THE APPLICATION OF EC COMPETITION RULES TO TELECOMMUNICATIONS – SELECTED ASPECTS: THE CASE OF INTERCONNECTION *

by

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A. Introduction

I. The European Telecommunications Sector: Regulatory and Policy Developments

From the vantage point of the mid 1990's, the special and exclusive rights historically granted to state telecommunications companies do not appear to sit easily with European Community competition rules, especially article 86 TEC. Although article 90 implicitly recognizes, one the one hand, that member states may accord special and exclusive rights to undertakings entrusted with carrying out tasks in the 'general economic interest', it provides, on the other, that member states may not enact or maintain in force any provisions which are contrary to the Treaty rules (especially the provisions concerning competition/arts 85ff). Moreover, article 90 (2) provides that undertakings which are the beneficiary of such rights are subject to the treaty rules only to the extent that the application of the rules do not appear do prevent them from carrying out the tasks assigned to them. It has been long established in the jurisprudence of the European Court of Justice (hereinafter referred to as 'Community Court' or simply 'the Court') that because article 90 (2) involves a derogation from the rules, it should thus be narrowly construed.[1] However, it should be appreciated that the technological and economic imperative towards liberalization in telecommunications, which is accepted almost without question today, is a relatively recent development.[2] It should also be noted that the task traditionally assigned to telecommunications undertakings within the meaning of article 90 (2) is the provision of a 'universal service'. It appears that at least until the late 1970's, the conventional wisdom

[1] See the overview Wish, R., Competition Law (1993), pp. 339, and for political considerations Kramer , R., A faith that divides: competition policy in European telecommunications (1991), and, Shepard, W., Concepts of competition and efficient policy in the telecommunications sector, in Noam (ed.), Telecommunications regulation today and tomorrow (1983), pp. 79.

[2] See Dyson, K., 'West European states and the communications revolution', in Dyson - Humphreys (eds.), The politics of the communications revolution in Western Europe (1986), pp. 10; Hendricks, J. K., The information technology revolution: the next phase, in Hawk (ed.), 1995 Fordham Corp. L. Inst. (1996), pp. 549; Tamarin, C., 'Telecommunications and technology applications and standards: a new role for the user', Telecomm. P. 1988, pp. 323.

was that telecommunications was a general monopoly, and hence, there was a general economic but also a social interest in member states running or at least controlling the provision of such services though the mechanism of special and exclusive rights. Whether or not this view was correct, the opportunities presented by the rapid development and convergence of technologies (for example, of telecommunications, broadcasting, and computers) presented the possibility of developing new markets, as well as radically changing traditional notions concerning economies of scale thought to render telecommunications a natural monopoly.[3]

In the 1990's it became apparent that some form of competition was possible in telecommunications markets without jeopardizing the general interest protected by article 90 (2). Thus, in 1987, the Commission's Green Paper on telecommunications[4] set out to develop a Community-wide program for action in this area that was based, generally, upon two different but related thrusts. The first involved a process of liberalization, which sought to create liberalized, competitive markets in telecommunications equipment, services and network operation. The second involved a process of harmonization of the conditions for the regulation of companies operating in the newly-liberalized markets.[5] The Green Paper was far-sighted in its appre-

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[3] Antonelli, C., Increasing returns: networks versus natural monopoly. The case of telecommunications, in Pogorel (ed.), Global telecommunications strategies and technological changes (1994), pp. 11; Ehlermann, C.-D., 'Managing monopolies: the role of the state in controlling market dominance in the European Community', ECLR 1993, pp. 61; Ungerer, H., EC competition law in the telecommunications, media, and information technology sectors, Fordham Int'l L.J. 1996, pp. 1118.

[4] Commission of the European Communities. Towards a dynamic European economy: Green paper on the development of the common market for telecommunications services and equipment, COM (87) 290 final.

[5] An introduction to EC telecommunications law is provided in Bauer, J. m. - Steinfeld, C., Telecommunications initiatives of the European Communities, in Steinfeld - Bauer - Caby (eds.), Telecommunications in transition: policies, services and perspectives in the European Community (1994); Ellger, R., Telecommunications in Europe: law and policy of the European Community in a key industrial sector, in Adams (ed.), Singular Europe. Economy and policy of the European Community after 1992 (1992), pp. 203; Faure V., Telecommunications and broadcasting in the EEC, in Korthals (ed.), Information law towards the 21st Century 1992), pp. 27; Huntley, J. A. K. Recent developments in European telecommunications law, Computer L. and Prac. 1990, pp. 49; Kamall, S., Telecommunications policy (1996), pp. 27; Lando, S. D., The European Community's road to telecommunications deregulation, Fordham L. Rev. 1994, pp. 59; Sauter, W., The telecommunications law in the European Union, ELR 1995, pp. 92, Schulte-Braucks, R., Telecommunications law and policy in the European Community, Fordham Int'l L. F. 1990, pp. 234.

ciation of certain emerging economic trends. It noted that a technically advanced, European-wide, telecommunications network would provide an essential infrastructure for improving the competitiveness of the European economy, achieving the internal market, and strengthening Community cohesion - which constitute priority goals reaffirmed in the Single European Act. The paper furthermore noted the convergence of the formerly separate markets of computing and telecommunications and the rapid expansion of the range of services that can be offered over a modern telecommunications network.

However, this strategy, and in particular the current application of EC competition rules to the telecommunications sector cannot be understood without reference to the Information Society concept that, since the Delors Paper[6] and the Bangemann-Report,[7] has become one of the pillars of EC policy in this field. The general framework underlying the concept of the Information Society was that new legal measures were required for the sector in question.[8] In order to accomplish this, an Action Plan[9] established a framework for action by developing the concept of the Information Society. This plan gave, in particular, a high priority to the accelerated liberalization of telecommunications as a core area of the Information Society, and therefore, the application of EC competition law was assigned a central role for ensuring that this liberalization was quick and effective. At the EU level, the principal consequences of this initia-

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[6] Commission of the European Communities. Growth, competitiveness, employment - the challenges and ways forward to the 21st century: white paper from the commission to the Council, COM(93) 700 final.

[7] Commission of the European Communities. Europe and the Global Information Society, Report of the high level group on the Information Society, Brussels, May 1994.

[8] For an overview see Fenoulhet, T. R., The regulatory dynamics of the Information Society, Dumort - Dryden (eds.), The economics of the Information Society (1997), pp. 23; Jagger, N. - Miles, I., New telematic services in Europe, in Foreman - Sharp - Walker (eds.), Technology and the future in Europe: global competition and the environment in the 1990's (1991), pp. 155; Schoof, H. - Watson Brown, A., Information highway and media policies in the European Union, Telecomm. P. 1995, pp. 325; Ungerer, H., EU competition law in the telecommunications and information technology sectors, in Hawk (ed.), 1995 Fordham Corp. L. Inst. (1996), p. 279; Van Miert, K., EU competition policy, in Hawk (ed.), 1995 Fordham Corp. L. Inst. (1996), pp. 288.

[9] Commission of the European Communities. Europe's way to the Information Society, an action plan: from the

tive were a substantial acceleration of the liberalization program for the telecommunications sector, towards full-scale voice telephony and pubic network liberalization by 1 January 1998. These developments have led to an accelerated application of EC competition law to the telecommunications sector, in particular through the liberalization of telecommunications networks.[10]

II. Deregulation in European Telecommunications

Before examining the substance of the EC competition rules, at least so far their influence upon the liberalization and harmonization process within the telecommunications sector is concerned, it is appropriate to very briefly describe the role of the most important authorities involved in the enforcement of competition law and policy within this sector.

The Commission of the European Communities (hereinafter referred to as 'the Commission') is the Community institution responsible for enforcing the Treaty establishing the European Community ('TEC'),[11] and for initiating and proposing Community legislation. In the late 1980's, this body began liberalizing telecommunications markets by applying Community competition rules to the telecommunications industry.[12] The European Council of Ministers established the basis for this process by adopting a basic recommendation.[13]

Commission to the Council and the European Parliament, COM(94) 347 final.

[10] Coleman, M., European competition law in the telecommunications and broadcasting sector, ECLRev. 1990, pp. 204. Moreover, the application of the competition rules to the telecommunications sector is likely to become significant as a means of completing the liberalization process.

[11] Treaty establishing the European Community, 7 Feb. 1992, incorporating changes made by Treaty on the European Union, 7 Feb. 1992, OJ C 224/1.

[12] For the factors influencing the Commission's approach to telecommunications, see Mosteshar, S. A., European Community telecommunications regulation (1993), pp. 2.

[13] Council Recommendation 84/549 from 12 November 1984 for harmonization in the field of telecommunications, OJ L 298/49.

The European Court of Justice's (ECJ) judgment in British Telecommunications,[14] which was the first to establish a principal basis for applying competition rules to the telecommunications sector, gave impetus to the Commission's liberalization program. In the late 1980's, commercial pressures, resulting from the growing importance of telecommunications, prompted the Commission to introduce competition into the telecommunications market. This led the European Council to adopt a Telecommunications Green Paper[15] that established, on the one hand, objectives for the attainment of a Community-wide open telecommunications market and, on the other, set forth for the first time a comprehensive policy framework for EC action in the telecommunications sector. This was reviewed in 1992,[16] and led, in turn, to an agreement on the full liberalization of the European telecommunications markets, which included public voice telephony and telecommunications network infrastructures.

In 1987, the Commission began the process of addressing the position of the telecommunications sector in the Community as a whole, through an ambitious legislative program designed to liberalize telecommunications markets and to harmonize the conditions for the operation of telecommunication networks, the supply of telecommunications services and the regulation of the telecommunications industry.[17] As was briefly mentioned above, the application of EC competition rules played a central role in the reform of the fundamental regulatory condi-

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[14] Italy v Commission ('British Telecommunications') [1985] ECR 510.

[15] Commission of the European Communities. Towards a dynamic European economy: Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290 final. Cf. Narjes, K H., 'Towards a European telecommunications community; implementing the Green Paper', Telecomm. P. 1987, pp. 106.

[16] Commission of the European Communities, 1992 Review of the situation in the telecommunications services sector, SEC (92) 1048.

[17] Cave, M. - Crowther, P., Determining the level of regulation in EU telecommunications: a preliminary assessment, Telecomm. P. 1996, pp. 728; Ramsey, T. J., The EU Commission's use of the competition rules in the field of telecommunications: a delicate balancing act, in Hawk (ed.), 1995 Fordham Corp. L. Inst. (1996), pp. 566; Scherer, J., Regulatory instruments and EEC powers to regulate telecommunications services in Europe, in Elixmann - Neumann (eds.), Communications policy in Europe (1990), pp. 36; Scherer, J., Telecommunications law and policy under the Maastricht Treaty, Computer L. and Prac. 1993, pp. 207.

tions which had prevailed up until 1998, the point of full deregulation. In order to create and promote an open and competitive environment, the policy specified a strategy consisting, firstly, of liberalization by means of directives adopted under article 90 (3), secondly, the application of the competition rules (in particular, article 86) and finally, the creation of EC-wide standards by means of directives adopted under article 100a.

1. Liberalization

The application of article 90 constitutes an instrument for the implementation of a competition policy with regard to member states. This provision has developed into a cornerstone of the Commission's telecommunications policy since it released the Telecommunications Green Paper in 1987. Article 90 entrusts the Commission with the duty to ensure that member states apply existing obligations under the TEC with respect to public undertakings or undertakings enjoying special or exclusive rights. The liberalization of EU telecommunications markets was and still is largely the result of a systematic use of provisions in Commission directives based on article 90 (3), together with principals laid down in individual cases.[18] However, without resorting to a comprehensive analysis of this case law, the particular importance of one of them calls for a very short review.[19]

In the early 1980's the Commission dealt with a number of cases concerning the extent of the legal monopolies held by national public telecommunications operators, but it was only the landmark case of British Telecommunications that led to a Commission decision, and ultimately, to a judgment of the Court of the European Community. Arguably, this case not only laid the

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[18] A number of Court rulings important for these developments originated from cases in the broadcasting sector. See, e.g., Sacchi [1974] ECR 409, and, Télémarketing [1986] ECR 3261.

[19] Italy v Commission ('British Telecommunications') [1985] ECR 873. A good analysis of this case is given by Müller, J., Competition in the British telecommunications market: the impact of recent privatization/deregulation decisions, in Mestmäcker (ed.), Law and economic transborder (1987), pp. 249, and, Schulte-Braucks, R., European telecommunications law in the light of the British telecom judgment, CMLRev. 1986, pp. 39.

foundations for applying the competition rules to the telecommunications sector in general, but was also the point of departure for the use of article 90 in the telecommunications sector.

In 'British Telecommunications', the Commission found that British Telecommunications (BT) had abused its dominant position in the telecommunications systems market by taking measures to prevent certain private message-forwarding agencies from offering a given type of service.[20] This service was new in the United Kingdom and permitted telex messages to be received and forwarded on behalf of third parties at prices lower than those charged by BT for its international telex service. In its judgment, the ECJ confirmed the Commission's assessment, holding that "the employment of new technology that accelerates the transmission of messages constitutes technological progress in conformity with the public interest and cannot be regarded per se as an abuse."[21] Moreover, the ECJ stressed that "the application of article 90 is not left to the discretion of the member state which has entrusted an undertaking with the operation of a service of general economic interest," but rather that "article 90 (3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court."[22] Thus, the ECJ not only confirmed the Commission's view that the EC competition rules apply to public telecommunications operators but also clarified two issues concerning the application of article 90 which have proved to be of major significance to subsequent developments in the telecommunications sector. First, the ECJ made it clear that it was for the Commission, subject to judicial review by the ECJ, to decide upon the granting of any derogation from the application of the

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[20] Commission Decision 82/861/EEC, OJ L 360/36. See furthermore Kamall, S., Telecommunications Policy (1996), p. 94; Wall, S A., The British telecommunications decision: towards a new telecommunications policy in the common market, Harvard Int'l L.J. 1984, pp. 301.

[21] British Telecommunications [1985] ECR 873, p. 887. Here, the Court ruled further, that the applicant "has totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavorable to British Telecommunications, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to British Telecommunications in jeopardy from the economic point of view."

[22] British Telecommunications [1985] ECR 873, p. 888.

competition rules on the basis of article 90 (2). Secondly, the ECJ emphasized that it favored a narrow interpretation of the scope of a derogation under article 90 (2) in the telecommunications sector. Furthermore, the Court clarified that the operation of a public telephone network could be considered a service of general economic interest within the meaning of article 90.

a) Regulatory Measures and Challenges

In the light of the principles set out in the Telecommunications Green Paper of 1987, the Commission adopted a number of directives based on article 90 (3) with the purpose of implementing the major liberalization goals of the Green Paper.[23] The following section discusses the most important of these.

The first step in the liberalization of the European telecommunications sector was the adoption by the Commission of the Terminal Equipment Directive in 1988,[24] which opened the markets for telecommunications terminal equipment, within which most European telecommunications administrations at that time enjoyed monopoly rights. Specifically, the directive obligated member states to withdraw all special and exclusive rights with regard to terminal equipment and to ensure that economic operators have the right to import, market, connect, bring into service, and maintain terminal equipment.[25] With respect to the legal justification for these obligations, the recitals to the directive are based on the TEC provisions concerning the duty to provide goods and services and on the provisions intended to ensure undistorted competition, i.e. art 86. Furthermore, the directive states that the conditions set out in article 90 (2) for a

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[23] For the role of the Commission see Dommering, E. J., Article 90 of the EEC treaty and the telecommunications, broadcasting and postal services sectors, in Stuyck - Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), pp. 69.

[24] Commission Directive 88/301/EEC of 16 May on competition in the markets in telecommunications terminal equipment, OJ 1988 L 131/73. See Mosteshar, S. A., European Community telecommunications regulation (1993), pp. 24; Pombo, F., European telecommunications law and investment perspectives, Fordham Int'l L.J. 1996, pp. 560.

[25] Art 2 and 3 Terminal Equipment Directive. Furthermore, the only restriction that can be placed upon the equipment is that it meets essential requirements such as the maintenance of the security of the network, the

derogation from the TEC rules could never be fulfilled, within this sector, since only the provision of the public telecommunications network could ever be considered a service of general economic interest.

The second directive concerned telecommunications services and had the effect of opening the market for them.[26] It provides for the removal of special and exclusive rights granted by member states for the supply of all telecommunications services other than voice telephony.[27] By defining voice telephony very narrowly,[28] the directive also liberalized these services (with the exception of those provided to the general public, such as voice services for corporate communications or so-called closed user groups /CUGs).[29] Moreover, it required member states to take the necessary measures to establish provisions for access to their network.[30] The general effect of both directives, taken together, is to radically change the position that has traditionally persisted in the telecommunications sector in member states. Basically, they create an *a priori* legal prohibition on the restriction of the supply of services; the only restrictions that are allowed are

achievement of interoperability and the protection of data.

[26] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunication services, OJ 1990 L 192/10. For its legal structure and consequences as regards the aimed liberalization of telecommunications services, see Edens, D. F., The concept of liberalization of telecommunications services in the Commission Directive of 28 June 1990 (90/388) on the competition in the market for telecommunications services, in Stuyck - Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), pp. 87.

[27] Art 2 Services Directive.

[28] "Voice telephony" means the commercial provision for the public of the direct transmission and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with other termination points.

[29] Similar to the terminal Equipment Directive, the services Directive allows member states to impose restrictions on the provision of services only in order to ensure compliance with specific requirements, such as the security of network operations, the maintenance of network integrity, interoperability of services, and data protection.

[30] Art 4 Services Directive.

those relating to technical matters and the maintenance of network security and interoperability.[31]

Article 90 (3) offers the Commission a means of implementing the liberalization strategy without granting a possibility of interference to member states. It almost goes without saying that in telecommunications this step was controversial as by adopting such an approach, the Commission passed the Council, where there would have potentially been a lack of consensus regarding such an action. Moreover, for the first time, the Commission used article 90 (3) as the basis for a directive of general application to all member states, and furthermore, it used article 90 (3) to limit a lawfully established monopoly rather than simply regulate the way in which it operated. Consequently, both directives were challenged before the Court of the EC by member states. However, the ECJ unambiguously upheld the validity of both directives. In *France v Commission*,[32] the Court upheld the Commission's authority to require member states under art 90 (3) to abolish exclusive rights regarding technical equipment,[33] and in *Spain v Commission*, the Court held similarly to its mentioned ruling; namely that the Commission has the power, on the basis of article 90 (3), to adopt a directive laying down general rules that specify the member states' obligations under the TEC.[34] A series of subsequent directives have enlarged the scopes of its operation such that satellite services and mobile and personal communications services, are now included.[35]

The reform of the EU telecommunications market, so as to provide for full liberalization, required a step additional to the directive providing for full competition. A specific issue that

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[31] The key point then is that the traditional justification for the maintenance of special or exclusive rights has been implicitly rejected.

[32] France v Commission [1991] ECR I-1223, p. 1265.

[33] France v Commission [1991] ECR I-1233, p. 1268.

[34] Spain v Commission [1992] ECR I-5833.

[35] The amendments concerning satellite, cable and mobile communications, are referred to at a later stage of this

needed to be addressed was the abolition of public telecommunications networks and voice telephony. Article 90 (2) allows derogation's from Community law where it would obstruct, either in law or in fact, the performance of tasks assigned to undertakings entrusted with advancing the general economic interest.[36] In it's Service directive, the Commission granted a temporary exemption under this article with respect to exclusive and special rights for the provision of voice telephony.[37]

However, a significant change was introduced by the Full Competition Directive amending the Service Directive,[38] which thereby required member states to liberalize public voice telephony by 1 January 1998.[39] The Full Competition Directive also made an important change in relation to what is referred to as the 'telecommunications infrastructure'. Up until the adoption of the Full Competition Directive, the Services Directive had been concerned with the abolition of special and exclusive rights regarding to the provision of services. Telecommunications services, by definition, can only be provided through telecommunications networks. However, the Service Directive had permitted member states to maintain special or exclusive rights for the provision or operation of public telecommunications networks so long as they took measures to ensure that the conditions governing access to those networks were published, and were objec-

section.

[36] For this issue in particular, see chapter 2 (I.2., and II.2.3.)

[37] This exemption was justified on the grounds that financial resources for the development of the network still derived mainly from the operation of the telephony service. Therefore, liberalization of that service could threaten the financial stability of the existing telecommunications organizations and interfere their responsibility to advance the public interest.

[38] Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74/13. In addition to implementing the political commitment to introduce full competition in the EU telecommunications markets by 1st January 1988, the directive also contains some rules concerning harmonization, for instance, with regard to interconnection.

[39] Art 1(1)a Full Competition Directive. As regards voice telephony, article 1(2) provides the possibility of derogation's for member states with 'less developed networks' (for up to five years), and member states with 'very small networks' (for up to two years). This has meant that Luxembourg has until the year 2000 to implement the directive, Greece, Spain, Portugal and Ireland must do so by 2003.

tive and non-discriminatory.[40] The Full Competition Directive repealed this and required member states to abolish special or exclusive rights for the establishment or provision of telecommunications network by 1 January 1998.[41]

The requirements concerning the abolition of exclusive and special rights in the Services Directive do not mean that member states cannot in some way regulate access to markets or the conditions under which they may operate. The Directive permits member states to make the supply of services or the establishment or provision of telecommunications networks subject to a licensing, general authorization or declaration procedure. However, such restrictions are only permissible to the extent that they are aimed at securing compliance with what are referred to as ´essential requirements´[42] which are defined as the "non-economic reasons in the general interest which may cause a member state to impose restrictions on the establishment and/or location of telecommunications networks or the provision of services."[43]

In order to fulfill the requirements of the Terminal Equipment and Services Directives, it was essential to safeguard emerging opportunities by preventing TOs from replacing their former monopoly-based barriers with those created by restrictive practices. Consequently, strict adherence to the measures contained in articles 85, 86, and 90, was essential. As a result, the Commission issued guidelines concerning the application of EC competition rules in the telecommunications sector[44] to reflect legal developments since the British Telecommunications

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[40] One exemption to this concerned cable TV infrastructure, which was liberalized by the Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, OJ 1995, L 256.

[41] Art 1(2) Full Competition Directive.

[42] See article 2(3) Services Directive.

[43] See article 1(1) Full Competition Directive.

[44] Commission Guidelines on the application of EEC competition rules in the telecommunications sector (91/C 233/02), OJ C 233, 6.9.1991, p. 2 (hereafter referred to as ´Competition Guidelines´). Broadly speaking, these guidelines concern the application of articles 85 and 86 to undertakings (see para. 12) and confirm that

case. These guidelines advise telecommunications operators, other telecommunications service and equipment suppliers and users, and other interested parties, on the general, legal, and economic principles of the Commission upon which application of the competition rules to undertakings in the telecommunications sector[45] are based.[46] The Guidelines do not bind the Com

mission, the Court of the European Community, or national authorities. The advantage of guidelines is, of course, that they are very flexible. The disadvantage is that they do not, in principle, offer legal certainty. However, the Commission did indicate that these principles will be applied in the future, although full consideration of the peculiar facts of each case will have to be borne in mind.[47] In addition, these guidelines confirm that the reservation of particular services does not imply TO exemption from competition rules.

In summary, the rapid progress made in liberalizing the European Union telecommunications sector has clarified the scope of article 90. The general contours of these developments include, on the one hand, the establishment of a general political framework and the development of a political consensus that full liberalization is needed to build the Information Society. On the other hand, a consistent line of directives and Court rulings has also been built up. Furthermore, a high priority has been given to rapid action in response to market requirements.

In legal terms, the essential steps have been, firstly, the recognition of the Commission's power to act, secondly, the confirmation by the ECJ that pursuant to article 90, special and exclusive rights cannot only be modified, but also abolished as far as they cause enterprises to infringe basic TEC rules, such as the freedom to provide services or the abuse of dominant mar-

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these two provisions apply to both private and public telecommunications operators including telecommunications administrations (para. 20).

[45] Competition Guidelines, p. 4.

[46] The Guidelines also apply to satellite communications and other telecommunications areas not regulated by the Services or ONP Directives.

[47] Competition Guidelines, p. 4.

ket power, and finally, the confirmation by the Court that the derogation provided under article 90 (2) must be interpreted narrowly. With respect to the telecommunications sector, the latter justification is provided by a framework developed on a broad political basis. Recent developments have made competition rules the spearhead for the deregulation of the EU telecommunications sector and, with this, of a core sector to the Information Society. At the same time, these developments show that the full effect of EC competition law can only be achieved by carefully correlating measures with the development of the general regulatory framework. The political compromise reached in this sector - liberalization and harmonization - is indicative of this requirement.

b) Legal Considerations concerning Article 90 (3) TEC

The above mentioned directives have, beyond their importance to the telecommunications sector, contributed substantially to the clarification of legal doctrine with regard to the application of article 90, and particularly, the acceptance of article 90 (2) and the powers conferred to the Commission under article 90 (3). Therefore, it appears necessary to consider more closely the legal justification underlying these directives.

The justification given in the recitals of the Service Directive builds on the provision of the TEC concerning the freedom to provide services as well as on the competition rules. In a number of judgments, the ECJ confirmed that the very existence of a legal monopoly does not *per se* infringe the TEC.[48] Therefore the legal reasoning which justified the obligation imposed on the member states in the recitals of both directives was not based on the assumption that a legal monopoly, as such, is incompatible with the TEC. The Commission justified the Directive on the grounds that, under the circumstances, the particular legal monopoly in question neces-

[48] See, for instance, Sacchi [1974]ECR 409; Debauve [1980]ECR 833. For a broad overview of the law of the ECJ, see, e.g., Marenco, G., Legal monopolies in the case law of the Court of Justice of the European Communities, Fordham Corp. L. Inst. 1991, pp. 197; Platteau, K., Article 90 EEC Treaty after the Court judgment in the Telecommunications Terminal Equipment case, ECLRev. 1991, pp. 105.

sarily led to a violation of provisions of the TEC. In the Terminal Equipment Directive, the Commission argued that special or exclusive rights for the provision of terminal equipment prevented users from choosing the equipment that best suited their needs, thus constituting an infringement of articles 30 and 37. Equally important, special or exclusive rights for the maintenance of terminal equipment are necessarily restrictive of the freedom to provide cross-border services, contrary to article 59.

In addition, the Commission stated that special or exclusive rights for the provision of terminal equipment would be incompatible with article 86, particularly, because such rights would limit outlets and impede technical progress, since the range of equipment offered by the telecommunications bodies is necessarily limited and will not necessarily be ´the best available to meet the requirements of a significant proportion of the users.´[49] Similarly, the Commission based the obligation to withdraw special or exclusive rights regarding telecommunications services on the argument that the existence of such rights necessarily constitutes a restriction on the freedom of nationals of one member state to provide services to persons in other member states, which is contrary to article 59. Regarding article 86, the Commission held that special or exclusive rights granted to telecommunications organizations led to the abuse of a dominant position, particularly, since such rights prevent or restrict access to the market for these telecommunications services provided by their competitors, thus limiting consumer choice. This is, in turn, liable to restrict technical progress, to the detriment of consumers.

With respect to the derogation provided by article 90 (2), the Terminal Equipment Directive explicitly recognized that the provision and exploitation of a universal telecommunications network were the particular tasks entrusted to the telecommunications organizations within the meaning of article 90 (2), consistent with the Commission's previous rulings.

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[49] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ No L 192/10.

Given the political significance of these directives, both in terms of their substance and the nature of the legal actions taken, both decisions were challenged before the ECJ. From the Commission's point of view, two conclusions can be drawn with respect to the further development of EC telecommunications regulatory policy. Firstly, the ECJ confirmed the Commission's power to adopt directives under article 90 (3) in order to clarify member state obligations arising from this article. The Court also confirmed that the Commission could clarify the obligations of member states in specific sectors, and that this power could include requiring member states to withdraw special and exclusive rights (apart from the core monopoly). Secondly, the Court confirmed that where the withdrawal of special or exclusive rights can be required, the Commission could also establish the conditions for ensuring the effective abolition of special and exclusive rights.

In addition to the above, and with regard to the amendments regarding satellite,[50] cable[51] and mobile communications[52] (in particular to their legal considerations), the following can be drawn.

With respect to its legal basis, the Cable and Satellite Directives build on the reasoning used in previous directives. Specifically, it argues that, contrary to article 90 (when read in conjunction with article 59), restrictions on the provision of telecommunications services over cable TV networks are restrict the free provision of services to the benefit of national telecommunications organizations. At the same time, the exclusive right of telecommunications organizations to provide services over their networks is contrary to article 90 when read in conjunction with

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[50] Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268/15. See Pombo, F., European Community telecommunications law and investment perspectives, Fordham Int'l L.F. 1996, pp. 575.

[51] Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions of already liberalized telecommunications services, OJ No L 256/49.

[52] Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20/59. See Pombo, F., European Community telecommunications law

article 86, specifically because the existence of this exclusive right delays the emergence of new services that can only be provided on broadband networks.

In the Mobile Directive, the principal argument advanced by the Commission for the removal of special or exclusive rights for mobile communications services was that they necessarily entail a restriction on the freedom to provide mobile communications services contrary to article 59. In addition to this argument, article 86,[53] and in particular lit d, is again invoked. Therefore, these directives (satellite, cable TV, and mobile) can be seen as logical extensions of the original Telecommunications Services Directive, advanced, however, in a rapid sequence and liberalizing substantial parts of the EU telecommunications market. They also represent a major step in developing the procedural framework for EC competition law relating to the telecommunications industry. Therefore, they have also laid down the groundwork for the formalization of these procedures at a later stage.

2. Harmonization: ONP Measures

The directives aimed at liberalizing the telecommunications market would not on their own be sufficient to deliver a single market for telecommunications. The liberalizing measures do not require that member states break up previously existing monopolies; all that is required is the abolition of previously existing legal monopolies as regards the provision of services, equipment or networks. Therefore, *de facto* monopolies may still remain for some time and the development of competition may be affected because the potential still remains for telecommunications organizations, in particular those which formerly enjoyed special or exclusive rights and which have developed national networks, to abuse their market positions. As regards potential competitors, this might be achieved through the refusal or restriction of access to intercon-

and investment perspectives, Fordham Int'l L.J. 1996, pp. 580.

[53] The first paragraph of article 86 sets out the prohibition of any abuse of a dominant position within the common market if it may affect trade between member states. The second paragraph contains a non-exhaustive list of circumstances which may in particular constitute a prohibited abuse.

nection facilities such as leased lines. Moreover, ordinary end-user consumers could be also detrimentally affected by the ability of these dominant network operators to dictate such matters as prices, the type and quality of services which they would be willing to provide, and the terms and conditions which they might seek to impose on persons who wish to be supplied with such services.[54]

These issues have been addressed in the Community through the concept of Open Network Provision (ONP) which has been defined in the Framework Open Network Provision Directive adopted in 1990 as "the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunication services."[55] Although the ONP rules that have been or are being developed are contained in directives that are addressed to member states, the ultimate objects of most of the rules are the telecommunications organizations themselves. The policy goal here is to provide the competitive environment necessary to promote free and fair competition among all operators on a Community-wide basis.[56] In this sense therefore the ONP framework is a blueprint for regulation, since it is concerned with establishing a framework of rules and principles to which member states must subject telecommunications organizations. It sets down substantive principles for the development of the ONP rules.[57]

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[54] See for example Schneider, V. - Dang Nguyen, G. - Werle, R., Corporate actors in European policy-making: harmonizing telecommunications policy, JCMS 1994, pp. 474.

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

[56] See Mulgan, G., Open network provision and the future of regulation in Europe, in Locksley (ed.), The Single European Market and the information and communications technologies (1992), pp. 89; Van Miert, K., EU competition policy, in Hawk (ed.), 1995 Fordham Corp. L. Inst. (1996), p. 289. For matters concerning technical harmonization see Peckmans, J., 'The new approach to technical harmonization and standardization', JCMS 1987, pp. 249.

[57] These are that, firstly, they must be based on objective criteria, secondly, they must be transparent and published in an appropriate manner, thirdly, they must guarantee equality of access and must be non-discriminatory, in accordance with Community law, and finally, thus may only restrict access to the public network on the basis of the 'essential requirements' criteria discussed above.

The first one of these is concerned with leased lines[58] and the second with voice telephony.[59] The particular importance of the ONP Leased Lines Directive in terms of promoting the development of competition was that in 1992, when it was adopted, Member states were not obliged to withdraw special or exclusive rights regarding the establishment of networks or the operation of networks. Therefore, companies wishing to enter service markets needed to be able to rent circuits from the existing public telecommunications operators in order to provide services to third parties. The directive obliged member states, broadly speaking, to ensure, *inter alia*, that TOs provided a minimum set of leased lines and imposed restriction on access to leased lines and their usage only if specific 'essential requirements' came into play.[60] Moreover, the directive also required member states to ensure that the National Regulatory Authority (NRA) would oversee the behavior of TOs so as to ensure that TOs adhere to the principle of non-discrimination. The NRA was established in that directive as the arbiter of disputes regarding refusals to supply leased lines, etc. In accordance with the directive it was required to lay down a procedure, in advance, setting out how it would approach such a decision-making process.

The ONP Voice Telephony Directive was adopted in 1995. As a whole the directive sets out the concept of universal service, which has been summarized as the 'obligation to provide access to the public telephone network and to deliver affordable telephone service to all users reasonably requesting it' [61] Hence, the directive obliges member states to ensure that users are able to obtain, on request, a connection to fixed public network for voice telephony.[62] The Di-

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

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

[60] Art 6 and 7 Leased Lines Directive.

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

[62] Art 3 ONP Voice Telephony Directive.

rective further requires member states to ensure that the provision of public pay phones meet the reasonable needs of users in terms of geographical coverage and numbers.[63] The NRA is charged with policing the relationship between telecommunications service providers and customers.[64]

Whereas the ONP Voice Telephony and Leased Lines Directive focus on specific telecommunications services, the Interconnection Directive,[65] to ensure universal service principles and interoperability through the application of ONP rules, involves the development of rules about basic telecommunications issues that cut across telecommunications service markets. This directive establishes for the first time a regulatory framework - even if very basic - for ensuring in the Community the interconnection of telecommunications networks (in particular the interoperability of services), and the provision of universal service in an environment of open and competitive markets. Its aim concerns the harmonization of conditions for open and efficient interconnection of and access to public telecommunications networks and publicly available telecommunications services.[66] The directive proceeds on the basis that the best approach to interconnection from a regulatory point of view is that TOs should be free to negotiate agreements on a commercial basis in accordance with Community law. According to article 4 of the Interconnection Directive, telecommunications organizations[67] shall have a right and an obligation to negotiate interconnection, and organizations with significant market power shall fur-

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[63] Art 17 ONP Voice Telephony Directive.

[64] Thus, the directive provides that the NRA shall be able to require alternation of the conditions of contracts etc. by TOs and there must be a right of appeal to the NRA where a dispute arises between service providers, and their customers (Art 7 and 27 ONP Voice Telephony Directive).

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

[66] See Art 1 of the Interconnection Directive.

[67] Organizations with rights and obligations to negotiate interconnection with each other in order to ensure Community-wide services are specified in Annex II of the Interconnection Directive.

thermore meet all reasonable requests for access to their network.[68] The role of the NRA is a supervisory one, where intervention is justified by the need to ensure the adequate interconnection within the Community of certain networks and services essential for the social and economic well being of Community users. In order to facilitate this, the directive provides that TOs shall have the right and an obligation to negotiate interconnection with each other for the purpose of providing services. Though the NRA is empowered to limit this obligation on the grounds that there are technically and commercially viable alternatives to the interconnection requested, such limitations must be fully justified in accordance with published criteria.

B. The Impact of Competition Law on Telecommunications

I. EC Competition Law: Selected Aspects

1. The Application of Article 86 in General

a) Scope and Framework

Article 86 TEC is, among other treaty rules (especially article 85), a powerful component of EC Competition Law.[69] It operates to check the abuse of market power where it is enjoyed by an undertaking in a dominant position is respect to a particular market.[70] In short, it abso-

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[68] According to article 4 II, an organization shall be presumed to have significant market power when it has (apart from the factors mentioned in article 4 III) a share of more than 25% of a particular telecommunications market in the geographical area in a member state within which it is authorized to operate.

[69] For an overview, see Jacobs, D. M. - Stewart, J., Competition law in the European Community (1990); Korah, V., An Introductory Guide to EC Competition Law and Practice (1997), pp. 27; Van Bael, I. - Van Bellis, J.-F., Competition Law of the European Community (1994), pp. 68, and for the philosophy behind EU competition law see Massey, P., Reform of EC competition law: substance, procedure and institutions, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 92. For the applicability of article 86 to concentrations, see Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), pp. 74; and for ECJ rulings Bellamy, C. - Child, G. D., Common market law of competition (1993), pp. 588.

[70] Article 86 reads as follows: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible within the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage, and

lutely prohibits any abuse of a dominant position, with no possibility for exemption. Moreover, it is directly effective in national courts without the need for implementing legislation. Finally, article 86 and also the regulations that implement it are, according to the Court to be read in the light of the objectives of the TEC (articles 2 and 3).

b) The Elements of Article 86 TEC

aa) The Relevant Market

Any inquiry into the applicability of article 86 to a particular set of facts typically starts with the definition of the relevant market. Companies may compete in a number of markets, which means that the objective of market definition is to identify the market that is relevant to the competition issues at hand. According to the ECJ, such a definition is of essential significance for the appraisal of a dominant position because "the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need, and are only to a limited extent interchangeable with other products."[71] Moreover, one has to consider that "...the object of market delineation is to define the area of commerce in which conditions of competition and the market dominance of the dominant firm is to be assessed."[72] Most importantly, it needs to be considered in the context of a particular market, of which the case law of the Commission and the Court suggests that there are two different types: first, the relevant product market, and second, the relevant geographic market.

(d) making the conclusion of contracts subject to acceptance by the others parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[71] Continental Can v Commission, [1974] ECR 223, p. 247.

[72] Commission Decision in ECS/Akzo Chemie (1985), OJ No L 374/17.

(1) The Relevant Product and Service Market

The relevant product market includes, in short, the provision of both goods and services. Issues of product market definition can arise in a variety of circumstances. Most frequently, the issue is whether the market should include products other than that produced by those whose conduct is at issue, which may serve as substitutes to which at least some consumers turn in the event of a significant price increase.

The test for defining whether products or services belong to the same market or not is the criterion of interchangeability (sometimes also referred to as substitutability) but the difficulty in using this criterion is that it leaves open the question of how many goods or services need to be interchangeable in order to pertain to the same market. However, in *Continental Can*[73] the ECJ emphasized that the identification of the relevant product market was important for the purpose of deciding whether a dominant position exists, and in particular for deciding the degree of interchangeability of the goods as services in question. In that case, the Court stated that the Commission had to identify out the "characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products."[74] This means, according to the Court, that products that are only to a limited extend interchangeable with other products should not be considered part of the same relevant market but that such products that are reasonably interchangeable should. The question as to what is meant by this requirement is broadly answered by the case law of the Court and the Commission, which shows that generally a very high degree of interchangeability is required for products or services to be considered to be part of the same market.[75] This case

[73] Continental Can v Commission [1973] ECR 215.

[74] Continental Can v Commission [1973] ECR 215, p. 247.

[75] See, e.g., United Brands v Commission [1978] ECR 207, pp. 272; Michelin v Commission [1983] ECR 3461, pp. 3508. See moreover Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), pp. 84; Kauper, T. E., and Norton, J. J., The European Court of Justice in United Brands: extraterritorial jurisdiction and abuse of dominant position, Denv. J. Int'l L. & Pol'y 1979, pp. 379.

law has set general standards to be applied in cases involving issues of product substitutability.[76] However, these cases define markets in narrow terms.[77] The fact that markets are narrow rather than broad does not in itself indicate that market definitions are correct or not. But in some of the cases, narrow markets seem to be serving the particular end of imposing public utility-like duties to provide access to facilities thought to be important to the public, and to do so as a matter of EC law.[78]

Interchangeability can be considered from the viewpoint of the demand side or the supply side. Demand side substitution occurs when customers switch their purchases from one supplier to another in response to a relative price change. This is often the most direct and immediate constraint on the behavior of firms. However, one also cannot sensibly ignore supply-side substitution.[79]

Firstly, from the viewpoint of the customer, objective criteria such as the nature of the goods, their price and use can be considered when judging whether goods are interchangeable or not. In addition to these objective criteria of the products involved, the "competition conditions and the structure of supply and demand on the market must also be taken into account."[80] In other words, even goods which based on their objective characteristics (nature, price, use)

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[76] The most troublesome of the decisions of both the Commission and the Court involved findings of abuse in vertical relationships, primarily cases involving refusals to deal with distributors or competing manufacturers. See, for instance, Hugin v Commission [1979]ECR 1869. The definition of product markets in the setting of vertical integration was, for example, at issue in Commercial Solvents [1974] ECR 223, and Akzo [1991] ECR I 3359; in both cases the firm in question was dominant in one market but the effects of its conduct were felt in another market.

[77] Cf., for instance, the Commission decision in Continental/Michelin (1988), OJ No L 305/33, respectively BPB Industries Plc (1989), OJ No L 10/50, where the market was defined as car tyres and plasterboard respectively.

[78] Kauper, T. E., The problem of market definition under EC competition law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), p. 256.

[79] For example see Baker, S. - Wu, L., Applying the market definition guidelines of the European Commission, ECLR 1998, p. 274.

[80] Michelin v Commission [1983] ECR 3461, p. 3504.

could be considered as being reasonable interchangeable, may be used by different categories of customers, who are part of different competitive environment. Under these circumstances it may be appropriate to treat the different categories of customers as belonging to separate markets.[81] Moreover, data concerning the cross-elasticity of demand can be a useful means for the inquiry into whether goods are interchangeable. Where there is a high cross-elasticity of demand between certain products (i.e. where a slight increase in the price of one product causes a considerable number of customers to switch to other products), this would tend to indicate that the products compete in the same relevant market. Therefore, cross-elasticity of demand directly measures the degree of interchangeability of certain products.[82]

Secondly, interchangeability should not be considered solely from the demand side because it may well be that companies, which do not offer interchangeable products, could thus be encouraged to alter their existing production methods and start supplying products that are considered interchangeable by the purchasers. This can be illustrated through the case law of the ECJ. In *Continental Can*, for instance, the Court held that a dominant position in the market for light metal containers for meat could not be said to exist where it has been proved that producers in other sectors of the market for such containers are in a position to enter this market, by a simple adaptation of production methods, with sufficient strength to create a serious counterweight.[83] The assessment of whether there is elasticity of supply between certain products also takes into account elements such as differences in production techniques and in the plant needed to manufacture the goods in question. If the manufacturer needs considerable time (and

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[81] Cf. Beal, I. - Bellis, J.-F. Competition Law, p. 71; Korah, V. Competition Law, pp. 79.

[82] See Baden Fuller, C., Article 86: economic analyses of the existence of a dominate position, ELRev 1979, p. 426.

[83] See Continental Can v Commission [1973] ECR 215, pp. 247, for the ECJ's holding in that case as to the assessment of supply substitutability in defining product markets. However, there is little in recent cases concerning supply substitutability.

moreover, investment) to adapt its production lines in order to make competing goods, it should not be considered part of the relevant market.[84]

(2) The Relevant Geographic Market

Every relevant market includes a geographic market for the reason that undertakings selling in mutually exclusive geographic areas are not in competition and do not serve to limit their respective abilities to significantly increase price. Geographic market definitions involve the identification of those undertakings selling products within the relevant product market to whom customers in the area will turn in the event of a significant price increase, and may also include firms who would enter the geographic area in response to such an increase. Cases under articles 85 and 86 speak in terms of areas where the conditions of competition are homogeneous.

The relevant geographic market to which the products relate is also a significant prerequisite of whether the undertaking in question enjoys a dominant position. As is discussed below, this will often turn on the width or narrowness of the market in which the goods or services are provided.

Article 86 requires a dominant position to be held in respect of "the common market or in a substantial part of it." Thus, any definition of a market for ascertaining the existence of a dominant position must include its geographical extent. In other words, article 86 applies only in cases of an abuse of a dominant position in, at least, "a substantial part of the common market". This condition implies, firstly, that an area within the common market has to be defined which can be considered relevant for the purposes of the proceeding, and secondly, the area that has been so defined should be important enough to be considered substantial within the meaning of article 86.

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[84] Cf. Michelin v Commission, [1983] ECR 3461, p. 3506; Tetra Pak I, OJ No L 272/27, pp. 37.

As far as the first requirement is concerned, the definition of the relevant geographic market[85] depends on the location of the firm that is the object of the examination and of the nature of the practices that are being examined. Its importance has been emphasized by the Court in *United Brands* where it ruled that article 86 has to be analyzed according to "a clearly defined geographic area in which the goods and services are marketed and where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated."[86] In *British Telecommunications,* the Commission somewhat stated the obvious when it found that the nationalized industry had a statutory monopoly for which the relevant geographic market must be the United Kingdom, rather than the Community as a whole. This principle was similarly expressed in *Alsatel,*[87] where the Commission tried to have the Court declare the Alsace region to be the relevant market. The ECJ refused to follow the Commission's suggestion and stated that the whole of France might be the relevant geographic market since the licenses granted by regional authorities to provide the telephone installations were valid for the whole country and not merely for a particular region.[88]

In another classic case,[89] the Netherlands was considered as the relevant market. This case dealt with discounts granted by Michelin NV (the Dutch subsidiary of the Michelin group) to its dealers. The reasons invoked for confining the relevant geographic market to the Netherlands were that Michelin NV's activities were concentrated on the Netherlands market, and that, in practice, the Dutch tyre dealers obtained their supplies only from suppliers operating in the

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[85] According to the ruling in Michelin v Commission, [1983] ECR 3461, p. 3502, the relevant geographic market is an "area where the allegedly dominant firm faces competition in respect of the practices that are considered abusive."

[86] United Brands v Commission, [1983] ECR 207, p. 274.

[87] Alsatel v Novasam [1988] ECR 5987.

[88] Alsatel v Novasam [1988] ECR 5987, p. 248.

[89] Michelin v Commission [1983] ECR 3461. For critical remarks concerning the ECJ's ruling in that case, see Jebsen, P. - Stevens, R., Assumptions, goals, and dominant undertakings: the regulation of competition under article 86 of the European Union, Antitrust L.J. 1996, pp. 467.

Netherlands. Moreover, Michelin's competitors were organized in the same way: they carried on their activities in the Netherlands through Dutch subsidiaries of their respective groups.[90]

Following the wording of article 86, the relevant geographic market must amount to a substantial part of the common market. This appears to be a very vague determinant of the above mentioned second requirement of ´substitutability´. Therefore, and according to the ECJ in *Suiker Unie*, for the purposes of determining whether a specific territory is large enough to amount to a substantial part of the common market within the meaning of article 86, "the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered."[91] Thus, as the Court ruled in that case, the Belgo-Luxemburg market and the southern part of Germany were considered substantial.

An undertaking that has a dominant position in a substantial part of may infringe article 86 if it abuses that position. But what constitutes a substantial part is again not open to ready quantification. While it may be possible to claim that dominance throughout the Community, or indeed throughout one member state, presupposes dominance also in a substantial part of the common market,[92] it will be less so if the case was such that the dominant position related to a more localized market, say, a part of a member state. Again, as the ECJ put it, it is relevant to consider the "pattern and volume of the production and consumption of the said products as well as the habits and economic opportunities of vendors and purchasers."[93]

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[90] Michelin v Commission [1983] ECR 3461, pp. 3535.

[91] Suiker Unie v Commission [1975] ECR 1663, p. 1977, where the ECJ defined the relevant market (for the sale of sugar) as Belgium, Luxembourg, and the southern part of Germany.

[92] Cf. Höfner and Elser v Commission [1991] ECR I-1991.

[93] Suiker Unie v Commission [1975] ECR 1663, p. 1977.

However, in most article 86 cases, the relevant market comprised the territory of at least one member state, thus, satisfying the substantiality requirement.[94] Moreover, *Suiker Unie* indicates that even a part of a member state may be qualified as a substantial part of the common market within the meaning of article 86.[95]

bb) The Relevant Market under the Merger Regulation

The definition of the relevant market in both product and geographic terms is an essential part of the Commission's analysis in cases under the Merger Regulation.[96] Until the adoption of the Merger Regulation in 1989, the EC lacked an adequate basis for the systematic review of mergers and other forms of concentrations that affected markets across the member states and that could not be adequately dealt with by one or more national competition authorities. The implementation of the EC Merger Regulation remedied this situation by providing a specific instrument of merger control with Community-wide jurisdiction. A key component of this regulation is the so-called 'one-stop shop' principle, under which, subject to some exceptional referral procedures, [97] the Commission alone has jurisdiction over large-scale mergers, while national

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[94] See, for instance, Delimitis v Henninger Bräu AG [1991] ECR I 935, p. 18, and Langnese-Iglo v Commission [1995] ECR II, 1533, where the relevant geographical market was defined as a national one. However, the narrowest market definitions in these recent cases are definitions which seem to be designed in some cases at least for the application of the essential facilities doctrine (which will be dealt with below).

[95] In Porto di Genova v Siderurgica Gabrielli, [1991] ECR I-5884, a case that dealt with the issue of essential facilities, the ECJ considered even a port to be a substantial part of the common market in view of its importance to trade into and out of Italy.

[96] Council Regulation No 4064/89 on the control of concentrations between undertakings (1990), OJ No L 257/14, hereafter referred to as the Merger Regulation. For the scope and background of that regulation, see Cook, C. J. - Kerse, C. S., EC merger control (1996), pp. 2; Downes, T. A., - Ellison, J., The legal control of mergers in the EEC (1991), pp. 34; Korah, V., An introductory guide to EC competition law and practice (1997), pp. 263, and furthermore Van Bael, I. - Bellis, J.-F., Competition law of the European Community (1994), p. 373.

[97] For procedural issues, see Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), pp. 253; Jones, C. - Gonzalez-Diaz, E., The EEC Merger Regulation (1992), pp. 191.

authorities are exclusively competent with regard to mergers falling below the regulation turn-over thresholds.[98]

The extent to which markets have to be defined for purposes of the Merger Regulation using the standards applied under articles 85 and 86 TEC is not an easy question to answer. However, it seems clear that in merger cases, the analysis is more rigorous, consistent and economically sound than under articles 85 and 86.[99] In one important sense, however, there is a clear difference between merger cases and others. The Merger Regulation is typically applied before the merger or concentration has occurred. Article 86 cases rest on proof of the actual market effects of allegedly abusive behavior. The Commission has no such evidence to rely upon in merger cases. It must predict likely effects at some point in the future. At a minimum, this means the Commission cannot rely on actual price effects as part of the market definition process or in order to obviate the need for defining markets altogether. Moreover, market definition plays a more significant role in predictive cases than when actual effects can be seen. Because merger cases are predictive, they must deal in some manner with changes in the market that are in the process of occurring or which will be occurring in the future, a problem which does not typically exist in cases concerning articles 85 and 86 cases where the inquiry is more directed to the past and present.

With regard to telecommunications, the EU - using a long series of directives and policies - has modified, eliminated or harmonized previously conflicting national (mostly technical) standards, licensing and authorization requirements and policies and a variety of other legal or regulatory requirements. In many instances these harmonizing directives have just come into

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[98] For the 'one-stop shop' principle, see Cook, C. J. - Kerse, C. S., EC merger control (1996), p. 12; Downes, T. A. - Ellison, J., The legal control of mergers in the EEC (1991), pp. 178; and Korah, V., An introductory guide to EC competition law and practice (1997), pp. 273

[99] Kauper, T. E. The problem of market definition under EC competition law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), p. 273.

force. Existing national legal and regulatory regimes have played a significant role in defining both product and geographic markets. In *Alcatel/Telettra*,[100] for instance, the Commission defined the relevant market for telecommunications equipment as Spain, based on the current structural characteristics of the Spanish market, namely, the procurement policies in Spanish telephone markets, the lack of a need for implementation of the procurement directive until 1996 and the vertical links between the Spanish telephone monopoly and its major equipment suppliers. In addition to that case, there are a number of other cases in which the market was characterized as national.[101] In each of these cases, the Commission, in principle, concluded that the concentration did not raise serious doubts about compatibility with the common market. It was not required to go further and consider the weight to be given to harmonization directives within its assessment of competition.[102]

(1) The Relevant Product Market

The Merger Regulation itself contains no specific provisions dealing with how product markets are to be defined nor does it indicate how market share data is to be used in the Commission's competitive analysis. Its ultimate standard[103] suggests an analysis comparable to that for finding dominance under article 86. This calls for the use of market shares at least as a starting point in merger cases.[104] But a critical element of market share determination is product market definition, the point at which the competitive analysis in the Commission's decisions

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[100] Commission Decision (1991), Alcatel/Telettra, OJ No L 122/48.

[101] See, for example, the Commission decision in Alcatel/AEG Kabel (1992), OJ No C 6/23; Mannesmann/Hoesch (1993), OJ No L 114/34; Hoechst/Schering (1994), OJ No C 9/3; and Mercedes-Benz/Kässbohrer (1995), OJ No L 211/1.

[102] Some of the decisions mentioned in the previous footnote are discussed in Kauper, T. E., The problem of market definition under EC law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 276.

[103] That is a merger which '...creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it...'.

[104] See Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), pp. 184; Jones, C. - Gonzalez-Diaz, E., The EEC Merger Regulation (1992), pp. 10; and the ECJ's ruling in Air France v Commission [1994]ECR II 323.

begins. The definition of product markets is also critical in considerations relating to relief and to the evaluation of undertakings offered by the parties in order to be permitted to proceed with concentrations otherwise thought by the Commission to be incompatible with the common market.[105]

Very broadly, the Commission has defined product markets in terms of substitutability in the eyes of the consumer (demand substitutability) and, in terms of supply substitutability. Market definition is an empirical economic issue, an issue addressed in the 1992 Merger Guidelines by asking what would happen if a hypothetical monopolist of a given, narrowly defined product market imposed a 'small but significant and non-transitory price increase, the price of other products remaining the same.'[106]

In many cases, product markets are obvious. The issue of product market definition arises when there are arguably other products to which consumers could turn in the event the concentration attempted to increase prices or engage in other conduct which adversely affected their interests. But the market needs a more narrow market definition to accurately reflect a reasonable degree of substitutability. There may be a number of products which meet a given consumer need, but consumers do not treat all of them differently. Some end users of a given product may, because of their specific needs, have virtually no real substitutes available while others, purchasing exactly the same product, may be readily able to turn to substitutes.[107]

However, in a number of cases, the Commission's analysis begun with an examination of qualitative factors, the physical characteristics and the end-users of the products in question.

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[105] Kauper, T., E., The problem of market definition under EC law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 279

[106] That same formulation appears in several Commission decisions, for instance, in Nestle/Perrier (1992), OJ No L 365/1.

[107] See Kauper, T. E., The problem of market definition under EC law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), p. 280

Where these characteristics or uses are sufficiently different, they may belong in separate markets for that reason alone.[108] Moreover, the evaluation of a product's characteristics and end uses is to be examined from the point of view of the user.[109] In addition, the ability of a firm or group of firms to increase price above competitive levels is dependent not only on demand factors but also on the willingness of undertakings not currently producing the product to do so in response. Potential competition may check market power as effectively as the availability of substitute products. But supply substitutability may bear on market definition and to this extent it is also relevant under this heading.

Supply substitutability can be dealt with in two ways in relation to market definition. Markets can be defined, firstly, in terms of demand considerations, and all questions relating to potential entry can be assessed as part of the general analysis of competitive effects. Secondly, at least in those cases where undertakings not producing the product currently have the ability to do so without incurring substantial costs within a relatively short period of time, the market can de defined as including some part of the capacity of these undertakings. Despite the fact that the Commission's decision in *Continental Can* was rejected by the ECJ,[110] in part because of its failure to assess adequately supply-side substitutability in defining the relevant market, markets have generally been defined only in terms of demand substitutability.

On the other side of the spectrum, it would be false to say that supply substitutability has never been relevant in product market definition.[111] However, the Commission established a

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[108] See, for example, the Commission decision in Fiat Geotech/Ford New Holland (1991), OJ No C 118/14; ABC/Generale des Eaux (1991), OJ No C 244/5; Du Pont/ICI (1993), OJ No L 7/13; and in Mannesmann/Hoesch (1993), OJ No L 114/34.

[109] Cf. The Commission findings in its decision in VIAG/Continental (1991), OJ No C 156/10; Newspaper Publishing (1994), OJ No C 85/6; and Havas Voyage/American Express (1995), OJ No C 117/8.

[110] Continental Can v Commission [1973]ECR 215.

[111] See, for instance, the Commission decision in Aerospatiale-Alenia/de Havilland (1991), OJ No L 334/42; Mannesmann/Hoesch (1993), OJ No L 114/34.

general standard that ensures that in determining product markets, ´supply-side substitutability can only be taken into account if manufacturers of products other than the product in question can readily and quickly switch to the production of the latter.´[112]

Firms that sell the same products in mutually exclusive areas do not compete in the same area and are therefore not in the same geographic market. Thus, the geographic market has to be defined. This means the process of identifying those undertakings which produce the same products as the parties and provide reasonable alternatives to consumers, therefore limiting the ability of the merged undertakings to raise prices to anti-competitive levels.

(2) The Relevant Geographic Market

Criteria for the determination of the relevant geographic market is set out in article 9(7) of the Merger Regulation.[113] However, it can be stated that market definition is not an easy task. This is left to the Commission, whose output on that issue thus far comprise a large number of cases reaching very different results; including rulings that the geographic market is either national[114] or EC-wide.[115] Apart from the establishment of upper and lower limits in terms of the size of the geographic markets, the Commission considers also a number of factors in defining

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[112] Commission decision in Mannesmann/Hoesch (1993), OJ No L 114734.

[113] This provision states that 'the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can de distinguished from neighboring geographic areas because, in particular, conditions of competition are appreciably different in those areas.' That definition is basically repeated in section 6 II of form CO relating to the notification of a concentration pursuant to regulation 4064/89, annexed to Commission Regulation 3384/94, OJ No L 377/1 (1994). For the rationale behind the relevant geographic market definition, see Canenbley, C., The geographic market definition under European merger control law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 308; furthermore Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), pp. 13; and Jones, C. - Gonzalez-Diaz, E., The EEC Merger Regulation (1992), pp. 117

[114] See, for example, the Commission decision in Magnati/Marelli/CEHc (1991), OJ No L 222/38; Mannesmann/Vallourec/Ilva (1994), OJ No L 102/15; and Mercedes-Benz/Kässbohrer (1995), OJ No L 21/1.

[115] See, for instance, the Commission decision in Mannesmann/Boge (1992), OJ No L 205; and Pilkington-Techint/SIV (1993), OJ No L 158/24. There is, at least, one decision in which the relevant geographic product market was defined in terms of brands; see Procter & Gamble/VP Schickedanz (1994), OJ No L 354/32 where the Commission used the distinction between national brands and so-called 'Eurobrands' in

the scope of the geographical market in individual cases, i.e. in identifying where 'the conditions of competition are sufficiently homogeneous' that this area can be distinguished from neighboring geographic areas.[116]

Broadly speaking, any assessment of the Commission's approach to the relevant geographic market must recognize that the EC was born out of a desire to overcome the fact that national boundary lines had long served as major barriers to competition throughout Europe. One has here to consider that as the Merger Regulation came into effect, these national barriers were falling (and continue to fall). Second, because the Merger Regulation coincides with the intensification of the Community's efforts to harmonize a variety of legal, technical and other regulatory standards throughout the Community, geographic market definition has been particularly affected by these 'transition' issues.[117]

As a result, it can be stated that the Commission has a flexible approach to the definition of the relevant market. Because the emphasis on particular elements of the analysis varies from case to case, decisions are difficult to compare and general themes are not easily identified. The characterization of outcomes as 'narrow' or 'broad' is not particularly useful, having little to do with whether they are right or wrong.[118] However, as the European market becomes more 'common', there will be less concern about trans-national problems. But notwithstanding the fact that markets in general are becoming increasingly European-wide and indeed global, it is

differentiating national and Community-wide markets.

[116] Section 6 of the form CO lists individual factors which may be taken into account in the assessment of the relevant geographic market. They are, firstly, the nature and characteristics of the products and services concerned, secondly, the existence of entry barriers, thirdly, consumer preferences, fourthly, appreciable differences in the undertaking's market shares between neighboring geographical areas, and finally, substantial price differences between neighboring geographical areas.

[117] Kauper, T. E., The problem of market definition under EC competition law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 293.

[118] Cf. Canenbley, C., The geographical market definition under European Merger control law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), p. 312; Kauper, T. E., The problem of market definition under EC competition law, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 303.

clear that sufficient barriers continue to exist in many markets to require that the effects of mergers in certain industries still be measured at the national level, or even at the local level.

cc) The Concept of Dominance

In any analysis of article 86, once the relevant market has been determined, the market power (dominance) of the undertaking in relation to that market must be considered.

(1) The Dominant Position

The determination of a relevant market is no more than a prerequisite for deciding whether article 86 has been infringed. It needs therefore to be established that within that relevant market or a substantial part of it, the undertaking enjoys a dominant position.

(a) Definition

Whether or not a dominant position exists is not easy to determine. However, in general terms, it relates to "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[119] However, such a strategic position refers to actions which a firm takes to improve its competitive position relative to actual and potential rivals, thereby increasing its profits.[120] Generally, strategic behavior is part of the healthy competitive process: it is not inherently anti-competitive. Whether strategic behavior is anti-competitive or not depends on the nature and purpose of the conduct.

The ECJ implies this in saying that a dominant undertaking must be capable of acting independently to an appreciable extent, and of hindering the maintenance of effective competition. This means, in other words, that, firstly, this definition indicates that article 86 is not con-

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[119] This definition was given by the ECJ in United Brands v Commission [1978] ECR 207, pp. 277, and has become the standard in subsequent applications of article 86; e.g., Hoffmann-La Roche ('Vitamins'), [1979] ECR 461, p. 520; Télémarketing v CLT [1985] ECR 3261, p. 3275.

[120] Smith, R. - Round, D., Competition assessment and strategic behavior, ECLR 1998, p. 227.

cerned with the minimum amount of market power that most undertakings enjoy, and secondly, clearly not all competition has to be eliminated for an undertaking to be in a dominant position. [121] Therefore, it is the ability to contain competition, not the ability to ignore it, which is characteristic of dominance.[122]

(b) Assessment

In *Continental Can*,[123] the ECJ insisted on the Commission´s analyzing a firm's dominance in two steps. Firstly, it should define the relevant market, and secondly, it should assess the firm's dominance therein.

With regard to the relevant market, and as broadly discussed in section I.1.2.1., markets do not always have clear limits, and the insistence on definition rather than analysis may be misleading. There may be substitutes that are not perfect, in which case selecting a narrow definition will overstate the market power of a firm supplying a large proportion of a defined product. If it raises prices above the competitive level, it may still loose considerable business. A wide definition will indicate a smaller market share and thus may understate it.

With regard to the finding of dominance, a useful determinant of market power is whether the undertaking in question is a monopoly by virtue of a statutory enactment.[124] Where a statutory monopoly does not exist, the ECJ and the Commission focus on the market shares of the undertaking. Unless it is a statutory monopoly, a market share of 100 per cent will be

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[121] See United Brands v Commission [1978] ECR 207, p. 283, where the ECJ ruled: "However, an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position."

[122] Cf. Baden Fuller, C., 'Article 86 EEC: economic analysis of the existence of a dominant position', ELRev 1979, pp. 423; Temple Lang, J., Some aspects of abuse of dominant positions in European Community Antitrust Law, Fordham Int. L. Forum (1979), pp. 11. However, the concept of dominance may indicate a different idea as well, namely the ability to foreclose and keep others firms out of the market.

[123] Continental Can v Commission [1973] ECR 215.

[124] See, e.g., Italy v Commission [1985] ECR 873.

improbable. The difficulty, then, is to draw the line at which a certain market share gives rise to a finding of a dominance within the meaning of article 86.

Furthermore, although the importance of the market share may vary from one market to another, the view may be taken that very large shares are in themselves evidence of the existence of a dominant position. An undertaking that has a very large share and holds it for some time, by means of the volume of production and the scale of the supply that it represents, is by virtue of that share in a position of strength that makes it somewhat unavoidable partner player within a given market. [125]

However, it has to be pointed out that the test for determining whether or not a company enjoys a dominant position is to assess its market share. But the lower a firm's market share, the more that additional factors (which will be dealt with below) have been relied upon by the ECJ to support a finding of dominance. As regards the market share, the Court has clearly indicated that the market share of an undertaking is an important factor in determining dominance, and furthermore, that an undertaking can only be seen to be in a dominant position in a market if it has succeeded in winning a large part of this market.[126] As already discussed above, very large market shares are in themselves evidence of a dominant position.[127] In addition, a market share of between 57 to 65 per cent[128] is sufficient evidence of a dominant position, which may also be presumed with regard to a market share of up to 40 per cent.[129] On the contrary, a market share of under 10 per cent does not meet the qualification of dominance within the meaning of article

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[125] Hoffmann-La Roche [1979] ECR 461, p. 527.

[126] United Brands v Commission [1978] ECR 207, p. 282.

[127] See furthermore the ruling of the ECJ in Hoffmann-La Roche [1979] ECR 461, p. 527, where it was held that a market share of at least 65 per cent is in itself evidence of the existence of a dominant position.

[128] Michelin v Commission [1983] ECR 3461, pp. 3509.

[129] United Brands v Commission [1978] ECR 207, p. 282; Akzo Chemie v Commission [1991] ECR 359, para 60.

86.[130] It follows from the case law of the ECJ that a company with a market share of less than 10 per cent is thus unlikely to be considered dominant.[131]

When the market share of the allegedly dominant undertaking is insufficient in itself to establish the existence of a dominant company, other factors have been cited by the Commission and the Court in support of a finding of dominance. What can be found in the relevant judgments concerning dominance are the following factors: a strong brand name, strict quality control, a highly developed sales network, absence of potential competition, a technological lead over competitors and an extensive range of products.[132] However, the use of these additional factors to support the establishment or even the confirmation of the existence of dominance are not entirely accepted[133] because they are competitive advantages also enjoyed by the already dominant firm. Any large company whose share of any particular market significantly exceeds that of its next competitor can easily be found to be dominant regardless of its market performance and the overall degree of competition in that market. Additional factors indicating dominance need to be taken into account, which inevitably must vary according to the circumstances of each case.[134]

(2) The Abuse of a Dominant Position

Once it has been established that a dominant position within the meaning of article 86 exists within a relevant market, it then needs to be determined whether there has been an abuse of that position.

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[130] Metro v Commission [1975] ECR 1977, p. 1902; Demo Studio Schmidt v Commission [1983] ECR 3045, p. 3065.

[131] As noted earlier in this chapter when discussing the relevant product market, the Commission and the ECJ have defined the market narrowly. See furthermore the rulings in General Motors Continental v Commission [1975] ECR 1367 and Hugin v Commission [1979] ECR 1869.

[132] United Brands v Commission [1978] ECR 207, p. 280; Hoffmann-La Roche [1979] ECR 461, p. 524; Michelin v Commission [1983] ECR 3461, p. 3511.

[133] See Van Bael, I. - Van Bellis, J.-F., Competition Law, p. 85.

[134] Van Bael, I. - Van Bellis, J.-F., Competition Law, pp. 85.

Article 86 does not expressly prohibit the existence of a dominant position, only its abuse. However, since the judgment in *Continental Can*,[135] it has become fairly clear that conduct by a firm holding a dominant position that reduces the competition which remains in the market is treated as abusive. The concept of abuse relates to "the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[136]

Consequently, it appears possible to infer from the fact of dominance that market abuse exists, since an undertaking with such a characteristic has a special responsibility not to allow its conduct to impair undistorted competition within the market. In short, article 86 imposes a special responsibility on undertakings found to hold a dominant position. Therefore, their scope of action is limited by the existence of a special set of rules that do not apply to undertakings that do not hold such a position.

Furthermore, article 86 does not define what may constitute an abuse but sets out a non-exhaustive list of examples of conduct which could constitute an abuse of a dominant position: namely, pricing, market restrictions, and unfair or irrelevant conditions.[137]

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[135] Continental Can v Commission [1973] ECR 215, p. 245.

[136] Michelin v Commission [1983[ECR 3461, p. 3511. For the interpretation of article 86 and of, in particular, the concept of 'abuse', see Akyürek-Kievits, H. E., The application of article 86 of the EEC treaty to state monopolies, in Stuyck - Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), pp. 91; and Kauper, T. E., Whither article 86? Observations on excessive prices and refusals to deal, in Hawk (ed.), 1989 Fordham Corp. L. Inst. (1999), p. 656.

[137] These examples refer to cases where dominant market power is directly abused to the detriment of suppliers or customers. See Bael. I. - Van Bellis, J.-F., Competition Law, pp. 576; Temple Lang J., Monopolization and the definition of "abuse" of a dominant position under Article 86 EEC Treaty, CMLRev 1979, pp. 345. An overview of

It can be regarded as a fact, as will be discussed below, that the Commission, with the support of the Court, had turned article 86 into an instrument of control over the conduct of large enterprises. This result has been achieved through an extensive interpretation of the concept of dominant position and abuse. This finally led to the assessment that, generally speaking, any large undertaking whose market share is significantly higher than that of its next competitor will easily be found to have a dominant position. The Commission has furthermore extended the scope of application of article 86 by resorting to extremely narrow market definitions in which a relevant market may be limited to the products or services of the company investigated, thus leading to a finding of dominance regardless of the competitive position of the firm concerned in the overall market.

Since the abuse may take many forms, the following discussion analysis the different types of abuse that have appeared most frequently in the case law of the Commission and the Court. However, it should be emphasized that the list of this case law is that the concept of abuse is capable of having a wide interpretation.[138] For instance, the ECJ accepted that abuse need not exist in the market in which the undertaking has a dominant position, but may instead relate to an ancillary or neighboring market.[139]

dd) Different Types of Abuse

(1) Refusal to Supply

A refusal to supply is a classic example of an abuse of a dominant position. Obviously an undertaking holding a dominant position, as with any undertaking, is entitled to select its customers, provided it does not do so on a discriminatory basis. However, it is not open to an un-

these cases is provided by Bellamy, C. - Child, G. D., Common market law of competition (1993), pp. 616.

[138] For instance, the ECJ accepted that abuse need not exist in the market in which the undertaking has a dominant position within the meaning of article 86, but may instead relate to an ancillary or neighboring market. See, for example, Telemarketing v CLT [1985] ECR 3261.

[139] E.g., Télémarketing v CLT [1985] ECR 3261.

dertaking in a dominant position arbitrarily to refuse to supply another undertaking without objective justification. Apart from a considerable case law on refusal to supply, two leading judgments need to be mentioned: *Commercial Solvents* and *Télémarketing.*

The first case[140] dealt with the refusal to supply raw materials and is an example of discrimination contrary to article 86 II (d). Commercial Solvents Corporation (CSC) had a dominant position for the production and sale of certain raw materials that are necessary for the manufacture of a certain drug (ethambutol). Instituto Chemoterapico Italianà (ICI), a related undertaking to CSC, acted as reseller of these raw materials produced by CSC and supplied, among others, another Italian producer (Zoja). CSC, firstly, decided to stop supplying raw materials to Zoja within the Community, and secondly, started itself to produce the drug.

The ECJ confirmed the decision of the Commission that qualified the refusal to supply Zoja as an abuse of a dominant position (mostly because SCS and ICI were related undertakings and had acted as an economic unit). The Court ruled that a manufacturer that has a dominant position in the production of a raw material and which is therefore able to control the supply to manufactures of derivatives may not refuse to supply these raw materials when such refusal risks eliminating all competition on the part of an important manufacturer of derivative products.[141] In other words, the ECJ upheld the Commission's decision that SCS, the only producer in the world of certain raw materials, enjoyed a dominant position in the common market. Herewith, the Court confirmed that it was abusive to refuse to supply the raw materials to Zoja.

The second case[142] concerned the supply of a service that is called Télémarketing.[143] The service consists of making telephone lines and telephone operators available to advertisers who

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[140] Commercial Solvents v Commission [1974] ECR 223.

[141] Commercial Solvents v Commission [1974] ECR 223, p. 250. For a critical view see Korah, V., Competition Law, pp. 117.

[142] Télémarketing v CLT [1979] ECR 3261.

[143] This service involves the indication in the advertisement of a telephone number that the public can call to obtain

thus in turn provide information to persons who respond to the advertisements. Compagnie Luxembourgeoise de Telefusion (CLT) and one if its subsidiaries (Information Publicité Benelux/IPB) which was also CLT's exclusive agent for television advertisements aimed at the Benelux countries were found by the ECJ to have had a dominant position in the market in television advertising aimed at viewers in French-speaking Belgium.[144] The main question which the ECJ had to answer was whether an undertaking like CLT had the right to reserve for itself (or a subsidiary under its control), to the exclusion of any other undertaking, an auxiliary activity, i.e. the provision of Télémarketing services, which could have been carried out by a third undertaking.[145] The Court ruled that "an abuse within the meaning of article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a

particular market reserves to itself or an undertaking belonging to the same group an auxiliary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such an undertaking."[146] Again, the abuse of a dominant position does not need to be a result of any direct activity by the dominant entity. It may arise as a consequence of the exercise of legal powers by a member state which restrict competition on the market. It would be an abuse of a dominant position for a dominant entity to reserve to itself or a member of its group ancillary activities on a neighboring but separate market, with the possibility of eliminating competition from such market.

Consequently, this case law shows that a dominant undertaking with regard to the production and supply of certain products that are necessary to compete in another market may not

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further information on the product that is being advertised.

144 Télémarketing v CLT [1979] ECR 3261, p. 3272.

145 The third undertaking was an enterprise skilled in the techniques of Télémarketing and had already conducted this service on the CLT channel.

146 Télémarketing v Commission [1979] ECR 3261, p. 3273.

refuse to supply these products and thereby reserve that market for itself. *Télémarketing* confirmed that this principle also applies to the supply of services by a dominant undertaking. Both cases have at least one thing in common, namely that an undertaking that is dominant in one market may not use its power in that market to eliminate or even to hinder effective competition in a separate but related market.

(2) Abusive Pricing

(a) Discriminatory Pricing

Another form of price discrimination that might be capable of infringing article 86 is the grant of certain types of rebates. As will be shown in this section, (systematic) discrimination may foreclose smaller firms and make it much harder for them to compete on their own merits. This concern arose in the landmark case of *Hoffmann-La Roche*,[147] in which fidelity rebates played an important role.

The key point of the judgment relates to a situation in which different purchasers who buy the same quantities may be treated differently if one - "subsidized" by a fidelity rebate[148] given from the supplier - buys all its requirements from this supplier, while the other uses several suppliers to meet its requirements. In general, this might not raise any concerns regarding competition but if they are competitors, the difference in treatment may be capable of putting the latter at a competitive disadvantage within the meaning of article 86 II (d). Moreover, fidelity rebates might, and in some cases actually will, restrict thus access of competitors to the market. As the ECJ put it, fidelity rebates are designed, through the grant of a financial advantage, to

[147] Hoffmann-La Roche [1979] ECR 461.

[148] The Court distinguished quantity discounts, which it considered as legal, from loyalty rebates which were not. A quantity discount is based on the volume of products from the same firm, and a loyalty discount (e.g. fidelity rebates), on the proportion of requirements bought from it. Yet quantity discounts may also foreclose small firms that cannot supply large quantities. The ECJ also referred to article 86 lit c and d, and it may be that conduct listed in article 86 should be assumed not to comprise competition on the merits.

persuade customers not to obtain their supplies from competing producers.[149] Indeed, where the dominant firm grants such a financial advantage, it may be difficult for smaller competitors to gain, at least, some business at the expense of the firm holding the dominant position. In this context, the ECJ clearly expressed that "an undertaking which is in a dominant position on a market and ties purchasers....by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position."[150] With this ruling the ECJ made clear that discounts that are conditional on the customer's obtaining most of its requirements from that supplier, should be considered as fidelity rebates, which comprise an abuse of a dominant position..

This appears to be in line with the classic case law. After the Court had condemned conduct that substantially reduced potential competition in *Continental Can*,[151] it confirmed its condemnation of practices such as requirements that customers should buy only from a dominant firm, and loyalty discounts promised to those buying most of their requirements from that firm. This was in principle confirmed in *Hoffmann-La Roche* on two grounds.

Firstly, obligations to buy a firm's total requirements or a large part of them and loyalty discounts foreclose competition and, secondly, they come within the examples of abuse listed in article 86. They make it harder for smaller competitors, who cannot supply a large percentage of a large customer's requirements, to compete. Furthermore, their effect is "...to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources

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[149] Hoffmann-La Roche [1979] ECR 461, p. 540.

[150] Hoffmann-La Roche v Commission [1979] ECR 461, p. 539.

[151] Continental Can v Commission [1973] ECR 215.

of supply."[152] This seems to be a clear reference to article 86 II lit c ("...applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage..."). In *Continental Can*, the ECJ stated that conduct leading to a substantial reduction of competition might infringe article 86, while in *Hoffmann-La Roche* the amount of foreclosure of competition to some suppliers of vitamins was small. Consequently, even a small reduction of competition may infringe article 86. However, the concern about foreclosing others reflects the desire in the Community to protect the interests of competitors wanting to enter a market as well as competition between existing supplies in the interest of customers.

(b) Predatory Pricing

Predatory pricing is a more direct exclusionary practice than unfair pricing in that it is often targeted to a particular competitor in an attempt to achieve market dominance. The principles to determine whether certain low prices are predatory and therefore abusive within the meaning of article 86 have been defined by the ECJ. The leading case in this area is that of *Akzo v Commission.*[153] In its judgment the Court enunciated a double test based on costs to be applied in order to determine whether prices are predatory.

Akzo was found guilty by the Commission[154] because of its attempt to drive a small competitor out of the market, i.e. the market for flour-additives in the UK and Ireland. This small competitor intended to use the profits derived from its flour-additives operations in the UK to expand in another, far more important market in which Akzo was also seen to be dominant. The Commission inferred the abusive nature of Akzo's prices from the exclusionary effects of Akzo's pricing behavior upon the complainant and the anti-competitive intent allegedly displayed by Akzo. Fundamental to the Commission´s decision was its conclusion that the small

[152] Hoffmann-La Roche v Commission [1979] ECR 461, p. 540.

[153] Akzo Chemie v Commission [1991] ECR 3359.

[154] ECS/Akzo (1985), OJ No L 374/1.

competitor had been eliminated as a competitor because of predatory pricing persuaded by Akzo. The abusive behavior of Akzo condemned by the Commission included direct threats against ESC, supply of flour additives at abnormally low prices, the maintenance of these low prices for a long period of time and the making of selective offers to ECS´s customers. The Commission alleged that this conduct was motivated by the desire to exclude ECS from the wider organic peroxides market including the chemical industry.

The ECJ´s judgment basically endorsed the Commission´s decision, but produced a more refined test for assessing predatory pricing which laid less emphasis in a finding of intent to carry out a predatory strategy. The Court established two tests for a finding of predatory pricing which are based on a mixture of economic and behavioral findings. The first test provides for a *per se* rule of illegality, and the second limb is linked to the finding of intentional predatory behavior. For the first test, the Court defined predatory pricing by distinguishing between prices lower than average variable costs and prices less than average total costs. The ECJ stated that where prices charged by a dominant undertaking were less than the average variable cost, they were likely to become abusive as a dominant undertaking would have no interest in offering such prices except to eliminate its competitors in order to raise its prices again on the basis of its dominant position. This was because every sale involves the dominant undertaking running at a loss.[155]

[155] What the ECJ did was nothing more than a comparison between the sale price and certain cost thresholds. Although the accounting formulae referred to in that case are presented as yardstick for determining the legality of the dominant undertaking´s pricing scheme, the Court justified these formulae by reference to the rationale underlying the prohibition of predatory pricing. Thus, the Court found that prices below average variable costs by a dominant firm are predatory. Indeed, predation is economically rational only if the predator has a reasonable possibility of raising prices after the elimination of the competitor to a level permitting recoupment of the losses incurred as a result of sales below cost. Alternatively, it could be argued that a dominant undertaking abuses its dominant position where it seeks to monopolize a non-dominated market by subsidizing sales below cost in that market with profits made in the dominated market. In such a case, however, proof of the abuse under article 86 requires a determination of the reasonable profit margin on sales of the dominated product.

Where the dominant undertaking charged less than the average total cost, which includes fixed costs and variable costs and is thus higher than variable costs, these prices will be regarded as abusive where they are fixed as part of a plan to eliminate a competitor.[156] The ECJ's judgment is important in that it goes some way towards defining what constitutes predatory pricing by a dominant undertaking. Having said that, the distinction between the average of variable costs and the average of total costs is not well-defined in the Court's judgment. This is so especially concerning the period of time for which average variable costs should be calculated and the required level of proof of intention to eliminate a competitor. Although there has been some disagreement on the measure of cost below which predation would be inferred, the average total cost standard seems to be the most conclusive: prices considerably below average total cost should be presumed predatory, unless there is sufficient reasonable justification to explain them.[157] However, the Akzo case shows that the practical computation of variable and total costs for a specific product or service may give rise to serious problems of interpretation and divergent views, which can only be resolved on the basis of well established accounting principles.

As discussed above, the Court has indicated that article 86 results in both an upper-limit (e.g. the prohibition against exclusively high prices), and a lower-limit(e.g. the prohibition against exclusively low prices), being imposed on the pricing practices of dominant companies.

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[156] In other words, prices below average total costs, i.e. fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as plan for eliminating a competitor. Such prices are considered as abusive 'since they can drive from the market undertakings that are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them' (ECJ, para 72 in its ruling). Moreover, 'it follows that article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using other than those methods which come within the scope of competition on the basis of quality.' From that point of view, however, not all competition by means of price can be regarded as legitimate. In general, see Rapp, R. 'Predatory pricing and entry deterring strategies: the economics of Akzo, ECLR 1986, pp. 233.

[157] Mastromalis, E. P., Predatory pricing strategies in the European Union: a case for legal reform, ECLR 1998, p. 216; for a critical view see Philips, L. - Moras, M., 'The Akzo decision: a case of predatory pricing?', J. Ind.

However, both the Commission and the Court have acknowledged that only firms holding dominant positions, at least in one relevant market, are capable of indulging in predatory pricing in that same or in other markets or sub-markets, in which they may subsidize their losses with the excessive profits earned in the dominated market. Predatory pricing strategies, entailing a systematic imposition by an established firm of prices below a certain level with the aim of excluding from the relevant market one or more of its small rivals, or of discouraging new entrants wishing to make inroads into that market, may develop in the European context and cause the obstruction of basic European competition goals. It could presumably have the consequence that only extremely powerful companies with abundant financial resources are in a position to consistently lower their prices to a substantial extent. Hence, European multi-market firms of a significant size, operating in many, largely segregated, national markets where diverse conditions prevail, may find it profitable to adopt predatory pricing in those markets where they face vigorous competition, while subsidizing their losses by charging more in other markets, where they are already powerful and do not face substantial competition.

Predatory pricing strategies may destroy those of the dominant undertaking's rivals which are at least vulnerable to normal competition on their merits, i.e. those that are equally or even more efficient than the dominant firm, but posses limited financial resources and technical facilities, which do not permit them to sustain a consistent price attack. Such strategies may also exclude less efficient firms from the market, although a dominant firm may decide merely to engage in competition on its merits, involving many intermittent, and perhaps not systematic, price cuts, with the same effects on its rivals.

ee) Effect on Trade

In order for the Community authorities to have jurisdiction over a practice, the conduct must have an effect on trade between member states. This requirement constitutes the natural

Econ. 1993, p. 321.

dividing line between the enforcement of the treaty rules on competition and national competition laws.[158]

At the other side of the spectrum, where the effects of the allegedly abusive behavior are confined to the territory of a single member state, article 86 will not apply. In that case, the behavior will be governed by national law. However, in practice the term "effect on trade" has been broadly interpreted by the Court of the European Community. Consequently, the coexistence of both the EC competition rules and national competition rules has given rise to concurrent enforcement.[159] However, "it is not sufficient to find that the structure of competition has been affected in each member state, since those effects may be of a local nature."[160] The effect on competition does not mean an effect on trade (between member states), which has an independent meaning. Where larger companies are involved, ´´the effect on competition will almost automatically lead to the required effect on trade, or at least to its possibility.´´[161] On the contrary, where local companies are involved, more must be shown than a mere effect on competition.

Following from the discussion above, is can be concluded that the wording of article 86 makes it clear that it is not market dominance as such that is prohibited, but its abuse. What is to be understood by the concept of dominant position is not defined in article 86 but has been clarified by the case law of the Commission and the Court as meaning a degree of market control that enables a firm to behave to an appreciable extent independently of its competitors and customers. As a prerequisite for the application of this definition, it is essential to establish the relevant market within the boundaries of which the market power of the company is concen-

[158] Hugin v Commission [1979] ECR 1869, p. 1899

[159] Van Bael, I. - Van Bellis, J.-F., Competition Law, pp. 253. See furthermore Faul, J., Effect on trade between member states and Community-member state jurisdiction, Fordham Corp. L. Institute 1984, pp. 485; Fine, F. L., Mergers and joint ventures in Europe: the law and policy of the EEC (1994), p. 124.

[160] Hugin v Commission [1979] ECR 1869, p. 1920.

trated. Depending on how broadly the parameters of the relevant market are drawn, the dominance will be easier or more difficult to establish. As to the concept of abuse, the list of examples provided in article 86 is not exhaustive. The required effect on trade between member states gives rise to some considerations under article 85. However, it should be noted that under article 86 the required effect on trade has been inferred from the impact of the abuse on the competitive structure within the common market.

In the Akzo decision, both the Commission and the Court found that Akzo abused its dominant position, in violation of article 86 in so far its behavior had an actual or potential effect on trade between member states, resulting in the segregation of the relevant national markets. The application of this article thus was contingent on the assessment of the adverse impact of the involved undertakings on the fulfillment of the goal of European market integration.[162]

2. State Measures: Article 90 TEC

A discussion of article 90[163] requires a general distinction to be made between state entrepreneurship and national monopolies. The TEC is neutral towards state entrepreneurship. It follows from article 222 that it makes no difference whether companies are state-owned or privately owned. They are all subject to the Treaty provisions, including those relating to competition. For undertakings to fall foul of these provisions, they must behave in an anti-competitive manner either by colluding among each other or by abusing a dominant position.

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[161] Michelin v Commission [1983] ECR 3461, pp. 3522.

[162] See Martinez, H., 'Predatory pricing literature under European competition law: the Akzo case, LIEI 1995, pp. 121; Mastromanolis, E. P., Predatory pricing strategies in the European Union: a case for legal reform, ECLR 1998, pp. 215.

[163] Article 90 reads as follows: (1) "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94." (2) "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be af-

National monopolies, on the one hand, seem to reunite two of the worst evils from a competition policy view point: lack of market integration and lack of competition.[164] The major TEC provision dealing with national monopolies is article 90[165] and the main question concerning the interpretation of this provision was for a long time whether it prohibits the mere existence of such a monopoly or whether something extra was needed. The monopolies questioned in this study are covered by article 90. The wording of this provision suggests that their mere existence is not in itself a violation of the TEC provisions, particularly those regarding competition. Article 90 seems to take it for granted that member states grant special or exclusive rights to certain firms. It only prohibits them from enacting or maintaining in force any measures contrary to the TEC. However, a string of ECJ judgments have begun to erode this interpretation of article 90 I.

The Sacchi judgment[166] has frequently been cited to support the argument that the mere granting of exclusive rights to firms, whether they are private or public, is not illegal but that other measures taken with respect of the beneficiaries of such rights needed careful scrutiny to ensure that they comply with the TEC provisions. Article 90 I was therefore traditionally considered to be a simple 'article de renvoi': it did not add anything of substance to the TEC rules to which it referred. The case law[167] of the ECJ has begun to qualify this. In certain circumstances, the mere granting of exclusive rights can now be seen to infringe the TEC provisions, in particular article 86. This case law has come to two conclusions with regard to natural monopolies.

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fected to such an extent as would be contrary to the interest of the Community."

[164] For the basic philosophy behind EU competition law and its role, see Massey, P., Reform of EC competition policy: substance, procedure and institutions, in Hawk (ed.), 1996 Fordham Corp. L. Inst. (1997), pp. 92.

[165] In this study article 37 is not dealt with.

[166] Sacchi [1991] ECR I-1979.

[167] Höfner [1991] ECR I-1979; ERT [1991] ECR I-2925; Porto di Genova [1991]ECR I-5889; RTT [1991] ECR I-

Firstly, when a company enjoys an exclusive right to determine at its own discretion certain conditions for entry into a market where it operates in competition with other companies, the latter do not have equal opportunities to compete. The firm that holds the exclusive right is in a position to discriminate. The distortion of competition is a structural one: it stems from the fact that one of the undertakings concerned is judge and party to the competitive process and has therefore the possibility to abuse its privileged status. Article 86 prohibits a dominant company from exercising its market power in a discriminatory or exclusionary fashion. These are examples of anti-competitive abuses. The difficult part of the 'judge and party' approach is that, in order to fit it within the scope of application of article 86, one must somehow assume that actual discriminatory behavior will inevitably occur.[168]

The second conclusion is derived from the *Höfner* and *Porto di Genova* cases.[169] While the beneficiary of an exclusive right appears to be manifestly incapable of serving its customers well, their behavior falls within the second category of abuses covered by article 86; namely customer exploitation. Were it not for the fact that the existence of an exclusive right forecloses all competitive opportunities for newcomers, such customer exploitation would be a form of abuse.

These two findings inspired the Commission to adopted its Equipment and Services Directives in the sector of telecommunications. However, these directives are not solely based on article 90 in combination with article 86 but this rationale was clearly present and it is a rationale that accords best with the competition provisions.[170]

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168 Gyselen, L., National monopolies - an evolving state action doctrine under article 90 EEC, in Stuyck-Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), p. 3.

169 Höfner [1991] ECR I-1979; Porto di Genova [1991]ECR I-5889.

170 Gyselen, L., National monopolies - an evolving state action doctrine under article 90 EEC, in Stuyck-Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), p. 4. See further Buenda, J. L. Liberalization and state intervention. Application of article 90 of the EC Treaty, Competition policy newsletter 1995, pp. 5; Papaconstantinou, H., Free trade and competition in EEC law, policy and

With regard to article 90 II, beneficiaries of exclusive rights which are entrusted with the operation of services of general economic interest are not subject to the TEC provisions, in particular the competition rules (arts 85ff) when the application of these provisions obstructs the performance of the particular tasks assigned to them. This means that, assuming that article 90 I in combination with article 86 encompasses the granting of certain exclusive rights as such, article 90 II acknowledges that there may be objective justifications for this. A parallel can be drawn with the *Cassis de Dijon*[171] case law concerning the mandatory requirements which justify state-directed obstacles to the free movement of goods.[172]

As regards the third paragraph of article 90, the above mentioned telecommunications judgments stand for the general proposition that the Commission can regulate the obligations of member states under the TEC and hence that its power is not limited to simple surveillance of the member states' compliance with already existing provisions of Community law. In these judgments, the Court had observed that article 90 III is available as a legal basis for regulatory action even if there exist other legal bases for legislative action by the Council (particular article 100 or 100a).

II. The Application of Art 86 TEC to the Telecommunications Sector

The application of the competition rules to interconnection, or more broadly, to issues related to interconnection must be examined at, at least two levels. Firstly, an obligation and the corresponding right to interconnect (including the conditions under which interconnection should take place) requires, principally, an analysis of on article 86.[173] The second level is the

practice (1988), pp. 27.

[171] Rewe ('Cassis de Dijon') [1979] ECR 659. See Dommering, E. J., Article 90 of the EEC treaty and the telecommunications, broadcasting and postal services sector, in Stuyck - Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), pp. 65.

[172] See, for instance, Commission v Netherlands [1991] ECR 2545.

[173] For the application of article 85 in the telecommunications sector, see Graak, C., EU-telecom markets and international networks alliances: developments, strategies and policy implications, Discussion paper no. 8,

possible application of the exception for public undertakings set forth in article 90 (2) exempting certain anti-competitive practices related to interconnection from the application of the competition rules. In the absence of case law regarding interconnection in telecommunications under the competition rules, the analysis below will necessarily be limited to the application of the existing case law by analogy.

1. Essential Facilities

This section deals with the issue of ensuring access to facilities on the basis of the EC competition rules.[174] It outlines a number of cases involving issues of access to infrastructure and other facilities as well as the shared use of such facilities. Because of the absence of cases in telecommunications, it focuses on the transport sector where rules regarding third party access (TPA) have, at least principally, been developed on the basis of the competition rules. The general discussion of the cases decided under article 86 regarding refusal to give access to certain products, services or facilities should serve a general basis for the following section that concerns selected competition aspects with regard to the issue of interconnection.

Before going into detail, some general comments are called for. Markets, especially as concerns telecommunications, have technically been opened to competition. However, monopoly telecommunications companies do not appear overnight and hence, the market does not suddenly become competitive once regulatory barriers to entry have been removed. Even where a second, third or more operator may have been granted a license, the markets cannot be re-

European Institute for International Economic Relations (1995); Hitchings, P., Access to international telecommunications facilities, ECLR 1998, pp. 95, and, Ungerer, H., EC competition law in the telecommunications, media and information technology sector, Fordham Int'l L.J. 1996, pp. 1146, 1150.

[174] There appear to be two sources of the essential facilities principle: US regulatory and antitrust law, and EC competition law under article 86. For a comparative analysis, see Venit, J. J. - Kallaugher, J. J., Essential facilities: a comparative law approach, in Hawk (ed.), 1994 Fordham Corp. L. Inst (1995), pp. 315, and especially, pp. 332. For the nature and utility of the essential facilities doctrine in US law, see, e.g., Areeda, P., Essential facilities: an epithet in need of limiting principles, Antitrust L. J., 1990, pp. 841, and Easterbrock, F., On identifying exclusionary conduct, Notre Dame L. Rev. 1986, pp. 972.

garded as competitive. Access to the existing network(s) of existing operators is of importance to new entrants and the principles that the Commission have been establishing concerning essential facilities are likely to be of considerable value in the future. With regard to interconnection, this means that, irrespective of the market power of a TO, it is required to carry calls originating on other operators´ networks.[175] It can be stated that the principle that companies in dominant positions have a duty to provide access to genuinely essential facilities on a nondiscriminatory basis is one of the fundamental EC law principles of importance; not only within the telecommunications sector but within the transmission of energy, in transport and in many other sectors as well.

a) The Essential Facilities Doctrine

The term "essential facilities" was explicitly introduced to in EC competition law in only two Commission Decisions relating to circumstances involving access to harbor facilities.[176] These cases have launched a debate as to the scope and consequences of an ´essential facilities´ doctrine under EC competition rules and have also raised the question as to whether there is a need to introduce this concept into EC competition law.[177]

At a more general level, this debate covers the question of how far the competition rules reach and which obligations they impose on economic operators when third parties apply for

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[175] As Cowen, T. (The essential facilities doctrine in EC competition law: towards a 'matrix infrastructure', in Hawk (ed.) 1995 Fordham Corp. L. Inst. (1996), p. 533) puts it: 'The objective is simple: if a person makes a phone call to another person who subscribes to a different company's network, he will be able to get through. To do otherwise, would enable operators with large subscriber bases to prosper at the expense of new entrants, and new entrants might lock in a category of customers.'

[176] Commission Decision of 21 December 1993, Sea Containers/Stena Sealink, OJ 1994 L 15/8, and Commission Decision of 21 December 1993, Rödby, OJ 1994 L 55/52. For previous Commission Decisions see BBI/Boosey & Hawkes, OJ No L 287/36, Napier Brown - British Sugar, OJ No L 284/41, and Decca Navigator System, OJ No L 43/27.

[177] See, e.g., Areeda, P., Essential facilities: an epithet in need of limiting principles, Antitrust L.J. 1990, pp. 841; Furse, M., The 'essential facilities' doctrine in Community law, ECLRev. 1995, pp. 469; Temple Lang, J., Defining legitimate competition: companies' duties to supply competitors and access to essential facilities, in Hawk (ed.), 1994 Fordham Corp. L. Inst. (1995), pp. 279.

access to the products, services and facilities that they possess. Although the EC Courts have not explicitly referred to the concept of essential facilities, some previous judgments are nevertheless generally referred to as involving elements similar to an essential facilities doctrine. This is particularly so for the cases decided by the Commission under article 86, some of which also involve elements of an essential facility doctrine.[178]

b) EC Jurisprudence

The first passage of this section deals with ECJ cases, whilst the second deals with cases decided by the Commission. As already touched upon, two cases are as essential starting point with regard to the application of the competition rules to refusals to supply and refusals to deal.

In *Commercial Solvents*,[179] the ECJ stated that a refusal to supply raw material to a competitor in a downstream market was an abuse of a dominant position within the meaning of article 86. The Court found that Commercial Solvents was in a dominant position for the production of a raw material for the production of a specific chemical. Commercial Solvents refused supplies to a downstream competitor that had been a previous customer of Commercial Solvents and who had previously regularly obtained from it the needed raw material for the production of a chemical. The Court considered that the plans of a dominant undertaking to begin producing the downstream product itself did not justify its refusal to supply the raw material to its competitor and former customer, when the refusal would have the effect of eliminating the competitor from the market.[180] The Court affirmed the Commission´s finding[181] of abuse, ruling that 'an undertaking being in a dominant position as regards the production of raw material and

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[178] As will be seen, the Commission's approach to the emerging essential facilities doctrine is probably most clearly illustrated by its decision on *Sea Containers versus Stena Sealink*.

[179] Commercial Solvents v Commission [1974] ECR 223.

[180] Idem.

[181] In its decision, the Commission found that the refusal to supply was an abuse of a dominant position within the meaning of article 86, and ordered the defendant to reinstate supplies (see Zoja/CSC-ICI, OJ L No 299/51).

therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing those derivatives (in competition with its former customers) act in such a way as to eliminate competition which, in the case in question, would amount to eliminating one of the principal manufacturers of ethambutanol in the Common Market.'[182]

In the second case, *United Brands*,[183] the ECJ stated that a refusal to supply an existing customer who had started to market a competing brand of bananas amounted to an abuse of a dominant position since it was not proportional to the threat to the legitimate business interests of the dominant undertaking, taking into account the respective economic strengths of the competing undertakings. Although this case mainly concerned a practice unfavorable to a dependent customer, the Court found that the abusive practice by United Brands would have indirect anti-competitive effects on the position of competitors of United Brands as well and, therefore, on the market structure. The Court considered that the conduct of United Brands could have exclusive effects on its competitors since it would discourage other distributors for promoting competing brands and would therefore strengthen United Brands' position.[184]

The cases discussed have at least the following elements in common. Firstly, they all involved forms of refusal to supply existing customers (as opposed to new customers). In the judgments, the ECJ also considered that the undertakings were using their dominant power in one market to eliminate competition in a related market. In other words, their practice has been qualified as monopoly leverage. As in other cases decided under article 86, the ECJ indicated that a practice which *prima facie* appears to be abusive may not be so in the case that it is objectively justifiable. These principles will be developed further in this study when applied to the specific issue of interconnection in section.

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[182] Commercial Solvents [1974] ECR 223, p. 250.

[183] United Brands v Commission [1978] ECR 207. See therefore, Venit, J. S. - Kallaugher, J. J., Essential facilities: a comparative law approach, in Hawk (ed.), 1994 Fordham Corp. L. Inst. (1995), pp.235.

As mentioned above, the Commission adopted two decisions in which it expressly referred to the concept of "essential facilities" and in which it imposed an obligation to give access to such facilities on a non-discriminatory basis. In *Sea Containers/Stena Sealink*,[185] the Commission Decision concerned a dispute between two ferry companies, Sea Containers and Stena, regarding the access to be given by Stena to Sea Containers to the port of Holyhead for the operation of high-speed ferries. Stena, which is both a British ferry operator and the port authority at Holyhead, was refusing to grant to Sea Containers access to the port, under the conditions requested by Sea Containers, for the purpose of commencing high-speed ferry services, thereby protecting its own ferry services from competition. Although the Commission eventually rejected Sea Containers' application for interim measures since the parties had arrived at a compromise solution which was acceptable to both of them, the Commission issued a decision in principle concerning the access by third parties to essential facilities and concerning the power of the Commission to adopt interim measures ordering such access.

The Commission considered Stena to hold a dominant position on the market for the provision of port services for passengers and vehicle ferries between the port of Holyhead, Wales, and Dun Laoghaire (Ireland). This was an essential route since it is the shortest route between the UK and Ireland and accounts for among 50 to 60 per cent of the ferry traffic between the two countries. The Commission stated that Stena had *prima facie* abused its dominant position because a company that both owns and uses essential facilities[186] may not refuse its competitors' access to that facility or grant access on less favorable terms than those it gives to its own services.[187] Stena had refused such an access by blocking any negotiation or proposition

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[184] United Brands v Commission [1978] ECR 207, p. 238.

[185] Sea Containers/Stena Sealink (1994), OJ No L 15/8.

[186] According to the definition of the Commission, these refer to a a facility or infrastructure without access to which competitors cannot provide services to their customers.

[187] The Commission held in its decision, at p. 66, that an 'undertaking which occupies a dominant position in the

made by Sea Containers and by offering inadequate slots to it. In summary, it may be said that the Commission concluded that Stena had to give access to the essential port facilities under reasonable and non-discriminatory conditions, which meant, in the particular circumstances of that case, under conditions at least equally suitable to those granted to its own services.

In the second case,[188] the Commission addressed an article 90 (3) decision to the government of Denmark stating that a double refusal by the Danish transport minister to allow Stena to build a private commercial port in the close vicinity of the port of Rödby and to provide from there ferry services, was incompatible with article 90 (1) read in conjunction with article 86. The Commission found that this refusal amounted to the extension of a dominant position held jointly by DSB, the Danish public undertaking in question, and the Deutsche Bundesbahn (DB). DSB held, by virtue of the exclusive right granted to it by the state in its capacity as port authority, a dominant position in Denmark within the market for the organization of port operations with regard to the transport of passengers and vehicles by ferry between Rödby and Putgarden. It furthermore operated (in conjunction with DB) as a carrier on the route from Rödby to Putgarden.

As the only two ferry companies on this route, the Commission found DSB and DB to be jointly dominant. The Commission qualified the port facilities held by DSB to be an essential facility, and considered that an undertaking which owns or manages an essential port facility from which it provides a maritime transport service may not without any objective justification refuse to grant shipowners wishing to operate on the same route access to that facility without infringing article 86. Since the refusal to give access to Stena Sealink was due to a state measure

provision of an essential facility and itself uses that facility (i.e., a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives to its own services, infringes Article 86 if the other conditions of that Article are met.'

[188] Rödby (1994), OJ No L 15, p. 52.

and not to DSB's behavior, the Commission also referred to the case law according to which the extension, resulting from a state measure, of the dominant position of a public undertaking or undertakings to which a state has granted special or exclusive rights, constitutes an infringement of article 90 (1) read in conjunction with article 86.[189]

In summary, applying an essential facilities doctrine results in special responsibilities and obligations being imposed on those holding the essential facility. It is crucial to the application of an essential facilities doctrine to determine, firstly, what such a facility is, and secondly, to determine what the rights and obligations imposed on those holding the facility are, particularly with regard to giving access to the facility to third parties. Although it may be stated that the ECJ made an important contribution to clarifying the doctrine in this respect, it must be noted from the outset that the existing case law does not provide a fully-reliable and adequate framework to deal with all types and all issues related to refusal to supply. However, the duty to provide access to a facility arises if without access there is, in practice, a barrier to competitors of the dominant firm, or where, without access, competitors would be subject to a serious competitive handicap that would render their activities uneconomic. In other words, essential facilities cases are not exceptions to normal rules, but are specialized examples of general rules concerning discrimination and competitive barriers imposed by dominant firms.

Moreover, there is no necessary implication of untoward behavior on the part of the essential facility operator, but rather a requirement that it has regard to 'normal commercial practice.' This requires that the facility operator must offer access where an independent operator would also offer access. In light of the above, there are at least, five requirements which need to

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[189] In addition to the above mentioned decisions of the Commission, there are a number of other Commission decisions which concern cases where the Commission has used the competition rules to ensure access by undertakings to products, services or facilities necessary to carry out economically viable operations in certain markets, without necessarily using the term essential facility; for an overview of these cases see Temple Lang, J., Defining legitimate competition: company's duties to supply competitors and access to essential facilities, in Hawk (ed.), 1994 Fordham Corp. L. Inst. (1995), pp. 247.

be met for this abuse to be proved. Firstly, the facility must be essential; that is where without access to the facility, the proposed activities would be rendered either impossible or at least seriously and unavoidably uneconomic; secondly, there has to be sufficient available capacity on the part of the essential facility operator. Thirdly, it must be shown that competition would be restricted by a denial of access; fourthly, the service provider seeking access has to be prepared to accept access on non-discriminatory terms, and finally, there must exist no objective justification for refusal of access.[190]

What remains is the question of just how many competitors must be provided with access to these facilities? Even when the dominant firm has a duty to provide access to essential facilities to competitors, it appears from the case law that the characteristics of the facility are relevant, and that the operator is not necessarily obligated to provide access to an unlimited number of competitors. Particularly in the case of physical facilities, there may be scope for only a limited number of competitors. In such a situation the dominant undertaking is not entitled to keep the facility completely to itself and to prevent all competition, but it may offer access to an appropriately limited number of competitors on terms equivalent to those of its own operations. Such an offer must itself be nondiscriminatory. The owner of the facility must decide objectively what is the optimum or maximum number of users that can satisfactorily use the facility, and then allocate them in a nondiscriminatory way, without giving preference to its own operations.[191]

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[190] On the basis of *United Brands*, it is arguable that the requirement to supply may exist even where the facility in question is not essential, provided that the operator is nevertheless dominant within the relevant market, that the refusal to offer is not ´normal commercial´, behavior, and that the refusal distorts competition on the downstream market.

[191] Temple Lang, J., Defining legitimate competition: companies' duties to supply competitors and access to essential facilities, in Hawk (ed.), 1994 Fordham Corp. L. Inst. (1995), p. 289.

The Commission has defined essential facilities as being a facility or infrastructure without access to which competitors cannot provide services to their customers.[192] It appears to have coupled this concept with a general prohibition for those holding such facilities, again discrimination with regard to other economic operators unless such discrimination can be objectively justified. In order to determine whether there is discrimination and whether the conduct of the dominant undertaking is abusive, the Commission introduced a method that consists of comparing the behavior of the dominant undertaking with that of a hypothetical independent body holding the facility but without being active within the relevant markets. Although it may be acknowledged, on the basis of the ECJ's case law, that there is a broad principle in Community law that companies in a dominant position must not refuse to supply their goods, services or infrastructure if refusal to supply would have a significant effect on competition, neither the scope of this principle or its exception have yet been fully clarified. In the absence of clear precedents in this area, opinions may diverge as to when obligations to supply arise under article 86 and when refusals to give access may be justified. On the other hand, the essential facilities doctrine could have an important role in the context of so-called dual cases, normally, but not necessarily, involving article 90, in which, as a result of the grant of a state monopoly over an essential facility or infrastructure, a company is charged at once both with the operation of that facility or infrastructure and is, at the same time, a dominant operator on the downstream market. In addition, the essential facilities doctrine may also provide a useful analytical tool in other cases where there is no real relevant market for the provision of the facility.

Once it has been determined that a dominant undertaking is under an obligation to supply or to give access, it has to be determined under which conditions such supply or access must be granted. Although the principle of non-discriminatory access is useful in this respect, it may not always provide an adequate answer. Whereas it may be sufficient for dealing with issues such as

[192] Commission Decision in Sea Containers/Stena Sealink, OJ No L 15/8, p. 66.

technical conditions for access, the principle of non-discrimination may prove to be less helpful when dealing with pricing. The test of non-discrimination should thus be supplemented by other tests such as those based on abusive pricing or reasonable pricing.

2. Selected Competition Aspects with Regard to Interconnection

a) The Obligation and Right to Interconnect: Analysis in the light of Article 86 TEC

A telecommunications network is a facility necessary to allow actual or potential TOs (other than formerly-monopolistic ones) to develop viable, economic telecommunications operations. Thus, the question as to whether competition rules result in an obligation for operators of telecommunications networks to give its competitors access to such networks and to interconnect them with the network of the other telecommunications operator, must be examined. This involves an analysis of the possible obligation for TOs to permit interconnection under article 86. The discussion below follows the classic approach to cases under article 86 entailing, firstly, the determination of whether or not an undertaking is in a dominant position, and secondly, the application of the notion of abuse.

As was discussed above, the interconnection regime imposes a number of obligations upon certain operators of former public telecommunications networks. The specific interrelationship between the competition rules and the ONP rules is discussed further below. Moreover, the regulatory framework, including the specific application of the competition rules and the specific regulatory instruments which are being put in place to deal with interconnection should provide an adequate degree of legal certainty for all undertakings concerned. They should, at least, be fully aware of their specific rights and obligations when making their decision whether or not to invest in this rapidly-developing sector .

aa) The Dominant Position of Telecommunications Organizations

In order for an undertaking to provide services in the telecommunications market, it will need to obtain access to various facilities. For the provision of telecommunications services, for

instance, interconnection to public telecommunications network will usually be necessary and one has to consider the fact that access to this network will almost always be in the hands of a dominant TO. Whether or not a company is dominant does not depend solely upon the legal rights granted to that company. The ending of legal monopolies did not necessarily put an end to dominance. Indeed, notwithstanding the liberalization directives, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.

The difficulty in defining the concept of dominant position within the meaning of article 86 starts with the determination of the appropriate market definition when dealing with interconnection. These difficulties are mainly due to the evolutionary nature of the markets in the telecommunications sector which in turn are very much influenced by the changing regulatory environment. Given the fact that this study is principally concerned with interconnection between telecommunications infrastructures, the discussion below focuses on market definition in this context. In assessing relevant markets it is, at least in a short term, necessary to look once again at developments in the market

(1) The Relevant Product and Service Market

A product or service market comprises the totality of the products/services that, with respect to their characteristics, are particularly suitable for satisfying content needs and are only to a limited extent interchangeable with other products/services in terms of use, price and consumer preference. Determining the market from a product service point of view involves, as mentioned, an assessment of both demand side and supply side substitutability.

As far as demand side substitutability is concerned, the ECJ has held that "the concept of the relevant market in fact implies that there can be effective competition between products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all products forming part of the same market in so far as a specific use of such prod-

ucts is concerned."[193] This raises, firstly, the question, of whether for purposes of applying article 86 to issues related to interconnection, the infrastructure of the incumbent TO must be seen as interchangeable with other types of telecommunications infrastructures such as alternative infrastructures provided, for instance, by cable TV networks or networks of utilities companies. Secondly, it must be determined whether fixed telecommunications networks are interchangeable with networks for mobile communications and satellite communications.

According to the above definition of the ECJ, these questions have to be answered by taking into account the specific interests of the other potential TOs wanting to interconnect their infrastructures with other telecommunications infrastructures. The infrastructure of a local fixed network operator, for example, which is the only provider of telecommunications network access with regard to a number of customers would be the only candidate from the demand side for other TOs of all size to interconnect with. Thus, for other TOs there would be no interconnection alternative, at least from the demand side, which is interchangeable with this local network infrastructure. The appropriate market definition should therefore be based on the notion of "access to telecommunications customers." In each individual case, it should be determined whether or not certain types of telecommunications infrastructure are interchangeable with each other with regard to such access. This market definition appears to be in line with the position taken by the Commission in its decision in *Sea Containers v Stena Sealink*,[194] where the Commission defined the relevant market as being the market for the provision of port facilities for car and passenger ferry operations on the central corridor route between the UK and Ireland.

The TO's infrastructure is special and may in some cases be unique in providing access only via its transmission medium to its particular customers. Indeed, any alternative infrastructure provider would also be distinguished in this way as providing a particular route to its cus-

[193] See, in particular, Michelin v Commission [1983] ECR 3461, p. 3505.

[194] Sea Containers/Stena Sealink (1994), OJ No L 15/8.

tomers. This route might have particular characters and capabilities that may or may not be replicated in other networks.

Furthermore, the notion of market definition in telecommunications is directly related to the characteristics of the different telecommunications infrastructures concerned. Certain telecommunications infrastructures, for example, may be capable of carrying certain signals coming from other TO's networks whereas others may not be. Similarly, a certain infrastructure may not be capable of providing capacity sufficient for carrying the signals coming from the other TO's networks, and moreover, individual telecommunications customers may be connected to more than one infrastructure, in particular, nowadays where customers might increasingly subscribe to both a fixed and a mobile network. These different types of access for customers may have to be treated as part of separate markets depending on the uses for which interconnection is requested and the way in which alternative networks[195] are utilized. The elements mentioned above may require a further narrowing down of the market definition in individual cases.

The test for determining the relevant market so far as telecommunications, and, particularly, interconnection is concerned could be supplemented by the classic test for determination of demand side substitutability, i.e. the cross-elasticity of demand. Although the market definition given above appears to be in line with the classic case law of the ECJ,[196] it may be subject to criticism as being artificial since in reality there would be no true market, at least in the economic sense of the word. Therefore, it seems to be arguable that a wider market definition has to be adopted which is not limited to the market for the facility to which access is essential for the other TO. On this wider market, which would consist of the provision of certain telecommunications services (to be determined on the basis of the specific circumstances of each case),

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[195] E.g., radio communications networks providing services to fixed as well as mobile terminals.

[196] See, for instance, Télémarketing v Commission [1985] ECR 3261, where the ECJ considered that there was a separate market for a service that was indispensable for the activities of other undertakings. See further Commercial Solvents v Commission [1974] ECR 223.

the fact that a TO holds the access to its customers could then be taken into account as a element in determining whether or not the TO is dominant in the relevant telecommunications market.[197]

The latter market definition might be seen as an alternative to the market definition described in the paragraph mentioned above. Both definitions could be combined in order to deal with issues related to interconnection. In order to determine the position of market strength of a TO and to derive from that the rights and obligations imposed on the TO, an examination of the market position of that TO in both markets should be envisaged; i. e. the market for access to telecommunications customers and the relevant market for telecommunications services. TOs holding a dominant position in both markets could be subject to further obligations and restrictions on their conduct than those who do not. It should be noted that using such a concept would be rather innovative under Community law but merits further exploration. However, the discussion below focuses on the first market definition outlined above, which appears to be the most suitable to deal effectively with interconnection issues under article 86.

As far as supply side substitutability is concerned, it has to be examined whether suppliers of services that are not demand substitutable in specific uses can readily switch their resources so as to provide and supply demand substitutable services. Given the relatively short time frame which is generally taken into account by the ECJ and the Commission also in examining supply side substitutability, it is difficult to see how certain existing infrastructures which do not provide the access needed by other TOs, could be qualified as being part of the same market as the market in which the position of the relevant TO is to be assessed. For example, although it may not be too difficult to enhance alternative infrastructures such as cable TV networks so as to be capable of carrying all sorts of telecommunications signals, it is more difficult to see how such

[197] I.e., whether the access held by the TO puts it into a position to prevent effective competition on the market for the telecommunications services concerned.

infrastructure could in the short term establish a market position covering access to customers for telecommunications services needed by the other TOs. However, it cannot be excluded that in individual cases there may be a degree of supply side substitutability that should be taken into account in defining the relevant market. Again, supply side substitutability is generally not used to define relevant markets; in practice it cannot be clearly distinguished from potential competition.[198] Demand substitutability is therefore the main tool used to define the relevant product market on which restrictions of competition for the purpose of article 86 can be identified. As regards the relevant product market, the ending of the legal monopolies in the telecommunications sector could lead to the emergence of a second type of market, related to the market for the provision of services, that of access to facilities[199] which are necessary to provide these services. In other words, there could be two types of relevant product markets in the telecommunications sector. On the one hand, that of a service to be provided to end-users,[200] and that of physical access to those facilities necessary to provide that service to end users. However, in the context of any particular case, it will be necessary to define the relevant services and access market. For a service provider to provide services to end users it will often require access to facilities. Given the pace of technological change in the telecommunications sector, any attempt to define particular markets could run the risk of rapidly becoming obsolete. Again, the definition of particular product markets is therefore best done on a case by case basis. In many of such cases, the Commission will be concerned with physical issues, where what is necessary is inter-

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198 Supply side substitutability and potential competition are used for the purpose of determining whether the undertaking has a dominant position or whether the restriction of competition is significant, or whether there has been the elimination of competition.

199 In the sector in question, interconnection to the (former) public telecommunications network is a typical example of such access without which it is impossible for OTOs to provide comprehensive voice telephony services.

200 The Commission defined that market broadly as 'the provision of any telecommunications service to a user.' See Communication from the Commission. Notice on the application of the competition rules to access agreements in the telecommunications sector. Framework, relevant markets, and principles, COM(96) 649 final, p. 14.

connection to the network of the incumbent TO. It may be tempted to resist providing access to third party service providers or other network operators, in particular in areas where the proposed service will be in competition with a service provided by the TO itself. It will be the task of competition law to ensure that these prospective access markets are allowed to develop, and that the incumbent TOs are not permitted to use their control over access to hinder developments on the services market.[201]

(2) The Relevant Geographical Market

The geographical market to be determined for the applicability of article 86 must be the common market as a whole or a substantial part of it. The relevant geographical market is also an area in which the conditions of competition applying to the product or service concerned are the same for all traders/suppliers. The discussion of the relevant geographical market should be seen in the light of the discussion above concerning the relevant product or service market. This results in the relevant geographical market being, in principle, the area in which the telecommunications customers to which access is needed by the other TOs are located. This territory may cover a member state or may be broader, or it may be limited to a part of a member state. As regards the provision of telecommunications services and access markets, the relevant geographic market could be 'the area in which the objective conditions of competition applying to service providers are similar.'[202]

Article 86 is only applicable where a dominant position is held in a substantial part of the common market.[203] There should be no doubt that TOs whose network infrastructure covers

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[201] In addition, one has to keep in mind that in the telecommunications sector, liberalization can be expected to lead to the development of new, alternative networks which will have a big impact on access market definition involving the incumbent TO.

[202] Communication from the Commission of the European Communities. Notice on the application of the competition rules to access agreements in the telecommunications sector. Framework, relevant markets and principles, COM(96) 649 final, p. 15.

[203] See section I.1.2.1.

the entire territory of a member state are in a dominant position within a substantial part of the common market. The individual territories of member states have been constantly qualified in the case law of the ECJ as a substantial part of the common market. In the light of the definition given above of "a substantial part of the common market", it is arguable that an operator of a network infrastructure covering the entire territory of one of the smaller member states would also be dominant in a substantial part of the common market, taking into account the pattern and volume of the telecommunications traffic they would carry.

In other cases, it seems to be less obvious to see how, on the basis of the test mentioned above, a local network infrastructure provider could be found to occupy a dominant position in a substantial part of the common market. In this respect, reference should be made to the rulings of the ECJ in *Almelo*[204] where the Court held, regarding a regional distribution company of electricity, that "...although the conclusion cannot be automatically drawn that a dominant position is held in a substantial part of the common market by an undertaking which.....has a non-exclusive concession covering only part of the territory of a member state, a different assessment must apply where that undertaking belongs to a group of undertakings that collectively occupy a dominant position." However, in order for such a collective dominant position to exist, the undertaking in the group must be linked in such a way that they adopt the same conduct on that market."

The ECJ has been quite vague on the concept of collective dominance, in particular, concerning the types of links between undertakings that may lead to their occupying a collective dominant position. However, the concept of collective dominance could play an important role in the telecommunications sector and, in particular, as far as interconnection is concerned. This concept could enable the Commission to intervene where an infrastructure provider taken alone would not fall within the prohibition contained in article 86 but would do so if considered

jointly with other infrastructure providers. The providers could be found to hold a collective dominance within a substantial part of the common market. It would be arguable that the fact that TOs use common standard terms and conditions (at least for interconnection agreements) may lead to a finding of collective dominance since through the use of those common terms and conditions they would adopt the same conduct within the market.[205]

Again, the definition of the relevant market is of primary importance, as in any competition case, but is particularly difficult here given the highly dynamics telecommunications market. In addition, the relevant geographical market will vary substantially depending on the products and customers involved. Thus, where a definition along national lines may well still be appropriate for the sale of network services to service providers, the provision of global, seamless, end-to-end services, directly or indirectly, to end users will naturally tend towards a more global market definition.

bb) Different Abusive Practices

Even assuming that a position of dominance has been obtained by any operator, for article 86 to apply, an abuse of that position must be established. According to *Hoffmann-La Roche,* this requires that competition is weakened through recourse to anti-competitive practices´. The main possibilities of commercial significance which could probably appear in the field of telecommunications and which are capable of raising competition concerns are as follows: Firstly, the refusal to grant interconnection, which could manifest itself in various forms including refusal to provide interconnection on any terms, refusal to provide interconnection at different points of connection, or refusal to provide essential facilities or services and secondly, pricing practices, whether qualified as excessive, discriminatory, or predatory. In order to achieve efficient terms for interconnection it is becoming increasingly important for other TOs to be able

[204] Almelo [1994] ECR I-1477. See section I.2.

to obtain interconnection components without being obliged to pay for other components that are unconnected or inessential to the component required. Therefore, the issue of tying could also arise in telecommunications.

(1) Refusal to grant Interconnection

As has been shown in chapter II.1, the refusal to supply has been considered as an abuse by the Commission and the Court.[206] Such behavior would make it impossible or at least very difficult for third parties to provide services and this would lead to a limitation of services and of technological development within the meaning of article 86 II lit d. Moreover, if applied only to selective users, this could also result in discrimination within the meaning of article 86 II lit c.[207] Furthermore, the Commission stated that certain abuses involving discriminatory prices or quality of the service provided may also relate to tariffs or to restrictions or delays in effecting the interconnection of systems or in providing information concerning network planning, technical standards or other information necessary for effective interconnection. It must be stressed, however, that it seems clear that a refusal to interconnect would amount to an abuse within the meaning of article 86.

Assuming that the reasoning outlined in the preceding paragraph fully applies to all dominant undertakings which also have activities in markets related to the market in which they hold

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[205] In this regard, see the opinion of the Advocate General in Almelo [1994] ECR I-1477.

[206] See, for instance, Commercial Solvents v Commission [1974] ECR 223; Télémarketing v CLT [1985] ECR 3261; United Brands v Commission [1978] ECR 207.

[207] Guidelines on the application of EEC competition rules in the telecommunications sector, OJ No C 233, 6.9.1991/2, para. 94. In para. 86, the Commission referred to the ECJ's judgment in Télémarketing and stated that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking enjoying a dominant position in a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity that might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such an undertaking. See Dommering, E. J., Article 90 of the EEC Treaty and the telecommunications, broadcasting and postal sectors, in Stuyck - Vossestein (eds.), State entrepreneurship, national monopolies and European Community law (1993), pp. 53; Pappelardo, A., State measures and public undertakings: article 90 of the EEC Treaty revisited, ECLR 1991, pp. 29.

their dominant position and where they can use their market power to strengthen or protect their position in the former market, any such dominant undertaking would be prohibited from treating the activities of an actual or potential competition on the related market less favorably than its own activities on that market. Such reasoning would clearly impose an important and far-reaching special responsibility on such dominant undertakings.[208] It would imply that any form of discrimination by the dominant firm, including the refusal to deal, in favor of its own activities in another market, would be viewed *per se* as an abuse of the dominant position unless it is objectively justified. In *ERT*,[209] the Court did not refer to the possibility of the objective qualification of discrimination when it discussed the scope of the competition rules. However, the Court clearly indicated that discriminatory effects brought about by normal legislation could be justified on the basis of the specific exceptions set out in the TEC.[210] What implication does this have for the issue of interconnection?

Applying the above principles to the issue of interconnection would lead to the conclusion that a dominant operator of a telecommunications network infrastructure which may be used to protect or strengthen its position in related markets may not treat its own operations in such related markets (e.g. such as the market for the provision of certain telecommunications services) more favorably than the operations of competitors in those related markets unless this could be objectively justified. A refusal to interconnect, at least in certain circumstances, would thus be a practice through which the dominant TO could use its market position in order to distort or even eliminate competition in the related market. Without access to and interconnection with a network of the incumbent TOs, new infrastructure operators or operators of alterna-

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[208] The concept of special responsibilities was used by the ECJ in a number of cases under article 86 in order to emphasize that article 86 prohibits practices that may be permissible in a normal competitive situation but are not permissible for dominant undertakings. See, e.g., Michelin v Commission [1983] ECR 3461.

[209] Ellinki Radiophonia Tileorassi [1991] ECR 2925.

[210] For instance, article 56, which provides that discriminatory rules may be justified on grounds of public policy, public security or public health.

tive infrastructures would not be able to provide telecommunications services in an economically viable manner. Therefore, article 86 would prohibit a TO that is dominant within the telecommunications´ access to customers market within in a substantial part of the common market, to refuse to interconnect with another TO.[211]

(2) Excessive Pricing

In the telecommunications sector, there is considerable potential for an undertaking's pricing policy to be abusive. Such abuses within pricing may be characterized in a number of ways: Article 86 II lit d specifically prohibits the distortion of competition in imposing dissimilar terms and conditions for similar transactions. This could include discriminatory pricing. Excessive pricing can also constitute an abuse under article 86 II lit a in that it amounts to unfair pricing. There is little jurisprudence in this area; the leading case is *United Brands* where the ECJ overturned the Commission's finding that excessive pricing has existed. While the Court found that excessive pricing could be established by comparing the ratio of cost production with that of the product being provided, it considered that the Commission had failed to inquire adequately into United Brands' cost structure. Generally speaking, dominant undertakings could take advantage of their market power to charge excessive prices. The first example of abuse listed in article 86 consists of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

According to the established case law, abusive, or even unfair, pricing may be comprised either of unfair low pricing, designed to eliminate a competitor, or unfairly high prices, designed to achieve for the dominant undertaking turnover and profits which it would not achieve in a more competitive environment or which designed to put a competitor in another market at a competitive disadvantage. As already pointed out, pricing for interconnection is one of the most

[211] The obligations imposed on dominant TOs would be similar to those resulting from the Commission's finding in the two decisions regarding access to port facilities. See Sea Containers/Stena Sealink (1994), OJ No L 15/8, and Rödby (1994), OJ No L 15/52.

difficult questions related to interconnection since through interconnection charges TOs can very much influence the costs of the other TOs with which they compete. Furthermore, dealing with pricing regarding interconnection must, of course, respect the legitimate interests of both the incumbent and the other TOs. In dealing with pricing issues, the ECJ has used different techniques to determine whether prices set by a dominant firm are abusive, which are briefly discussed below. Although certain elements in the body of the case law of the ECJ may prove useful in specific circumstances regarding interconnection, it must be noted from the outset that the existing case law of the Court is not very sophisticated on this point.

As already indicated above, the ECJ considered that it had to be ascertained whether the dominant undertaking made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and effective competition. The Court indicated as a general test that a price would be excessive where it has no reasonable relation to the 'economic value'[212] of the product. As far as the specific test to be applied in determining whether or not a price is excessive, the ECJ considered that this excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would then disclose the amount of the profit margin.[213] Once it has been determined that the difference between the costs actually incurred and the price actually charged is excessive, it has to be determined whether a price has been imposed which is either unfair in itself or when compared to competing products. The ECJ emphasized that the test outlined

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[212] Cf. the Court's ruling in United Brands v Commission [1978] ECR 207, p. 301 ("...changing a price that is excessive because it has no reasonable relation to the economic value of the product supplied is...abusive.") Here, the ECJ clearly confirmed the Commission's statement in its decision in 'Chiquita', OJ No L 95/1, p. 15 ("United Brands Corporation's prices are excessive in relation to the economic value of the product supplied")

[213] United Brands v Commission [1978] ECR 207, p. 301. Recently, in cases where the ECJ was giving a preliminary ruling and did not have to itself decide whether charges were unfair, it has suggested comparisons with charges made in other markets. See, for example, Lucazeau v SACEM [1984] ECR 2811, and, Bodson v

above is certainly not the only test available and stated that "other ways may be devised - and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is fair."[214]

One will remember that the Commission Decision in *United Brands*[215] was quashed by the ECJ in so far as it concerned excessive pricing by the dominant undertaking. The Court considered that the Commission had not adduced adequate legal proof of the facts and evaluations that formed the foundation of its finding that United Brands had infringed article 86 by directly or indirectly imposing unfair selling process for bananas.[216] Before coming to this conclusion, the Court indicated that the Commission had failed to make a comparison between the costs of United Brands and the prices it had charged. Although the ECJ accepted that in some cases an analysis of costs may be a difficult task to perform, it found that in the particular circumstances of the case the determining of the production costs of bananas did not seem to present any insuperable problems.[217]

As regards telecommunications, pricing problems in connection with access for service providers to a dominant operators' essential facility could often revolve around excessively high prices. In the absence of another viable alternative to the facility to which access is being sought by service providers, the dominant or monopolistic operator may be inclined to charge exces-

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Pompes funèbres [1988] ECR 2479.

214 United Brands v Commission [1978] ECR 207, p. 226.

215 'Chiquita', OJ No L 95/1.

216 United Brands v Commission [1978] ECR 207, p. 300.

217 It is worth noting that in para. 254 of the judgment, the ECJ considered that "while appreciating the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production cost of the banana do not seem to prevent any insuperable problems."

sive prices.[218] However, it must be concluded that the case law cannot provide an adequate framework for dealing with all issues related to interconnection pricing. The body of the case law is limited to setting out very general principles, without giving guidelines as to how to calculate or allocate costs. Although some of the rulings mentioned above may prove useful in dealing with interconnection charges, pricing of interconnection requires much more developed rules. It is unclear how far the Court would scrutinize general principles set out by the Commission in the specific context of interconnection. With regard to telecommunications, and in particular to interconnection, the pricing of access is likely to become a key factor in determining the intensity of competition in the transformation process towards a liberalized market. At the same time, the establishment of rules governing the pricing for interconnection has tended to lay behind developments in the telecommunications sector. However, the current Community approach[219] does set out principles for interconnection charges. Although these provisions are of a very general nature, they do provide good guidelines for the pricing of interconnection. However, the more the telecommunications sector liberalizes, the more these rules will have to be developed further.

(3) Discriminatory and Predatory Pricing

It almost goes without saying that any pricing by the TO that is discriminatory as against the other TOs or other operators could infringe article 86. The judgment as to what is discriminatory or what places competitors of a TO in a discriminatory position is normally a matter to be determined by the Commission or the ECJ in the specific circumstances of the case. The issue of discrimination by a TO regarding interconnection in favor of its own activities has been dealt with generally in the section above concerning the refusal to interconnect. However, it

[218] Communication from the Commission of the European Communities. Notice on the application of the competition rules to access agreements in the telecommunications sector. Framework, relevant markets and principles, COM(96) 649 final, p. 28.

[219] See the Interconnection Directive, especially its articles 7ff.

must be added that article 86 contains a general prohibition on discrimination. Article 86 II lit c lists as an example of an abuse of a dominant position the fact of "applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage." Discrimination by a TO in the pricing of interconnection as between different TOs in comparable positions would therefore be an abuse by a TO of its dominant position. It must be noted that not all differences in treatment automatically amount to discrimination within the meaning of article 86. Differences in treatment may indeed be objectively justified where the underlying facts are objectively distinguishable. It appears very difficult from the viewpoint of the case law to develop precise and general assessment criteria for determining whether or not a difference in treatment by a TO with regard to other TOs and the former's own activities in the secondary market is objectively justified. Assessment under article 86 of any form of differential treatment will require a case-by-case analysis. This analysis could prove to be rather difficult since the complexity of interconnection could render the comparison between arrangements difficult.

On the other side of the spectrum, the availability and use of published standard prices for interconnection provide some safeguards against the discrimination by the TO with regard to certain other TOs. Reference is made here to the body of case law of the ECJ concerning the application of the prohibition against discrimination to rebate schemes applied by dominant firms.[220]

As far as predatory pricing is concerned, the Akzo case shows that the practical computation of variable and total costs for a specific product or service may give rise to serious problems of interpretation and divergent views, which can only be resolved on the basis of well established accounting principles. Applying these principles set out by the ECJ to interconnection charges appears to be an extremely difficult task, involving as it does also issues of cross-

subsidization, and the allocation of common costs and costs for the provision of universal services. The ECJ's existing case law under article 86 provides little guidance in these respects.

As discussed above, the ECJ has indicated that article 86 results in the imposition of both an upper-limit (for example, the prohibition on excessively high prices) and a lower limit (i.e., the prohibition on excessively low prices) on the pricing practices of dominant firms. Furthermore, the cases on the obligation of certain dominant firms to give access to certain facilities they hold have shown that this obligation is accompanied by an obligation to provide such access on reasonable terms, particularly, with regard to pricing. This requirement of reasonable pricing could further narrow the scope of the dominant firms' discretion to fix their prices, even if these are within the upper-limit and lower-limit described above.

However, the problem of unfairly low prices could arise in the context of competition between different telecommunications infrastructure networks where a dominant operator may tend to charge unfairly low prices for access in order to eliminate competition from other (emerging) infrastructure providers, in violation of article 86 II lit a. Generally speaking, a price is abusive if it is below the dominant company's average variable costs or if it is below average total costs and comprises part of an anti-competitive plan.[221]

(4) Tying

The last example which is dealt with in this section consists of "making the conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their

[220] Reference is made to section II 1.2.3.2.

[221] See the *Akzo* case. However, the average variable cost rule cannot be applied in many situations in the telecommunications sector, since the variable costs of providing access to an already existing network are almost zero. Accordingly, the test which the Commission considers should be applied is whether a company charges a price for goods and services - other than in the context of a new product or service - which, although above the average variable cost of providing the specific goods and services for which the price in question is paid is so low that the overall revenues for all the goods or services in question would be less than its average total costs of providing them if it sold the same proportion of its output at the same price on a continuing basis, even where no intent to exclude a competitor is proved.

nature or according to commercial usage, have no connection with the subject of such contracts" (article 86 II lit d). In other words, an undertaking that enjoys a dominant position in the market for a product or a service may not make the sale of this product or the provision of this service conditional upon the sale of another product or the provision of another service.

When dealing with tying within the telecommunications sector, two cases appear to have some relevance: *Italy v Commission* and *Télémarketing*. Here, the ECJ based its conclusions on its judgment in *Commercial Solvents*[222] where it had held that an unjustified refusal by a dominant firm to supply raw materials to a former competitor in order to reserve for itself the market for a final product may infringe article 86. Similarly, in the *Télémarketing* case,[223] the Court suggested that the refusal by a dominant firm in Belgium to transmit Télémarketing spots unless its own answering service was used may constitute an abuse of that dominant position in the absence of a technical or commercial justification.

This judgment may have particular importance to the analysis of tying in the telecommunications sector. In short, as regards *Italy v Commission*,[224]it can be said that the Commission emphasizes the absence of connection between the tied products or services. Hence, the Commission challenged a practice whereby BT[225] prevented message-forwarding agencies in the UK from relaying telex messages both originating from and for delivery outside the UK. This practice was condemned on the ground that it made the use of telephone and telex installations' subject to obligations that have no connection with the assignment of telephone or telex services.

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[222] Commercial Solvents v Commission [1974] ECR 223.

[223] Télémarketing v CLT [1985] ECR 3261.

[224] Italy v Commission ('British Telecommunications') [1985] ECR 873.

[225] At the time this case arose, BT was a public corporation with a statutory monopoly for the running of telecommunications systems through the United Kingdown.

In the second case,[226] a company refused to accept spot advertisements that indicated a telephone number to be used by the public unless the number given was one provided by its own subsidiary. This conduct was construed by the ECJ to constitute a tie within the meaning of article 86 II lit d. The Court held that "...an abuse within the meaning of article 86 is committed where, without any objective necessity, an undertaking holding a dominant position in a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities an a neighboring but separate market, with the possibility of eliminating all competition from such an undertaking."[227] Again, the ECJ objected to the practice whereby a television station subjected the sale of broadcasting for Télémarketing operations to the use of a telephone number of an exclusive advertisement agent belonging to the same group. The Court stressed, *inter alia*, that Télémarketing constitutes a neighboring but separate market from that of the chosen advertising medium. Again, tying is of particular concern where it involves the tying of services for which the TO is dominant with those for which it is exposed to competition. Where the vertically integrated dominant network operator obliges the party requesting access to purchase one or more services without adequate justification, this may exclude rivals of the dominant access provider from offering these elements of the package independently. This requirement could thus constitute an abuse under article 86.

One of the main examples of where the question of tying may arise in telecommunications, and in particular with regard to interconnection, is the issue of bundling services. Where a dominant TO refuses to unbundle services and does not have a lawful, objective justification for doing so, that TO would be viewed as abusing its dominant position. Examples of such tying practices in relation to interconnection may include a TO refusing to offer a tariff and thus the

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[226] Télémarketing v CLT [1985] ECR 3261.

[227] Télémarketing v CLT [1985] ECR 3261, p. 3276.

service which provides a purely international carriage component of message conveyance but offers instead a tariff that covers the international component bundled with a national access component. This would have the effect either of preventing direct interconnection with the international traffic switch or of rendering it uneconomic for the other TO or reseller to provide its own or an alternative national access component.

b) The Role of Article 90 (2) TEC

As already pointed out, article 90 (2) provides an exemption for undertakings entrusted with the operation of services of general economic interest from the full application of the treaty rules. In particular, this provision may grant to undertakings that are entrusted with services as defined in that provision an exemption from the applicability of the competition rules.

With regard to the influence of article 90 (2) on the application of the competition rules to interconnection in the telecommunications sector, an important fact has to be kept in mind. The application of article 90 (2) requires three conditions to be met: Firstly, the undertaking concerned must have been entrusted, with the operation of a service of general economic interest, secondly, the application of the competition rules must hinder the performance of the services concerned, and finally, a balance must be made between the Community interest and the beneficial results derived from the exclusion of the application of the competition rules. As far as interconnection is concerned, the issue that arises up with regard to a possible application of article 90 (2) concerns the universal service obligation (USO)[228] imposed on TOs.

The first condition for the application of article 90 (2) does not appear to raise problems of interpretation with regard to USOs. This is because, firstly, USOs are generally imposed on TOs by way of a formal legislative or administrative act adopted under national law, and sec-

[228] 'Universal service obligations' refer to those obligations placed upon an organization by a member state which concern the provision of a network and service throughout a specified geographical area, including - where required - average prices in that geographical area for the provision of that service. See Annex III of the Interconnection Directive.

ondly, USOs correspond to what the ECJ has considered in its case law to be services of general economic interest. For instance, in *Corbeau*,[229] a case regarding postal services, the ECJ considered that it could not be disputed that Belgium PTT was entrusted with a service of general economic interest "consisting in the obligation to collect, carry and distribute may on behalf of all users throughout the territory of the member state concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation ."[230]

In *Almelo*,[231] a case concerning electricity supply, the ECJ considered that the undertaking which had been given the task, through the grant of a non-exclusive public concession to ensure the supply of electricity in part of the national territory had been entrusted with a service of general economic interest. Furthermore, the ECJ noted that the undertaking concerned was obliged to ensure, throughout the territory in which the concession was granted, that all consumers, whether local distributors or end-users, received uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms that could not vary save in accordance with objective criteria applicable to all consumers. As far as the telecommunication sector is concerned, reference should be made to another judgment[232] where the ECJ considered that the monopoly held by a PTN for the establishment and operation of a public telecommunications network constituted, at that stage of development of the Community, a service of general economic interest within the meaning of article 90 (2).[233] The

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[229] Corbeau v Belgian Post Office [1991] ECR I-2533.

[230] Corbeau v Belgian Post Office [1991] ECR I-2533, p. 2553.

[231] Almelo [1994] ECR I-1477.

[232] RTT v GB-INNO-BM [1991] ECR I-5941.

[233] "Restrictions placed on the ability of private operators to provide telephones to be connected to this network could not be justified as necessary to allow the PTT to carry out this service of general economic interest."

ECJ referred to the fact that such a monopoly is intended to make a public telephone network available to users.

As far as the second condition for the application of article 90 (2) is concerned, it appears from the case law that this condition results in the application of an economic test. In *Almelo*, the Court stated that restrictions on competition from other economic operators had to be allowed in so far as they were necessary in order to enable the undertaking entrusted with the task of general interest to perform it. In order to apply this test, which was left to the national court to perform, the ECJ furthermore stated, taking into account the specific circumstances of the case, that it was necessary to take into consideration the economic conditions under which the undertaking operates, in particular the costs which it has to assume and the legislation (particularly that concerning the environment) to which it was subject.[234] In *Corbeau*, the Court was still more explicit with regard to the economic test to be applied for determining whether or not a derogation from the application of the treaty should be granted. It ruled that it had to be determined whether the full application of the treaty rules would compromise the economic equilibrium of the service of general economic interest performed by the undertaking entrusted with this service. We can summarize the ECJ's reasoning as follows: Article 86 relates only to anti-competitive conduct engaged in by undertakings on their own initiative and not to state measures. In this respect the ECJ pointed out, that although the simple fact of creating a dominant position by the granting of an exclusive right is not as such incompatible with article 86, the TEC requires member states to refrain from adopting or maintaining in force any measure which could deprive that provision of its effectiveness. Thus, article 90 II provides that, in the case of firms to which member states grant special or exclusive rights, member states are neither to enact or maintain in force any measure contrary to the rules contained in the TEC. However, this provision has to be read in combination with the second paragraph of article 90 which pro-

[234] Almelo [1994] ECR I-1477.

vides that undertakings entrusted with the operation of services of general economic interest are subject to the rules concerning competition as long as it cannot be established that the application of those rules is incompatible with the performance of their particular tasks.

What can be concluded from the ruling in *Corbeau* is, first, that this is undoubtedly a landmark judgment as regards article 90 II. For the first time the ECJ explicitly declared that article 90 II allows member states to grant exclusive rights conferring monopoly powers upon an undertaking. However, this was subject to two provisions: firstly, the undertaking has to have been entrusted with a task of general economic interest, and second, a restriction or exclusion of competition is necessary, in order to perform this task.[235] Thus, article 90 II seeks to reconcile the member states' interest in using certain undertakings, particularly within the public sector, as an instrument of economic policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity on the common market.

In a regulatory environment where the USOs of the TOs selected for such service provision is financed by payments made out of a specific fund (the universal service fund), it is, at least on the basis of the above mentioned case law, difficult to see how there would still be place a for invoking a derogation to the treaty rules under article 90 (2). Moreover, the economic viability of the service of general economic interest could not be jeopardized by the obligations under the treaty rules since it would be entirely financed through direct funding. However, given the case where the USO burden is not fully dealt with through a universal service fund, the rationale for the TO entrusted with the universal service invoking article 90 (2) appear to be much stronger. In such a situation, it would be arguable that for the TO to face full competition from other TOs not under USO, the economic viability of the universal service would be jeopardized. However, restrictive measures chosen by the TO to ensure the economic viability of the provi-

[235] The Court did not consider the third condition for the application of article 90 II that 'the development of trade may not be affected to such an extent as would be contrary to the interests of the Community.'

sion of universal service would have to be compatible with the general principle of proportionality.

The third condition for the application of article 90 (2) involves a balancing of the requirements, on the one hand, of the particular tasks entrusted to the undertakings concerned and, on the other hand, the protection of the interests of the Community. Thus far, this condition has not given rise to important developments in the case law because it seems to be quite clear that certain restrictive practices by the TO being under an obligation of universal service fulfill the other two conditions under article 90 (2). Moreover, such practices would equally satisfy the balance to be struck in terms of the last condition of article 90 (2).

C. Summary

I. Conclusion

1. The EU Regulatory Approach to Access in a Liberalized Environment

A look at the EC regulatory framework reveals that the Community has adopted no specific regulatory model for competition but rather has sought to promote competition in any way possible whether over its own, TO or third party infrastructure. A policy of open access to public infrastructure formed an integral part of the EC regulatory framework before infrastructure liberalization.[236] Indeed, the principles of open network provision (ONP) are essentially principles of open access.

The liberalization of alternative infrastructure under the Full Competition Directive provides a good example of the Community's approach. This initiative required the removal of all restrictions to the provision of liberalized services over the operator´s own and third party networks and infrastructure by 1 July, 1996. The immediate objective of infrastructure liberalization

[236] See Preiskel, R. - Nicholas, H., Liberalization of telecommunications infrastructure and cable television networks, Telecomm. P. 1995, pp. 381; OECD, Telecommunications infrastructure: the benefits of competition (1995), pp. 11.

was to enable operators to use more sophisticated infrastructure alternatives - the offering of leased lines required of the TO under the Leased Lines Directive had provided a relatively low performance capability and capacity level which limited the ability of service providers to develop new services and thereby restricted competition. More fundamentally, this course of liberalization reflected the underlying objective of full infrastructure liberalization, of which infrastructure liberalization formed an initial stage, which was to ensure that there should be free choice as to the underlying infrastructure used to provide liberalized services.

The EC has also identified the end-to-end interoperability of services for Community users as one if its principal goals in the telecommunications sector.[237] This objective reflects the peculiar importance within the telecommunications markets for any user to be able to contact any other user, i.e. any-to-any communications, and the economic reality that users will not all subscribe to the same operator. Therefore, in the interests of ensuring the development of competition, it is necessary that networks should interconnect with one another. This is, of course, the underlying objective of the Interconnection Directive. This Directive imposes interconnection obligations on operators of public telecommunications networks that, broadly, either control the means of access to a customer or have significant market power indicated by a market share greater than 25 per cent. [238] Where a public network operator has significant market power, there is an additional obligation to provide differentiated forms of access "including access at points other than the network termination points offered to the majority of end-users."[239]

Facility-sharing is also a Community policy objective in the telecommunications sector. For example, it was contemplated as part of alternative infrastructure liberalization that liberal-

[237] See, for example, Recital 2 of the Interconnection Directive.

[238] Art 4(1) - 4(3) Interconnection Directive.

[239] Art 4(2) Interconnection Directive.

ized services may be provided "by means of sharing of networks, other facilities and sites."[240] This provision, concerned with lifting restrictions on facility sharing, however, does not impose any obligation to share facilities. Such an obligation does nevertheless find weak expression in the Full Competition and Interconnection Directive.[241] In the event that planning restrictions prevent the construction of parallel facilities, article 11 of the Interconnection Directive states that national regulatory authorities (NRAs) are to "encourage the sharing" of facilities. In principle, such facility-sharing is to be freely negotiated by parties. Member states may only impose facility-sharing after an appropriate period of public consultation and having given interested parties the opportunity to express their views. Where the laying of new international cables is restricted by planning requirements, there may then be scope for an operator seeking an IRU ("indefeasible right of use")[242] access to an existing cable to invoke these rights in relation to facility-sharing. The effectiveness of these rather ´soft´ rights will depend on the effectiveness of national implementing measures and the willingness of NRA's to police and resolve disputes.[243]

It is possible that the leased lines' obligations could arguably require the sale of IRUs. Leased lines are defined in the Leased Lines Directives by reference to the concept of the public telecommunications network. Like the public telecommunications network, leased lines equally cover transmission capacity between "network termination points" - although without the switching involved in a public network.

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[240] New Article 2(2) Service Directive.

[241] New article 4d of the Service Directive introduced by the Full Competition Directive, and article 11 of the Interconnection Directive.

[242] Following Hitchings, P., Access to international telecommunications facilities, ECLR 1998, p. 85, who describes this as "the right in the facility equivalent to an absolute or freehold property right".

[243] The application of the competition rules to facility sharing may be more effective and their application is expressly contemplated in the preamble to the Full Competition Directive as follows: "In addition, pursuant to Article 86, all public telecommunications network operators having essential resources for which competitors do not have economic alternatives are to provide open and non-discriminatory access to those resources."

A "network termination point" is defined in the Service Directive to mean "all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to an efficient communications through the public network."[244] This definition has been broadened by the revised ONP Framework and Leased Lines Directive to include "the physical point at which a user is provided access to a public telecommunications network."[245] 'User' includes organizations as well as individual end consumers and it seems at least arguable that this definition would also cover cable ends. On that basis, transmission capacity in a cable between those points would fall within the leased lines definition and would have to be made available by the TO and/or certain other operators with significant market power.

Clearly, however, the difficulty in ensuring cost orientation under the leased lines' rules may mean that even if it would be possible to require transmission capacity to be supplemented between cable head ends, the cost of those lines would still be above normal IRU prices. Furthermore, there is the difficulty that IRU's are sold as different products under different terms by facilities operators - although this would not seem to present an insurmountable problem for a sufficiently determined NRA. However, open network provision is regarded as a major instrument for achieving a European single market in telecommunications services. The basic goal of ONP is to oblige (former) national telecommunications companies in all member states to grant competitors access to their telecommunications networks.

2. EC Competition Rules and non-discriminatory Effects

As already pointed out, providers of international telecommunication services are not currently denied access to the infrastructure that is necessary in order for them to offer those services. They can, in fact, offer services using transmission capacity in the form of leased lines

[244] Art 1(1) of the Directive.

[245] New article 2(5) of the ONP Framework Directive.

from the national TOs that own the international facility over which international telecommunications services have to be transmitted. Nevertheless, service providers may find themselves at a competitive disadvantage as against the TO on the service market where they are provided access to the international facility on different - and less advantageous - terms than the service arm of the TO. It is not the policy of Community law to deny undertakings competitive advantages that they have legitimately gained. To do so would seriously reduce the incentive for undertakings to invest in innovation and would thereby have the effect of impairing competition and the competitiveness of EU industry. The importance of domestic property rules is expressly recognized in article 222 TEC.

At the same time, Community law has required that, in certain circumstances, an undertaking should be obliged to supply third parties, or make available for their use, products, facilities, rights, information or services it owns or provides, in order to prevent competition being distorted. The obligation to supply may apply in order to prevent an undertaking with a dominant position from refusing or restricting supplies in order to gain for itself an advantage over its competitors. This relates to the traditional understanding of abuse under article 86 whereby a dominant undertaking seeks to exploit its position of power. Indeed, particularly serious competition concerns arise when an operator has the ability to totally exclude competition within a given market and has an interest in doing so in order to promote its own operations on that market. Such circumstances have arisen most frequently and most clearly in relation to monopolies with vertically-integrated operations in a separate market. Where an operator is active on two neighboring markets and where competition in one market is dependent on the other, there is a conflict of interest between the operator's interest in exploiting its property rights on one market and its interest in promoting to promote the competitiveness of its activities on the related, dependent market. It may then be tempted to use these rights to grant to itself a competitive advantage on the dependent market. In such circumstances, EC competition law considers

it necessary to intervene and, in particular, imposes an obligation on the dominant operator not to discriminate between its activities and those of third parties on the dependent market.

The obligation to supply seems also to be based partly on the assumption that it is normal commercial behavior for an operator to fully exploit its property and, where there is demand from third parties for that property, to make it available to them.[246] The point was made most clearly by the ECJ in *United Brands*, where it stated that "it is advisable to assert positively from the outset that an undertaking that is in a dominant position for the purpose of marketing a product ... cannot stop supplying a long-standing customer who abides by normal commercial practice, if the orders placed by this customer are in no way out of the ordinary."[247]

The legal rationale behind article 86 goes as follows: where an operator holds a dominant position in the supply of the property in question and there is a downstream market which is dependent on those supplies, its refusal to supply may restrict competition on the downstream market. Such restrictions may take the form, for instance, of limiting the downstream market to the prejudice of consumers, or putting some at a competitive disadvantage. There is nothing necessarily untoward or sinister in the behavior of the dominant player in such cases; rather, the application of competition rules seeks to protect or even promote undistorted competition in accordance with the fundamental principle set out in article 3g TEC. This approach reflects the objective concept of abuse developed by the ECJ in its judgments in *Continental Can*, *Hoffmann-La Roche*, and *Michelin*[248] that focused on the structural market implications of a dominant undertaking's behavior rather than on any attempt by that undertaking to exploit its position to its own advantage.

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[246] See section I.1., and in particular, the references there.

[247] United Brands v Commission [1978] ECR 207, p. 182.

[248] Michelin v Commission [1983] ECR 3461; Hoffmann-La Roche [1979] ECR 461; Continental Can v Commission [1983] ECR 461. See furthermore Korah, V., Competition Law, pp. 121.

The jurisprudence of the ECJ in cases involving refusal to supply, beginning with *Commercial Solvents*,[249] and the Commission's so-called "essential facility" cases derived from the Court's case law[250] illustrate both these strands of theory: firstly, that a dominant player must not exploit that position of strength in order to gain for itself a competitive advantage, and secondly, that a dominant player has a special responsibility to ensure its behavior does not distort or impair a competitive market structure and, therefore, to behave in a normal commercial manner. Moreover, the full application of the competition rules is central to the Commission's overall approach to telecommunications. Therefore, it is important for all participants in the telecommunications sector to have a clear view of how these rules may apply to the sector, and, in particular, to their own activities. This will assist the participants in shaping their plans and arrangements in a manner which is consistent with the competition rules. In view of the Commission's commitment to review and continuous monitoring of developments within the sector, participants also must be aware of the possibility that the Commission's approach to the application of competition rules in this area remains subject to adoptions.

The deregulation of the core telecommunications market and the dynamics created by the privatization of (former legal) monopolies that accompanies deregulation in Europe, and furthermore, the development of new segments through convergence (e.g., less diversification of television and broadcasting) create new possibilities for horizontal or/and vertical integration and the small number of powerful actors holding essential positions, thus allowing them to control market development, generates great potential for anti-competitive behavior and will become one of the major challenges for EC competition policy.[251] The Commission's efforts to

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[249] Commercial Solvents v Commission [1974] ECR 223. See furthermore, e.g. Télémarketing v CLT [1985] ECR 3261

[250] Drawing explicitly on the ECJ's Commercial Solvents ruling, the Commission has developed and refined the application of the competition rules in similar situations in its 'essential facilities' cases. See, e.g. Sea Containers/Stena Sealink (1994), OJ No L 15/8.

[251] For an overview of international alliances in the sector of telecommunications, see Kamall, S., Telecommunications policy (1996), pp. 22.

liberalize the telecommunications sector would serve little purpose if new cartels were allowed to develop or if incumbent TOs were at liberty to engage in abusive behavior.[252] As the cases discussed clearly indicate, the issue of access and the related issue of network interconnection are bound to become a central issue in the telecommunications sector. This calls for a short concentration of article 85 as applied to strategic alliances.

In *Eirpage*[253] the Commission exempted a joint venture agreement between Bord Telecom Eireann (BTE) and Motorola Ireland Ltd for the formation and operation of a nationwide paging system. BTE had statutory exclusive rights over the public telecommunications network to which the paging system was to be interconnected. In view of this, the Commission required an undertaking from BTE that BTE would supply any other potential operator who satisfied the relevant licensing and financial requirements on the same terms as Eirpage. Both cases are typical of cases that the Commission expects to face in the future, with the increasing removal of all remaining exclusive and special rights, as former monopoly incumbents turn into dominant operators. The post-monopoly and future telecommunications environment is likely to be characterized by situations where undertakings singly or jointly control facilities, such as networks, conditional access systems, or critical software interfaces, which may also be essential routes for customers.

The issue of access and interconnection agreements will therefore be a central issue for the future application of EC competition law in this sector. Access and interconnection agreements may, in principle, be seen as pro-competitive because they aim to enlarge the service offered to the customer. These agreements can, however, also generate substantial collusive behavior and market foreclosure, as well as abuses of dominant positions, raising concerns under

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[252] Ungerer, H., EC competition law in the telecommunications, media, and information technology sectors, Fordham Int'l L. J. 1996, p. 1148.

[253] Commission Decision No 91/502/EEC, OJ L 306/22.

articles 85 and 86. The central problem will surely be that, given the evolving market structure, the telecommunications sector will in many areas need to ensure access to essential facilities, such as networks, that are essential for reaching customers and which cannot be replicated in a reasonable manner by other means. The concept of access to essential facilities and the evolving doctrine in this respect within EC competition law has been discussed in-depth in a more general context. [254] According to this EC competition law also provides that when a dominant company owns or controls a facility, access to which is essential to enable its competitors to carry on business, it may not deny them access, and it must grant access on a non-discriminatory basis, in certain circumstances.[255] The issue of access and interconnection in the telecommunications sector will surely become a major test for the application of the essential facilities doctrine under EC competition law. Another significant test will be the definition of the relationship between the application of EC competition law and the regulation of access under the ONP regulations.

II. Comments

As the telecommunications market becomes increasingly more dynamic, Europe's main concern will be thus managing the adjustment within the current regulatory framework, specifically whether interconnection is concerned. Agreements in this specific sector of telecommunications establish conditions under which service providers and network operators interconnect their facilities.[256] Interconnection possibilities are constantly increasing and are thus becoming

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[254] Temple Lang, J., Defining legitimate competition: companies' duties to supply competitors and access to essential facilities, in Hawk (ed.), 1994 Fordham Corp. L. Inst. (1995), pp. 282.

[255] Ibid., at p. 283.

[256] In the telecommunications industry, access agreements are central in allowing market participants the benefits of liberalization. For the Commission's approach in relation to this issue, see the Communication from the Commission: ´´Notice on the application of the competition rules to access agreements in the telecommunications sector. Framework, relevant markets and principles,´´ COM(96) final, whose purpose is threefold, namely, to set out principles stemming from EU competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and

important in order to provide European-wide integrated services. The possible configurations and corresponding complexities of interconnection increase daily. Because construction of suitable networks is often economically and legally unfeasible, the cost and degree of interconnection are crucial factors for the viability of newly-provided services. There is a consensus that the ONP framework is the most appropriate for developing interconnection principles.

Another major challenge is defining the relationship between the application of EC competition law and specific legislation established to regulate the sector. The relationship between ONP rules and competition rules is one of complementary. The ONP provisions are narrower in scope in that they concern the harmonization of conditions for open and efficient access to and use of former public telecommunications networks and services. Instruments adopted pursuant to the ONP framework are limited to conditions affecting open and efficient access, usage conditions and tariff principles. By contrast, the competition rules have more 'bite' in the sense that they are enforceable by fines applied by the Commission and offer the possibility of offensive and defensive action by organizations and individuals before courts, and complainant rights. It is suggested that the Community institutions may consider taking action for clarifying and emphasizing this relationship of complementary between both sets of rules. An immediate concern is the application of competition rules to access issues related to the ONP framework in the telecommunications sector, as mentioned above. However, the competition rules act as a safety net in the event that the ONP rules, for whatever reason, are not applied, or if an incumbent operator restricts competition in a manner which is not addressed by the ONP rules. More generally, the complementary role of competition rules and EC internal market regulation for public services, established particularly to ensure interconnection and universal service in the

commercial initiative in the telecommunications sector, secondly, to define and clarify the relationship between competition law and sector specific legislation under the article 100a framework (this relates particularly to the relationship between competition rules and ONP legislation), and finally, to explain how competition rules will be applied in a consistent way across the converging sectors involved in the provision of new telecommunications services, and in particular to access issues in that context.

field of public networks, will have to be established more clearly. With respect to EC competition rules, the developments in the telecommunications sector in the last decade have made an important contribution. They have firmly established that the implications of EC competition law, especially under article 90, comprise an essential pillar of EC competition law; at a minimum, the application of article 90 in this sector has proven that this article can be fully applied full in a competitive context. It is also important to note that the ONP framework imposes certain obligations on TOs that go beyond those that would normally be imposed by article 86.

However, the application of EC competition law to the sector of telecommunications must be examined in the general context of the rapid evolution of the markets in this field. The competitive behavior of undertakings is largely conditioned by the positions undertakings have taken in response to the rapid changes in the market and regulatory environment. Potentially anti-competitive behavior generated by these rapid changes poses new challenges for EC competition law and competition policy.[257] In addition, the required adjustment of the competitive framework and, in particular, the role played by the Commission in eliminating existing monopolies, are creating new challenges for EC competition law and policy in these sectors. These challenges for EC competition law of, firstly, creating a competitive framework and promoting pro-competitive market structures, and secondly, in ensuring the competitive behavior of economic actors, have initiated a new phase in the application of EC competition rules to the sector of telecommunications and are testing some current EC competition policy concepts in a number of respects. As a result of these developments, EC competition rules will play a role within the telecommunications sector far beyond their traditional boundaries.

With regard to interconnection, access to telecommunications infrastructure is likely to become the bedrock of modern telecommunications and an essential platform for the so-called

[257] See for general considerations Schaub, A., European competition policy in a changing economic environment, in Hawk (ed.), Fordham Corp. L. Inst. (1997), pp. 74.

'global' networks. As the world's telecommunications infrastructure has grown, so has the drive for what is termed 'interconnectivity', the linking of these networks. This networking is now a sophisticated aspect of the telecommunications scene, but what has really spurred interest in interconnection is liberalization - the gradual opening of the telecommunications networks to competition. As we have moved from a monopolistic to a competitive era, networks and services have developed alongside the traditional and formerly public networks. The new networks and services may be fixed, mobile, satellite-based[258] or serving a specialized requirement, but the one thing they tend to lack, either because of a defined territorial scope or due to the limitations of a particular technology, is ubiquity - the ability to reach and to be reached by the general population of terminal equipment users. The only entity person with that ubiquity is typically the former national monopoly provider, the telecommunications organization.

D. Appendixes

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[258] Interconnection will arise in the future between a variety of different network operators and service providers. The potential possibilities are the following: fixed to fixed, fixed to mobile/mobile to fixed, mobile to mobile, fixed to satellite/satellite to fixed, (former) public to private/ private to (former) public, (former) public to specialized/specialized to (former) public, (former) public to reseller. Amongst these different interconnection relationships, those that tend to share common features involve the networks (whether of TOs, mobile operators or cable television operators) providing telecommunications services, i.e., generally speaking, the infrastructure providers.

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