An access regime is based on determination of terms, conditions and charges to be applied between the access provider and the access seeker. In this context, such terms, conditions and prices could not be always determined by the parties, particularly in case of dispute. Not only in case of dispute, but also in general terms, access conditions must not be left to the parties at all, because of the imbalance between the parties.

Considering the asymmetrical powers (imbalance) between incumbent operators and new entrants, the public authorities usually determine prices and other conditions of an access regime in favour of new entrants and urge to facilitate new entries *via* some policy tools. That is to say, competent authorities, namely competition authorities and regulatory authorities generally follow a 'service-based competition', which encourages access to essential infrastructure, under familiar conditions. Provision of services on fair and reasonable conditions rather than constructing networks is

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and quality standards for telecommunications services, including universal service. Meanwhile competition law rules essentially include prohibition of (i) anticompetitive agreements between undertakings, (ii) abusive behaviours of dominant undertakings, (iii) mergers and acquisitions which affect competition seriously.

embodied under service-competition strategies. However, such a strategy is not permanently desired, because public policies do or at least ought to concern investments and facility buildings, in the mid or long-term. Then, a political attitude favouring network duplication rather than access to existing networks constitutes a 'facility-based' strategy. That is to say, when the new entrant prefers to build its own facility instead of sharing with or access to the facilities of incumbent operator, there exist facility-based competition. Facilities-based competition takes place when access to existing network components is discouraged by the competent authorities or is not preferred by operators. With a simplified account, the entrants' incentives to build their own facilities depend on the difference between the expected profit flows from facility-based competition and service-based competition.[284]

Competition policies in telecommunications sector aim at promoting both service-based and facility-based competition. Having regard to the disadvantages of duplication of access networks and advantages related to emergence of competitive services, national regulatory authorities usually prefer to adopt service-based competition in the short term. In this regard, regulatory authorities as well as competition authorities have become so familiar with mandatory access to network facilities duplication of which is impossible or unfeasible in economic terms. As a consequence, the notion of 'access to essential facilities' has become a theme of central interest in respect of application of both EC competition law and European telecommunications policies, in recent years.

Granting third party access to essential network facilities and the competitive measures for this end figured on the agenda of EU telecommunications sector step-by-step. First step in this process was the *British Telecommunications*[285] case, where the ECJ confirmed that the EC competition law is applicable to telecommunications sector. In this case, the Commission found that British Telecommunications had abused its dominant position by taking action to prevent certain private message-

[284] M. Bourreau, P. Dogan, "Service-based vs. Facility-based Competition in Local Access Networks", *Telecommunications Policy*, 2001, Vol. 25, Issue. 3, p. 2.

[285] Commission Decision 8/861/EEC, OJ L 360/36.

forwarding agencies from offering a new type of service called 'international telex service'. Upholding the Commission's decision, the ECJ stated that "the employment of new technologies that accelerate the transmission of messages constitutes technological progress in conformity with the public interest and can not be regarded *per se* an abuse".[286]

As value-added services[287] such as internet access, electronic mail, voice mail and online databases were progressively liberalised in EU, access to essential network facilities started to become a recurrent theme and a central issue in the telecommunications, media, and information technology markets.[288] As a matter of fact, one of the reasons why the Commission drives for a policy encouraging new entry is that much of the growth in the telecommunications sector is due to the expansion of value-added services, offered by new independent service providers.[289] In order for the provision of competitive services not to be affected, the Commission emphasised importance of the rapid development and use of Internet services, drawing the necessary measures ensuring access to the bottleneck facilities for the so-called policy reasons.[290]

Alongside the progressive liberalisation and harmonisation measures carried out in 1990s which are convenient to be deemed crucial steps towards open access regime, competition law became more important than before. This is so, because the coherent application of the EC Competition Law rules became more needed in order for achieving internal market objectives in a liberalised environment, where small and

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[286] Commission Decision 8/861/EEC, OJ L 360/36.

[287] Value-added telecommunications services generally mean the telecommunication services which employ computer processing applications that provide the users with additional, different or restructured messages or involve users interaction with stored message.

[288] Herbert Ungerer, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", 13 November 1998, Florence, p. 6.

[289] J. Kalliala, "Market Definition Under the EC Competition Law in the field of Voice Telephony", 2000, PILC Student Paper, Brussels, p. 36

[290] At that time, access to the Internet in Europe was substantially more expensive than in United States and most possibly the Commission had taken this fact into account when adopting measures in order to facilitate new entries.

medium-sized operators, myriad new services and a great many (potential) strategic anti-competitive behaviours are much more involved.

Throughout these developments, mandated access has gained a key role, *via* which new entrants are enabled to provide new services or the existing services as alternative service providers. As a corresponding matter, the issue of access and interconnection began to dominate attention in the application of EC Competition Law as a prelude to full liberalisation of telecommunications sector with the 1996 Full Competition Directive.[291] Under the ONP regime, national regulatory authorities were established in all Member States to deal with access issues, and national regulatory regimes began to accompany enforcement of competition rules at national level. The rapid establishment of European harmonised access and interconnection regime together with the properly functioning competition law rules led to an effective opening of core segments of the telecommunications network infrastructure, and allowed rapid development of competition in both long distance and international services, and in the long-distance network backbone.[292]

Regarding these developments, the Commission needed to issue a Notice concerning application of EC Competition rules in telecommunications sector.[293] In this regard,

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[291] Herbert Ungerer, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", 13 November 1998, Florence, p. 6.

[292] Ibid., p. 24. In telecommunications networks do exist three distinguishable segments: *local loop*, which is the network component between subscribers and the point(s) of interconnection at local exchanges; *long distance*, which is the network of cables and switching equipment that connects the local exchanges to higher levels of exchange known as transit exchanges; and *international*, namely the network of cables and related switching equipment which leads traffic from the international gateway and hence out of the country and to public telephone operators in other countries. (*cited in* J. Kalliala, p. 36) All of these segments are connected with each other by access and interconnection arrangements. From the demand point of view, not only long-distance and international carriers but also companies running private networks such as Internet Service Providers need access to and possibly interconnection with the network of the incumbent operator in order to be able to exchange traffic originating or terminating in the country concerned.

[293] It is noticeable that effective enforcement of competition policies was achieved by the combination of binding Directives with non-binding Recommendations, Notices, etc. that are called 'soft legislation'. As being one of the most important soft legislative measures, the Access Notice (1998) aimed at not establishing strictly binding measures, but ensuring certainty with regard to the dual regime concerning access agreements in telecommunications sector. Prior to the Access Notice, European Commission in 1991, issued a Guideline that is entitled 'Commission Guideline on the application of EEC competition rules in the telecommunications sector (91/C 233/02),02), OJ C 233, 6.9.1991. The Commission has also issued two Recommendations on Interconnection Pricing in order

"Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector" was published in August 1998. The purpose of the Notice was to set access principles stemming from EC Competition Law in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecommunications and multimedia sectors, to define and clarify the relationship between competition law and sector-specific legislation, and to explain how competition rules will be applied in a consistent way across the converging sectors involved in the provision of new multimedia services, and in particular to access issues and gateways in this context.[294]

2.5.2 Commission's Access Notice

In 1990s, European telecommunications policies were prompted to move forward with the soft legislation such as Recommendations, Notices, etc. which was issued by the Commission with the aim to ensure a stable and harmonised implementation of the Directives. The Access Notice is one of the most important pieces of such legislation, having been issued in order to guide operators with regard to access agreements. Given the fact that access agreements are playing the key role within the telecommunications sector, the Access Notice should be considered as a statement of policy regarding competition policies in European telecommunications sector.[295] This is so, because at the time of issue of the Access Notice, a fully liberalised and a sufficiently competitive sector had not been gained and the consequences of full liberalisation could not have been estimated entirely by the practitioners.

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for establishment of price ranges for interconnection rates across the EU, based on the 'best practice' of the three Member States which have the lowest interconnection rates at the time of the issue of the Recommendation. (Commission Recommendation of 8 April 1998 on interconnection in a liberalised telecommunications market (98/322/EC) and Commission Recommendation of 8 January 1998 on interconnection in a liberalised telecommunications market (98/195/EC).

[294] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, Preface.

[295] Mark Naftel, "Does the European Commission's Telecommunications Access Notice Send the Correct Economic Signals to the Market?", Phoenix Center for Advanced Legal and Economic Public Policy, January 1999, p. 1. Available at www.phoenix-center.org

Access Notice therefore concentrated on the scenarios of distortions and/or restrictions of competition in telecommunications sector. In specific terms, the concerns of competition breaches by the means of access agreements were the main impulse for issuing Access Notice. Furthermore, the Essential Facilities Doctrine found its most explicit formulation in the Access Notice, which was drawn from a broad range of Commission decisions and Court judgments.[296]

The Commission's 1998 Access Notice refers the 'essential facility' concept both in defining the boundaries of dominance and describing an abuse of dominance. It is visible that whilst explaining both 'dominant position' and 'abuse of dominant position', the Commission devotes a primary role to EFD. According to the Access Notice,[297]

> A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 86 (now 82). Conversely, a company may enjoy a dominant position pursuant to Article 86 (now 82) without controlling an essential facility.

In addition, a company according to the Access Notice may abuse its dominant, if by its actions, it prevents the emergence of a new product or service.[298] In respect of demonstrating the general attitude of the Commission to the Doctrine, the paragraph 68 of the Access Notice deserves to be quoted, here:

> In the telecommunications sector, the concept of 'essential facilities' will in many cases be of relevance in determining the duties of dominant telecommunications operators. The expression 'essential facility' is used to describe a facility or

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[296] Herbert Ungerer, "Access Issues under EU Regulation and Anti-Trust Law - The Case of the Telecommunications and Internet Markets", July 2000, Research Paper, WCFIA Fellows Program 1999/2000, Harvard University (Weatherhead Center for International Affairs), p. 15.

[297] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at. 69.

[298] Ibid., at 90. This paragraph is reminiscent of the ECJ judgment in *Magill,* where one of the reasons for advancing an abuse by the Court was as follows: "...thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand." See *supra* note 110.

> infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which can not be replicated by any reasonable means.[299]

It is not hard to deduct from the above paragraphs that, at least with respect to access agreements in telecommunications sector, the Commission explains dominance on the basis of the main thrusts of the concept of essential facilities.

After the so-called explanation, the Commission cites five conditions for an obligation to grant access (to an essential facility) to be imposed: [300]

> (a) Access to the facility in question is generally essential in order for companies to compete on that related market,
> (b) There is sufficient capacity available to provide access,
> (c) The owner of the facility fails to satisfy demands on an existing service or product market, blocks the emergence of a potential new service or product market,
> (d) The company requiring access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions,
> (e) There is no objective justification for the refusal to provide access

Within the Access Notice, 'access' concept has been given a broader meaning when compared to the 'access to essential facilities'. According to the paragraph 71 of the Notice, 'access' is related to a range of situations including the availability of leased

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[299] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 68. The paragraph 68 of the Access Notice expressly refers to the definition included in the "Additional commitments on regulatory principles by the European Communities and their Member States" ("Regulatory Annex" or "Reference Paper") in the context of the World Trade Organisation (WTO) Basic Telecommunications Agreement, which defines 'essential facilities' in the following manner:

"Essential facilities mean facilities of a public telecommunications transport network and service that:

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service."

[300] Ibid., at 91.

lines[301] and enabling a service provider to build up its own network and interconnection in the strict sense namely, interconnecting two telecommunications networks, for instance mobile and fixed.[302]

Subsequent to dealing with the concept of access, the Commission expresses its post-liberalisation concerns with regard to access in the following statements:[303]

> In relation to access it is probable that the incumbent operator will remain dominant for some time after the legal liberalisation has taken place. The incumbent operator which controls the facilities, is often also the largest service provider, and it has in the past not needed to distinguish between the conveyance of telecommunications services and the provision of these services to end-users. Traditionally, an operator who is also a service provider has not required its downstream market operating arm to pay for access, and therefore it has not been easy to calculate the revenue to be allocated to the facility. In a case where an operator is providing both access and services it is necessary to separate so far as possible the revenues as the basis for the calculation of the company's share of whichever market is involved.

Upon these findings, the Access Notice offers the prohibitive tools in order for removing competition breaches, specifically in the context of access. Paragraph 83 of the Access Notice sets forth such rules as follows:

> A refusal to give access may be prohibited under Article 86 (now Article 82) if the refusal is made by a company which is dominant because of its control of facilities, as incumbent TOs (telecommunications operators) will usually be for the foreseeable future. A refusal may have the effect of hindering the

[301] For the purposes of Directive 92/44/EEC, leased lines are defined as:
"telecommunications facilities which provide for transparent transmission capacity between network termination points and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision)." (Article 2 of the amended Directive 92/44/EEC.)

[302] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 71.

[303] Ibid.

> maintenance of the degree of competition still existing in the market or the growth of that competition.
>
> A refusal will only be abusive if it has exploitative or anti-competitive effects. Service markets in the telecommunications sector will initially have few competitive players and refusals will therefore generally affect competition on those markets. In all cases of refusal, any justification will be closely examined to determine whether it is objective.[304]

The most remarkable point here is the established criterion as to whether a refusal to access is abusive or not in a case. The so-called criterion is seemingly well-defined as 'having exploitative or anti-competitive effects'. According to the Access Notice, a refusal to grant access will not be deemed 'abusive' by the Commission, if it does not bear exploitative or anti-competitive effects. However, the first paragraph of the above excerpt reveals *per se* elements when deciding to an infringement of an abusive practise under Article 82.

Within the context of the Access Notice, does also exist an articulation for distinguishing the telecommunications markets as 'downstream' and 'upstream', in accordance with the EC competition case-law.[305] Within this perspective, the former corresponds to a market where services are offered to end-users, whereas the latter correspond to a market where access is offered for the facilities necessary to provide

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[304] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 83. In the subsequent (84th) paragraph of the Access Notice have been envisaged three potential types of 'refusal to grant access' as follows:

(a) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate to that services market;
(b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;
(c) a withdrawal of access from an existing customer"

[305] Article 45 of the Access Notice, under the sub-heading 'Relevant Product Market', makes clear the distinction between downstream and upstream markets as follows: "It is clear, therefore, that in telecommunications sector there are at least two types of relevant markets to consider - that of a service to be provided to end users and that of access to those facilities necessary to provide that service to end users (information, physical network, etc.). In the context of any particular case, it will be necessary to define the relevant access and services markets, such as interconnection to the public telecommunications network, and provision of public voice telephony services, respectively."

the services to end-users. In the Access Notice, the Commission recognised that given the pace of technological change in the telecommunications sector, any attempt to define particular product markets (in the Notice) would run the risk of rapidly becoming inaccurate or relevant.[306]

In light of the above explanations it is possible to say that the Access Notice enlightened the way after liberalisation by setting out important guidelines aiming at ensuring pro-competitive markets. Among those guidelines, the implications for application of EFD in telecommunications sectors occupy an important place. However, the requirements laid down in the Access Notice have been largely criticised for being framed under an over-zealous and over-interventionist approach.[307] As a matter of fact, the Access Notice regards it to be sufficient if the owner of the infrastructure either *fails to satisfy demand* on an existing market, or *blocks the emergence* of a potential new product, or *impedes* competition on an existing or potential market.[308]

Considering the restrictive approach of the ECJ portrayed in its *Oscar Bronner* judgment, the Commission's approach regarding EFD in the Access Notice exhibits a quite contrast to the attitude of the ECJ in *Oscar Bronner*. From this point of view, the Access Notice does not seem to have taken the Court Rulings into sufficient account, by somehow interpreting EFD in a broad manner. Such a perspective is seemingly framed in line with the philosophy of the Commission decisions which

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[306] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 47. In contrast to the case within the Access Notice, the relevant product markets are precisely defined in the last Recommendation of the Commission concerning market definitions (Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications networks and services, O.J. 8.5.2003 L 114/45). In the Annex of the so-called (last) Recommendation, seven markets at the retail level, and eleven markets at the wholesale level are specified in accordance with the new EU Regulatory Framework.

[307] See Andres Bartosch, "EC Competition and Telecommunications Law" (International Competition Law Series, Vol. 6), Kluwer Law International, 2002 (Edited by C.Koenig, A. Bartosch, J. Braun), p. 136. and N. Nikolinakos, "Access Agreements in the Telecommunications Sector-Refusal to Suply and The Essential Facilities Doctrine under EC Competition Law", 1999, European Competition Law Review, No:8, p. 404.

[308] Andres Bartosch, "EC Competition and Telecommunications Law" (International Competition Law Series, Vol. 6), Kluwer Law International, 2002 (Edited by C.Koenig, A. Bartosch, J. Braun), p. 149.

reveal a clear 'service-based competition' approach. According to P. Nihoul and P. Rodford it appears that the positions adopted by the Commission in *Sea Containers/Stena Sealink*[309] and the Access Notice are identical in substance.[310] 'Essential character of the facility', which was primarily brought into the case-law by the so-called decision, was maintained by the Access Notice, in their opinion. Indeed, it seems that Access Notice has a vision just the same as Commission's attitude in antitrust cases, particularly for the concurrent policy objectives.

On the other hand, though including some quotations from the decisions of the Community Courts, no detailed guidance for assessment of such judgments was provided by the Notice. In spite of existence of a number of provisions regarding EFD and related criteria that remind preceding Court rulings, many access issues have not been clarified in the Access Notice. For instance, in the Notice does exist neither a clarification concerning the clear-cut boundaries of 'objective justification' nor an analytical explanation relating to the application of EFD on a Community-wide basis.

With regard to access policies, the Access Notice is able to be seen as either a policy guideline or an over-interventionist legislative tool in order for prevention of potential refusal(s) to grant access to essential facilities. The new (2002) Regulatory Framework which will be analysed below, sets out more flexible and less interventionist provisions regarding access to essential facilities, envisaging a progressive transition from *ex ante* sector-specific regulation to *ex post* competition law remedies in the sector. Interestingly saying, there is a remarkable contrast between the philosophies of the Access Notice and the 2002 Regulatory Package.

As the past experience has shown, the markets exhibit dynamic growth in terms of new entry, investment and development of services following full liberalisation. In particular during liberalisation period, EFD has potential to cope with bottleneck

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[309] See *supra* note in 129.

[310] P. Nihoul and P. Rodford, EU Electronic Communications Law, Oxford University Press, 2004, p. 475.

cases and does offer more effective solutions in comparison to sector-specific rules. Thus, in transition periods from monopolies to liberalised markets or in sectors where the market data reveal a non-competitive structure, EFD could be invoked as the key policy tool as the Access Notice envisages.

2.5.3 The Rationale and Main Parameters of Applying EFD under the EU Access Regime

In order to introduce competition in networked sectors, entrants need to be granted access to the incumbent's network facilities, the reason for which is the inherent fact that these sectors are characterised by a significant degree of economies of scale, scope and density. Not only economies of scale, scope and density but also other entry barriers such as behavioural hindrances make compulsory access inevitable. That is explicitly to say, for many times 'negotiated access' does not yield satisfactory conclusions, and 'mandated access' is called forth for securing competition between the market players. In telecommunications sector, such access is furthermore required because entrants, in order to offer a competing product need the ability to terminate calls on the incumbent's network.[311] In other words, every operator has a monopoly over its network, and when another operator wants its subscribers to reach the subscribers of the concerned operator, that operator has no option other than call termination on the concerned operator's network. Thus, access to another operator's network (usually in the form of interconnection) is crucial for interaction between customers and for ensuring competitive services.

Aiming at ensuring efficient access through networks, many policy tools have been developed so far. Among the measures of 'mandated access', EFD has emerged one of the most influential methods for granting new entrants access to incumbent's essential network facilities. In parallel with the relationship between mandated access and EFD, the interplay between competition law and sector-specific rules in the telecommunications sector is most prominent, where access to 'essential facilities' is

[311] Jonas Holm, "Regulating Network Access Prices under Uncertainty and Increasing Competition: The Case of Telecommunications and Local Loop Unbundling in the EU", 2000, University of Copenhagen, Institute of Economics (MSc Thesis), p. 107.

concerned.[312] In essence, all the telecommunications sectors including those of EU and Turkey are well-suited for application of EFD, since all telecommunications services and networks, by nature, exhibit almost common entry barriers and similar access problems.[313]

Firstly, duplication of telecommunications infrastructure is seriously uneconomic, especially from the point of new entrants' views. Critical bottlenecks (essential network facilities) do exist where new entrants need access to them in order to compete with the incumbent operators. Such network facilities are prohibitively expensive, which occasionally prevent or deter new entrants from entering the market. Ownership of 'local telephone networks' may be used, for instance, to deter or delay the entry of competitors, in the field of information and communications services which rely on access to and use of the local network for the provision their own products.[314] From this point of view, cost structures of networks often constitute a bottleneck situation and thereby an insuperable barrier when incumbent operators are not forced to deal with their competitors under EFD.

Secondly, the rationale behind competition policies in the telecommunications sector lies at the factual point that the monopoly control still dominates a lot of network segments in the sector, even after abandonment of special and exclusive rights. Monopolies or dominant undertakings mainly produce their outputs in the upstream market(s) and sell their products in the downstream market(s) in a more efficient manner. The 'efficiency' advantages generated through the strong positions of the incumbent in the two adjacent markets so many times thwart the competition in the downstream markets. That is to say, new entrants hardly perform their activities in the downstream markets against the vertically integrated position of incumbents. Both competition authorities and national regulatory authorities try to prevent the

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[312] Georg Koopman, "Competition Policies and Telecommunications Regimes", p. 36. Available at http://www.hwwa.de/Projekte/Forsch_schwerpunkte/FS/Hande/Publikationen/Koopman%20edit.pdf

[313] In this part of the thesis, the analysis on entry barriers and access problems is predominantly done independently of country-specific evaluations. The specific implications of EFD for Turkish telecommunications sector is going to be discussed in the 3rd Chapter.

[314] Op.cit in note 312.

dominant operators from strengthening their positions in adjacent markets *via* some tools, among which EFD has proved itself through the case-law successfully.

Thirdly, incentives for dominant operators to engage in anticompetitive behaviours may ultimately derive from the presence of network externalities.[315] Given the fact that in the presence of positive network externalities, the value of a product supplied by a dominant operator increases when an additional consumer is included to the network of the product, such network externalities that are peculiar to networked industries constitute a basis for anti-competitive behaviours. In fact, many established incumbent operators have a long history of providing public telephony services at subsidised rates, which provides themselves with strong network externalities.[316] As a corresponding matter, the competitive structure in the sector might be distorted through established network externalities in absence of any pro-competitive measures. In this context, EFD is deserved to be deemed an effective tool to neutralise such distortions with its balancing role between the asymmetrical powers of market players.

Fourthly, an incumbent operator can use its control over bottlenecks to increase a competitor's costs and make its service less attractive to customers.[317] In other words, an incumbent operator can increase the competitors' costs through increasing the prices of its own network facilities or somehow refuse to share its infrastructure with other operators at competitive and fairly established prices. In both situations, there occurs an absolute need on the part of competing firms to access to the existing network components for carrying out their activities. In absence of compulsory access by regulatory tools or EFD, new entrants could be in a bottleneck situation to compete and may find it very difficult to persuade customers to switch from an incumbent operator that has served them for many years. Here suffice to say that,

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[315] Georg Koopman, "Competition Policies and Telecommunications Regimes", p. 10. Available at http://www.hwwa.de/Projekte/Forsch_schwerpunkte/FS/Hande/Publikationen/Koopman%20edit.pdf,

[316] H. Intven., J. Oliver, E. Sepulveda, (2000), "Telecommunications Regulation Handbook", Published by McCarthy Tetraultz, (5th Section), p. 9. Available at http://www.infodev.org/projects/-314regulationhandbook/

[317] Ibid.

EFD by its adjustable nature to any bottleneck situation, would be more effective in solving access problems, comparing to sector-specific rules.[318]

In the light of the above explanations, it is possible to say that structural deficiencies and strong advantages inherently existed in favour of incumbent operators make telecommunications markets quite unique and subject to EFD. When the Doctrine is reminded, we face four main elements. These are respectively, control of an (essential) facility by the dominant undertaking, inability of other competitors to duplicate the facility practically, denial of use of the facility by the facility owner (with substantial harm to competition) and the absence of a legitimate business justification for denial of access.

According to I. Vogelsang and B. M. Mitchell, the notion of essential facilities is closely related to that of (normative) monopoly for the reason that the second element of the Doctrine spells out natural monopoly.[319] In their opinions, the difference between an essential facility (bottleneck) and a natural monopoly is that the former refers to an input for which a market may not exist or may not be meaningfully defined, whereas the latter refers to a market or a set of markets.

In fact, market definition in bottleneck cases is not an easy phase to be tackled before making a decision concerning abuse of dominance. While the upstream / downstream market pattern may be present, there may not be any market in the casual sense of the word at the level of the (essential) facility.[320] Whereas two easily identifiable markets are present in the classical (vertical relationship) cases, i.e. *Commercial Solvents,*[321]

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[318] The adjustability of EFD to converging markets and technological changes is going to be discussed in the following parts of the thesis.

[319] I. Vogelsang and B. M. Mitchell, "Telecommunications Competition: The Last Ten Miles", 1997, The MIT Press and the AEI Press, Washington, D. C., p. 56.

[320] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 205. Regarding essential facilities cases, Larouche advises caution in market definitions, considering that a finding that the essential facility constitutes a relevant market might be misleading. Pointing out that many allegedly essential facilities could not be individualised and be offered on a stand-alone basis, he emphasises that the established criteria for market definition are of very limited help and finding that there is a relevant market for access schemes goes beyond *market definition* and into *market structuring*.

[321] See *supra* note 97.

United Brands,[322] the established criteria for market definition (the normative establishment of two strictly separate markets depending on some tests, i.e. demand-side & supply-side substitutability) are not so reliable in the cases where a part of network rather than a good or service is alleged to be an 'essential facility'. With respect to the cases *Magill,*[323] *Oscar Bronner,*[324] and *European Night Services,*[325] where the markets for access (to essential facility) are respectively programming information, home-delivery network, and tracks of railway undertakings and their locomotive engines, the subject-matter of the case(s) is not the same as that of the former (vertical relationship) cases. In these latter cases, as P. Larouche points out,[326] the markets do not consist of trading goods or services, but rather constitute either a unique network or a part of a huge infrastructure such as rail tracks, airports, telecommunications which are not so convenient to be assessed under the classical tests of market definition.[327]

As a matter of fact, network industries such as telecommunications are distinguished by the fact that their services have a geographic component involving the use of the network.[328] Here, one is confronted a market, boundaries of which are drawn not through the consumer preferences or relevant quantitative / qualitative tests but rather with regulatory and geographic constraints. That is to say, the essential network facilities are subject to interventions through competition policies, and in such an intervention based on the 'essentiality' of the facility, market definition sometimes becomes meaningless. Then, uniqueness of the essential resources is placed at the centre of the essential facilities cases.

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[322] See *supra* note 99.

[323] See *supra* note 110.

[324] See *supra* note 169.

[325] See *supra* note 154.

[326] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 205.

[327] This is so, because the criteria with regard to assessment for definition of a relevant market mainly depend on the 'interchangeability' phenomenon which is affiliated with the tests of 'demand-side substitutability' and of 'supply-side substitutability'. See Richard Whish, "Competition Law, *Fourth edition*", Butterworths, 2001, p. 22-36, and J. Kalliala, "Market Definition Under the EC Competition Law in the field of Voice Telephony", 2000, PILC Student Paper, Brussels, p. 13.

[328] Op.cit in note 326.

Besides difficulties relating to 'market definition', 'grounds for intervention' in essential facilities cases differ in comparison to classical cases.[329] While in the former cases, the remedy is easy to identify as it usually takes the form of resuming the trade of goods / services, in the latter cases, the remedies generally consist of duty to share with or access to essential sources towards third parties. Thus, more structural remedies in essential facilities cases usually take place whilst more behavioural ones seem to be relevant in classical (refusal to deal) cases.

In this framework, especially when access to one of the essential resources such as local loops of incumbents, rights of way, poles and conducts and other unique components of communications networks, etc is the subject-matter of a case, 'essentiality' test would become the key argument in applying EFD. Moreover, in essential facilities cases, 'dominance' becomes far less meaningful, and is replaced by the notion of 'essentiality'.[330]

2.5.4 The Application of EFD in Liberalisation Period: EU Experience and Further Implications

The replacement of 'dominance' with the 'essentiality' within the picture cited above demonstrates that there is an equivalence between EFD and the economic concept of 'natural monopoly'. Inherent in the concept of an 'essential facility' is the premise that the owner of that facility possesses monopoly power.[331] The term 'facility' itself connotes an integrated physical structure or large capital asset with the degree of cost advantage or a unique character that usually confers monopoly power and market control by virtue of its superiority for its intended purposes.[332] In this regard,

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[329] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p. 205, p. 209.

[330] Ibid., p. 207. Larouche cites the example of the local loop for illustration. According to this example, if a service provider controls 5% of the local loops in a local access zone such a city, at first glance it would not appear to be in a dominant position. Yet the competitive concerns surrounding the local loop (due to the fact that provision of some certain services to the end-user is impossible without access to the local loop) could initiate the competent authorities to require the owner of the 5% of the local loop for granting access to other parties.

[331] Abbott B. Lipsky, Jr. and J. Gregory Sidak, "Essential Facilities", Stanford Law Review, Vol. 51, No: 1187, May 1999, p. 1211.

[332] Ibid.

'essentiality' means that the facility in question is a unique product, service or infrastructure which any competitor inevitably needs for carrying out its activities. From this point of view, such a unique facility is generally accepted to have been possessed by monopolists; namely by firms having either *de jure* or *de facto* monopoly.

As a matter of fact, in particular geographic areas, the incumbent operator may have a degree of market power which goes beyond simple dominance, and may extend through what is sometimes called super-dominance to *de facto* monopoly.[333] In such circumstances, refusal to grant access to essential network facilities, i.e. denying (unbundled) access to the local loop may constitute an abuse of the dominant position; potentially, it has the effect of eliminating a competitor's ability to compete in downstream markets with the owner of the (essential) facility.[334] However, irrespective of market power, there could also appear some competitive concerns in related market activities, if the facility requested is a key input such as content, local loop or set top boxes. That is to say, if such a facility exhibits an 'essential' character, one can presume that EFD is applicable even though the said facility is owned by a small and medium-sized firm.[335]

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[333] Martin Cave and Luigi Prosperetti, "European Telecommunications Infrastructures", Oxford University Press and the Oxford Review of Economic Policy, Vol. 17, No. 3, 2001, p. 429.

[334] Ibid. The owner of the allegedly essential facility in such a case is normally the incumbent operator who has the monopoly over access to the local access network. Herein, unbundled access to the 'local loop' means the provision of access to local exchanges at an unbundled basis, which enable the third parties to compete at the same conditions with the incumbent operator. The essential character of the local loop stems from its distinct role in fixed telecommunications infrastructure. The local loop is the physical component of the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame (at the local exchange), and this feature of the local loop makes it the crucial part of the network in terms of direct access to the end-user. In this perspective, the local loop may be deemed an essential (network) facility, when its 'essential' character and the potential substantial harms to competition in case of denying access are considered together.

[335] However, such an application seems improper under the competition law principles, because if a facility is not owned by a dominant undertaking, an abuse of dominance under EFD can not be found in a case. That is to say, EFD is an argument that contributes to answer the question 'whether an abusive practice has been conducted by the concerned firm or not'. On the other hand, a version of EFD is presumably applicable *via* sector-specific regulation, namely, in an implicit manner and dedicated context (to a specific area), rather than by relying upon a clearly defined market and a (abusive) practice of a market power. For instance, in case of competitive concerns, some access obligations related to a specific area of regulation can be imposed on operators not enjoying a dominant position. Pertaining to some specific hubs of telecommunications, i.e. local loops, points of

Given the role of EFD, the applicability of EFD has gained more importance during the liberalisation period of EU. In particular, with the acceleration of legislative steps towards full liberalisation, there appeared a number of cases exhibiting the close relation between 'essential facilities' and 'legal monopolies'.

Influence of EFD in EU liberalisation period is remarkably seen in *Atlas*[336] case which culminated with an exemption decision regarding a telecommunications alliance. In *Atlas*, the Commission focused the 'non-discrimination' principle and specifically referred FT and DT's potential power to supply 'building blocks' for a number of services in a discriminatory basis. The services in question were defined as "access to the PSTN, the ISDN and to other *essential facilities*, and also ... reserved services".[337] At the time of the decision, PSTN, ISDN and other services which were ordered to be granted access were under the scope of legal monopoly, and were deemed an essential facility by the Commission. The Commission held:[338]

> However, even when all telecommunications facilities and services are non-reserved, FT and DT will at least for a number of years remain *indispensable* suppliers of building blocks for the relevant services in France and Germany. Given that FT and DT are shareholders of Atlas, it is essential for the safeguarding of fair competition between Atlas and other existing and future telecommunications service providers to eliminate the risk that the former might be granted more favourable treatment regarding ... such facilities and services which remain an *essential facility* after full and effective liberalisation of telecommunications infrastructure and services in France and Germany.

Atlas is a distinct decision regarding two points. First, the Commission seemingly took action regarding the fear that FT and DT who are the shareholders of Atlas would discriminate in providing the building blocks. Then, Commission made its

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access or interconnection, etc. some *ex ante* obligations can be imposed by regulatory authorities, regardless of the market share of the operator concerned.

[336] *Atlas* and *Phonenix/GlobalOne* [1996] OJ L 239/23.

[337] Ibid., at 53.

decision by referring a possibility of discrimination and presumably having regard to the concern of preventing a potential discrimination. Second, the main reason for the Commission's decision seems to have been the 'essentiality' of the building blocks which were offered under monopoly at that time. In the decision, as P. Larouche points out, an explicit link between legal monopolies and essential facilities is established by the Commission.[339]

The Commission in this and other decisions surrounded by liberalisation aims such as *London European/Sabena*[340] and *British Midland/Aer Lingus*[341]demonstrated its aspiration for ensuring that creation of *super* dominants succeeding the former monopolies be prevented. In this framework, the application of EFD seems to have been given a central role in liberalisation period. The objectives targeted by the liberalisation makes such an application evidently necessary. Particularly in absence of alternative measures, EFD is of potential to be used as an effective tool in a wide range of bottleneck situations during liberalisation periods. The experience in the EU telecommunications sector can be shown as a quite successful example for application of EFD during the transformation period from monopoly to competitive markets.

The main reason for rapidly evolution of EFD in the EU context relates to the inherited reserved area under the control of incumbent (monopoly) firms. More explicitly, until the beginning of liberalised services and networks, lack of alternative networks dominated the sector. The paragraph 64 of the Access Notice which reads as "The development of effective competition from alternative network providers with adequate capacity and geographic reach will take time." also confirms this factual point.[342]

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[338] Ibid., at 34.

[339] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p.187.

[340] See *supra* note 123.

[341] See *supra* note 124.

[342] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 64.

While other competing firms rely upon access to incumbents' essential network facilities, incumbent operators hold a 'gatekeeper' position. However, it must not be expected that this fact would be changed just after the liberalisation. This is why market players unavoidably need access to the existing networks particularly due to the economic constraints for a long time. The statements of H. Ungerer reveal this fact:

> In the fixed network field, the new entrants are faced with a situation where the incumbents hold fixed network assets built over one hundred years of monopoly. None of the new entrants can, in the short term, build parallel networks in the local loop which could rival these assets worth 200-300 billions of euros of investment. [343]

For the sake of illustrating such a bottleneck situation, one can consider emergence of a variety of different service providers after liberalisation. A lot of Internet Service Providers (ISPs), international operators and other telecommunications service providers after being awarded a license, enter the market and use the same network access lines and local switches to reach subscribers. In this situation, in order for new entrants not to be faced with a bottleneck problem, mandating access to the incumbent's essential network facilities is crucial for viability of new entrants in the market.

As a result of rapidly completed liberalisation of EU telecommunications sector, many new firms would have faced a difficult situation where no other option than access to incumbent's networks was economically viable. However, such a fateful situation has not been taken place in the EU context, thanks to the Commission's efforts. The Doctrine's success, in this regard illustrates the importance the Commission attaches to the acceleration of liberalisation.

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[343] H. Ungerer, "The arrival of competition in European telecommunications", 3rd European Forum on the Law of Telecommunications, Information Technologies and Multimedia: Towards a Common Framework, Luxembourg, June 19, 1998, p. 7-8.

In order to reap the benefits of liberalisation, many commentators affirm the vitality of the Doctrine within the transition periods towards full liberalisation.[344] To sum up, the history and development of EFD to date reveals that EFD has the potential to remedy the bottleneck situations with regard to 'third party access', during liberalisation periods.

2.6 Recent Developments in EU after Full Liberalisation

In telecommunications policy of the EU, a dual system has so far been continued to exist and to an appreciable extent has also been successful in tackling access and interconnection issues. In this context, dual system at EU/national level has ensured efficient access to the incumbents' networks particularly with regard to access and interconnection regime, *inter alia* in unbundling and co-location issues, elimination of anti-competitive conducts as regards access and interconnection, etc.

In securing such an efficient *dual* (access) regime, sector-specific regulation which incorporates predominantly *ex-ante* obligations played a comparatively preceding role. Except for merger and acquisition controls, imposition of *ex ante* obligations is quite rare under competition law remedies.[345] Most probably due to this fact, the Commission acknowledged in the Access Notice that EC Competition Law rules are not sufficient to remedy all the problems in the telecommunications sector.[346] From this point of view, sector-specific regulations in the form of Directives, Regulations, etc. have stimulated the sector during and after liberalisation in the EU, remarkably.

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[344] See N. Nikolinakos, "Access Agreements in the Telecommunications Sector-Refusal to Supply and The Essential Facilities Doctrine under EC Competition Law", 1999, European Competition Law Review, No: 8, p. 399-411; J. T. Lang, "Defining legitimate competition: companies' duties to supply competitors, and access to essential facilities, Fordham Corporate Law Institute, International Law and Policy", 1994, p. 437-524 and Antonio Capobianco, "The essential facility doctrine: similarities and differences between the American and the European approach", European Law Review, 26, no. 6, 2001, p. 548-564.

[345] Under competition law analysis, the respective steps in general are, definition of relevant market, identification of dominance, and investigation as to whether dominant undertaking's behaviour constitutes an abuse of dominance or not. The sanctions and actual remedies of general competition law are imposable according to the conclusion of that investigation.

[346] The paragraph 14 of the Access Notice reads as follows:
"Community competition rules are not sufficient to remedy all of the various problems in the telecommunications sector. NRAs (national regulatory authorities) therefore have a significantly wider ambit and a significant and far-reaching role in the regulation of the sector. It should also be noted that as a matter of Community law, the NRAs must be independent."

Through such regulations, many reserved areas have undertaken a considerable diffusion of competition.

While competition has expanded rapidly and significantly into some sector segments, i.e. long distance and international telephony, some other segments such as local access networks largely remained being operated and managed by incumbent operators. Thus, in many countries have remained various questions concerning how to foster competition in local telecommunications markets after liberalisation. These questions continued to be open for some time on the part of practitioners as well as policy makers at the EU level. On the other hand, as the time was passing the gap between EU and USA was widening in terms of broadband services, particularly high-speed internet applications.

One of the remaining issues was related to the debate on consequences of convergence including transformation of the regulatory framework. In this context, at late nineties the premise that all transmission networks and services should be covered by a single framework echoed widely and the Community Institutions, mainly Commission commenced to take action towards this end. Below will be explained the relevant Commission's efforts and legislative steps, respectively.

2.6.1 Reform Process since 1999

Given the short-term requirements to speed up large-scale deployment of Internet at affordable rates in EU, and to open up development towards high-speed multimedia Internet applications, the Commission chose to pursue a wide-ranging reform, taking the convergence phenomena into account.[347]

Within this framework, in November 1999, the Commission launched a review of the existing regulatory framework with the publication of the Communications Review.[348] The Commission Review presented a series of policy proposals

[347] Herbert Ungerer, "Access Issues under EU Regulation and Anti-Trust Law - The Case of the Telecommunications and Internet Markets", July 2000, Research Paper, WCFIA Fellows Program 1999/2000, Harvard University (Weatherhead Center for International Affairs), p. 29.

[348] "Towards a new Framework for Electronic Communications Infrastructure and associated services", COM(1999)539.

introducing significant changes to the 1998 Package,[349] main reasons of which can be specified as 'adaptation of existing legislation towards convergence', 'introduction of wide-spread Internet applications', and 'elimination of *de facto* monopolies after full liberalisation', etc.

As the initial step, the Commission issued a Recommendation,[350] where the Commission recommended the implementation of full unbundling by Member States, on 31 December 2000 at least. In this regard, the Commission set out detailed guidance to assist national regulatory authorities on fair regulation of unbundled access to local loop, in particular with regard to pricing issues, technical conditions and consultation procedures.

Under the unbundling scheme, the Commission took a further step and proposed a Regulation for unbundled access to the local loop in accordance with the Lisbon Summit.[351] Notably, after a soft regulation, i.e. Recommendation, the Commission issued a Regulation which is an instrument rarely used at the Community level for being directly applicable in the Member States without transposition.[352]

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[349] The Open Network Provision (ONP) measures constitute the so-called "*1998 package*" of legislation, which were issued during the transition period along the way for a fully harmonised and a liberalised EU market in field of telecommunications.

[350] "Commission Recommendation on Unbundled Access to the Local Loop", C(2000)1059, 26 April 2000. http://www.europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/comgreen/-index_en.htm

[351] Proposal for a Regulation of the European Parliament and of the Council on unbundled access to the local loop, adopted 12 July 2000 Com(2000)394. http://www.europa.eu.int/information_society/-topics/telecoms/regulatory/new_rf/index_en.htm#ull
The conclusions of the European Council of Lisbon of 23 and 24 March 2000 note that, for Europe to fully seize the growth and job potential of the digital, knowledge-based economy, businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services. The Member States, together with the Commission, are called upon to work towards introducing greater competition in local access network before the end of 2000 and unbundling the local loop in order to help bring about a substantial reduction in the costs of using the Internet in the Lisbon Summit. (*cited in* the Regulation 2000/2887, Preface)

[352] The reason for preferring such a harsh measure is presumably stemming from the perception that the development of Internet in Europe is insufficient in comparison to USA. In the Preface of the Regulation 2887/2000, the legal justification for issuing a Regulation concerning unbundled access to the local loop is divulged as follows:
"In accordance with the subsidiarity as set out in Article 5 of the Treaty, the objective of achieving a harmonised framework for unbundled access to the local loop in order to enable the competitive provision of an inexpensive, world-class communications infrastructure and a wide range of services for all businesses and citizens in the Community cannot be achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved by the Community. In accordance

In fact, for reaching regulatory objectives, unbundling policies have been preferably put into effect by EU Institutions, while there are alternative access technologies such as cable networks, broadband wireless local loop, satellite technologies, etc. (See the Table 2.)

Table 2: Access Technologies (Source: Chris Doyle, (2000), "Local Loop Unbundling and Regulatory Risk", *Journal of Network Industries*, Vol. 1, p. 41)

Access Platform	**Technologies**
Twisted Copper Pair	Analogue modems, ISDN (Integrated Services Digital Network), xDSL (generic family of Digital Subscriber Lines capable of expanding capacity on copper wire)
Optical Fibre	High bandwidth services direct to home or kerb
Cable Television	Cable modems allowing bi-directional traffic
Wireless	Cellular (GSM), UMTS (Universal Mobile Telecommunications System – broadband cellular), Narrowband wireless (DECT, Digital Enhanced Cordless Telephone), Broadband wireless (LMDS, Local Multipoint Distribution Service)
Satellite	VSATs (Very Small Apperture Terminals), LEOs (Low Earth Orbiting Satellites)

Given the so-called access networks, there principally exist a number of alternatives other than using the incumbent's local loop, among which, cable television networks would be deemed the most prominent access platform. However, this is not the case, because cable networks require technical adaptation in order to be used for telephony.[353] Other alternative networks include electricity cables entering the subscriber's premises and radio links; but since these forms of access are not commercially developed, they do not offer an immediately available competitive alternative for the bulk of telephone users.[354]

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with the principle of proportionality as set out in that Article, the provisions of this Regulation do not go beyond what is necessary in order to achieve this objective for that purpose."

[353] Exceptionally, in UK, cable networks were built out not only with the usual co-axial cable for the supply of television services, but with an additional twisted copper pair with the intention that it might be used for telephony. There is no other equally successful example in EU as regards cable TV connections, especially in the context of using cable network for a wide range of services such as cable telephony, internet, etc.

[354] J. Kalliala, "Market Definition Under the EC Competition Law in the field of Voice Telephony", 2000, PILC Student Paper, Brussels, p. 39. For a comparative analysis of the access technologies in context of their costs, speed and ubiquity, see Chris Doyle, "Local Loop Unbundling and Regulatory Risk", *Journal of Network Industries,* 2000, Vol. 1, p. 33-54; M. Bourreau and P. Dogan, "Service-

One of the main reasons behind the regulatory preference in favour of mandatory unbundling policies is the fact that, the only networks which have been developed nation-wide in each of the Member States were local loops (local telecommunications networks) at that time. In fact, alternative infrastructures (i.e. cable television, satellite, wireless local loops) do not generally offer the same functionality and ubiquity, and this made local telecommunications networks to a significant degree, non-substitutable against other access technologies. In view of these reasons, local loop unbundling was deemed the most effective way allowing new entrants to compete with incumbent operators under the same conditions in offering high-speed Internet and multimedia applications based on broadband technologies and was initiated by the EU policy makers immediately after liberalisation.

2.6.2 Introduction of New (2002) Regulatory Framework

In response to the conclusions of the European Council of Lisbon of 23-24 March 2000 and the results of the public consultation on the 1999 Communications Review of the Electronic Communications Sector, the Commission proposed in July 2000 a package of measures for a new regulatory framework for electronic communications networks and services. The new package consists of five European Parliament and Council Directives under Article 95, one Commission Directive adopted under Article 86 and one Commission Decision on a regulatory framework for radio spectrum. The following legislative documents are included in the so-called package (2002 Regulatory Framework):

1- Directive (2002/21/EC) on a Common Regulatory Framework, OJ L 108, 24.4.2002.

2- Directive (2002/19/EC) on Access, OJ L 108, 24.4.2002.

3- Directive (2002/20/EC) on Authorisation, OJ L 108, 24.4.2002.

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based vs. Facility-based Competition in Local Access Networks", *Telecommunications Policy*, 2001, Vol. 25, Issue. 3, p. 167-184 and Lixia Li, "Local Loop Unbundling: International Experiences and Implications for China", December 2002, University of Strathclyde, (MSc Thesis)

4- Directive (2002/22/EC) on Universal Service and Users' Rights, OJ L 108, 24.4.2002.

5- Directive (2002/77/EC) on Competition in the Markets for Electronic Communication Services, OJ L 249/21 16.09.2002.

6- Directive (2002/58/EC) on Data Protection and Privacy, OJ L 201/37, 31.07.2002.

7- Decision 676/2002/EC on a Regulatory Framework for Radio Spectrum Policy in the European Community, OJ L108/1, 24.04.2002.

The new legislation aims at creating a single framework for all electronic communications networks and services. At the Global Internet Summit which was held in 24 May 2000, Commissioner Liikanen defined the major goals expected from the new Package.[355] These are (i) simplification and clarification of the existing framework aiming at bringing the number of regulatory measures down to 6 from 20 (Directives), (ii) introduction of greater flexibility in the framework, (iii) adaptation of the 1998 Package in the light of technological developments and convergence of markets and (iv) introduction of greater competition in particular within the least competitive segment of telecommunications network, the local loop of incumbent operator.

Given the so-called policy objectives, the new Framework, aiming at adaptation to the changing needs of electronic communications sectors in the Internet age, consolidated the existing legal measures under six Directives, under which all transmission networks and services are covered under a single regulatory framework. This framework does not cover the content of services delivered over electronic communications networks.[356]

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[355] Herbert Ungerer, "Access Issues under EU Regulation and Anti-Trust Law - The Case of the Telecommunications and Internet Markets", July 2000, Research Paper, WCFIA Fellows Program 1999/2000, Harvard University (Weatherhead Center for International Affairs), p. 32.

[356] The term 'telecommunications' which was used in the 1998 Package has been replaced with the one 'electronic communications' in the new (2002) Regulatory Framework so as to include all transmission networks and services under the new Framework. Behind this change was inherent the aim of introducing the principle 'technology neutrality' under the new (2002) Regulatory Framework.

In order to answer the conditions of the growing convergence of telecommunications and broadband markets and the resulting requirement for a more flexible framework, predominance of the sector-specific rules has been set aside. That is to say, the new Framework is built on the main thrusts of competition law instead of the detailed *ex ante* rules which were the core of the 1998 Package. This key change has been spelled out in the Preface of the Framework Directive (Directive 2002/21/EC) clearly:[357]

> It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem.

The most prominent and supportive fact revealing the movement towards greater reliance on the competition law is the transformation of the concept 'Significant Market Power-SMP.' According to the old (1998) Framework, operators possessing a market share more than 25% in a relevant market were presumed having SMP and the concept of SMP played a major role under the asymmetrical regulation, where the access obligations used to be imposed to the operators having SMP. However, the concept of SMP in the new Package is redefined in line with the competition law principles, namely in accordance with the definition of 'dominant position'.[358]

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[357] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002 O.J L 108/33. (Framework Directive), Preface (at 27) Superseding role of competition law and the increasing need to a more flexible framework is rationalised in the paragraph 25 of the Preface of the Framework Directive, as follows:
"There is a need for *ex ante* obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power in the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) has proved effective in the initial stages of market opening as the threshold for *ex ante* obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities."

[358] Article 14 of the Directive 2002/21/EC (Framework Directive) reads as follows: "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers." This definition is almost the same as the 'dominant position' definition of which was

In line with the new definition of SMP, the new Regulatory Framework has adopted two procedures concerning 'market analysis' and 'market definition'.[359] The rationale of such an adoption is inherent in the competition law approach adopted by the 2002 Framework. This is why imposition, maintenance, or withdrawal of regulatory obligations such as mandatory access and/or unbundling is dependant upon the competitive analysis to be carried out in accordance with the Framework Directive under the new regime. Pursuant to Articles relevant to the market analysis and market definition included by the Framework Directive, the Commission issued a Guideline[360] and a Recommendation[361] according to which, relevant markets are to be defined in accordance with the principles of EC Competition Law.[362]

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established in the *United Brands* Judgment. (Case 27/76, *United Brands v. Commission*, [1978] ECR 207; See *supra* note 100).
In the new Framework, it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares, in contrast to the old regime. According to the new regime, national regulatory authorities should undertake a thorough and overall analysis of the relevant market before coming to a conclusion that the undertaking concerned enjoys significant market power (SMP). In assessing SMP, the following criteria are used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:

- overall size of the undertaking,
- control of infrastructure not easily duplicated,
- technological advantages or superiority,
- absence of or low countervailing buying power,
- easy or privileged access to capital markets/financial resources,
- product/service diversification (e.g. bundled products or services),
- economies of scale,
- economies of scope,
- vertical integration,
- a highly developed distribution and sales network,
- absence of potential competition,
- barriers to expansion.

[*cited in* the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)]

[359] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002 O.J L 108/33. (Framework Directive), Articles 15 and 16.

[360] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

[361] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks ad services, O.J. 8.5.2003 L 114/45.

[362] The market definitions in electronic communications sector were made by the Commission according to the Commission Recommendation of 11 February 2003 on relevant product and service markets. In the Annex of the so-called Recommendation, seven markets at the retail level, and eleven

Summarising, sector specific rules has a subsidiary role under the new regime where *ex ante* obligations are imposable only if effective competition does not prevail in the relevant market. In other words, under the new regime does appear no asymmetrical regulation without a detailed market analysis.

2.6.3 Assessment of the Recent Developments under EFD

The recent developments in EU have important implications with regard to application of the Essential Facilities Doctrine. Having evolved through the case-law, the Doctrine has culminated in the *Oscar Bronner*[363] case with important results that appealed to many practitioners and commentators. The appealing face of the Doctrine seems to have also influenced the Community Institutions.

As expounded in the first Section, the *Oscar Bronner* judgment draw a mile-stone in application of EFD, by bringing somehow restrictive principles such as 'indispensability' and 'non-substitutability' tests. After the combination of these tests with the further test 'non-duplicability' cited in the so-called judgment which has already been inherent in the US case-law, the Doctrine was strictly characterised and became more reliable. Since then, the main themes of the Doctrine have been incorporated as a part of the EC Competition Law. In some of the soft legislation particularly in the Access Notice, important criteria, i.e. the conditions for abuse of dominance and access obligations, are correlated with the Doctrine. In essence, the Access Notice regarded EFD as the central measure within the competition law tools with regard to third party access.

Whereas some soft legislation provides some details with regard to the 'essential facilities' notion, the binding measures, i.e. Directives, Regulations include implied remedies instead. Even the so-called binding provisions reveal the fact that some of the network components are of potential to be deemed 'essential facility', and

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markets at the wholesale level are determined in accordance with the Directive 2002/21/EC (Framework Directive).

[363] See *supra* note in 169.

thereby must be covered under access regulation. 2002 Regulatory Framework has a number of examples in somewhat hidden way, in this regard.

For instance, within the framework of Article 12 of the Access Directive, national regulatory authorities are empowered to impose obligations on operators to meet reasonable requests for access to, and use of specific network elements and associated facilities. For such an access obligation, a situation should be arisen where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect, (i) would hinder the emergence of a sustainable competitive at the retail level, or (ii) would not be in the end-user's interest.

According to the so-called Article, within the framework of access obligations, operators may be required *inter alia*:[364]

> (a) to give *third parties access* to specified network elements and/or facilities, including unbundled access to the local loop;
>
> ...
>
> (c) not to withdraw access to facilities already granted;
>
> ...
>
> (e) to grant open access to technical interfaces, protocols or other key technologies that are *indispensable* for the interoperability of services or virtual network services;
>
> ...
>
> (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
>
> (i) to interconnect networks or network facilities.

When the abovementioned obligation "granting open access to technical interfaces, protocols or other key technologies that are *indispensable* for the interoperability of services or virtual network services" is considered under EFD, an actual equivalence

[364] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Art. 12.

could be inferred between the Doctrine and the core of this requirement. However, any specific form of access is not given precedence in the context of mandatory obligations. This gives a large room for application of EFD in both implicit [in specific forms of access (*ex ante*) obligations] and explicit [through typical (*ex post*) enforcement of the Doctrine] manner.

Given the general understanding of the new (2002) Regulatory Framework, one can say that *ex post* obligations *via* explicit application of EFD have superior role over sector-specific obligations. Affirming such a perception, the superiority of *ex post* obligations is emphasised both in the Access Directive and the Framework Directive.[365] The Access Directive with the aim of optimisation of level of access obligations, devoted particular emphasis to the market analysis and cited the progressive transition from the detailed *ex ante* regulation to the less detailed *ex post* obligations, consonantly. It is worth quoting here the parts of the so-called Directive that are most relevant to EFD:[366]

> Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure forits own benefit, and the rights of other service providers to access facilities that are *essential* for the provision of competing services. Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused *on the basis of objective criteria* such as *technical feasibility* or the need to maintain network integrity ... The imposition by national regulatory authorities of *mandated access* that increases

[365] Since the responsibility of enforcement of both Access and Framework Directives is given to the national regulatory authorities and not to competition authorities; as regards electronic communications sector, the regulatory authorities are fully competent in imposing any (either *ex post* or *ex ante*) access obligations. Although competition authorities are equipped with the power to investigate abusive practices and 'refusal to grant access' cases, regulatory authorities under Article 8-12 of the Access Directive, are also empowered to remedy such cases *via* its respective tools specified therein.

[366] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002 O.J L 108/33. (Framework Directive), at 19 (Preface)

> competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term...

As could be seen, mandatory access scheme is transformed within the new Framework and is superseded with a type of 'exceptional' intervention aiming at removing the market distortions which are temporary in nature. The aim is to reduce *ex ante* sector-specific rules progressively as competition in the relevant market develops. When the competition becomes sufficiently effective in the marketplace, then mandating access to third parties in the form of mandatory unbundling, co-location, etc. would become quite limited. Thereby the application of EFD will most probably be given way in a wider range, as an *ex post* measure by nature. This is so because, along the technological and market developments within the telecommunications sector, no one could predict the extent to what the network components should be mandated for third party access. This fact entrusts a crucial role to EFD in the Internet Age, owing to its flexible nature. Thanks to the flexibility of the Doctrine, some network elements which are not currently deemed as an 'essential facility' could be opened to third party access by application of the Doctrine, in the future. In fact, there is always the possibility of arising of new bottlenecks (essential facilities) as a result of technological developments. And, such an occurrence may require an intervention where the new bottlenecks are not able to be defined in a precise form in advance. All these possible developments would make EFD more effective under the competition policies.

As a conclusion, though the Community Courts have not made any decision as regards application of EFD in field of electronic communications, under the new EU legislation is clearly recognisable an implicit adoption of the Doctrine which bear new appearance(s) of EFD in future. As will be discussed below, important signals are identifiable for the future envisioning of the Doctrine in not only telecommunications but also other neighbouring markets.

2.7 The Future Implications of EFD for Telecommunications Sectors

2.7.1 Convergence and Institutional Implications

As mentioned above, telecommunications markets have been undergoing a phase of rapid convergence with neighbouring markets, particularly since mid-1990s. The broadcasting, telecommunications and information technology markets are rapidly converging towards a single multi-media market in which TV operators supply voice telephony, telecommunications companies supply video images, and where the Internet is delivering both basic voice telephony and moving pictures on a commercial basis.[367]

While attention is generally concentrated on the convergence between telecommunications and broadcasting, the impact of convergence is easily seen also in other fields, i.e. between fixed-mobile communications, finance and telecommunications, etc.[368] At this juncture, in terms of access to the essential network facilities, two major consequences seem to emerge:[369]

First, new types of service providers will require new types of resources and access to new types of bottlenecks and bottleneck holders, ranging from sophisticated network resources to access to set-top boxes, conditional access systems, navigator software, AIPs (Application Programme Interfaces), and content rights,

Second, convergence threatens to outpace existing sector-specific regimes.
As the neighbouring markets converge rapidly, an increasing demand for high-speed Internet through new technologies such as DSL, upgraded cable television networks, etc. is witnessed. Within such fundamental changes, notably to say that the Internet is

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[367] Cowie, C. and C. T. Marsden (1998), "Convergence, Competition and Regulation", International Journal of Communications Law Policy, p. 1. Available at http://www.ijclp.org

[368] Herbert Ungerer, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", 13 November 1998, Florence, p. 15.

[369] Ibid.

at the very centre of crossing field of the converging markets.[370] The Internet has the potential to develop into the link between the current networks and the digital delivery systems of the future.[371] In fact, having a global and a pervasive nature, the Internet is of the central importance for building the Information society, as well.

Given the threatening face of the 'convergence' phenomenon, converging markets and services such as digital TV and other multi-media services will probably bring out major challenges for the existing regulatory regimes. The remarks of Herbert Ungerer have important implications about the relationship between the convergence and the future developments:[372]

> Convergence is driving infrastructure provision but it is also defining the future bottlenecks (essential facilities)...whether the band-width (broadband) explosion will happen, will entirely depend on the competitive conditions...Convergence can now not mean the creation of new super-monopolies – and this danger is very real. It is the immediate question underlying most current competition cases in the area.

Though not being new in telecommunications sector, emergence of new bottlenecks would be much more faced after a unique multi-media sector has evolved out of the converging markets. As Ungerer states, such an emergence is directly related to the competitive conditions in the market. In other words, a fateful situation occurs when a super monopoly possessing big market shares in each of the converging markets emerges and follows new strategies detrimental to new entrants and consumers. Convergence must not be deemed a bad fate through the future complexities, alone. That is to say, if a super monopoly begins to operate in the converged marketplace and an increase in competition breaches is observed, one might then, mention about a case of bottleneck situation emerged out of convergence.

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[370] See *supra*, p. 87 (Figure 5)

[371] Herbert Ungerer, "Competition in Telecommunications - the Regulators' Challenge", Asia Telecom 97 Forum, Singapore, 10.06.1997, p. 5.

[372] Ibid.

In case of super monopolies which have emerged out of the distorted competition in a converged environment, the question of institutional design of competition policies comes to the agenda of public authorities. In such a competitive failure, it is widely argued that sector-specific regulation may lack flexibility and lead to technological by-pass and regulatory obsolescence in a market as dynamic as digital television.[373] At this juncture, traditional approaches with regard to regulation of network industries might be challenged within the context of rapid technological developments.

In fact, considering the global nature of new electronic communications services such as World Wide Web and the growing face of convergence, it is unlikely that any detailed sector-specific regime for regulating access could satisfactorily ensure the regulatory objectives. Given the fact that sector-specific regulation is thought to be imposed to ensure a competitive and dynamic environment; competition law remedies must be recalled instead of sector-specific rules in the event of a converged marketplace that has arisen in the intersection area of competitive and dynamic sectors. That is to say, sector-specific rules must be progressively withdrawn after a competitive structure has been emerged and would rather be replaced with competition law rules. Considering that EFD is placed at the centre of the access measures under competition policies, all the markets and competition breaches might be assessed *via* a sophisticated interpretation of EFD in a converged marketplace, then.[374] In the light of above statements, EFD would be the most convenient competition law tool in a converged marketplace, owing to its adjustability to electronic communications markets which involve steadily changing needs.

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[373] Herbert Ungerer, "Competition in Telecommunications - the Regulators' Challenge", Asia Telecom 97 Forum, Singapore, 10.06.1997, p. 18.

[374] According to Ungerer, the very concept of private sector self-regulation of the Internet will make strict application of competition law indispensable for securing competitive access markets in order to prevent the emergence of new bottleneck (essential facility) holders at the level of the global telecommunications market. (See Herbert Ungerer, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", 13 November 1998, Florence, p. 23.)

2.7.2 The Role of EFD within the Technological Changes

In parallel with the technological and market developments which generally culminate with increase of technological bottlenecks, emergence of innovations and deployment of new technologies would naturally be a topic of agenda in competitive regimes. As Doyle points out, technological innovation is one of the two main drivers of convergence in global trends.[375] It should be noted that if neighbouring markets converge without adequate investment, in other words, when a convergence occurs in an inefficient manner, more complicated and unidentifiable anti-competitive behaviours may be witnessed in the marketplace. That is to say, unless investors are encouraged sufficiently, there appear undoubtedly competitive concerns that would arise from monopoly control(s) of bottleneck (essential) facilities after convergence which has evolved with the increase of technological opportunities.

At the EU level, a remarkable point in this regard is that the physical networks in most EU countries were constructed in the era of national monopoly, and in the aftermath of the removal of monopolies, a limited investment is undertaken in telecommunications sectors. In order to compensate lack of investment and foster competition at whole (infrastructural) level, building new networks must be encouraged, in actual terms. In this respect, when service-based competition reaches to an appreciable level, EFD must be interpreted narrowly as having been portrayed in the *Oscar Bronner* judgment. This is so, because the over-zealous application of the Doctrine has the potential seriously to undermine the incentive for firms to innovate.[376]

The Commission made it clear that it favours this approach in field of telecommunications. The Commission stated in its Communication Document on Cable TV Review that "From a competition policy point of view, convergence must be built on the development of a broadband base of pro-competitive infrastructures

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[375] Chris Doyle, "Local Loop Unbundling and Regulatory Risk", *Journal of Network Industries,* 2000, Vol. 1, p. 39. Available at http://www.cdoyle.com/papers/llurisk.pdf Other main driver of convergence is 'liberalisation', according to C. Doyle.

[376] A. Overd and B. Bishop, "Essential Facilities: The Rising Tide", European Competition Law Review, 1998, No: 4, p. 185

of telecommunications and cable TV networks."[377] Similarly, in Article 8 of the Framework Directive, 'promotion of competition in the provision of electronic communications networks' is specified as a policy objective of the new Regulatory Framework, and in the same Article, 'encouraging efficient investment in infrastructure and promoting innovation' is envisaged as one of the ways to reach this end.[378]

However, we are now faced a sharp decrease of investment in comparison to the years preceding full liberalisation, particularly in the context of fixed telephony networks. Under service-based competition, encouragement of new entries by the Commission through mandating access has led to a bias towards duplication of networks. Considering the fact that investment in local telecommunications networks would be unattractive, many investors turned their face to mobile communications. It is actually eye-catching that mobile technology is generally regarded as an authentic success of European industry when compared with USA.[379]

On the other hand, the incumbents acting in the local telecommunications markets beginned to face the competition of mobile and cable telephony as competitive substitutes to the local loops. Necessarily saying, cable TV is participating in the competition nearby mobile technology, with the advantage of being capable to provide multiple services including voice, data and video and cost advantages.[380] At the local access networks (level), there are also a variety of technology options other

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[377] Communication from the Commission on the Consultation on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, COM(95)158, 03.05.95., p.23. Available at http://europa.eu.int/ISPO/infosoc/legreg/16bar3c.html

[378] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002 O.J L 108/33. (Framework Directive), Art. 8.

[379] Martin Cave and Luigi Prosperetti, "European Telecommunications Infrastructures", Oxford University Press and the Oxford Review of Economic Policy, Vol.17, No.3, 2001, p. 425.

[380] However, in order for co-axial cables which are used in performing cable TV services to extend to other areas, i.e. cable telephony, internet, etc. a technical adaptation (upgrade) is necessary *via* additional twisted copper pair.

than cable TV, which reveal different characteristics and cost structures. (See Table 2, p. 118)[381]

In confrontation of the increase of alternative technologies, i.e. cable and satellite networks, local loop unbundling becomes more substitutable, especially in terms of broadband (high-speed) Internet applications. Thus, the perception that the local loops are essential facilities would be discounted against this picture. Correspondingly, the superiority of unbundled access to the local loop in provision of high-speed Internet might be challenged in time. In near future, non-substitutable and indispensable character of the incumbent's local loops would therefore be deemed unfounded.

Given the advantages and disadvantages of other access technologies, arguments alleging the 'essentiality' of local loop seem to be less meaningful, in terms of EFD. Another point that evades application of EFD in context of local access networks is related to the increase of network providers after liberalisation. Because of scale economies, alternative access infrastructure will typically able to be provided by new entrants without any need for regulatory support in a range of areas.[382] In Europe, there already exist many alternative access providers, among which cable television operators occupy an important place, and operators using other access technologies run comparatively less.[383] When the discussions on the 'non-substitutability' and 'indispensability' themes are reminded within the context of technological developments and radical changes after liberalisation of EU telecommunications

[381] Currently, most consumers can connect to the Internet from their home or small business premises through dial-up (narrowband) access at very low speeds. In the narrowband Internet access market, local loops may seem to be in the dominant position, because narrowband modems (with access speed up to 56Kbps) are the mostly adopted technology at present. Aiming at promoting advanced Internet and broadband services, different countries established different regulatory strategies among which, unbundling policies became the forerunner policy in the EU. (See *supra*, p. 117-118) However in the broadband Internet access, local loop based technology such as DSL and leased line (those with speed not more the 2Mbps) is challenged by other alternative broadband access technologies such as cable TV, fixed wireless access, etc. From that point of view, in particular, the ability to offer competitive video, voice, and high-speed data services of cable TV networks after an upgrading process has attracted non-incumbent operators to enter the cable television market.

[382] Chris Doyle, "Local Loop Unbundling and Regulatory Risk", *Journal of Network Industries,* 2000, Vol. 1, p. 41. Available at http://www.cdoyle.com/papers/llurisk.pdf

[383] Ibid.

sector, the strong face of EFD seems to be turned over. Such an interpretation may be done in line with recent developments; however this must be verified along with the recent legislative steps. When EFD is assessed under the new regulatory framework, somewhat a different conclusion could be inferred as will be mentioned below.

From this vantage point of view, two points are remarkable with regard to the Essential Facilities Doctrine. First, within the technological changes, the rapid increase of essential (bottleneck) facilities enables EFD to be used in a more consistent and wide-ranging way, thanks to the flexibility of the Doctrine. Second, while the access technologies are figured on the agenda of the regulatory policies, increasing alternative technologies gain importance and invoking EFD .becomes relatively needless. In spite of such a prediction, EFD would rather be deemed necessary for dealing with future bottlenecks, since most of the bottleneck situations and facilities are not easily identifiable for the foreseeable future, and EFD is adjustable to every technological change actually.

2.7.3 Complementarity & Superiority of EFD

Most of the debate so far has been in the EU preoccupied with how best to open incumbents' networks to third parties.[384] On the one side, everyone acknowledged the problems concerning third party access, and sought possible ways in order to resolve such problems. On the other side, compensation of insufficiency in investments and innovations comprised a macro policy problem to be tackled in time. Ideally, regulatory policies harmonise service-based and facility-based competitive strategies in an efficient manner. Therefore, in policy procurement, one ought to strike a balance between the incentives for deployment of innovative facilities and the obligations for access to already established networks.

Against the policy concerns regarding lack of investments, facility-based competition, increase of access technologies, etc. it can be supposed that the enforcement of EFD must be handled in a 'complementary' manner. Such an

[384] Martin Cave and Luigi Prosperetti, "European Telecommunications Infrastructures", Oxford University Press and the Oxford Review of Economic Policy, Vol.17, No. 3, 2001, p. 416.

approach also seems to be adopted in the Commission Guideline (2002/C 165/03) which was issued in accordance with the Framework Directive. This Commission Guideline includes important clues as regards the application of EFD under the new Framework. In the paragraph 81 of the so-called Guideline, emphasis is cited to the *complementarity* of the Doctrine:[385]

> ... In particular, the doctrine of 'essential facilities' is *complementary* to existing general obligations imposed on dominant undertaking, such as the obligation not to discriminate among customers and has been applied in cases under Article 82 in exceptional circumstances, such as where the refusal to supply or to grant access to third parties would limit or prevent the emergence of new markets, or new products, contrary to Article 82(b) of the Treaty.

Under the aspirations of stimulating high internet penetration and the development of e-commerce and interactive applications, determined regulatory steps had been taken to date by the EU Institutions. In this regard, the incumbents' local loop(s) were required to be granted for access on reasonable terms and conditions, in December 2000. However, as a result of liberalisation and growing convergence, there emerged a number of technological substitutes which paved way for new and cheap services in telecommunications sector.

Given the fundamental changes such as removed borders between markets, increased technologies for access and high-speed innovations, envisioning EFD in a cautious manner seems much more important than before. In renewing face of EFD, *simple but effective* criteria rather than technically detailed conditions must be emphasised. At this juncture, the key issue for the competent authorities, to resolve in EFD cases would simply become whether usage of alternative technologies or facilities is commercially or technically feasible.[386] Unless the alternative facilities are not

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[385] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), at 81.

[386] Martin Cave and Luigi Prosperetti, "European Telecommunications Infrastructures", Oxford University Press and the Oxford Review of Economic Policy, Vol.17, No. 3, 2001, p. 417. Inherent in

technically or economically feasible, then reliance on EFD would not be consistent with the core of the EC competition law principles.

The second line of justifications that evade application of EFD lies at macro policy reasons such as enhancing investment on infrastructure, promoting access technologies, protection of intellectual rights, etc. Through such reasons, facility-based competition might be initiated so as to take precedence over service-based competition by some policy makers. From the scratch, EU Institutions favoured service-competition consciously. In fact, the EU Institutions have made most of their decisions on the straight way of the service-based competition, which is predominantly inspired with notion of development of competition in services, rather than infrastructure. However, one can receive some important signals regarding lack of adequate investments within the 2002 EU Regulatory Framework, that give priority to facility-based competition in order to remove the imbalance already established in favour of service-based competition in the sector.

From that point of view, one can say that the *Oscar Bronner* judgment is proved after the recent changes. This seems so, because in the 43rd paragraph of the so-called judgment, does exist one of the main thrusts of EFD, making the distinction between the 'indispensability' and 'being less advantageous'.[387] According to this distinction, in order for a facility to be essential, establishing that the facility in question is less advantageous among alternatives is not sufficient at all. In fact, the indispensability and non-substitutability tests brought by the *Oscar Bronner* makes clear that EFD is not easily applicable to all 'refusal to deal' cases.[388]

Considering the market and technological developments together with the *Oscar Bronner* judgment, some conclusions are note-worthy here. Primarily, it is visible

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such a 'feasibility' analysis is the examination of harmful effects to competition arisen out of not granting access. This is why in any EFD case, the primary concern is related to the competitive impacts of the refusal of the essential facility owner.

[387] See *supra* note in 184.

[388] It is commonly accepted that since *Oscar Bronner* decision, it is hard to demonstrate that an infrastructure or a facility is 'essential' for the purpose of applying EFD. See *supra*, p. 52-58.

that 2002 EU Regulatory Framework adopted more flexible provisions related to mandating third party access. When the Access Directive is considered with other legal measures under the new Package, one can conclude that a less interventionist policy is encouraged in the new Framework. Under this policy, facility-based competition is seemingly given way as an alternative regulatory policy against service-based competition which has dominated the EU telecommunications policies so far.

Such an approach that envisages measures to restore the balance between the incentives to build new networks and to use existing networks re-shaped EFD, as well. As mentioned above, many provisions of the 2002 EU Regulatory Framework give path for the application of the Doctrine. However, the Doctrine seems to have been envisioned on a 'complementary' basis under the new Framework.

Though having not been referred clearly under the new Framework, one can extract some provisions related to EFD from the Access and Framework Directives that constitute the core of the new Framework. Notably saying, the philosophy and the regulatory tools of the new Directives are in compliance with EFD. Hereby, it must be reminded that the new Framework rendered equivalence between 'dominant position' and 'significant market power', and in determining access obligations competition law-based terms and obligations are for many times cited in the new regime. Among tools envisaged for mandating third party access, EFD is remarkable from this vantage point of view. That is to say, not only competition authorities but also national regulatory authorities could refer EFD in conferring access principles, because it lies at the area of intersection between sector-specific regulation and general competition law, and yield effective solutions. Therefore, it is possible to say that in future, the concept of 'essential facilities' will in many cases be of direct relevance in determining the duties of dominant operators in telecommunications sectors.

In addition, as emphasised above, converging markets would require the flexible nature of the Doctrine due to possibility of emergence of new bottlenecks, and this

fact might elevate EFD to superior level among competition policies. Furthermore, in this century that is involved with fast-moving changes such as Internet telephony, digital television, and other multi-media services, the need for the Doctrine would become more evident and urgent so as to supersede the application of sector-specific rules. Unforeseen changes in technology and steady convergence of markets reveal that network architecture in electronic communications sector become more complicated and require less stringent definition(s) of bottlenecks. As expounded above, sector-specific rules are designed according to the distinct features of each sector and do not have potential alone, to keep track of the rapid technological changes and increasing bottlenecks. Given the fact that EFD is quite flexible and adjustable to high-speed technologies and converging markets, it should be stated that the Doctrine is exactly capable to cope with bottleneck situations in future telecommunications sectors.

As a conclusion, the extension of competition law to telecommunications sector puts the Essential Facilities Doctrine in a 'key' situation at EU/national level. Actually, the Essential Facilities Doctrine represents the most effective tool of competition law in determination of access rules. It is obvious that access scheme will remain to lie at the core of the competitive measures in the field of telecommunications, and all these facts strengthens the superiority of the Doctrine in future telecommunications sectors.

CHAPTER 3

IMPLICATIONS OF THE ESSENTIAL FACILITIES DOCTRINE FOR TURKISH TELECOMMUNICATIONS SECTOR

3.1 EFD under Turkish Competition Law

Like the case in many European countries, the application of competition law is an integral part of free market economy in Turkey. Considering that competition policy focuses on the aim of realisation of two main purposes, namely, prevention of anti-competitive agreements and prohibition of abuse of dominant position, it is possible to say that the Turkish system conferred in the relevant legislation aligns with competition policy objectives in general. Articles 167 and 172 of the Constitution,[389] establish the fact that the economic choice in Turkey is free market economy that depend on some protectionist rules in fields of anti-trust and consumer rights.

In order to ensure both the implementation of the abovementioned Article of the Constitution and the harmonisation of the EC Competition Rules, the Law on the Protection of Competition No. 4054 was enacted in 1994.[390] After examining the definition, legal boundaries and the given examples of 'abuse of dominance' together with other prohibited practices, one can say that the Law on the Protection of Competition (hereinafter sometimes called 'Turkish Competition Act') largely

[389] Article 167 of the Constitution of the Republic of Turkey reads as follows: "The State takes necessary measures for ensuring and improving the sound and regular functioning of the markets for money, loan, capital, goods and services; it prevents, in markets, de facto monopolisation and cartelisation or those which shall arise by agreement". On the other hand, Article 172 of the Constitution reads as follows: "Since the protection of consumers is only possible in free market economy, conditions for free competition should be ensured, and cartels and monopolies should be prevented in compliance with the requirements of this market"

[390] Here it is particularly useful to refer the obligations under the Association Agreement (Ankara Agreement) of September 12, 1963 between Turkey and EEC. Article 16 of the Association Agreement requires that the principles conferred in the provisions of the Rome Treaty concerning competition, tax and the alignment of legislation be applicable within the association relationship.

depends on Articles 81 and 82 of the Rome Treaty. In fact, Turkish Competition Act identifies the prohibited practices, in particular agreements restricting competition (set forth in Article 4) and abusive practices (set forth in Article 6) almost the same as the referred Articles of the Rome Treaty do.[391]

For purposes of implementation of Article 6 (Article entitled 'Abuse of Dominant Position'), it is crucial to determine whether an undertaking holds a dominant position in the Turkish context. Article 3 of the Competition Act defines dominant position as "any position enjoyed in a certain market by one or more enterprises by virtue of which, those enterprises have *the power to act independently of their competitors and purchasers in determining economic parameters* such as the amount of production or distribution, price and supply". This definition is similar with the 'dominant position' definition of the *United Brands* judgment, which was also referred in other Community Court judgments and Commission decisions.[392] Another related issue that is not specified in the Turkish Competition Act is the procedure regarding 'market definition'. Market definition is a well-known, important step to reach to an abuse of dominant position in a case, and due to this fact it is detailed in

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[391] For the reason that the subject-matter of this part relates to Article 6 of the Law on Protection of Competition, that Article is worth quoting here:
"Abuse of Dominant Position

Article 6- Any abuse, by one or more enterprises acting alone or by means of agreements or practices, of a dominant position in a market for goods and services within the whole or part of the territory of the State, is unlawful and prohibited.

Abusive practices are, in particular, as follows :

a) To prevent, directly or indirectly, other enterprises in its area of commercial activities or practices which aim to impede the activities of the competitors in the market;

b) To make discrimination, directly or indirectly, by way of imposing dissimilar conditions for equivalent and same rights and obligations to the purchasers who have equivalent position;

c) To make the conclusion of contracts subject to the acceptance of restrictions concerning resale conditions such as the purchase of other goods and services or acceptance by the intermediary purchasers to display other goods and services or maintenance of a minimum resale price;

d) Practices which aim to distort competition in a market for goods and services by means of taking financial, technological and commercial advantages created by the dominant position in another market;

e) To restrict production, marketing or technical development thereby causing a disadvantage for the consumers.

[392] In the United Brands Judgment (Case 27/76, *United Brands v. Commission*, [1978] ECR 207.), the dominant position is defined as follows: "A position of economic strength enjoyed by an undertaking which enable it to prevent effective competition being maintained in the relevant market by affording it the power *to behave*, to an appreciable extent, *independently of its competitors, customers and ultimately consumers*."

the Communiqué No.1997/1 which was issued in accordance with the Law on Protection of Competition.

Having close relation to Article 82 of the Rome Treaty in the context of the principles concerning abuse of dominant position; Turkish Competition Act does not confer an explicit statement prohibiting a 'refusal to deal' with competitors or consumers.[393] Similarly, under the Turkish Competition Act does not exist a prohibitive rule on refusal to grant access to 'essential facilities'. However, there are a number of cases that illustrate the applicability of the Essential Facilities Doctrine under implementation of Article 6.

3.2 EFD Decisions in Turkish Case-Law

3.2.1 *Eti Holding* Decision[394]

The case surrounds the relationship between legal monopoly and essential facilities under competition law. Eti Holding is the sole operator in field of extracting, gathering, refining, manufacturing and marketing of boron products in the Republic of Turkey, in accordance with the Law numbered 2840. Enforcement of this Law has been entrusted to Eti Holding under a legal monopoly. Eti Holding is also a world-wide operator, controlling the share of %65 of the world's reserves.

Ceytaş A.Ş., a competing firm in the downstream (derivative) market, requested colemanite ore, a kind of boron raw material from Eti Holding in order to produce

[393] In terms of scope and purpose, Turkish Competition Act is in harmony with the Community Rules. Referring 'abuse of dominance' rather than 'monopolisation', and adopting the principle that being dominant in a relevant market is not *per se* unlawful reveal the fact that Turkish system depend on the EC Competition Law principles. However, the 'compensation of three times of the damage or the profit' rule set forth under the second paragraph of Article 58th which reads as: "In cases where damages arise from an agreement, or a decision or from the heavy negligence of the parties, the judge may, upon the request of the parties who have damages, decide on a compensation three times of the actual damages or three times of the profit gained or likely to be gained by the parties who caused damages." seems to be adapted from the Antitrust Law of US.

[394] Competition Board's Decision dated 21/12/2000 and numbered 00-50/533-295.

derivative colemanite. Eti Holding rejected to supply the requested raw material, and consequently Ceytaş A.Ş. brought the case before the Turkish Competition Authority. The Authority did not find an infringement of the Competition Act, holding that there did not appear a duty to deal in the colemanite market due to the legal constraints therein. In its decision, the Competition Board designated the 'derivative colemanite' market as the relevant market, implying that existence of the legal monopoly in the colemanite market justifies the 'refusal to deal', ironically. In reaching such a conclusion, the Board identified the essential facility with "unavailability of an alternative other than the inevitably needed facility that is owned by the dominant undertaking or impossibility of duplicating a new source economically and reasonably, in order to carry out a transaction" and pointed out that colemanite is the essential facility for production of final products such as glass, ceramic, etc.

Eti Holding decision is debatable from some respects, one of which relates to the interpretation of the Law numbered 2840 and Law on Protection of Competition. Scope of the Turkish Competition Act has been drawn in Article 2 of the so-called Act, and the focus is directed on "any undertaking operating or affecting the goods and services markets within the territory of the Republic of Turkey". On the other hand, Article 3 of Turkish Competition Act clarifies what an undertaking is for the purpose of Turkish competition law regime. According to the said Article, an undertaking is defined as "any natural or legal person who produces, markets or sells goods and services and who forms an economic whole, capable of acting independently in the market".

Thus, any undertaking - either public or private - carrying out an economic operation and/or affecting the goods and services markets within the territory of the Republic of Turkey falls under the scope of the Turkish Competition Act. In spite of the quoted statutory provisions, the Board refrained from challenging the refusal to supply of a public undertaking in *Eti Holding* decision. Although the reason for such a refraining stems from the existence of the legal monopoly, Turkish Competition Act is applicable to all undertakings irrespective of the nature of the undertaking

concerned. Therefore, *Eti Holding* decision is quite controversial for its interpreting the current legislation.

On the hand, there seem controversial points in market definition and reconciliation of essential facility with the relevant products, within the scope of decision. In the decision, a distinction between downstream and upstream markets has not been made clearly, whereas the case is quite suitable for such a two-fold determination of markets. The unclear approach on market definition is perpetuated in delineation of essential facility, as well. On the one hand 'colemanite' was specified as the essential facility, on the other hand 'derivative' but not raw colemanite was accepted as the product that constitutes the relevant market. In this context, a structural or operational link has not been established for the ultimate decision, namely neither a relationship between the market products and essential facility nor a link between essential facility and refusal to supply has been set forth in the decision.

However, the Competition Authority seemed to have affirmed the validity of the notion of 'essential facilities' in *Eti Holding* decision. Though an analysis has not thoroughly been done in terms of the criteria that apply to EFD, a distinct perspective giving way to the enforcement of the Doctrine could be observed within this decision.

3.2.2 *BİRYAY* Decision[395]

BİRYAY case illustrates a typical 'refusal to deal' case. In the case, holding a joint dominant position in newspaper and magazine distribution market, BBD and YAYSAT aimed at imposing more onerous terms and conditions to the competing newspapers and magazines, and for this end founded BİRYAY. BBD, YAYSAT and their joint venture BİRYAY reached a consensus to determine the distribution conditions, commission fees and other charges to be applied to other distribution companies within the Main Contract of BİRYAY. Thereafter, BBD and YAYSAT forced their dealers not to sell newspapers and magazines distributed by other

[395] Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333.

distribution companies, made some amendments to the applied distribution contracts, refused to renew existing contracts with some publication owners and transferred to BİRYAY the distribution activities of publications already distributed under the existing contracts. Against his picture, it was decided to open an investigation to establish whether there existed an infringement of competition in the context of Articles 4 and 6 of Turkish Competition Act.

The most prevailing characteristic of the newspaper and magazine distribution market is the existence of oligopoly between three undertakings that is strengthened through horizontal as well as vertical integration(s) within the markets for distribution (upstream) and publication (downstream). Prohibitively expensive costs for duplicating a distribution network and vertical integration between the already established companies made new companies' situation quite difficult in comparison to the incumbent firms.

In the case, the Competition Board was confronted with both an explicit refusal to deal and a discriminatory act that cause harmful effects to competition in the market. Thereby, the Board, finding that Article 4/a,b and Article 6/a,d were infringed with the so-called activities, imposed fines on BBD, YAYSAT and BİRYAY and obliged all municipality kiosks to sell all publications provided by all distribution companies, thus made it available for consumers to find any newspaper and magazine at final sales point.

The prohibitively expensive cost of duplicating a distribution network cited in the decision reminds the *Oscar Bronner* judgment. In fact, there appears a similarity between the nature(s) of the requested facility in the said two decisions. However, in *BİRYAY* case was held a joint dominance by three undertakings whereas Mediaprint was holding dominant position on itself in *Oscar Bronner* case. Another difference seems to emerge in relation to the 'essential' character of the facility in question. In *Oscar Bronner*, the distribution network was deemed substitutable with other means of distribution such as post, kiosk, etc. while any alternative way is hardly seen, on the part of the requesting party in *BİRYAY* decision. As a matter of fact, due to the anti-competitive agreement signed between the dominant distributing companies in

BİRYAY case, other companies would have been in a 'genuine strangehold'. This is so, because municipality kiosks were not able to sell already distributed newspapers and magazines under the said agreement, and could not renew their long-standing agreements according to the previous conditions. Hence, the conditions in *BİRYAY* seem harsher, comparing to those in *Oscar Bronner*, and the Board decision regarding *BİRYAY* case therefore has a sound basis in terms of criteria that apply to refusal to deal / EFD cases.

3.2.3 *ÇEAŞ* Decision[396]

ÇEAŞ is the last dated decision with regard to application of EFD in Turkish case-law. In the case, ÇEAŞ was the sole operator which was given concession to generate, transmit and distribute power within a specific area of southern Turkey. When Enerjisa, a firm acting in the market for power generation requested ÇEAŞ to transmit the power needed for generation, ÇEAŞ did not accept to make an agreement for transmission and did not provide interconnection for transmitting power. On the other side, ÇEAŞ refused to another undertaking named Toros which was operating as a power supplier on the basis of auto-generation. The said refusal had taken place with prejudice to the agreement made between ÇEAŞ and Toros in the year of 1999.

When the so-called undertakings claimed that the refusals of ÇEAŞ constituted a competition infringement under the Law 4054; the Board, in its decision, first held that ÇEAŞ was the dominant undertaking in the market for power transmission. After then, the Board pointed out that electricity is a non-storable product and for this reason, interconnection for power transmission and distribution during the process of generation is crucial for undertakings. After all, on the ground of the uniqueness of the power transmission, ÇEAŞ was held as the controller of the 'essential facility' in the downstream (power transmission) market. In other words, the infrastructure for power transmission was deemed a facility 'essential' to power generation in the case. Following the abovementioned assessment, the Board found that ÇEAŞ abused its

[396] Competition Board's Decision dated 10/11/2003 and numbered 03-72/874-373.

dominant position by delaying to meet the Enerjisa's requests for power transmission and thwarting the transmission of power on the part of Toros and by preventing the so-called undertakings from access to the essential facility in the market for power transmission.

The most remarkable points of the decision are reference to the essential facility and definition of the relevant market(s). Unlike the usual distinction in essential facilities cases, the decision conferred that the dominant undertaking abused its dominance in the upstream market which was defined as the market for provision of power generation. However, in general, owner of the essential facilities possesses monopoly/dominance at least in the upstream market and abusive practise usually take places in the downstream market. However, in this case, an adverse situation is confronted, where the dominant supplier controlling the essential facility in the downstream market (market for provision of power transmission) abused its dominant position in the upstream market. Regarding the 'essential' character of the transmission infrastructure which was deemed 'essential facility' in the decision, relevant points will be discussed in relation to other EFD cases in field of telecommunications.

3.3 EFD Cases in Field of Telecommunications

3.3.1 *TTAŞ* Decision[397]

TTAŞ Decision is highly important in terms of introduction of EFD into Turkish Competition Law. In the case, Türk Telekom (TTAŞ) acting as the legal monopoly in carrying out (fixed) voice telephone services as well as establishment and operation of all telecommunications infrastructure was accused of abusing its dominant position for several reasons. Accusations concentrated on charging its corporate users below the rates which it applied to its competitors, in field of providing broadband

[397] Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333.

internet access services. Not having an explicit EFD character, the case involved tariff-related abusive practices in particular, vertical price squeezing.[398]

Holding that Türk Telekom was dominant in the market involving the necessary infrastructures for the provision of broadband/narrowband internet access service, the Board found that Türk Telekom infringed Article 6 of the Turkish Competition Act, by abusing its dominant position through determining the charges of services provided under the name of TTNet to users, below the charges which it applied to competing undertakings in the same market. Besides, in the Board decision, some citations were made to EFD through references to the terms of the usage of the monopoly rights by TTAŞ. After referring the philosophy and the basic criteria that apply to EFD, the position of TTAŞ was examined in terms of the Doctrine in a rather superficial manner. As a conclusion, since TTAŞ has the control on access to end-users over cable-television and local telecommunications networks (which exhibit natural monopoly characteristics according to the decision) and it is considered unpredictably impossible to duplicate such networks; the services which TTAŞ solely provides were deemed convenient to be called 'essential facility' in the decision.

Another remarkable point expounded in the decision relates to the relationship between the Turkish Competition Authority and Telecommunications Authority (sector-specific regulator). After quoting the relevant Articles of both Turkish Competition Act and Telecommunications Legislation (Law No. 406 and 2813), it was construed that the powers of each Authority are uniquely designed and due to this fact, differ from each other in terms of scope, purpose and implementation. In

[398] Vertical price squeezing is a particular type of anti-competitive conduct that may be engaged in by incumbent operators acting in two or more 'vertical' markets, i.e. downstream and upstream markets. This form of conduct can occur when an operator with market power controls certain services that are key inputs for competitors in downstream markets, and where those same key inputs are used by the operator or its affiliates to compete in the same downstream market. If the incumbent decided to engage in vertical price squeezing, it could increase the price to competitors for the upstream input (i.e. dedicated local circuit rates in the context of TTAŞ case) – while leaving its downstream prices the same (i.e. prices for its own dedicated internet access services in the context of TTAŞ case). The effect would be to reduce or eliminate the profits of competitors and their profits would consequently be *squeezed*. To increase the squeezing effect, the incumbent could also reduce its downstream prices (for internet access).

defining the respective powers of the said Authorities, the rule *lex posterior derogate priori* (the law dated later instead of the law dated earlier applies to the case) was deemed inapplicable owing to both wording and the spirit of the Telecommunications Legislation. Moreover, it was not considered possible under the current legislation, that the Telecommunications Authority can investigate and conclude (with necessary remedies) the cases that involve breach of competition in telecommunications sector.

3.3.2 *Aria* (Roaming) Decision[399]

This decision constitutes the core of the case-law regarding EFD under Turkish Competition Law. The case relates to 'refusal to grant access' to their own respective networks by two GSM 900 operators (Turkcell and Telsim) towards a GSM 1800 operator (Aria) and seems to be totally built upon EFD.

In the case, there were three players, among which Turkcell and Telsim were granted GSM 900 licenses in 1998. Some years later in early 2001, Aria was awarded a GSM 1800 license and commenced to operate, however needed access to the existing networks of Turkcell and Telsim *via* making a roaming agreement,[400] since their parallel networks covered almost all the country and Aria's coverage was so limited at that time. However, Turkcell and Telsim refused to open their networks to Aria, in other words did not accept the conditions offered by Aria for roaming agreement.

In the decision of the Competition Board, the criteria set forth in US and EC case-law regarding EFD, respectively control of an (essential) facility by a dominant undertaking, inability of other competitors to duplicate the facility practically or

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[399] Competition Board's Decision dated 09/06/2003 and numbered 03-40/432-186.

[400] For the purpose of the Law No. 406, Roaming means "inter-systems conveyance which provides operation of services of an operator through the equipment of clients of another operator or which provides interconnection to another system, provided that certain technical compatibility exists" Roaming is a typical access agreement signed between (wireless, i.e. GSM) network operators or service providers to allow access by one service provider's customers to the network or services of another service provider located outside the service area of the first service provider.

reasonably, denial of use of the facility by the dominant undertaking (with substantial harm to competition), and the absence of a legitimate business justification for denial are referred and thereafter it is investigated if the so-called criteria have existed in the case or not.

The most important argument taken into account within the investigation was regarding the determination of access charges by Turkcell and Telsim at the very high rates which could potentially exclude Aria from competing and financing its investments whilst carrying out its services. The justifications of the respondent operators (Turkcell and Telsim) which consisted in technical and economic constraints were not considered legitimate by the Board. As a conclusion, it was found that the infrastructures of Turkcell and Telsim were deemed "essential facility" during the phase of entry of GSM operators into the market.

In parallel with the application of the Doctrine, whether there is abuse of joint dominant position was examined in the decision, as well. Upon holding that a (joint) dominant position was possessed by Turkcell and Telsim in GSM telecommunications infrastructure market, the said undertakings were found to have abused their joint dominance by refusing to make a roaming agreement with Aria. It was therefore established that Article 6 (a) of the Competition Act reading as "To prevent, directly or indirectly, other enterprises in its area of commercial activities or practices which aim to impede the activities of the competitors in the market" was infringed.

Subsequent to such a conclusion, taking the necessary remedies in order to restore the distorted competition, namely determination of technical and economic conditions to be applied in the case was given to Telecommunications Authority. Repeatedly (in the same manner as in *TTAŞ* decision), depending on the invalidity of the rule *lex posterior derogate priori* in the context of the relations between Telecommunications Authority and Competition Authority,[401] the decision conferred that the Competition Authority was entirely competent in terms of investigation and

[401] See *supra*, p. 144-145.

imposing a fine as regards the case. As was stated in *TTAŞ* decision, the conviction that each Authority are authorised on different legal basis and accordingly empowered with different tools was asserted in the decision. What's more, the decision conferred a strict delineation between the powers and responsibilities of each Authority, in which, power of sanction of Telecommunications Authority is dedicated only to the licensing breaches and breaches of Telecommunications Legislation not including a anti-competitive effect.

3.4 Assessment of the Turkish Case-Law in light of the Community Approach on EFD

Notably saying, Turkish Competition Board regarded EFD as a Doctrine relying on a stand-alone basis. At first glance, this seems to be in line with the EC case-law, particularly with the framework drawn with the second line of judgments, i.e. *T. Ladbroke, E. Night Services* and *O. Bronner* decisions. If the Doctrine is evaluated within the framework of these judgments, we face highly strict rules and a limited application. However, an over-zealous application of EFD is remarkable in the context of the Turkish case-law.

That is to say, pertinent infrastructure and/or services have easily been deemed 'essential facility' throughout Turkish case-law, so far. When the 'essentiality' criterion is considered as the core of EFD, one should characterise a facility within an 'essential' nature, in a cautious manner. This is so, because a Doctrine standing on a relatively uncertain term 'essential' needs to be delineated with clear-cut rules. In this context, nature and boundaries of the Doctrine as broadly construed in Turkish case-law recalls the early phases of EC case-law, but not the second phase of the Doctrine, in particular not the strict interpretation of the *Oscar Bronner* judgment.

In liberalisation periods of networked industries such as railways, airports, telecommunications, etc. the Community Institutions, particularly European Commission followed a comprehensive policy that aim at creating fully liberalised markets. Not only competition law measures but also other socio-economic remedies through the Common Community Policies were all directed towards this end in

1990s, and subsequent to these policies trans-national borders were started to be removed in the way of realisation of a European Single Market. EFD has been used widely in this process, and telecommunications sector became one of the foremost areas influenced by application of EFD. On the other hand, as telecommunications markets have been liberalised progressively, the need for applying EFD decreased relatively, at least an unfettered application was left behind in time. At the last mile of European case-law in *Oscar Bronner,* EFD has entered into a turning point where demonstration that the facility concerned is 'essential' depends on some difficult tests, i.e. indispensability, non-substitutability, etc. From this point of view, Turkey appears to be going forward through a quasi-European transformation, not having reached to the so-called last-mile, yet.

When the transformation of Turkish telecommunications sector is taken into account, the commentators and practitioners might respect approach of Turkish Competition Authority which usually incorporated an over-zealous application of EFD. However, a number of issues pointed out in Board decisions especially in *Roaming* decision are challengeable. As a matter of fact, the *Roaming* decision is a distinct decision in terms of EFD for revealing a unique implementation as well as having far-reaching results in the sector.

3.5 Assessment of EFD Decisions in Field of Telecommunications

Primarily saying, case-law regarding EFD in field of telecommunications is far less established under the Turkish Competition Law. Simply, neither clear-cut rules relating to 'essential facilities' nor the specific boundaries of the Doctrine are hardly seen in the Competition Board decisions. However, in order for EFD to be maintained and applied within the objective principles, precise and objective delineation of relevant conceptions rather than reference(s) to the EC case-law is strictly needed. This is why each antitrust case has its respectively distinct character and entails peculiar remedies, by nature.

In almost every essential facilities case under Turkish Competition Law, two specific (downstream and upstream) markets have been defined in accordance with the

Community rules. With regard to market definitions, European Commission took care to comply with the EC Competition Rules and urged not to sacrifice the competition law principles on 'market definition' to the rules of EFD. Confirming this attitude, not only in its decisions but also through the relevant legislation, the Commission called attention for market definition within the essential facilities cases. In this regard, distinction between the telecommunications markets under the downstream/upstream pattern was adopted by the Commission in the Access Notice.[402] Consonantly in Turkish telecommunications sector, through the *Roaming* decision, markets for provision of 'GSM services' and 'GSM telecommunications infrastructure' were specified as the two separate markets respectively deemed 'downstream' and 'upstream' markets.[403] Similarly in *TTAŞ* case, seven product markets were identified, among which some of which were including downstream products (generally regarding internet access services) some others were consisted in upstream products (generally regarding infrastructure needed for access to end-users);[404] and abusive practise had taken place through vertical integration between the so-called markets *via* restricting competition in the downstream (internet access) market.

In contrast with the arguments used in market definition, competition law tools used in order for reaching abusive practices appear quite subjective. Particularly in *Roaming* decision, the discussions surrounding refusal to grant access 'roaming' reveal a somehow subjective way of thinking. For instance, in arguing existence of abuse of joint dominant position in the case, oligopolistic market structure and (consequently emerged) market distortions are demonstrated as indicators for joint dominance. Such a demonstration seems to be built upon general evaluations rather than specific instances, in that, inflexible demand for GSM infrastructure, sunk costs incurred by new entrants and strong network externalities were shown as the basis of joint dominance. Afterwards, notion of essential facilities and abuse of joint

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[402] Commission's Access Notice on Application of Competition Rules to Access Agreements in the Telecommunications Sector (1998) O.J. C265/2 (1998) 5 C.M.L.R. 821, at 45. See also *supra* note in 305.

[403] Competition Board's Decision dated 09/06/2003 and numbered 03-40/432-186, p. 13-17.

[404] Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333, p. 21.

dominant position were interestingly merged in order for the ultimate decision. However, in proving that the GSM networks are *essential* to carry out GSM communications services, the 'indispensability' and 'non-substitutability' tests were not referred, depicting a contradiction to the strictly defined Community rules on EFD.[405] Given the *Oscar Bronner* criteria that apply to EFD; the economic and technical deficiencies, i.e. disadvantageous conditions regarding base stations, troubles related to huge costs of building infrastructure and difficulties arising out of delays, which were pointed out to have existed in the decision do not match with the strict requirements of EFD quoted above.

Besides, abuse of joint dominance accompanying application of EFD is hard to justify against the ECJ's attitude towards joint dominance. In *France v. Commission* case, the ECJ found that, while collective dominant positions could be taken into account (in the course of assessing a concentration under the MCR - within the referred case), the Commission had to show that the oligopolists "in particular because of correlative factors which exist between them, are able to adopt a *common policy* in the market and act to a considerable extent independently of their competitors, their customers, and also of consumers."[406] Regarding the *Roaming* case, in which the instances developed out of the falling negotiations between GSM 900 and 1800 operators, it is actually hard to verify the existence of an abuse of joint dominance, since it is not absolute that there was a common policy between the respondents (Turkcell and Telsim) in the case.

On the other hand, if GSM networks had been deemed essential facility, mandating access to such networks would have been justifiable under the sole application of EFD or through sector-specific regulation alone, but not through a combination of

[405] Revealing the so-called strictness, *Oscar Bronner* judgment established that in order for a refusal to grant access to be unlawful the following conditions must be met: (i) The refusal must be likely to eliminate all competition in the relevant market on the requesting party, (ii) The refusal must be incapable to be objectively justified, (iii) The facility in question must be *indispensable* in order for business of the requesting person to be carried on (inasmuch as there is "no actual or potential *substitute* in existence.").

[406] P. Larouche, "Competition Law and Regulation in European Telecommunications", Hart Publishing, 2000, p.371.

EFD and Article 6.[407] From this point of view, reaching an abuse of joint dominance by resorting to EFD means neither applying EFD nor invoking the arguments related to abuse of joint dominance is considered adequate on a stand-alone basis in the context of concluding a competition breach. Then, a unique but vague conception in the form of a 'joint refusal to grant access to essential facility as an abusive practise' is preferably used in the decision.

Another conflicting issue under EFD decisions in field of telecommunications (both in *TTAŞ* and *Roaming* decisions) relates to the overlapping powers of Telecommunications Authority and Competition Authority. The decisions seem to have solved this problematic issue by regarding the position of Competition Authority as equipped with all relevant powers and responsibilities in case of a competition breach. *TTAŞ* and *Roaming* decisions brought an exception to this general establishment in the event of arising of law breaches regarding Telecommunications Legislation, not resulting in an anti-competitive effect, including licensing breaches. According to the so-called decisions, other than the referred infringements, Competition Authority is deemed solely competent in investigating and concluding (with necessary remedies) the antitrust cases.[408]

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[407] It should be noted that Telecommunications Authority is also involved in the Roaming case, by playing a role as both a mediator and an arbitrator between the parties, independently of the investigation carried out by Competition Authority. In this regard, Telecommunications Authority ordered Turkcell and Telsim to allow Aria to make roaming through their own networks in accordance with Article 10/5 of the Law No. 406 which reads as follows: "Within the content of this Article, mobile telecommunications, data operators or operators of other services and infrastructure as determined by the Authority are also required to meet reasonable, economically proportionate and technically feasible roaming requests of other operators working in the same field for permitting the use of the customer equipment of the requesting operator on their telecommunication system." However, Turkcell and Telsim brought the Authority order to administrative and judicial courts as well as international arbitration courts, and the order was rendered ineffective through the ligitations that prolonged so much. After the said ligitations have concluded, in December 2003 and March 2004, the Authority respectively imposed fines to Telsim and Turkcell for the reason that they infringed the said Article. Though having risks of delaying that could arise from litigation,etc. the mandatory roaming under sector-specific might be considered more justifiable and effective in comparison to competition law measures. This is why the Article 10/5 of the Law No. 406 requires operators to meet reasonable, economically proportionate and technically feasible roaming requests in a clear and precise way.

[408] See Competition Board's Decision dated 09/06/2003 and numbered 03-40/432-186 (*Roaming* Decision), p. 27-33 and Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333 (*TTAŞ* Decision), p. 49-53.

However, as the Law No. 406 imposes the (*ex ante*) duty to make a roaming agreement under specified conditions (if the request in question is reasonable, economically proportionate and technically feasible), the *ex post* imposition of such a duty is to be deemed 'supplementary' in nature. In order to refrain from a duplication of sanctions that are imposable by the two Authorities, a concrete and an efficient co-ordination must be held between the authorities. Then, one of the authorities must take action ahead in a case co-operating with the other thoroughly, namely take the responsibility of investigating the EFD case as the forerunner authority.[409] Given the fact that, competition authorities are deprived of adequate information regarding the relevant sector and the market players, sector-specific regulators must in general be empowered to act with the necessary tools and remedies, including imposition of fine in a case. However, in some cases, the situation might be in opposite, where competition authorities would be more equipped with the relevant data and more capable to solve the case. In such cases, competition authorities must take the initiative first and coordinate with the sector-specific authorities, substantively.

With regard to solving 'overlap' problems and securing collaboration between the authorities, there exist a 'Coordination Protocol' between Turkish Competition Authority and Telecommunications Authority which was signed on September 23, 2002 by each party. In the Protocol, procedures and principles were determined for ensuring cooperation and coordination in transactions conducted by both Authorities in the telecommunications sector, such as investigations, mergers/acquisitions, exemptions/negative clearances and secondary regulations.[410] In the working of the Protocol, whereas the main concern should have been to discuss and determine what should be done and who should take action in a case, this does not seem to have been conducted in *Roaming* case. While the Protocol would be expected to have been applied effectively, duplication of procedures and sanctions shows a failure in terms of co-ordination in *Roaming* case.

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[409] Unfortunately, such a roadmap has not been followed in the *Roaming* decision and overlapping powers of each Authority have crashed with each other and the same amount of fines were imposed to the respondents (Turkcell and Telsim) by both Competition Authority and Telecommunications Authority.

[410] http://www.rekabet.gov.tr/word/rapor2002/dort.doc

In order for such administrative failures not to be faced, a governmental body (a public authority equipped with reconciliatory as well as administrative powers)[411] would settle the co-ordination problems. In such a settlement, the so-called public authority must conclude the conflict with an applicable and effective solution incorporating the determination of executive powers of each authority, relevant tasks in imposing fine and designating requirements for exchange of information, in each case. Briefly, how to initiate and coordinate the investigation must be clarified in the course of a case within the settlement procedure. In order to clarify the nature of the case and the boundaries of (overlapping) powers of each authority, the so-called authority would rather be invested with adequate, effective and objectively justified powers so as to make ultimate decision on the issue regardless of political concerns.

Importantly saying, though having different legal basis, methods (*ex ante-ex post*) and procedures; the ultimate objectives of the two types of remedies are the same, actually. That is to say, both competition law remedies and sector-specific rules aim at securing effective competition in a relevant market. While the said authorities impose on undertakings 'duty to grant access to third parties' *via* different tools and powers, the content and consequences of such duties in many occasions do not differ, by nature.

For instance, in *Roaming* case, the duty (being either in *ex ante* or *ex post* nature) to grant access to GSM network on part of the dominant undertaking(s) means the same burden in actual terms. Hence, it is not acceptable that the powers of each authority conferred by Turkish Competition Act and Telecommunications Legislation (Law No. 406 and 2813) are different from each other in terms of scope, purpose and implementation because of their respective legal basis. Rather, in order to complement each other and to reach the most effective decision, the two authorities

[411] In order for coordination problems especially those incorporating overlapping powers and responsibilities to be prevented, a state unit such as a State Planning Department or a similar authority drawing and maintaining public strategies regarding competition policies would be empowered to make the ultimate decision in case of conflict. In addition, irrespective of any conflict, some coordinative steps would be taken under the leading role of the so-called public authority, *inter alia* concrete lines would be drawn between the legal powers, some legislative measures can be taken in order to eliminate forum shopping.

must act in a co-operative manner to solve the competition breaches, especially in EFD cases. The leading role must be left one of the authorities according to the features of the case, by taking some criteria, i.e. collection of data, close relation to the case, etc. into account and in case of a conflict regarding overlapping powers, a high-level body, namely a re-conciliator must engage in the case so as to solve the conflicting issue.

As mentioned above, *Roaming* case was the most debatable essential facilities case among others in Turkish case-law. Other than some points which are common with *TTAŞ* case such as 'overlap' problems between the authorities, the main challenge towards *Roaming* decision was its evaluation of the 'essentiality' on part of the GSM networks. Here is worth noting another related fact that, the *ÇEAŞ* decision which concerned an abusive practice in the field of electricity (power) transmission reminds a crucial point in EFD analysis. As stated above, investigating the 'essential' character of a facility constitutes the core of EFD analysis and necessitates cautiousness; however while such a cautious analysis is confronted in *ÇEAŞ* decision, an over-zealous and seemingly unstable application of EFD does exist in *Roaming* decision. For instance, it must be noted that whereas the indicating factor would have been the examination of technically and economically feasible alternatives, such an examination had not been conducted in a detailed manner, in *Roaming* case. Accordingly, *Roaming* decision incorporated sceptical and vulnerable points in the light of both EC and Turkish competition law principles.

As to *ÇEAŞ* case, the situation was different due to a wide range of constraints, *inter alia* lack of concession for power transmission, inability to generate power without transmission, geographical restraints, etc. which made access to and interconnection with the transmission infrastructure actually indispensable, on part of the requesting parties. That is to say, whereas - in *ÇEAŞ* case - without access to transmission infrastructure any power supplier could not carry out its activities and the duplication of such an infrastructure is indeed impossible, there does not appear a similar indispensability and non-duplicability in the context of GSM networks.

Briefly saying, though having recognised EFD under the Turkish Competition Law, Turkish Competition Board decisions established far-reaching results and many challengeable points which are still on the agenda of the competition law practitioners and commentators and need to be re-evaluated in respect of competition law principles.

3.6 Implications of Applying EFD for Turkish Telecommunications Sector

In recent years, major structural changes and significant regulatory reforms, including a considerable progress in opening the telecommunications services to competition has taken place in Turkish telecommunications sector. Turkey has for the last few years accelerated liberalisation process in its telecommunications markets, through which one of the major driving factors was the influence of EU candidateship. A brief history of the Turkish telecommunications sector would constitute a beneficial basis for further explanations.

Until 1994, Turkey's telecommunications networks and services were developed and offered through a state-run monopoly (under the name of 'PTT'). With the enactment of the Law No. 4000 in June 1994, the first step in the way of liberalisation of the sector was taken. In accordance with this Law, PTT was divested into two parts and telecommunications services started to be carried out by a separate company, Turk Telekom.[412]

At the same time, the mobile communications market was opened to competition progressively, with two operators (Turkcell and Telsim) performing under revenue-sharing agreements with Türk Telekom in 1994. Internet service providers also started to appear under service contracts with Turk Telekom. Such developments led to amendments of the Law No. 4000 to liberalise some parts of the telecommunications services. Under the new regime, two GSM 900 operators were granted 25-year licences in 1998.[413]

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[412] With the Law No.4000, it was made possible to privatise 49% of Turk Telekom, as well.

[413] With the amendments to the Law No.4000 and after being awarded the two GSM 900 licenses, Turkcell and Telsim began to perform their activities under a separate license, being released from the revenue-sharing agreement with Turk Telekom.

In January 2000, a new Law (Law No. 4502) separated policy and regulatory functions in the sector by establishing an independent regulatory body, the Telecommunications Authority. Through this legislation, Turk Telekom was released from the state control (under the situation of KİT - a quasi public company) and was rendered a different status as a 'private company'.[414] One of the major steps taken *via* this Law is the envisaging of the date of full liberalisation. According to the Law, the monopoly (of Turk Telekom) in fixed voice telephony and establishment and operation of infrastructure would be expired by 31st December 2003.[415]

Legal monopoly in fixed telephony services and telecommunications infrastructure was removed by 31st December 2003, and at that time liberalisation process started up. Correspondingly, besides GSM operators and ISPs (Internet Service Providers) a number of companies named 'long distance carriers' were granted licenses. In spite of commenced liberalisation with recently licensed operators, it is possible to say that *de facto* monopoly of Turk Telekom is being perpetuated for the time being. This is why in many relevant fields of telecommunications is still continuing the lack of alternative networks, which makes Türk Telekom's infrastructure to a significant degree, non-substitutable. Besides the lack of efficient alternatives to the current access networks, Türk Telekom's established consumer inertia as well as its vertically integrated companies acting in different markets makes difficult to reap the benefits of liberalisation, in general.

It is known that awarding a number of licenses regarding cable TV, infrastructure, and fixed wireless access is under the agenda of Telecommunications Authority for the near future. However, in order to remove the concerns regarding effective competition in Turkish telecommunications sector, a number of steps are remaining to be taken by Telecommunications Authority. In particular, during liberalisation process, it must be ensured that effective entries by new operators be accomplished

[414] However, all shares of Turk Telekom has remained to be owned by Treasure.

[415] The Law No. 4502 also stipulates that the monopoly of Turk Telekom will not be last more when more than 50% of Turk Telekom shares are privatised even before the end of 2003.

in telecommunications markets. Thereby, Telecommunications Authority's main task seems to be facilitating new entries under reasonable, transparent and fair conditions. In fact, any perfect licensing is not adequate on its own, and it is always – even in competitive markets – needed to take remedies for granting access to third parties on reasonable terms and conditions. In this perspective, one can say that at the centre of Turkish telecommunications sector lie the problems with regard to access and interconnection.

Against this picture, not only Turkish Competition Authority but also Telecommunications Authority must be ready for any kind of competition breaches, potential bottleneck cases, etc. As implied above, the existing access problems will be able to increase during the process of liberalisation, and such an increase would raise the necessity of a more sophisticated competition law that is to be in harmony with sector-specific regulation. Such a harmonised and co-operative approach between the relevant authorities is indeed necessary for preventing duplication of procedures, imposition of excessive burdens, etc.

In a liberalised environment, new companies, innovative services and strategic alliances could restrain the incumbent operators from monopolistic behaviours. However without necessary measures, liberalisation would not bring out the desired outcomes and in bottleneck situations there would be competitive failures due to the lack of an established access regime. In order to reap the benefits of the liberalisation on a country-wide basis, an efficiently harmonised access regime must be set out and accompanied with the relevant competition policy tools, *inter alia* application of EFD drawn with clear-cut rules. From this point of view, EFD would represent the competition law measures as one of the effective tools for opening 'essential' network elements to third parties, in the liberalisation process. During this process, Turkey proved its determination in demonstrating that the dominant undertakings would be required to share its assets with the third parties, where necessary. In particular, Turkish Competition Authority reached important decisions as regards application of EFD in field of telecommunications, most of which served as mile-stones in realm of competition policies.

Harmonising its legal framework with the EU Directives on the one hand, and coping with the access problems on the other hand, Turkey is undergoing a period that is difficult but quite similar to the transitional period of EU on the way of full liberalisation. In this situation, the issue of access and interconnection in telecommunications sector would constitute a major test for the application of EFD in Turkey as had been the same in the EU context. In order to overcome the bottleneck problems surrounding access and interconnection scheme, EFD would thus be seen as an important tool not only by Turkish Competition Authority but also Telecommunications Authority.

Considering that within the transition period from monopoly to fully completed liberalisation, sector-specific regulation has a potential to play a key role in ensuring competitive markets, Telecommunications Authority, as the sector-specific regulator might resort to EFD as an alternative tool, under its access regime. However, such a resorting would probably be in the form of implicit regulations rather than explicit formulations. That is to say, the philosophy of EFD would favourably be embedded into the sector-specific regulations such in regulations related to access and interconnection, unbundling the local loops, etc. where the 'essential' character must be conferred as the foremost criterion. In addition, the harmful effects of any denying access to an essential network facility must be cited, and in lack of any legitimate justification network access must be mandated on reasonable and fair conditions. Briefly, the criteria that apply to EFD must be handled as a basis for sector-specific obligations in reasonable terms.[416]

Summarising, after the removal of legal monopoly in Turkish telecommunications sector by the beginning of 2004, as experience of other countries have shown, the market is expected to show dynamic growth in terms of new market entry,

[416] A provision of the German Telecommunications Act can be demonstrated as an example for using EFD in telecommunications regulation. Under Article 33 of the German Telecommunications Act, any provider of telecommunications services considered to possess a dominant position is required to grant its competitors on the relevant market non-discriminatory access to essential services it uses internally or sells to the market "to the extent that they are essential".

investment and development of services.[417] Acceleration of new entries and services are of potential to generate more competition breaches and problems related to access and interconnection. Essential Facilities Doctrine is capable to cope with such (bottleneck) situations, especially in the environment of converging markets and services. Given the fact that liberalisation speeds up convergence and innovation, EFD is convenient to be placed in a more central position in Turkish telecommunications policies.

[417] OECD, "Regulatory Reform in the Telecommunications Industry-2002", p.34. Available at http://www.oecd.org/dataoecd/40/13/1840797.pdf

CHAPTER 4

CONCLUSION

Essential Facilities Doctrine has been one of the note-worthy developments in EC Competition Law in the 1990s, which is usually deemed a notion originated from the 'refusal to deal' cases. Whereas some commentators state that the Doctrine is vital for liberalisation aims, some others underpin the perception that the Doctrine is only a useful label, being a specific form of 'refusal to deal' cases. However in EC Competition Law, it is widely accepted that the Doctrine is regarded as an unspecified type of the application of Article 82 of the Treaty, aiming at removing the danger that could arise out of refusal of dominant undertakings to grant essential resources to third parties. Hence, in EC case-law EFD is consciously invoked in order to neutralise the abusive control of dominant firms over facilities which are called 'essential' or 'indispensable'.

When the initial stages of the Doctrine-based case-law are taken into account, there did not appear even an implicit formulation of EFD and the first essential facilities cases are generally acknowledged as a refusal to deal case. In these cases, it became clear that the refusal to supply an already *existing* customer/competitor a facility which is an input for sale of retail products, amounts an abuse of dominant position. For reaching such a conclusion, a number of pre-conditions including 'lack of objective justification' and 'elimination of competition on the part of the competing firm' were to be met. In these cases, there was not a reliance on the notion 'essentiality', which is the core of EFD.

Following this line of case-law, the *Magill* case came into agenda of Community Institutions, which concerned a dispute involving a refusal to supply a *new* customer and prevention of emergence of a new product in the relevant market. In that case, the ECJ rendered a decision regarding anti-competitiveness of a 'refusal to grant a license', which attracted so much attention. The ECJ found three exceptional

circumstances that would support a finding that the refusal to license an intellectual property right is abusive. Briefly, the rationale of the judgment was based on the notion of reservation of a secondary market by denying access to a facility which is an *indispensable* raw material for production of a new service.

The notion of 'indispensability' called upon in *Telemarketing* and *Magill* judgments took its appropriate form to EFD in *B&I Line* and *Sea Containers* cases. In this second line case-law, 'essential facility' is explicitly cited by the Commission, whereas such an articulation has not been put forward by the European Court of Justice. The referred Commission decisions emphasised the superior position of harbour owners and heightened their obligations for their dual role (as acting both in the downstream and upstream markets).

EFD was used in a different guise in the context of a number of decisions which concerned railways. The Commission characterised rail services '*essential*' in *HOV SVZ/MCN* case, and referred them as being 'necessary' for rail transport operators in *European Night Services* case. Finally in the *Eurotunnel* case, the Commission found that the Channel Tunnel was an essential facility, and each half of the Tunnel was to be used separately by the parties to the case. The remedies of the Commission in the lastly cited two cases resemble those of a sector-specific authority, revealing the Commission's ambition for applying EFD in a wide spectrum. Notably, such an ambition is manifested explicitly in the Commission decisions during the liberalisation period.

In the *Atlas* judgment was established an explicit link between legal monopolies and essential facilities. In spite of the existence of ONP (Harmonisation) Directives which include sector-specific rules, it seems that the Commission was prone to use EFD in order to impose specific obligations, i.e. non-discrimination, access requirement, where necessary. The conditions imposed by the Commission under EFD cases exhibited a more structural nature, when the relevant markets consisted of network industries i.e. telecommunications, railways alike the situation in *European Night Services* case.

The attitude of the Commission in such cases gave the way for using EFD as a competitive measure for mandating third party access. One can see this rationale behind the issue of the Commission's Access Notice. After the enactment of Full Competition Directive (Directive 96/19/EC), Access Notice was issued as an important legal instrument for triggering access obligations, in order for enabling the liberalisation to be more effective. The main concern of the Commission was prevention of emergence of *de facto* monopolies after the removal of *de jure* antecedents. In fact, during the transition period from monopoly to full liberalisation of European telecommunications sector, the Commission gave a critical role to EFD so as to apply the Doctrine in a wide-spread manner. In this context, the Access Notice might be regarded as an explicit formulation of post-liberalisation policies, which included an over-zealous application of EFD. Through the application of EFD in an over-zealous manner, the balance to be drawn between the rights of the firms seeking access and obligations of incumbent firms was shifted in favour of the parties seeking access, namely towards service-based competition.

However, in the *Oscar Bronner* judgment, ECJ set a higher threshold to be met in an EFD analysis, and facility-based competition is appropriately given way by this decision. The ECJ provided a three-part test under which refusal to grant access would constitute an abuse in the event that (i) the refusal to provide access to the facility would be likely to *eliminate all competition* on the part of the undertaking requesting access; (ii) access to the facility should be *indispensable* for the competitor to carry on its business *in that there is no actual or potential substitute* to the facility in existence; (iii) the refusal is incapable of being *objectively justified.*

In the *Oscar Bronner* judgment, the ECJ filled up the term 'indispensability' with the 'non-substitutability' test, going beyond the preceding decisions. The Court went further and held that for an access to be capable for being regarded as indispensable, it would be necessary at the very least to establish that it is not economically viable to create for an 'objective competitor' comparable in size to the holder of the alleged essential facility to replicate or duplicate the facility in question.

After the *Oscar Bronner* judgment, although one can regard EFD as having a stand-alone basis under EC Competition Law, it became clear that demonstrating that a product is *indispensable* or *essential* is not easy within the meaning of the Doctrine. More precisely, the *Oscar Bronner* judgment proved that invoking EFD in a bottleneck situation is not always acceptable; that is to say, the notion of 'essential facilities' must be assessed within a stronger, analytical and economics-oriented framework. Under such a detailed analysis, *the short-term and long-term benefits* of opening an essential facility to third party access must be thoroughly investigated. In this context, if access to production, distribution or sale of a facility is permitted too easily, there would be no incentive for a competitor to develop competing facilities and innovations. In aftermath of such a decision made after a superficial analysis, competition is able to be increased in the short term, whilst it would probably be reduced in the long term. Therefore, *access to essential facilities should be mandated upon a detailed analysis taking the short & long term conflicts and the balance between service & facility-based competition into account.*

Without a detailed analysis, access to allegedly essential facilities could be ordered under some findings, depending solely on theoretical and comparative analysis which is not reliable from a whole perspective. Such findings could be counterproductive against sector-specific regulation where detailed conditions are developed for mandating new entrants for access to incumbent's facilities. The strict conditions specified by sector-specific regulation may contravene with the conditions determined through application of competition law by referring to EFD. Therefore, competition authorities and sector-specific authorities must always be in coordination with regard to anti-competitive practices which have elements that are suitable to be assessed under EFD. In this coordination, *detailed intervention of sector-specific authorities should be mitigated with the manoeuvrability of competition authorities.*

With respect to the co-operation between competition authorities and (sector-specific) regulatory authorities, not only relevant data, but also powers of the authorities must be exchanged, when necessary. In case of a bottleneck situation; one

of the referred authorities must take initiative as the forerunner body according to the distinct characteristics of the each case. In this regard, the 'Coordination Protocol' signed between Turkish Competition Authority and Telecommunications Authority could be given as an unsuccessful example in terms of distribution of tasks, prevention of duplication of sanctions, etc. In the so-called Protocol, there exist only provisions regarding exchange of relevant information, but not detailed guidelines for implementing overlapping measures.

Ideally, each authority must take into account the 'essential' character of the resource concerned, feasibility of providing facility, etc. when making decision as regards liability for third party access. In an essential facilities case, focus should be directed on special characteristics of the case, according to which each case would be handled with respective remedies. If the case entails more telecom-specific analysis, sector-specific regulator must lead the case, in otherwise situation(s) competition authorities must take the initiative. In case of conflict, a high-level administration (a public authority invested with extensive powers) must make the ultimate decision regarding the handling of the case.

In context of handling essential facilities cases, sector-specific authorities would seriously conduct EFD analysis in their decisions as well as take necessary steps to adopt EFD in their respective regulations, at least in an implicit manner. These propositions might be called onerous, however they must be taken into account in order to remove any inconsistency between the procedures and the decisions of the competent authorities.

Within the evolution of EFD from the *Commercial Solvents* judgment to *Oscar Bronner* judgment, it can be concluded that EFD has potential to bring some added value by providing an analytical framework to extend the range of Article 82 EC beyond its traditional boundaries. The expansive as well as the adjustable nature of EFD is able to be seen along the transition from the classical (refusal to deal) cases to bottleneck (essential facilities) cases. Whereas, in the former cases could be seen two easily identifiable markets, in the latter cases market definition becomes more

difficult due to the geographic and regulatory constraints. That is to say, in essential facilities cases does not exist trade of goods or services, rather does opening of network facilities to third parties.

Considering multiple types of networks and convergence between services, one can not distinguish markets from each other under the classical formulation of competition law. Thus, a market for access to a facility could not be specified clearly in each case, particularly in cases regarding networked industries. Some instances, which are also subject to regulatory oversight, i.e. unbundled access to the local loop, incorporate the difficulties of relying on classical tests of competition law. In such difficult instances, EFD has the capability to resolve (access) problems and cope with the bottleneck situations. One can also observe in such cases that dominance becomes less meaningful, and is likely replaced by the notion of *essentiality* as the key competitive concern.

The application of EFD within the telecommunications sectors must be examined in the general context of the rapid evolution of the markets. Potentially anti-competitive behaviours generated by these rapid changes pose new challenges for competition law and policies. Such challenges could be eliminated neither through the sector-specific regulation alone nor *via* application of the classical methods of competition law. In this framework, EFD would possess a central importance and have the power to respond to the needs of the converging telecommunications markets.

In time, the more situations of convergence among rapidly changing markets are confronted, the more apparent the constraints of the sector-specific regulation become. *Considering that the convergence between changing markets entails the convergence of legal remedies, EFD would be the leading rule in the converged marketplace.* Accordingly, future implications of the changing markets would increase the importance of EFD against the strict application of sector-specific rules.

While under sector-specific regulation, local loop unbundling is seen as the single way allowing new entrants to compete with incumbent operators at local access

markets, and is deemed an essential facility for new entrants either implicitly or explicitly, the situation can be changed from the point of view of EFD. Given the alternative access technologies recently emerged at local access level, (i.e. digital satellites, cable, and wireless local loop) EFD which offers a wider perspective in terms of global changes and 'convergence' phenomenon could deny the 'essential' character of the incumbent's local loop. The superiority of EFD as a tool of competition law is excellently spelled out within the words of H. Ungerer, which is quoted below:

> Without going into further detail, *suffice it to say* that competition law - in the form of a developed essential facilities concept - can adjust, in a flexible manner, to situations of convergence, by adjusting the market definitions used and without changing either the regulatory framework or its basic principles.[418]

In essence, in EU telecommunications sector, the need for EFD is becoming increasingly important due to the increased *convergence* of industries such as fixed and mobile telecom, CATV, Internet, satellite etc. Since liberalisation accelerates convergence, EFD also becomes a necessary measure in telecommunications markets which are undergoing liberalisation process, such in candidate countries for EU membership.

Being one of the candidate countries, Turkey rapidly digitalised telecommunications networks and started to liberalise the services that are carried out through the so-called networks. In parallel with the liberalisation process, a higher degree of competition in provision of telecommunications services prevailed in the sector. However, an efficient access regime that is to be harmonised with the competition law rules is clearly became needed in terms of ensuring effective competition and prevention of *de facto* monopolies. Confirming this need, Turkish Competition Authority resorted to EFD in a number of its decisions to date. One of them

[418] H. Ungerer, "The arrival of competition in European telecommunications", p. 19, 3rd European Forum on the Law of Telecommunications, Information Technologies and Multimedia: Towards a Common Framework, Luxembourg, June 19, 1998.

concerned charging of an incumbent operator (Türk Telekom) its corporate users below the competitive rates in field of providing broadband internet access services. The other was related to an abuse of joint dominance through refusal to grant access to the GSM network(s) that were deemed 'essential facility' to carry out GSM telecommunications services.

Particularly in the latter case, there appear a number of points detrimental to diligence of the Doctrine. Among them, interpretation of the criteria 'indispensability' and 'non-substitutability' in the context of GSM networks constitutes the core point which seems to have depended on an unstable basis. This is why under the Community Rules, more strict and clear-cut rules had been developed as regards application of EFD. In particular, when the criteria of the *Oscar Bronner* judgment are taken into account, it is hard to mention about a coherent application of EFD. Rather, an over-zealous application of EFD is remarkable in *Roaming* case.

When the referred decisions are considered with the ongoing period of liberalisation, some positive evaluations regarding the attitude of Turkish Competition Authority could come into mind. However, since the GSM markets are entirely liberalised and the new entrants have other possibilities than access to the existing networks which are called essential facility, the Roaming decision is quite debatable. Against another decision of Turkish Competition Authority, *ÇEAŞ*, it is indeed controversial that the claimant could not carry out its services in absence of roaming. This is why the facility in the latter (*ÇEAŞ*) decision was the transmission infrastructure without access to which, any power supplier could not generate power by itself, whereas the GSM operators could perform their activities - even under less advantageous conditions - without access to the existing networks in the former (*Roaming*) decision.

Against this picture, it is advisable that a more coherent but less ambiguous application of EFD is favourably to be adopted under the Turkish Competition Law. Not only Turkish Competition Authority but also Telecommunications Authority must recall attention towards a cautious application of EFD. In EFD cases, both

authorities must act in a collaboration and make their decisions in aftermath of a more detailed and economics-oriented analysis.

Considering that actual and potential access problems could constitute insuperable barriers to new entries during the liberalisation period, EFD must be used as an alternative tool in eliminating such problems, in an effective manner. Not in case-by-case analysis but also in implementation of the relevant legislation (i.e. sector-specific rules), EFD would simply be deemed applicable. This is why EFD might highly contribute to opening non-duplicable networks to competition in field of telecommunications, when applied under clear-cut rules.

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