

## ABSTRACT

The essential facilities doctrine compels under certain conditions a dominant undertaking to make facilities, which gives it a commercial advantage, available to its competitors against a reasonable remuneration. The doctrine has its origin in US antitrust law where it can be traced back to the beginning of the century. It was initially subject to a restrained application and only evoked against companies which had a genuine stranglehold of the markets through their control of facilities such as railway tracks, pipelines or telecommunication cables. The doctrine was however adopted in to EC competition law during the last decade and showed soon the same signs as could be perceived in the US: the doctrine began to be applied in a large scope of cases and some scholars argued that it was running out of control. The reasons for this development was firstly that the concept of facilities was extended to intellectual property, information and services and secondly that the test applied to show when a facility is essential lacked in coherence. Hopes were therefore raised when the ECJ faced the doctrine for the first time in *Oscar Bronner v Mediaprint* (Case C-7/97) where the plaintiff demanded access to the defendant's newspaper distribution system arguing that the scheme constituted an essential facility. The dissertation examines whether the judgment in effect limited the future application of the doctrine and will see if a more cogent framework can in the light of the ruling be laid down for the process of finding a facility to be allegedly essential.

The dissertation follows the doctrine's development from its origin in US antitrust law and the doctrine of refusals to deal in EC competition law to the early application in a number of Commission decisions where the first problems could be perceived. A more prudent approach was laid down by the CFI in *European Night Services* (Cases T-79/95 and 80/95) and this development was followed by the ECJ's ruling in *Oscar Bronner* which may prove to constitute the rein the critics of the earlier application of the essential facilities doctrine demanded. The ECJ declared that access to the facility must be a sine qua non so that a refusal eliminates all competition from the rival, but the greatest effect is likely to emerge from its definition of economic infeasibilities. There usually is a sufficiently high duplication cost and it was earlier unclear during what circumstances it would be held not to be a viable alternative to circumvent the facility due to economic obstacles. The ECJ declared that it is only economically infeasible to duplicate the facility if it would not be a viable alternative even if there was a market for another company of equivalent size to the dominant undertaking. For example, in *Oscar Bronner* it should not be feasible for the plaintiff to organise a distribution system of its own even if it had the same market share as Mediaprint, i.e. 71 per cent. This is likely to limit this range of cases to situations where the facilities were constructed under conditions not related to a competitive market, basically facilities earlier controlled as statutory monopolies.

The judgment can however not be seen as the final word on the essential facilities doctrine but constitutes only the beginning of an inevitable process to define its applicability. The dissertation proposes therefore a test which may provide a suitable framework for such a future restrained application while taking into account the impact of *Oscar Bronner*. The test requires, in order for the facility to be essential, firstly that the denial of access constitutes a total and permanent barrier to market entry, duplication shall thus not be a viable alternative. Such infeasibilities may basically emerge from economic, physical or legal obstacles. The dominant undertaking and the applicant shall be actual or at least potential competitors so that granting access is likely to substantially improve competition in the market. The market shall thus not already be competitive, if several companies

already competes on the market will admission of another one usually not improve competition. The market of interest is ancillary, vertically related to the level where the facility is found. The doctrine will not lead to a suitable solution if the applicant primarily seeks access to the latter market, usually in order to become part of a joint venture. Admitting the applicant access shall be likely to substantially improve competition in the market and a valid business reason to refuse access shall always save the dominant undertaking. This test may be applied in order to examine whether a facility is essential but it does not automatically also indicate what shall be considered to constitute “facilities”. These should therefore be limited to infrastructures, services and people whose expertise is indispensable for using the facility. Products should in this context follow the traditional doctrine of refusal to supply while information and intellectual property should only constitute facilities during exceptional circumstances as those found in *Magill*.

Even if *Oscar Bronner* illuminated the doctrine and the test may give some guidance several dim aspects remain and one example is its potential application under Article 85. Section 1 of the Sherman Act has been evoked against essential facilities in several cases and an application of the doctrine does not seem to constitute any great problems as far as horizontal agreements, primarily joint ventures, are concerned. Vertical agreements are more ambiguous, but since the anti-competitive effects often are even greater in these cases may the doctrine provide a suitable solution when the agreement between the owner of the facility and the applicant’s competitors prevents an equitable sharing of the facility.

Another obscurity concerns what terms the controller of the facility is obliged to grant the applicant access. The opinions contrasts between access on operating costs which has principally been applied by the Commission and the Efficient Component Pricing Rule which means that the owner shall charge an access price that compensates it for the losses caused by allowing access. The Commission’s strict position is emphasised by its opinion that owners must separate the management of the facility to an independent body in order to grant access on fair and non-discriminatory terms. The defendants argues in this context often that it violates their right to property and there indeed seems to exist a conflict between competition and ownership. These two problems may however to a large extent be avoided by an application through sector specific legislation. The present statutory application have been largely successful since it may be better determined whether it is an essential facility, it is possible to relate the conditions to the specific industries and access terms can be dealt with by industry experts rather than by a court in a liability trial.

Thus the judgment does not mean the end of the essential facilities doctrine. It has a *raison d’être* in its own right and this may in particular be the case in the process of breaking up monopolies. This concerns above all areas such as telecommunications, energy and transport where, even if liberalisation is carried through, the markets are often still controlled by a near monopolist or a group of strong companies. Access in these cases will still have to be granted following the doctrine after *Oscar Bronner* and thus it provides a suitable framework for a further liberalisation of these markets. And even if problems remain the difficulties to a material degree may be avoided through an application of the doctrine in the form of sector specific legislation.

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## **ABBREVIATIONS**

BOCCRF	Bulletin Officiel Conseil de la Concurrence et de la Repression des Fraudes
BR	British Railway Board.
CCITT	Internal Telegraph and Telephone Consultative Committee
CFI	Court of First Instance
CH	Chancery Division
Cir.	Circuit
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
DG	General Directorate
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Courts Reports
EIPR	European Intellectual Property Review
ENS	European Night Services
EuzW	Die Europäische Zeitung für Wirtschaftsrecht
FSR	Fleet Street Reports
F. d.	Federal Reporter
IATA	International Association of Travel Agents
IP	Intellectual Property
MMC	Monopolies and Mergers Commission
OFT	Office of Fair Trading
OJ	Official Journal of the European Communities
SNCF	Société Nationale des Chemins de fer Français
UK	United Kingdom
US	United States of America

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#### COUNCIL AND EUROPEAN PARLIAMENT DIRECTIVES

#### COMMISSION NOTICES, RECOMMENDATIONS AND PROPOSALS

#### JOINT DECLARATION

**“When the essential facility principle is better known, it will lead in many cases to parties entering into contracts which they otherwise might not have done, without the transaction costs of litigation or Commission procedures.”**

**John Temple Lang. Speech 17 of October 1996 at the Fordham Corporate Law Institute.**

## 1.0 INTRODUCTION

An undertaking holding a dominant position may have a duty to deal with its actual or potential competitors if a refusal to do so would amount to an abuse of that position. This is a well established principle in EC competition law which has primarily consisted in a duty to supply existing customers. The doctrine of refusals to deal does, however, also comprise more controversial aspects. May, for example, the competitor instead of demanding to be supplied, exact access to the source where the products are produced or the services provided? This dissertation will examine the essential facilities doctrine (or “the doctrine”) which under certain conditions compels dominant undertakings to make facilities, which give them a commercial advantage, available to competitors for a reasonable remuneration.

Essential facilities is a fairly novel concept even for such a modern subject as EC competition law. It has however been present in substance for a longer period than might be presupposed if one merely examines explicit references to the doctrine in case-law. It is neither a unique EC phenomenon but an integrated part of several Member States’ competition law, indeed, in some cases even laid down in legislative provisions. Furthermore, considering that several Member States have pledged themselves to consistently interpret their competition acts as to diminish the disparity vis-à-vis the EC law,<sup>1</sup> the doctrine is of immense importance also on a non-Community level. This implies that the signs that the doctrine has shown of running out of control may have serious influence both at the Community and national level.

### 1.1 Statement of the problems

The essential facilities doctrine has its origin in US antitrust law where it can be traced back to the beginning of the century. It was applied in a restrained way until recent decades when it began to be invoked in support of a large scope of litigations where the plaintiffs sought admission to such diverse “facilities” as hospitals,<sup>2</sup> joint ventures<sup>3</sup> and technological information about the competitors’

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<sup>1</sup> See e.g. Section 60 of the UK Competition Act and Bernitz, Ulf. *Den svenska konkurrenslagen*. Stockholm 1996. Page 28.

<sup>2</sup> Makar, Scott D. *Florida State University Law Review*. 1994 Winter. 913.

<sup>3</sup> *Aspen Skiing Co. v Aspen Highlands Corp.* 472 U.S. 585 (1985). See section 2.2.



products.<sup>4</sup> The doctrine evolved in the EC rapidly in a similar direction during recent years, with cases showing even more far-fetched features. The concept of facilities left the infrastructures it originally adhered to, and the test applied to show when the facilities are essential lacked coherence so that dominant undertakings had to make the facilities available even if the applicants appeared to be able to compete without access to them. Voices were therefore raised to evoke a reining in of the doctrine and many saw the *Oscar Bronner* case<sup>5</sup> as an opportunity for the ECJ to implement such a more cautious approach. The expectations were further raised by Advocate General Jacobs' opinion which suggested a more prudent application of the doctrine. The aim of this dissertation is to examine whether the *Oscar Bronner* judgment in effect limited the future application of the doctrine, and will also see if a more cogent framework can in the light of the ruling be laid down for the process of finding a facility to be allegedly essential.

## 1.2 Material, limitations and method

The material used consists primarily of ECJ and CFI judgments, Commission decisions and, when suitable, opinions of the General Advocates. Judgments from national courts, including US courts, and competition authorities will also be examined when it is necessary to do so. The remainder of the material used consists basically of legal articles and EC statutes. The dissertation will however not to any larger degree deal with the statutory application of the essential facilities doctrine, in particular sector specific legislation in the telecommunications area. Neither the implication of law and economics will be thoroughly scrutinised although both aspects will be subject to some attention. The solutions to the problems stated above will be sought in the context of two “invariable constants” consisting of the doctrine of refusals to deal and the essential facilities doctrine in US antitrust law. A comparison of the doctrine's application in EC competition law with these constants may prove to show the effects of *Oscar Bronner*.

## 1.3 Outline

The dissertation is divided into four substantive parts. The first examines the origin of the doctrine which partially derives from US antitrust law and partially from the doctrine of refusals to deal in EC competition law. The second part renders the application of the doctrine in the EC from the earlier Commission decisions to the judgments by the CFI in *European Night Services*<sup>6</sup> and the ECJ in *Oscar Bronner*. The following part of the dissertation consists primarily of a proposed test which may be applied in order to find whether a facility is essential. The discussion of the different prerequisites of the test provides also an appropriate framework for an examination of the doctrine as such. The essential facilities doctrine is primarily applied under Article 86 of the EC Treaty, but the section will examine if not Article 85 may not be of interest as well. The third part will also deal with the question of under what terms access has to be granted, whether the fundamental right to property might be relevant and finally the statutory application of the doctrine. The fourth and final

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<sup>4</sup> *Berkey Photo v Eastman Kodak Co.* 603 F.2d 263 (2nd Cir 1979). See section 2.2

<sup>5</sup> *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft GmbH & Co. KG and Mediaprint Anzeigengesellschaft GmbH & Co. KG.* Case C-7/97 [1998] ECR I-0000.

<sup>6</sup> *ENS and Others v Commission.* Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 [1998] ECR II-00.

part will present the results and conclusions that may be drawn from the earlier discussion. It will try to answer the question whether the essential facilities doctrine remains unaffected after *Oscar Bronner*, if its applicability has been limited or if there indeed is any future for the doctrine at all.

## **PART I. ORIGIN AND CONTEXT**

### **2.0 THE ORIGIN OF THE DOCTRINE**

The origin of the essential facilities doctrine is, as many other parts of the EC competition law, found in US antitrust law where it can be traced back to the beginning of the century. The doctrine emerged in both legal systems as a separate issue within the vast doctrine of refusals to deal but did not follow a totally consistent evolution. Despite this fact, it is nevertheless necessary to depict the doctrine's origin in the US in order to fully comprehend its present status in Europe.

#### **2.1 An example: United States v Terminal Railroad of St Louis**

The first case alleged to concern access to an essential facility was *Terminal Railroad*.<sup>7</sup> Since this case shows many of the characteristics frequently found in cases concerning the essential facilities doctrine, it may be convenient at this stage to see in what context the doctrine may apply, although not all the facts in the case are such as to make it a perfect archetype.<sup>8</sup>

St Louis is situated on a number of hills which makes it impossible to approach from the west in any other way than by a narrow valley. Due to this circumstance, all railroads coming from the west had to use this route and this meant that only one joint terminal facility was constructed. The facilities (trackage as well as terminal facilities) were then acquired by a number of railroad companies who controlled access to these facilities through their jointly owned company Terminal Railroads. The government argued that this suppressed competition, since the companies could deny potential rivals access to the facility and there were no alternatives for the rivals to compete. The Supreme Court held that the control of the facilities was not per se an infringement since competitors in most cases would be able to build their own facilities. That was however impossible in this case due to the physical situation in and around St Louis. The court declared that when "the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all the companies under compulsion to use them violates" the Sherman Act.<sup>9</sup> The companies were therefore obliged not to use their monopoly power oppressively and were required to provide equal and non-discriminatory access to all competing railroad companies.

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<sup>7</sup> *United States v Terminal Railroad of St Louis*. 224 U.S. 383 (1912).

<sup>8</sup> It concerned for example an agreement between a number of companies under Section 1 of the Sherman Act and not the more commonly applied Section 2 concerning monopolisation.

<sup>9</sup> *Supra* note 8. At 409.

The reader may from this draw the conclusion that the essential facilities doctrine applies where an infrastructure, which is indispensable for competition and cannot be duplicated due to physical circumstances, is controlled by a person who refuses potential rivals access to the facility. This is, indeed, the basic case in which the doctrine is applied but, as we shall see, it has evolved to into a quite complex and far reaching creature, as it now comprises cases with less easily identifiable features.

## 2.2 The essential facilities doctrine in US antitrust law

The doctrine has in US antitrust law primarily been applied under Section 2 of the Sherman Act (the US antitrust act) which is the equivalent of Article 86 of the EC Treaty. The provision states that:

[e]very person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons to monopolise, or attempt to monopolise, or combine or conspire with any person or persons to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.

As with a dominant position under Article 86, monopoly as such is not illegal but if the subjective aspects show that the company has the intent or purpose to monopolise the market, then it infringes Section 2 of the Sherman Act. It is not necessary that a monopoly in reality has been attained, it is sufficient that there is a dangerous probability that that is the case. Article 86 thus parallels Section 2, but a difference is that while the former concerns abuse of a dominant position, the latter is concerned with the manner in which the company acquires, maintains or extends a monopoly.<sup>10</sup> Section 2 is thus infringed if monopoly is gained, maintained or extended by improper conduct.<sup>11</sup> Another difference is that the list of abuses in Article 86 is non-exhaustive but on the other hand more specified than Section 2.<sup>12</sup>

Refusal to grant access to an essential facility is one aspect of the doctrine of refusal to deal. Refusals to deal are treated in US antitrust law under section 2 and the subjective element mentioned above is therefore of interest here. The courts have often examined the question of purpose or intent to exercise a monopoly power using a rule of reason approach<sup>13</sup> but in certain circumstances a refusal to deal may be a *per se* invalidation.<sup>14</sup> This may be the case if the defendant's market share is substantial and its practice gives the competitors a particularly severe competitive disadvantage.<sup>15</sup> If

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<sup>10</sup> Areeda, Philp. Antitrust Law Journal. Vol. 58. 1990. 841. Page 846.

<sup>11</sup> Shenefield, John H and Stelzer, Irwin M. The Antitrust Laws. A Primer. Washington D.C. 1993. Page 41.

<sup>12</sup> But that does not necessarily mean that the scope of application under the section is broader. See Hawk, Barry. E. (1998)1 ECLR 53. Page 78.

<sup>13</sup> Neale, A.D. and Goyder D.G. The Antitrust laws of the U.S.A. Third ed. Cambridge 1980. Page 94.

<sup>14</sup> Warden, Gregory J. St Louis Univ. Law Journal. Vol. 32 Part 2. 1987. 433. Page 437. The Supreme Court has started to require that the plaintiff shows that the refusal is anti-competitive before applying the *per se* rule. Makar, Scott. D. Florida State Univ. Law Review. Winter 1994 913. Page 917.

<sup>15</sup> Blumenthal, William. Antitrust Law Journal. Vol. 58 Part 3. 1989. 855. Page 865.

the *per se* rule is inapplicable then, as stated, the courts examine the refusal under the rule of reason. This is generally done by either the intent test or the essential facilities doctrine.<sup>16</sup> The first obviously concerns the subjective aspects of the refusal but also the anti-competitive effects that the refusal may cause and the defendant's conduct. It is thus both a subjective and objective test. The cases where this test is applied indicate that a monopolist with a monopolistic intent cannot act as to exclude competitors either in the monopoly market or in a downstream market.<sup>17</sup> The second method for this kind of case is thus the essential facilities doctrine, in US antitrust law also called the "bottleneck" theory, referring to the barrier of entry that arise when a competitor must attain access to one level of production in order to compete with vertically integrated companies.<sup>18</sup> There is no total conformity between scholars concerning which cases are to be catalogued into the folder of the Intent test or the essential facilities doctrine. The rest of this chapter will, however, concern cases that directly or indirectly involve the latter.

*Eastman Kodak Co. v Southern Photo Materials Co.*<sup>19</sup>

This case is one of the first to consider the refusal to deal doctrine and the first to concentrate on anti-competitive intent.<sup>20</sup> Kodak wanted to integrate vertically into the retailing market. It acquired control over most of the competing retailers in Atlanta but the defendant refused to sell. Kodak answered with a refusal to sell supplies to the retail photography store except at retail prices and thus refused to give normal discounts. The court found that Kodak had acted with a purpose to monopolise and that such a refusal to deal was a special category of monopolisation<sup>21</sup> unless valid business reasons were presented.

*Associated Press v United States*<sup>22</sup>

The doctrine of refusal to deal was extended in this case where local AP newspapers could veto membership in the news-sharing arrangement. AP consisted of approximately 1 200 newspapers and there was a mutual arrangement about access to news. The Supreme Court declared that AP did not need to admit news access to everyone but it was a violation of the Sherman Act to discriminate against competitors since it hindered other newspapers from entering into markets where AP members were already publishing. Membership may not have been essential<sup>23</sup> but since 96 per cent of the morning papers belonged to AP, a refusal of access imposed a severe handicap on potential competitors.

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<sup>16</sup> Glazer, Kenneth L and Lipsky, Abbott B Jr. *Antitrust Law Journal*. Vol. 63. 1995. 749. Page 754.

<sup>17</sup> Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 441.

<sup>18</sup> It has however been argued that the bottleneck theory is not identical with the essential facilities doctrine. See Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 461.

<sup>19</sup> 237 U.S. 359 (1927) *Oppenheim, S. Chesterfield*. *Unfair Trade Practices*. Minnesota 1950. Page 1305.

<sup>20</sup> Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. 438.

<sup>21</sup> Glazer, Kenneth L. and Lipsky, Abbott B Jr. *Antitrust Law Journal*. Vol. 63. 1995. 749. Page 752.

<sup>22</sup> 326 U.S. 1 (1945)

<sup>23</sup> Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 436.

*Hecht v Pro-Football Inc.*<sup>24</sup>

This is the first case to use the term “essential facility”. A covenant in the Redskins’ stadium lease prohibited leasing of it to any other team. The court found that the use of the stadium was essential for American football teams, that it could not be practicably duplicated and that another team could get access to the stadium without interfering with the Redskins’ use but that the covenant prevented competitors from getting access to the facility. The covenant constituted therefore an unreasonable restraint on competition. It is held that this case showed that a facility does not need to be indispensable to be essential; it is sufficient that a duplication would be economically infeasible if a denial of access is a great detriment to potential market entrants.<sup>25</sup>

*Gamco Inc. v Providence Fruit & Produce Building Inc.*<sup>26</sup>

The defendant in this case owned a building that provided facilities for fruit and vegetable wholesalers. Practically all the local trade in these products was centred in the facility. Gamco Inc. was a tenant but violated a term in the lease by amalgamation with another wholesaler which made the defendant refuse to renew the lease. The plaintiff was thus excluded from the building without any possibilities of finding an alternative facility. The court held that this infringed the Sherman Act since access could not be denied without objective business justification and the plaintiff’s infringement was considered not to be such a justification.

*Otter Tail Power Co. v United States*<sup>27</sup>

Until this case, few actions concerning refusals to deal were analysed under Section 1 of the Sherman Act concerning collective conduct parallel to Article 85 of the EC Treaty. This case “transferred” the refusal to deal doctrine to Section 2.<sup>28</sup> The plaintiffs were municipalities that wanted to provide local distribution of electric power to their residents. They therefore asked Otter Tail Power Co. if it could sell them electricity or “wheel” electricity purchased from another supplier over its lines. The defendant had a monopoly in the wholesale market but competed also in the retail market. It refused therefore both to sell electricity to the municipalities at wholesale or to wheel power to them from another wholesale supplier outside its market. The court found that Otter Tail Power Co. violated Section 2 since it intentionally exploited its monopoly power in one market (at the wholesale level) so as to gain an advantage in another market (at the retail level). The defendant was obliged to supply or wheel other wholesalers power through its lines as long as it did not affect its ability to provide adequate service to its own customers. Despite the many characteristics this

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<sup>24</sup> 570 F. 2d. 982 (D.C. Cir. 1977)

<sup>25</sup> Blumenthal, William. Antitrust Law Journal. Vol. 58. Part 3. 1989. 855. Page 860. Footnote 16.

<sup>26</sup> 194 F. 2d. 484 (1st Cir.) 344 U.S. 817 (1952)

<sup>27</sup> 410 U.S. 366 (1973)

<sup>28</sup> Glazer, Kenneth L and Lipsky, Abbott B Jr. Antitrust Law Journal. Vol. 63. 1995. 749. Page 756.

case may seem to show of an application of the essential facility, it has been argued that it was not solved by the doctrine but by the intent theory.<sup>29</sup>

*MCI Communications Corporation v American Tel. & Tel. Co.*<sup>30</sup>

This case is perhaps the most important for the development of the essential facilities doctrine in US antitrust law. MCI wanted to provide long-distance telephone services but AT&T refused to interconnect MCI's long-distance circuits with its local facilities. The seventh circuit declared that four elements must be established for the essential facilities doctrine to apply:

1. control of the essential facility by a monopolist or a group of competitors with monopoly power;
2. a competitor's inability to practically or reasonably duplicate the essential facility;
3. the denial of the facility's use to a competitor; and
4. the feasibility of the owner's provision of access to the facility.<sup>31</sup>

AT&T was found to have control over the distribution facility, the interconnections were essential for MCI to offer its services and the facilities were not duplicable since it was not economically feasible and regulatory authorisation could not be obtained. Its refusal thus reduced competition in the market to the detriment of consumers and rivals and no objective justifications were found. The last aspect will be examined further in the next case.

*Aspen Skiing Co. v Aspen Highlands Skiing Corp.*<sup>32</sup>

The defendant owned three mountains in Aspen, Colorado and a fourth mountain was owned by the plaintiff. The two companies had earlier offered a six-day lift ticket that gave the purchaser access to all four mountains, but the defendant refused to continue to offer the multi-ticket. This naturally meant that the plaintiff faced great difficulties in its ability to compete. It was not feasible to develop another range of ski slopes and the defendant could not justify its refusal to continue with the co-operation. The case did not involve leveraging into an ancillary market, but the tenth circuit stated that this was not necessary in order to apply the essential facilities doctrine. It found that the defendant's refusal was anti-competitive under the doctrine and they reached the same result when applying the intent test. Efficiency reasons were held to potentially legitimate a refusal of access, but such reasons were not presented. The Court of Appeal declared that the multi-ticket was an essential facility that the defendant was obliged to share and that was found to be sufficient evidence to find that the refusal was intended to create or maintain a monopoly. The Supreme Court explained however that it was "unnecessary to consider the possible relevance of the 'essential facilities' doctrine"<sup>33</sup> It agreed that the refusal infringed Section 2 of the Sherman Act but came to that result after a general discussion regarding refusal to deal.

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<sup>29</sup> Warden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Page 440 f.

<sup>30</sup> 708 F.2d. 1081 (7th Cir.) 464 U.S. 891 (1983)

<sup>31</sup> Ibid. At 1132-1133.

<sup>32</sup> 472 U.S. 585 (1985)

<sup>33</sup> Ibid. At 611. Note 44.

It has been suggested that this case added a fifth prerequisite to the test laid down in the *MCI* judgment “namely, whether the defendant advanced a reasonable business justification for denying access or conditioning access on terms that the plaintiff deems to be excessively burdensome.”<sup>34</sup> The case also indicates the courts’ continued development away from subjective intent towards objective factors such as business justifications and competitive effects.<sup>35</sup> This, however, does not mean that the doctrine was applied in a less cogent manner, and this will be substantiated by the last three cases referred to in this chapter.

*City of Anaheim v Southern California Edison Co.*<sup>36</sup>

The city demanded that the utility company should wheel electricity from a competing supplier to them over its lines. The court found that the city had not shown that refusal to grant access to the lines was anti-competitive but only that the rival might benefit if access was granted. It is thus not sufficient that access to the facility would give the competitor an advantage, the refusal to grant access must be of great detriment to the rival and concern an exploitation of the defendants monopoly power.

*Re Air Passenger Computer Reservation System Antitrust Litigation*<sup>37</sup> and  
*Alaska Airlines Inc. v United States*<sup>38</sup>

These are two other cases where refusal to access was deemed not to be anti-competitive. In the first case, a computerised reservation system controlled by American Airlines was not considered to be an essential facility since there was no risk that it would give them a monopoly position in the airline transportation market. The other case also concerned a computerised reservation system. The defendant had a policy of charging competitors a high fee for using the system but the court found once again that it was not an essential facility since the defendant’s share of the downstream market was only 12 - 14 per cent. The court emphasised that competition in the downstream market must be eliminated by the refusal. These cases shows that although leveraging, i.e. an undertaking uses its monopoly power in one market to gain a competitive advantage in another market, may infringe Section 2 of the Sherman Act, this is only the case if the monopolist tries to acquire or maintain a monopoly in the second market by using its power in the first market. Competition in the downstream market must thus be eliminated by the refusal in order for the doctrine to apply.

## 2.3 Comments

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<sup>34</sup> Gellhorn, Ernest. *Antitrust law and Economics in a Nutshell*. Fourth ed. Minnesota 1986. Page 151-152. It has also been argued that the judgment was based on the fact that the multi-ticket would improve the consumers’ position. See Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 441.

<sup>35</sup> Glazer, Kenneth L and Lipsky, Abbott Jr. *Antitrust Law Journal*. Vol. 63. 1995. 749. Page 763.

<sup>36</sup> 955 F.2d. 1373 (9th Cir. 1992).

<sup>37</sup> 694 F. Suppl. 1443.1445 (C.D. Cal. 1988) 948 F.2d. 536 (9th Cir. 1991).

<sup>38</sup> 948 F.2d. 542 (9th Cir. 1991).

The referred case-law has shown how the essential facilities doctrine (or the “bottleneck doctrine”) has evolved from being an infringement of Section 1 of the Sherman Act (in e.g. *Associated Press v United States* and *Terminal Railroad*) to particularly concern Section 2 (e.g. *Otter Tail Power*). A large number of the cases concerned allegations that companies vertically integrating into ancillary markets, behaved anti-competitively at one level by denying access to a facility at another level. This was, however, not always the case; *Aspen* concerned for example two companies at the same level and the situation was the same in *Hecht*. It is also noticeable that the courts seems to be changing their focus from the subjective intent test towards the more objective standards that can be found in the essential facilities doctrine. This comprises the different objective justifications that may make a denial of access lawful, e.g. valid business reasons mentioned in *Kodak* and efficiency reasons in *Aspen*. One of the reasons for the courts’ willingness to embrace the doctrine may be found in these objective standards. Instead of analysing the alleged monopolist’s market share can the courts focus on the facility and its importance for the level of competition on the market. The doctrine may therefore provide a “shortcut” in the Section 2 analysis which otherwise may be (even more) complex.<sup>39</sup> Another advantage is that the remedy for infringement of the provision is clear; access to the facility. This “simplification” is however only possible to a limited extent. The application must still embrace the requirements necessary to constitute monopolisation under Section 2, i.e. wilful acquisition or maintenance of monopoly power.<sup>40</sup> It has been suggested that the courts realising this have started to require an equivalent thorough examination of the relevant markets and the essential facility’s ability to grant its controller a monopoly power in those markets.<sup>41</sup> The subjective aspects of monopolisation cannot however be totally ignored. This was shown in *Spectrum Sport Inc. v McQuillan US*<sup>42</sup> where it was emphasised that it is an attempt to monopolise if the undertaking has engaged in anti-competitive conduct with a specific intent to monopolise and there is a dangerous probability that it might succeed. The US courts seems thus still to a certain extent to continue to rely on the intent of the defendant.<sup>43</sup>

Finally, it should be emphasised that the Supreme Court has not in any case explicitly used the essential facilities doctrine. They found it for example “unnecessary” to do so in *Aspen*. The lower courts have however applied the doctrine in a number of cases basically using the four level test laid down in *MCI* and the fifth element of objective justification found in *Aspen*. Not only tangible physical objects have been judged to be “facilities” but the case-law has generally concerned infrastructure or services. The essentiality was in *MCI* defined as the competitor’s inability to practically or reasonably duplicate the facility and *Hecht* indicated that the facility does not need to be indispensable for the competitor; it may be sufficient that duplication would be economically infeasible and that a denial of access would give potential market entrants a severe handicap. The two airline reservation system cases and *The City of Anaheim* may be an indication of the potential range of application of the doctrine. If access is found to be indispensable to competition, such

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<sup>39</sup> Lock, Reiner. *Utilities Law Review*. Vol. 2. 1991. 18. Page 19.

<sup>40</sup> Areeda, Philip. *Antitrust Law Journal*. Vol. 58. 1990. 841. Page 845.

<sup>41</sup> Lock, Reiner. *Utilities Law Review*. Vol. 2. 1991. 18. Page 20. See e.g. the two airline reservation system cases. *Supra* notes 38 and 39.

<sup>42</sup> 113 S.Ct. 884, 122 L.Ed. 2d. 247 (1993).

<sup>43</sup> Hawk, Barry E. (1998)1 *ECLR* 53. Page 79.



access shall be given on reasonable and non-discriminatory terms unless it is infeasible due to practical reasons or would affect the defendant's ability to give its customers adequate service<sup>44</sup> or conflict with security measures or public interest. It has been argued that the EC competition law and the US antitrust law have arrived at much the same conclusions concerning the essential facilities doctrine,<sup>45</sup> but even if several identical aspects may be identified, we will see that the conformity is not total.

### 3.0 REFUSALS TO DEAL IN EC COMPETITION LAW

Refusals to deal emerged as an offence under Article 86 via case-law but soon became one of the most important abuses under the provision. This section will try to illustrate the traditional content and the most important elements of the doctrine of refusals to deal. These elements have been suggested to consist of: firstly, the duration of the bonds between the undertakings; secondly, the dependent undertaking's ability to adopt to the new situation; thirdly, its difficulty in finding another partner and finally its importance for the dependent undertaking.<sup>46</sup> We will, however, see that these elements do not apply with equivalent force to all aspects of the doctrine of refusals to deal.

#### 3.1 Refusals to supply

Similarly, the duty to supply is not explicitly found in Article 86, but this does not mean that the prerequisites of the provision can be ignored; the refusing undertaking must be dominant and the refusal must amount to an abuse of that dominant position. This means that a refusal as such does not have to be anti-competitive and it should be emphasised that there is no general duty to supply under Article 86. However, a refusal may under certain circumstances constitute an abuse and that is especially the case if the dominant undertaking stops supplying an established customer.

*Commercial Solvents*<sup>47</sup> was the first case to deal with a refusal to supply. Commercial Solvents had a monopoly in the production of nitropropane and aminobutanol which is the base product for the production of ethambutol, needed for the production of drugs used to treat tuberculosis. Zoja had been a customer of Commercial Solvents over a number of years but since the supplier started to produce ethambutol itself (although through a subsidiary) it raised its prices and reduced its supplies to Zoja which soon became unable to manufacture further ethambutol. The ECJ held that the refusal to supply was an abuse, especially since Zoja was an established customer, the two undertakings were rivals in the market and the refusal could eliminate all competition. The fact that Commercial Solvents wanted to enter the market for derivatives was held not to be an objective justification.<sup>48</sup>

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<sup>44</sup> See e.g. *Otter Tail Power*. Supra notes 28.

<sup>45</sup> Hawk, Barry E. (1998)1 ECLR 53. Page 54.

<sup>46</sup> Glais, Michel. *Revue Du Marché Commun*. 1987. 306. Avril. 203. Page 206.

<sup>47</sup> *Commercial Solvents v Commission*. Joined Cases 6 and 7/73 [1974] ECR 223.

<sup>48</sup> It has been argued that Commercial Solvent's refusal should not be considered to be an abuse since there was still sufficient competition on the market for the final products and the refusal was thus not to the detriment of consumers. Glais, Michel. *Revue Du Marché Commun*. 1987. 306. Avril. 203. Page 204.

The ECJ developed the doctrine further in *United Brands*<sup>49</sup> where a dominant undertaking refused to continue to sell bananas to the Danish distributor Olesen since it had taken interest in a competitor's products. The ECJ declared that the refusal was abusive since Olesen was a long-standing customer and its orders were within the normal range. If we try to distinguish this case from *Commercial Solvents*, the main differences are firstly that *United Brands* was not active at the market level of the refused customer and secondly that the court did not emphasise the risk of elimination of competition in the market. A similarity is however that both refused companies were existing customers of the dominant undertakings and it has been argued that a "dominant company appears to have no obligation to supply an undertaking with which it had never previously dealt, even an actual or potential competitor."<sup>50</sup> This may be the case for refusal to supply but does not, as we shall see, seem to apply to the doctrine of refusal to deal as a whole.

### 3.2 Objective justifications

Even if *United Brands*' justification regarding disloyalty was quashed, protection of commercial interests may be a valid justification if it is proportionate and has not as its purpose to strengthen or abuse the dominant position. In *BBI v Boosey & Hawkes*<sup>51</sup> the defendant (B&H) had a dominant position in the manufacturing of brass band instruments. It dealt with GHH, a retailer, and RCN, a repairer of the same products, until the two formed BBI for the purpose of competing with B&H. The defendant tried to justify its refusal with the claims that GHH and RCN had been disloyal and dishonest.<sup>52</sup> The Commission stated that a "dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat."<sup>53</sup> If a customer starts to promote a competing brand the dominant undertaking may be entitled to review its commercial relations with that customer and also terminate the relationship after adequate notice. B&H's total refusal to deal was, however, regarded as going beyond its legitimate defence of commercial interests.<sup>54</sup>

As *Commercial Solvents* indicated, a wish by the dominant undertaking to enter the customer's market is not an objective justification. This was confirmed by *Hugin*<sup>55</sup> where the Swedish manufacturer of cash registers stopped supplying spare parts to Liptons since it wanted to set up its own subsidiary in the UK. The Commission held it to be abuse of a dominant position but the ECJ found no effect on Inter State trade. If that prerequisite had been fulfilled, it is probable, however, that the refusal would have amounted to an abuse although it would hardly have been to the

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<sup>49</sup> *United Brands v Commission*. Case 27/76 [1978] ECR 207.

<sup>50</sup> Goyder, D.G. *EC Competition Law*. Third ed. Oxford 1998. Page 335. Footnote 5.

<sup>51</sup> *BBI v Boosey & Hawkes*: Interim measures. Com. decision 87/500/EEC of 29 July 1987. OJ L286/36.

<sup>52</sup> And argued also that a requirement to resume supplies to the competitors would seriously damage the morale of its employees.

<sup>53</sup> *Supra* note 52 Para. 19.

<sup>54</sup> And the effect on employee's morale was not considered to be an decisive consideration.

<sup>55</sup> *Hugin v Liptons*. Commission decision 73/457 of 31 December 1978. OJ L22/23.

detriment of the final consumers.<sup>56</sup> The fact that it would have been cheaper to deal with the repair market themselves through vertical integration than to involve an independent undertaking would probably neither have been decisive. It also seems clear that a constructive refusal to supply, i.e. the undertaking offers to supply but in terms which it knows are unacceptable to the customer, is not an objective justification.<sup>57</sup> One example is *Napier Brown v British Sugar*<sup>58</sup> where the dominant undertaking offered only a special kind of sugar which the customer could not use in its production.

Commercial interests may thus be an objective justification for a refusal to supply. This includes reasonable commercial objectives as, for example, a refusal to supply a customer with a poor credit record.<sup>59</sup> *BP v Commission*<sup>60</sup> may provide another example. BP reduced its supplies to ABG during the oil crises by much more than it reduced its supplies to its other customers. It was held not to be an abuse since ABG was just an occasional customer, BP had problems with its own supply and had given a notice to ABG concerning the shortage. This does not, however, seem to indicate that shortage is always an objective justification; the refusal shall still be proportionate and non-discriminatory.<sup>61</sup> Safety reasons and special technical requirements may also be objective justifications, but even if there seems to be a number of justifications for a refusal to supply under EC Competition law, the doctrine is less liberal than the US equivalent with its approval of refusal on valid business rationale.<sup>62</sup>

### 3.3 Reservation of an ancillary market

In several of the cases referred to in the section above, an undertaking which had a dominant position in one market used that position in a separate but ancillary market to eliminate or to hinder effective competition and finally drive an existing competitor out of business in that related market.<sup>63</sup> This is considered to be an abuse and that applies also to other parts of the refusal to deal doctrine as well as refusal to supply goods. The three cases which are going to be dealt with here are, apart from being examples of reservations of ancillary markets, also cases held to concern essential facilities. They are however hardly textbook cases in that aspect and, indeed, the scholars have not unanimously held them to be examples of the doctrine.<sup>64</sup> They will therefore be dealt with here as far

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<sup>56</sup> Due to Hugin's small share in the market of cash registers as a whole.

<sup>57</sup> Freeman, Peter and Wish, Richard. Butterworths Competition Law 2. London 1998. Page VI/373.

<sup>58</sup> *Napier Brown v British Sugar*. Commission decision 88/518 of 19 October 1988. OJ L284/41. (1990) 4 CMLR 196. OJ

<sup>59</sup> Goyder, D.G. EC Competition Law. Third ed. Oxford 1998. Page 340.

<sup>60</sup> *British Petroleum v Commission*. Case 77/77 [1978] ECR 1513.

<sup>61</sup> *BPB Industries plc*. Commission decision 89/22 of 13 January 1989. OJ L10/50.

<sup>62</sup> Freeman, Peter and Wish, Richard. Butterworths Competition Law 2. London 1998. Page IV/399. See e.g. *Aspen* in section 2.2.

<sup>63</sup> "Monopoly leveraging" in U.S. antitrust law. See e.g. *Commercial Solvents* supra note 48.

<sup>64</sup> See e.g. Glasl, Daniel in ECLR (1994)6 306, page 309 where he states that *Télémarketing* "is in fact concerned with an essential facility" and page 311 where he argues that *Magill* "does not contribute to the essential facilities doctrine because the intellectual property concerned cannot be classified as an essential facility." Compare with Ridyard, Derek in ECLR (1996)8 438 and Desealers, Wolfgang. EuzW Heft 16/1995. 563. Page 563.

as the question of ancillary markets are concerned instead of under the following section but their alleged importance for the essential facilities doctrine will be examined in section 8.2.

*Télémarketing*<sup>65</sup> is the scheme where an advertiser places in television broadcasts an advertisement carrying a telephone number which the public can call to buy or obtain further information on the products which are being advertised. Centre Belge d'Etudes de Marché-Télémarketing SA (CBEN) wanted an injunction restraining the Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB) from refusing to sell it television time on the RTL station for telemarketing operations using a telephone number other than that of IPB. CBEN had the exclusive right to conduct telemarketing on the station aimed at the Benelux market but RTL refused to renew the contract when this right expired unless the telephone number was that of IPB. The Tribunal de Commerce consequently referred the case to the ECJ for a preliminary ruling. The ECJ, quoting *Commercial Solvents*, held that "an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position in 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."<sup>66</sup> The refusal to provide the service could therefore constitute an abuse if telemarketing constituted a separate market from the medium (television) if it was not justified by technical or commercial requirements.

In *IBM*,<sup>67</sup> the company refused to provide competitors with the technical interface information needed in order to construct competitive hardware and software products compatible with IBM's then most popular range of computers, System/370. It tried thus to reserve a market ancillary to the computer market and this was held to be an abuse by the Commission since access to the information was a sine qua non for the production of the competitive products. This case can be compared with the *American Berkey Photo v Eastman Kodak Co.*<sup>68</sup> where Berkey Photo claimed that Kodak had acted abusively by introducing a new camera system without disclosing the results of its research so that it could market equipment compatible with the new system. The American court found no violation of the Sherman Act in that case and the same outcome can be found in *California Computer Prods. v International Business Machines Corp.*<sup>69</sup> The US courts do thus seem to have a different approach to refusals of disclosure of competitive information.

### 3.3.1 Magill

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<sup>65</sup> *CBEN v CLT & IPB*. Case 311/84 [1985] ECR 3261.

<sup>66</sup> *Ibid.* Para. 27.

<sup>67</sup> *IBM*. IP(84)291 of 2 August 1984. (1984)3 CMLR 147. The case was settled.

<sup>68</sup> *Berkey Photo v Eastman Kodak Co.* 603 F.2d. 263 (2nd Cir. 1979).

<sup>69</sup> 613 F.2d. 727 (9th Cir. 1979).

Another case concerning reservation of an ancillary market and access to information, and one which has caused quite a lot of controversy is *Magill*.<sup>70</sup> But since the information in this case was protected as intellectual property, it is necessary to first briefly examine the right of access to such protected areas before we can examine the case itself.

In *Volvo v Veng*,<sup>71</sup> the car manufacturer brought action against Veng since he had imported front wings of Volvo series 200 cars into the UK manufactured without authority from Volvo. When asked by the High Court whether it was an abuse of a dominant position to refuse to license even against a reasonable fee, the ECJ stated that “the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right.”<sup>72</sup> If it was held to be an abuse, the proprietor would thus be deprived of the substance of his exclusive right and the refusal would therefore per se not constitute an abuse. That can, however, be the case if the refusal involves certain abusive conduct, such as a refusal to continue producing spare parts for a particular model that still is in circulation, but such conduct was not considered to be present in the case.<sup>73</sup>

Even if a refusal to license is still generally not considered to be abusive conduct, *Magill* gave an indication of the kind of exceptions that may apply to the principal rule. RTE, ITV and BBC broadcasted in the UK and Ireland but no comprehensive weekly television guide was available since each television station had copyright protection for its own weekly program listings and published their own exclusive television guides. The consumers had thus to buy three TV guides to get full cover and Magill used that fact to publish a comprehensive guide but was prevented by an injunction. The ECJ did not overrule *Volvo v Veng* but referred to the exceptions in paragraph 9 of the judgment and such “exceptional circumstances”<sup>74</sup> needed in order to break through the sacred walls of intellectual property were found in *Magill* since

1. there was no substitute for Magill’s television guide;
2. there was a specific, constant and regular potential demand for such a guide;
3. the broadcasters refused to provide information about their programs;
4. there were no justifications for such a refusal; and
5. the broadcasters reserved to themselves a secondary but ancillary market by excluding all competition on that market.

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<sup>70</sup> *Radio Telefis Eirann (RTE) and Independent Television Publications Ltd (ITP) v Commission*. Joined cases C-241/91P and C-242/91P. [1995] ECR I-0743.

<sup>71</sup> *AB Volvo v Veng (UK) Ltd*. Case 238/87 [1988] ECR 6211.

<sup>72</sup> *Ibid.* Para. 8.

<sup>73</sup> *Volvo v Veng* is usually referred to in conjunction with *CICRA v Renault*. Case 53/87 [1988] ECR 6211. This case was decided in the same day and concerned also the protected design of car body panels.

<sup>74</sup> *Supra* note 71. Para. 50.

The question whether this line of argument indicates that the ECJ followed an essential facility approach or not shall be considered in section 8.2, but it should at this point be mentioned that the court referred to the information about the programmes as “raw material”<sup>75</sup> It should also be emphasised that the ratio decidendi indicates that the judgment indeed was as an exception to the principal rule.

That *Magill* constitutes an “exception” was also indicated by *Tiercé Ladbroke SA*.<sup>76</sup> French race course companies refused Ladbroke’s betting shops in Belgium access to live broadcasts of French horse races. The CFI held that this was not an abuse, but it should be clear that the case showed some differences compared to *Magill*. The refusal did in this case not prevent market access, the French undertakings did not compete on the betting market and the broadcasts were not essential for the introduction of new products so the consumers’ demand was not ignored. In the absence of these factors, the refusal to license did not constitute an abuse in accordance with *Magill*, especially since the applicant was already present in, and had a large share of, the market while the owners of the rights were not active in the betting market. But even if these circumstances were different, the refusal would still not infringe Article 86 “unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented despite specific, constant and regular potential demand on the part of consumers”.<sup>77</sup> It has been suggested that this case narrowed the scope of *Magill* since the CFI did not examine whether there was any demand for the broadcasts from the betting-shop customers in Belgium but only if the broadcasting was indispensable to the applicant’s main activity, i.e. betting in the downstream market.<sup>78</sup>

Analysis of market dominance and abuse in ancillary markets involves some complex features absent in the more frequent cases concerning dominance in one single market.<sup>79</sup> It is not sufficient to show dominance in the original, usually upstream, market but also to demonstrate how the market power is used in the ancillary, usually downstream, market. The concept is known in US antitrust law as “monopoly leveraging” and consists usually of four elements:

1. two separate markets exist;
2. the undertaking has monopoly power in one market;
3. it secures competitive advantage in the second market; and
4. does it in a way that constitutes an abuse of the monopoly power in the first market.<sup>80</sup>

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<sup>75</sup> Ibid. Paragraphs 53 and 56.

<sup>76</sup> *Tiercé Ladbroke SA v Commission*. Case T-471/93 [1995] ECR II-2537. Appeal dismissed in Case C-353/95P [1997] ECR I-7007.

<sup>77</sup> Ibid. Paragraph 131.

<sup>78</sup> Art, Jean-Yves and van Liedekerke, Dirk. (1998)35 CMLRev 1135. Page 1164.

<sup>79</sup> Lock, Reiner. Utilities Law Review. 1991. Vol. 2. 18 Page 20.

<sup>80</sup> Ibid. Page 21.

As was seen in the US case-law presented in section 2.2 and as will be seen in following chapters, reservations of ancillary markets are of particular importance in the application of the essential facilities doctrine. It may therefore not be coincidence that has made some scholars argue that the three main cases referred to in this section are examples of the doctrine. In order to fully grasp the implications that this circumstance confers on the doctrine it is, however, necessary to first present a more complete range of cases involving the doctrine. The concept of ancillary markets' importance for the essential facilities doctrine will therefore be further examined in section 6.3.4 and the concept of intellectual property as "facilities" will be scrutinised in section 8.2.

### 3.4 Statutory monopolies

Although Articles 85 and 86 are two of the few provisions in the Treaty that are not directed towards the Member States, it does not mean that they are inapplicable to public services or nationalised industries. Interesting implications can be found when reading the provisions in conjunction with Article 5 which obligates the Member States to take measures to fulfil the Treaty, Article 3(g) regarding the protection of competition in the internal market and Article 90 clarifying the competitions rules' application to the Member States.<sup>81</sup> There is no need in this context to deal with this subject as a whole, but certain aspects of it calls for some attention. It comes naturally that essential facilities often are state controlled, this is to large extent due to the costs involved in constructing e.g. railways, pipelines or electric cable systems. It may also be explained by the fact that this kind of facilities are, although to a lesser extent these days, used to provide services traditionally controlled by the states as public utilities. It may therefore be useful to briefly deal with a couple of cases that represents this category.

Italy brought in the *Telespeed* case<sup>82</sup> an action against the Commission regarding a decision<sup>83</sup> where the latter found that British Telecom (BT), which held a statutory monopoly on the running of telecommunication systems in the United Kingdom at the time, had abused its dominant position. The undertaking had refused private operating telegraph forwarding agencies to get access to a telex service in accordance with the rules of the CCITT.<sup>84</sup> The Commission argued that telecommunication services is a business activity even if BT had a statutory monopoly while Italy meant that Article 90(2) concerning protection of services of general economic interests exempted BT from Article 86 since the refusal of access protected the services that BT by statutes was required to carry out. The ECJ did not agree with the plaintiff since BT had refused access as an undertaking in an ordinary commercial context. BT was therefore found to have infringed Article 86.

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<sup>81</sup> Article 222 which preserves national systems of property rights and Article 37 regarding adjustment of state monopolies are also of interest.

<sup>82</sup> *Italian Republic v Commission*. Case 41/83. [1985] ECR 0873.

<sup>83</sup> *British Telecommunications*. Commission decision 82/861/EEC of 10 December 1982. OJ L 360.

<sup>84</sup> The International Telegraph and Telephone Consultative Committee.

Another illustrating case is *ERT*.<sup>85</sup> Ellinkí Radiophona Tileorassi Anonimi Etairia (ERT) was a Greek radio- and television undertaking with a legal monopoly of broadcasting which was infringed when Dimotiki Etairia Plorotorissis (DEP) set up a competing television station. ERT brought action against DEP in order to get an injunction prohibiting it from broadcasting. The ECJ held that the monopoly infringed Article 86 if it led to a discriminatory broadcasting policy where the undertaking favours its own programmes “unless the application of Article 86 obstructs the performance of the particular tasks entrusted on it.”<sup>86</sup> The exclusivity was thus not an abuse in itself and due regard had to be paid to the services that the undertaking by statutes was obliged to provide.

In *Ijsselcentrale*<sup>87</sup> complained NV IGMO, a local electricity distributor, about its supplier Ijsselcentrale’s imposition of an import and export ban, exclusive purchasing obligation and an extra cost equalisation charge. The provisions were found in an agreement between four Dutch public electricity suppliers and the action was consequently brought under Article 85. The undertakings cooperated through a public limited company, SEP, which owned a high voltage interconnection between the Netherlands, Germany and Belgium and the members had to export its electricity through these power lines. The agreement was partially covered by law but the statutory regulation did not cover imports for the importer’s own consumption. The Commission held that SEP’s ownership of the international interconnections did not justify a total control over imports and exports. Although the supply of electricity was regarded as a service of general economic interest, Article 90(2) did not justify SEP’s total control and the facility could have been made available to other parties. The agreement was thus held to be an infringement of Article 85.

Unloading in the *Port of Genoa*<sup>88</sup> was reserved to special Italian dock-workers. Siderurgica needed to unload a consignment of steel and even if the crew of the ship could have done it themselves, were they obliged to contract the Genoa dock-work company whose employees unfortunately had gone on strike. The ECJ held that the exclusive right was within the meaning of Article 90(1). An undertaking having a statutory monopoly over a substantial part of the Common Market may hold a dominant position, and due to the volume of traffic in the port and its importance was the market constituted by the port considered to be substantial. The undertaking was thus dominant and it was found to have abused this position since it was induced to demand payment for non-requested services, charged disproportionate prices and had an excessive price level. The dock-work undertaking was not regarded as being entrusted with the operation of services of general economic interest within the meaning of Article 90(2).

Finally, *RTT v GB-Inno-BM*<sup>89</sup> shows that the issue illustrated in this section may be of importance also for the control over ancillary markets. Régie des Télégraphes et des Téléphones (RTT) brought

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<sup>85</sup> *ERT AE v DEP*. Case C-620/89 [1991] ECR I-2925.

<sup>86</sup> *Ibid.* Paragraph 38.

<sup>87</sup> *Ijsselcentrale and Others*. Commission decision 91/50/EEC (1992)5 CMLR 154. The decision upheld by the CFI (Case T-16/91 [1992] ECR II-2417) and by the ECJ (Case C-19/93P [1995] ECR I-3319).

<sup>88</sup> *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*. Case C-179/90 [1991] ECR I-5889.

<sup>89</sup> *Régie des télégraphes et des téléphones v GB-Inno-BM SA*. Case C-18/88 [1990] ECR I-5941.



proceedings against GB-Inno-BM to prohibit it from selling non-approved telephones. RTT had a statutory monopoly over the operation of telephone lines in Belgium and all telephone equipment connected to the lines had to be approved by RTT. RTT did however also compete on the downstream market of telephone equipment and had the statutory power to approve the equipment attachable to the telecommunication network . The ECJ repeated that an undertaking holding a monopoly in one market, without any objective necessity, reserves to itself an ancillary market, thereby eliminating all competition in that market, infringes Article 86.<sup>90</sup> But since the control of the ancillary market originated from a measure adopted by a state, it was Article 90(1) that applied. The restriction could not be justified as a service of general economic interest and the extension of the monopoly was therefore prohibited by Article 90(1) in conjunction with Articles 86 and 3(f).<sup>91</sup>

We may from these cases conclude that public undertakings controlling access to facilities (*Telespeed* and *Ijsselcentrale*), the use of facilities (*Port of Genoa*) and extension of statutory monopoly power in to ancillary markets (*RTT v GB-Inno-BM*) may infringe the competition rules as well as private companies. Public undertakings may however benefit from a larger degree of exemption. This is indicated by *ERT* where the ECJ stated that regard must be paid to the tasks entrusted to the undertakings and Article 90(2) which defines such tasks as “services of general economic interest”. However, this exemption only applies when the task assigned to the undertaking would be obstructed if the competition rules were applied and Inter-State trade is not affected.<sup>92</sup> The court’s reasoning in *Telespeed*<sup>93</sup> and *Port of Genoa*<sup>94</sup> confirms that the threshold indeed is rather high.<sup>95</sup> Thus, the essential facilities doctrine may apply to statutory monopolies but the issue may become even more interesting in the process of breaking up these monopolies.

## **PART II. THE DOCTRINE IN EC COMPETITION LAW**

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<sup>90</sup> See section 3.3.

<sup>91</sup> This is however not always the case if the dominant position in the adjacent market is not incompatible with the competition rules. See Hancher, Leigh and Trepte, Peter-Armin. (1992)4 ECLR 149. Page 153.

<sup>92</sup> Van Bael, Ivo and Bellis, Jean-Francois. Competition Law of the European Community. Third edition. Bicester 1994. Page 900.

<sup>93</sup> Supra note 83. Paragraphs 28-35.

<sup>94</sup> Supra note 89. Paragraphs 25-27.

<sup>95</sup> Hancher, Leigh and Trepte, Peter-Armin. (1992)4 ECLR 149. Page 153.

## 4.0 APPLICATION OF THE DOCTRINE

Even if essential facilities is one aspect of the doctrine of refusal to deal is its content only to a certain extent analogous to that of cases concerning refusals to supply. That fact will be illustrated by this section which examines the application of the doctrine before *Oscar Bronner*. One should not indulge oneself in making ex post facto rationalisations, but all cases referred to in this section have been identified as concerning essential facilities and it will be indicated when that opinion is not unanimous.

### 4.1 The port decisions

It may not be very surprising that a relatively large proportion of the cases in the essential facilities' catalogue concerns harbours. They are capital consuming to build and their positions are of immense importance in order to provide services in an effective way.<sup>96</sup> It may however be regarded as surprising that two of these cases concerns the same harbour and the same dominant undertaking; Holyhead in North Wales and Stena Sealink.

#### 4.1.1 B&I v Sealink

The Irish ferry operator B&I Line plc complained in *B&I v Sealink*,<sup>97</sup> the first decision in 1992, to the Commission that Sealink had abused its dominant position in Holyhead. Sealink is both the port authority and owner of Holyhead Harbour (through Sealink Harbours Ltd) and a British ferry operator (through Sealink Stena Line Ltd). Both B&I and Sealink operates the ferry line between the UK and Ireland from the port but uses two different berths. Sealink uses the station berth in the inner harbour while B&I uses the admiralty pier berth in the outer harbour. This caused some problems since Sealink's vessels had to pass through a narrow and shallow channel and passed thus close to B&I's berth when sailing to and from the station berth. This resulted in rising of the water forcing B&I's vessel's ramp to be disconnected and interrupted thereby loading or unloading. B&I faced this problem once every time its ferry was berthed until Sealink planned to introduce a new schedule which should have meant that two Sealink ferries should pass during the time B&I's vessel was in its berth and even longer loading times would therefore be required.

The Commission found that the relevant market was "the market for the provision of port facilities for passenger and vehicle ferry services on the central corridor routes between the United Kingdom and Ireland".<sup>98</sup> Sealink was therefore held to have a dominant position since geographical circumstances meant that Holyhead was the only port serving in that market,<sup>99</sup> and Holyhead was thus the only available port for B&I's ferry service to Dublin. It was also considered that Holyhead Harbour constituted a substantial part of the Common Market since the port provided one of the

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<sup>96</sup> The doctrine is indeed particularly relevant in the transport sector as a whole. See Freeman, Peter and Whish, Richard. *Butterworths Competition Law 2*. London 1998. Page VI 707.

<sup>97</sup> *B & I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*. Commission decision (1992) 5 CMLR 255.

<sup>98</sup> *Ibid.* Recital 39.

<sup>99</sup> The market definition has been criticised. See Ridyard, Derek. (1996)8 ECLR 438. Page 442.

main links between the two Member States.<sup>100</sup> The Commission made, regarding the question of abuse, some statements which deserves to be quoted in full since this obviously was the first case where the term “essential facilities” was used in EC competition law.

[A] dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own service, thereby placing the competitors at a competitive disadvantage, infringes Article 86 if the other conditions of that Article are met.<sup>101</sup>

Holyhead Harbour was thus defined as an essential facility and Sealink could not discriminate in favour of its own activities. The Commission stated concerning reservation of an ancillary market that

[t]he owner of an essential facility which uses its powers in one market in order to strengthen its position in another related market, in particular, by granting its competitors access to that related market on less favourable terms than those of its own services infringes Article 86 where a competitive disadvantage is imposed upon its competitor without objective justification.<sup>102</sup>

An alteration of the schedule by Sealink would impose a competitive disadvantage on B&I, and Sealink had infringed Article 86 since an objective justification was not presented. The attempted justification that the alteration of the schedule would make Sealink’s operations more efficient was not approved by the Commission. Commercial interests is not enough to justify damages to its competitors “if the conduct is not to be considered an abuse, it must relate instead to an objective concern which the conduct is necessary to protect.”<sup>103</sup>

#### 4.1.2 Sea Containers v Stena Sealink

Maybe *B&I v Stena Sealink* aroused the Commission’s suspicion because a new case, *Sea Containers v Stena Sealink*,<sup>104</sup> evolved the following year where Stena Sealink once again was alleged to have abused its dominant position in Holyhead. The complainant was in this case Sea Containers that sell and lease cargo containers and operates passenger, car and freight ferry services. The company wanted access to Holyhead in order to introduce a fast ferry service on the central corridor using a high-speed catamaran and the port was considered to be the only one suitable. Sealink offered Sea Containers some slots but they were regarded as unacceptable and

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<sup>100</sup> This has also been criticised. See Maltby, Nick. (1993)5 ECLR 223. Page 224.

<sup>101</sup> Supra note 98. Recital 41.

<sup>102</sup> Ibid. Recital 42.

<sup>103</sup> Ibid. Recital 43.

<sup>104</sup> *Sea Containers v Stena Sealink*. Commission decision 94/19 of 21 December 1993. OJ L 15/8.

Sea Containers lodged its complaint with the Commission when the negotiations later broke down. Sealink declared simultaneously that itself should start a fast ferry service from the admiralty pier berth, slots that earlier were offered to Sea Containers but were ruled out on technical grounds. During the proceedings, Sea Containers finally accepted slots offered to it by Sealink for one season but they continued to have opposing views regarding the capacity of the existing facilities, the legitimate reasons for Sealink to refuse Sea Containers access and the feasibility to continue to operate from the temporary facilities.

The Commission came to the same conclusion regarding the relevant market as in the earlier case so Sealink was once again found to have a dominant position. Concerning the alleged abuse, the Commission repeated the phrases in *B&I v Sealink*<sup>105</sup> adding that “[t]his principle applies when the competitor seeking access to the essential facilities is a new entrant into the relevant market.”<sup>106</sup> No fast ferry service was available until Sealink introduced its catamaran and it was held to have acquired the goodwill and commercial reputation which Sea Containers wished to build up. The Commission found also that Sealink delayed and raised difficulties concerning Sea Containers’ possible use of the facilities. Sealink’s contribution to the negotiations was further “not consistent with the obligations on an undertaking which enjoys a dominant position in relation to an essential facility.”<sup>107</sup> Sea Containers had no right to insist on obtaining a preferential position, but access was offered on discriminatory terms so enough evidence was presented for the Commission to conclude that Article 86 was infringed.

#### 4.1.3 Port of Rødby

Stena found itself once again involved in a case concerning access to an essential harbour two years later but this time as plaintiff. In *Port of Rødby*<sup>108</sup> the Danish government had refused to allow the company to operate from the public port of Rødby and to build another private commercial port in the immediate vicinity. One Danish (DSB) and one German (DB) public undertaking operated jointly and solely on the Rødby-Puttgarden route which hardly can be substituted by any other maritime links or air transport. DSB argued that there was no unsatisfied demand for ferry services and that the existing port facilities could not comprise a new ferry service, but expanded its own services on the same facilities one year later. The refusals were considered to be state measures within the meaning of Article 90(1). Since it was not DSB but the Danish minister for transport that refused access, the refusal infringed Article 90 in the same way as it would have been contrary to the competition rules if the refusal was made by a private undertaking.<sup>109</sup> The relevant market was found to be “the market for the organisation of port services in Denmark for ferry services operating on the Rødby-Puttgarden route”<sup>110</sup> and the two joint ferry companies had therefore a joint dominant

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<sup>105</sup> Ibid. Recital 66.

<sup>106</sup> Ibid. Recital 67.

<sup>107</sup> Ibid. Recital 70.

<sup>108</sup> *Port of Rødby*. Commission decision 94/119 of 26 February 1994. OJ L55/52.

<sup>109</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18 Part 2. 1994. 437. Page 462.

<sup>110</sup> *Supra* note 109. Recital 7.

position. The refusals were held to eliminate a potential competitor and it was then an abuse to without any objective justification reserve an ancillary activity.<sup>111</sup>

#### 4.1.4 Port of Roscoff

A similar decision was taken by the Commission in *Port of Roscoff*.<sup>112</sup> Irish Continental Group (ICG) was refused access to the port facilities in Roscoff by the Chambre de Commerce et d'Industrie de Morlaix acting as the port authority for Roscoff. The defendant was thus not itself competing on the downstream market and had no interest in the ferry companies that did so. ICG wanted to commence a ferry service between Ireland and Brittany but since the negotiations with Morlaix broke down, it lodged a complaint with the Commission who found that Morlaix had violated Article 86. The port was held to be the only adequate port facility in France for ferry services between Brittany and Ireland. The Commission consequently decided that Morlaix had to allow ICG access to the facility.

#### 4.1.5 Comments

The cases referred to in this section are of great importance not only because they were among the first to explicitly apply the essential facilities doctrine in EC law<sup>113</sup> but foremost because the Commission defined the concept<sup>114</sup> and indicated its applicability. The Commission legally justified the doctrine<sup>115</sup> with *Commercial Solvents*, *Télémarketing*, *CICRA v Renault*, *Volvo v Veng*, *ERT*, *Magill* and *RTT v GB-Inno-BM*. This did however not mean that the decisions are fully illuminating.<sup>116</sup> The definition presented in *B&I*, and repeated in the other cases, is the most widely possible but some more specific features of the application of the doctrine are provided. Firstly, the dominant position which is allegedly abused shall exist within the common market or in a substantial part of it.<sup>117</sup> But since the Commission is generous in labelling markets as substantial, this should seldom be a great obstacle in the finding of abuse. Secondly, granting access on non-discriminatory terms does not only mean that the owners shall treat undertakings using the facilities equally but also that they shall not be treated less favourably than they treat their own services.<sup>118</sup> This was expanded further in *Sea Containers* where the Commission indicated that it may be necessary for the owner to separate the management of the facility to an independent body in order to make such non-discriminatory decisions.<sup>119</sup>

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<sup>111</sup> Recital 12 of the decision repeated the phrase found in *B&I* and *Sea Containers*.

<sup>112</sup> *Irish Continental Groupe v CCI Morlaix*. Commission press release IP(95) 492 of 16 May; (1995) 4 CMLR 677.

<sup>113</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 461.

<sup>114</sup> *B & I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*. Recital 41.

<sup>115</sup> *Ibid*. Footnote 2.

<sup>116</sup> Maltby, Nick. (1993)5 ECLR 223. Page 225.

<sup>117</sup> Furse, Mark. (1995)8 ECLR 469. Page 471.

<sup>118</sup> *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*. *Supra* note 98. Recital 41.

<sup>119</sup> *Sea Containers v Stena Sealink*. *Supra* note 105. Recital 75.

*Sea Containers* blurred slightly the concept by adding, after re quoting the definition in *B&I*, that “[t]his principle applies when the competitor seeking access to the essential facility is a *new entrant* into the relevant market.”<sup>120</sup> This was the case in *Sea Containers* but B&I was obviously not a new market entrant. Further, although it seems clear that the doctrine principally is to be applied where power in one market is leveraged into an ancillary market<sup>121</sup> indicated *Port of Roscoff* that it may not be necessary for the controller of the essential facility to be an operator on the downstream market to which the applicant is denied access. Morlaix, acting as a port authority, was neither an actual nor a potential competitor of ICG and tried not to reserve an ancillary market. It may be explained by arguing that Morlaix prima facie infringed Article 86 by denying ICG access, but this explanation is not totally convincing. Finally, *Port of Rødby* made finally clear that the doctrine applies under Article 90 of the Treaty. It may also be concluded that the intent of the facility controller for refusing access does not seem to be decisive which is in line with the application of Article 86 as a whole.<sup>122</sup>

## 4.2 The airport decisions

Under this not wholly illustrative title four cases concerning the essential facilities doctrine’s applicability to air travel undertakings will be presented. Two of them concern access to infrastructure, as in the port decisions, while the other two relates to services, thus extending the concept further.

### 4.2.1 Groundhandling

*Héli-Inter Assistance v SA Jet Systems*<sup>123</sup> is a French case but presents some interesting features. Héli-Inter Assistance (Héli) had a management concession for a heliport in Narbonne. When the owner, a hospital, contracted Jet Systems to provide helicopter ambulance services the undertaking had to use Héli’s heliport and its personnel should exclusively refuel and provide other groundhandling services to the helicopters. The Competition Council held that “the operators of essential structures should accede to reasonable requests for access to these structures by their competitors on down-line service markets, the financial term for access to the essential structure, required by its operator, should not be discriminatory compared to those terms that it applies for the purpose of its own services, in the same competitive market, and these conditions must be proportionate, cost related, transparent and based on objective criteria.”<sup>124</sup> It would also be anti-competitive to discriminate by charging itself less for access to the facility than it charges its competitors. The scheme fell therefore within the scope of Article 8 of the Ordinance prohibiting abuse of a dominant position.

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<sup>120</sup> Ibid. Recital 17. Emphasis added. To justify this, the Commission quoted the ECJ in *Hoffman-La Roche & Co. AG v Commission*. Case 85/76 [1979] ECR 451, 541.

<sup>121</sup> Furse, Mark. (1995)8 ECLR 469. Page 472.

<sup>122</sup> See *Hoffman-La Roche v Commission*. Case 85/76 [1979] ECR 461. Paragraph 91. As contrast to the American case-law (see section 2.2).

<sup>123</sup> *Héli-Inter Assistance v SA Jet Systems*. Competition Council September 3, 1996. B.O.C.C.R.F. January 8, 1997, at 3. Utzchneider, Yann. (1997)3 ECLR R-51. Secondary source.

<sup>124</sup> Ibid.

*FAG-Flughafen Frankfurt/Main AG*<sup>125</sup> is a Commission decision concerning groundhandling. FAG, which owns and operates Frankfurt airport, refused to allow self-handling or to admit third-party handlers to deal with groundhandling concerning ramp-side activities which had thus to be done exclusively by FAG. FAG justified its policy with that insufficient space made it impossible to allow additional service suppliers. The relevant service market was held to be the provision of airport facilities and the relevant geographical market was Frankfurt airport. FAG's monopoly was partially due to legal demands but in accordance with *Télémarketing*<sup>126</sup> did this not exclude application of Article 86. The groundhandling market was ancillary to the market of airport facilities for the landing and take-off of aircraft. After citing *Télémarketing* and *RTT v GB-Inno-BM*,<sup>127</sup> the Commission found that the denial to grant potential competitors access to the ramp meant that FAG extended its dominant position into an ancillary market, thus infringing Article 86. The refusal was not justified by the fact that it owned the airport and thereby was entitled to determine the use of its property.<sup>128</sup> The Commission also rejected the claim that FAG had been entrusted with a service of general economic interest within the meaning of Article 90(2). The Commission finally considered that the groundhandling services could be separated from FAG's management of the slots.<sup>129</sup>

#### 4.2.2 Reservation and interlining systems

In the first of the two cases concerning less infrastructure related facilities, *London European v Sabena*,<sup>130</sup> the plaintiff complained that Sabena had abused its dominant position in refusing to grant it access to the computer reservation service Saphir which Sabena controlled. The system means that travel agents can make reservations via computers instead of telephoning the concerned airline company for each booking. Since all major European airlines had access to computerised reservation systems and non-computerised systems were not considered to be equivalent, access to the reservation system was held to be "essential for a company wishing to compete with companies already on the market."<sup>131</sup> The Commission found that the reason for the refusal was to put pressure on London European to raise its fares on the London-Brussels route or to make the competitor withdraw from it completely. Sabena had thus for anti-competitive reasons refused to supply an essential service and the Commission consequently held that Sabena had infringed Article 86.

*British Midland v Aer Lingus*<sup>132</sup> concerned interlining; a system which authorises airlines to sell each others services and includes approximately 95 per cent of the world's scheduled traffic. The

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<sup>125</sup> *FAG-Flughafen Frankfurt/Main AG*. Commission Decision 98/387 of 14 January 1998. OJ L 72/30.

<sup>126</sup> Supra note 66.

<sup>127</sup> See section 3.3 and 3.4.

<sup>128</sup> Regarding the possibilities to restrict the fundamental right to property in the general interest see section 10.0.

<sup>129</sup> Cases concerning groundhandling is generally examined under the Council directive 96/67/EC (1996) OJ L 272/36. See section 11.0.

<sup>130</sup> *London European v Sabena*. Commission decision 88/589 of 24 November 1988. OJ L 317/47.

<sup>131</sup> Ibid. Recital 14.

<sup>132</sup> *British Midland v Aer Lingus*. Commission decision 92/213 of 10 April 1992. OJ L 96/34.

system enables passengers to buy a single ticket providing transport by different carriers and makes them easy to change. Aer Lingus decided to terminate this co-operation with British Midland when that company began to compete with Aer Lingus on the Dublin-London route. Aer Lingus was dominant on that route and a refusal to interline was held to hinder the maintenance or development of competition. That could in particular occur when the refusal or withdrawal of interline facilities might affect market entrance “and when the dominant airline cannot give any objective commercial reason for its refusal ... other than its wish to avoid helping this particular competitor.”<sup>133</sup> Aer Lingus’ claim that it should lose customers if it was forced to interline was not an objective commercial reason,<sup>134</sup> so it had to provide British Midland temporary access under a two year period.

The Commission obviously applied the essential facilities doctrine in the three decisions, although not as explicitly as in the port decisions. *Flughafen Frankfurt/Main* showed once again that even if the holding of the essential facility comes from statutory demands, it does not preclude the applicability of the competition rules. The decision also dealt with the question of objective justification, and the right to property was considered not to be such a justification. The Commission stated however in *Aer Lingus v British Midland* that an “objective commercial reason” may constitute such a justification, but since loss of revenue was not held to be within the meaning of the phrase, it may be asked during what circumstances objective commercial reasons may arise.<sup>135</sup> Finally, it may be concluded that the Commission with the two last decisions showed that the essential facilities doctrine is not limited to access to infrastructures but also applies to services.

### 4.3 The Ice Cream Saga

The protracted but never tedious “Ice cream Saga” has evolved during the decade showing several important features and among them, access to essential facilities. The crucial point concerns freezer exclusivity, i.e. the scheme where producers and distributors of ice cream also supplies freezers to the retailers on free loan or on a small charge included in the price of the products if the retailers undertakes not to stock competing ice cream in the freezers. The origin was that Mars tried to enter the European market but found its endeavour hindered by the freezer exclusivity (firstly) in Germany by its competitors Schöller and Langnese-Iglo and complained therefore to the Commission. The Commission adopted two decisions<sup>136</sup> against the two undertakings but only prohibiting outlet exclusivity, i.e. the practice where the retailer is not allowed to stock any competing brands at all, but not freezer exclusivity.<sup>137</sup> Simultaneously with this development, similar cases arose in the UK and in Ireland. The later concerned HB’s, a subsidiary of Unilever, freezer exclusivity and Mars was

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<sup>133</sup> Ibid. Recital 26.

<sup>134</sup> It has been suggested that this decision might have been influenced by the wish to liberalise the aviation market. See Ridyard, Derek. (1996)8 ECLR 438. Page 443.

<sup>135</sup> That question will be tried to be answered in section 6.5.

<sup>136</sup> *Langnese-Iglo GmbH & Co KG*. Commission decision 93/406 of 23 December 1992. OJ L183/19 and *Schöller Lebensmittel GmbH & Co. KG*. Commission decision 93/405 of 23 December 1992. OJ L183/1.

<sup>137</sup> The decisions were upheld by the CFI and the ECJ in most parts, see Joined cases T-7/93R *Langnese-Iglo GmbH v Commission* and T-9/93R *Schöller Lebensmittel GmbH and Co. v Commission* [1993] ECR II-131 and *Langnese-Iglo GmbH v Commission* Case C-279/95P [1998] ECR I- 0000.



once again found in the role as plaintiff. The Irish High Court found that the scheme infringed neither Article 85(1) nor Article 86<sup>138</sup> but Mars also lodged a complaint with the Commission.

The agreement between HB and the retailers provided apart from freezer exclusivity also that the freezer cabinets should be in a prominent position on the premises. This is of great importance since ice cream undertakings, as HB and Mars, rely on impulse purchasing decisions and the products must therefore be easily available and visible. The Commission organised a survey where 87 per cent of all outlets stated that it would not be a viable option for them to occupy more space to install another freezer.<sup>139</sup> The Commission consequently found that the contracts between HB and the retailers constituted agreements within the meaning of Article 85(1)<sup>140</sup> and that they restricted the retailers' ability to stock competing products due to the space constraints. The exclusivity was held to be a substantial barrier to entry since newcomers did not have access to the freezers and the retailers with non-exclusive freezers were in a great minority. The alternatives were to persuade the retailer to replace the freezer or install an additional freezer. None of these were viable due to HB's market strength (there would hardly be any incentives to replace HB with a smaller supplier) and the cost and inconvenience to acquire and maintain an own freezer. Installation of an additional freezer was neither a viable option due to the space constraints and the importance of accessibility and visibility which limits the suitable space in the outlet.<sup>141</sup> The Commission found that HB abused its dominant position by forcing retailers into the agreements making them de facto exclusive sellers of its ice cream and thereby strengthened HB's dominant position in conflict with Article 86.<sup>142</sup> The Commission also noted that the HB had the intent to cause the exclusionary effect, although the concept of abuse is objective.<sup>143</sup>

HB tried to defend itself with the right to property both under Articles 85 and 86.<sup>144</sup> The Commission stated firstly that property rights may be restricted in public interest and secondly that the freezers more likely belonged to the retailers since they indirectly paid a rent. It finally concluded by referring to *London European v Sabena* and *B&I v Sealink*<sup>145</sup> that "HB uses its property as an inducement to grant exclusivity in relation to the purchase of goods, with the result that this use constitutes in itself an abuse within the meaning of Article 86."<sup>146</sup>

#### 4.3.1 Comments

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<sup>138</sup> Robertson, Aidan and Williams, Mark. (1995)1 ECLR 7. Page 19-20 and Para. 279 of *Van den Bergh Foods Ltd* . Commission decision of 11 March 1998. 98/531. OJ L246/1. The MMC came to the same conclusion.

<sup>139</sup> Ibid. Recital 97.

<sup>140</sup> Ibid. Recital 142.

<sup>141</sup> Ibid. Recitals 158 - 184.

<sup>142</sup> Ibid. Recital 264.

<sup>143</sup> Ibid. Recital 265.

<sup>144</sup> Ibid. Recitals 211 - 220 and recital 270.

<sup>145</sup> Supra notes 131 and 98.

<sup>146</sup> Supra note 139. Recital 270.

The reader may object that the Ice Cream Saga concerns vertical restraints, exclusive purchasing obligations or perhaps tying but not essential facilities. However, HB had a dominant position and controlled the use of the freezers. The retailers are mostly small grocery stores, tobacconists or similar and since the products are sold by impulse purchasing decisions the freezers must be situated in a prominent position in the stores where they are easily available and visible. There is thus in most cases not enough space in the shops for an additional freezer (87 per cent of the outlets in the Commission's survey stated that that was the case) especially since the agreement provided that HB's freezers should be in a prominent place. The competitors were further prevented by the agreement from using the freezers and the reason for this was not lack of space inside them but the wish to exclude the competitors.<sup>147</sup> The freezers constituted therefore in essence essential facilities.<sup>148</sup> The Ice Cream Saga has split the competition law scholars into two camps. Some argue that the freezer exclusivity indeed creates a strategic barrier to entry<sup>149</sup> while others mean that the scheme produced the kind of benefits that the competition rules should encourage and that Mars' market entrance was not impeded,<sup>150</sup> but few have examined the case in the light of the essential facilities doctrine. It may therefore be interesting, also in this context, to see the end of the Saga. Mars appealed the Irish High Court's judgment to the Irish Supreme Court which has asked the ECJ for a preliminary ruling. HB has simultaneously appealed the Commission's decision to the CFI<sup>151</sup> (which in itself is an interesting situation). The ECJ and the CFI may thereby be given a chance to illuminate the essential facilities doctrine, although the two following cases (*European Night Services* and especially *Oscar Bronner*) have already indicated their position.

#### 4.4 The Channel Tunnel case-law

*European Night Services* seems to be the first case where the essential facilities doctrine was explicitly dealt with on a level higher than Commission decisions. The CFI did not just have to consider the doctrine's applicability, and indeed its mere existence, but the case also raised questions concerning more detailed aspects of the doctrine. The relevant circumstances in that case mirrors to a large extent the *ACI* and *Eurotunnel* decisions,<sup>152</sup> which preceded the decision disputed in *European Night Services* and will therefore be briefly examined before the CFI case.

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<sup>147</sup> A similar case is *Spices* (Commission decision 78/172 of 24 February 1978. OJ L53/20) where an agreement prevented supermarkets from selling competing brands of spices which, as ice cream, was considered to be subject to impulse purchase and therefore had to be located carefully (Recital 9). Liebig Spices installed and serviced the special illuminated display units where the spices were sold and they should only contain the supplier's products and the supermarket's own brand. The Commission held the agreement to infringe only Article 85(1).

<sup>148</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 444 and Temple Lang, John. Fordham Int. Law Journal. Vol. 18. Part2. 1994. 437. Page 499.

<sup>149</sup> Robertson, Aidan and Williams, Mark. (1995)1 ECLR 7. Page 20.

<sup>150</sup> Maitland-Walker, Julian. (1995)8 ECLR 451.

<sup>151</sup> Rowe, Michael. (1998)7 ECLR 479. Page 480. Further, a similar case has evolved in Italy where the court followed the Commission's rulings. See Bissocoli, Eugenio. (1998)8 ECLR 520.

<sup>152</sup> *ACI*. Commission decision 94/594 of 27 July 1994. OJ L224/28. *Eurotunnel*. Commission decision 94/894 of 13 September 1994. OJ L224/28.

#### 4.4.1 ACI

Allied Continental Intemodal Services Ltd (ACI) was a joint venture formed by the British Railway Board (BR), Société Nationale des Chemins de Fer Francais (SNCF) and Intercontainer (IC) to be a rail transport operator through the Channel Tunnel to the continent. The Commission found that the agreement infringed Article 85(1) since the parties controlled the specialised wagons needed to supply the services in the Channel Tunnel and an appreciable proportion of the paths in the facility.<sup>153</sup> Exemption was however granted under Article 85(3) since the undertakings agreed to provide the same necessary rail services to other operators and to let potential rivals hire their specialised wagons on a non-discriminatory basis.

#### 4.4.2 Eurotunnel

A usage contract between on the one hand Channel Tunnel Group Ltd and France Manche SA and on the other hand BR and SNCF regulated the use of the Channel Tunnel as far as train traffic was concerned. The undertakings were entitled to 50 per cent of the capacity per hour in each direction. The Commission declared that the Channel Tunnel constituted an essential facility<sup>154</sup> and that it was impossible for other railway undertakings to get access to the paths necessary to operate rail transport in the Channel Tunnel, and that the contract therefore infringed Article 85 (1). Exemption was however granted under the condition that competitors should have access to at least 25 per cent of the hourly capacity. The decision was later annulled by the CFI due to error of fact not related to the essential facilities doctrine.<sup>155</sup>

#### 4.4.3 European Night Services

French, Dutch and British railway undertakings formed European Night Services (ENS) to provide and operate overnight passenger rail services through the Channel Tunnel and agreed to provide ENS with locomotives, train crews and paths. The Commission exempted once again the agreement<sup>156</sup> on the condition that the railway undertakings supplied to any international grouping of railway undertakings wishing to operate night passenger trains the same necessary services they had agreed to supply to ENS on the same terms, i.e. traction over their networks, locomotives, train crews and paths. ENS was unhappy with the decision and sought to have it annulled.<sup>157</sup>

The train undertakings argued that the Commission had misapplied the essential facilities doctrine since only train paths and not locomotives or crews could meet the criteria for the application of the

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<sup>153</sup> *ACI*. Recitals 34 - 35 and 42.

<sup>154</sup> *Eurotunnel*. Commission decision 94/894 of 13 December 1994. OJ L354/66. Para. 56.

<sup>155</sup> *Soci t  nationale des chemins de fer francais and British Railways v Commission*. Joined cases T-79/95 and T-80/95 [1996] ECR II-1491.

<sup>156</sup> *Night Services*. Commission decision 94/663/EC of 21 September 1994. OJ L259/20.

<sup>157</sup> *ENS, Eurostar, EPS, UIC and SNCF v Commission*. Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 [1998] ECR II-0000.

doctrine.<sup>158</sup> The obligation undermined the undertakings' efforts in setting up international groupings and obliged them to share the benefits with third parties that did not bear any commercial risk, the decision amounted thus to an expropriation. The essential facilities doctrine was, they stated, only applicable under Article 86 "and only in a situation where one undertaking denies rivals access to facilities which are both essential to the rival's competitive capacity and to the existence of competition."<sup>159</sup> Access was further provided by the Directive 91/440 and trains with skilled crews could be acquired from elsewhere. The Commission had furthermore not drawn a distinction between facilities which were only advantageous to a competitor and those which were essential. The UK, in intervention, agreed that the conditions required for the doctrine were not met since, firstly, the undertakings had no dominant position and secondly, they had not sole control over the facilities which could thus not be regarded as essential.<sup>160</sup>

The CFI stated that it followed from the case-law on the application of Article 86 "that a product or service cannot be considered necessary or essential unless there is no real or potential substitute" and it does not amount to an essential facility "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."<sup>161</sup> Since ENS's market share was 7 - 8 per cent its refusal to supply competitors with special locomotives and crew could not have the effect of excluding them from the relevant market. And even if the agreement could impede access by third parties to the downstream market, that could only restrict competition if the trains and crew were essential facilities which they were not. In order for that to be the case, they had to be essential for ENS's competitors "in the sense that without them they would not be able to penetrate the relevant market or continue to operate on it"<sup>162</sup> and the Commission had not showed that they could not be obtained from other sources. The access to rail paths was furthermore provided for by Council directive 91/440 and application of the essential facilities doctrine was therefore not necessary.<sup>163</sup>

#### 4.4.4 Comments

A part from the already stated fact that the CFI in this case acknowledged the existence of the essential facilities doctrine, it also illuminated some more specific aspects. The CFI referred to *Magill* and *Tiercé Ladbroke* as a legal justification of the doctrine<sup>164</sup> and stated that there must be no real or potential substitute to the facility. It specified that this means that no viable alternatives shall exist due to the facilities' non-interchangeability and that the facilities shall not reasonably be

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<sup>158</sup> Ibid. Paragraph 190.

<sup>159</sup> Ibid. Paragraph 191.

<sup>160</sup> Ibid. Paragraph 202.

<sup>161</sup> Ibid. Paragraph 209.

<sup>162</sup> Ibid. Paragraph 212.

<sup>163</sup> The directive will be considered in section 11.0.

<sup>164</sup> Supra note 158. Paragraph 208.

able to be duplicated due to, in particular, prohibitive costs or the excessive time needed. If the nature of the facilities is such and the consequences are that potential competitors are excluded from the market, then the facilities are essential. One may notice that the CFI in this context seems to acknowledge that the doctrine not only may apply to infrastructure, as the UK in intervention argued, but also to products (as locomotives) and services (crews).

The agreement between the railway undertakings was naturally examined in accordance with Article 85. The applicants argued that the doctrine only is applicable under Article 86 and the UK agreed that a dominant position is necessary in order for the doctrine to apply. The CFI did not explicitly state whether the application of the doctrine is limited to Article 86 but declared that ENS's small market share meant that its potential refusal to grant access would not have the effect of excluding competitors from the relevant market. It seems therefore that even if the controller of the facility is not dominant, it shall at least have a market share of some substance for the facility to be regarded as essential so that the refusal will have an appreciable effect on competition. Finally, the CFI indicated that the doctrine not only applies to new markets entrants but also to existing competitors on the market if access to the facility is essential for their ability to continue to operate on the market.<sup>165</sup>

## 5.0 OSCAR BRONNER

We have with this section consequently come to the *raison d'être* of the dissertation. In the *Oscar Bronner* judgment<sup>166</sup> did the ECJ finally refer to the essential facilities doctrine and indicated its applicability in EC competition law. Before the judgment will the background facts and the cogent opinion of Advocate General Jacobs be examined.

### 5.1 Background

Oscar Bronner GmbH & Co. KG (Oscar Bronner) published the daily newspaper *Der Standard* constituting a market share of approximately four per cent of the circulation and six per cent of the advertising revenues in Austria. It sought an injunction in *Oberlandsgericht Wien* to require *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* and its two subsidiaries (*Mediaprint*) to allow it access to *Mediaprint's* nation-wide home-delivery service for daily newspapers against a reasonable fee. *Mediaprint* published the daily newspapers *Neue Kronen Zeitung* and *Kurier*, with a combined market share of almost 50 per cent of the total circulation and 42 per cent of the advertising revenues. Furthermore, its publications reached 71 per cent of all newspaper readers in Austria and it operated the only distribution system for daily newspaper subscribers in the Member State. Oscar Bronner argued that *Mediaprint's* refusal to grant it access to the distribution system amounted to an abuse of its dominant position. There were no equivalent alternatives to the scheme and it would be unprofitable for Oscar Bronner to organise its own distribution system. It also transmitted that *Mediaprint* had discriminated against it since the defendant had allowed another independent daily newspaper (*Der Wirtschaftsblatt*) to have access to the system.

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<sup>165</sup> Ibid. Paragraph 212.

<sup>166</sup> Opinion of Advocate General Jacobs delivered on 29 May 1998. Case C-7/97. *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*.

Mediaprint rejected the claim stating that it had organised the system at great costs and that it was not obliged to share it with competitors even if it had a dominant position. Concerning *Der Wirtschaftsblatt*, it claimed that that was a different situation since Mediaprint also printed and marketed the newspaper and it was not a direct competitor of Mediaprint's own publications. The distribution system would finally be overloaded if Mediaprint was required to admit every Austrian publisher of daily newspapers access. The Oberlandsgericht transferred the case to the ECJ for a preliminary ruling.

## 5.2 Advocate General Jacobs' opinion

Advocate General Jacobs quickly identified Oscar Bronner's claim as referring to the essential facilities doctrine and started consequently, in his examination of relevant case-law, to cite cases concerning refusal to supply goods,<sup>167</sup> reservation of ancillary markets<sup>168</sup> and refusal to license.<sup>169</sup> He drew from this case-law the conclusion that "a dominant undertaking commits an abuse where, without justifications, it cuts off supplies of goods or services to an existing customer or eliminates competition on a related market by tying separate goods and services. However, it also seems that an abuse may consist in mere refusal to license where that prevents a new product from coming on a neighbouring market in competition with the dominant undertaking's own product on that market."<sup>170</sup> He continued to look at Commission decisions concerning refusal to deal and the application of the essential facilities doctrine in US antitrust case-law and Commission decisions.

After the examination of the legal background, Advocate General Jacobs declared the fundamental right to deal with whom one pleases. He explained also that even if access to a facility may be pro-competitive in the short-term, there would soon be no incentives for a dominant undertaking to invest in essential facilities and competition would therefore be reduced in the longer term.<sup>171</sup> The mere fact that the dominant undertaking has an advantage by controlling such a facility should not mean that the competitors can demand access to it<sup>172</sup> since Article 86 protects competition, not competitors. Refusal of access may however, stated the Advocate General, be anti-competitive both in the short and the long term when "access to a facility is a precondition on a related market for goods or services for which there is a limited degree of interchangeability."<sup>173</sup> It is necessary in those cases to consider whether the setting up of the facility required a substantial investment (as in e.g. intellectual property rights) and if competition can be achieved only by granting access. The latter will only be the case when "the dominant undertaking has a genuine stranglehold on the

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<sup>167</sup> *Commercial Solvents* and *United Brands*. See section 3.1.

<sup>168</sup> *Télémarketing* and *GB-Inno-BH*. See section 3.3.

<sup>169</sup> *Volvo v Veng, Magill* and *Tiercé Ladbroke*. See section 3.3.

<sup>170</sup> *Supra* note 167. Point 43.

<sup>171</sup> Stanley, Paul. *Solicitors Journal* 1998 142(28) 620. Page 620.

<sup>172</sup> *Supra* note 167. Point 57.

<sup>173</sup> *Ibid.* Point 61.

relevant market”<sup>174</sup> and it shall even then be fully compensated for the access and also be able to make an appropriate return on its investment.

It is possible that a facility may be essential due to the costs of duplicating it, especially if the facility was created under non-competitive conditions. The test must however be objective; “it must be extremely difficult not merely for the undertaking demanding access but for any other undertaking to compete”<sup>175</sup> without access to the facility. The cost must thus deter all potential market entrants in order to alone be a sufficient barrier to entry. Following this fact, Advocate General Jacobs found that Mediaprint had no obligation to allow Oscar Bronner access to the home-delivery network since the former could either duplicate the facility or use other means of distribution. It would be uneconomic in the short term to set up a new nation-wide distribution system, but Oscar Bronner would then be able to compete with Mediaprint on equal terms. He finally notes that an acceptance of Oscar Bronner’s arguments would lead to an intervention not compatible with a free market economy.<sup>176</sup>

### 5.3 The judgment

Before the Court, Oscar Bronner argued that the delivery system constituted an essential facility on a separate market which was reserved by Mediaprint without any objective necessity and that such a refusal to supply undertakings immediately downstream must be objectively justified.<sup>177</sup> Mediaprint objected that even dominant undertakings are free to deal with whom they wishes, an obligation to contract is subject to exceptional circumstances and those exist only if the refusal is likely to eliminate all competition in a downstream market. This was not the case since there were alternative distribution systems, and even if such exceptional circumstances would be considered to exist, its refusal would be objectively justified since the inclusion of Der Standard would compromise the functioning of the distribution system or be excessive to its capacity.<sup>178</sup>

The ECJ first explained that a refusal by a dominant undertaking to supply an undertaking with which it competes in a neighbouring market with raw materials<sup>179</sup> or services<sup>180</sup> which are indispensable for it to carry on its business may amount to an abuse only if the refusal is likely to *eliminate* the rival’s ability to compete.<sup>181</sup> A refusal to license may furthermore only be an abuse in

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<sup>174</sup> Ibid. Point 65. He exemplifies with situations where duplication is hindered by geographical, legal or public policy reasons.

<sup>175</sup> Ibid. Point 66.

<sup>176</sup> Ibid. Point 69.

<sup>177</sup> *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft GmbH & Co. KG and Mediaprint Anzeigengesellschaft GmH & Co. KG*. Case C-7/97 [1998] ECR-0000. Paragraphs 24 - 25.

<sup>178</sup> Ibid. Paragraphs 26 - 28.

<sup>179</sup> See *Commercial Solvents*. Joined Cases 6/73 and 7/73 [1974] ECR 223. See section 3.1.

<sup>180</sup> See *CBEM v CLT and IPB*. Case 311/84 [1985] ECR 3261. (*Télémarketing*) See section 3.3.

<sup>181</sup> *Supra* note 178. Paragraph 38.

exceptional circumstances. Therefore, even if it would be possible to rely on *Magill*<sup>182</sup> in a situation not related to intellectual property rights but to any property rights, it would still be necessary to conclude firstly that the refusal of access would likely eliminate all competition from the undertaking seeking access and that the refusal is not objectively justified. Secondly that access in itself is indispensable for the undertaking's ability to carry on its business due to the lack of actual or potential substitute for the facility.<sup>183</sup>

The ECJ found that this was not the case in *Oscar Bronner* even if there was only one nation-wide home-delivery system and the owner of the system was dominant. There were other methods of distributing the newspapers, even if they would be less advantageous, and there were no technical, legal or economic obstacles which could have made it impossible or unreasonably difficult to duplicate the distribution system.<sup>184</sup> The ECJ declared that "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"<sup>185</sup> but it would at least be necessary to establish that it would not be economically viable to duplicate the system even if there was a market for another daily newspaper of equivalent size to the one that was distributed by the existing system. Mediaprint's refusal did thus not constitute an abuse of a dominant position within the meaning of Article 86.

The judgment's effect on the future applicability of the essential facilities doctrine will be examined later in this dissertation. It may however be suitable to briefly note that the ECJ took a narrow approach, firstly by not explicitly stating that *Commercial Solvents* and *Magill* justifies the doctrine, secondly by declaring that it is not sufficient that a refusal of access may restrict competition but it shall be eliminated, and finally that costs in duplicating the facility may only be excessive if it would not be economically viable even for an undertaking of the size of the dominant undertaking to build an equivalent facility.

## **PART III. DISCUSSION - REINING THE DOCTRINE**

### **6.0 THE TEST REFINED**

Although the Commission defined the essential facility as "a facility or infrastructure without access to which competitors cannot provide services to their customers",<sup>186</sup> the test for what is to be

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<sup>182</sup> See section 3.3.1.

<sup>183</sup> Supra note 178. Paragraph 41.

<sup>184</sup> Ibid. Paragraph 44.

<sup>185</sup> Ibid. Paragraph 45.

<sup>186</sup> *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*. Supra note 48. Recital 41.



considered to be an essential facility must be subject to a more stringent definition. The US court tried to do that in *MCI*<sup>187</sup> but this test also has been criticised. Professor Areeda suggests that it is necessary to take into account that there is no general duty to share, a requirement to do so shall substantially improve competition in the market, denial of access is per se lawful and legitimate business purposes always save the dominant undertaking.<sup>188</sup> Considering these limitations and the cases applying the essential facilities doctrine, or the doctrine of refusal to deal as a whole which has been referred to earlier, it may be possible to construct a test that is more in line with the current legal situation. This section will try to do that while taking into account the impact of *Oscar Bronner*. The different prerequisites are marked in bold text.

## 6.1 Control of the facility

### **Control of the facility by an undertaking or a group of undertakings which are alone or jointly in a dominant position**

The earlier US cases often ignored market definition and merely examined whether the facility was essential from the plaintiff's perspective. It may seem that this has also been the case for the EC. The Commission did for example not deal with market definition in *Port of Genoa* but noted only the significance of the port. There is no consensus whether this is a wanted or necessary development. Glasl argues that "this approach might indeed replace the definition of the relevant geographical and product market"<sup>189</sup> while Makar submits that the traditional market power examination must be carried through.<sup>190</sup> The problem is largely found in the fact that there are two markets; the one where the facility exists and another, usually downstream, where the rival seeking access wants to compete. It seems clear that the undertaking does not have to be dominant on the second market, but that is usually the case.<sup>191</sup> This fact has made Subiotto argue that the traditional test of dominance under Article 86 is insufficient<sup>192</sup> since it is enough to conclude that the undertaking has monopoly power over the facility. Indeed, the market allegedly monopolised is the facility itself and the concern is the monopoly power that arises from the control over the facility.<sup>193</sup> But this does not mean that the traditional market share approach should be ignored; the relevant markets should be identified and it should also be shown how the facility grants the controller a dominant position in these markets. Advocate General Jacobs defined the relevant market in *Oscar Bronner* as the distribution market but did not consider the issue further since no abuse was found.<sup>194</sup>

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<sup>187</sup> Supra note 31.

<sup>188</sup> Areeda, Philip. *Antitrust Law Journal*. Vol. 58. 1990. 841. Page 841.

<sup>189</sup> Glasl, Daniel. (1994)6 ECLR 306. Page 310.

<sup>190</sup> Makar, Scott D. *Florida State Univ. Law Review*. Winter. 1994. 913. Page 916.

<sup>191</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 478.

<sup>192</sup> Subiotto, Romano. (1992)6 ECLR 234. Page 244.

<sup>193</sup> Advocate General Jacobs stated in *Oscar Bronner* (supra note 167) that "[t]he alleged abuse is refusal to access, or the imposition of unreasonable terms for access, to Mediaprint's distribution system. Thus the claim relates to an alleged abuse by Mediaprint of its market power in the area of newspaper distribution." Point 29.

<sup>194</sup> *Ibid.* Point 29.

The question whether the monopoly should be natural, i.e. situations where the most economic way or the only possible way, is to provide the service on a monopoly basis, divides scholars. Ridyard means that this is one of the facts that makes it an essential facility<sup>195</sup> which Temple Lang disputes.<sup>196</sup> Perhaps Werden's view is the most realistic, stating that the cases have tended to involve natural monopolies but that this is neither necessary nor sufficient.<sup>197</sup> Control is often constituted by an actual ownership but it can also be control emerging from a dominant undertaking's exercise of contract rights. This was the case in the Ice Cream Saga and involves therefore considerations concerning Article 85. This aspect will be examined in section 7.0.

## 6.2 The infeasibility of duplication

### **The foreclosed competitor's inability to practically or reasonably duplicate the facility**

The question is whether there are any alternatives for the facility, but a negative answer is only a necessary and not a sufficient condition to make the facility essential.<sup>198</sup> If there are any alternatives, then there is no barrier to entry. Inability to duplicate may basically stem from physical, legal or economic infeasibilities.

Inability to duplicate the facility may emerge from geographical factors and other physical infeasibilities. The first two cases in US and EC competition law (*Terminal Railroad* and *B&I Line v Sealink*) involved this circumstance. In the first case a narrow valley limited the possibilities to construct a complementary track and in the second the relevant market was defined as the central corridor of ferry services between the UK and Ireland where Holyhead was the only available port. The physical infeasibilities do not, however, have to have a geographical origin; in the Ice Cream Saga were in most cases the only suitable place in the retailers' shops occupied by the dominant undertaking's freezers. There was thus not sufficient space available for an additional freezer due to the limited suitable positions for ice cream freezers.

This range of cases, where the inherent conditions are such as to prohibit a duplication of the facility, constitutes the most classic and least controversial aspect of infeasibilities. They are however uncommon since there usually is a sufficiently high cost for duplication. This does not mean on the other hand that the test in all aspects must be an economic one.<sup>199</sup> One example is legal infeasibilities which might arise when an industrial plant puts such restraints on the ecological system that the applicant would not be permitted by the authorities to construct an equivalent factory. The same may be the case when the facility is used in connection with another function which is protected as a statutory monopoly. Another aspect may be that duplication is impossible due to intellectual property law. Whether this is to be regarded as a "proper" infeasibility will be examined in section 8.2.

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<sup>195</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 441.

<sup>196</sup> Temple Lang, John. Fordham Int. Law Journal. Vol. 18. Part 2. 1994. 437. Page 490.

<sup>197</sup> Werden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Page 454.

<sup>198</sup> Makar, Scott D. Florida State Univ. Law Review. Winter. 1994. 913. Page 922.

<sup>199</sup> As Tye argues. See Tye, William B. Energy Law Journal. Vol. 8. Part 2. 1987. 337. Page 348.

There is often, as stated, some sufficiently high duplication cost. The question is then when it will be considered not to be economically feasible to duplicate the facility. It is clear that the cost of duplication must be higher than the price of the desired access, but that is not sufficient. A number of economic theories have been presented trying to show where the limit should be drawn,<sup>200</sup> but since this was one area which *Oscar Bronner* clarified, it may be more relevant to examine the ECJ's opinion. Advocate General Jacobs did not "rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry."<sup>201</sup> He declared that the test must be objective; "it must be extremely difficult not merely for the undertaking seeking access but for any other undertaking to compete." The cost must "deter any prudent undertaking from entering the market"<sup>202</sup> which means that the test shall not take the economical strength of the applicant into account. For example, in *Oscar Bronner* should a newspaper with a size equivalent to Mediaprint (i.e. reaching over 70 per cent of all newspaper reader in the state) be deterred from setting up a distribution system of its own, if it should be considered to be economically infeasible to duplicate it.<sup>203</sup> The test is thus very hard indeed since the owner of the facility once judged it to be feasible. The ECJ followed the Advocate General's opinion, even adding that "it would be necessary *at the very least* to establish" that it would not be feasible for an undertaking with the size of the dominant undertaking to duplicate the facility.<sup>204</sup> Finally, the CFI indicated in *European Night Services* that a need for excessive time for a duplication may also make it infeasible for the applicant.<sup>205</sup> The Tribunal did not specify the time scale needed, but considering the economic demands for infeasibility in *Oscar Bronner*, one may draw the conclusion that it should be extensive.

### 6.3 The denial of access and actual or potential competition

**The denial of access, or refusal to make it available on reasonable terms, when access is indispensable for the foreclosed competitor's ability to compete in an ancillary market where the dominant undertaking competes, or should have been competing with the applicant absent the practice<sup>206</sup>**

#### 6.3.1 Denial of access

Access means actual use of the facility, i.e. sharing and allocating its functions. The denial may be an absolute refusal or even a refusal to participate in negotiations. Unreasonable offers must furthermore also be seen as refusals, such constructive refusals to deal were considered to be a

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<sup>200</sup> Ibid.

<sup>201</sup> Supra note 167. Paragraph 66.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid. Paragraph 68.

<sup>204</sup> Supra note 178. Paragraph 46. Emphasis added.

<sup>205</sup> Supra note 158. Paragraph 209.

<sup>206</sup> Due to the many aspects of this part of the test, it might be convenient to take each aspect separately.

refusal in *Napier Brown v British Sugar*<sup>207</sup> A constructive refusal may for example consist in charging such a high access price that the applicant has no chance to make a return.<sup>208</sup> It is however often stated that access shall be granted on fair and non-discriminatory terms.<sup>209</sup> Whether this means that the owner of the facility cannot bargain hard to reach the most favourable arrangement possible will be considered in section 9.0. It seems in any case to implicate that the threshold for what is to be considered to be a constructive refusal may be relatively low.

### 6.3.2 Indispensable

It has been suggested that this means that a refusal shall constitute an insurmountable barrier to entry for the competitor, i.e. it would without access “be subject to a serious, permanent and inescapable competitive handicap that would make their activities uneconomical.”<sup>210</sup> This seems however to make the test unnecessarily complex and not sufficiently stringent. Indispensable does instead seem to mean that a denial of access totally excludes the potential competitor from the market.<sup>211</sup> The denial shall thus constitute a permanent barrier to entry in accordance with *Magill*. It is, as Advocate General Jacobs explained,<sup>212</sup> not sufficient that access would give the applicant a competitive advantage. The ECJ declared in *Oscar Bronner* that it is necessary “not only that the refusal of the service comprised in home delivery [would] be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal [would] be incapable of being objectively justified, but also that the service in itself [would] be indispensable to carrying on that person’s business, in as much as there is no actual or potential substitute in existence for that home-delivery scheme.”<sup>213</sup> The applicant shall thus be totally unable to compete on the market and this must be due to the refusal of access to the facility.

### 6.3.3 Ancillary market

The competitor shall not be in the market occupied by the essential facility but in an upstream or downstream market so the market of interest shall be a market vertically related to the essential facility. All cases in EC competition law concerning the essential facilities doctrine seems to involve occupations of ancillary markets.<sup>214</sup> This was not the case in *Aspen*<sup>215</sup> which has made some US scholars argue that vertical integration is not necessary.<sup>216</sup> Tye suggests however that “[s]ince ownership of the facility must already confer monopoly power in order to be “essential”, it is clear

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<sup>207</sup> *Napier Brown v British Sugar*. Commission decision 88/518 of 19 October 1988. (1990)4 CMLR 196. OJ L284/41. See section 3.2.

<sup>208</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 482.

<sup>209</sup> See e.g. *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd*. *Supra* note 98 Recital 41

<sup>210</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 487.

<sup>211</sup> Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 454.

<sup>212</sup> *Supra* note 167. Point 65.

<sup>213</sup> *Supra* note 178 Paragraph 41.

<sup>214</sup> With the exception of *Port of Roscoff* (see section 4.1.4) which will be examined below.

<sup>215</sup> See section 2.2.

<sup>216</sup> See e.g. Glazer, Kenneth L. and Lipsky, Abbott B Jr. *Antitrust Law Journal*. Vol 63. 1995. 749. Page 757.

that the foreclosure of competition must be in a market other than the one directly served by the facility itself”.<sup>217</sup> Subiotto explains that the extension of the monopoly power into a downstream market is ipso facto the act that constitutes the misuse of the facility<sup>218</sup> and Kezsbom and Goldman firmly declare that “the threat of downstream monopolisation is the sine qua non of an essential facilities claim”.<sup>219</sup> Advocate General Jacobs states however in *Oscar Bronner* that “[i]n many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favour of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct product or services.”<sup>220</sup> It is however hard to identify such cases as directly concerning the essential facilities doctrine. We may as an example take the *European Night Services*. Suppose that a potential competitor wanted access to its essential facilities; paths, trains and crews (ignoring for one moment that the CFI found them not to be essential). The ENS would then be dominant in the upstream market where these facilities are found and would extend its dominance into the downstream market of railway transport. This is obviously a case of the essential facilities doctrine, but consider then that the potential competitor does not demand access to the facilities on the downstream market but wants to be a member of the joint venture ENS. It is then no more a case of leveraging into ancillary markets vis-à-vis the potential competitor since it seeks access to the level where the facilities are. This is basically the scenario in *Aspen* but it is hard to identify it as a normal case of essential facilities. It seems therefore justified to retain the prerequisite of ancillary market in the test. Horizontal cases should probably be more appropriately judged by another method in the doctrine of refusal to deal.

*European Night Services* raises another question in this aspect. It would be absurd to find an undertaking’s attempt to use its facilities on the downstream market mala in se. The same would be the case when an undertaking leverages upstream to acquire its own source of supply or downstream, to take an “*Oscar Bronner*-example”, a newspaper takes over its own distribution to save costs. The fact that the dominant undertaking leverages into an ancillary market should thus not per se be seen as a sign of abuse. This is also indicated by Advocate General Jacobs in *Oscar Bronner* stating that it would be “unsatisfactory ... to focus solely on the [dominant undertaking’s] market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse.”<sup>221</sup>

The only case among the applications of the doctrine in EC competition law where the owner of the facility did not leverage into an ancillary market is *Port of Roscoff*.<sup>222</sup> But that fact was due to another uncommon circumstance; the dominant undertaking was neither an actual nor potential competitor to the undertaking seeking access. This aspect will be considered next.

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<sup>217</sup> Tye, William B. *Energy Law Journal*. Vol. 8. Part 2. 1987. 337. Page 347.

<sup>218</sup> Subiotto, Romano. (1992)6 *ECLR* 235. Page 244.

<sup>219</sup> Kezsbom, Allen and Goldman, Alan V. *Columbia Business Law Review*. Vol. 1. 1. 1996. Page 6.

<sup>220</sup> *Supra* note 167. Point 50.

<sup>221</sup> *Ibid.* Point 58.

<sup>222</sup> *Supra* note 113.

#### 6.3.4 Actual or potential competition

In the obscure case of *Port of Roscoff* access to the harbour was denied by the chamber of commerce in Morlaix which was also the port authority for Roscoff. The Commission followed its earlier port decisions in finding that the port was the only adequate port facility available for the ferry route, and that the chamber of commerce therefore had to allow the ferry company access. This was the case even if the controller of the facility did not have any interests in the ferry companies using the harbour and thus did not compete with the applicant. It is, as Glazer and Lipsky have stated,<sup>223</sup> hard to see how a denial of access to a facility vis-à-vis an undertaking who is not an actual or potential competitor, could reinforce the dominant undertaking's market power. It seems clear that the applicant and the controller should be in the same market, or should have been if the applicant was granted access. The courts seem in some US cases to find it sufficient that the two parties are in the same line of business<sup>224</sup> but as Kezsbom states; "the fairness grounds for demanding access" should then have considerably less application.<sup>225</sup> Some have argued that it is particularly convenient to use the essential facilities doctrine in cases like these since the problem is difficult to solve otherwise. There seem however to be better solutions in EC competition law, e.g. the discrimination prohibition in Article 86(c). The doctrine should therefore apply only when the dominant undertaking actually or potentially competes with the applicant. The case becomes less clear when the dominant undertaking refuses the applicant access since it has a contractual liability to do so and the agreement is between it and actual or potential competitors of the applicant. This scenario can be found in the Ice Cream Saga and will be dealt with in section 7.0 concerning application under Article 85.

#### 6.3.5 New entrant

Finally, it may be justified to deal here with the question of whether the undertaking seeking access to the facility must be a new entrant on the market. The Commission declared that that was the case in *Sea Containers*<sup>226</sup> and contradicted itself thereby since the year before it had applied the doctrine in favour of B&I who was already competing on the market. The same applies to Aer Lingus who had earlier interlined with British Midland and then refused to continue with the co-operation. It is easy to agree with Temple Lang stating that "[a] distinction between a new entrant and an existing competitor increasing its capacity would not make sense."<sup>227</sup> Indeed, a distinction between a new entrant and the *withdrawal* of access from an existing competitor would not make sense. Such a case should likely cause liability to a larger extent than a case where access has never been granted in the first place.<sup>228</sup> The test can therefore not reasonably demand that the competitor

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<sup>223</sup> Glazer, Kenneth L and Lipsky, Abbott B Jr. *Antitrust Law Journal*. Vol. 63. 1995. 749. Page 783.

<sup>224</sup> Kezsbom, Allen and Goldman, Alan V. *Columbia Business Law Review*. Vo. 1. 1996. 1. Page 10.

<sup>225</sup> *Ibid.* Page 16.

<sup>226</sup> *Sea Containers v Stena Sealink*. *Supra* note 105. Recital 67.

<sup>227</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 495.

<sup>228</sup> Glasl, Daniel. (1994)6 ECLR 306. Page 314.

shall be a new entrant. This opinion is supported by the CFI in *ENS*<sup>229</sup> and by the fact that the refusal to deal doctrine normally applies to cases where the dominant undertaking refuses to supply an existing customer.<sup>230</sup>

#### 6.4 Improvement of competition

##### **Admitting access to the applicant is likely to substantially improve competition in the market**

It is thus not sufficient that access is critical to the applicant's ability to compete, it shall also be essential for competition in the market as a whole. Substantially improve means that competition in the (usually downstream) market is absent or substantially lacking and that the applicant would improve competition in the market to a material degree if it was granted access.<sup>231</sup> This emerges from the fact that "the primary purpose of Article 86 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors."<sup>232</sup> It has been stated that EC competition law has not explicitly said that the plaintiff must be essential for competition,<sup>233</sup> but it seems to be indicated e.g. by *Commercial Solvents*<sup>234</sup> and is supported by Advocate General Jacobs' statement above. It is, as Ridyard has declared,<sup>235</sup> necessary to examine where the essential facilities doctrine fit into the general objective of competition rules to protect effective competition. If there is a number of competitors in the ancillary market, then adding the applicant would hardly improve competition if it concerns the same geographical and product market. Thus, there should be no general duty to grant access<sup>236</sup> if the market is already competitive, unless there is a discriminatory aspect which may in itself affect competition in accordance with Article 86(c) concerning application of dissimilar conditions to equivalent transactions with other trading parties.<sup>237</sup> This fact also emerges from *Magill* where one of the prerequisites in finding that a refusal to grant access to the information was abusive, was that it should probably exclude all competition in the secondary market of television guides.<sup>238</sup> The ECJ refers to this fact in *Oscar Bronner*<sup>239</sup> and there appear thus to be enough reasons to demand that the refusal should not only harm the competitor but also competition in the market.

#### 6.5 Valid business reasons

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<sup>229</sup> Supra note 158. Paragraph 212.

<sup>230</sup> Goyder, D.G. *EC Competition Law*. Third ed. Oxford 1998. Page 335. Footnote 5.

<sup>231</sup> Overd, Alan and Bishop, Bill. (1998)3 ECLR 183. Page 184.

<sup>232</sup> Supra note 167. Point 58.

<sup>233</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 522.

<sup>234</sup> *Commercial Solvents v Commission*. Supra note 48. Paragraph 32.

<sup>235</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 448.

<sup>236</sup> Krattenmaker, Thomas G. and Salop, Steven C. *Antitrust Law Journal*. Vol. 56. Part 1. 1988. 71. Page 74f.

<sup>237</sup> See e.g. the Commission's statement in *Oscar Bronner*. Supra note 178. Paragraph 41.

<sup>238</sup> *Magill*. Supra note 71 Paragraph 56.

<sup>239</sup> It is "likely to exclude all competition in the secondary market". Supra note 178. Paragraph 40.

## The absence of a valid business reason to refuse access

Some tests have both this prerequisite and also the feasibility of the owner's provision of access to the facility. But if it is not feasible to grant access, then the controller of the facility has a valid reason to refuse doing so. It seems therefore convenient to amalgamate the two. The fact that a refusal to deal may be justified if the dominant undertaking have a valid business reason was early recognised, even if the threshold was high. The wish to enter the secondary market was considered not to be an objective justification in *Commercial Solvents*, and United Brands' justification regarding disloyalty was also quashed. The Commission stated however in *BBI v Boosey & Hawkes* that fair and proportional protection of commercial interests is justified and *BP v Commission* showed that shortages may also be a justification. The developments in US antitrust law seem to have followed the same course. Valid business reasons was for example regarded as a justification in *Kodak* and the same applies to efficiency reasons in *Aspen*. Professor Areeda divides the justifications into a micro and a macro level. The micro level focuses on the circumstances of the particular case, for example security demands, while the macro level is a class justification concerning general policy, for example that the dominant undertaking would never have built the facility in the first place if it knew that it would be obliged to share it.<sup>240</sup>

It seems possible to identify some potentially valid justifications in an essential facility context. One example is bad credit worthiness on the part of the applicant, this was indicated in *British Midland v Aer Lingus*.<sup>241</sup> The same applies to safety and technical standards, the applicant may have to have the professional and technical skills needed for the operation. This leads however to another question: can the trained personnel working at the facility on behalf of the dominant undertaking then also constitute essential "facilities" as the skilled train crew in *ENS*? This question will be considered in section 8.1. The fact that the facility has no spare capacity should be a valid justification<sup>242</sup> especially if several competitors fully utilise the facility and they would have to reduce their operations to let the competitor in. Admission would then hardly improve competition.<sup>243</sup> And granting of access may even if there is spare capacity, result in congestion or overuse<sup>244</sup> or could cause a corresponding reduction in the quality of the service that the dominant undertaking offers its customers. These examples should be valid business reasons and the same applies where the dominant undertaking performs a public service mission or protects another public interest which might be impeded. That access will reduce the owner's profit is in itself not a valid business reason,<sup>245</sup> but there may be a valid reason for refusal if it would endanger its economic stability.

The problem can however not be solved by general principles. It seems necessary to balance the business reason against the effects of the refusal. Krattenmaker and Salop examines whether the refusal has generated any significant efficiency benefits or cost savings that can be achieved only by

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<sup>240</sup> Areeda, Philip. *Antitrust Law Journal*. Vol. 58. Part 3. 1990. 841. Page 850f.

<sup>241</sup> *British Midland v Aer Lingus*. *Supra* note 133. Recital 25.

<sup>242</sup> Glasl, Daniel. (1994)6 *ECLR* 306. Page 314.

<sup>243</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 493.

<sup>244</sup> Makar, Scott D. *Florida State Univ. Law Review*. Winter. 1994. 913. Page 923.

<sup>245</sup> Tye, William B. *Energy Law Journal*. Vol. 8. Part 2. 1988. 337. Page 360.



permitting the exclusionary practices. If the answer is positive, due to lower prices or increased customer welfare, then the refusal is legitimate. But where the anti-competitive effects are probable, then efficiencies are no defence since harm to consumers cannot be outweighed by cost savings.<sup>246</sup> This seems to be consistent with the case-law both in EC competition law and US antitrust law. Mediaprint justified its refusal to grant Oscar Bronner access claiming that inclusion of the newspaper was likely to compromise the functioning of the distribution system.<sup>247</sup> The ECJ referred to the lack of objective justification in *Magill*<sup>248</sup> and stated that the refusal shall be “incapable of being objectively justified” in order to impose an obligation to share, but did not exemplify any such justifications, probably since it had found the delivery scheme not constituting an essential facility earlier in the test. It is however likely that the circumstances depicted here will constitute such justifications.

## 7.0 APPLICATION UNDER ARTICLE 85

Even if the essential facilities doctrine has, as refusals to deal as a whole, its legal justification in Article 86, the potential application under Article 85 shall not be ignored. A refusal of access to an essential facility by a single dominant undertaking may have the same effects as a concerted refusal or a refusal emerging from an agreement between the controller of the facility and a third party. This section will examine these alternatives.

### 7.1 Concerted refusals to deal under Section 1 of the Sherman Act

The reader may recollect that *Terminal Railroad*, the first case alleged to deal with the essential facilities doctrine, concerned a restraint of trade under Section 1 of the Sherman Act and not monopolisation under Section 2. Section 1 basically mirrors Article 85 stating that: “[e]very 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 hereby declared to be illegal”.<sup>249</sup> It is basically a per se prohibition since the effect of the collusion is of less importance.<sup>250</sup> *Terminal Railroad* was followed by *Associated Press* where the Supreme Court found that its by-laws infringed Section 1 since they allowed members to block membership to their competitors. Professor Areeda suggests that *Associated Press* indicates that when competitors jointly create a facility that is essential to the competitive vitality of rivals and the market and admission of the rivals is consistent with the legitimate purposes of the co-operation, then the controllers must admit the rivals access to the facility.<sup>251</sup> Concerted refusals to deal have, as Section 1 cases generally, traditionally been classified as per se violations.<sup>252</sup> This is however dependant upon whether the defendant undertakings either have a substantial market power or the controlled facility is of importance to effective competition. The last fact shall naturally be found if the facility shall be

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<sup>246</sup> Krattenmaker, Thomas G. and Salop, Steven C. *Antitrust Law Journal*. Vol. 56. Part 1. 1988. 71. Page 76f.

<sup>247</sup> *Supra* note 178. Paragraph 28.

<sup>248</sup> Paragraph 55 in *Magill*, *supra* note 71 and paragraph 40 in *Oscar Bronner* *supra* note 178.

<sup>249</sup> It should be noticed that vertical restraints of trade is regulated by section 3 of the Clayton Act.

<sup>250</sup> Weiss, Leonard W. and Strickland, Allyn D. *Regulation: A Case Approach*. Second edition. MC Graw-Hill Book Company New York 1982. Page 18.

<sup>251</sup> Areeda, Philip. *Antitrust Law Journal*. Vol. 58. Part 3. 1990. 841. Page 844.

<sup>252</sup> Makar, Scott D. *Florida State Univ. Law Review*. Winter. 1994. 913. Page 917.

deemed to be essential to start with. If the per se rule is inapplicable, the courts assess concerted refusals to deal under a rule of reason approach.<sup>253</sup>

## 7.2 Concerted refusals to deal under Article 85

The problems with concerted refusals to deal in this context can to a large extent be found in the fact that it combines elements of monopolisation and anti-competitive agreements, thus constituting a kind of hybrid which calls for cross-border application of the competition law provisions. This fact is especially accentuated in EC competition law and concerns the ambiguous relationship between Articles 85 and 86. In *Italian Flat Glass*<sup>254</sup> three producers of flat glass allegedly agreed about prices and conditions of sale. The Commission argued that both Articles 85 and 86 were infringed since the undertakings had a collective dominant position. The CFI partially annulled the Commission decision as far as Article 85 was concerned but found regarding Article 86 that several independent economic entities may be united by economic links so that they together hold a dominant position. The Commission had however not sufficiently proved this, it was not possible to “recycle” the facts constituting an infringement of Article 85 to find a violation of Article 86.

Although *Italian Flat Glass* indicated where the line between the two provisions should be drawn, the details are still disputed. Weatherill and Beaumont argue that “Articles 85 and 86 maintain a separate identity and are not mutually applicable”<sup>255</sup> while Goyder states that an abuse of joint dominance in the form of an agreement or concerted practice breach both Articles.<sup>256</sup> This discussion is relevant in the context of essential facilities since the facilities may be controlled by a group of undertakings in the form of a joint venture or an agreement may impede the competitor’s access to the facility. One example is *Ijsselcentrale*<sup>257</sup> where a joint venture of four electricity generators owned and operated the international power lines which were drawn over Holland. The agreement provided that all imports and exports had to be effected through the joint venture and the Commission held that that constituted an infringement of Article 85(1).<sup>258</sup> Joint ventures were at issue also in the Channel Tunnel case-law. The Commission found in *ACI* and *Eurotunnel* that the joint ventures were unlawful under Article 85(1) since they controlled essential facilities. Exemptions were however granted with the condition that other operators should get non-discriminatory access to them. The third case, *ENS*, was appealed to the CFI where the defendants argued that the doctrine is only applicable under Article 86. The UK claimed in intervention that the controllers must have a dominant position in order for the doctrine to be applicable. The CFI found that the joint venture’s market share was too small to have the effect of excluding competitors. Thus it did not say

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<sup>253</sup> Werden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Page 437.

<sup>254</sup> *Italian Flat Glass*. Cases T-68,77,78/89 [1992] ECR II-1403.

<sup>255</sup> Weatherill, Stephen and Beaumont, Paul. EC Law. Second edition. London. 1995. Page 726.

<sup>256</sup> Goyder, D.G. EC Competition Law. Third ed. Oxford 1998. Page 371.

<sup>257</sup> *Ijsselcentrale and Others*. Commission decision 91/50 of 16 January 1991. OJ L28/32. Considered concerning statutory monopolies in section 3.4.

<sup>258</sup> *Ibid*. Recitals 29 and 54.

that the doctrine was not applicable under Article 85, which they easily could have done, but demanded a substantial market power in order for the joint venture to have anti-competitive effects. This is in line with US antitrust law and seems to indicate that the agreement shall be of some importance<sup>259</sup> rather than constituting a requirement of dominance.<sup>260</sup> Refusals of access will however in most cases hardly restrict competition without dominance.<sup>261</sup>

The other series of cases where the essential facilities doctrine was relevant in an Article 85 context was the Ice Cream Saga.<sup>262</sup> The provisions in the contract between HB and the retailers concerning freezer exclusivity were held to be agreements within the meaning of, and infringed, Article 85(1). But the Commission found also that HB had abused its dominant position by forcing the retailers into the agreements, thereby strengthening its dominant position in an abusive way. The use of property to gain exclusivity constituted in itself an abuse within the meaning of Article 86. In the similar case of *Spices*<sup>263</sup> the Commission only found Article 85(1) violated although the defendant was by far the greatest supplier of spices in Belgium with a market share of 39 per cent.

### 7.3 Horizontal and vertical agreements

Some US scholars challenge the fact that the doctrine is applicable under Section 1 of the Sherman Act although this obviously was the case in *Terminal Railroad* and *Associated Press*. Kezbom and Goldman states that “applying the label of essential facilities analysis to these cases is a misnomer that hampers any potentially valid essential facilities analysis in cases where single firm conduct is involved.”<sup>264</sup> Professor Areeda on the other hand points out that the essential facilities doctrine cannot always apply to concerted and unilateral refusals to deal in the same way. Firstly, unilateral actions are more frequent and it calls for precaution not to label them all essential facilities. Secondly, concerted exclusions are much easier to remedy, especially if the rival seeks admission when the joint venture is being created. Thirdly, the admission to a joint venture is a one-time remedy and is thus less likely to impair efficiency. Finally, the combination itself may be evidence of essentiality.<sup>265</sup> Professor Areeda seems thus to argue that the doctrine in effect is more appropriately applied in concerted rather than unilateral refusals to deal, at least as far as joint ventures are concerned. Although the same advantages do not apply to vertical agreements like the Ice Cream Saga, the same aspects seem to have relevance in an EC perspective. The application of Article 85 may furthermore in certain cases be broader than Article 86,<sup>266</sup> for example due to the lack of a

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<sup>259</sup> Compare with the Commission notice of 9 December 1997 concerning agreements of minor importance. OJ C372.

<sup>260</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 437. Page 507.

<sup>261</sup> Hitchings, Paul. (1998)19 ECLR 94. Page 95.

<sup>262</sup> *Van den Bergh Foods Ltd*. Commission decision 98/531/EC of 11 March 1998. OJ L246/1.

<sup>263</sup> *Spices*. Commission decision 78/172/EEC. OJ L 53/20. Supra note 148.

<sup>264</sup> Kezbom, Allen and Goldman, Alan V. *Columbia Business Law Review*. Vol 1. 1996. 1. Page 11. The authors are however reluctant as to give the doctrine any application at all, see pages 34 - 35.

<sup>265</sup> Areeda, Philip. *Antitrust Law Journal*. Vol. 58. Part 3. 1990. 841. Pages 844 - 845.

<sup>266</sup> Hitchings, Paul. (1998)19 ECLR 94. Page 95.

requirement of dominance,<sup>267</sup> we have however seen that market power is of importance also in these cases. Werden argues that the same standards should basically be applied whether the facility is owned by one undertaking or by a joint venture.<sup>268</sup>

However, even if the essential facilities doctrine thus without great effort may be applied to joint ventures, the line between the two provisions is still blurred and this causes uncertainty also in this context. Hitchings states that “the assessment of what constitutes legitimate competitive advantage under Article 85 is very similar to the *Commercial Solvents*/essential facilities approach under Article 86 and, in certain cases, each may be applied in the alternative.”<sup>269</sup> He provides an example where a cable consortium controls the use of a cable and each half circuit of it is managed by a separate member. If both refuse the applicant access, then Article 85(1) is infringed but if only one refuses access, then Article 86 may be applied.<sup>270</sup> Even if that is the case, ambiguity remains concerning vertical agreements as in the Ice Cream Saga where the Commission, as stated, found that HB infringed both Article 85(1) and Article 86, contrasted with *Spices* where only the first provision was found to be violated. A potential illumination by the ECJ and the CFI when writing the end of the Saga on where the line between the provisions is to be drawn may therefore be awaited with great interest not only in the context of essential facilities. It seems however possible with the referred background to add an alternative element to the test laid down in section 6.0 which will enable it to be applied to vertical agreements, namely;

**An agreement between the owner of the facility and some of the applicant’s (potential) competitors that prevents an equitable sharing of the facility**

The doctrine seems not to constitute any great problems as far as horizontal agreements,<sup>271</sup> primarily joint ventures, are concerned. Potential problems are furthermore often avoided by block exemptions or, as in the case of *ACI* and *Eurotunnel*, individual exemptions under Article 85(3). This aspect will be further considered in section 11.0.

## 8.0 FACILITIES

A disproportionately small part of the discussion regarding the essential facilities doctrine has concerned the question of what shall be considered to constitute “facilities”. The major part of the discussion has concerned essentiality, and it is true that the question of what is a facility to a certain extent is dependent on, and limited by, the demand of essentiality. The test to determine this is

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<sup>267</sup> Furse does not agree arguing that abuse under Article 86 is less formal and provides a broader framework than application of Article 85. (1995)8 ECLR 469. Page 471. Temple Lang states that the duty not to discriminate arises in a wider range of situations under Article 85 than Article 86. Fordham Int. law Journal. Vol. 18 Part 2. 1994. 437. Page 507.

<sup>268</sup> Werden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Page 478.

<sup>269</sup> Hitchings, Paul. (1998)19 ECLR 94. Page 96.

<sup>270</sup> Ibid. Page 97.

<sup>271</sup> Which is already covered by the first prerequisite of the test; control “by an undertaking *or a group of undertakings*”. See section 6.1.

however, as yet, too broad to also automatically indicate what the term “facilities” comprises. This section will therefore try to examine the subject, firstly with regard to tangible objects, services and people and secondly, as we shall see, the more controversial aspect of intellectual property and information.

## 8.1 Tangible objects, services and people

Classic essential facilities cases often involve some kind of natural monopoly infrastructure indispensable to the rival’s ability to compete, e.g. harbours, telephone networks, pipelines or electrical transmission lines. The Commission stated in *B&I Line v Sealink* that the doctrine applied to “a facility or infrastructure”<sup>272</sup> but the concept was soon extended to comprise services and not only services related to infrastructure<sup>273</sup> but also interlining and reservation systems.<sup>274</sup> Identifying infrastructures as facilities is relatively non-controversial, the real uncertainty applies to products and raw materials, which have both been argued to constitute facilities.<sup>275</sup> Werden<sup>276</sup> identifies two scenarios in this context. In the first one, a facility is needed in order to deliver a product to customers. Such a facility would be an infrastructure such as a pipeline or a railtrack or also land when the facility is not a natural monopoly and the owner of the facility also owns the land on which other facilities must be built. In the second scenario, the facility constitutes a monopoly input into the production of a product. Werden finds in this aspect no reason to distinguish between infrastructure, products, land, natural resources and people, but the problems of granting relief are so severe that “requiring access to resources other than structures and commodities would be unwise”.<sup>277</sup> The reason for this is that efficient price regulation is virtually impossible since efficient prices are not directly related to production cost (land, natural resources and labour are not produced). If products are considered to be facilities, this may result in the application of the doctrine in unsuitable cases, e.g. downstream integration into the distribution of the undertaking’s own products may be held to be unlawful.

The CFI discussed whether or not people and products could constitute facilities in *ENS*.<sup>278</sup> The case must however be examined with some caution because of the role that that directive 91/440, which obliges railway undertakings to provide certain services to third parties, played in the outcome.<sup>279</sup> The plaintiffs argued that the services they supplied to the joint venture were not essential facilities<sup>280</sup> and the UK agreed, in intervention, with that opinion. The CFI stated that infrastructures, products and services may be considered as essential if they are not interchangeable

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<sup>272</sup> Supra note 98. Recital 41.

<sup>273</sup> As Glasl argues. See Glasl, Daniel. (1994)6 ECLR 306. Page 308.

<sup>274</sup> *London European v Sabena and British Midland v Aer Lingus*. Supra notes 131 and 133.

<sup>275</sup> Temple Lang, John. Fordham Int. Law Journal. Vol. 18. Part 2. 1994. 437. Page 477.

<sup>276</sup> Werden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Pages 474 - 476.

<sup>277</sup> Ibid. Page 475.

<sup>278</sup> Supra note 158.

<sup>279</sup> See section 10.

<sup>280</sup> Supra note 158. Paragraph 190.

and there are no viable alternatives.<sup>281</sup> The locomotives could thus be facilities and even if the case is not as clear regarding the crews, their status as facilities was ruled out on the same grounds as the locomotives,<sup>282</sup> so it would seem that the CFI regarded them as potential facilities to the same degree as products.

If infrastructure, services, products and people are potential facilities, the next question concerns raw material. Advocate General Jacobs stated in *Oscar Bronner* that “[a]n essential facility can be a product such as raw material or a service”<sup>283</sup> in which he included infrastructure. It is however hard to find any case where the doctrine has been applied to a refusal to supply raw material. Cases such as *Commercial Solvents* and *Napier Brown v British Sugar*<sup>284</sup> were solved by the classic refusal to supply doctrine, which basically applies to anti-competitive refusals to supply already existing customers, and there appears to be a reason for this. It is not appropriate, or even possible, to have one single test for refusals to deal. The problem is in US antitrust law, apart from the essential facilities doctrine, dealt with under the intent test using a rule of reason approach<sup>285</sup> or in certain cases as a per se violation.<sup>286</sup> The same applies to EC competition law; the essential facilities doctrine originates from cases concerning access to infrastructure and has not been adapted for a great number of other types of “facilities”. This is particularly the case concerning refusals to supply raw material where there already exists a method suitable to deal with the matter in a more stringent way than the essential facilities doctrine would present. There are thus strong motives to limit the definition of “facilities” and in particular to exclude raw material from the term. This may also exert an influence on intellectual property and information as we shall see in the next section.

## 8.2 Intellectual property and information

One of the earliest cases in this context was the settlement between IBM and the Commission.<sup>287</sup> IBM agreed under the terms of the settlement to predisclose its interface information on its System-370 products so that competitors would be able to produce compatible products. IBM was naturally a monopolist on the upstream market of System-370 computers and its policy of not disclosing the information gave it an important advantage in the downstream market of products compatible with the hardware. These circumstances were however also found in two US antitrust cases where the courts found no infringements although the essential facilities doctrine at that time was, in contrast to EC competition law, acknowledged and widely applied by the lower courts.<sup>288</sup> The courts thus did not find the doctrine applicable to refusals to share information. Goyder suggests

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<sup>281</sup> Ibid. Paragraph 209.

<sup>282</sup> Ibid. Compare paragraphs 215 and 216 with paragraph 218.

<sup>283</sup> Supra note 167. Paragraph 50.

<sup>284</sup> Supra notes 48 and 59.

<sup>285</sup> Neale, A.D. and Goyder D.G. *The Antitrust Laws of the U.S.A.* Third ed. Cambridge 1986. Page 94.

<sup>286</sup> Werden, Gregory J. *St Louis Univ. Law Journal*. Vol. 32. Part 2. 1987. 433. Page 437.

<sup>287</sup> Supra note 68.

<sup>288</sup> *American Berkey Photo v Eastman Kodak Co.* 603 F.2d. 263 (2nd Cir. 1979) and *California Computer Prods. v International Business Machines Corp.* 613 F.2d. 727 (9th Cir. 1979)

that the case shows that dominant undertakings have a responsibility to see that markets are competitive regardless of whether their actions are justified on other grounds.<sup>289</sup> Subiotto formulates the same suggestion in a comment on *Magill*<sup>290</sup> which raises the question of whether the cases can be explained by this all-embracing principle rather than the essential facilities doctrine.

Both Advocate General Jacobs and the ECJ commented on *Magill* in *Oscar Bronner*.<sup>291</sup> They stated that the special circumstances in the case which took it outside the principal rule in *Volvo v Veng* were that: 1. the supply of a product was indispensable for carrying on the business; 2. the refusal prevented a new product for which there was a potential demand; 3. the refusal was not objectively justified; and 4. it was likely to exclude all competition in the secondary market.<sup>292</sup> When comparing these facts with the test found in section 6, we find under the assumption that IP is indeed a facility, that the dominant broadcasters controlled the facility, that *Magill* was practically unable to duplicate it due to the copyright, that the dominant broadcasters refused *Magill* access to the facility and that access was indispensable for its ability to compete. Further, the market in which *Magill* tried to compete was ancillary to the broadcasting market and the dominant undertakings extended their monopolies into the downstream market where *Magill* was a potential competitor. Finally, granting *Magill* access to the information was likely to improve competition in the downstream market and the dominant undertakings had no valid business reasons to refuse access. *Magill* thus fulfils all the prerequisites of the test. Basically the only difference in the Court's approach exists in its emphasis on the fact that *Magill* tried to produce a new product when the existing ones were inadequate. Temple Lang states however that the important issue is not whether the plaintiff's product is new but whether it is found in a product market ancillary to the market in which the intellectual property right primarily operates. The plaintiff can then rely on the prohibition of monopoly leveraging.<sup>293</sup>

As stated earlier, it should only be necessary and not sufficient to fulfil the test in order for the object to be a facility, and there is indeed no consensus that the essential facilities doctrine was applicable to *Magill*. Glasl identifies the judgment as a duty to supply case but "it does not contribute to the essential facilities doctrine, because the IP concerned cannot be classified as an essential facility."<sup>294</sup> Deselaers states that *Magill* brought the doctrine into EC law in the real sense<sup>295</sup> and Ridyard argues that the ECJ decided that TV listings were essential facilities since they are merely by-products and not a result of a creative activity subject to effective competition.<sup>296</sup> He seems to suggest that the TV listings constituted essential facilities since they were not a useful form of

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<sup>289</sup> Goyder, D.G. *EC Competition Law*. Third ed. Oxford 1998. Page 353.

<sup>290</sup> Subiotto, Romano. (1992)6 ECLR 234. Page 239

<sup>291</sup> *Supra* notes 167 and 178. Point 63 and paragraph 53.

<sup>292</sup> *Ibid.* Paragraphs 53 - 56.

<sup>293</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18 Part 2. 1994. 437. Page 515.

<sup>294</sup> Glasl, Daniel. (1994)6 ECLR 307. Page 311.

<sup>295</sup> Deselaers, Wolfgang. *EuzW*. Heft 16/1995. 563. Page 563.

<sup>296</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 446.

intellectual property and Subiotto agrees that they did not deserve to be protected by copyright.<sup>297</sup> This, and the fact that the ECJ referred to the TV listings not as intellectual property protected information but as raw material indicates that Ridyard is correct in stating that “IP rights are not essential facilities but ... they may be an essential facility where there is some serious impediment to the way competition between IP owners works.”<sup>298</sup>

If *Magill* then should be considered to be a case of refusal to supply raw material, which is also suggested by Greaves,<sup>299</sup> does that indicate that the discussion in the section above also applies to intellectual property? It would in most cases be inappropriate to apply *United Brands* to intellectual property cases but is the essential facilities doctrine better suited to the task? This was considered in *Philips Electronics N.V. v Ingman Ltd. and the Video Publishing Co. Ltd.*<sup>300</sup> where the defendants infringed the plaintiff’s IP right by producing CD:s without a licence. They argued as Euro-defences that compulsory licences is consistent with *Port of Rødby*<sup>301</sup> since intellectual property rights are essential facilities so that a refusal to grant competitors access to the licence constitutes an abuse of a dominant position under Article 86.<sup>302</sup> Mr Justice Laddie declared: “I do not accept Mr Barling’s argument based on the *Port of Rødby* case. If he is right, in any intellectual property right case it will be open to the defendant to say that the proprietor of the right cannot enforce the exclusivity of his right and must grant access.” “Ownership of an intellectual property right would, per se, mean the ownership of a dominant position or an “essential facility” and the refusal to licence would, per se, amount to an abuse of it. This appears to me to be inconsistent with *CICRA v Renault* and *Volvo v Veng*.”<sup>303</sup> Mr Justice Laddie agreed with the opinion that the information in *Magill* was raw material and that the intellectual property was merely the tool to effect the abuse.<sup>304</sup> It has been argued that this rejection of the essential facilities doctrine in intellectual property cases is consistent with *Tiercé Ladbroke*.<sup>305</sup> The differences in that case are however accentuated from an essential facility perspective since market entrance was not affected, the applicant and the dominant undertakings did not compete on the downstream market and the broadcasts were not indispensable for the former’s activities on the betting market. It can thus not be identified as an essential facility case.

It seems possible from this discussion to draw the conclusion that the essential facilities doctrine is not generally applicable to intellectual property cases but that it may be useful in exceptional circumstances such as those found in *Magill*. Indeed, the most coherent way to explain the case

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<sup>297</sup> Subiotto, Romano. (1992)6 ECLR 234. Page 238.

<sup>298</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 445.

<sup>299</sup> Greaves, Rosa. (1995)4 ECLR 438. Page 246.

<sup>300</sup> [1999] FSR 112, CH 1997 P No. 4100 and CH 1997 P No. 4101. The judgment has been appealed.

<sup>301</sup> See section 4.1.3.

<sup>302</sup> Supra note 301. Paragraphs 45 - 47.

<sup>303</sup> Ibid. Paragraph 48.

<sup>304</sup> Ibid. Paragraph 52.

<sup>305</sup> Jones, Nigel. (1998)9 EIPR 352. Page 353.



seems to be from an essential facility perspective but, as stated, that does not mean that intellectual property or even information in general should be considered to be facilities. In *Oscar Bronner* the ECJ did not confirm that the plaintiff's reference to *Magill* as an acknowledgement of the essential facilities doctrine was correct<sup>306</sup> but it would appear that the Court confirmed that if the prerequisites in the case are fulfilled, then it would be applicable in other situations and, as we have seen, the prerequisites mirror those traditionally found in the test to determine an essential facility.

## 9.0 ACCESS TERMS

Maybe the most obscure part of the essential facilities doctrine concerns on what terms the controller of the facility is obliged to grant the applicant access. Has it only the right to cover the extra cost involved or is it justified to demand a fair return, or even to remain in the same economical position as it was before access had to be granted? The Commission decisions gives little guidance, stating seldom more than that access shall be made available on "fair and non-discriminatory terms".<sup>307</sup> The Commission explained in *FAG* that applicants should make "adequate payment" in the form of rents "as long as such amounts were within the limits imposed by the competition rules"<sup>308</sup> but neither that is very illuminating. It is clear that the dominant undertaking cannot charge prices that are so high that the applicant cannot make a reasonable return<sup>309</sup> and it is also clear that the owner does not have to discriminate in favour of a competitor or be obliged to use the facility in an uneconomical way.<sup>310</sup> But "access on reasonable and non-discriminatory terms" is in need of a more specified definition. Such a definition may in certain circumstances be found in industry regulations. The Commission could for example in *British Midland v Aer Lingus* apply the standard terms for interlining,<sup>311</sup> but such guidelines are not very common within the Community<sup>312</sup> and it is only to a limited extent possible to take access terms from analogous markets. It seems thus that Ridyard is correct in stating that "an overview of the cases reveals a notable determination ... to side-step the thorny issue of access terms."<sup>313</sup> We have therefore to look for guidance in national competition authorities' practice.

### 9.1 Access on operating costs

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<sup>306</sup> Supra note 178. Paragraphs 24 and 41.

<sup>307</sup> See e.g. *B&I v Stena Sealink*. Supra note 98. Recitals 41-42 with reference to *ERT*. Supra note 86. Paragraphs 37-38.

<sup>308</sup> *FAG*. Supra note 126. Recital 92.

<sup>309</sup> In principle concerted refusals. See section 3.2.

<sup>310</sup> Temple Lang, John. *Fordham Int. Law Journal*. Vol. 18. Part 2. 1994. 487. Page 497.

<sup>311</sup> *British Midland v Aer Lingus*. Supra note 133. IATA resolution concerning the Multilateral Interline Traffic Agreement.

<sup>312</sup> Cave, Martin and Crowther, Peter. *Rivista Internazionale Di Science Sociali*. Vol. January - March. 1995. 141. Page 141.

<sup>313</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 449.

*Southern Vectis*<sup>314</sup> is in many aspects a classic essential facility case. The company had a dominant position in the market of local bus services on the Isle of Wight and refused its competitor Gange Taxis and Mini Coaches (Gange) access to the Newport bus station which it owned. The OFT found that duplication of the facility was not feasible due to the cost of entry and the lack of available space. Southern Vectis explained that it could admit other bus operators access on a commercial basis but that the bus station was already fully utilised with no spare capacity. The OFT challenged that, stating that there were additional capacity and “where the effects is to restrict, distort or prevent competition, the manner in which property rights are exercised may amount to an anti-competitive practice.”<sup>315</sup> The denial of access was thus held to restrict competition under Section 3 of the Competition Act 1980. The question then arose on what terms it had to grant Gange access. The owner wanted to charge in relation to the proportionate share of the stands used. Access to one stand out of ten would then mean ten per cent of the bus station’s running costs including a charge for capital costs plus 20 per cent to give profit.<sup>316</sup> The OFT found it more justified for Gange to pay a fee calculated with regard to the volume of departures that it would enjoy. The amount of the departure fee was a matter for the parties to negotiate with reference to the running costs. Since the applicant would have approximately one per cent of the total departures should it pay the same share of the costs.<sup>317</sup> The French Competition Council came to a similar conclusion in *Héli-Inter Assistance v SA Jet Systems*<sup>318</sup> where the terms of access should be cost related, transparent and based on objective criteria. Ridyard finds this demand of access on operating costs amounting to “a complete confiscation of the asset value associated with the essential facility... Interventions that ignore considerations of dynamic efficiency for static efficiency objectives represent the ‘nightmare scenario’ for business.”<sup>319</sup>

## 9.2 The Efficient Component Pricing Rule

An alternative method can be found in the case *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd*<sup>320</sup> where the defendant operated the public service telecommunications network in New Zealand, formerly run as a state monopoly. The dispute concerned how much Telecom could charge for interconnecting Clear to its network. The plaintiff wanted to pay Telecom for the direct costs of providing the access but nothing for the maintenance of the network. The defendant wanted Clear to pay a charge amounting to the profits which it would lose by granting access; the opportunity costs in accordance with the Baumol-Willig Rule or the Efficient Component Pricing Rule. The High Court found that the defendant was right in applying the rule which states that the dominant undertaking shall not be forced to receive less than necessary for making it indifferent as to whether the electricity shall be carried entirely or only partially over its

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<sup>314</sup> *The Southern Vectis Omnibus Company Ltd*. OFT Report of 17 February 1988.

<sup>315</sup> *Ibid.* Page 25.

<sup>316</sup> *Ibid.* Page 10.

<sup>317</sup> *Ibid.* Pages 30-31.

<sup>318</sup> *Supra* note 124.

<sup>319</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 451.

<sup>320</sup> (1992) 5 TCLR 166 and (1993) 4 NZBLC 103, 340. Privy Council not reported, judgment of 19 October 1994. LAWTEL <http://www.lawtel.co.uk/cgi-bin/w97166&DB>. 1 of April 1999.

own lines.<sup>321</sup> Clear appealed and the Court of Appeal found that the Rule was anti-competitive since it allowed Telecom to include monopoly profits. It was entitled to a fair commercial return but should not be compensated for its opportunity costs.<sup>322</sup> Telecom appealed to the Privy Council which found that it was not anti-competitive to charge opportunity costs since the Efficient Component Pricing Rule reflected what could be charged in a competitive market. The Privy Council consequently approved the rule, but emphasised that it should be examined in each case whether there was a risk that the applicant would be forced to pay monopoly prices.

The Efficient Component Pricing Rule means thus that the owner shall charge an access price that compensates it for the losses caused by allowing access and thereby makes it indifferent whether to grant access. The scholars have not unanimously adapted the rule. Tollemanche claims that the Privy Council was not right in stating that opportunity costs would be charged in a fully competitive market since there would then be no barriers to entry.<sup>323</sup> Ridyard is however sympathetic stating that the rule ensures that third parties only enters the market if they can operate more efficiently than the owner.<sup>324</sup> He concludes that in order to find the optimal access pricing must the competition authorities measure the unconstrained asset value (i.e. the value of the essential facility if the owner is free to exploit the asset) with the appropriate asset value (i.e. the value if the owner was subject to effective competition from rival assets). If the unconstrained asset value is higher, then there is an excess profit which will be “confiscated” by the intervention.

There are no clear answers to the questions posed in the beginning of this section but some comments should be made. The Efficient Component Pricing Rule, or the Baumol-Willig Rule, seems on the outcast to be justified. If the controller of the essential facility does not charge monopoly prices, then it is clear that it should neither incur losses by providing rivals access and the opportunity costs should be covered. One could however argue that in order for the facility to be “essential” in the first place shall competition in the (usually downstream) market be improved by the granting of access. So if the controller is not taking the opportunity to charge a monopoly price, is not the market already “competitive”? On the other hand is the strength of the rule, as Ridyard stated, that it may prevent non-effective rivals from access since they must charge prices below the prices charged by the owner. So even if the prices were not excessive to start with, they will become even lower to the benefit of the consumers and thus nevertheless improve competition. This line of argument omits however one factor; in order for the controller to be obliged to share the facility to start with, it must abuse its dominant position. It is hard to see how an abuse is constituted when the same price is charged as if the controlling company was subject to effective competition. Considering the Privy Councils’ judgment, it should be noted that the applied provision, Section 36 of New Zealand’s Commerce Act 1986, is not totally consistent with Article 86 of the EC Treaty. The court also stated that it is necessary to examine in each case whether the dominant undertaking charged prices amounting to (in Ridyard’s terms) the appropriate or unconstrained asset value. If

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<sup>321</sup> Tollemanche, Melanie. (1994)1 ECLR 43. Page 43.

<sup>322</sup> Tollemanche, Melanie. (1994)4 ECLR 236. Pages 236 f.

<sup>323</sup> Tollemanche, Melanie. (1995)4 ECLR 248. Page 251.

<sup>324</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 450.

the last is the case, then shall the access price still only cover the opportunity costs. But that leaves us with the same result as the Court of Appeal; the controller shall be able to cover its costs plus receive a fair return. It is thus difficult to find a clear solution to the problem. If the Efficient Component Pricing Rule is applied, then it is either hard to see the barriers to entry if it does not charge monopoly prices and if it does, it leaves us with just the problem that the rule should solve i.e. to identify what a fair commercial return is when the service has only been provided by a monopolist.

The ECJ gave in *Oscar Bronner* no guidance on how to solve the problem, but Advocate General Jacobs stated that an undertaking obliged to provide access must “in my view be fully compensated by allowing it to allocate an appropriate proportion of its investment costs to the supply and to make an appropriate return on its investment having regard to the level of risk involved.”<sup>325</sup> It seems therefore clear that the applied policy should be more generous than the OFT was in *Southern Vectis*, but there does still not seem to exist an all embracing formula to find the optimal access pricing. The problem is accentuated when it is the duty for the controller to grant such non-discriminatory access. That may cause conflicts of interests which has made some argue that the owner must separate the management of the facility from the management of the services produced by the facility. This raises questions concerning the right to property which will be examined in the following section.

## 10.0 THE RIGHT TO PROPERTY

The ECJ has on several occasions declared that fundamental rights originating from the European Convention on Human Rights (ECHR) and the common constitutional principles of the Member States constitutes integrated parts of the *acquis communautaire*<sup>326</sup> Among the fundamental rights have in particular the right to property, provided by Article 1 of the first protocol to the ECHR, been a common ground of defence in essential facilities cases.<sup>327</sup> In *Liselotte Hauer v Land Rheinland-Pfalz*<sup>328</sup> was the applicant refused authorisation to plant vines on her land. The ECJ found that there was a right to property but that it may be restricted in order to promote various public interests.<sup>329</sup> The restriction was also held to be justified by such interests<sup>330</sup> and this fact has traditionally constituted the Commission’s counter-claim in essential facilities cases. In *FAG* argued for example the defendant that the owner has the right to determine the use of its property. The Commission acknowledged the impact of *Liselotte Hauer* but stated that the competition rules constituted “restrictions on the right to property which correspond to objectives of general interest

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<sup>325</sup> Supra note 167. Point 64.

<sup>326</sup> *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel*. Case 11/70 [1970] ECR 1125 and *Nold v Commission*. Case 4/73 [1974] ECR 491. See also the joint declaration on fundamental rights by the Parliament, Council and Commission from the 5 of April 1977. (1977) OJ C 103/1.

<sup>327</sup> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

<sup>328</sup> *Liselotte Hauer v Land Rheinland-Pfalz*. Case 44/79 [1980] ECR 3727.

<sup>329</sup> *Ibid.* Paragraph 19.

<sup>330</sup> *Ibid.* Paragraph 30.

pursued by the Community.’<sup>331</sup> The duty to give access was thus held not to deprive the owner of the property, but restricts the exercise of it to what is compatible with the competition provisions.<sup>332</sup> HB made the same argument in the Ice Cream Saga<sup>333</sup> and the Commission dismissed the claim on the same grounds adding that the proceedings did not concern HB’s use of its own property, but the restrictions which it imposed on the retailers in their use of the property.<sup>334</sup> Since the retailers paid for the freezers could the exclusivity provision concerning the use of the property not be justified by reference to property rights.<sup>335</sup> These aspects are fairly non-controversial, although Subiotto has argued that it will be hard to find a limitation of the right to property properly proportionate and no more restrictive than necessary in order to attain the Community objective, when the objectives underlying the requirement of access and the consequent economic and social effects are not analysed.<sup>336</sup>

A more controversial aspect is constituted by the opinion that the owner must separate the management of the facility to an independent body in order to grant access on non-discriminatory terms. Ridyard finds this unavoidable since the owner otherwise will admit access to maximise the overall profitability of the group.<sup>337</sup> There may, indeed, exist a conflict of interest and Temple Lang argues that the only way to avoid this conflict is to let an independent public utility with a duty of impartiality or a separate undertaking own the facility.<sup>338</sup> He agrees that it might seem strict but “it is not easy to see how any standard lower than that of an independent owner could be justified or formulated satisfactorily.”<sup>339</sup>

However, if the line of argument concerning protection of property rights was rightly quashed with reference to the general interests in the cases above, the same justifications of an expropriation (which it in effect amounts to) is much less clear. The compulsory breaking up of Standard Oil<sup>340</sup> might have been justified but a compulsory acquisition of the facility merely exchanges one problem to another. If the owners’ duty to admit access on non-discriminatory terms constitutes a conflict between its interests in the up- and downstream markets, a compulsory acquisition of the facility constitutes a conflict between competition and ownership. One of the most frequent criticisms of the

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<sup>331</sup> Supra note 126. Recital 90.

<sup>332</sup> Ibid. Recital 92.

<sup>333</sup> Supra note 139. Recital 211.

<sup>334</sup> Ibid. Recital 213.

<sup>335</sup> Ibid. Recital 270.

<sup>336</sup> Subiotto, Romano. (1992)6 ECLR 234. Page 234.

<sup>337</sup> Ridyard, Derek. (1996)8 ECLR 438. Page 451.

<sup>338</sup> Temple Lang, John. Fordham Int. Law Journal. Vol. 18. Part 2. 1994. 437. Page 480.

<sup>339</sup> Ibid. Page 480.

<sup>340</sup> *Standard Oil Company of New Jersey v US*. 221 US1 (1911).

essential facilities doctrine is that a duty to share impairs the incentive to invent and construct the facility in the first place. This argument is emphasised if the owner in addition is forced to transfer the control of the facility to a separate body. The development of the essential facilities doctrine was indeed heading in this direction before *Oscar Bronner*, but there is reason to believe that the advocates of this interventionist approach have less grounds for their claims now. The ECJ did not have to examine the future management of the distribution system since Oscar Bronner's claims were unfounded. Advocate General Jacobs stated however that "a detailed regulation of the markets, fixing prices and conditions for supply would be an unworkable intervention scarcely compatible with a free market economy."<sup>341</sup> One should finally not deny that there are problems with having the owner both using and permitting access to the facility, which is clearly illustrated by the Holyhead decisions, but a policy of expropriation would in the longer term only lead to other more serious problems. The difficulties that have been illustrated in these last two sections may to a certain extent be avoided if the case to case application of the essential facilities doctrine is exchanged by a statutory application. This will be examined in the following section.

## 11.0 STATUTORY APPLICATION

It may be seen as a sign on the essential facilities doctrine's growing importance that it has left the case-law stadium and now also is subject to statutory application.<sup>342</sup> The reader may recall that the Commission granted individual exemptions to the railway undertakings in the decisions preceding the *ENS* judgment under the condition that non-discriminatory access to the facilities was provided for potential competitors. Logically, also group exemptions have been implemented concerning, for example, access to computerised systems for air transport services.<sup>343</sup> The exemptions contains basically the same provisions; access shall be granted on non-discriminatory basis (Article 1), the facilities shall be separated from the management on the ancillary market (Article 3) and the applicants shall pay a reasonable and non-discriminatory access fee (Article 12). The same content can be found in the railway directive which was at issue in *ENS*<sup>344</sup> and regulations in the airport sector concerning slot allocation and groundhandling has also followed an essential facility approach.<sup>345</sup> However, the doctrine has more frequently been used as a vehicle to liberalise sectors

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<sup>341</sup> Supra note 167. Point 69.

<sup>342</sup> Goyder D.G. *EC Competition Law*. Third ed. Oxford 1998. Page 350.

<sup>343</sup> Commission regulation 3652/93 of 22 December 1993. Group exemption of agreements concerning computerised systems for air transport services. OJ L333/37. (Expired 30 June 1998.)

<sup>344</sup> Council directive 91/440/EEC of 29 July 1991 on the development of the Community's railways. OJ L237/25. See Articles 10, 6 and 8.

<sup>345</sup> Commission regulation 1523/96 of 27 July 1996. Air services and slot allocation. OJ L155/18 and Council directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports. OJ L272/36. See Articles 6, 4 and 16(3).

as electricity transmissions,<sup>346</sup> gas pipelines<sup>347</sup> and, above all, telecommunications.<sup>348</sup> It would be outside the aim of this dissertation to intimately deal with this last sector but the Commission left some interesting remarks in its Draft Access Notice<sup>349</sup> which are worth examining.

The Commission identifies three potential abuses, firstly a refusal to grant access when the owner of the facility already has granted other undertakings, including itself, access to it (Paragraph 73). This has been seen as a non-discriminatory principle in accordance with *Commercial Solvents* since the provision does not, they argue, seem to presuppose that there are competing service providers on the downstream market. A “*Commercial Solvents*-abuse” does not require that the facility shall constitute an essential facility and this has caused concern since it would mean that the doctrine is extended to ordinary dominance situations.<sup>350</sup> It is however hard to accept this interpretation since the Commission as its only example of an abuse in the provision provides the situation where the owner is in direct competition with the applicant on the downstream market. The second abuse is a refusal when no operator has been granted access and a refusal would limit the development of new markets or products contrary to Article 86(b) (Paragraph 75). It has been suggested that the owner nevertheless may be active on the downstream market and that the provision constitutes a requirement to follow normal commercial behaviour in accordance with *United Brands*.<sup>351</sup> The last abuse is constituted by a withdrawal of access from an existing customer (Paragraph 86). This probably indicates that the Commission has changed its view in *Sea Containers* that the refused undertaking shall be a new market entrant. The Commission also explains that there is no difference between *Commercial Solvents* and a withdrawal of access from an essential facility in this aspect (paragraph 87).

The Commission provides in Paragraph 79 a test showing when access shall be granted in telecommunications cases. (a) Access to the facility is essential for the applicant to compete on a related market; (b) there is sufficient capacity available to provide access; (c) the controller does not satisfy demand on the market, blocks the emergence of a potential new product or service or impedes competition on an existing market; (d) the applicant is prepared to pay a reasonable and non-discriminatory access price and will accept non-discriminatory access terms; and (e) there is no objective justification to refuse access. Relevant justifications may be that the applicant is a credit risk (Paragraph 73) or that an “overriding difficulty” arises which prevents the owner from admitting access due to e.g. its own need of the facility to introduce a new product or service. The Commission finally concludes that similar considerations may be made regarding access agreements

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<sup>346</sup> Council directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids. OJ L313/36.

<sup>347</sup> Council directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids. OJ L147/37.

<sup>348</sup> European Parliament and Council directive 97/33 of 30 June 1997 on interconnection in telecommunications. OJ L199/32. Amended by European Parliament and Council directive 98/61/EC of 24 September 1998. OJ L268/37.

<sup>349</sup> Commission notice of 11 March 1997. Communication from the Commission on the application on the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles. OJ C76/9.

<sup>350</sup> Hitchings, Paul. (1998)19 ECLR 85. Page 96.

<sup>351</sup> Ibid. Page 97.

under Article 85 which have exclusionary effects on third parties (Paragraphs 101 and 104(c)). These principles may prove to apply to other areas than telecommunications. The Commission states that essential facilities in the transport sector shall be examined in the same way as telecommunications (Paragraph 75) and it has even been suggested that the telecommunications sector will act as a driving force for developing certain issues in EC competition law and “the essential facility concept is one of the concepts most likely to be elaborated - or litigated - soon.”<sup>352</sup> Finally, apart from the usual essential facility ingredients does the statutory application of the doctrine usually also provide procedural provisions. Some kind of controlling body shall be created, an arbitration procedure shall be provided and the access terms are specified.<sup>353</sup> It is usually the Member States that shall implement these procedures and even provide the regulatory bodies.

## **PART IV. FROM BOLDNESS TO MODERATION?**

### 12.0 RESULTS

In order to fully comprehend the alleged changes in the applicability of the essential facilities doctrine that the *Oscar Bronner* judgment may confer, it is necessary to first recapitulate how the doctrine was applied by the Commission and the CFI before the ECJ made its ruling. The next section will try to do this, followed by an examination of the impact of *Oscar Bronner* and finally a brief discussion on the future of the doctrine.

#### 12.1 The Commission’s and the CFI’s application

The Commission was at first hesitant about giving the doctrine of refusals to deal a broad scope of application and advocated in *Commercial Solvents* a more prudent approach than the one finally adopted by the ECJ.<sup>354</sup> The Commission also implied at an early stage that there could be relatively generous grounds of objective justifications for the dominant undertaking which was always allowed to take “reasonable steps to protect its commercial interests.”<sup>355</sup> The Commission soon showed however a readiness to adopt the doctrine and this has during later years in particular concerned access to essential facilities. The result was that a great number of cases emerged both at Community and national level where the plaintiffs, often without much justification, argued for the

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<sup>352</sup> Ungerer, Herbert. Speech 27 October 1995 at the Fordham Corporate Law Institute 22nd Annual Conference in International Antitrust Law & Policy. <http://europa.eu.int/comm/dg04/speech/index.htm>. 13 of April 1999.

<sup>353</sup> See e.g. Commission proposal of 29 October 1998 for a Council Directive relating to the allocation of railway infrastructure and safety certification. Articles 14, 32, 8(4) and 9(1). OJ C321/6.

<sup>354</sup> *Zoja v Commercial Solvents*. Commission decision 73/457 of 31 December 1972. OJ L299/51.

<sup>355</sup> *BBI v Boosey & Hawkes*. Supra note 52. Recital 19.



applicability of the essential facilities doctrine. This development has faced severe criticism<sup>356</sup> which may in certain aspects be justified. In some cases where the Commission applied the doctrine alternative solutions might have been more suitable, and other cases lack a coherent discussion about all the relevant elements that should be considered in an essential facility case. The infeasibility of duplicating the facility was for example not subject to any greater discussion in *B&I v Stena Sealink* and the market definition in the same case<sup>357</sup> as well as in other cases have been narrowly defined.

The objective justifications for a refusal have not been sufficiently clarified in the Commission's case-law, but its position seems to have become more rigid compared to its obiter dictum in *BBI v Boosey & Hawkes* and certainly more exacting than US antitrust law's valid business rationale. Temple Lang has declared that "the essential facility concept is more important in EC law than in U.S. antitrust law"<sup>358</sup> and that view may explain the differences in application between the two legal systems. Refusals to grant access to alleged essential facilities have in similar cases been allowed by the US courts but upheld by the Commission. *Re Air Passenger Computer Reservation System Antitrust Litigation* and *Alaska Airlines Inc. v United States*<sup>359</sup> may for example be compared with *London European v Sabena* and *British Midland v Aer Lingus*.<sup>360</sup> In the two first cases Section 2 was held not to be violated by the charging of excessive prices for access to the computerised reservation systems. The courts explained that competition in the downstream market must be eliminated by the refusal. That contrasts to the Commission's ratio decidendi which appear to concentrate on the finding that the defendants did not behave in a commercially normal way. The ambivalence was further emphasised in the latter decision since British Midland was only granted temporary access during two years whereupon it should be able to compete without access to the facility.<sup>361</sup> It may in this circumstance be asked whether the interlining system in effect constituted an essential facility. The disparity between the Commission's and the US courts' application is also contrasted in the *IBM* cases where the undertaking had to predisclose its interface information in the EC but not in the US.

The divergences can obviously be partially explained by the differences between Section 2 of the Sherman Act and Article 86 of the EC Treaty. However, the development can despite this be considered to have come to a point where it is justified to ask whether the essential facilities doctrine is applied to protect competition or competitors. Simultaneously with the extension of the definition of essential facilities also the demands of separation of the dominant undertakings' management has brought matters to a head. It is furthermore notable that this strengthening of the doctrine's impact has been carried through without a change of policy regarding the access terms. They shall still be "fair and non-discriminatory", hardly covering more than the costs that the forced access incur on

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<sup>356</sup> See e.g. Overd, Alan and Bishop, Bill. (1998)3 ECLR 183. Page 185.

<sup>357</sup> Where the other corridors between the UK and Ireland really no alternatives?

<sup>358</sup> Temple Lang, John. Fordham Int. Law Journal. Vol. 18 Part 2. 487. Page 483.

<sup>359</sup> Supra notes 38 and 39.

<sup>360</sup> Supra section 4.2.2.

<sup>361</sup> *British Midland v Aer Lingus*. Supra note 133. Article 2 of the judicial decision.

the dominant undertaking. It may thus be justified to agree with Subiotto's statement that "[u]nder Commission practice, it is ... apparently prohibited for undertakings in a dominant position to wish to avoid helping competitors."<sup>362</sup> Indications that this development was about to change could first be seen in the CFI's judgment in *ENS*.<sup>363</sup> The Tribunal found that the Commission had not shown that a refusal of access to the paths, trains and crews would impede competition on the downstream market. Neither had the Commission shown with sufficient certainty that the "facilities" could not be obtained from other sources. Thus the CFI demanded more coherent evidence both on the anti-competitive effects that the refusal would have and the infeasibility to find other means to penetrate the market.

## 12.2 The impact of Oscar Bronner

When the ECJ finally faced the essential facility concept, it took a position similar to the one the Supreme Court had taken in *Aspen* by neither rejecting nor explicitly adopting the doctrine. The ECJ seems however to a larger extent than the Supreme Court, to imply that the doctrine indeed has a scope of application in EC competition law, albeit not such an extensive applicability as the Commission's case-law asserted. The Court laid down the limits in unequivocal terms, considering it was a preliminary ruling under Article 177, leaving a small scope of assessment to the Austrian Oberlandsgericht.<sup>364</sup> These limitations can be divided into two main points; the effect on competition and the absence of alternatives to the facility. The ECJ declared concerning the first point that access to the facility must be a *sine qua non* so that a refusal eliminates all competition from the rival.<sup>365</sup> This is only the case if access in itself is indispensable for its ability to carry on its business and this is linked to the second point.

The ECJ declared that it is not sufficient that the substitutes of the facility are less advantageous, but that there shall not exist any feasible alternatives at all. The Court implied that the absence of alternative facilities shall basically stem from technical, legal or economic obstacles. It is highly likely that the main impact of the *Oscar Bronner* judgment is to be found in the definition of the last obstacle. The ECJ agreed with Advocate General Jacobs that it is only economically infeasible to duplicate the facility if it would not be a viable alternative even if there was a market for another company of equivalent size to the dominant undertaking. The economic strength of the applicant is thus irrelevant, i.e. only if Oscar Bronner reached 71 per cent of all newspaper readers in Austria and still would not find it economically viable to create its own distribution system, should access be granted.<sup>366</sup>

The ruling may at first view seem unlikely to limit the application of the essential facilities doctrine to any greater degree, but it is in effect an ingenious way to restrain future plaintiffs' opportunities to

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<sup>362</sup> Subiotto, Romano. (1992)6 ECLR 235. Page 237.

<sup>363</sup> Supra note 158.

<sup>364</sup> Stanley, Paul. Solicitors Journal 1999 (143)No 1. Page 12.

<sup>365</sup> Supra note 178. Paragraph 41.

<sup>366</sup> Ibid. Paragraph 45.

refer to the doctrine. The reason is firstly to be found in the fact that there usually is a sufficiently high duplication cost. In the majority of the cases where the doctrine has been applied in EC competition law the infeasibility did not emerge from geographical or even legal circumstances, but from the opinion that it would not have been an economically viable alternative to duplicate the facility. The limitation will thus apply to the majority of alleged essential facility cases. Secondly, since the dominant undertaking once found it economically viable to construct and has continued to operate the facility, it is in most cases unlikely that it would not be a viable alternative for it to duplicate the facility at the time of the litigation. Thus this approach limits ipso facto the cases where access has to be granted. Virtually the only situation where a facility will be essential due to economic infeasibilities is when it was constructed under conditions not related to a competitive market, basically facilities earlier controlled as statutory monopolies.

Concerning the other types of infeasibilities, the classical essential facility situation remains where the physical or geographical conditions are such as to make a duplication impossible. This line of cases seems to remain unaffected by the judgment and that hardly imposes any problems since they are uncommon and furthermore situations where the doctrine often is the most appropriate solution. Finally, among the legal obstacles can still the case where duplication is impossible since the facility is protected by IP rights be found. That scenario was not further illuminated by the ECJ in *Oscar Bronner* and it may be a vain hope that the Court within the near future will show how *Magill* fits into the essential facilities concept.

### 12.3 The future of the doctrine

The principal problem with the essential facilities doctrine is the conflict between the short term competitive gains that can be achieved by a compulsory access and the potential long term losses in welfare emerging from the lack of incentive for future undertakings to invent and construct the facilities in the first place. In the light of this risk, *Oscar Bronner* limited the application of the doctrine but that does not indicate that it will lose its importance in the future. Quite the reverse it may prove to constitute an important tool, albeit in a more narrow range of situations than was indicated by the Commission's case-law. This is challenged by the Chicago School which has in the usual "Adam Smithian" terms contended that a rational company do not have any incentive to deny competitors access since it can achieve monopoly profits through the requested access price.<sup>367</sup> And if access is denied, then it would be to block entry of inefficient competitors thus rationalised by efficiency gains. In an unregulated market companies can, they argue, compete with each other for access to the facilities and efficient equilibrium will be attained.<sup>368</sup> This reliance on the invisible hand has however yet to prove any justification. Even if the dominant undertakings could demand monopoly prices (perhaps following the Efficient Component Pricing Rule) this would hardly automatically lead to a situation where only efficient competitors would be granted access. And, a fortiori, even if full competition leads to efficient equilibrium for the undertakings involved, does that

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<sup>367</sup> Tye, William B. *Energy Law Journal*. Vol. 8 Part 2. 1987. 337. Pages 347 and 359.

<sup>368</sup> Krattenmaker, Thomas G. and Salop, Steven C. *Antitrust Law Journal*. Vol. 56. Part 1. 1988. 71. Page 86.

not necessarily apply to the consumers who cannot demand their own access to the facilities. In Krattenmaker's and Salop's words; "we would not want a free market in arson."<sup>369</sup>

The essential facilities doctrine has therefore a *raison d'être* in its own right and this may in particular be the case in the process of breaking up monopolies. This concerns above all, areas such as telecommunication, energy and transport where, even if liberalisation is carried through, the markets are often still controlled by a near monopolist or a group of strong companies. The ability to compete is in these cases frequently dependent upon access to the facilities constructed during the statutory monopoly era since they cannot be reasonably duplicated by the potential market entrants. Access will in these cases still have to be granted following the doctrine after *Oscar Bronner* and provides thus a suitable framework for a liberalisation of these markets. However, an application of the doctrine in the form of sector specific legislation may prove to be even more efficient.

Several advantages can be seen in this type of application compared to compulsory access provided by litigation. Apart from greater predictability, this approach gives also the Community the possibility to gradually introduce the doctrine and thus enables the industry to adjust its policies in a more harmless way.<sup>370</sup> The problems concerning access terms and the separation between the owners' up- and downstream activities may to a large extent be avoided by regulations. This is e.g. provided by the Commission's latest recommendation on the telecommunications market which in Part one lays down guidelines on interconnection pricing and Part two concerns accounting separation.<sup>371</sup> Since each area is subject to sector specific legislation and the Member States may determine how the rules shall be enforced, the "bulldozer" application of the doctrine can also be avoided and more effective solutions be found. Indeed, Werden argues that the essential facilities doctrine should "be entirely abandoned in favour of regulation."<sup>372</sup> He explains that the reasons for this is that it can then better be determined whether it is an essential facility, it is possible to relate the conditions to the specific industries and access terms can be dealt with by industry experts rather than by a court in a liability trial.

There are naturally disadvantages as well as advantages to this approach. The normal principles concerning legislation must be followed<sup>373</sup> and it is hardly viable to totally replace the case to case application of the doctrine. Another disadvantage is that the statutes do not exclude application of the competition provisions.<sup>374</sup> However, when a statutory application is possible the advantages

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<sup>369</sup> Ibid.

<sup>370</sup> Hancher, Leigh and Trepte, Peter-Armin. (1992)4 ECLR 149. Page 149.

<sup>371</sup> Commission recommendation of 8 January 1998 on interconnection in a liberalised telecommunications market. Part 1. 98/195/EC OJ L73/42. Part 2. 98/322/EC OJ L141/6.

<sup>372</sup> Werden, Gregory J. St Louis Univ. Law Journal. Vol. 32. Part 2. 1987. 433. Page 479.

<sup>373</sup> As generality, transparency, publicity, objectivity etc. See Glasl, Daniel. (1994)6 ECLR 306. Page 314.

<sup>374</sup> See e.g. Paragraph 52 of the Draft Access Notice supra note 350 and Recital 28 of the Council directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports. OJ L272/36.

seem to prevail. This is emphasised by the fact that the existing sector legislations appear to have been largely successful.<sup>375</sup>

In situations where a statutory application is not possible the refined test suggested in this dissertation may provide a suitable framework for a future case to case application of the doctrine. Following this test firstly the definition of facilities should be limited to infrastructures, services and people whose expertise is indispensable for using the facility. Tangible objects may also constitute facilities but “refused access to products” may more appropriately be dealt with as a refusal to supply following the prerequisites laid down in *Commercial Solvents* and *United Brands*. Information and IP should only constitute facilities during exceptional circumstances as those found in *Magill*. In order for these facilities to be essential the denial of access to them must constitute a total and permanent barrier to entry. It follows from this that duplication shall not be a viable alternative. *Oscar Bronner* clarified that economic infeasibilities may constitute such obstacles but also geographic or physical infeasibilities may render a duplication impossible. The same may apply to legal infeasibilities e.g. when a duplication is prohibited due to environmental protection or other policy grounds. The dominant undertaking and the applicant should be actual or at least potential competitors so that admitting access is likely to substantially improve competition in the market. The market shall thus not already be competitive, if several companies already competes on the market will admission of another one usually not improve competition in the market. The market of interest is ancillary, vertically related to the level where the facility is found. The doctrine will not provide a suitable solution if the applicant primarily seeks access to the latter market, usually in order to become a part of a joint venture.

There does not seem to exist any rationale to limit the application of the doctrine to Article 86. Concerted refusals may have even bigger anti-competitive effects than a refusal by a sole undertaking. However, this is usually only the case if the controllers of the facility have a substantial market share, whether or not it constitutes a joint dominance. The same applies to contractual foreclosures illustrated by the Ice Cream Saga which could be effectively remedied by the essential facilities doctrine. There should be no general duty to grant access, valid business reasons should always save the controller of the facility. These justifications could to a large extent be analogous to those found in the rest of the doctrine of refusals to deal. Finally, even if the test shows that the facility in effect is essential and access has to be admitted, the owner shall always have a right both to cover the costs incurred by providing access and also receive a fair return amounting to what it could charge in a competitive market. There may be problems in finding such a level and also in restraining the owner from behaving discriminatorily in its management of the facility. This leads back to the initial result that the essential facilities doctrine is most appropriately applied through legislation.

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<sup>375</sup> See e.g. Karlsson, Kent and Callaghan, James J. (1999)1 ECLR 86. Page 87.

### 13.0 CONCLUSIONS

The *Oscar Bronner* judgment may prove to constitute the rein the critics of the earlier application of the essential facilities doctrine demanded. The definition of economic infeasibilities is likely to limit the number of future litigations both at Community and national level. It may also result in a greater predictability since earlier it was unclear during what circumstances duplication would be held not to constitute a viable alternative due to the cost of circumvention. The demand that it shall not be reasonable even for a company of the size of the dominant undertaking to duplicate the facility will probably limit this line of application to facilities constructed under non-competitive conditions, basically facilities earlier controlled as statutory monopolies. The judgment did however not illuminate the other types of infeasibilities. The “classic” cases where duplication is impossible due to physical or geographical conditions seem to remain unaffected while the legal infeasibility that intellectual property rights may constitute was not subject to any further consideration than a reiteration of the prerequisites laid down in *Magill*.

*Oscar Bronner* should thus not be seen as the final word on the essential facilities doctrine in EC competition law. Quite the reverse, the judgment constitutes only the beginning of an inevitable process to define its applicability. This dissertation has proposed a test which may provide a suitable framework for such a future restrained application but several dim aspects remain. There is no universal definition of what shall be comprised in the term “facilities”, there is no consensus on how to calculate the optimal access price and the doctrine’s alleged applicability under Article 85 remain indistinct.

Notwithstanding these uncertainties and the impact of *Oscar Bronner*, it would appear that the essential facilities doctrine will also be of importance in the future. This concerns in particular its usefulness for the process of breaking up statutory monopolies which is accentuated by the definition of economic infeasibilities since it, as stated, will limit other situations where access has to be granted. The remaining problems would, both in this context and in “bottleneck-situations” not emerging from statutory monopolies, to a large extent be avoided by an application through sector specific legislation.

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