



FACULTY OF LAW
University of Lund

Andreas Öhlin

Contractual Aspects of the Essential Facilities Doctrine

Master thesis
20 points

Supervisor: Professor Lars Gorton

European Competition Law

Autumn Semester 2001

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Summary

During the last decade, the so-called essential facilities doctrine has been present in EC competition law. Under the doctrine, an undertaking that owns or controls an “essential facility” may be under a special responsibility to grant its competitors access to the facility. A refusal to provide access would, if the owner cannot present any objective justification for the refusal, constitute a breach of Article 82 EC. The doctrine, which has its origin in American antitrust law, can be viewed as an example of a refusal to deal, which is one of the chief forms of an abuse of a dominant position in breach of Article 82 EC.

Much controversy surrounds the idea that a dominant undertaking must share its assets with its competitors. This principle must be treated with caution, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has legitimately acquired. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. Mandatory access to essential facilities is, furthermore, a clear limitation of the right to property and the freedom of contract. Thus, dominant undertakings should only be required to share its assets if those are genuinely required in order to protect undistorted competition.

The question whether a facility is “essential” is a complicated one, which requires careful considerations. The ECJ has taken a narrow view of what constitutes an essential facility, declaring in its 1998 *Oscar Bronner* judgement that a refusal to provide access is contrary to Article 82 only if it is likely to eliminate all competition, it cannot be objectively justified, and if the facility is indispensable to the company requiring access, inasmuch as there is no actual or potential substitute.

When an owner of an essential facility is required to share its facility the conditions of the access must be settled. The owner is, for example, entitled to payment for providing access to its property and this is something that is to be contractually determined. Mandatory access involves many contractual implications. Besides the important access pricing issue, other conditions have to be settled. Moreover, the granting of access could affect the contractual relations with companies that are already using the facility in question.

The ECJ and the Commission have generally not discussed the contractual aspects in cases concerning refusals to grant access to essential facilities. The Court and the Commission have repeatedly held that the owner of the facility is entitled to “fair” or “reasonable” remuneration. Thus, there exist a legal limitation of how much the facility owner could charge for the access. However, the Court and the Commission have not discussed the exact

meaning of these concepts, let alone determined the specific access terms. This issue has been left to the parties to decide.

This thesis deals with the contractual implications of an application of the essential facilities doctrine. First, it discusses the doctrine and its origin in American antitrust case law and in the EC case law concerning refusals to supply. Secondly, the contractual aspects is examined, covering the important issue of what constitutes reasonable terms, who should determine these terms, and how existing contractual rights and obligations concerning the facility could be affected. The case law of the Court and the Commission concerning these issues is discussed, alongside other sources such as national decisions and judgements and some less traditional sources such as access pricing models based on economic analysis.

Abbreviations

AG	Advocate General
CFI	European Court of First Instance
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
EC	European Community/Treaty Establishing the European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
ELRev	European Law Review
FTC	Federal Trade Commission
IATA	International Air Transport Association
OFT	Office of Fair Trading
OJ	Official Journal of the European Communities
UK	United Kingdom
US	United States
U.S.C.	United States Code

1 Introduction

1.1 Background

“The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order.”¹

Although being of “paramount importance” the principle of freedom of contract is not an absolute rule. This thesis deals with an exception from this principle. Article 82 of the EC Treaty prohibits undertakings from abusing a dominant position. It has been established that if a dominant undertaking owns or controls an asset that is deemed “essential” to competitors, it can under certain circumstances have a duty to share the asset. This so called essential facilities doctrine was first developed in US antitrust law and has during the last decade been introduced in the European competition system.

As a competition law remedy, the requirement to share one’s assets is a far-reaching restriction on the right to contract freely and the right to property, and should as such be treated with caution. A careful balancing of interests must be conducted. On the one hand undistorted competition must be protected. On the other hand undertakings cannot be forced to share its assets too easily, as this would risk reducing the incentives to invent in facilities that could be seen as “essential”.

One aspect of the essential facilities doctrine which is remarkably unclear is the doctrine’s contractual implications. The dominant undertaking is, for example, entitled to reasonable payment for granting access to its facilities but what constitutes a reasonable price is to a large extent uncertain. As will be shown below this is far from the only ambiguous contractual implication of the doctrine.

1.2 Purpose

The purpose of this essay is twofold. Firstly, I shall attempt to provide an examination of the nature and scope of the essential facilities doctrine in the EC competition law. This is not an easy task as there is much controversy surrounding the concept and no coherent interpretation is to be found in the case law. Thus, the examination will be relatively extensive, covering both the doctrine’s origin in US antitrust law, the community case law concerning refusals to deal, and the application of the doctrine by the EC courts and by the Commission. Questions that will be dealt with are what constitutes an essential facility and when an owner of an essential facility

¹ Comment to UNIDROIT Principles of International Commercial Contracts, Article 1.1.

must provide access to that facility in order to avoid infringing Article 82 EC.

The second objective is to examine in what ways an application of the doctrine affect commercial contracts. If the scope of the doctrine as such is not entirely clear, its contractual implications are definitely a moot point. The mandatory access to an essential facility has several contractual implications, for example on which terms access must be granted and the effects on existing contractual relations. These and other issues will be scrutinised, alongside a more general discussion of the freedom of contract and the right to property.

1.3 Limitation

The community law provision at focus in this essay, Article 82 EC, consists of three separate criteria which all must be fulfilled in order for an infringement of the article to occur. An undertaking must hold a dominant position, the dominant position must have been abused, and the abuse must have had an effect on the trade between member states. Attention will be drawn to each of these criteria in order to provide a background to the key issues, that is, when a refusal to provide access to an essential facility becomes a breach of Article 82 and which contractual implications such a mandatory granting of access has. However, this thesis is by no means intended as a full presentation of Article 82. Hence, Article 82 EC is, on a general level, only briefly discussed.

The thesis is furthermore limited to deal with the general Community competition law of the Treaty which means that sector-specific regulation falls outside the scope of the paper. One example of statutory application of the essential facilities doctrine, the telecommunications regulation, will nonetheless be discussed. This discussion is however limited to the main features of the legislation.

Moreover, the historical background and the general economic theory underlying Article 82 has been left out. Economic reasoning is however very important in many situations, for example in access pricing, and will accordingly receive some attention.

1.4 Method and Material

In order to find answers to the questions stated above, I have consulted both traditional sources of law as well as academic commentary. The case law of the EC Courts and Commission and, to some extent US courts, has set the framework of the presentation of the essential facilities doctrine. Concerning the doctrines contractual consequences national judgements and decisions have been used to some extent.

The essential facilities doctrine has over the last years been thoroughly scrutinised and debated in the academic literature. Specialised articles submitted in the periodic literature as well as more general works in the competition law area have been of great importance. As already noted, the essential facilities problem is apparent not only in EC competition law. As a consequence academic works concerning other jurisdictions, predominantly US antitrust law, have been included. The problems dealt with here are in most instances the same as in the European context. Where this is not the case, it has been clearly stated.

A final note concerns the renumbering of the EC Treaty brought about by the Treaty of Amsterdam, which entered into force on 1 May 1999. Article 82 EC was Article 86 before the renumbering. I have used the new numbering system even in relation to cases and other materials written prior to 1 May 1999. Direct quotations are however made to Article 86 if the quoted document in question was produced before the renumbering.

1.5 Outline

The thesis is divided into three main parts. The first part consists of chapters 2, 3 and 4. Chapter 2 describes in general terms Article 82. Chapter 3 discusses the case law concerning refusals to deal as a breach of Article 82. This chapter is intended to provide a background to the following discussion of the essential facilities doctrine, which mainly is discussed in chapter 4. This chapter covers the doctrine's origin in US antitrust law and its application in the case law of the EC Court and Commission. The *Oscar Bronner* case² receives special attention in chapter 4.4, as it is of great importance to the doctrine's scope within the competition law of the Community. The chapter ends with summary of the present field of application of the doctrine.

The second main part is chapter 5, which deals with various contractual aspects of an application of the doctrine. The chapter starts with a general examination of the principles of right to property and freedom of contract, followed by a more in-depth analysis of some specific contractual issues, most notably the regulation of access terms and the doctrine's impact on existing contractual relation.

In the final chapter I critically discuss some points more in depth and present some concluding remarks.

² Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, [1998] ECR I-7791.

2 Abuse of a Dominant Position

Article 82 EC³ prohibits abuse by one or more undertakings of a dominant position within the common market or a significant part of it, in so far as the abuse may affect trade between Member States. The article does not prohibit dominance *per se* – it prohibits the abuse of such dominance. An undertaking that is deemed dominant has however a ”special responsibility not to allow its conduct to impair genuine undistorted competition”.⁴ Thus, the provision imposes a restriction on dominant undertakings’ commercial behaviour.

It follows from the wording of the article that three separate criteria have to be fulfilled in order to show abuse of a dominant position – the undertaking must hold a dominant position, it must abuse that position and the conduct must affect trade between Member States. These criteria will now be briefly described.

2.1 Dominant Position

When determining if an undertaking possesses a dominant position, one should adopt a two-stage assessment. First the relevant market must be determined, consisting of a relevant product market and a relevant geographical market. Then it should be determined whether the undertaking in question is dominant on that market.

The relevant product market has been defined by the Commission:

“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”.⁵

The most important aspect is the interchangeability of the product – if an increase of the price would make consumers to switch to available substitutes it is likely that the product does not constitute an own product market. In this respect the specific characteristics of the product is of importance as well. The interchangeability on the supply side – i.e. the question whether producers easily could alter their existing production and start producing products that are considered interchangeable by consumers – is also of importance when determining the relevant product market.

³ Article 82 is reproduced in Supplement A.

⁴ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities*, [1983] ECR 3461, para. 52.

⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C372/5, para. 7.

The relevant geographical market has been defined by the Court in *United Brands* as “an area where the objective conditions of competition applying to the product in question must be the same for all traders.”⁶ The relevant geographical market is, broadly speaking, the area in which manufacturers are willing to deliver and where consumers are willing to buy substitutes. For example, high transport costs make producers less willing to deliver in a large area and consequently the relevant geographical market smaller. The relevant market can consist of the whole common market, as well as considerably smaller areas, such as harbours and airports.⁷

When having determined the relevant market, in product and geographical terms, one can decide whether the undertaking in question is dominant on that market.

The Court has defined the concept of dominant position as a position of economic strength that gives the undertaking in question the power to act independently of its competitors, customers and ultimately the consumers.⁸ When measuring economic strength, the most important criterion is the undertaking’s market shares. Large market shares are in themselves evidence of a dominant position. The Court has e.g. held a market share of 50 per cent as evidence of a dominant position.⁹ The market shares of the alleged dominant undertaking are often contrasted with the market shares of its competitors. When there is a significant gap between the dominant firm’s market shares and its competitors’ market shares, this indicates the existence of dominance within the meaning of Article 82. However, it is important to note that market shares are not the only criterion of relevance when determining dominance. High barriers to entry, which render it difficult for other firms to enter the market, may for example indicate that an undertaking, which do not necessarily hold a large market share, has a dominant position. Barriers to entry can consist of e.g. superior technology and know-how, various legal or administrative provisions, the possession of intellectual property rights, or the dominant firm’s high degree of vertical integration.¹⁰ As follows from the wording of Article 82, the dominant position can be held by one undertaking or by several firms collectively.

A dominant position must be distinguished from an oligopoly, which, even if it consists of large market shares, does not necessarily give the individual undertaking the power to act independently from its competitors. If an undertaking holds a dominant position its conduct is to a great extent determined unilaterally, while in an oligopoly the courses of conduct interact.

⁶ Case 27/76, *United Brands Company and United Brands Continental BV v. EC Commission*, [1978] ECR 207, para. 44. See also Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C372/5, at para. 8.

⁷ See section 4.3.1 for examples of narrowly defined geographical markets.

⁸ *United Brands*, *supra* n. 6, at para. 65.

⁹ C-62/86, *AKZO Chemie BV v. Commission*, [1991] ECR I-3359, at para. 60.

¹⁰ Craig & DeBurca, pp. 951-954.

2.2 Abuse

As already noted, Article 82 does not prohibit the holding of a dominant position – the article prohibits abuse of such position. The provision does not provide any definition of what constitutes abuse of a dominant position. Based on the non-exhaustive list of abuse situations in Article 82, the Court and the Commission have produced an extensive jurisprudence concerning a wide range of abusive behaviour. The case law can be divided into two main categories; exclusionary abuses and exploitative abuses.

The general idea of exclusionary abuses is that an abuse of a dominant position takes place where the method used differs from those which condition normal competition, and that such methods hinders the competition in the market or the growth of that market.¹¹ It is important to note that the concept of abuse is an objective one that does not require anti-competitive intent. However, intent can be one factor to take into account when determining whether the practice in question is the result of competition on the merits. It is not illegal for a dominant firm to try to exclude its competitors from the market, but when the exclusion is not the result of better performance, it is likely that the dominant undertaking has abused its dominant position.¹² When distinguishing competition on its merits from abusive behaviour, one must analyse whether the practice in question could be justified by other reasons than the dominant undertaking's wish to exclude rival firms from the market. For example, if the practice increases the dominant undertaking's efficiency it is generally regarded as an example of normal competition, notwithstanding the fact that competitors are excluded from the market. If the practice that excludes a competitor do not enhance efficiency, it is likely that it will constitute abuse. Thus, in this sense, intent can be of relevance when considering a potentially abusive behaviour.¹³ Examples of exclusionary abuses are discriminatory or predatory pricing, tying arrangements and refusals to deal.

Exploitative abuses refer to practices, which, while not directly harmful to competitors, nonetheless reduce the welfare of consumers. Examples of exploitative practices that have been held to be contrary to Article 82 are unfair or excessive prices, discriminatory treatment of consumers and the limitation of production markets or technical development.

Only refusals to deal will be further discussed in some detail as it is of direct importance to the essential facilities doctrine. The case law concerning excessive prices will be briefly discussed when considering the access price issue in chapter 5.

¹¹ See Case 85/76, *Hoffman-La Roche & Co. AG v Commission*, [1979] ECR 461, at para. 91. A potential negative effect on the market is sufficient, see Faull & Nikpay, p. 149.

¹² Faull & Nikpay, p. 148.

¹³ *Ibid*, pp. 146-148.

2.3 Effect on Trade Between Member States

An abuse of a dominant undertaking is only contrary to Article 82 insofar as it may affect the trade between Member States. This final criterion of Article 82 has been broadly construed, covering all abuses capable of influencing, either directly or indirectly, actually or potentially the patterns of trade between Member States.¹⁴

¹⁴ Ibid, p. 198.

3 Refusal to Deal

Under EC competition law, an undertaking is under certain circumstances obliged to sell goods or services to its customers or competitors in order to avoid infringing Article 82. This rule emanates from the case law of the ECJ and the Commission and is the legal basis from which the essential facilities doctrine has emanated. The most important cases in this area will now be discussed followed by a concluding section.

3.1 EC Case Law

3.1.1 Refusal to Supply

The first case where the Court held a refusal to supply to be in breach of Article 82 was the seminal *Commercial Solvents* case.¹⁵ The case concerned the Italian company ICI, a subsidiary of the American company Commercial Solvents (CS), who refused to supply an existing customer, Zoja, with a raw material used in the manufacturing of ethambutol, an anti-tuberculosis drug. ICI acted as a re-seller in the community of the aminobutanol produced by CS, who was the only producer of the raw material in the world on an industrial scale. CS refused to supply after a decision to enter the downstream market of ethambutol manufacturing itself. The Court held this behaviour to be in breach of Article 82.

“Since such conduct is contrary to the objectives expressed in Article 3 (f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.”¹⁶

Worth noticing is that Zoja was an existing customer, that the dominant undertaking planned to enter the downstream market itself and that the refusal risked eliminating *all* competition.

As in the *Commercial Solvents* case, *United Brands*¹⁷ concerned a pre-existing commercial relationship. United Brands refused to sell bananas to a Danish fruit-dealer, Olesen, after Olesen had become the only Danish distributor of Dole bananas, a rival banana brand. He had also taken part in an advertising campaign for Dole bananas. It was not disputed that this was

¹⁵ Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. EC Commission*, [1974] ECR 223.

¹⁶ *Ibid*, para. 25. Article 3 (f) [now Article 3 (g)] states: “For the purposes set out in Article 2, the activities of the Community shall include [...] g. a system ensuring that competition in the internal market is not distorted.”

¹⁷ *United Brands*, *supra* n. 6.

the reason why United Brands refused to continue to supply Olesen with bananas. The question was whether or not United Brands' conduct constituted an abuse of its dominant position.

The Court argued that United Brands was entitled to protect its commercial interests if it was attacked. However, the Court stated that it could not accept actions that were designed to strengthen the dominant position and when the actual purpose of the action was to strengthen this dominant position and abuse it.¹⁸ Retaliation was hence not illegal *per se*, but the Court held that actions taken must be proportionate. In this case, United Brands' refusal to supply was regarded as a breach of its dominant position. Decisive factors appears to have been United Brands' greater economic strength and the fact that United Brands' action would discourage other dealers, who mostly were small and medium sized firms, from selling rival brands.¹⁹ United Brands' actions were therefore: "[...] designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependant upon the dominant undertaking to stay in business."²⁰

Temple Lang suggests that the case imply that the duty to supply a customer (as Olesen) may be less strict than the duty to supply a competitor (as in the *Commercial Solvents* case).²¹ A dominant undertaking *is* allowed to look after its commercial interests by refusing to supply a customer. However, due to the specific facts of the case the refusal to deal was not proportional, and United Brand's actions were considered to be an infringement of Article 82.

The *Telemarketing* case²² is another case regarding refusal to deal that is relevant to the essential facilities doctrine. The defendant was a TV broadcaster, which only accepted advertisements for telemarketing²³ if its own subsidiary was contracted to answer customers' calls. The Court ruled that the defendant company had extended its dominant position in one market to an ancillary market. Relying on *Commercial Solvents*, the Court held that this constituted a breach of Article 82, as the defendant could not present any technical or commercial requirements that justified the conduct.

¹⁸ Ibid, para. 189.

¹⁹ Ibid, paras. 190-193.

²⁰ Ibid, para. 194.

²¹ Temple Lang, p. 251.

²² Case 311/84, *Centre belge d'études de marché – Télémarketing (CBEM) SA v. Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA*, [1985] ECR 3261. See also Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA*, [1990] ECR I-5941, which deals with similar questions. The cases has been described as "extending monopoly" cases, see Doherty, p. 412-413.

²³ "Telemarketing" can be described as advertisements which encourage viewers to call a telephone number to place orders. The telemarketing company answers the calls on behalf of the advertiser.

3.1.2 Refusal to Licence

So far, the cases described have dealt with the refusal to supply goods or the reservation of an ancillary market. This section will concern the relationship between intellectual property rights and the duty to deal. In *Maxicar v. Renault*²⁴ and *Volvo v. Veng*²⁵ the Court held that if a proprietor of a registered design refuses to grant a third party licence to produce design protected spare parts, this itself cannot constitute an abuse.²⁶ The Court argued that it is lawful to obtain exclusive rights under IP legislation, but that it nevertheless, in *exceptional circumstances*, can be an abuse to exercise those rights.²⁷ It can, for example, be prohibited to refuse spare parts to independent repairers, to fix prices at an unfair level, or to stop producing spare parts for a car model even though that model remains in circulation.²⁸ The car manufacturer may thus refuse to grant a licence, but it may not refuse to sell the finished product to independent repairers. According to Doherty, this demonstrates the fundamental difference between intellectual property and other property where the latter, per definition, includes some form of exclusivity.²⁹

Another important case where the Court had to examine the relationship between intellectual property rights and Article 82 is *Magill*.³⁰ The background of the case was the following. Three TV broadcasters in Ireland each published weekly TV-magazines, giving details of their own programmes for the forthcoming week. There was no comprehensive TV-guide since the programme information was copyright protected, and the broadcasters refused to license other parties, e.g. newspapers, to publish the information for more than a few days in advance. Consumers thus had to buy three separate TV-guides to get full coverage of the forthcoming weeks' programmes. One publisher, Magill, tried to publish a comprehensive weekly guide but was stopped by the broadcasters. The Commission³¹ and the CFI³² both held this refusal to be in breach of Article 82. Advocate General Gulmann argued that copyright per definition gives the copyright owner the right to restrict competition. Interference with this right requires substantial and weighty grounds. The Advocate General was of the opinion that there were no such grounds, and proposed that the Court should change the judgement of the CFI.

²⁴ Case 53/87, *Consorzio Italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault* [1988] ECR 6039.

²⁵ Case 238/87, *AB Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211.

²⁶ *Ibid*, para. 11.

²⁷ *Ibid*, para. 9.

²⁸ *Maxicar v. Renault*, *supra* n. 24, para. 16.

²⁹ Doherty, p. 407.

³⁰ Joined cases C-241/91 and C-242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. EC Commission* [1995] ECR I-743

³¹ *Magill TV Guide/ITP, BBC and RTE*, Commission Decision of 21 December 1988, OJ 1989 L78/43.

³² Case T-69/89, *Radio Telefis Eireann v. EC Commission*, [1991] ECR II-485.

The ECJ did not agree with the Advocate General. The Court referred to its judgement in *Volvo v. Veng* where it stated that the refusal to grant a licence cannot be an abuse *per se*. As noted above, this rule is however not without exemptions, and the Court stated that the exercise of an exclusive right might, in *exceptional circumstances* involve abusive conduct.³³ The Court found that there had been an abuse, building its judgement on the above-mentioned exemption in *Volvo v. Veng*. Three reasons were given why the broadcasters had abused their dominant position. First, the Court stated that there was a potential consumer demand for a comprehensive TV-guide that that was not met by the broadcasters.³⁴ This itself constituted an abuse of Article 82.2 (b). Secondly, there was no acceptable justification for the refusal.³⁵ Thirdly, and perhaps most important in the context of this essay, the Court held that:

“ [...] the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market [...] since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.”³⁶

This part of the judgement is most relevant to the essential facilities doctrine, and the case has been treated as an “essential facilities case” by various academic commentators.³⁷ The dominant firms abused their dominant positions by denying access to a resource that was essential (or “indispensable”) for competitors on a related but separate market. Thus, the case will be of relevance when later discussing the doctrine.

Magill was followed by, and interpreted in, the CFI *Ladbroke*³⁸ case and in the *Oscar Bronner* case³⁹. However, those cases will be dealt with later, as they are directly relevant to the essential facilities doctrine.

3.1.3 Objective Justifications

Even if a dominant undertaking’s refusal to supply goods or services on the face would be in breach of Article 82, its actions may be objectively justified. The Court has identified various circumstances that justify anti-competitive behaviour. A case where the *commercial interests* of the dominant undertaking was discussed as an objective justification for a refusal of supply was the Commission decision *Boosey & Hawkes*.⁴⁰ Boosey & Hawkes (B&H) was dominant in the market for brass band instruments.

³³ *Magill*, *supra* n. 30, para. 50

³⁴ *Ibid*, para. 54

³⁵ *Magill*, *supra* n. 30, para. 55.

³⁶ *Ibid*, para. 56. It is suggested that this third point of constitutes a separate abuse, see Doherty, p. 408.

³⁷ See Venit & Kallaugher, pp. 336-337; Ridyard, p. 446. See also Nikolinakos, p. 404 who argues that *Magill* is “the clearest example of an essential facility case in the Court jurisprudence”.

³⁸ Case T-504/93, *Tiercé Ladbroke SA v. EC Commission*, [1997] ECR II-923.

³⁹ *Oscar Bronner*, *supra* n. 2.

⁴⁰ *BBI/Boosey & Hawkes*, Commission Decision of 29 July 1987, OJ 1987 L 287/36.

B&H dealt with two companies, one repairer and one retailer. These two companies later formed the joint venture BBI to supply instruments directly to customers. BBI needed B&H's instruments to have a full range of products, but B&H refused to supply instruments to BBI. B&H argued that the companies, when forming BBI, had been dishonest and disloyal.

The Commission repeated the rule from *United Brands*, stating 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".⁴¹ The Commission considered the total refusal to supply as going beyond the legitimate defence of B&H's commercial interests.

Another case dealing with objective justification of a refusal to supply is the *BP* case.⁴² The case has its background in the oil crisis in 1973 and the general shortage of oil that followed. Due to the shortage, BP reduced its supplies to all customers by in average 12,7 per cent. In relation to ABG, a Dutch petrol distributor, BP reduced its supplies by 73 per cent. The question ECJ had to decide was whether BP's cut of supplies to ABG constituted an abuse of its dominant position. The Court held that ABG was only an occasional customer and that BP had warned ABG about the cuts in advance. This justified BP's refusal to supply ABG.

The *BP* case hereby indirectly established the rule that a dominant undertaking has to deal equitable with its ordinary customers. This rule may however be hard to apply in the individual case.⁴³

3.2 Conclusions

It is a well-established rule that a dominant undertaking under certain circumstances is obliged to supply a customer or a competitor. The duty to deal has been imposed on companies who, like in the *United Brands* or *Boosey & Hawkes* cases, have punished a customer that did not act in the way the dominant company wished. The duty to deal has also been imposed when a dominant undertaking on one market wished to exclude a competitor from a secondary market and therefore refused to supply the competitor. This situation arose in *Commercial Solvents* and *Magill* where the dominant undertakings reserved the secondary markets themselves and undermined competition on that market.

A refusal to supply can, although it normally would constitute a breach of Article 82, under certain circumstances be justifiable. Commercial interests of the dominant undertaking were regarded as an objective justification for the refusal to supply in *United Brands* and *Boosey & Hawkes*. The measures

⁴¹ Ibid, para 19.

⁴² Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV v. EC Commission*, [1978] ECR 1513

⁴³ See Goyder, p. 339. Korah suggests that the judgement is so specific it is unlikely to be a precedent in the future, p. 115.

taken to protect the commercial interests must however be fair and proportional to the threat. General shortage of raw material can, according to the *BP* case, constitute an objective justification to refuse to supply an occasional customer. The dominant undertaking's wish to enter a downstream market itself has not been regarded as an objective justification to refuse to supply existing customers in that market. This was indicated in *Commercial Solvents*. It is argued that Court has been relatively reluctant to identify circumstances that justify a refusal to sell.⁴⁴

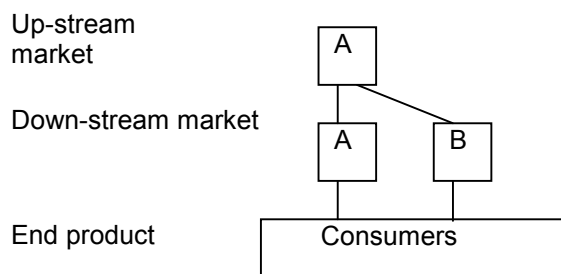
That a refusal to sell can constitute an infringement of Article 82 is thus a well-established rule in EC competition law. The essential facilities doctrine is, in EC competition law, said to have its legal basis in this rule, and cases concerning essential facilities have been decided with reference to refusal to supply cases.

⁴⁴ See Venit & Kallaughner, p. 317 and Hancher, p. 1304, who compares ECJ's case law with American courts' view on this issue.

4 The Essential Facilities Doctrine

4.1 Introduction

As already noted above, the essential facilities doctrine ("the doctrine") requires, under certain circumstances, an undertaking dominant in the relevant market to give a competitor access to a facility owned or controlled by the dominant firm. It is thus an abuse of the dominant position *not* to give access to the facility. The typical situation can be illustrated with a figure.



The undertaking A is dominant in the upstream market (consisting of some form of facility) and operates in the downstream market.⁴⁵ B wants to compete on the down-stream market but do not have the necessary facilities to do so. It is for practical, legal or economical reasons impossible for B to create its own facility, which means that B's only possible way to enter the down-stream market is to use A's facility (against reasonable payment). The upstream market usually consists of some form of infrastructure, e.g. a harbour, an airport, a pipeline, a telecommunications network etc. The downstream market is a related but separate market; e.g. ferry operations, airline operations, the supply of gas or oil through pipelines or the supply of telephone services.

B typically argues that A's refusal to provide access to the upstream facility prevents B from entering the downstream market, which in the end is detrimental to consumers. A, on the other hand, typically argues that if it were allowed to operate on both markets, this would benefit economical efficiency. A would further argue that a dominant undertaking acting under the threat that its facilities would be deemed "essential" to competitors, would be less interested to create the facility in the first place, and that this would have negative long-term effects on the economy as a whole.

⁴⁵ It is somewhat unclear whether the undertaking must be dominant on the related market, see section 4.6.

Essential facilities problem often arises in newly liberalised markets, where a former state monopolist controls infrastructure that has taken long time, and vast investments, to create and thus is enormously expensive or practically impossible to duplicate. Essential facilities arguments have been advanced both in the general antitrust law as well as in sector-specific regulation, such as in the telecommunications, post and gas industries.

The doctrine is however in many respects unclear, and it has, both in the US and in Europe, believers and doubters. Some see it as an appropriate instrument for liberalising markets, while others see it as an assault on the legitimate property rights of successful firms. Many hoped that the ECJ would clarify the scope of the doctrine in the *Oscar Bronner* case,⁴⁶ but it is safe to argue that the case did not help to completely illuminate the ambiguous parts of the doctrine. Many parts of the doctrine remain ambiguous. The discussion and critique of the doctrine will be dealt with later. First, the origin of the doctrine in American antitrust law will be described to provide a background to the forthcoming discussion.

4.2 US Antitrust Law

4.2.1 General

Section 2 of the Sherman Act, which roughly corresponds to Article 82 of the EC Treaty, prohibits monopolies created or maintained by improper means.⁴⁷ The US Supreme Court has established that the offence of monopoly has two elements:

“[...] (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.”⁴⁸

A monopoly, or a dominant position, is thus not prohibited *per se*. As in EC competition law, US antitrust law has no *general* duty to deal with a competitor. This was established by the US Supreme Court in *US v. Colgate*⁴⁹ where the court held that:

“[...] in absence of any purpose to create or maintain a monopoly [Section 2 of the Sherman Act] does not restrict the long recognised right of a trader or manufacturer engaged in entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal.”⁵⁰

⁴⁶ *Oscar Bronner*, *supra* n. 2. The case is discussed in section 4.4.

⁴⁷ Section 2 of the Sherman Act (15 U.S.C. § 2) states: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [...]”.

⁴⁸ *United States v. Grinnell Corp.* 384 US 563 (1966), at pp. 570-571.

⁴⁹ *United States v. Colgate & Co.* 250 US 495 (1948).

⁵⁰ *Ibid*, p. 307

The so-called Colgate doctrine is however not an absolute rule. The two main exemptions from the Colgate doctrine are based on the “intent test” and the “monopoly leveraging test”. The intent test is indicated in the above-cited section of *US v. Colgate*; a monopolist cannot refuse to deal with a competitor when the *purpose* is to create or strengthen a monopoly. This corresponds to the ECJ’s ruling in *United Brands*. American courts have however been less reluctant to accept various circumstances that justify anti-competitive intent than the ECJ.⁵¹

The monopoly leveraging test aims to determine whether a monopolist has used its monopoly power in one market to gain a competitive advantage in another market.⁵² As with the “intent cases”, American courts have recognised that various reasons exist which justifies a monopolist’s attempt to gain advantages on a related market.

A question one now needs to answer is what position the essential facilities doctrine (sometimes referred to as the “bottleneck theory”) has in relation to these well-established rules. Venit and Kallaugher suggest that the essential facilities situations overlap to a considerable extent cases dealing with anti-competitive intent or monopoly leveraging,⁵³ while others treat it as a free-standing antitrust doctrine. This brings us to the case law, dealing directly with essential facilities.

4.2.2 Case Law

The doctrine is generally said to derive from the US Supreme Court’s *Terminal Railroad*⁵⁴ decision in 1912. Here, a number of railroad companies controlled an essential facility, consisting of railroad terminals, bridges, and switching yards serving the City of St. Louis. Due to the geographical and topographical situation in and around St. Louis, the facilities controlled by Terminal Railroad were the only feasible. Without using them, it was impossible to load or unload passengers or cargo in the area. The court held that Terminal Railroad was required to provide equal and non-discriminatory access to all competing railroad companies. The court argued that the control over the facilities was not an infringement as such, but that it made impossible for competitors to compete unless they were granted access to the facilities. As a result, the court came to the conclusion that there had been a breach of the Sherman Act.

The case provides a good example of a so-called “bottleneck facility”. The doctrine apparently applies where an infrastructure, which is indispensable

⁵¹ Venit & Kallaugher, p. 317

⁵² Ibid, pp. 317-318 who refer to the US Court of Appeals case *Berkey Photo v. Eastman Kodak Co.* 603 F.2d 263 (2d Cir. 1979), cert. denied 444 US 1093 (1980).

⁵³ Venit & Kallaugher, p. 318.

⁵⁴ *United States v. Terminal Railroad of St Louis*. 224 US 383 (1912). For a description of the facts of the case and the court’s reasoning, see Lipsky & Sidak, pp. 1189-1190 and 1195-1198.

to competition and which cannot be duplicated, is controlled by someone who refuses competitors access to the infrastructure.

The next case cited in favour of the doctrine is *Associated Press*.⁵⁵ Associated Press (AP) was an association of approximately 1 200 newspapers, formed to collect, assemble and distribute American and international news. News published by one member was made available to the other members. The case concerned AP's by-laws, which in practice made it possible for one member to veto the admission of a new member of the association. The Supreme Court held the by-laws to be violating Section 1 of the Sherman Act, when the size and nature placed non-members at a competitive disadvantage. For example, the by-laws made it possible for a newspaper in one city to prevent the admission of a second newspaper from that city, making it much harder for the latter to compete. The by-laws were "essential features of a program to hamper or destroy competition".⁵⁶

Terminal Railroad and *Associated Press* both concerned an alleged violation of section 1 of the Sherman Act, which makes contracts restraining trade or commerce illegal. The first Section 2 case of importance is *Otter Trail*.⁵⁷ Otter Trail distributed electric power to a number of American cities. When the contracts expired, some of the cities wanted to distribute power themselves. Otter Trail refused to sell power and refused to provide access to its transmission network, which prevented the cities from buying electricity from more distant producers. The court held both refusals to be a violation of Section 2, when Otter Trail had used its monopoly power "to foreclose competition or gain competitive advantage, or to destroy a competitor".⁵⁸ The court did not explicitly refer to an essential facilities doctrine, and it can be argued that the case was solved by the intent theory, rather than with the essential facilities doctrine, but it is nevertheless frequently cited in support of the doctrine.

In *Aspen Skiing*,⁵⁹ Aspen Skiing Co. (Aspen) owned three mountains and Aspen Highlands Skiing Corp. (Highlands) owned one mountain in the Aspen area. The two companies had for several years offered skiers a four-mountain ski ticket, allowing skiers access to all four mountains. In 1978, Aspen cancelled the collaboration with Highlands, with the result that Highlands attracted fewer skiers. The Supreme Court held Aspen's cancellation to infringe Section 2 of the Sherman Act. In contrary to the Court of Appeals, the Supreme Court did not expressly rely on the essential facilities doctrine. Decisive factors were instead the fact Aspen had no valid business justification for cutting of the co-operation with Highlands, and that there was a considerable consumer demand for the four-mountain ski pass.⁶⁰

⁵⁵ *Associated Press v. United States*, 326 US 1 (1945).

⁵⁶ *Ibid*, p. 13.

⁵⁷ *Otter Trail Power & Co. v. United States*, 410 US 366 (1973).

⁵⁸ *Ibid* pp. 570-571.

⁵⁹ *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985).

The US Supreme Court has thus never explicitly relied on the doctrine. Lower courts have, however, applied the doctrine in various situations.⁶¹ The leading case is *MCI v. AT&T*⁶² decided by the US Court of Appeals for the 7th Circuit in 1983. In this case MCI, a telecommunications company, challenged AT&T's refusal to allow MCI to connect its long distance telephone lines to AT&T's telephone network. MCI argued that interconnection was essential to MCI's ability to compete on the long distance market. The court developed a four-part test based on prior case law to analyse essential facility doctrine claims. According to the test, courts must examine the following factors:

- (1) Control of the essential facility by a monopolist;
- (2) A competitor's inability to practically or reasonably duplicate the essential facility;
- (3) The denial of use of the facility to a competitor; and
- (4) Feasibility of providing the facility.⁶³

This definition will not be analysed in detail, but some points are worth noticing. First, the facility must be truly "essential"; that is, it must be vital to competition. What concerns the possibility to duplicate the facility, the definition does not require that it is impossible to duplicate the facility – it is sufficient that duplication is unreasonable. It is further clear that the monopolist is entitled to payment for granting access to its facility. The question how much the monopolist can charge is however a very complex issue, which will be dealt with later. Finally, the last part of the definition raises many intricate questions on how the monopolist's own business, and its existing customers, is affected. This will also be discussed further in chapter 5.

4.3 EC Law

4.3.1 Commission Decisions

Cases relating to the essential facilities doctrine, without explicitly referring to it, have been decided by the Commission since the 1970's.⁶⁴ The first case referring directly to it was however not decided until the *B&I v. Sealink*

⁶¹ Sheehan, p. 72, Doherty, p. 398. For examples where the doctrine has been applied in lower courts, see Lipsky & Sidak, pp. 1191-1193, who refer to some 70 cases regarding, *inter alia*, football stadiums, a computerised airline reservation system, oil pipelines, hospitals, and the New York Stock Exchange. Worth noticing is that the doctrine has not been applied in relation to intellectual property.

⁶² *MCI Communications Corp. and MCI Telecommunication Corp. v. American Telephone and Telegraph Co.* 708 F. 2d 1081, 1132 (7th Cir.) 464 US 891 (1983).

⁶³ *Ibid*, pp. 1132-1133

⁶⁴ Temple Lang, pp. 257-260, provides a good overview of Commission decisions relevant to the doctrine, without explicitly referring to it. He identifies, *National Carbonising*, Commission Decision of 29 October 1975, OJ 1976 L35/6, as the first relevant case.

case in 1992.⁶⁵ During the 1990's the Commission applied the doctrine in a number of cases, which will now be discussed.

4.3.1.1 The Harbour Decisions

The background of *B&I v. Sealink* was as follow. Sealink Stena Line Ltd (Sealink) was both a car ferry operator between Holyhead in north Wales and Dublin, and the owner of the Holyhead Harbour. B&I Line Plc (B&I) also used the harbour for the Holyhead-Dublin route. Due to the narrow mouth of the harbour and the fact that B&I's berth was placed in the mouth of the harbour, B&I's ship had to stop loading or unloading whenever Sealink's ship passed. In 1991, Sealink altered its timetable, with the result that B&I's ship had to stop loading more frequently. The Commission found that the relevant market was the market for the provision of port facilities for ferry services on the so-called central corridor route between the UK and Ireland.⁶⁶ According to the Commission, Sealink held a dominant position on this market. The Commission defined the doctrine when stating that a:

“dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86 [...]”⁶⁷

The Holyhead Harbour was thus defined as an essential facility. Sealink could not discriminate competitors in the downstream market in favour of its own activities. The Commission argued that the owner of an essential facility “may not impose a competitive disadvantage on its competitor, also a user of the essential facility, by altering its own schedule to the detriment of the competitor's service”.⁶⁸

The Commission came to the conclusion that Sealink's alteration was to the benefit of Sealink and to the detriment of B&I. When Sealink could not present any acceptable objective justifications that authorised its conduct, the Commission held that Article 82 had been infringed.

In the *Sea Containers* case⁶⁹ the following year, the Commission once again alleged Sealink to have abused its dominant position on the “central corridor”. The dispute arose after Sea Container, a ferry operator, required

⁶⁵ *B & I Line plc v. Sealink Harbours Ltd and Sealink Stena Ltd.* (1992) 5 CMLR 255.

⁶⁶ This narrowly defined market has been criticised, see Ridyard, p. 442, and NERA, Competition Brief, January 1999, pp. 3-4. The latter article questions the Commission's reluctance to consider the Liverpool – Dublin route as an efficient substitute to the Holyhead – Dublin route. The article points out that Sealink in 1996 started to operate a passenger service from Liverpool.

⁶⁷ *B&I v. Sealink*, *supra* n. 65, at para. 41. In footnote 2 of the decision, the Commission referred to, *inter alia*, *Commercial Solvents*, *supra* n. 15, *Telemarketing*, *supra*, n. 22, *Volvo v. Veng*, *supra* n. 25, *London European v. Sabena*, *infra* n. 75 and *British Midland v. Aer Lingus*, *infra*, n. 76.

⁶⁸ *B&I v. Sealink*, *supra* n. 65, at para. 42.

⁶⁹ *Sea Containers v Stena Sealink*. Commission decision of 21 December 1993. OJ L15/8.

access to Holyhead Harbour in order to set up a fast ferry service on the Holyhead – Dublin route. Sealink offered Seacontainers access on terms that were regarded unacceptable. The Commission cited the Court’s case law regarding refusal to supply, and its earlier *B&I v. Sealink* decision. The main difference between the two harbour decisions was that Sea Containers, in contrast to B&I, was a new competitor on the relevant market. The Commission referred to its earlier decision, adding that the “principle applies when the competitor seeking access to the essential facilities is a *new entrant* to the relevant market”.⁷⁰ This position was justified by a reference to *Hoffman-La Roche*, where it was held that the development of competition is one of the goals of the competition law.⁷¹ The Commission held that Sealink had delayed the possible use of the harbour and that Sea Containers was not offered access to the facilities on non-discriminatory terms.⁷² Hence, Article 82 had been infringed.

Beside the two cases relating to the Holyhead Harbour, the Commission has applied the doctrine in two similar cases concerning harbours.⁷³ From this line of cases some points are worth noticing. First, the Commission has defined the relevant market narrowly, making it possible to apply the doctrine to cases only relating to small markets, such as harbours. Secondly, the definition of essential facilities, presented for the first time in *B&I v. Sealink*, is very wide; “a facility or infrastructure without access to which competitors cannot provide services to their customers”.⁷⁴ Finally, the Court accepted that a refusal to grant *new* competitors access to an essential facility could be a breach of Article 82. To conclude, the Commission’s application of the doctrine in the harbour decisions was wide, making it possible to apply it in a variety of situations. This view has been criticised by academic commentators, and the strict view the ECJ adopted in *Oscar Bronner*, may be seen as a reaction to the Commission’s extensive view.

4.3.1.2 The Airport Decisions

The first case concerning airports, *London European v. Sabena*,⁷⁵ did not expressly refer to the doctrine but is nevertheless of importance. The defendant airline was dominant on the Belgian market for computer reservation systems (CRS). Sabena refused London European access to its CRS. According to the Commission, access to a CRS is essential to competing airlines. Sabena refused access to the system in order to put pressure on the other airline to raise fares on the London – Brussels route, or

⁷⁰ *Ibid.* at para. 67 (emphasis added)

⁷¹ *Hoffman-La Roche*, *supra* n. 11, at para. 125.

⁷² *Sea Containers v. Stena Sealink*, *supra* n. 69, at paras. 70 and 76.

⁷³ See *Port of Rødby*. Commission decision of 26 February 1994, OJ 1994 L55/52. This case was decided under Article 90, now Article 86, (state measures inconsistent with EC competition rules), but the relevant rules are the same. See also *Irish Continental Groupe v. CCI Morlaix* (“*Port of Roscoff*”). (1995) 4 CMLR 667.

⁷⁴ *B&I v. Sealink*, *supra* n. 65, at para 41.

⁷⁵ *London European v. Sabena*, Commission decision of 24 November 1988, OJ 1988 L317/47.

to withdraw from the route. The Commission held that Sabena, for anti-competitive reasons, had refused access to an essential service, and hence infringed Article 82.

A similar case is *British Midland v. Aer Lingus*⁷⁶, which concerned “interlining” – an IATA practice that authorises airlines to sell each other’s services. A vast majority of the world’s airlines are included in the practice. When British Midland became a competitor on the London – Dublin route, Aer Lingus, who was dominant on the route, terminated its agreement to interline with British Midland on this route. The Commission held that Aer Lingus’ refusal to interline was intended, and likely to hinder the development of competition.⁷⁷ When Aer Lingus could not advance any legitimate business justifications, it was held to have acted in breach of Article 82.

A third airport case relevant to the doctrine is *FAG-Flughafen / Main*.⁷⁸ FAG owned and operated the Frankfurt airport, the largest airport in Germany. The case concerned FAG’s dominant position in the market for provision of airport facilities for the landing and take-off of aircraft. The Commission argued that the market of ground-handling services⁷⁹ was a neighbouring but separate market. FAG refused airlines and independent suppliers access to this market. The Court cited *Telemarketing and RTT v. GB-Inno*⁸⁰, stating that:

“[...] an abuse within the meaning of Article 86 of the EC Treaty is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.”⁸¹

The Commission found that that FAG had extended its monopoly power in the market of airport facilities to the market of ramp-side handling, making it impossible for potential providers of such services to compete in the latter market. FAG argued that the refusal was justified by the lack of space at the airport, but the Commission was not convinced by this argument. Hence, FAG was held to have abused its dominant position in breach of Article 82.⁸²

⁷⁶ Commission Decision of 26 February 1992, *British Midland/Aer Lingus*, OJ 1992 L96/34.

⁷⁷ *Ibid.*, at para. 29.

⁷⁸ Commission decision of 14 January 1998, *FAG - Flughafen Frankfurt/Main AG*, OJ L72/30.

⁷⁹ Ground-handling services is, for example, loading and unloading baggage, cabin cleaning, fuelling of aircraft and transport of passengers and crew between the terminal and the aircraft.

⁸⁰ *Telemarketing and RTT v. GB-Inno*, *supra* n. 22.

⁸¹ *FAG - Flughafen Frankfurt/Main*, *supra* n. 78, at para. 71.

⁸² The Swedish Competition Authority has applied the essential facilities doctrine in two similar cases, see *Luftfartsverket*, 1994-08-25, Dnr. 31/94, 241/94, 311/94 and *Göteborgs hamn*, 1995-01-12, Dnr. 1438/94. For a description of the cases, see Westin, p. 5; Carlsson, Schuler and Söderlind, p. 392.

4.3.2 CFI Cases

The CFI has showed willingness to embrace the essential facilities doctrine and define its scope. The *Ladbroke* case⁸³ concerned a Belgian company, Ladbroke, which took bets in Belgium on horse races run abroad. Ladbroke wanted to show French races on television, but the owners of the television pictures, two French companies called PMU and PMI, refused to grant a licence to show the television pictures. Ladbroke argued that PMU and PMI had infringed Articles 81 and 82, but the Commission rejected this argument. It held that Ladbroke was already dominant in the Belgian market, and when PMU and PMI were not present in that market, the Commission rejected the complaint.

Ladbroke challenged the Commission decision before the CFI. Ladbroke argued that Article 82 had been infringed when the French companies had licensed the pictures to German bookmakers, and that the refusal prevented the emergence of a new product. The first argument was rejected when the Court concluded that the relevant market was Belgium. PMU and PMI could thus not have discriminated in relation to German bookmakers, when German and Belgian bookmakers did not compete on the same market. The second argument – that the refusal prevented the emergence of a new product, which would constitute a breach of Article 82 according to *Magill*, was also rejected. What is interesting is that the CFI added an essential facility-requirement to the *Magill*-test.

“The refusal to supply the applicant could not fall within the prohibition laid down by 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...”⁸⁴

The Court held that television pictures were not “indispensable” when Ladbroke had been able to enter the betting market without them. Ladbroke’s complaint was consequently rejected. Sheehan notes, that the above cited passage of the judgement strictly speaking is *obiter dictum*, but that CFI in the case showed that it was willing to accept the existence of an essential facilities doctrine.⁸⁵

A case where the CFI more explicitly applied the doctrine is *European Night Services*.⁸⁶ European Night Services (ENS) was a joint venture formed by French, British and Dutch railway companies to provide and operate overnight passenger services through the Channel Tunnel. The agreement to form ENS was exempted by the Commission under Article 81

⁸³ Case T-471/93, *Tiercé Ladbroke SA v Commission*, [1995] ECR II-2537.

⁸⁴ *Ibid*, at para. 131.

⁸⁵ Sheehan, p. 84.

⁸⁶ Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *ENS, Eurostar, EPS, UIC and SNCF v. Commission* [1998] ECR II-3141.

(3) on the condition that the railway companies had to supply locomotives, train crew and path to third parties on the same technical and financial terms as they allow to ENS.⁸⁷

The railway companies challenged the decision before the CFI, arguing that these services were not “essential”. The CFI held that the plaintiffs’ market power did not exceed 8 per cent, and that the locomotives and train crew of the railway companies were not necessary in order to enable third parties to enter the market. CFI consequently changed the Commission decision. This did however not prevent the Court from commenting on the essential facilities doctrine. The Court stated that:

“neither the parent undertakings nor the joint venture thus set up may be regarded as being in possession of infrastructure, products or services which are 'necessary' or 'essential' for entry to the relevant market unless such infrastructure, products or services are not 'interchangeable' and unless, by reason of their special characteristics - in particular the prohibitive cost of and/or time reasonably required for reproducing them - there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.”⁸⁸

Some points are worth noticing regarding this statement. First, the CFI referred to “infrastructure, products or services”. The Court was thus of the opinion that the doctrine is relevant only to infrastructures. This can be a decisive factor if the doctrine should be applied in cases like *Commercial Solvents*, where the dominant undertaking refused to supply raw material. Secondly, the Court stressed that an unreasonable cost for reproducing the facility is sufficient in order to apply the doctrine. This important issue will be dealt with in connection with the *Oscar Bronner* case. Finally, it is argued that the CFI made an extensive interpretation of *Magill* and *Ladbroke*.⁸⁹ The importance of the Court’s interpretation in this respect is however somewhat limited, when the ECJ made a more restrictive interpretation in the following *Oscar Bronner* case, which now will be discussed.

4.4 Oscar Bronner

The *Oscar Bronner* case⁹⁰ is important in many aspects. The case is the first where the ECJ was faced with essential facilities arguments. What further makes it important is that the Court chose *not* to apply the doctrine directly, alternatively to make a narrow interpretation of its scope. It is safe to argue that the Court did have an opportunity to examine the doctrine’s field of application but chose to apply the more traditional refusal to supply rule.

⁸⁷ *Night Services*, Commission decision of 21 September 1994, OJ 1994 L259/20.

⁸⁸ *European Night Services*, *supra* n. 86, at para. 209.

⁸⁹ Doherty, p. 412.

⁹⁰ *Oscar Bronner*, *supra* n. 2.

4.4.1 Background of the Case

The background of the case was briefly the following. Oscar Bronner was the publisher of *Der Standard*, a daily Austrian newspaper with a market share of approximately 4% of the circulation and 6% of the advertising revenues. Mediaprint published newspapers with a combined market share of approximately 47% of the circulation and 42% of the advertising revenues. Bronner required access to Mediaprint's nation-wide home-delivery service against reasonable payment. When Mediaprint refused Bronner access, Bronner argued that Mediaprint had breached the Austrian equivalence to Article 82. Bronner's argument why it should be granted access to Mediaprint's network was based on the essential facilities doctrine. The Austrian court referred the question to ECJ, seeking a ruling on whether Mediaprint's refusal amounted to an abuse of its alleged dominant position.

4.4.2 Opinion of Advocate General Jacobs

The Opinion of Advocate General Jacobs is of special interest, when he conducted an in-depth analysis of the doctrine's boundaries and implications. The Advocate General first noted that the Court had not referred to the doctrine in its judgements. However, after having examined the Court's case law concerning refusal to supply, the doctrine's origin in US antitrust case law and the Commission's essential facility decisions, one can easily be led to believe that Advocate General Jacobs indeed recognised a free standing essential facilities doctrine.

In the second part of the opinion, the Advocate General tends to be much more hostile towards the doctrine and suggests a narrow interpretation of it. First he emphasised the freedom to contract with whom one pleases and the right to property, stating that a limitation of these rights require careful justifications.⁹¹ Secondly, the Advocate General argued that in the long run, it is generally pro-competitive, and in the interest of consumers, to allow a company to retain for its own use facilities which it has developed. The Advocate General stressed that an extensive application of the doctrine could reduce dominant undertakings' incentives to invest. The Advocate General stated:

“[...] if access to a [...] facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.”⁹²

Advocate General Jacobs further pointed out that the primary purpose of Article 82 is not to protect particular competitors, but to prevent distortion

⁹¹ Opinion of AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para. 53.

⁹² *Ibid*, at para. 57. This is further discussed in section 4.6.

of competition.⁹³ The Advocate General concluded by stating that intervention in the dominant undertaking's business can be justified "only in cases in which the dominant undertaking has a genuine stranglehold on the related market".⁹⁴ It is thus not sufficient that the undertaking's control over a facility should render it a competitive advantage. Cost of duplicating the essential facility would constitute a barrier to entry only if it were such as to "to deter any prudent undertaking from entering the market".⁹⁵ It is thus not sufficient that, for example, a small company finds it economically impossible to duplicate the facility – this must be the case even for larger companies.

The Advocate General found that the present case fell "well short" of the type of situation where it would be appropriate to impose an obligation to allow access.⁹⁶

4.4.3 The Court's Judgement

The Court's judgement is considerably shorter, and does not elaborate with the essential facilities doctrine in the same way as the Advocate General. In its judgement, the Court relied on cases concerning refusal to deal. The Court especially emphasised *Magill*, which the Court held to apply to all forms of property, not only intellectual property. After having summarised *Magill*, the Court stated that in order for a refusal to constitute an abuse of a dominant position, the refusal must not only:

"[...] be likely to eliminate all competition in the daily newspaper market [...] and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."⁹⁷

This statement forms what have been called the *Bronner-test*. The test can be said to consist of three criteria, which all must be fulfilled in order to show an abuse:

- (1) The refusal must be likely to eliminate all competition;
- (2) The refusal cannot be objectively justified;
- (3) The service or product must be indispensable to carrying on the business of the company requiring access, inasmuch as there is no actual or potential substitute.

Regarding the cost of creating a new distribution system, the Court agreed with Advocate General Jacobs – it must be economically viable to create a second home-delivery service for a newspaper of the same size as the

⁹³ Ibid, at para. 58. See also *Korah*, p. 16.

⁹⁴ Ibid, at para. 65. According to the Advocate General, this can be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy.

⁹⁵ Ibid, at para. 66.

⁹⁶ Ibid, at para. 71.

⁹⁷ *Oscar Bronner*, *supra* n. 2, at para. 41.

incumbent company. The test is thus objective – that a smaller company finds it impossible to create a new distribution system is not sufficient.⁹⁸

The Court found that it existed other distribution forms, such as postal delivery and kiosk sales, although these distribution forms may be less advantageous.⁹⁹ It further held that there were no technical, legal, or even economic (if Bronner would have been a publisher of the same size as Mediaprint) obstacles to establish a new distribution system.¹⁰⁰

For these reasons, the Court held that Mediaprint had not abused its dominant position by refusing access to its home delivery service.¹⁰¹

4.5 Statutory Application – The Example of Telecommunications

So far, I have only discussed cases concerning general competition rules. The notion of essential facilities is however present in many regulated industries. A good example of a sector where the doctrine has played a crucial role is the telecommunications sector. Until the mid-1980's the provision of telecommunication services was provided by state owned telecommunications operators (TO's), and competition between different TO's was virtually non-existent. Since then the Commission and Council have taken an active role in liberalising and deregulating the industry, introducing a series of legislative initiatives which culminated with full liberalisation of voice telephony by 1 January 1998.¹⁰² To ensure effective competition in the liberalised market, the Commission and the national competition authorities has enforced both sector-specific regulation adopted by the Commission, the general competition rules in the Treaty (Articles (81, 82 and 90). Of great importance is the so-called ONP directives (open network provision),¹⁰³ regulating third parties' right to access TO's network, and on which terms these so-called interconnection agreements should be concluded. Of special importance is the pricing rules in the ONP directives, which compels TO's to set interconnection tariffs based on objective, cost-based criteria. Interconnection prices must furthermore be transparent and

⁹⁸ Ibid, at para. 46. This part of the judgement is important in practice. Bergman, pp. 60-61, notes that the question whether a facility is duplicable or not, is almost always determined by economic considerations, rather than e.g. laws of nature.

⁹⁹ *Oscar Bronner*, *supra* n. 2, at para. 43. Doherty, p. 419, suggests that this is a broad view on available substitutes.

¹⁰⁰ *Oscar Bronner*, *supra* n. 2, at para. 44.

¹⁰¹ The *Bronner* judgement has been applied in a similar decision by the Swedish Competition Authority, see *Tidnings AB Metro*, 1999-01-08, Dnr. 1044/96.

¹⁰² See Commission Directive 1996/19/EC of 13 March 1996 amending Directive 1990/388/EEC with regard to the implementation of full competition in telecommunications markets, [1996] OJ L74/13.

¹⁰³ See Bellamy & Child, pp. 1032-1034; Faull & Nikpay, pp. 755-756 for references to the relevant directives.

non-discriminatory.¹⁰⁴ The ONP rules are predominantly enforced by national regulatory authorities (NRA's).

In addition to the ONP framework, general competition rules are of relevance when ensuring the liberalisation. Article 86 is of special importance, when most of the former monopolists still are in a dominant position. In 1998 the Commission published the "Access Notice",¹⁰⁵ aiming to clarify the relationship between the ONP rules and the general competition rules. The Access Notice states that Article 82 prevails over the ONP rules, but that the ONP rules, especially pricing rules, goes beyond the scope of general competition provisions.¹⁰⁶ So far, the ONP rules have played the most important role, but the Commissioner for Competition Policy, Mario Monti, foresees a transition from sector-specific regulation to general competition rules, as liberalisation proceeds.¹⁰⁷

Of special interest in the context of this paper is that the Access Notice defines the concept of essential facilities. The Notice states that an essential facility in the telecommunications sector is:

"...a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means."¹⁰⁸

When considering a refusal to grant access to an essential facility, the Commission will, cumulatively, take into account the following elements:

- (1) there is sufficient capacity available to provide access;
- (2) the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;
- (3) the company seeking access is prepared to pay the reasonable and non-discriminatory price;
- (4) there is no objective justification for refusing to provide access.¹⁰⁹

As a general limiting principle, the Access Notice states that it is not sufficient that it would be more advantageous for the entrant if access were granted – a refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomical.¹¹⁰

The essential facilities can thus be said to have moved from mere case-law status to that of an issue reflected in community legislation¹¹¹ – indeed an

¹⁰⁴ Bellamy & Child, p. 1033.

¹⁰⁵ Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, [1998] OJ C265/2.

¹⁰⁶ Ibid, at paras. 14-15.

¹⁰⁷ Monti, Mario, *Telecommunications between Regulation and Competition*, Speech delivered 28 September 2000.

¹⁰⁸ *Access Notice*, *supra* n. 105, at para. 68.

¹⁰⁹ Ibid, at para. 91(b).

¹¹⁰ Ibid, at para. 91(a). Cf *Oscar Bronner*, *supra* n. 2, para. 43.

¹¹¹ See Goyder, p. 350.

important advance. However, one must keep in mind that the Access Notice was drafted before the ECJ's *Oscar Bronner* ruling.

The *Bronner* case affects the doctrine's field of application in a variety of ways. This impact will now be considered.

4.6 The Doctrine's Present Field of Application

After having discussed the Court's and the Commission's case law on refusal to deal and the essential facilities doctrine, it is now appropriate to conclude the doctrine's present field of application within EC competition law. In this respect, the *Bronner* judgement is of particular importance.

Bergman argues that the doctrine after *Oscar Bronner* has entered into a limiting phase, following a phase where its scope increasingly had expanded.¹¹² It seems safe to argue that the Court in *Oscar Bronner* made a narrow interpretation of the possibilities to demand access to a dominant undertaking's infrastructure or services, whether or not they are deemed to be "essential" under a free standing essential facilities doctrine. As Doherty has put it:

"The *Bronner* judgement did not explicitly accept or reject the essential facilities theory, but has poured cold water on the expansionist claims made by some"¹¹³

Others have argued that the Court in *Oscar Bronner* recognised that the doctrine is a part of the European legal order, but that the Court also recognised the necessity of a more careful application of it.¹¹⁴ Thus, one can argue that the doctrine has survived *Oscar Bronner*, albeit the Court limited its field of application. The question whether the doctrine as such survived *Oscar Bronner* might however not be a question of crucial importance. It seems more important to analyse what the Court said in the judgement, and how this relates to the earlier case law. The issues dealt with under the essential facilities doctrine remains – the most important and interesting task is to analyse how they would be dealt with today.

The Commission's definition of the doctrine, first articulated in *B&I v. Sealink*,¹¹⁵ is wider than the three criterion introduced by the Court in *Oscar Bronner*. Doherty has applied the Bronner-test retrospectively, with the result that some cases dealing, directly or indirectly, with the access to essential facilities, would have been decided differently using the Bronner-test.¹¹⁶ For example, the Court did not examine whether there existed any actual or potential substitutes in the *Commercial Solvents*, *United Brands* and *BP* cases. Nor did the Commission investigate whether the refusal to supply in the two Holyhead-cases was likely to eliminate all competition.

¹¹² Bergman, pp. 59-60.

¹¹³ Doherty, p. 422.

¹¹⁴ Capobianco, p. 553.

¹¹⁵ See chapter 4.3.1.1.

¹¹⁶ Doherty, pp. 419-423. See also Hancher, p. 1304.

However, the Bronner-test does not hold all answers – some questions remain unsolved. The three concepts; “likely to eliminate all competition”, “objectively justified” and “indispensable” leaves a great margin of appreciation to the courts. How should “likely” to eliminate competition be assessed? On which market must this elimination take place, and must the dominant undertaking also be dominant on the downstream market?¹¹⁷ It is furthermore not entirely clear whether the companies must be competitors on the same market. If elimination of competition is one part of the abuse, it seems logical that the parties must be actual or potential competitors.¹¹⁸ However, this contradicts *United Brands* where Olesen was not a competitor, but a customer to United Brands. If the Bronner-test protects competitors, does *United Brands* still protect customers?

The case has also been criticised for confusing the concepts of dominance and abuse. Stothers argues that two of the requirements in the Bronner-test, elimination of competition and indispensability for the business in the downstream market, is facets of the determination of dominance rather than evidence of abuse. As both requirements deals with available substitutes for the service in question, they are better suited to be dealt with in an analysis of the relevant market and the supposed dominance on that market.¹¹⁹

When determining if a facility is “indispensable” for a competitor, the *cost* of a possible duplication of the facility is perhaps the most important issue. Most facilities could be duplicated if cost were no object. In *Oscar Bronner*, the Court clarified its view by stating that it must be impossible to duplicate a facility for a company of the *same size* as the incumbent company. Bergman provides two possible interpretations of this requirement.¹²⁰ First, must the company seeking access be unable to create a new facility at the *current size* of the market? Or, alternatively, must the market entrant be unable to duplicate the facility even if it actually was of the size of the dominant undertaking? The second interpretation presupposes that the market entrant holds the same market share (50% in the *Bronner* case) as the dominant company at a *redoubled* market.¹²¹

The narrow view on the possibilities to demand access to a dominant undertaking’s facilities may be seen as a response to one of the main criticisms of the doctrine. Scholars have repeatedly argued that if the doctrine were to liberally applied, this would jeopardise firms’ incentives to invest in infrastructure and other facilities that in the future could be seen as

¹¹⁷ AG Jacobs implied in his opinion that a dominant undertaking must hold a strong position on the downstream market. See Opinion of AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para. 41. This view is contradicted by Temple Lang, p. 276.

¹¹⁸ See Doherty, p. 426.

¹¹⁹ Stothers I, p. 258-259.

¹²⁰ Bergman, p. 61.

¹²¹ The second alternative deals with so-called natural monopolies, that is, markets in which two or more firms can never be economically viable on their own. The second, stricter, interpretation has been criticised by Doherty, p. 424. Temple Lang, writing prior to *Oscar Bronner*, also rejects this interpretation, see p. 286.

“essential”. This would result in negative effects on the rate of innovation and product development.¹²² The situation is sometimes referred to as the “free rider” problem – a risk that third party is able to demand a free ride on the fruits of another’s investments. This might deter the asset owner from making the investments in the first place.¹²³ Moreover, it risks reducing the market entrant’s incentives to create its own facilities.

Although being generally accepted, this position can be challenged. Stothers argues that if access is paid for at a competitive market rate, there remain normal incentives to create the facility. The doctrine merely hampers incentives to charge excessive prices.¹²⁴ This position presupposes that it is possible to determine a market rate, a question addressed in the following presentation.

That the *Bronner* judgement has introduced a stricter test of when a facility owner can be compelled to share its assets with its competitors is evident when examining the following case law. To my knowledge, the essential facilities doctrine has only been applied once by Community institutions once since *Oscar Bronner*. In an application for interim measures, the Commission applied the doctrine in the field of intellectual property rights.¹²⁵ The case concerned the German company IMS Health that refused to licence its copyright protected system for collecting pharmaceutical sales information. The system was held to be national standard in the industry and essential when competing on the market. The Commission cited, *inter alia*, *Ladbroke*, *Magill* and the three-part test set out in *Oscar Bronner* before concluding that the exceptional circumstances of the case met the test set out in *Bronner* for a refusal to supply to be considered as an abuse of a dominant position.¹²⁶

Although the Commission seemingly applied the doctrine due to the exceptional circumstances of the case, it has been argued that the case represents a substantial departure from the past jurisprudence, in so far as the refusal concerned only one market. Earlier case law has generally dealt with the situation of two separate markets: the market for the essential facility and the market where competition is restricted.¹²⁷

IMS contested the Commission decision before the CFI, which first ordered to provisionally suspend the decision pending a submission from the

¹²² See Sheehan, pp. 87-88; Temple Lang, p. 277; Nikolinakos, p. 402; Bishop & Walker, pp. 116-117; Turnbull, p. 103. See also AG Jacobs’ opinion in *Oscar Bronner*, *supra* n. 2, at para. 57.

¹²³ Whish, p. 617.

¹²⁴ Stothers I, p. 260. See also Baker, Director at the Bureau of Economics, FTC, who, from an American horizon argues that if the market structure is of a “winner-take-all” nature, the enforcement of antitrust law will *promote* innovation.

¹²⁵ Case COMP D3/38.044 – *NDC Health/IMS Health: Interim measures*, 3 July 2001.

¹²⁶ *Ibid*, at paras. 179-181.

¹²⁷ See Capobianco, p. 555. See also Stothers II, pp. 90-92.

Commission,¹²⁸ and, after a hearing, ordered to suspend the decision until the full appeal was heard.¹²⁹ The CFI stated that there was, “at the very least, a serious dispute” regarding the correctness of the Commission’s conclusion that exceptional circumstances existed.¹³⁰

The case is presently not finally decided, but one gets the impression from the wording of the two CFI Orders that the Commission’s decision will be repealed. This would, in my view, better correspond to the restrictive approach taken by the ECJ in *Oscar Bronner*.

¹²⁸ Case T-184/01 R *IMS Health v. EC Commission*, Order of The President of The Court of First Instance, 10 August 2001

¹²⁹ Case T-184/01 R *IMS Health v. EC Commission*, Order of The President of The Court of First Instance, 26 October 2001

¹³⁰ *Ibid*, at para. 106.

5 The Doctrine's Contractual Implications

5.1 Introduction

The above conducted case law survey has shown that EC competition law under certain circumstances can force a dominant undertaking to share its recourses with competitors, whether or not the recourses are considered “essential” under a free-standing essential facilities doctrine.

Mandatory access to an undertaking's facilities raises many contractual questions. Access must be granted on specific terms, but who determines the terms and what can the terms state? The determination of reasonable payment is an example of one, but far from the only, important issue that must be carefully examined. As will be shown below, the Court and the Commission have habitually avoided many of the doctrine's contractual implications, focusing solely on the question whether the undertaking has abused its dominant position or not.

This chapter is intended to shed light on various contractual implications of the essential facilities doctrine. First, the principles of right to property and freedom of contract will be briefly dealt with. This is followed by an examination of the questions who should determine the terms, especially the access price, and how these terms should be determined. After this, I will discuss how existing contractual relationships between the facility owner and its customers may be affected when a new competitor gains access to the facility.

5.2 The Right to Property

The right to property is guaranteed in Article 1 of the first protocol to the European Convention on Human Rights (ECHR). This provision is however not without exceptions; a person (legal or physical) may be deprived of his possessions if it is in the public interest, and subject to conditions provided for by law and general principles of international law. This exception is of great practical importance. Indeed, much of the tax law, environmental law and competition law is based on this exception.

The ECJ first acknowledged the right to property as a part of the community law in *Liselotte Hauer*.¹³¹ The case concerned a wine-producer who argued that a community regulation that prohibited new planting of vines had deprived her right to property. The Court examined the right to property, as it is expressed in ECHR and in the member states' constitutions. The Court

¹³¹ *Liselotte Hauer v Land Rheinland-Pfalz*, Case 44/79 [1980] ECR 3727.

declared that it is necessary to identify the aim of the regulation and to determine whether there exists a reasonable relationship between the measures provided for by the regulation and the aim pursued by the community.¹³² After having discussed the purpose of the provision and stated that the provision did not deprive the applicant of her property, merely prohibited a certain use of the property for a limited period, the Court found that the property rights of the wine-producer had not been infringed.¹³³

The conflict between competition and ownership is apparent in cases concerning essential facilities and, to lesser extent, traditional refusal to sell cases. If an owner of e.g. a harbour must grant a competitor access to the harbour to avoid acting in breach of Article 82, this clearly is a severe restriction on the harbour-owner's right to use its property as it wish. It is consequently not surprising that the right to property has been invoked as an argument not to grant access to a facility. In *FAG-Flughafen / Main*,¹³⁴ FAG used the right to property as one line of defence. The Commission cited *Liselotte Hauer*, stating that the right to property is guaranteed in the Community legal order, but that this right may be restricted. The Commission held that services could only be carried out at the airport area. Limiting FAG's right to property would therefore be neither disproportionate nor excessive, but simply the result of the lack of alternatives.¹³⁵

Property rights were hence not a sufficient defence, and to my knowledge such rights have never been regarded as a valid defence for a dominant undertaking's refusal to supply. Bearing this in mind, it seems further doubtful if a dominant firm can justify a refusal to deal with the principle of proportionality. Article 5 EC provides that any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

Bearing the Commission's and the Court's reasoning in mind, it is likely that individual property rights only would be a valid defence in cases where the measures taken greatly exceeds the underlying competition objectives. Thus, property rights do not form a strong defence for a dominant undertaking that do not wish to share its recourses. One must however remember that all cases must be decided on their own merits, and that property rights and the principle of proportionality may form a valid defence in certain instances.

¹³² *Ibid.*, at para. 23.

¹³³ *Ibid.*, at para. 30.

¹³⁴ *FAG-Flughafen / Main*, *supra* n. 81.

¹³⁵ *Ibid.*, at para. 91. See also AG Cosmas in Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, at para. 105: "Article 222 [now Article 295] of the EC Treaty may in no event be used as a shield by economic operators to avoid application of Articles 85 and 86 to their detriment."

The Court's case law concerning the relationship between EC law and ECHR was codified in the Maastricht Treaty. Article 6.2 provides that the Union shall respect fundamental rights, as guaranteed by the ECHR, and as they can be construed from the constitutional traditions common to the Member States, as general principles of Community law.

5.3 Freedom of Contract

Advocate General Jacobs stated in *Oscar Bronner* that the laws of the Member States generally regard freedom of contract as an essential element of free trade. He further noted that this principle does not prevent some Member States competition rules from providing that an unjustified refusal to enter a binding contract may constitute a breach of a dominant position.¹³⁶ Some states have even specific provisions concerning essential facilities, which state that a dominant undertaking cannot refuse to enter a contract to supply those facilities.¹³⁷

As has been shown above, American antitrust law acknowledges the right to deal with whom one pleases. This so called Colgate rule is, however, not without exceptions, and the essential facilities doctrine may be seen as an, albeit limited, exception.

To force a company to enter a contract with a competitor, allowing the competitor to access its recourses is clearly a grave restriction of the right to contract freely. The question, consequently, arises whether the principle of freedom of contract can be invoked as a valid argument not to grant access. The answer to this question is somewhat unclear. It is doubtful whether the principle can be invoked as a defence as such. In the *BP* case (discussed in section 3.1.3) the Commission took the firm position that:

“Undertakings cannot avail themselves of criteria based on the law of contract in order to prevent the realization of the objectives of competition law in the community”.¹³⁸

One must however remember that the narrow interpretation of refusals to grant access conducted by the Court in *Oscar Bronner* most likely stemmed from the notion that effective competition in the long run is best served if the principles of freedom of contract and right to property are respected. This is closely connected to the above described view that dominant companies' incentives to invest would be held back if they are unable to profit from their investments. This is one of the strongest arguments why the scope of the doctrine should be construed narrowly. One could thus argue that the freedom of contract is not a strong free-standing argument not to deal with a competitor that requires access to a facility, but that the principle

¹³⁶ See Opinion of AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para. 53. The AG *inter alia* referred to telephone networks and electricity transmission networks in Finnish competition law, and rail networks, bus services and energy distribution in Austrian law.

¹³⁷ *Ibid.* The AG referred to provisions concerning a port and an electricity network in Denmark, a heliport in France and supplies of tobacco in Spain.

¹³⁸ *ABG oil companies*, Commission Decision of 19 April 1977, OJ 1977 L117/1.

is respected indirectly, inasmuch as the scope of the doctrine has been limited.

5.4 The Access Price

In *B&I v. Sealink*, the Commission stated that a dominant undertaking infringes Article 82 if it refuses its competitors access to an essential facility or grants access to competitors only on terms less favourable than those which it gives its own services.¹³⁹ The contract price is in most cases the most important access term. The Commission has never set a specific access price, but referred to phrases such as access on “fair and non-discriminatory” or “reasonable” terms. Ridyard suggests that the case law “reveals a notable determination (with a few exceptions) to side-step the thorny issue of access terms”.¹⁴⁰ This part of the essential facilities doctrine is unclear in the case law, and guidelines of what constitutes a fair remuneration must consequently be found elsewhere; in general statements in the case law of the ECJ and the Commission, in national court cases, in sector specific regulation and in general pricing models based on economic theory.

One may at this stage ask what place pricing issues have when discussing essential facilities, and why these issues should be emphasised at all when they have not been specifically addressed to any greater extent by the Court and Commission. The reason for this is the following. The facility owner is undoubtedly entitled to some form of “fair” or “reasonable” remuneration for granting access to its facility. Moreover, it is clear that the facility owner cannot charge whatever price he chooses, when this would amount to a *de facto* refusal to grant access. The logical consequence of this is that a company that has been granted access to a competitor’s facility (perhaps after a decision from a court or a competition authority), also must be entitled to challenge what it regards as an unreasonable price. As Areeda puts it: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.”¹⁴¹ Situations can thus arise when a court or a competition authority has to decide what actually is a fair price. When answering this often complicated question, a theoretical background consisting of statements in earlier cases and the economical analysis of the problem will probably be of assistance.

5.4.1 Case Law

The Court and the Commission have, as already noted, never fully examined the doctrine’s contractual implications. It has often been stated that the facility owner is entitled to fair or reasonable remuneration, or that it must provide access on non-discriminatory terms, but the precise meaning of

¹³⁹ *B&I v. Sealink*, *supra* n. 65, at para. 41.

¹⁴⁰ Ridyard, p. 449.

¹⁴¹ Areeda, p. 853.

these concepts has been left to the parties to decide. However, some statements are of some guidance. Advocate General Mischo in *Volvo v. Veng* was of the opinion that that the proprietor was entitled to recover not only production costs, but also research and development expenditure and a reasonable margin.¹⁴² The Court was however much more imprecise, stating that Volvo was entitled to “reasonable royalty”.¹⁴³

In his Opinion in the *Bronner* case, Advocate General Jacobs argued that if a dominant undertaking is forced to grant access to a facility it must 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.”¹⁴⁴ How this assessment should be conducted, and what is meant by “appropriate proportion” is not further discussed by the Advocate General. As described above, the Court constructed a three-part test to examine whether the dominant undertaking could be forced to sell. After having concluded that Oscar Bronner could not demand access to Mediaprint’s distribution network, it is not very surprising that the Court did not discuss an appropriate access charge.

It is suggested that American courts dealing with mandatory access to facilities under Section 2 of the Sherman Act have not either been specific when it comes to setting the access price. Courts have only been able to apply specific solutions in three circumstances; to order access under the same conditions as those already granted to others, to grant access under conditions that the monopolist itself already enjoys, or to refer to conditions established by a special regulator.¹⁴⁵ For example, in *Otter Trail*¹⁴⁶ it existed a regulatory body that supervised terms and prices in the electricity industry. This made it relatively easy for the Supreme Court to impose a duty to grant access to the network.¹⁴⁷

Thus, the case law concerning refusals to grant access, in the EC as well as in the US, does little to help illuminate this rather obscure part of the essential facilities doctrine. This is most likely a deliberate choice – Advocate General Jacobs stated in his Opinion in the *Bronner* case that a detailed fixing of prices and conditions would be unworkable and scarcely compatible with a free market economy.¹⁴⁸

However, as Ridyard puts it, “evading the problem does not make it disappear”,¹⁴⁹ and a benchmark of what is meant by fair and reasonable price needs to be found elsewhere.

¹⁴² Opinion of AG Mischo in *Volvo v. Veng*, *supra* n. 25, at para. 32.

¹⁴³ *Volvo v. Veng*, *supra* n. 25, at para. 8.

¹⁴⁴ Opinion of AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para. 64.

¹⁴⁵ See Kerf & Geradin, p. 982.

¹⁴⁶ Discussed in section 4.2.1 above.

¹⁴⁷ Areeda, p. 848, suggests that the case for this reason should be construed narrowly.

¹⁴⁸ Opinion of AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para. 69.

¹⁴⁹ Ridyard, p. 451.

Some guidance can be found in cases concerning excessive prices, which is contrary to Article 82 (a). In *General Motors Continental*,¹⁵⁰ the Court ruled that unfair prices, for the purposes of Article 82 (a), means prices which are excessive because they have no reasonable relation to the *economic value* of the service supplied. This approach is criticised by Korah, who argues that the “economic value” is the value decided by the market. If prices and profits are high, this would encourage new firms to enter the market. However, Korah does not blame the Court for what she considers to be a regretful approach, but the wording of Article 82, which prohibits unfair purchase or selling prices.¹⁵¹

In *United Brands*¹⁵² the Court found that the dominant undertaking abused its position if it made use of the opportunities arising out of the dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. Similarly, in *Lucazeau v. SACEM*¹⁵³ the Court conducted a comparison between the prices of the dominant undertaking, and prices in more competitive markets. The court declared that when an undertaking holding a dominant position imposes prices which are appreciably higher than those charged in other Member States, that difference must be regarded as indicative of an abuse of a dominant position. However, different prices may be justified if the dominant undertaking can show objective dissimilarities between the situation in the Member State concerned and the situation in other Member States.¹⁵⁴

Thus, some general conclusions can be drawn from the case law concerning excessive prices. Prices must be related to the economic value of the product or service supplied. A comparison should furthermore be conducted between prices charged by the dominant firm and prices in competitive market. The onus of proof that price differences do not relate to objective dissimilarities lies at the dominant undertaking. This may serve as a very general guideline in the situation of access to essential facilities. However, it is important to keep in mind that essential facilities by their very nature often are unique assets, which render it difficult to estimate an economic value.

A related situation is when the access price can be compared with prices charged to existing users of the facility, including in-house users of the facility, to determine a non-discriminatory access price. This issue will be dealt with below.

¹⁵⁰ Case 26/75, *General Motors Continental NV v. EC Commission*, [1975] ECR 1367, at para. 12.

¹⁵¹ Korah, p. 134.

¹⁵² *United Brands*, *supra* n. 6, at paras. 248-249.

¹⁵³ Joined cases 110/88, 241/88 and 242/88, *Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM)*, [1989] ECR 2811.

¹⁵⁴ *Ibid*, at para. 25.

5.4.2 Free Negotiating

The courts and competition authorities have generally been reluctant to determine specific access terms. The problem, it thus seems, belongs to the facility owner and the company seeking access. Will free negotiating lead to a suitable solution? This question is of course not easy to answer – the final access agreements are generally well-kept business secrets that are not accessible to public scrutiny. Commentators have however expressed fear that free negotiating is not the best way to deal with the problem. The facility owner holds a very strong position, sometimes a monopoly position, in the relevant market, which means that he has the strongest negotiating position. If the parties are left to settle their own terms, one may expect that the dominant undertaking imposes prohibitive high access charges. To do so may be based on valid economic reasons, but it may nevertheless result in a *de facto* refusal to deal. Unreasonable high prices thus undermine the very basis of the doctrine, and it is argued that if the dominant firm demands unreasonable prices, this itself amounts to a breach of Article 82.¹⁵⁵ This position goes moreover well in hand with the two Holyhead cases, where it was not a refusal to deal, but rather the *intolerable terms* the facility owner imposed, that constituted the abuse.

An interesting solution to the problem who should decide the access terms was demonstrated by the Commission in the recently decided *NDC Health/IMS Health* case.¹⁵⁶ Here the Commission decided to leave to the parties to agree on non-discriminatory, commercially reasonable terms. However, if the parties failed to come to a mutual agreement within two months the terms would be settled by independent experts on the basis of transparent and objective criteria.¹⁵⁷

The Commission has also allowed the parties to resolve the issue between themselves, with the possibility to overview by the Commission itself. In *Magill*, the Commission required the parties to submit proposals for approval by it within two months.¹⁵⁸

5.4.3 Non-discriminatory Access

One preferable solution to the access pricing problem is to grant access to a facility on the same terms as are applied in relation to other parties using the same facility. *British Midland v. Aer Lingus*¹⁵⁹ is a good example of this situation. In this case it existed a widely accepted industry practice – the IATA interlining agreement – which provided terms that could be applied.

¹⁵⁵ Ridyard, p. 450; Whish, p. 624, 637. See also the *Access Notice*, *supra* n. 105, para 97, which explains that the demanding excessive prices for access, as well as being abusive in itself, may also amount to an effective refusal to grant access.

¹⁵⁶ *NDC Health/IMS Health*, *supra* n. 125.

¹⁵⁷ *Ibid*, paras. 218-219. See also Stothers II, p.89-90.

¹⁵⁸ *Magill TV Guide/ITP, BBC and RTE*, *supra* n. 31, at para. 27.

¹⁵⁹ *British Midland v. Aer Lingus*, *supra* n. 76.

The Commission ordered Aer Lingus to interline with British Midland in accordance with provisions laid down by the relevant IATA resolution.

This situation is however not as common as the related situation where the dominant company is vertically integrated and both owns the essential facility and operates services on the downstream market. The question that needs to be addressed is whether non-discriminatory access shall apply in this situation. The Commission stated in *B&I v. Sealink* that:

“The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitors access to that market on less favourable terms than those of its own services, infringes Article 86.”¹⁶⁰

How should this requirement be understood? Temple Lang argues that a facility owner may charge highly for the facility, provided its charges to its own operations are no less than what it charges its competitors.¹⁶¹ But what if the prices charged do not correspond to the costs, or are otherwise not justified for business reasons? The different parts of the dominant undertaking may be cross-subsidising each other for various reasons.

Ridyard suggests that non-discriminatory pricing only works when there is “genuine separation of decision-making between the downstream and the upstream operations”.¹⁶² If there is no such separation, the facility owner is free to operate with the profit-maximisation of the whole company as sole purpose, which will undermine the objectives of non-discriminatory access pricing.¹⁶³ Having drawn this conclusion, it is legitimate to ask whether the doctrine can force a dominant undertaking to separate its management. Whish suggests that when the upstream facility and the downstream activities are clearly separated, it is less likely that the dominant undertaking commits an abuse.¹⁶⁴

Temple Lang suggests that, in order to avoid the consequences of possible cross-subsidisation, a dominant firm that is forced to provide access to its facility must keep separate internal accounts. The terms on which it uses its facility should be formalised in order to make it possible for a third party to use the facility on the same terms. If the dominant firm does not keep separate accounts and formalises its terms, this may constitute an abuse of its dominant position.¹⁶⁵ In the telecommunications sector dominant undertakings must keep separate accounts for, on the one hand, their activities related to interconnection – covering both interconnection services provided internally and interconnection services provided to others – and,

¹⁶⁰ *B&I v. Sealink*, *supra* n. 65, para. 41. See also *Sea Containers v. Stena Sealink*, *supra* n. 69, at paras. 75-76.

¹⁶¹ Temple Lang, p. 284.

¹⁶² Ridyard, p. 451.

¹⁶³ *Ibid.*, p. 452.

¹⁶⁴ Whish, p. 258.

¹⁶⁵ Temple Lang, p. 295; Goyder, p. 350.

on the other hand, other activities, so as to identify all elements of cost and revenue.¹⁶⁶

Yet another aspect of this issue is the way the dominant undertaking has to treat requests for access to a facility. The Commission states in the Access Notice that the incumbent firm has a duty to deal with requests to access efficiently – unjustified delays in responding to a request may constitute an abuse.¹⁶⁷

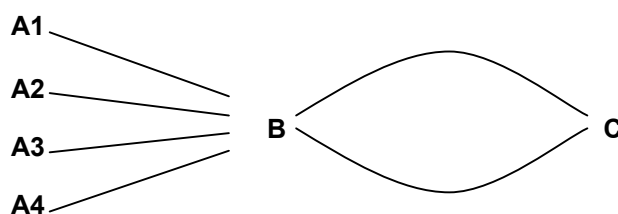
In *Seacontainers*, the Commission held the doctrine to apply to *new* entrants. In *Magill*, the Court ordered the TV companies to provide access for a new entrant in a *new market*. This means that there are no existing terms, which could be applied to the new entrant. In a case like *Magill*, and other cases where non-discriminatory prices for some reason are not easily determined or appropriate, guidelines of what a reasonable and fair price imply can be found in various access pricing models. This will be discussed in the forthcoming section.

5.4.4 Access Pricing Models

Mainly economists have proposed a number of access pricing models, which aim at finding appropriate access prices. The models are predominantly applied in regulated industries, but they can be of interest in general antitrust law as well.

5.4.4.1 The Efficient Component Pricing Rule

The Efficient Component Pricing Rule (ECPR) suggests in its most simple form that the owner of an essential facility should set an access price that compensate it for cost of providing access *and* the loss of revenue caused by allowing a competitor access to its facility. The general idea is that the rule makes it indifferent for the owner of the facility whether to share the facility with a competitor or not. It is furthermore argued that only competitors that are as efficient, or more efficient than the incumbent company will gain from demanding access at a price set by the ECPR. This is best explained by an example of access to a telecommunications network.¹⁶⁸



¹⁶⁶ Council Directive 1997/33/EC on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), Article 8(2).

¹⁶⁷ Access Notice, supra n. 105, para. 95; Whish, p. 624.

¹⁶⁸ The example is based on Economides & White, pp. 3-6.

The dominant firm owns the telephone switch B, which is regarded as an essential facility for providing telephone services from A1-4 to C (hereinafter called the ABC service). Local customers at A1-4 must use the switch B to gain access to long distance calls.¹⁶⁹ A rival firm, who already owns a BC segment, demands access to B in order to provide its own ABC service. Suppose that the owner of the switch charges its customers 1 unit for its ABC service. Suppose further that the marginal cost¹⁷⁰ is 0,2 units for the BC segment and 0,5 units for the AB segment. The revenue for the ABC service is thus 0,3 units. The ECPR states that the dominant firm could charge an access fee of 0,8 units – the 0,5 cost relevant to the AB segment *plus* the forgone revenue of 0,3 that the dominant firm loses by allowing a third party to compete on the ABC service.

If the company seeking access is charged 0,8 units, and the dominant firm charges 1 unit as its price to its customers, then it will be able to offer the ABC service only if its costs for the BC segment is at or below 0,2 units, i.e. at or below the costs of the incumbent firm. Costs exceeding 0,2 units will mean losses on the ABC service. The ECPR will hence ensure that the rival firm enters the market only if its costs are lower than the incumbent's costs.

The example shows that access pricing according to the ECPR fully compensates the owner of the facility, and that only efficient market entrants will profit from demanding access to the facility.

The ECPR was discussed, and finally applied, in a telecommunications case in New Zealand, *Clear v. Telecom*.¹⁷¹ The case concerned the telecommunications company Clear that demanded access to the former monopolist Telecom's local telephone network. The key issue was what price Telecom could charge Clear for providing access to the network. Telecom argued, with reference to the ECPR, that it was entitled to revenue forgone as a result of Clear's access (the so-called opportunity costs). Clear on the other hand argued that the price only should cover the direct cost of changing the network.¹⁷² The first instance upheld the approach of Telecom and applied the ECPR. The Court of Appeal found the rule to be anti-competitive, when it included Telecom's monopoly rents. The court held that Telecom was entitled to "fair commercial return" and urged the party to return to the negotiating table.¹⁷³ The dispute was finally solved in the Privy Council, who held that the ECPR was not anti-competitive. The Privy Council argued that the ECPR reflected what would have been charged in a

¹⁶⁹ The BC segment can also represent some complementary service, e.g. access to Internet.

¹⁷⁰ Marginal cost is the change of total costs brought about by a one-unit change in output, i.e. the cost of the last produced unit.

¹⁷¹ *Telecom Corporation of New Zealand Limited v. Clear Communications Limited* [1995] 1 NZLR 385. The case has been unavailable to the author, who has relied heavily on the three articles by Tollemanche describing the case and on the article by Kerf & Damien.

¹⁷² Tollemanche I, pp. 44-45.

¹⁷³ Tollemanche II, pp. 237-238

competitive market, and that the demanding of a price in accordance with the rule thus not constituted “use of dominance”.¹⁷⁴

The specific access price was not determined by the Privy Council, but left to the parties to settle. The Court argued that direct price-setting was not a matter for the courts, which only can deal with pricing in an indirect way, by introducing competition on a market.

In an American case, *City of Los Angeles Department of Airports v. US Department of Transport*,¹⁷⁵ the Court of Appeals analysed the concept of opportunity cost. The Court rejected the view that “actual cost” requires a use of historic cost. Instead, the Court defined cost as opportunity cost, that is, what could have been obtained in the best alternative use of the asset.¹⁷⁶ Defined like this, opportunity cost will usually equal the asset’s market value.¹⁷⁷

The Privy Council’s finding in *Clear v. Telecom* that the ECPR reflected what would have been charged in a competitive market has been criticised. Kerf and Geradin argues that the Privy Council’s economic analysis was insufficient, inasmuch the Court held Telecom’s opportunity costs to be as high as they would be in a competitive market. In a competitive market, Telecom would have considerably lower opportunity costs, when it would have to compete with lower prices.¹⁷⁸ Ridyard criticises the rule on another basis. He argues that absence of competition is required when identifying an essential facility, and that a pricing model that leaves the facility owner indifferent whether to share the facility cannot be satisfactory, when it does little to promote competition.¹⁷⁹ Ridyard does however not entirely reject the ECPR; that it ensures that only effective competitors will enter the market is a positive feature of the model. The main criticism, however, is that it includes monopoly profits as part of the network owner’s foregone revenue, which would cement the dominant position.¹⁸⁰

Thus, one may conclude that the ECPR, although it has many proponents and apparent advantages, does not hold all answers in complex access pricing situations. Besides the criticism described above, a problem remains as concerns the actual application of the rule. When the parties, or a court, has decided that the ECPR, on a general level, should be applicable, many difficult problems still remain. For example, in *Clear v. Telecom* the Privy

¹⁷⁴ Tollemanche III, p. 248. Note that the relevant provision (section 36 of the Commerce Act) does not entirely correspond to Article 82.

¹⁷⁵ *City of Los Angeles Department of Airports v. US Department of Transport*, 103 F.3d 1027 (D.C. Cir. 1997).

¹⁷⁶ Ibid, pp. 1033-1034.

¹⁷⁷ See Lipsky & Sidak, p. 1237.

¹⁷⁸ Kerf & Geradin, p. 987. The authors suggest that the courts are ill-equipped to decide complex pricing issues. See also criticism submitted in Tollemanche III, p. 251.

¹⁷⁹ Ridyard, p. 450.

¹⁸⁰ See Knieps, p. 108.

Council declared that direct price-setting was not a matter for the courts, leaving it for the parties to actually apply it.¹⁸¹

5.4.4.2 Other Pricing Models

The ECPR is perhaps the most discussed pricing model but it would be incorrect to assume that it is the only model discussed and applied. According to the average incremental cost approach, an access price should be set to cover the average incremental cost approach, i.e. the total additional cost incurred by the access.¹⁸² This approach typically provides lower access prices than the ECPR as it do not cover forgone revenue.

Another model that does not include opportunity costs is access on “operating costs”. This model was applied by the British Office of Fair Trading (OFT) in the *Southern Vectis* case¹⁸³ concerning a bus company’s request to access its competitor’s bus station. OFT decided that the entrant should pay a fair share of the operating costs, i.e. the direct cost brought about by the access. Ridyard is very critical to the decision, arguing that it amounts to a complete confiscation of the asset and goodwill value of the facility.¹⁸⁴ In contrast, Ridyard endorses the “optimal access pricing model”, according to which competition authorities and regulators should set an access price that will provide a revenue stream that will remunerate the appropriate value of the asset, but no more. The appropriate value will correspond to the value the asset would have if it were subject to effective competition from other assets.¹⁸⁵

5.4.5 Public Acquisition of Property

Mandatory access to a firm’s facilities is comparable to compulsory acquisition of property by public authorities. Property owners deprived of their property are, like an owner of an essential facility that is forced to provide access for competitors, entitled to compensation when his property is acquired. Compensation rules can thus be of some interest when discussing a reasonable access price to an essential facility. For example, in Swedish law the property owner is compensated for the market value of the property. The market value is regularly settled by a comparison with other properties in the area. However, if the purpose of the expropriation (e.g. the building of a road) would effect the property prices in the area, these changes should not be taken into account.¹⁸⁶

¹⁸¹ In *Clear v. Telecom* it took the parties more than a year from the Privy Council decision to come to a final settlement of the access price. Before the settlement, the New Zealand government had indicated that it would intervene directly if an agreement were not reached. See OECD, *Relationship Between Regulators And Competition Authorities*, p. 214.

¹⁸² Cave, pp. 18-19.

¹⁸³ *The Southern Vectis Omnibus Company Ltd*, OFT Report of 17 February 1988.

¹⁸⁴ Ridyard, p. 451.

¹⁸⁵ *Ibid*, p. 451. See also Capobianco, p. 563.

¹⁸⁶ See Expropriationslagen (SFS 1972:719) chapter 4, sections 1-2.

Sidak and Lipsky have compared the market value-based compensation for compulsory taking of land with the concept of opportunity cost. In the above mentioned case *City of Los Angeles Department of Airports v. US Department of Transport*, the Court defined the relevant cost that should be covered as the opportunity cost, that is, what could have been obtained in the best alternative use of the asset. Defined like this, opportunity cost will usually equal the asset's market value. This seems like a reasonable way of approaching the problem. It should however be remembered that there per definition cannot be any actual or potential substitutes to an essential facility, which makes it difficult to determine a market value.

5.5 Existing Contractual Relations

I have so far only discussed the contractual implications to the relationship between the dominant firm and the market entrant. However, the doctrine may have an effect on existing contractual relationships between the owner and the users of the facility as well. As noted above, the case law provides that essential facilities principles may be relevant to new competitors, both in the existing market and in a new market. The underlying reason why the doctrine is relevant to new markets is that *development* of competitions is regarded as a goal of the competition rules.¹⁸⁷ If the facility owner is required to provide access to a new competitor, the existing contractual rights and obligations can be affected in various ways.

A delicate problem arises when there is insufficient capacity in the upstream market. Can the dominant undertaking be forced to terminate or alter existing contractual commitments to meet the needs of a new entrant? There are two main approaches to this issue. One can either argue that lack of space constitutes an objective justification to refuse to grant access. As we have seen above, objective justification is one of the requirements of the test advanced by the Court in *Oscar Bronner*. The case law does however not provide a clear answer to the question whether lack of capacity constitutes an objective justification. In *FAG-Flughafen/Main*¹⁸⁸, the facility owner argued that lack of capacity justified its denial to provide access to third parties, but the Commission rejected this requirement after having consulted various experts. The specific facts of the case thus seem to have been decisive. It should also be remembered that the market entrant in this case did not intend to provide a new service.

In the *BP* case¹⁸⁹ the Court established that a dominant undertaking in times of general shortage of raw material was obliged to deal equitable with its customers. This obligation could however only be invoked by regular customers – to refuse to supply an occasional customers was held to constitute an objective justification to of a refusal to supply. This conclusion can have some bearing on an essential facilities situation when undertakings

¹⁸⁷ See *Hoffman-La Roche*, *supra* n. 70, at para. 125.

¹⁸⁸ *FAG-Flughafen/Main*, *supra* n. 78

¹⁸⁹ *BP v. EC Commission*, *supra* n. 42.

seeking to access a competitor's facilities in most instances are not regular customers.

Worth noticing is furthermore that American courts have treated the feasibility to provide access as one of four conditions when determining a claim to access an essential facility.¹⁹⁰

The second, alternative, approach is to argue that lack of capacity cannot constitute an acceptable defence to refuse to provide access. This approach has been advanced by Temple Lang, who argues that when the new entrant will compete with the facility owner and the existing facility users, lack of space can merely constitute a temporarily defence. When contracts with existing users expire, the facility owner is obliged to behave as an independent company and allocate the resources without any discrimination in favour of its own activities or the activities of the existing competitors.¹⁹¹ The existing contracts must be of reasonable duration. Contracts concluded for an unreasonable long period could, if the capacity was not fully used, restrict competition. Whether the contract is of reasonable duration depends on, *inter alia*, if the parties have invested substantial sums on the basis of the contract and the normal practice in the area in question.¹⁹² If the contracts are not of reasonable duration, this might constitute a breach of Article 82. A logical consequence of Temple Lang's approach seems to be that the facility owner under certain circumstances must terminate or renegotiate unreasonable contracts with existing users of the facility.

Nikolinakos comes to a similar conclusion. He argues that when the entrant intends to provide a new product, the facility owner has a duty to provide access despite lack of capacity. If the new product or service could be regarded as contributing to the growth of competition this justifies an equal and non-discriminatory cutting of supplies to existing users of the facility.¹⁹³

If more than one firm is seeking access to the facility but the facility owner only has capacity for one additional user, it has been argued that it is appropriate to hold an auction and to grant access to the highest bidder.¹⁹⁴

Another difficult issue is whether the facility owner can be forced to *invest* in new capacity to be able to provide access to new entrants. It has been argued that if investments in fact are made to meet the needs of a new entrant, the investment cost should be shared in a non-discriminatory way between all users of the facility.¹⁹⁵ The doctrine as such can however not force a facility owner to make investments.¹⁹⁶

¹⁹⁰ See discussion about *MCI v. AT&T* in section 4.2.1.

¹⁹¹ Temple Lang, p. 290.

¹⁹² *Ibid*, pp. 293-294. This question is of course closely connected to Article 81.

¹⁹³ Nikolinakos, p. 408.

¹⁹⁴ Whish, p. 624.

¹⁹⁵ Temple Lang, p. 291.

¹⁹⁶ See Doherty, p. 431.

What, then, happens *if* the facility owner is forced to terminate or alter the terms of a contract with an existing customer in order to facilitate the entrance of a new competitor. This could undoubtedly result in severe costs to the facility owner as a consequence of contractual penalties or the claim for damages for breach of contract. Could this costly effect be avoided? There are at least two possible solutions. The first is to argue that if the owner is compelled to grant access to a new user and ration the capacity to the detriment of existing users, this constitutes such a supervening event that discharges the party from liability. Most legal systems have rules to this effect,¹⁹⁷ but as they are exemptions from the basic contract law principle *pacta sunt servanda*, they are generally construed very narrowly.

A better approach for the dominant firm is to, prior to concluding a contract that grants access to its facility, analyse whether the facility may be viewed as essential by other competitors in the future. If so, a hardship clause should be included into the contract which gives the owner the right to renegotiate the terms. A hardship clause sets out the events in which the clause should be applicable and lays down the procedure to be adopted if any events occur, primarily a right to renegotiations.¹⁹⁸ To draft a suitable hardship clause may thus prevent many of the inconveniences described above. However, in a negotiating situation, the facility owner will perhaps be unwilling to discuss the possibility that another firm may require access to the facility in the future. Considering the far-reaching effects a granting of access to a second user of the facility can bring about, it is my firm belief that the owner of the facility should overcome this unwillingness.

¹⁹⁷ For example, the doctrines of frustration and impracticability in English contract law, the German “Wegfall der Geschäftsgrundlage” and the Swedish “Förutsättningsläran” may have this effect. See also UNIDROIT Principles of International Commercial Contracts Articles 6.2.1-6.2.3 concerning hardship.

¹⁹⁸ Schmitthoff, pp. 85-87.

6 Conclusions

In this final chapter I analyse in more detail some of the main issues discussed above and make some concluding remarks. First some attention is drawn to the question of the essential facilities doctrine's present field of application in EC law and, secondly, the contractual aspects of the doctrine are further discussed.

To fully examine all aspects of the application of the doctrine has not been the purpose of this essay. The doctrine has however been relatively extensively described, covering both its origin in US antitrust law and the EC case law concerning refusals to deal, and the application of the doctrine by the EC Commission and courts. Much controversy still surrounds the idea that a denial to provide access to a dominant undertaking's facility may constitute an abuse of a dominant position in breach of Article 82. However, there exist legal facts that are fairly undisputed.

First, it is safe to argue that a refusal by a dominant firm to supply a customer or competitor with its goods or services can in certain instances constitute a breach of Article 82. This rule was first established by the Court in *Commercial Solvents* and has been repeated by the Court on several occasions. The case law tells us that where a dominant undertaking reduces competition by refusing to supply a competitor or customer and cannot present any objective justification for the refusal, the dominant undertaking infringes Article 82. The essential facilities doctrine differs from this rule in at least one important aspect – traditional refusal to supply cases concerns the products or services produced by the dominant firm whereas essential facilities cases concerns the *source* of the products or services produced. In essential facilities cases the refusal generally concerns a refusal to grant access to an upstream market consisting of some form of a facility, which would make competition impossible in the downstream market. Hence, the two rules holds in many aspects the same characteristics but can be separated as two examples of abuses, albeit refusal to supply is the general form of abuse and refusal to provide access to an essential facility is a specific example of a refusal to supply.

It is furthermore undisputed that the doctrine has its origin in US antitrust law as an example of violation of Section 2 of the Sherman Act. The US Supreme Court has not explicitly applied the doctrine but lower courts have applied it in a wide variety of situations. Despite the fact that the doctrine has not been explicitly applied by the highest court and the fact that many academic commentators have criticised it on legal and economic grounds, it is generally considered as an existing and powerful antitrust doctrine in US antitrust law.

The essential facilities doctrine was first applied in the EC by the Commission in the early 1990's in relation to infrastructure such as harbours

and airports. The Commission established that when a dominant undertaking controls a facility that is found "essential" to a competitor and cannot present any objective justification for the refusal, it must, against reasonable payment, provide access to the facility in order not to infringe Article 82.

The Commission's decisions in connection with the lack of any authoritative court decisions spurred an extensive debate about the boundaries of the doctrine. Many questions and implications were regarded uncertain. The ECJ had an opportunity to clarify the scope of the doctrine in its 1998 *Oscar Bronner* judgement where the plaintiff argued that it should be granted access to a competitor's newspaper distribution network as the network would constitute an essential facility. The Court declared that a refusal to provide access is a breach of Article 82 if it is likely to eliminate all competition, if it cannot be objectively justified, and the service or product is indispensable to carry on the business of the company requiring access, inasmuch as there is no actual or potential substitute. However, the Court did not discuss the essential facilities doctrine as such, but choose to base its finding on the well-established case law concerning refusals to deal.

What, then, is the doctrine's field of application after the *Bronner* judgement. Most authors tends to be of the opinion that the Court has not explicitly accept or reject the essential facilities doctrine. However, it seems safe to argue that the expansionist phase instigated by the Commission ended with *Oscar Bronner*. If one accept that essential facilities still has a role to play in EC competition law, the Court definitely introduced strict confines of the doctrine, represented by the above described three-part test. Moreover, one important limitation introduced by the Court was that it held that it must be economically viable to create a new facility for a company of the same size as the incumbent company. The test is thus objective – that a smaller company found it impossible to create a new distribution system was not sufficient.

As the Court did not explicitly reject the doctrine one could perhaps consider it still present, in substance if not name, within the EC competition system. The Court held that a product or a service had to be "indispensable" in order to constitute an abuse. The *Bronner*-test leaves a considerable margin of consideration to the courts in questions such as the meaning of objective justifications and the meaning of "indispensable". Worth noticing is moreover that the notion of essential facilities has been embraced in statutory application in, for example, the telecommunications sector.

The underlying reason as to why the doctrine often is criticised, and one reason why the Court was not inclined to fully apply it, is that if successful firms would not be allowed to freely explore facilities that it has invested in but must, upon request, share them with competitors, this would reduce the incentives make investments. The controversy between the protection of competition and the right of undertakings to enjoy the fruits of their

investments and innovations lies at heart of the essential facilities concept and require a careful balancing of interest. As have been shown above this is the chief argument why access to facilities only should be demanded in exceptional circumstances. Besides the economically based criticism, the doctrine could be questioned when it circumscribes the freedom of property and the freedom of contract.

To conclude, the refusal to provide access to essential facilities by dominant undertakings can, in certain limited circumstances, be regarded as an abuse of a dominant undertaking in the meaning of Article 82. The possibility to demand access to essential, or in the wording of the Court "indispensable", facilities has however been limited by the Court in *Oscar Bronner* which established a strict three-part test.

Unsolved issues regarding the scope of the doctrine still remains. One of the most obscure parts of the doctrine is its contractual implications. This issue can be divided into two main problems: the relationship between the company seeking access and the facility owner, and, secondly, the relationship between the facility owner and existing users of the facility.

The first problem consists primarily of the determination of access terms, but it covers by no means only the access price issue. The access price is in most instances the most important access term but disagreements do not always concern the price. Other terms, such as when and how the new entrant can use the facility can be of crucial importance as well. This was indeed demonstrated in the very first case concerning essential facilities in the EC, *B&I v. Sealink*,¹⁹⁹ where the way the facility could be used amounted to a breach of Article 82. However, the access price is in most cases the chief concern.

How, then, should the access terms be determined, and, who should determine the terms? Beginning with the second question, one should firstly note that in EC case law, the Court or the Commission has never determined specific access terms. The specific terms have been left to the parties to decide. Essential facilities situations often arise in former regulated industries and the Court and the Commission tends to be reluctant to take on the role of the regulator. As the Advocate General explained in *Oscar Bronner*, a detailed fixing of prices and conditions would be unworkable and scarcely compatible with a free market economy.²⁰⁰ However, many commentators have expressed fear that free negotiating of access terms is not a suitable solution as the facility owner has the strongest negotiating position and could demand unreasonable terms. If the owner demands unreasonable terms this may result in a *de facto* refusal to grant access to its facility. Thus, it exists limitations of, for example, how much the owner can charge for granting access.

¹⁹⁹ *B&I v. Sealink*, *supra* n. 65.

²⁰⁰ See Opinion by AG Jacobs in *Oscar Bronner*, *supra* n. 2, at para 69.

A modified version of the free negotiating approach is to leave the determination of reasonable access terms to the parties, but, if the parties fail to come to a mutual agreement within a certain time limit, independent experts would settle the terms. The Commission has adopted this approach in recent cases.²⁰¹ I believe this could be a good way to deal with the problem, especially in cases requiring a high degree of technical or economical considerations. In those instances a group of experts could be more suitable to make the necessary considerations than the court or competition body that decides that the owner has to share its facilities, and it does not have to act as a regulator. Moreover, the parties would probably be more inclined to come to a mutual agreement if it exists a settled time limit.

As noted above, the demanding of unreasonable terms could amount to a refusal to grant access. A logical consequence of this conclusion is that access terms must be able to be supervised by the Courts and competition agencies. This lead us to the second main problem concerning the relationship between the company seeking access and the facility owner – how should fair access terms be determined? The owner of the facility is undoubtedly entitled to payment for granting access to the facility. The Court and the Commission has repeatedly held that the payment should be “fair”, “reasonable” or “non-discriminatory” but these concepts are hardly any workable pricing benchmarks. However, in some instances it is fairly easy to determine reasonable payment. For example, if it exists a well-settled price practice exist within the industry in question, access could be ordered with reference to this practice. Furthermore, if another company already uses the facility, the existing terms could be applied in relation to the new users on a non-discriminatory basis. A related situation is when the facility owner or a subsidiary of the owner uses the facility. In this case the terms that the owner itself applies could be used in relation to the new company. However, this requires the existents of identifiable terms and that those terms are not the result of other considerations than the value of the use of the facility.

Thus, there are examples of situations where the access terms could be relatively easily determined. On the other hand, situations exist where there are no existing terms to apply in relation to the new user of the facility, or where it is inappropriate to do so. What is meant by reasonable payment in those cases? The case law gives no clear answers to this question. In essential facilities cases this issue has not been discussed in detail. In *Oscar Bronner* and other cases the Advocate Generals have expressed the view that the dominant undertaking must be fully compensated, allowing it to allocate an appropriate proportion of its investment costs in the access charge. However, the Court and the Commission have not analysed which costs that could be covered by the access price. Cases concerning excessive prices as a form of an abuse of a dominant position could also be of some help. The ECJ has held that prices that have no reasonable relation to the economic value of the service supplied, is in breach of Article 82 (a). The

²⁰¹ See FAG-Flughafen/Main, *supra* n. 78; IMS Health, *supra* n. 125.

economic value has been determined by a comparison between the prices of the dominant undertaking, and prices in more competitive markets. Cases concerning excessive pricing could accordingly be of some guidance, but one must remember that it could be very hard to find a competitive market to compare prices with, as essential facilities per definition are unique assets. Hence, the case law helps to explain what is meant by reasonable prices only to a limited extent.

A different way of determining an appropriate access price is by adopting an economic approach and by applying a pricing model. I have in particular discussed the Efficient Component Pricing Rule as one way to approaching the problem. The rule basically tells us that the facility owner should cover the cost of providing access *and* the loss of revenue caused by allowing a competitor access to its facility. This would fully cover the facility owner's loss, and ensure that only competitors that are as efficient, or more efficient than the incumbent company will gain from demanding access at a price set by the rule. This rule has many obvious advantages, but may be difficult to apply in practice. The rule is perhaps more suitable for regulated markets where a regulatory can apply it. However, as shown in the above given example from New Zealand, a court can rule that the essence of the rule is in compliance with the general competition rules. Such a clarification would, in my opinion, be welcomed in EC law as well.

What, then, is a "reasonable" access price? In my opinion there exists no clear answer to this question. In cases where the price could not be determined by referring to existing terms, or where this is not appropriate, one finds only a complex answer consisting of many different aspects. As the Court and the Commission have decided not to set specific access terms, only general statements will help illuminating this thorny issue. According to the case law, prices must relate to the economic value of the service provided, they cannot be higher than what the owner charges existing users, and they can include a reasonable part of investment costs. If one looks beyond the case law, pricing models based on an economic analysis can serve as guidance. These models are predominantly applied by regulatory agencies in regulated markets, but they can be applied in relation to general competition rules as well. However, the pricing models can be hard to apply in practice and there are no authoritative grounds that any of the pricing models gives the answer to the question what is meant by reasonable payment.

Turning to the question of how existing contractual rights and obligations may be effected by the mandatory access of a new competitor, one could first note that the doctrine could be applied in relation to new competitors in existing as well as in new markets. If the facility's capacity already is fully used, this could bring about problems as concerns contractual obligations with the existing users of the facility. Some commentators have argued that existing contracts, under certain circumstances, must be terminated or renegotiated, in order to make access of a new competitor possible. This could involve contractual penalties or claims for damages. To avoid this the

owner can argue that the obligation has, without default of either party, become something radically different due to new circumstances that could not have been foreseen when concluding the contract. The possibility to be relieved from contractual obligations due to changed circumstances is recognised in most contract laws but it is generally construed very narrowly. A better way to avoid liability for breach of contract is to, prior to concluding the contract, include a hardship clause that covers the event in question.

Additionally, if investments are made to meet the needs of new users, it has been argued that all users should share the investment costs in a non-discriminatory way.

To summarise the contractual implications of the essential facilities, one could, at the outset, note that this part of the doctrine is complex and, compared to the question when access must be given, not frequently discussed. The main reason for this is that the question largely has been left to the parties to regulate. There are many difficulties concerning the questions who should determine the access conditions, what the terms can state, and how existing contractual obligations could be effected. These issues have not been thoroughly discussed by the Court or the Commission.

In my opinion, there is today no coherent interpretation of these important issues. Difficulties and uncertainty of legal concepts are of course not desirable but they could serve as a reminder not to order access to an essential facility too readily. One must keep in mind that mandatory access to essential facilities should, particularly after the *Oscar Bronner* case only be ordered in exceptional cases. However, I find it regretful that the Court and the Commission has not yet provided any detailed and coherent analysis of the contractual implication of the doctrine. That they have not been inclined to settle the specific access terms can be understood, but I tend to think that all parties would benefit from a careful analysis, resulting in clarifying principles of, for example, how much the owner of the facility could charge for providing access to its facilities. This would, in my opinion, strengthen the essential facilities doctrine. It must be remembered that if access is required in unsuitable situations, this could damage long-term efficiency to the detriment of consumers. If uncertainties concerning, for example, access pricing, could be resolved, this may help to shed light on the situations where a requirement to provide access genuinely would to protect or introduce undistorted competition.

Supplement A

Article 82 (ex Article 86) EC

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

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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