

The EU essential facilities doctrine

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Table of contents

1. If there were an EU doctrine	4
1.1. Case law pointing to the existence of a doctrine.....	6
1.1.1. At the EU level.....	6
1.1.1.1 Commission practice.....	6
1.1.1.2. The CFI/ECJ	11
1.1.2. At the member States level	15
1.2. The content of the doctrine	18
1.2.1. Conditions for the application of the doctrine	18
1.2.1.1. A facility	19
1.2.1.2. Essential	21
1.2.1.3. Elimination of competition	23
1.2.1.4. The distinction between the market of the facility and an ancillary market for which the facility is indispensable	26
1.2.1.5. The requirement that the facility be used for a ‘new’ product.....	28
1.2.1.6. Unjustified refusal.....	31
1.2.1.7. Conditions pertaining to the competitor seeking access	32
1.2.1.8. Issues <i>ratione temporae</i>	33
1.2.1.9. Other factors – Is the list an exhaustive one?	33
1.2.2. Consequences of the application of the doctrine	34
1.2.2.1. Access to the facility under reasonable terms.....	34
a. Access	34
b. Under reasonable terms.....	34
c. For a reasonable access fee	35
1.2.2.2. Complementary obligations of the facility holder	37
2. Should there be an EU doctrine?	39
2.1. A doctrine?.....	39
2.1.1. Positive definition of the doctrine (scope)	40
2.1.1.1 Differences between essential facilities and ‘classic’ competition rules	40
2.1.1.2. A doctrine or just a legislative pattern?	43
a. Just a pattern?.....	44
b. Or rather a doctrine?	45
2.1.2. Negative definition of a doctrine (limits).....	47
2.1.2.1. Will the access imposed enhance competition in the ancillary market?	48
2.1.2.2. Has the facility been built on private resources and entrepreneurship?	48
2.1.2.3. Is the facility essential due to the efforts of its owner?.....	50
2.1.2.4. The existence of IPRs	51
2.2. An EU doctrine?	54

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2.2.1. Differences between the US and the EU doctrine of essential facilities.....	55
2.2.1.1 Relation of the doctrine with other competition rules	55
2.2.1.2. Conditions for the application of the doctrine	56
2.2.1.3. Effects of the doctrine	57
2.2.2. The essential facilities doctrine, rule for the internal market?	58
2.2.2.1. Within legislation	58
2.2.2.2. In the Court’s case law	59
Conclusion	60

The essential facilities doctrine may be seen as the ‘extra weight’ which is put onto the balance, in order to give precedence to the maintenance of competition over the complete contractual freedom of undertakings controlling an important and unique facility. The main purpose of the doctrine is to impose upon such ‘dominant’ undertakings the duty to negotiate and/or give access to the facility, against a reasonable fee, to other undertakings, which cannot pursue their own activity (and therefore will perish) without access to such a facility.

This very simple description of the content of the doctrine underlines its limitations: through the imposition of a duty to negotiate or *contractual* obligations, the rule tends to compensate for the weaknesses of the competitive *structure* of a market, which are due to the existence of some essential facility. In other words, the doctrine does not by itself provide a definitive solution to the lack of competition, but tends to contractually maintain or even create some competition.¹

The doctrine of essential facilities originates in the US antitrust case law of the Circuit and District Courts, but has never been officially acknowledged by the Supreme Court. It has been further developed and hotly debated by scholars in the US, both from a legal and from an economic viewpoint. In the EU, the essential facilities doctrine was openly introduced by the Commission during the early 1990s, but has received only limited and indirect support by the Court of First Instance (the CFI) and the European Court of Justice (the ECJ). It also indirectly inspired the legislation concerning the deregulation of traditional ‘natural’ monopolies.

The judicial origin of the doctrine, combined with the hesitant application by the appeal courts, both in the US and the EU, cast uncertainty not only on the precise scope of the doctrine, but also on the issue of its very existence. These questions

¹ This was recognized by the Court of First Instance (the CFI) in its judgment in Case T-102/96 *Gencor v. Commission* [1999] ECR II-753, where, in annulment proceedings against a Commission decision under Reg. 4064/89 which imposed access rights to third parties, the CFI held, in para 319, that ‘it is true that commitments which are structural in nature ... are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position ... Nevertheless, the possibility cannot automatically be ruled out that commitments which prima facie are behavioural, for instance not to use a trademark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position.’

receive a particular light within the EU context, where the doctrine is called upon to play a different role from its US counterpart. In order to address the above issues, we will *first* pretend that an EU essential facility doctrine does indeed exist and we shall try to identify the scope and content thereof, through its main applications (Section 1). Subsequently, we will try to answer the question whether such a doctrine should exist at all in the EU (Section 2).

1. If there were an EU doctrine ...

The origin of the essential facilities doctrine is to be found in the case law of the US courts. The foundations of the doctrine are generally regarded as having been laid down by the Supreme Court itself. There are two pairs of milestone cases. The first pair concerns common action (= joint venture or concerted practice) by several undertakings, while the second pair refers to unilateral action.

The starting point of the doctrine is to be found in the judgment of the Supreme Court in *United States v. Terminal Railroad Association*.² This case concerned the association set up by fourteen out of the twenty-four rail companies which serviced, at the time, the St. Louis Railway Station. This joint venture would manage the infrastructure necessary for getting access to the said railway station, which included a bridge that was technically impossible to duplicate. Therefore, the joint venture could completely exclude the remaining ten companies from the said piece of infrastructure and drive them out of the relevant market. The Supreme Court, however, recognized that the projected joint venture could lead to rationalization and to economies of scale and did not order its divestiture. Instead, the Court imposed the condition that the joint venture should allow the non-participating undertakings access to the jointly controlled (essential) facility. The later *Associated Press* case³ concerned the prohibition imposed by the news agency on its members not to sell or otherwise transmit to non-members some categories of news. The Supreme Court considered that this very significant network of no less than 1.200 members involved in collecting, processing and distributing news was of crucial importance in the relevant market. Therefore, competitors could not reasonably operate without having access to it.

² *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).

³ *Associated Press v. United States*, 326 U.S. 1 (1945).

Unilateral action by a dominant undertaking was at issue in *Otter Tail Power Co. v. United States*.⁴ The appellant was a highly integrated company which produced, transmitted and distributed electric power and which refused to a) sell energy in bulk to its competitors, b) offer them capacity in its transmission grid or c) give them access to its local distribution network. The Supreme Court held that in some markets, such as the energy market, access to the grid is the only means by which competition can develop. Therefore, it imposed the relevant obligation on the electricity company, in order to stimulate competition. In *Aspen Skiing*⁵ the objective was not the creation of new, but the maintenance of existing competition. This case concerned the decision by a dominant undertaking, which managed three ski resorts, to interrupt its previous dealings with the owner of a fourth, smaller resort and to stop issuing common ski passes for all four. This would commercially isolate the smaller resort and weaken its position in the relevant market, in which the other undertaking was already dominant. The Supreme Court found that such a refusal was not commercially justifiable and imposed the relevant obligation. Subsequent to these “foundation” cases the Supreme Court has occasionally applied the essential facilities doctrine, without ever explicitly acknowledging it. It is worth noting that the first time the term was ever used by the Supreme Court was as late as 1999, in an *obiter dictum*.⁶ However, in its most recent case law the Supreme Court has cast shadows on the very existence of a US ‘essential facilities’ doctrine. In *Trinko*⁷ the issue at stake was the extent to which the incumbent monopolist in the telecommunications market in New York, Verizon, was under an obligation to provide access to its local networks to new entrants. The Supreme Court avoided taking a position on whether the doctrine should be considered as ‘established law’, since it considered it to be inapplicable on the facts of the case, where a legislative act already provided for mandatory access to Verizon’s facilities. It did note, however, a) that the doctrine had been crafted only by lower courts, b) that mandatory access could reduce incentives to invest and that c) in trying to establish a

⁴ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

⁵ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁶ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁷ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004). For an interesting comment of this case and its relevance for EU law see D Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn from the US Supreme Court’s Judgment in *Trinko* in the Wake of *Microsoft*, *IMS* and *Deutsche Telekom*?’ (2004) CML Rev 1519-1553.

right price for access, antitrust courts would act as ‘central planners’, a role for which they are ill-suited.⁸

Trinko apart, the above cases may be seen as setting a limit on the freedom to deal, as expressed by the Supreme Court itself in its famous ‘*Colgate* doctrine’.⁹ A series of Circuit and District Court judgments have further explained the rationale, defined the scope and identified the conditions for the application of the above Supreme Court decisions, thereby giving rise to a ‘doctrine’¹⁰. This doctrine has inspired the EU Commission and has also led the CFI and ECJ to become involved with the circumstances of its application.¹¹

1.1. Case law pointing to the existence of a doctrine

1.1.1. At the EU level

1.1.1.1 Commission practice

The Commission has developed an extensive case law where recourse is made to the doctrine of essential facilities. In many of its decisions the Commission expressly refers to the doctrine, while in others – especially in the most recent ones – it follows the doctrine without naming it. The relevant Commission decisions, depending on their subject matter, may be classified into four main categories.

a) Ports

⁸ The exact weight which should be given to this judgment is subject to debate, since some authors view it as ‘an ideological judgment written by the Court’s most conservative judge (Justice Scalia) whose primary objective was to impose a minimalistic vision of antitrust law (see Geradin in the previous note, who presents the view put forward by Fox in the 2004 spring meeting of the Antitrust Section of the American Bar Association), while others talk of a more liberal (as opposed to a more interventionist) approach ‘celebrated’ by the Supreme Court in *Trinko*, see I. Forrester, ‘The Interaction Between Competition Law and Intellectual Property Law’ RSCAS/EUI June 2005, at <http://www.iue.it/RSCAS/Research/Competition/2005/200510-CompForrester.pdf>, at p. 14.

⁹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

¹⁰ See, *i.a.* *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1977); *United States v. AT&T*, 524 F.Supp. 1336 (D.C. Cir. 1981); *MCI Communications v. AT&T*, 708 F.2d 1081 (7th Cir. 1983); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *Image Technical Services v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *Intergraph Corp v. Intel Corp*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998); *United States v. Microsoft Corp.*, Civ. Action no 98-1232 (D.D.C. filed May 18, 1998); *AT&T Corp. v. Iowa Utils. Bd.* above n 6.

¹¹ For a general overview of the relevant case law see, in addition to the numerous articles quoted below, in relation to specific issues, the more general contributions by D Glasl, ‘Essential Facilities Doctrine in EC antitrust Law; a contribution to the current debate’ (1994) *ECLR* 306; M Furse, ‘The essential Facilities Doctrine in Community Law’ (1995) *ECLR* 469; and more recently L Flynn, ‘The Essential Facilities Doctrine in the Community Courts’ (1999) *Commercial Law Practitioner* 245.

The very first case in which the Commission expressly applied the essential facilities doctrine was in *B&I/Sealink*,¹² concerning the use of the port of Holyhead. Sealink owned the port and was at the same time using it in order to offer transport services. It decided to change its own timetables, so that its vessels obstructed B&I's loading procedure, thus rendering it more time consuming. In the second case concerning the same port, *Sea Containers/Stena Sealink*,¹³ the complainant had no presence whatsoever in the port, but required access, in order to penetrate the relevant market. In both cases the Commission decided in favour of the complainants and awarded interim measures. In the former case, the Commission held that the owner of the essential facility was subject to a special duty of non-discrimination: he could not reserve to his competitors less favourable treatment from the one reserved to his own activities, based on the essential facility.¹⁴ In the latter case, the Commission made it plain that the doctrine would not be restricted to ensuring fair treatment of existing competitors, but would also apply for allowing new entrants into the market.

The two further Commission decisions on ports have the particularity of concerning, at least formally, measures by public authorities, not private undertakings.¹⁵ In *Port of Rødby*,¹⁶ the Commission found that Article 82 EC together with Article 86 EC were being violated by the Danish government which refused the competitor of the state-owned ferry company a) authorization for the construction of a new facility close the existing one and b) access rights to the existing facility. The same logic prevailed in *ICG/CCI Morlaix (Port of Roscoff)*,¹⁷ where the Commission ordered the Chambers of Commerce of Morlaix, in Brittany, to give access to the port of Roscoff to an Irish company who wanted to set up a new route, in which no undertaking was present.

¹² *B&I/Sealink*, Decision (interim measures) of 11 June 1992, EC Bull. 6-1992, at 1.3.30. On this decision see N Maltby, 'Restrictions on Port Operators: Sealink/B&I Holyhead' (1993) *ECLR* 223.

¹³ *Sea Containers/Stena Sealink*, Decision (interim measures) of 21 December 1993, 94/19/EC, EE L 15, 18-1-94, 8.

¹⁴ The 'special' character of the duty of non-discrimination lies precisely on the fact that the comparison is not held between the various competitors which seek access to the facility, but as between the holder of the facility himself, and any of his competitors in a downstream market.

¹⁵ On the issue of the application of competition rules to public measures and internal market rules to private ones, see J Baquero Cruz, *Between Competition and Free Movement* (Oxford/Portland, Hart Publishing, 2002), where the reader is to find extensive references to further bibliography.

¹⁶ *Port of Rødby*, Decision of 21 December 1993, 90/119/EC, EE L 55, 26-2-94, 52.

¹⁷ *ICG/CCI Morlaix (Port of Roscoff)*, Decision (interim measures) of 16 May 1995 (IV/35.388) 5 CMLR (1995), 177.

b) Airports

In *London European/Sabena*,¹⁸ the Commission ordered the Belgian company to allow the British firm access to its computerized reservation system (CRS), for the Brussels-London route.¹⁹ In *British Midland/Aer Lingus*,²⁰ the Irish company was compelled to continue its interlining agreement²¹ with the complainant company, for at least two years. In *FAG-Flughafen Frankfurt/Main AG*²², the company operating the airport was ordered to allow other undertakings to offer groundhandling services, in competition to its own services. Similarly, in *Alpha Flight Services/Aéroports de Paris*,²³ the airport operating company was obliged to charge non-discriminatory fees to all the undertakings offering catering services within the airport, even though it did not, itself, have any presence in this secondary market.

c) Rail infrastructure

The Channel Tunnel has given rise to two important Commission decisions. In *Night Services*,²⁴ the Commission cleared the creation of a joint venture for the provision of night services through the Tunnel, subject to the condition that, after a grace period of eight years, the infrastructure should be accessible to any competitor.²⁵ Similarly, in *Eurotunnel*²⁶ the Commission intervened, requiring the owner of the Channel tunnel, while it committed capacity to the French and British rail companies, to make sure that some capacity would be set aside for potential new

¹⁸ *London European/Sabena*, Decision 88/589/EEC, EE L 317, 24-11-88, 47.

¹⁹ It is doubtful, however, whether it is justified to present this case as an application of the essential facilities doctrine since a) there was already competition along the route in question and b) the CRS in question was not the only one existing in the market, since other companies already operated alternative CRS.

²⁰ *British Midland/Aer Lingus*, Decision 92/213/EEC, EE L 96/34 (1992).

²¹ Interlining agreements are concluded between air companies, in order to allow passengers to use a single ticket for flights with all the participating air companies, change flights between the various companies, offer common groundhandling services etc. Interlining produces 'network externalities' and makes air companies with such agreements more attractive to passengers than small 'isolated' companies.

²² *FAG-Flughafen Frankfurt/Main AG*, Decision of 14 January 1998, 98/190/EC, EE L 72, 11-3-98, 30.

²³ *Alpha Flight Services/Aéroports de Paris*, Decision of 11 June 1998, IV.35.613, EE L 230, 210. This Commission decision has been upheld on appeal, by the CFI, see Case T-128/98 *Aéroports de Paris v. Commission* [2000] ECR II-3929 and further by the ECJ, see Case C-82/01 P *Aéroports de Paris v. Commission* [2002] ECR I-9297.

²⁴ *Night Services*, Decision of the 21 September 1994, 94/663/EC, (IV/34.600) OJ L 259/20.

²⁵ It is worth noting that this case presents considerable similarities with the US *Terminal Railroad Association* case above n 2.

²⁶ *Eurotunnel*, Decision of the 13 December 1994, 94/894/EC, IV/32.490, OJ 1994 L 354 31-12-94, 66.

entrants. Both these Decisions were set aside by the CFI, but for reasons which do not negate the application of the essential facilities doctrine.²⁷

d) Intellectual property

The Commission applied the essential facilities doctrine in respect of intellectual property rights (IPRs) for the first time in the famous *Magill* decision.²⁸ The fact that the Commission decision has been upheld both by the CFI and the ECJ and the grounds for doing so, have been extensively commented upon.²⁹ In the *Tiercé Ladbroke* decision the Commission,³⁰ in a decision later upheld by the CFI,³¹ showed itself respectful of the IPRs covering horse race images and refused to order their holder to assign them to the bookmakers taking bets on these same races. In *NDC Health/IMS Health*,³² the Commission ordered the holder of a patent for a database to allow its competitors to use the database's information structure (based on a mapping of the German territory in 1860 or 2847 bricks: "the brick structure"), in order to offer a competitive database. This interim decision was quashed by an Order of the President of the CFI,³³ subsequently confirmed by an Order of the President of the ECJ.³⁴ The Commission later withdrew its decision, since a judgment by the Frankfurt Higher Regional Court allowed third parties to develop a brick structure very similar to the one patented by IMS.³⁵ At the same time, the Frankfurt District Court, from which IMS had asked for protection of its patent rights, submitted three preliminary questions to the ECJ, on the same issues discussed in the annulment proceedings. The Court's judgment, strongly debated already before being delivered³⁶ recognized that

²⁷ See joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECR II-3141 and Case T-79 & 80/95 *SNCF & BRB v. Commission* [1996] ECR II-1491.

²⁸ *Magill TV Guide/ITP, BBC & RTE*, Decision of 21 December 1989, OJ L 78, 43.

²⁹ See R Whish, *Competition Law*, 5th ed (United Kingdom, Butterworth & Co Publishers, 2003), 665 et seq., and the bibliography quoted there.

³⁰ Commission Decision of 24 June 1993 (IV/33.699).

³¹ Case T-504/93 *Tiercé Ladbroke v. Commission* [1997] ECR II-923.

³² *NDC Health/IMS Health*, Decision (interim measures) of 3 July 2001, OJ 2002 L 59, 18.

³³ Orders of the 26th of October 2001.

³⁴ Case C-481/01 P(R) [2002] ECR I-3401.

³⁵ See Press Release n. IP/03/1159 of 13-8-2003 available at the Rapid database, <http://europa.eu.int/rapid/>.

³⁶ This is why reference to the relevant doctrine is deemed important. See *i.a.* G Zebedee & C Dussart-Lefret, 'Commission exceptionally orders the licensing of a copyright to safeguard competition in the German pharmaceutical sales reports market' (1/2002) *Competition Policy Newsletter*, 61; M M M Griffiths, 'Court's Intervention Intensifies Debate About Commission's Imposition of Interim Measures on IMS Health' *EuroWatch*, 15-9-2001, 3; L Idot *Europe* 11/2001, comm. 331; more recently C Stothers, 'The end of exclusivity?: Abuse of Intellectual Property Rights in the EU' (2002) *European Intellectual Property Review*, 86; F Fine, 'NDC/IMS: A Logical Application of Essential

IMS could be ordered to give a compulsory license on its patented structure.³⁷ The material conditions for this to happen, restrictively defined by the ECJ, had to be ascertained by the referring court.

The recent *Microsoft* decision is highly relevant in this respect.³⁸ In an investigation, which was initiated as early as August 2000, the Commission has identified two abuses by the world's leading software company. (i) In the field of interoperability, Windows (a PC operating system) is designed to work better with Microsoft's own low-end network software (used for work group servers), while rivals are being refused access to essential code and interface information. The remedy adopted by the Commission in its decision is the imposition of core disclosure obligations that would be indispensable for Microsoft's competitors to achieve full interoperability with Windows. Importantly enough, disclosure does not extend to the source code, let alone the software itself, but is restricted to interface information.³⁹ This may in fact mean that Microsoft, in order to comply with the decision, has to put up extra work and produce a comprehensive set of interface information (which is of use only to the competitors), but it also means that the "essential" software itself continues to be protected. In other words, the measure ordered by the Commission is only apt to secure "vertical" interoperability (between the basic or "essential" software and applications which are based on this basic software), but not horizontal (between software programs which have the same basic functions).⁴⁰ To the extent that any of this interface information might be protected by intellectual property in the European Economic Area, Microsoft would be entitled to reasonable remuneration.⁴¹ (ii) The second abuse identified by the Commission is a tying practice, whereby

Facilities Doctrine', available at <http://www.ftc.gov/os/comments/intelpropertycomments/finefrank.pdf>; also the extremely interesting article by counsel in *Magill* and *IMS*, I Forrester, 'Compulsory Licensing in Europe: a Rare Cure to Aberrant National Intellectual Property Rights', available at http://www.whitecase.com/article_competition_ip_law_forrester.html.

³⁷ Case C-418/01 *IMS Health v NDC Health* [2004] nyr. For a fuller account of this judgment see below at 1.1.1.2.

³⁸ Commission Decision of 24 March 2004, COMP/C-3.37.792, C(2004) 900 final.

³⁹ i.e. the 'hooks' on which the competitors may connect their own operation systems which would 'talk' to Windows.

⁴⁰ For the distinction between 'vertical' and 'horizontal' interoperability, and for other extremely interesting developments concerning the need not to confer absolute legal protection to software programs, see the excellent article by B Rotenberg, 'The Legal Regulation of Software Interoperability in the EU: Confronting *Microsoft* with *Appleby* and *Chassangou*' Jean Monnet Working Paper 7/05, at 13.

⁴¹ Under the surveillance of a Monitoring Trustee, named by the Commission decision.

Microsoft is offering its Media Player as an integrated part of the operating system, thereby excluding all competition on the merits. The remedy adopted by the Commission in this respect is that Microsoft be obliged to offer a version of Windows without the Media Player included (typical untying obligation).⁴² The more drastic remedy of a ‘must carry’ obligation, whereby Microsoft would be obliged to offer competing media players with Windows, was dropped by the Commission at the last minute. Such a remedy would rest on the idea that the operating system is an essential facility, to which competitors need access in order to compete in downstream markets, such as the one for media players.⁴³ However, the fact that such a remedy has not been adopted makes the second violation identified by the Commission less interesting for the application of the essential facilities doctrine.

1.1.1.2. The CFI/ECJ

The EC Courts have been far more reserved in the application of the essential facilities doctrine, despite the fact that several Advocates General have openly discussed, in their opinions, the conditions and effects thereof.

1.1.1.2.1. The ECJ

The *Magill* judgment⁴⁴ is seen as the ‘unconfessed’ adoption by the ECJ of the doctrine of essential facilities. In this case, without expressly referring to the doctrine, the Court found that in ‘exceptional circumstances’ third parties should be granted access to goods/services (such as TV listings), despite the fact that they were

⁴² Although this obligation has been criticized because a) it allows the regulator to intervene in the very design of the products, b) it forces the dominant firm to put into the market an inferior quality product, c) while it does not make any provision for such a product to be sold at an inferior price; see Heinemann, ‘Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission’s *Microsoft* Decision’ (2005) *International Review of Intellectual Property and Competition Law – ICC*, 63-82, at 79 et seq.

⁴³ It is worth noting that a series of actions against Microsoft have been brought by the US Federal Trade Committee and the Department of Justice, for which see http://www.usdoj.gov/atr/cases/ms_index.htm. At this occasion also, the application of the essential facilities doctrine has been adequately discussed; see M Harz, ‘Dominance and Duty in the EU : A Look Through Microsoft Windows at the Essential Facilities Doctrine’, available at <http://www.law.emory.edu/EILR/volumes/spg97/HARZ.html> and J Lopatka & W Page, ‘Microsoft, Monopolization and Network Externalities: Some Uses and Abuses of Economic Theory in Antitrust Decision Making’ (1995) *Antitrust Bulletin*, 317. See also on the similar Intel case ‘Intel and the Essential Facilities Doctrine’ available at <http://www.cptech.org>. Unsurprisingly, the EC Commission’s decision is more restrictive for Microsoft than the US equivalent.

⁴⁴ Case C-241 & 242/91 P *Radio Telefis Eireann v. Commission* [1995] ECR I-743, thereby upholding previous judgments by the CFI, see Cases T-69/89 & T-76/89 *RTE & ITP v. Commission* [1991] ECR II-485 & 575, respectively.

protected by IPRs. This would occur where three conditions, detrimental to competition, were met: that by refusing to licence, the holder of the right a) reserved for himself a secondary market (that of TV guides), thus excluding all possible competition and b) rendered impossible the emergence of a new product (comprehensive TV guides), for which demand existed in the market. Further, c) any objective justification should be absent. This judgment clearly restricted the freedom to refuse supply, which the ECJ had bestowed upon holders of IPRs some years earlier, in the *Maxicar v. Renault*⁴⁵ and *Volvo v. Veng*⁴⁶ cases. Moreover, it raised a wave of criticism and uncertainty as to the precise value of IPRs.⁴⁷

The second occasion on which the Court was faced with the application of the essential facilities doctrine, was in the *Oscar Bronner* case.⁴⁸ In his opinion, Advocate General Jacobs offered a quite extensive and knowledgeable discussion of the doctrine. The Court substantially followed the Advocate General and held that access to a facility (a nationwide system of home delivery for newspapers) could only be granted if, on top of *Magill's* ‘exceptional circumstances’, two cumulative conditions were satisfied: a) that the refusal to deal was likely to eliminate all competition from the relevant market, on the part of the person requesting access and b) that the facility ‘in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence’.⁴⁹ This last condition, which is the main contribution of this judgment in the application of the essential facilities doctrine,⁵⁰ would only be fulfilled if i) there are no plausible alternatives to the facility, even of

⁴⁵ Case 53/87 *Maxicar v. Renault* [1988] ECR 6039.

⁴⁶ Case 238/87 *Volvo v. Veng* [1988] ECR 6211.

⁴⁷ See among others I Govaere *The Use and Abuse of Intellectual Property Rights in EC Law* (London, Sweet & Maxwell, 1996), esp. Chapter 5 ‘Abuse of Intellectual Property Rights under the Competition Rules’; V Korah, ‘The interface between intellectual property and antitrust: the European experience’ (2001) *Antitrust L.J.* 801 and ‘The Ladbroke Saga’ (1998) *ECLR*, 169; A Overd & B Bishop, ‘Essential facilities : The rising Tide’ (1998) *ECLR* 183; R Subioto, ‘The Right to Deal with Whom One Pleases Under EEC Competition Law: A Small Contribution to a Necessary Debate’ (1992) *ECLR* 234.

⁴⁸ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeinungs-und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-779. For this case see *i.a.* E Gippini- Fournier, ‘“Essential facilities” y aplicacion del articulo 82 CE a la negativa unilateral a contratar. Algunas consideraciones tras la sentencia Bronner’ (2000) *Gaz.Jur.U.E.Comp* 77 ; L Hancher, ‘Caselaw: Court of Justice (Oscar Bronner v. Mediaprint)’ (1999) *CML Rev* 1289 ; and R Pillitteri, ‘La Corte di Giustizia circoscrive rigorosamente I confini di applicazione della c.d. « essential facilities doctrine » nella repression dell’ abuso di posizione dominante’ (1999) *Diritto del Commercio Internazionale* 1024.

⁴⁹ See *Oscar Bronner* above n 48, para 41.

⁵⁰ See in this respect D Neven & P Mavroidis, ‘The Interface Between Competition and Contract Law. The Case of Essential Facilities’ EUI 2003 EU Competition Law and Policy Workshop/Proceedings, available at <http://www.iue.it/RSCAS/Research/Competition/2003/200306COMP-Neven-Mavroidis-sII.pdf>

an inferior quality (such as selling through the post, kiosks, shops etc)⁵¹ and ii) the impossibility of duplicating the facility is objective, due to ‘technical, legal or economic obstacles’ and not to the limited capacities (e.g. inadequate output) of the specific competitor requiring access.⁵² This case is clearly more restrictive and less far-reaching than the judgment in *Magill*. It seems, however, to stand for the acceptance/confirmation, albeit in a restricted form, of the essential facilities doctrine.

The view that an essential facilities doctrine does exist in EU law cannot be seriously disputed after the judgment of the Court in the *IMS v. NDC* case.⁵³ First, the Court started its reply, and indeed based the entire judgment ‘on the premise ... that the use of the 1860 brick structure is *indispensable* to allow a potential competitor to have access to the market’.⁵⁴ Second, the Court, following on this point Advocate General Tizzano’s opinion, rephrased the second and third questions of the referring court: while the questions had as their object to determine whether the participation of pharmaceutical companies in the definition of the protected structure and their eventual efforts to adapt to any alternative structure, made IMS’s *refusal abusive*, the Court gave judgment on whether these elements rendered the protected *structure essential*. Only because these were found to be ‘indispensable’ for competitors, IMS’s refusal could qualify as abusive. Third, the Court did indeed find that, when ‘exceptional conditions’ are met, the refusal to licence would be abusive. Therefore, from a formal point of view all the elements of an essential facilities doctrine, though not the name, have been acknowledged by the ECJ in its judgment in *IMS Health*.⁵⁵

From a substantive point of view the Court’s judgment in *IMS Health* is important in two ways. First, it further explains some of the ‘exceptional’ *Magill* conditions and especially, the requirement that the refusal to licence competitors is only abusive when such competitors wish to put into the market ‘new products or

⁵¹ *Oscar Bronner* above n 48, para 43.

⁵² *Oscar Bronner* above n 48, para 44.

⁵³ Above, n 37. and for an extensive explanation as to why this case may be seen as the consecration by the ECJ of the essential facilities doctrine, see our comments in CML Rev (2004) 1613-1638. Contra, see D Geradin, above n 7 at 1539 who states that ‘[i]n sum, as in US antitrust law, there does not seem to be an “essential facilities” doctrine formally recognized by the ECJ’.

⁵⁴ *IMS Health*, above n 37, para 22, emphasis added.

⁵⁵ The doctrine of essential facilities has been argued by the parties and discussed by the Court in another couple of cases, in which, however, the Court did not make reference to the doctrine: Case C-363/01 *Flughafen Hannover-Langenhagen* [2003] nyr, and Case C-109/03 *KPN Telekom v OPTA* [2004] nyr; for both these cases see below 1.1.2. At the member States level.

services not offered by the copyright owner and for which there is a potential consumer demand⁵⁶. Second, it gives an (imperfect) answer to one of the main theoretical queries linked with the scope of the essential facilities doctrine: should there be a clear distinction between the market of the facility, in which its owner is dominant, on the one hand and the ancillary market (upstream or downstream) in which the competitor will compete using the facility, on the other?⁵⁷

1.1.1.2.2. The CFI

The CFI in the *Tiercé Ladbroke* case,⁵⁸ upheld the Commission's decision, in holding that horse race images are not necessary for the taking of bets on races and therefore, do not qualify as an essential facility. Moreover, the CFI made it plain that the doctrine could not be invoked by an undertaking which already has a strong presence in the relevant market and which only wishes to strengthen its position. In *European Night Services*⁵⁹ the CFI annulled the restrictions imposed by the Commission on the members of the joint venture.⁶⁰ Three points of this judgment merit attention. First, that the doctrine may not apply to an undertaking which does not occupy a dominant position in the relevant market (in the market of rail, road, air and intermodal transport, the joint venture only held 7%).⁶¹ Second, the CFI was stricter than the Commission on the conditions that render a facility 'essential'. Therefore, contrary to the Commission, the CFI found that neither the locomotives, nor the specialized personnel, were part of the facility to which access could be claimed. Third, the CFI, taking into account the importance of the investments required for the setting up and running of the joint venture, annulled the Commission's decision, to the extent that it granted to the joint venture an exemption limited to eight years.⁶² In the other cases, where the CFI itself refers explicitly to the

⁵⁶ *IMS Health v. NDC Health*, para 52 and operative part. Further for this requirement see below 1.2.1.5.

⁵⁷ For the answer to this question see below 1.2.1.3. Elimination of competition.

⁵⁸ Above, n. 31.

⁵⁹ *European Night Services* above n 27.

⁶⁰ For the decision of the Commission see above, 1.1.1.1 Commission practice.

⁶¹ Note that this was an Art 81 case – a decision as to the existence of dominance was necessary in order to assess the Article 81(3) conditions that the Commission had imposed upon the undertakings by virtue of the essential facilities doctrine.

⁶² In fact, the CFI annulled the Commission decision because it had failed to prove that the agreement hindered competition at all. However, the CFI made it clear that (para 230) 'even if it is assumed that the Commission's assessment of the restrictions on competition in the contested decision was adequate and correct ... the length of time required to ensure a proper return on that investment [necessary to

term ‘essential facilities’, it does so without further clarifying the content thereof, usually in the context of some *obiter dictum*.⁶³

1.1.2. At the member States level

Magill and the subsequent case law, combined with the ongoing liberalisation of telecommunications, gave rise to significant litigation at the national level.

One first issue which came to be judged by the national courts and competition authorities concerned the right to publish and/or use listings of the telephone subscribers of incumbent companies. In a controversial judgment, *SFR v. France Télécom*,⁶⁴ the Paris Court of Appeal held that the complete list of subscribers of the incumbent operator (comprising also those whose numbers were held secret) constituted an essential facility.⁶⁵ Hence, the incumbent could not use this listing for its own advertisement, without allowing its competitors to have equal access to it. The same logic prevailed in the decision of the Italian Competition Authority in *Sign/Stet-Sip*,⁶⁶ on a basis of facts very similar to those prevailing in *Magill*. The telecom incumbent (Sip) and its mother company (Stet) held exclusive rights over the listings of their subscribers and, despite the existence of public demand to this effect, refused to publish them in electronic form, either in the form of CD ROMs or online. They were compelled to allow others to offer such a new product into the market. This decision by the Italian Autorità came some months after it had acknowledged, for the first time, the existence of the doctrine of essential facilities, in *Telesystem v. SIP*,⁶⁷

economic progress and consumers’ welfare] is necessarily an essential factor to be taken into account when determining the duration of an exemption, particularly in a case such as the present, where it is undisputed that the services in question are completely new, involve major investments and substantial financial risks and require the pooling of know-how by the participating undertakings’.

⁶³ These cases are: *SNCF & BRB v. Commission* above n 27; Case T-102/96 *Gencor v. Commission* above n 1; *Aéroports de Paris v. Commission* above n 23; Case T-112/99 *Metropole Television* [2001] ECR II-2459; Case T-52/00 *Coe Clerici Logistics v. Commission* [2003] ECR II-2123; T-158/00 *ARD v Commission (BSkyB)* [2003] nyr.

⁶⁴ CA Paris, 1 sept. 1998, *SFR v. France Télécom*, RG 98/12345, Dalloz Affaires, n° 133, 8-10-98, 1559.

⁶⁵ It is questionable whether this is a proper application of the essential facilities doctrine, since competition in the French telecommunications market was already fierce, at the time when access to the directory was asked for. Furthermore, the solution reached by the Paris Court of Appeal runs against the logic of the telecom directives, in particular Directive 98/10/EC on universal service, under which each operator (also the incumbent) is compelled to communicate to other entities wishing to edit telephone directories only the ‘non-reserved’ numbers; see in this respect ECJ Case C-146/00 *Commission v. France, Universal Service* [2001] ECR I-9767, para 67-68.

⁶⁶ Decision of 26-27 April 1995, *Sign/Stet-Sip*, Boll. Autorità conc. e mercato, n. 17/1995, 5.

⁶⁷ Decision of 1995, *Telesystem v. Sip*, Boll. Autorità conc. e mercato, n. 1-2/1995, 5.

concerning access to the fixed telecommunications network of the incumbent. In Belgium, in *Belgacom v. Kapitol Trading*, the Commercial Tribunal of Brussels, held that the incumbent operator could not prevent third parties wishing to publish CD ROMs with the telephone listings from publishing them, despite the fact that they were the subject of an IPR.⁶⁸ A similar issue, but with the difference that in the meantime the 1998 ONP Directive had come into effect,⁶⁹ arose in the Netherlands. The Directive (art. 6 (3)) *expressly provides that incumbents* ‘meet all reasonable requests to make available the relevant information in an agreed format on terms which are fair, cost oriented and non-discriminatory’. KPN’s competitors were requesting access not merely to the basic information, but also to additional information compiled by KPN (concerning the profession, the existence of other phone numbers, etc). In a preliminary ruling the ECJ held that such a disclosure of information did not stem from the Directive itself, nor from any other source.⁷⁰

A second field of extensive litigation concerns airports and linked facilities. In *Héli-Inter Assistance* the French Conseil de la Concurrence,⁷¹ upheld by the Paris Court of Appeal,⁷² held that a heliport within Paris was an essential facility for the provision of first aid and rescue services. Therefore, its owner, which itself offered such services was compelled to give access to the heliport to competitors in this downstream market.⁷³ In *De Montis v. Aeroporti di Roma*,⁷⁴ the Italian Autorità ordered the defendant to allow competitive catering companies to have access to the ramps, etc of the airport. More recently, in *Aeroporti di Roma/Tariffe di*

⁶⁸ After this decision *Belgacom* started giving licences to its listings, but against an exorbitant fee. A Dutch Company *ITT Promedia NV*, complained to the EC Commission and eventually the case was settled with the incumbent agreeing on a fee almost 90% lower than the initial fee, see Commission Press Release of 11 April 1997, IP/97/292. For further applications of the doctrine in Belgium see *E. Vegis* ‘La théorie des « essential facilities » : genèse d’un fondement autonome visant des interdictions d’atteinte à la concurrence ?’, RDC/TBH (1999) 4.

⁶⁹ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ (1998) L 101/ 24.

⁷⁰ Case *KPN Telekom v Opta*, above n 55. On the issue of the possible application of the essential facilities doctrine in sector-regulated fields, such as the telecommunications see below 1.2.1.3. Elimination of competition

⁷¹ Cons. Conc. Déc. 96-D-51, 3 sept. 1996, BOCCRF 8-1-97, 3.

⁷² CA Paris, 9 sept. 1997, BOCCRF 7-10-97, 692.

⁷³ For this and other cases in which the French Conseil de la Concurrence and jurisdictions have discussed and/or applied the doctrine of essential facilities see M Thill-Tayra & C Couadou, ‘Le droit d’accès à l’épreuve de la théorie des installations essentielles’ (5/1999) *Contrats – Concurrence – Consommation*, , 4.

⁷⁴ Decision of 2 March 1995, *De Montis Catering Roma v. Aeroporti di Roma*, Boll. Autorità conc. e mercato, n. 9/1995, 5.

*Groundhandling*⁷⁵ the Italian Authority applied the essential facilities doctrine in order to assess whether the fee system imposed by the airport to undertakings offering groundhandling services constituted an abuse of a dominant position.⁷⁶ The Frankfurt Oberlandesgericht faced a similar issue, in a dispute between the airport of Hannover and Lufthansa. The point that distinguishes this case from previous airport cases is that Directive 96/67/EC on groundhandling had entered into force in the meantime.⁷⁷ This Directive provides for a fee to be paid by the users of airport facilities. The question which arose was whether on top of this ‘usage fee’, the facility holder was also allowed to charge an ‘access fee’, presumably stemming from general competition rules and the doctrine of essential facilities (the facility holder invoked the Commission decision in *Aéroports de Paris* in this respect). The Court denied the existence of such a right, but held that nothing ‘prevent[s] the fee from being determined in such a way that the managing body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit.’⁷⁸

In a field with which EU competition lawyers are by now highly familiar, the French *Conseil de la Concurrence* rejected a plea under the essential facilities doctrine concerning the refusal of Apple to grant a license to one of its competitors for the electronic platform which allows digital music to be downloaded, transferred and played by a piece of hardware patented by Apple, the iPod.⁷⁹ The similarities between this case and the European *Microsoft* case are evident. However, in contrast to *Microsoft*, Apple was not found dominant in any of the possible relevant markets: (a) the market for the technologies which allow the distinctive encoding and downloading of music, especially since Microsoft’s Media Player tends to dominate this market, b) the market for portable music players, since other ‘flash’ players

⁷⁵ Decision of 20 November 2000, *Aeroporti di Roma / Tariffe di Groundhandling*, Boll. Autorità conc. e mercato, n. 38/2000 and <http://www.agcm.it>.

⁷⁶ For a thorough discussion of the Italian experience of the essential facilities doctrine see M Siragusa & M Beretta, ‘La dottrina delle essential facilities nel diritto comunitario ed italiano della concorrenza’ (1999) *Contrato e impresa, Europa*, 260.

⁷⁷ Directive 96/67/EC, on access to the groundhandling market at Community airports, OJ 1996 L 272, 36.

⁷⁸ Case *Flughafen Hannover-Langenhagen* above n 55, para 56.

⁷⁹ Conseil de la Concurrence, Décision n° 04-D-54 of 9 November 2004, available at <http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>. See on this decision G Mazziotti, ‘Did Apple’s refusal to license proprietary information enabling interoperability with its iPod music player constitute an abuse under Article 82 of the EC Treaty’ (2005) *Berkeley Center of Law and Technology*, paper 5/2005.

occupy an important part of the market and c) the market for downloaded music. Hence, the case was dropped.

Further (attempted) applications of the essential facilities doctrine may easily be identified in the practice of the competent authorities and jurisdictions of member states.⁸⁰ The existence of such a ‘trend’ within member states does not in itself mean that there is an EU doctrine of essential facilities. It may, nevertheless, constitute an important indication that such a doctrine does exist .

1.2. The content of the doctrine

From the developments of the previous subsection (1.1) it becomes clear that the courts and competition authorities, both at the EU and the member state level, tend to reason in a specific way, when faced with cases where the use of some essential infrastructure or facility is at stake. The adoption of a specific pattern in the case law seems to argue in favour of the existence of a doctrine.⁸¹ It is, therefore, crucial to examine the conditions for the application of such a doctrine (1.2.1), as well as the consequences thereof (1.2.2).

1.2.1. Conditions for the application of the doctrine

No attempt to define the contents of an EU essential facilities doctrine can succeed without addressing: a) the definition given by the Commission in the first decision in which the doctrine was applied⁸² and, more importantly b) the definition given by Advocate General Jacobs in his opinion in *Oscar Bronner*.⁸³ The Advocate General states that

according to that doctrine a company which has a dominant position in the provision of facilities which are essential for the supply of goods or services in another market abuses its dominant position where, without objective justification, it refuses access to those facilities. Thus, in certain cases, a dominant undertaking must not merely refrain from anti-competitive action

⁸⁰ See, for each separate country, the articles referred to above.

⁸¹ Of course, the strengths and weaknesses of this proposition are going to be tested in Section 2 of the present Chapter.

⁸² *Sea Containers/Stena Sealink*, above n 13, paras 66-67.

⁸³ Opinion delivered in Case 7/97 *Oscar Bronner* [1998] ECR I-7791, para 34.

but must actively promote competition by allowing potential competitors access to the facilities which it has developed.⁸⁴

From the definition given above, the scope of the EU essential facilities doctrine may be defined by reference to seven (plus one implicit) elements.

1.2.1.1. A facility

The nature and characteristics of the facility which may justify the application of the doctrine is a topic of argument and dissent among writers. According to the more restrictive view, only infrastructure which is objectively bulky, costly or else very difficult to duplicate could justify the application of the doctrine. These conditions would be satisfied by fixed infrastructure, such as ports, airports, railway stations and material networks (e.g. the electricity grid or natural gas pipeline) and, only exceptionally, by intangible networks (e.g. radio frequencies, distribution networks etc).⁸⁵ Such a restrictive view accounts for the vast majority of cases in which the Commission applied the essential facilities doctrine to ‘natural monopolies’.⁸⁶ Moreover, it is corroborated by the terminology used in several countries: in French the term used instead of ‘facilities’ is the more restrictive ‘installations’,⁸⁷ while in other languages the term ‘infrastructures’ is also used.⁸⁸

However, such a restrictive definition of the term ‘facility’ does not account for all the case law of the Commission and, more importantly, that of the Court. For, in *Magill*, the Court ordered access to be given to *TV listings*. Similarly, in *Ladbroke* the CFI implicitly admitted that the race *images* could qualify as a ‘facility’, but

⁸⁴ What Mr. Jacobs omits to mention is that the undertaking giving access to the facility is entitled to receive a just access fee.

⁸⁵ See among others, V Korah, ‘The interface between intellectual property and antitrust: the European experience’ above n 47; R Pillitteri, ‘La Corte di Giustizia circonscrive rigorosamente I confini di applicazione della c.d. «essential facilities doctrine» nella repression dell’ abuso di posizione dominante’ above n 48.

⁸⁶ For which see below 2.1.1.2. A doctrine or just a legislative pattern?.

⁸⁷ See M Thill-Tayra & C Couadou ‘Le droit d’accès ...’, above, n 67.

⁸⁸ In view of the semantic difference of the terms used, most writers prefer to use the English terminology, irrespective of the language in which they are writing; see for Italian Pillitteri, above, Siragusa & Beretta, above n 76, and S Bastianoni, ‘A proposito della dottrina delle essential facilities, Tutela della concorrenza o tutela dell’iniziativa economica’ (1999) *Mercato Concorrenza Regole* 149; G Moglia & D Durante, ‘Le essential facility e la creazione di nuovi mercati concorrenziali: recenti sviluppi tra antitrust e regolamentazione’ (1999) *Concorrenza e mercato* 299; for Spanish Gippini-Fournier; for French (Belgian) Vegis, cited in the previous notes; and for Greek, V Hatzopoulos, *The essential facilities doctrine in EU and Greek Competition Law* (Athens, Sakkoulas, 2002).

rebutted the argument that they were ‘essential’ for the market of bookmaking. In *Oscar Bronner*, which clearly stands for a restrictive approach to the doctrine, the ECJ was ready to accept that a private *distribution network* for newspapers may constitute a facility, but was not convinced that, in this given case, it was ‘essential’. More importantly still, in *IMS Health*⁸⁹ the Court held that the (protected) *logic structure of a database* could constitute an essential facility and instructed the national court to order compulsory licensing thereto, subject to the proviso that the information thus obtained would be used by the competitors in order to bring to the market a new product.⁹⁰ Last but not least, in *Microsoft*, the Commission deemed a *PC operational system* to be essential and ordered interface information to be delivered to competitors. The Commission also ordered an interim injunction to this effect, which Microsoft sought to have suspended by the ECJ. The President of the CFI, in a lengthy Order (of no less than 478 paragraphs) delivered in December 2004, rejected Microsoft’s action.⁹¹

In view of the above practice, it is really difficult to argue convincingly that only ‘heavy’ and ‘one off’ pieces of infrastructure, such as airports, are contemplated by the doctrine. Moreover, in an era of privatisation and market liberalisation, where access to the majority of fixed infrastructures is regulated by extensive secondary legislation, a restrictive definition of the term ‘facility’ would hardly leave any scope for the doctrine. At most, this would confine the doctrine to a mere interpretative instrument of acts of secondary legislation,⁹² or to a complement thereto.⁹³ Such an outcome would hardly be satisfactory, for at least two reasons. First, it is not clear to

⁸⁹ Case C-418/01 *IMS Health* [2004] nyr, for which see the comment by the present author in (2004) *CML Rev* 1613.

⁹⁰ For the “new product” requirement see below 1.2.1.5. The requirement that the facility be used for a ‘new’ product.

⁹¹ Case T-201/04 R *Microsoft e.a v. Commission* [2004] nyr.

⁹² See, for a case where the doctrine is applied as a means of interpretation of the rules on telecommunications, Case C-79/00 *Telefonica de Espana* [2001] ECR I-10057.

⁹³ See Commission Decision 2003/707/EC of 21 May 2003, *Deutsche Telekom*, OJ [2003] L 263/9, for an instance where the Commission held that the high access fees charged by Deutsche Telekom to its competitors constituted a violation of Art. 82 EC, despite the fact that the access tariffs had been approved by the national regulatory authority, in conformity with the applicable directives. Geradin makes the point that the application of general competition rules, such as Art. 82 EC and the essential facilities doctrine, on top of sector-specific regulation may be a useful instrument for keeping the sectors concerned running smoothly. Compare J Temple Lang, ‘European Competition Policy and Regulation: Differences, overlaps and constraints’, paper delivered at the 3d Antitrust Conference organised by the CERNA (Ecole des Mines, Paris) and BCLT (Berkeley University) in January 2006, available at http://www.cerna.ensmp.fr/cerna_regulation/Documents/Antitrust2006/Temple-Lang.pdf, who claims that there should be as little interaction as possible between regulated markets on the one hand, and mainstream competition law on the other.

what extent general competition rules – and especially the essential facilities doctrine – should apply to sector-regulated industries.⁹⁴ Second, such a restrictive vision of what constitutes a ‘facility’ would be self-defeating, since the role of any legal doctrine is primarily the formulation of general principles, covering situations for which there is no specific rule, or serving as the background against which specific rules are to be adopted.⁹⁵ Such a restrictive attitude, which would deprive the competition enforcement authorities of a useful instrument,⁹⁶ does not seem to be embraced by the EU Institutions.

1.2.1.2. Essential

According to the Commission, a facility is essential

if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic.⁹⁷

The ECJ in *Oscar Bronner* made it plain that the existence of an ‘insuperable barrier’ is understood in an abstract and absolute way. That is, not in relation to the capacities of a particular competitor actually seeking access to the facility, but taking into account the financial, technical and other resources that could be brought to bear by a hypothetical competitor. In other words, the Court in *Bronner* held that any compulsory access requirement, should aim at the preservation of competition, not the protection of competitors. This means that, in any given market, the same facilities will qualify as ‘essential’ for all the undertakings involved. The test is an objective

⁹⁴ For which see below 1.2.1.3. Elimination of competition

⁹⁵ At this stage of the analysis we take for granted that a doctrine of essential facilities does exist and we are trying to sketch out its precise content. In the second part of the present contribution we will try to answer the more fundamental question whether such a doctrine should exist at all.

⁹⁶ For the usefulness of the essential facilities doctrine in relation to the existing competition rules, see below 2.1.1.1 Differences between essential facilities and ‘classic’ competition rules.

⁹⁷ Report by the EC Commission in OECD/GD(96)113, The Essential Facilities Concept, 97, available at [http://www.oalis.oecd.org/olis/1996doc.nsf/LinkTo/OCDE-GD\(96\)113](http://www.oalis.oecd.org/olis/1996doc.nsf/LinkTo/OCDE-GD(96)113).

one, according to the criteria set out below and does not take into account the particularities of every (potential) competitor.⁹⁸ The facility must be:

i) *Unique* or, at least, very difficult to duplicate. In this respect, the existence of technical, economic, legal, etc insuperable obstacles is taken into account. Duplication is deemed to be impossible when the cost or the time required is exorbitant,⁹⁹ when the market is totally indisposed to switch to the use of a new facility,¹⁰⁰ when IPRs or other regulatory obstacles stand in the way of the competitors,¹⁰¹ etc. Duplication is to be assessed in a given time and re-assessed periodically, as technological progress or other developments may allow for the creation of substitutes to once ‘unique’ facilities.¹⁰²

ii) *Absolutely necessary* to anyone wishing to enter the relevant market. In this respect, the cross-elasticity of the goods/services based on the facility is to be considered, in relation to alternative goods/services which are not based on the facility. Moreover, the existence of substitutes to the facility (even imperfect) must be taken into account.¹⁰³ Substitutability is to be assessed in a broader sense than the one usually followed for determining the relevant product market.¹⁰⁴

⁹⁸ A different question is whether the very competitor seeking access to the facility is himself ‘essential’ to competition, in the sense that his entry into the relevant market will substantially increase competition.

⁹⁹ See Case *European Night Services* above n 27.

¹⁰⁰ See Case *IMS Health v NDC Health*, above n 37.

¹⁰¹ See the case law concerning intellectual property rights, above 1.1.1.1 Commission practice and below 2.1.2.4. The existence of IPRs; see also the Commission decision in *ICG/Morlaix*, above n 17.

¹⁰² The most striking example here is telecommunications, where wireless and satellite networks provide for realistic substitutes to the fixed network, once thought of as being essential.

¹⁰³ See above n 51. This aspect of the judgment has been criticised by D Neven & P Mavroidis, ‘The interface...’ above n 50. These writers argue that making the duty to deal contingent upon the absence of an inferior substitute is economically unsound, since in such circumstances the owner of the facility would not object to dealing with third parties, while, on the contrary, he would be more tempted to object where there are some inferior substitutes. Therefore, depending on the general contractual environment (flexibility, observability, etc of the contracts) of the Member State concerned this condition may be source of any or both of the errors below: a) impose a policy intervention which is not necessary and b) more seriously, fail to impose a policy intervention which is necessary to ensure consumer’s welfare.

¹⁰⁴ In this respect it is noteworthy that the Court in *Bronner*, first held that the market for home delivered newspapers was a distinct market in which Mediaprint was dominant, but then found that substitutes to such a system of distribution (albeit of an inferior quality) did exist and therefore the distribution network was not ‘essential’. This remark is also made by E Gippini-Fournier, “‘Essential facilities’ y aplicacion del articulo 82 ...’ above n 48, and D Neven & P Mavroidis ‘The Interface...’ above n 48.

iii) Absolutely necessary *to anyone* wishing to enter the relevant market (i.e. the hypothetical ideal competitor). In this respect, the weaknesses (technical, financial, organizational etc) of the particular competitor requiring access to the facility, may be taken into account in order to offset any of the above two criteria. Or, conversely, if any of the above two conditions is satisfied because of some competitive failure of the potential entrant, then the facility is not in itself ‘essential’.

1.2.1.3. Elimination of competition

a) General: how much competition is enough?

The corollary of the requirement that the facility be essential is that it must serve for the maintenance of competition in the downstream markets, to the benefit of consumers.

As stated above, what is important is not the safeguarding of any particular competitor, but of competition as such. This entails an analysis of cross-substitutability of the goods/services offered in the downstream market with others which a) are based on alternative facilities or b) use different means to achieve comparable results. Then, the question arises, when does that the foreclosure of competition become serious enough to justify the application of the essential facilities doctrine?

Article 82 EC, to start with, does not require a total absence of all competition, but merely ‘limiting production’ to the ‘prejudice of consumers’.

The Court, for its part, in *Bronner*, referred itself back to the judgments in *Commercial Solvents*, *CBEM* and *Magill* and found that all those ‘precedents’ were based on the assumption that the refusal to supply would eliminate *all* competition in the downstream market.¹⁰⁵ Similarly in *IMS Health* the Court held that the refusal would be abusive if it were ‘such as to exclude *any* competition’.¹⁰⁶

¹⁰⁵ *Bronner* above n 48, paras 40-41.

¹⁰⁶ *IMS Health v NDC Health* above n 32, para 38.

The Commission, on the other hand, in *Microsoft*, makes use of a more flexible criterion, consisting of the ‘risk of elimination of competition’¹⁰⁷ and the need to ensure that any competitor can ‘viably stay in the market’.¹⁰⁸

Despite these differences in wording, the overall practice of the EC Institutions seems to be imposing a duty to licence only when it is clear that the refusal to deal results in the *substantial* elimination of competition. This would occur each time that dominance in the upstream market would also lead to dominance in the downstream market. ‘In most cases, however, a small number of reasonably efficient rivals should be enough to make the market reasonably competitive’.¹⁰⁹

b) Application of the doctrine in sector-regulated markets?

A further question is to what extent, if at all, the essential facilities doctrine should be applied in sector-regulated markets, such as telecommunications, energy, rail transport, etc.

In this respect the US Supreme Court in *Trinko* seems to be following the idea that where ‘a regulatory structure designed to deter and remedy competition harm exists’ there will be little scope left for anti-trust intervention. There are, however several reasons why in the EU the opposite solution seems preferable, not least because the existence of secondary legislation may not set aside the direct application of the Treaty rules on competition. Other reasons include the fact that a) the instruction of cases by the EC Commission is much less time-consuming than antitrust adjudication in the US, b) EC directives tend to be less precise and more open-ended than US legislative acts, and c) sector-specific regulators and agencies

¹⁰⁷ Note that the words ‘all’ or ‘any’ are not there and that the word ‘risk’ is added.

¹⁰⁸ *Microsoft* above n 38, paras 779-784.

¹⁰⁹ For the quotation as well as for the overall assessment contained in this very last paragraph see R O’Donoghue & JA Padilla, *The Law and Economics of Article 82 EC* (Oxford/Portland, Hart Publishing, 2005) Ch. 8 at 29-30.

have a longer tradition of independence and are less likely to be ‘captive’ in the US than in the EU.¹¹⁰

The Commission clearly holds that it may intervene and apply the Treaty rules on sector-regulated industries. This was made apparent in its decision in *Deutsche Telekom*,¹¹¹ where the Commission held that the high access fees charged by the incumbent monopolist to its competitors for access to its local telecommunications network constituted a violation of Art. 82 EC. This, despite the fact that the access tariffs had been approved by the national regulatory authority, in conformity with the applicable ONP directives.

This Commission decision may be said to be drawing on the Court’s earlier judgment in *Telefonica*.¹¹² In this case the Court held that the Royal Decree transposing into Spanish law the ‘interconnection/Open Network Provision (ONP)’ Directive 97/33¹¹³ was legal, despite the fact that it exceeded the terms of the Directive. In fact, the Decree gave to the National Regulatory Authority (NRA) not only the right to encourage and support but also to *impose* on the incumbent the conclusion of interconnection agreements. Hence, it could be said that the Court found that, next to the specific ONP requirements stemming from the Directive, other more general competition rules founded the right of intervention of the NRA.

More recently, however, in *KPN Telekom v Opta* and *Flughafen Hannover*,¹¹⁴ the Court did not seem to favour the application of general competition principles on top of sector-specific regulation. It is true that, contrary to *Deutsche Telekom* and *Telefonica*, in these two more recent cases there was no indication that the application of sector-specific rules was deficient or else failing. Hence, it is not clear whether these cases indicate that the Court will, as a general rule, resist the application of the

¹¹⁰ For a full conversation of the merits of the *Trinko* approach in the EU context see D Geradin, ‘Limiting the Scope of Article 82 EC...’ above n 7, 1546 *et seq.*

¹¹¹ Commission Decision 2003/707/EC of 21 May 2003, *Deutsche Telekom*, OJ [2003] L 263/9.

¹¹² Case C-79/00 *Telefonica de Espana* [2001] ECR I-10057.

¹¹³ Directive 97/33/EC of the EP and the Council of 30 June 1997, OJ [1997] L 199/32.

¹¹⁴ Both discussed above at 1.1.2. At the member States level.

essential facilities doctrine in sector-regulated industries, or whether it will do so only when the sectoral rules are properly into place and fully complied with.¹¹⁵

1.2.1.4. The distinction between the market of the facility and an ancillary market for which the facility is indispensable

a) The traditional / formalistic view

According to the traditional expression of the essential facilities doctrine, a fundamental distinction should be drawn between, on the one hand, the market of the facility itself and, on the other hand, an ancillary market for which access to the facility is essential: in the former market the owner of the essential facility is, by definition, dominant,¹¹⁶ while he should allow competitors to enter in the latter market. It is not clear whether the owner of the facility should also be dominant, or even present, in the secondary market.¹¹⁷ In the production chain, the essential facility can be, in relation to the secondary market, upstream (e.g. a port for the provision of transport services), downstream (e.g. the grid for the transport and distribution of electricity) or parallel (e.g. the patented software which is necessary to operate a computer).

b) The more elliptic / realistic view

According to an increasing number of writers, the above distinction between two clearly defined markets is only notional, often fictitious and without economic significance. It is therefore irrelevant for the application of the essential facilities

¹¹⁵ Geradin makes the point that the application of general competition rules, such as Art. 82 EC and the essential facilities doctrine, on top of sector-specific regulation may be a useful instrument for keeping the sectors concerned running smoothly. Compare J Temple Lang, ‘European Competition Policy and Regulation: Differences, overlaps and constraints’ above n 93, who claims that there should be as little interaction as possible between regulated markets, on the one hand and mainstream competition law, on the other.

¹¹⁶ If he is not dominant in the market of the facility then the doctrine may not apply, see *European Night Services* above n 27, and the relevant developments above, para. 1.1.1.2. The CFI/ECJ.

¹¹⁷ In this respect the European version of the doctrine clearly differs from its American counterpart, in that it does not require dominance – or even presence – in the secondary market; see below 2.1.1.2. A doctrine or just a legislative pattern? and, in more detail 2.2.1.2. Conditions for the application of the doctrine. See also J Venit & J Kallaugher, ‘Essential Facilities: A Comparative Law Approach’ (1994) *21st Annual Fordham Corporate Law Institute* 315, 333.

doctrine.¹¹⁸ These writers stress that the market of the essential facility is often of minor economic importance in relation to the secondary market,¹¹⁹ that there is no market for the essential facility at all,¹²⁰ or that, at any rate, such a market is not distinguishable, in economic terms, from the secondary market.¹²¹ Therefore, they argue that it is unreasonable to try to identify an abuse in a non-existent primary market or in one of no economic weight, in order to interfere in an ‘ancillary’ market of great economic importance. What matters is that if the owner of the facility gave access to it to any competitor, the parties would compete in the *same final market*. Such a rule, simplistic as it may appear, is perfectly consistent with the policy reasons underlining the essential facilities doctrine, *i.e.* preserve competition at each phase of production, whether defined as a separate market or not. ‘The policy concern is simply to ensure competition in the market where two parties could compete *but for* the refusal to provide access to the essential asset; any characterization of the essential facility would be superfluous and artificial’.¹²² This view is corroborated by a long series of US applications of the doctrine.¹²³ Further, it accords with one of the first definitions of the doctrine given by the Commission.¹²⁴

The Court took a position on this issue in its judgment in *IMS Health*. In that case, one of the main arguments put forward by the holder of the intellectual property right was that ‘the essential facility doctrine cannot require the dominant undertaking

¹¹⁸ See F Denozza, ‘Refusal to Deal and IPRs’, (typeset) minutes of the Conference on «Antitrust Between EC Law and National Law», 16-17 May 2002, Treviso, Italy; R Pitofsky, ‘The essential Facilities Doctrine Under US Antitrust Law,’ available at <http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf>; F Fine, ‘NDC/IMS: A Logical Application of the Essential Facilities Doctrine’ above n 36; and I Forrester, ‘Compulsory Licensing in Europe: a Rare Cure to Aberrant National Intellectual Property Rights,’ paper presented at the US Department of Justice/Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy: Comparative Law Topics, May 22, 2002, published in October 2002 in English in the *Chinese International Business Daily* (web edition, not available online any more).

¹¹⁹ Such is the case e.g. for airways, for which the computerized reservation systems are of no value compared to the market of air transport itself.

¹²⁰ Such was the case in *Magill* above n 28 for the daily TV listings.

¹²¹ Such was the case in *Tiercé Ladbroke* above n 31 for the race images which were only important for the betting market; the same applies to interface information relating to copyrighted software – it may be sold separately but its economic value lies with the copyrighted product they relate to.

¹²² See Denozza above n 118, text corresponding to footnotes 24-25.

¹²³ Denozza, above n 118 and Pitofsky above n 118, para 5.

¹²⁴ In its Report by the EC Commission in OECD/GD(96)113 above n 97, 94, where the Commission puts forward the following formulation: ‘if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic.’

to share with other operators an intellectual property right solely in order to allow the latter to compete with it more effectively on the same market on which it is exploiting its right'.¹²⁵ The Court made three successive statements in this respect:

43. The fact that the [required good or service] was not marketed separately [is not to be] regarded as precluding, from the outset, the possibility of identifying a separate market

44. ...it is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable'.

45. Accordingly, it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product.

Some authors view this as a confirmation of the requirement that two different markets need exist, although they are at pains explaining how this should actually be done.¹²⁶ To the eyes of the present and other authors, however, there is a clear slippage from the requirement of there being 'two separate markets' to one which is satisfied each time that 'different stages of production' and demand, by third parties, for the outcomes of such production stages may be identified.¹²⁷

1.2.1.5. The requirement that the facility be used for a 'new' product

In *Magill* and in the more mature and, thus, more authoritative judgment in *IMS Health*, the Court held that a refusal to grant a license would be abusive¹²⁸

... only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on

¹²⁵ See para 35 of the opinion of AG Tizzano.

¹²⁶ See among many O'Donoghue & Padilla, above n 109 at 26, who argue in favour of a restrictive interpretation of the concept of 'stage of production' as corresponding to 'something identifiably distinct, either in the literal sense of there being an intermediate product or in the sense of a separate input as a catalyst'.

¹²⁷ Hatzopoulos above n 88 at 1627 et seq, and Geradin above n 7 at 1530.

¹²⁸ *IMS Health* above n 37, para 49.

the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.

Such a condition was not at all discussed in *Bronner* or in other cases not involving IPRs. Hence, almost all writers take the view that when the essential element is covered by some IPR, then this additional condition should also be satisfied. This point has raised great excitement in view of the ongoing Microsoft saga, precisely because the Commission's Decision has failed to address the issue that Microsoft's competitors needed Window's interface information in order to compete with Microsoft in the market for work group servers – a market in which Microsoft was active.

In a somehow heretical way, it is submitted that this 'newness' criterion does not make sense on its own (a) and may only be understood in relation to the requirement above, that two distinct markets need (not) necessarily be identified (b).

a. The requirement that there be a 'new' product is unworkable and flawed.

First, Advocate General Tesauro (among others), already before the judgment in *IMS*, had underlined the difficulty of deciding whether a product is innovative enough in order to qualify as being 'new' and not merely an improvement to previously existing products.¹²⁹ The task is further complicated by the requirement implied in the excerpt of the judgment quoted above, that goods offered by the licensees, although 'new' should nonetheless be offered on the (same) secondary market as the goods of the facility/IPR owner.

Second, the fact that the term 'new' does not have any 'well received legal or economic definition', thus allowing for some coherent application (such as e.g. the criterion of cross elasticity) has also been stressed.¹³⁰ The idea, put forward by some authors, that 'the new product should ... be market-expanding rather than simply stealing share from existing products'¹³¹ is hardly compatible with the rationale of the essential facilities doctrine and, more generally, market liberalization and the abolition of monopolies: the desirability of the introduction of competition in

¹²⁹ G Tesauro, 'The essential Facility Doctrine – Latest developments in EC Competition Law' in *EU Competition Law and Policy*, (Athens, Hellenic Competition Commission/Nomiki Vivliothiki, 2002), 89.

¹³⁰ Geradin, above n. 53 at 1531.

¹³¹ O'Donoghue & Padilla above n. 109 at 34.

previously monopolistic markets may not be conditional upon demand in this market being infinite – and it may be that the previous monopolist did satisfy all existing demand. More generally, competition law is not only about allowing consumers short-term benefits, but also about preserving and even stimulating (in the medium and long term) the competitive structure of the market.

Third, the very facts of the *Microsoft* case show the practical deficiencies of this criterion. In fact Microsoft’s competitors (notably Sun Microsystems) were already in the market for group work servers long before Microsoft decided to enter this market. In fact, Microsoft stopped providing ‘competitors’ with interface information only when it decided itself to enter the market in which they were already present. Then, is it that Sun and the others should change their own products in order for those to be ‘new’ in comparison with Microsoft’s copied product, or, on the contrary, is it that Microsoft should be left to use its IPRs in a primary market in which it is dominant in order to expel any competition from any secondary market it decides to penetrate?

Last but not least, many writers criticize the fact that IPRs are treated in any different way than tangible property rights.¹³²

b. The ‘new’ product requirement as an alternative to the existence of two separate markets

It has been demonstrated above (1.2.1.4) that in *IMS Health* the Court accepted that the distinction between an upstream market (that of the essential facility or the IPR) and a downstream market (in which the holder of the facility is to compete with the new entrants) market need not be clearly established. Indeed, in *IMS* there was no separate market for the database brick structure and only *IMS*’ competitors could have wanted to have access to it. Similarly, in *Magill*, the Court only artificially identified a ‘market’ for daily TV listings while none, in fact, existed. In these two cases the Court introduces the condition that a ‘new’ product be marketed by competitors. That is, when the facility/IPR itself does not correspond to a good or service for which there is an actual market (in which case competitors would only have access the upstream facility/IPR in order to compete in the downstream market, according to the traditional analysis above at 1.2.1.4), the Court makes sure that the

¹³² For the very rich literature on the topic see below, the notes in 2.1.2.4. The existence of IPRs .

facility/IPR holder is not bothered by his competitors when marketing the good/product in which the facility/IPR is incorporated (by compelling the competitors to come up with a different product). This is not a peculiarity specific to IPRs (although it will often materialize in relation to IPRs, since rare are the IPRs which constitute markets on their own), but a particular expression of the idea that competitors should not be given access on the very same (primary) market of the facility/IPR holder, but rather on a severable one. Where two markets cannot be distinguished as such, then, at least, the requirement that newcomers introduce a product ‘different’ from the one produced with the facility/IPR is imposed, as a minimal protection of the interests of the facility/IPR holder. Where software programs are involved, the above idea means that an eventual license may only seek to achieve vertical – and not horizontal – interoperability.¹³³

1.2.1.6. Unjustified refusal

Refusal, by the holder of the facility, to allow competitors access may be direct or absolute. It may also be inferred by the imposition of illogical, exorbitant or otherwise unjustified conditions. Such conditions may be of an economic, technical or other nature.¹³⁴ Refusal to grant access to an essential facility is in principle prohibited, but it may be justified. The reasons which may justify such a refusal must be objective and may not be technically and economically unsound, discriminatory or otherwise discretionary. Although the precise nature of such reasons is unclear,¹³⁵ there is no doubt that, in the presence of an essential facility, a) it is for the holder of the facility to prove that his refusal to grant access to third parties is justified, b) according to objective criteria, subject to administrative and judicial control. Therefore, the position of the competitor who requires access is doubly facilitated, through a) the reversal of the burden of proof and b) the fact that the freedom of the

¹³³ See above n 40 and the corresponding text. Note that if the preceding analysis is correct, then the Commission Decision in *Microsoft* is correct, since Microsoft’s IPRs relate to Windows, while the product for which they are going to be used by its competitors is different.

¹³⁴ The conditions under which access should be granted are described with more precision in 1.2.2.1. Access to the facility under reasonable terms, below.

¹³⁵ Community legislation, which tends towards the liberalisation of the markets and embodies the essential facilities doctrine (see below 2.1.1.2. A doctrine or just a legislative pattern?), allows the incumbent operators to refuse or restrict access to their facility/network only for purely technical reasons. However, writers such as P Areeda, ‘Essential Facilities: An Epithet in need of Limiting Principles’ (1990) *Antitrust L.J.* 841 and P Treacy, ‘Essential Facilities – Is the Tide Turning?’ (1998) *ECLR* 501, argue that legitimate commercial considerations may allow the facility owner to refuse access to its competitors. This latter view is indirectly corroborated by the judgment of the ECJ in Case 27/76 *United Brands v. Commission* [1978] ECR 207.

holder of the facility (not) to deal is limited by reference to objective (i.e. not subjectively ill-defined commercial) criteria. It rests with the plaintiff, however, to prove that the facility is, indeed, essential; not an easy task following the judgment in *Bronner*.

1.2.1.7. Conditions pertaining to the competitor seeking access

Both the essential nature of a given facility and the possible justifications for a refusal to grant access thereto are considered against objective criteria. On the contrary, access itself may only be imposed on an *intuitu personae* basis. The competitor seeking access to the facility (which may also be referred to as ‘the plaintiff’) should fulfill two sets of conditions.

First, the plaintiff should itself be essential for competition. This in turn, embraces two different conditions. The plaintiff should be an undertaking wishing to penetrate the relevant market itself, not an intermediary, broker, etc.¹³⁶ Moreover, the plaintiff should possess the necessary resources other than the essential facility itself to create and maintain a reasonable market share within the relevant market. To impose an access obligation on the holder of the facility, in favour of a competitor who does not effectively strengthen competition, would counter the general principle of proportionality. Of course, this would not necessarily exclude small competitors from the scope of the doctrine, but would counter ‘rogue’ competitors from meddling with the dominant undertaking.

Second, the plaintiff must fulfil its obligations under the terms by which access is granted. This embraces both the periodic payment of the agreed or mandated access fee and all the other terms and conditions (such as technical specifications, kind of use, capacity, timetables, etc) attached to the granting of access to the facility. Such requirements may be freely agreed between the owner of the facility and its competitors or imposed upon them by the third party (competition authority, trustee or other) who will be defining and monitoring the access requirement.¹³⁷

¹³⁶ Report by the EC Commission in OECD/GD(96)113 above n 97 at 99.

¹³⁷ Similar requirements are extensively provided for in the various sectoral liberalization directives.

1.2.1.8. Issues *ratione temporae*

Time matters to the application of the essential facilities doctrine, in three ways. *First*, over time a facility may cease to be essential.¹³⁸ *Second*, where the facility is newly built/developed and financed by private resources, it may be sensible to impose access only after an initial period, during which the owner should be allowed to recoup his investment through monopoly profits.¹³⁹ *Third*, in other occasions, access is being given for a limited period of time, allowing the competitor some leeway, in order to create his own infrastructure.¹⁴⁰

1.2.1.9. Other factors – Is the list an exhaustive one?

While in its decision in *Microsoft*, the Commission examines all the conditions set out in the *Magill/Bronner/IMS Health* case law and discussed above, it also puts forward a much more flexible test, upon which compulsory licensing could rest. This test, referred to as the ‘balancing test’¹⁴¹ consists in weighing the facility/IPR owner’s incentives to innovate against ‘the general public good’ as embodied in the competitor’s incentives to innovate and in consumer’s welfare. This test, although commended by some authors,¹⁴² is somehow problematic since it suffers from the recurrent *ex post/ex ante* divide and may be extremely open-ended, with unpredictable outcomes.

The formulation of such a test in the Commission’s decision begs the more fundamental question, whether the ‘exceptional circumstances’ in which a facility holder may be compelled to allow competitors to use it (analytically set out above), are exhaustive. For instance, is the fact that Microsoft is not merely dominant, but super-dominant in the market of operating systems relevant at all? In this respect the Court has already judged in *IMS Health* that industry participation and outlay in the adoption of the protected structure did not constitute an additional factor which should

¹³⁸ See also above, para 1.2.1.2. Essential.

¹³⁹ A Overd & B Bishop, ‘Essential facilities : The rising Tide’ above n 47 at 183. In the same vein the CFI in *European Night Services* above n 27, annulled the Commission decision which limited the duration of the exemption given to the joint venture to only eight years.

¹⁴⁰ See e.g. *British Midland v. Aer Lingus*, Decision 92/213/EEC, OJ L 96/34 (1992).

¹⁴¹ See I Forrester, ‘The Interaction Between ...’ above n 8 at 24. The same author is quite critical of this balancing test.

¹⁴² F Lévêque, ‘Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case’ (2005) *World Competition* 71.

be evaluated on its own, but rather an element to be taken into account when assessing the abusive character of the refusal. This seems to be indicating that, for the sake of legal certainty, the conditions set out in the *Magill/Bronner/IMS Health* case law are exhaustive and that other factors should be taken into account only to the extent that they affect one of the ‘exceptional circumstances’ set out above.

1.2.2. Consequences of the application of the doctrine

Where the conditions for the application of the essential facilities doctrine are met, the competitor(s) should be granted access to the facility. However, this primary consequence may, in some circumstances, be completed by other complementary obligations imposed upon the holder of the facility.

1.2.2.1. Access to the facility under reasonable terms

a. Access

The way in which access is ensured differs, depending on the nature of the facility. If the facility consists of a network, physical interconnection is the minimum requirement, while in value added networks (VANs) access to some basic services may also be required.¹⁴³ Similarly, where the facility consists of physical infrastructure (port, airport, etc) access may cover not only the infrastructure itself, but also ‘collateral’ facilities or services, indispensable for the proper use of the basic infrastructure.¹⁴⁴ When the facility consists of an array of services (such as a distribution network), then access to some ‘basic services’ may be required. The same logic prevails where the facility consists of protected rights (such as IPRs), where access to the basic raw information, or even to mere interface information (the hooks on which competitive products may effectively hang up) not the end product (or operational software) is to be granted.¹⁴⁵

b. Under reasonable terms

¹⁴³ See e.g. Directive 97/5/EC of the EP and the Council, of 27 January 1997 on cross-border credit transfers, OJ L 43/25 and Communication 95/C 251/03. Also Communication 98/C 265/02 concerning interconnection in the telecommunications sector.

¹⁴⁴ See the Commission decision and the CFI judgment in *European Night Services*, above n 27 on the use of rolling stock, personnel etc.

¹⁴⁵ On this issue the *Microsoft* saga is highly relevant, see above para 1.1.1.1 Commission practice

What constitutes reasonable terms is decided on a case-by-case basis. The test here is simple to state: competitors should have access to the facility under the same terms as the holder himself.¹⁴⁶ Applying the principle may prove delicate, especially in cases where the holder of the facility is strongly integrated, thus making it difficult to isolate the facility and to identify the conditions of its use. Moreover, on some occasions the holder of the facility may be charged with public service or other contractual obligations, requiring him to make more intensive use of the facility than other competitors. It remains, however, the case that the owner should not obstruct, in any unjustified way, the access of the competitors to the facility.

On the other hand, the competitor who is given access to the facility should [must?] also respect the obligation of reasonableness.¹⁴⁷

A very delicate issue, especially in the field of high technology networks and software, is that of normalization and interoperability. If the facility cannot interconnect or interface with the competitor's applications, access to it is pointless. Two issues arise. First, the choice of technical specifications within any given market should strike a fine balance between, on the one hand, highly specialized 'closed' specifications, which are typically protected by intellectual property rights and, on the other hand, more generic 'open' specifications, which may allow for interconnection.¹⁴⁸ Second, it is unclear whether an incumbent facility holder may bar access by the competitors by arguing that the specifications used by them are far too developed for the facility, or whether, on the contrary, he should use his best endeavours to update his infrastructure.

c. For a reasonable access fee

¹⁴⁶ See *i.a. B&I/Sealink* above n 12 at 1.3.30.

¹⁴⁷ See in this respect, above, 1.2.1.5. The requirement that the facility be used for a 'new' product.

¹⁴⁸ The issue of interconnection and competition law is not a simple one, see among others, ACIS Comments on Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, at <http://www.interop.org/Antitrust.html>; the US/FTC report to the OECD in OECD/GD(96)113, The Essential Facilities Concept, 81; and more recently J Gray, 'Antitrust and New Technologies: A View from the US' (typeset) minutes of the Conference «Antitrust Between EC Law and National Law», Treviso, Italy, 16-17 May 2002.

The calculation of the fee due to the holder of the facility is one of the most abstruse issues of the doctrine of essential facilities and, indeed, one strong argument in the hands of those who oppose the judicial application of the doctrine.¹⁴⁹

Here too the principle is that competitors should be required to pay a fee which is both non-discriminatory and reasonable. If the former condition is difficult to assess, especially in vertically integrated facilities,¹⁵⁰ the latter condition calls for fierce theoretical debate. There are at least four different ways to work out the appropriate access fee for the holder of the facility. Starting from the least favourable for the holder of the facility, these are:

- i) The access fee only consists of the marginal cost linked to interconnection / physical access to the facility and/or of expenses necessary for the increased maintenance and repair requirements of the facility;
- ii) In addition, the fee may also cover some return on the initial investment of the holder of the facility, thus allowing for the average total cost to be taken into account;
- iii) In addition to the above, the fee may also include some return on capital for the holder of the facility;¹⁵¹
- iv) The efficient component pricing rule, put forward by the US economists Baumol and Sidak,¹⁵² states that the facility holder may charge his competitors the total cost for the building, operation and maintenance of the facility, as it is incorporated in the prices of his own final products, minus

¹⁴⁹ See B Doherty, 'Just What Are Essential Facilities?' (2001) *CML Rev*, 397, 431-433.

¹⁵⁰ It is also questionable whether it is a correct principle to apply, or whether the facility holder should be left free to negotiate individually with each new entrant and allow price differentiation depending on the size of the undertakings involved and on the way each one of them values the input in question; see F Lévêque, 'Quel est le prix raisonnable d'une licence obligatoire?' available at <http://www.cerna.ensmp.fr/Documents/FL-RevueConcurrence.pdf>

¹⁵¹ This option seems to be favoured by the ECJ in case *Flughafen Hanover*, above at 1.1.2. At the member States level, where the Court acknowledged that the 'usage fee' that the airport authorities were authorized to charge to users of the facilities (air companies, groundhandlers, etc) could be calculated '*in such a way that the managing body of the airport is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit*' (para 56). This case concerned the application of a sector-specific directive (Directive 96/67/EC on groundhandling services, [1996] OJ L 272/36) which, however, gave only general guidance concerning the calculation of the access fee.

¹⁵² W Baumol & G Sidak, *Toward Competition in Local Telephony*, (Cambridge (Mass.)/London, The MIT Press, 1994).

the marginal cost of each unit produced by it. This allows the facility holder to transfer his own inefficiencies to his competitors, thus allowing only competition on the margin.¹⁵³

None of the above criteria provides a universal solution, as the circumstances of each case may call for a different approach. Naturally, figures coupled with varying accounting standards further complicate the matter.¹⁵⁴

In addition to these issues of intense theoretical debate, there is also a very important practical difficulty in determining the amount of a ‘reasonable’ fee. The real costs of the firm whose prices are being examined need to be taken into account. This may be impossible if the (administrative or judicial) authority which is to decide as to the fee is without a power to require “accounting separation,” i.e. rules to prevent the firm hiding certain costs and inflating others in its internal accounts.

1.2.2.2. Complementary obligations of the facility holder

Access may, in some circumstances, be devoid of substance if other, complementary, conditions are not satisfied. In this respect the EC Commission is more demanding than the US courts. The Commission requires the holder of the facility not merely to give access, but also to behave as if he were an independent third party or a public authority.¹⁵⁵ This may, depending on the circumstances, require the facility owner to satisfy one or more of the following requirements.¹⁵⁶

¹⁵³ For a more detailed and critical analysis of the theory see N Economides & L White, ‘Access and Interconnection Pricing: How Efficient is the ‘Efficient Component Pricing?’ (1995) 3 *Antitrust Bulletin* 557, also available at <http://www.stern.nyu.edu/networks/95-04.pdf>. The Nobel Prize winning economist J Stiglitz is reported to have taken the view that ‘the theory is not well founded, it is well funded’.

¹⁵⁴ It is worth noting that in New Zealand, for the same access case, three different courts followed as many different formulas for the calculation of the “reasonable” access fee, see *Telecom Corporation of NZ v. Clear Communications* [1995] 1 NZLR, 385.

¹⁵⁵ See, the Commission’s report to the OECD above n 97 and J Temple Lang, ‘Defining Legitimate Competition: Companies duties to supply Competitors and Access to Essential Facilities’ (1994) 21st Annual Fordham Corporate Law Institute 245, 278.

¹⁵⁶ The principles outlined here are mostly based on the Commission report, above n 97, where it is perhaps easy to make general statements. It might be useful to examine how far these principles can be derived from actual decisions where the Commission had to examine real facts and take a position which was subject to the possibility of a court challenge.

- i) Tariff transparency. The requirement for a non-discriminatory and reasonable access fees¹⁵⁷ presupposes that the cost structure of the facility owner is ascertainable and rationally presented. This, in turn, may require more or less substantial unbundling of the various activities of the incumbent undertaking.¹⁵⁸
- ii) Non-discrimination. Access fees are to be calculated without discrimination for all users¹⁵⁹ and access granted according to objective criteria. In cases where the facility has limited capacity, the holder shall make an objective determination as to the optimal number of users and split fairly the available capacity between them (or the best among them, if they are outnumbered availability).¹⁶⁰ This may require the facility holder to proceed to a competitive tender.¹⁶¹
- iii) Proper management – maintenance – conservation of the facility, especially where it is of limited capacity, in order to accommodate the optimal number of competitors. This may require the facility holder to ensure the maintenance, rationalize the use, or even upgrade the facility.¹⁶²
- iv) Information – coordination – obligation to act in good faith in respect of the other users of the facility.

Some of the complementary obligations may prove, for the facility holder, as costly and even more burdensome than the obligation to give access itself. Such costs should be incorporated in the access fee and should be shared among the competitors. Moreover, any of the above obligations which require the undertakings to act in

¹⁵⁷ See above 1.2.2.1. Access to the facility under reasonable terms.

¹⁵⁸ See, among others, J Temple Lang, above n. 155 at 294. This solution has been extensively applied in legislation, see e.g. for rail transport, Directive 91/440/EEC of the Council of 29 June 1991, OJ L 237/25, as amended by Directive 2001/12/EC of the European Parliament and the Council, of 26 February 2001, OJ L 75/1, art. 6(2).

¹⁵⁹ This should not exclude bespoke arrangements, such as the use of the facility during certain time periods in exchange for a higher fee etc...

¹⁶⁰ Commission's report to the OECD above n 97 at 99. Hence, in *Sea Containers* above n 13 and *Port of Rødby*, above n , the Commission held that the port's capacity and the possible routes reasonably allowed for three competitors. See, more in detail on this issue Owen, B., *Determining Optimal Access to Regulated Essential Facilities*, Antitrust LJ 1990, p. 887.

¹⁶¹ *Ibid.*, at 102 and J Temple Lang, above n. 155, 294-295. See, however, B Doherty, above n 149, at 430, who argues that such a bidding system may not be fair and that any legislation requiring it might be void, since it would allow the dominant undertaking to choose its competitors.

¹⁶² J Temple Lang, above n. 155 at 291.

concert may fall foul of Article 81 EC. Therefore, such complementary obligations should be imposed with particular frugality. Furthermore, there is no doubt that the legislature will be in a better position than a judge to impose and set up a monitoring system for the above complementary obligations.

2. Should there be an EU doctrine?

In the first part of the present contribution we examined the case law of the EC Commission and courts where some essential facility was involved. We tried to identify the recurrent solutions which could be held to constitute an autonomous legal doctrine. In this second part we shall focus more on policy considerations and try to evaluate whether such a doctrine does, indeed, add to the existing armoury of EU competition law.

2.1. A doctrine?

The expression ‘essential facilities doctrine’ is derived from US law. Therefore, in the quest to understand whether in the EU there is such a thing as an essential facilities ‘doctrine’, the word ‘doctrine’ should be understood in its common law sense.¹⁶³ Hence, the term will not be used in the more Continental sense to describe the ‘analytically evaluative exposition of the substance of law’ consisting in ‘the interpretation and systematization of valid law’ or the ‘description of the literal sense of statutes, precedents etc, intertwined with many moral and other substantive reason’.¹⁶⁴ Instead, we will use the term legal ‘doctrine’ as consisting of propositions and assertions about the legal norms, in relation to hypothetical future decisions. The idea is that such assertions may allow

a prediction to the effect that if an action in which the conditioning facts given in the section [of an Act] are considered to exist is brought before the courts ..., and if in the meantime there have been no alterations in the circumstances which form the basis of [the assertion], the directive to the judge contained in

¹⁶³ The content of the term legal ‘doctrine’ has as many variants as the writers referring to it. An extensive discussion of what is a legal doctrine may not be carried out here, nor is the present author in a position to do so. Instead, two definitions broadly representative of the Continental and common law traditions are briefly presented, in order to provide the necessary elements for the apprehension of what constitutes a legal doctrine.

¹⁶⁴ See e.g. A Peczenik, ‘Can Philosophy Help Legal Doctrine’ (2004) *Ratio Juris* 106, at 106-107.

the section will form an integral part of the reasoning underlying the judgment.¹⁶⁵

In other words, we shall try to identify whether within EC law there is an intrinsically coherent and extrinsically systematic way of applying competition (and internal market?) rules, whenever in the presence of some facility which is deemed to be essential.

2.1.1. Positive definition of the doctrine (scope)

A large number of writers question the necessity for such an essential facilities doctrine. They argue that all cases dealt with under the doctrine could be better resolved - with the same result - under the ‘traditional’ competition rules.¹⁶⁶ A further argument put forward is that a rule requiring the holder of a facility to give access to his competitors should only be used in the deregulation of ‘natural’ monopolies and applied only by the legislature.¹⁶⁷ Therefore, to speak of a ‘doctrine,’ i.e. a rule of general application, may be misleading. These two arguments merit some discussion.

2.1.1.1 Differences between essential facilities and ‘classic’ competition rules

From the case law presented above, it can be seen that the existence of an essential facility (whether physical or otherwise), often leads to the imposition of mandatory access. This happens, irrespective of whether the practice examined is a concerted practice,¹⁶⁸ an abuse of a dominant position¹⁶⁹ or the creation of a joint venture.¹⁷⁰ This observation does not, by itself, argue for the existence of an autonomous

¹⁶⁵ See H Zahle, ‘Legal Doctrine Between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross’ Conception of Legal Doctrine’ (2003) *European Journal of International Law* 801, at 802, also referring to Alf Ross, *On Law and Justice* (London, Stevens, 1958, American edition by University of California Press, Berkeley and Los Angeles, 1959).

¹⁶⁶ See G Werden, ‘The Law and Economics of the Essential Facility Doctrine’ (1987) 32 *St. Louis U.L.J.* 433; Kezsbom & Goldman, ‘No Shortcut to Anti-trust Analysis: the twisted journey of the “essential facilities” doctrine’ (1996) *Columbia Business Law Rev* 602; E Vegis, ‘La théorie des « essential facilities »: genèse d’un fondement autonome visant des interdictions d’atteinte à la concurrence?’ (1999) *RDC/TBH* 4; B Doherty, ‘Just What Are Essential Facilities?’ above n 149.

¹⁶⁷ See below 2.1.1.2. A doctrine or just a legislative pattern?.

¹⁶⁸ See e.g. the US cases *Terminal Railroad* above n 2, and *Associated Press* above n 3. See also the Commission in *Eurotunnel* above n 26.

¹⁶⁹ See e.g. the Commission’s decisions on ports and the ECJ judgments in *Magill* above n 28, *Bronner* above n 48, and *IMS* above n 37.

¹⁷⁰ See the Commission and the CFI in *European Night Services* above n 27. Moreover, the Commission has (directly or indirectly) applied the essential facilities doctrine in a series of other decisions under Regulation 4064/89, see e.g. *Swissair/Sabena* of 19 July 1995 (IV/M.616) EE L 239, 1995, 19, *Mercedes-Benz/Kässbohrer* of 14 February 1995 (IV/M.477) OJ L 211, 1995, 1, *Glaxo/Wellcome* of 28 February 1995 (IV/M.555).

doctrine. It shows, however, that it is not correct to treat the problem of access to an essential facility as a mere subcategory of the ‘refusal to supply’ abusive practice.

Second, the essential facilities doctrine offers yet another instrument for the protection of competition. That is, Article 81 EC and the merger Regulation¹⁷¹ allow for *ex ante* preventive action, in order to preserve the competitive functioning and structure of the market. Article 82 EC, on the other hand, allows only for *ex post* intervention, once the structure of the market is already weakened, as it reprimands abuse. The essential facilities doctrine, to the extent that it allows for an abuse to be ‘inferred’ whenever access to the essential facility is denied, could cover the intermediate space and allow the prevention – not merely redress – of actual abusive conduct in situations where the market structure is already weakened (because of the existence of the facility). Through the imposition of one or several contractual obligations on the dominant undertaking (holder of the facility), the doctrine aims at rendering such abuse impossible.

Third, from the developments above, it follows that, where some essential facility is involved, the ‘traditional’ competition rules suffer some substantial alterations.

- i) The existence of a facility affects the definition of the relevant market: despite the dissonant voices of many writers,¹⁷² the facility is very likely to be held as an autonomous relevant market, in which the holder thereof is dominant, without any detailed market analysis being necessary.¹⁷³
- ii) Reversal of the burden of proof: contrary to ‘traditional’ Article 82 cases, where the aggrieved competitor must show abuse, it is for the holder of the

¹⁷¹ Regulation (EC) n. 139/2004 of the Council of 20 January 2004, OJ L 24/1.

¹⁷² P Areeda, *Antitrust Law*, vol. IIIA (Little, Brown, Boston, 1996), 208; M Siragusa & M Beretta, above n 76, para 6a.

¹⁷³ See in the US, *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), where the stadium home to the Chicago Bulls was considered to be ‘essential’ without there being any effort to find whether any other stadium in Chicago could hold their games; in the EC, see all the port cases (above 1.1.1. At the EU level), where the Commission held that each port was a market of its own. More importantly, see the judgment in *Bronner* above n 48, where the Court held that the market for home delivery was a separate market in which Mediaprint was dominant, notwithstanding the existence of substitutes (to which the Court referred itself in order to refute the ‘essential’ character of the facility in question).

facility to prove that his refusal to grant access to the facility is justified, on the basis of objective criteria.¹⁷⁴

- iii) The practical effects of the doctrine are different: contrary to Article 81 EC cases, which tend to disallow agreements between undertakings, the application of the essential facilities doctrine leads to the making of such agreements. A refusal to deal/supply which is found to be contrary to Article 82 EC is altogether void and, thus, the dominant undertaking is simply compelled to give access to/supply its competitors and/or customers; under the essential facilities doctrine, on the other hand, the holder of the facility is allowed to impose reasonable access conditions and to receive a fee.¹⁷⁵ An illustration of this point may be given by reference to the well-known ice-cabinet saga.¹⁷⁶ HB, a dominant supplier of ‘impulse ice-cream’ was providing retailers with the necessary freezer cabinets, free of charge, against an ‘exclusivity clause’. This would prevent retailers from stocking other ice-cream in the freezers. Hence, if they were to sell competitive ice-creams, they either had to pay HB for an ‘exclusivity free’ cabinet freezer or get a second one from HB’s competitors. The Commission found that this had a foreclosing effect for new entrants and, under Article 82 EC, required HB to declare void the exclusivity clause. Hence, retailers were henceforth free to stock at will competitive ice-creams in HB’s freezer cabinets, without competitors bearing any cost. If, on the other hand, the freezer cabinets were held to constitute essential facilities, then competitors should negotiate with HB limited access thereto, against a reasonable fee. Hence, HB would be better off through the application of the essential facility doctrine (because of the fee), rather than a pure application of Article 82 EC.
- iv) The above ice-cream example gives yet a further illustration of how the essential facilities doctrine could be used, depending on the facts of each specific case, to regulate the conduct of dominant undertakings. If, indeed, the

¹⁷⁴ See above 1.2.1.4. The distinction between the market of the facility and an ancillary market for which the facility is indispensable.

¹⁷⁵ See above 1.2.2.1. Access to the facility under reasonable terms.

¹⁷⁶ See recently Case T-65/98 *Van den Bergh (ex HB) v. Commission* [2003] nyr.

retailers had not complained to the Commission, then the doctrine would provide a ground for complaint by the competitors themselves.

2.1.1.2. A doctrine or just a legislative pattern?

Compulsory third party access to the infrastructure has been the core legislative pattern within the EU for the deregulation of traditional ‘natural’ monopolies. In the field of telecommunications the Open Network Provision Directives,¹⁷⁷ together with the Local Loop Unbundling Regulation¹⁷⁸ allowed the progressive deregulation of telecommunications services, which eventually led to the complete liberalization in July 2003.¹⁷⁹ In the field of energy, Directives 2003/54 for electricity¹⁸⁰ and 2003/55 for natural gas¹⁸¹ set out the conditions and procedures for (negotiated and) regulated Third Party Access to the transport grid and the distribution network. Similarly, in the field of rail transport, framework Directive 91/440/EC,¹⁸² together with the Directives on licensing,¹⁸³ capacity allocation¹⁸⁴ and interoperability,¹⁸⁵ make sure that the basic rail infrastructure of incumbent operators is made available to competitors for the provision of transport services.

¹⁷⁷ Framework Directive 90/387/EEC of the Council of 28 June 1990, OJ L 192/1; Directive 92/44/EC of the Council of 5 June 1992, concerning leased lines, OJ L 165/27; Directive 97/33/EC of the European Parliament and the Council of 30 June 1997 concerning interconnection, OJ L 199/32; Directive 98/10/EC of the Council of 28 February 1998, concerning voice telephony, OJ L 101/24. For an overview of the ONP technique see V Hatzopoulos, ‘L’Open Network Provision moyen de la dérégulation’ (1994) *Revue Trimestrielle de Droit Européen* 63.

¹⁷⁸ Regulation (EC) n. 2887/2000 of the European Parliament and the Council of 18 December 2000, OJ L 366/24.

¹⁷⁹ See the series of Directives of the European Parliament and the Council of 7 March 2002: Directive 2002/19/EC concerning access to the networks, OJ L 108/7, Directive 2002/20/EC concerning licensing, OJ L 108/21; Directive 2002/21/EC, the framework directive, OJ L 108/33 and Directive 2002/22/EC concerning universal service, OJ L 108/51.

¹⁸⁰ Directive 2003/54 of the European Parliament and the Council of 26 June 2003, replacing Directive 96/92, OJ L 176/37.

¹⁸¹ Directive 2003/55 of the European Parliament and the Council of 26 June 2003, OJ [2003] L 176/57.

¹⁸² Directive 91/440/EEC of the Council of 29 June 1991, OJ L 237/25, as modified by Directive 2001/12/EC of the European Parliament and the Council of 26 February 2001, OJ L 75/1.

¹⁸³ Directive 95/18 of the Council of 19 June 1995, OJ L 143/70, as modified by Directive 2001/13/EC of the European Parliament and the Council of 26 February 2001, OJ L 75/26.

¹⁸⁴ Directive 2001/14/EC of the European Parliament and the Council of 26 February 2001, OJ L 75/29.

¹⁸⁵ Directive 96/48/EC of the Council of 23 July 1996, OJ L 235/6 and Directive 2001/16 of the European Parliament and the Council of 19 March 2001, for high speed and conventional trains, respectively. A ‘third railway package’ was adopted by the EP and the Council in March 2004, amending the above Directives and establishing a European Railway Agency; see Directives 2004/49, 2004/50 and 2004/51 [2004] OJ L 164/44 *et seq*; see also Regulation (EC) 881/2004 [2004] L 164/1 for the Agency.

These Directives tend to describe and/or define the parts of the infrastructure/facility to which access should be granted. Moreover, they set out the conditions under which access should be offered and those under which it may objectively be refused. In addition, they provide basic rules for the calculation of the access fee, together with minimal guarantees of non-discrimination and transparency.¹⁸⁶

a. Just a pattern?

This has prompted some writers to submit that the essential facilities doctrine should be no more than the general background to the above body of legislation. It should be seen as a general legislative pattern underpinning the liberalisation directives.¹⁸⁷ According to these writers, compulsory access to an essential facility is too complicated an issue to be handled by judges. Judges lack the legitimacy for striking the appropriate balance between the various policy objectives at stake. Moreover, they do not have the material resources, time and command of economics required to make a clear decision as to the desirability of access. In addition, it is very difficult for them to impose the appropriate conditions of access, let alone to monitor their observance by the parties. Calculating the appropriate access fee, which will enhance competition without excessively burdening the holder of the facility, is a task which may only be carried out, if at all, by specialists.¹⁸⁸ Finally, judges decide on a case-by-case basis and upon variable criteria, potentially creating legal and economic uncertainty.

This argument is complemented by a further – even more restrictive – one. Several authors argue that the essential facilities doctrine should only apply to natural monopolies. The term ‘natural monopoly’ is used for sectors of the economy where the cost structure is such that no combination of undertakings may operate as cost

¹⁸⁶ For a more detailed discussion of these issues see D Geradin, ‘L’ouverture à la concurrence des entreprises de réseau – Analyse des principaux enjeux du processus de libéralisation’ (2001) *Cahiers de Droit Européen* 13, and P Jan Slot & A Skudder, ‘Common Features of Community Law in the Network-Bound Sectors’ (2001) *CML Rev* 87.

¹⁸⁷ Doherty above n 149; see also S Gorinson, ‘Overview: Essential Facilities and Regulation: Court or Agency Jurisdiction’ (1990) *Antitrust LJ* 879.

¹⁸⁸ See above 1.2.2.1. Access to the facility under reasonable terms.

efficiently as a single supplier.¹⁸⁹ This happens when the marginal cost of production is steadily decreasing (typically after significant investment in infrastructure): each undertaking is inclined to produce as much as possible to keep reducing marginal and, ultimately, average total cost. This, however, may be impossible because of a) scarcity of (one of) the resources or other physical constraint (such as limited transport capacity) and b) demand which is not infinite. Therefore, if more undertakings have to share the market in question, each one of them will be producing less than its full capacity, at a higher total cost than under monopoly conditions. Hence, a monopoly is socially preferable. Most natural monopolies, such as telecommunications, postal services, rail transport etc, were made into legal monopolies during the 50s and 60s.

However, monopolies cease to be natural when technology reverses one (at least) of the conditions on which such monopoly is based: a) when substitute resources or capacity is made available or b) demand is increased. A further factor which weakens natural monopolies is specialization: competitors may be able to offer cheaper goods/services in squarely defined niche markets, thus undercutting the monopolist's volume of sales and increasing his marginal cost. It is no coincidence that the deregulation wave of the '90s started from the field of telecommunications and with specific value-added services. Nowadays, therefore, where technological progress runs in overdrive and specialization is greater than ever, the very existence of natural monopolies is questioned. Hence, the argument according to which the essential facilities doctrine should only apply to the deregulation of natural monopolies, to a great extent rejoins the one previously presented, i.e. that it should only be confined to legislative application in order to liberalize the (already liberalized, to a great extent) traditional natural monopolies. This argument, about natural monopolies, serves more as an *ex post* conceptualisation of the deregulation already achieved, rather than as an analytical instrument for the future, since it seems to preclude any further substantial use of the essential facility toolkit.

b. Or rather a doctrine?

¹⁸⁹ WJ Baumol, EE Bailey, & RD Willig 'Weak invisible hand theorems on the sustainability of multiproduct natural monopoly' (1977) *American Economic Review* 350; see also M Waterson, *Regulation of the Firm and Natural Monopoly* (Cambridge (Mass.), Blackwell, 1988).

The opinions expressed above do not correspond to the practice of the EC Institutions.

First, the EC legislature has followed the essential facilities doctrine or pattern to regulate not only ‘traditional’ natural monopolies, such as trains, but also different sectors of the economy. Hence, basic elements of the essential facilities doctrine are to be found in the cross-border transfers Directive.¹⁹⁰ Similarly, in the field of air transport, the Council Regulation concerning slot allocation,¹⁹¹ the block exemption Regulation for computerized reservation systems¹⁹² and the Directive for groundhandling services,¹⁹³ all embody the concept of essential facility. The same is true for the latest set of legislation in the field of telecommunications, which *completely liberalizes* the sector.¹⁹⁴ Therefore, the idea that the legislator should only have recourse to the essential facility pattern in order to open up *traditional* monopolies does not hold true any more than the idea that the doctrine should only apply to *monopolies*.

Second, it is clear that the application of the essential facilities doctrine is far from being a one way street: the legislator constantly finds inspiration in the practice of the other Institutions. Hence, the Commission Notice on the application of competition rules on access agreements in the telecommunications sector,¹⁹⁵ which defines essential facilities as being ‘a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means’ draws on previous case law of the Commission and the Court. This same Communication has, subsequently, been used as a reference point for the enactment of the recent package of Directives in the field. Therefore, the doctrine, far from being the preserve of the legislator alone, is the result of ‘cyclical’ interaction between all the Institutions of the EU, administrative, judicial and legislative.

¹⁹⁰ Directive 97/5/EC of the European Parliament and the Council of 27 January 1997, OJ L 43/25; see also the relevant Communication, COM 95/C 251/03.

¹⁹¹ Regulation (EC) n. 95/93 of the Council of 18 January 1993, OJ L 14/1.

¹⁹² Regulation (EC) n. 3652/93 of the Commission of 22 December 1993, OJ L 333/37.

¹⁹³ Directive 96/67/EC of the Council of 15 October 1996, OJ L 272/36.

¹⁹⁴ See above n 136.

¹⁹⁵ 98/C 265/02, OJ C 265, 26-8-1998, see also N Nikolinakos, ‘Access Agreements in the Telecommunications Sector – Refusal to Supply and the Essential Facilities Doctrine under EC Competition Law’ (1999) *ECLR* 399.

More importantly, the ECJ itself reasons in terms of the essential facilities doctrine. It is true that the Court has never expressly named the doctrine, but the CFI has done so on several occasions.¹⁹⁶ Moreover, Advocates General Jacobs in *Bronner* and Tizzano in *IMS* have made extensive developments concerning the conditions and effects of the doctrine.

Finally, there is no doubt that the Commission in its competition practice does regularly – albeit in an increasingly restrictive manner – refer to the essential facilities doctrine.¹⁹⁷

From the above it follows that, in EU competition law, the existence of some essential facility does not only give rise to a specific legislative pattern. Rather, it leads all the Institutions to follow, in their respective field of competence, some basic common principles. Therefore, it seems justified to talk of a general *doctrine* of essential facilities. This position is also embraced by the majority of writers,¹⁹⁸ and can hardly be disputed after the judgments of the Court in *Bronner* and *IMS Health*.

2.1.2. Negative definition of a doctrine (limits)

The policy considerations underlying the doctrine of essential facilities would be impaired if the obligations thus imposed deterred undertakings from developing important facilities. Indeed, the few undertakings which may afford the R&D and other costs for constructing a significant infrastructure or facility would have second thoughts if they knew that they would not be allowed to collect monopoly profits.¹⁹⁹ Therefore, several considerations should be taken into account in order to limit or, indeed, exclude the application of the essential facilities doctrine.

¹⁹⁶ Cases *SNCF & BRB v. Commission*, *European Night Services*, *Gencor v. Commission* and *Aéroports de Paris v. Commission* and *Coe Clerici*, all quoted above in 1.1.1.2. The CFI/ECJ.

¹⁹⁷ See above 1.1.1.1 Commission practice.

¹⁹⁸ See, in this direction: J Temple Lang above n. 155, J Venit & J Kallaugher, E Gippini-Fournier, F Fine, R Pitofsky, and M Harz, all quoted above and E Sheehan, ‘Unilateral Refusals to Deal and the Role of the Essential Facility Doctrine, A US/EC Comparative Analysis’ (1999) *World Comp. Rev.* 67.

¹⁹⁹ See among others, P Areeda, ‘Essential Facilities: An Epithet in need of Limiting Principles’ (1990) *Antitrust L.J.* 841 and A Overd & B Bishop, ‘Essential facilities : The rising Tide’ above n 47 at 183. Also, J Ratner, ‘Should there Be an Essential Facility Doctrine?’ (1988) University of California, Davis, Law Review, 327, M-E Schill, ‘Refusals to Deal by Single Firm Monopolists – Should we Rob Peter to Save Paul?’ (1998) *Notre Dame Law Review* 214.

2.1.2.1. Will the access imposed enhance competition in the ancillary market?²⁰⁰

The doctrine of essential facilities relies on a fundamental distinction between, on the one hand, the facility itself and, on the other hand, an ancillary market for which access to the facility is indispensable.²⁰¹ *Magill* and, more importantly, *IMS Health*, teach us that the ancillary market may not actually exist, provided that demand for the good/service in question is real. If however, the ancillary market does exist and the facility holder is already present in it, will the forcible introduction of a new competitor necessarily enhance competition? Several factors are to be taken into consideration:

- i) Is the new entrant ‘strong’ enough in order to create and maintain a reasonable market share? If not, proportionality argues in favour of the facility holder.²⁰²
- ii) Is the new entrant the sole competitor of the facility holder in the ancillary market? If not, a) do the existing competitors offer a sufficient degree of competition and b) do they have access to the facility?²⁰³
- iii) Is there no substitute at all to the facility? It is to be noted in this respect that, according to *Bronner*, this issue is to be appreciated in a much wider context than the traditional delimitation of relevant markets and that even imperfect substitutes are to be taken into account.²⁰⁴

2.1.2.2. Has the facility been built on private resources and entrepreneurship?

The doctrine of essential facilities has served as an instrument for the deregulation of traditional natural monopolies, such as ports, airports etc.²⁰⁵ Where the R&D for and construction of the facility have been financed by public funds, policy considerations argue in favour of enlarged access rights. The same applies for

²⁰⁰ This consideration limiting the scope of the doctrine directly stems from the basic assumption underlying the doctrine, that competition be enhanced through the facility being forcibly made available to competition.

²⁰¹ As for the question whether these should be two distinguishable markets, in competition law terms, see above para 1.2.1.3. Elimination of competition

²⁰² See above 1.2.1.5. The requirement that the facility be used for a ‘new’ product

²⁰³ Only an optimal number of - not all - competitors should have access to the facility. See above 1.2.2.2. Complementary obligations of the facility holder.

²⁰⁴ See above, 1.2.1.2. Essential. See also J Sharpe, ‘The doctrine of Essential Facilities: Defining the Relevant Market’ (1996) *Essex Law Review* 44.

²⁰⁵ For the concept of ‘natural monopolies’, see 2.1.1.2. A doctrine or just a legislative pattern?.

facilities built/developed by private undertakings, where such undertakings enjoyed special or exclusive rights and had the opportunity to recoup the cost thereof, sheltered from competition. The same may also be true for entirely private facilities, which are relatively old and completely amortized by the time access to them is requested.

The situation is different, however, where the facility has been developed by purely private means, within a genuinely competitive environment. Hence, in *European Night Services*²⁰⁶ the importance of the investment projected by the joint venture combined with the high risk involved, was taken into account by the CFI in order to annul the Commission decision which required the joint venture to grant access to third parties after an initial period of eight years. In the same vein, the Local Loop Unbundling (LLU) Regulation,²⁰⁷ limits the access rights of third parties to the old twisted metallic pair circuits, to the exclusion of more modern networks. The reason for this is that incumbent ‘operators rolled out their metallic local access infrastructures over significant periods of time protected by exclusive rights and were able to fund investment costs through monopoly rents’.²⁰⁸ This does not mean, however, that any privately financed, newly-built facility will necessarily evade the application of the essential facilities doctrine: nowhere in its judgment in *Bronner* did the Court attach any importance to the purely private origin of the distribution network to which access was asserted.

Further, the fact that a facility is controlled by numerous undertakings, by virtue of an agreement or concerted practice, may argue in favour of the application of the doctrine. Hence, in situations where several undertakings pool their assets, thus creating an essential facility,²⁰⁹ the merits of the individual arguments available to each of the undertakings may not counter the application of the doctrine. If the same facility were built by a single undertaking, the situation could be different. It follows, therefore, that for the same material facility, Article 81 situations may lead to

²⁰⁶ *European Night Services* above n 27.

²⁰⁷ Regulation (EC) 2887/2000 of the European Parliament and the Council of 18 December 2000, concerning the Unbundling of the Local Loop, OJ L 366/24.

²⁰⁸ Paragraph 3 of the Regulation.

²⁰⁹ Situation prevailing in *United States v. Terminal Railroad Association* above n 2, and the Commission decisions in *Eurotunnel* above n 26 and *European Night Services* above n 24.

different results, as far as the applicability of the essential facilities doctrine is concerned, from cases analysed under Article 82 EC.²¹⁰

2.1.2.3. Is the facility essential due to the efforts of its owner?

A further issue, linked to the previous one, is whether the ‘essential’ character of the facility is due to its intrinsic characteristics, or to other external factors and/or ‘externalities’.²¹¹ In the former case credit should be given to the maker/holder of the facility, who should, therefore, be treated more leniently than in the latter case. The Commission and Court seem inclined to follow such an approach, albeit in a discreet manner.

Contrary to the Channel Tunnel (in *European Night Services*), the daily TV listings (in *Magill*) had nothing intrinsically essential. They constituted raw material, protected by IPRs, for a product for which there was demand in the market. However, the holders of the relevant IPRs had put no creative or other effort in compiling the listings (which were a by-product of their core activity). The Commission, confirmed by the CFI and ECJ, did not dispute the existence of the IPRs, but ‘bypassed’ them, invoking ‘exceptional circumstances’. One of the reasons, explicitly put forward by the Commission was that the bottleneck facility (i.e. the daily TV listings) incorporated no creative or financial effort whatsoever on the part of the holder.

In the same vein, in the *IMS Health* case, which concerned a protected database structure, the Commission stressed that the protected structure a) had been developed with the active participation of all the industries participating in the market – not by the holder of the rights alone – and b) that it became essential because the market embraced it – not because of any particular intrinsic quality.²¹² The Court’s judgment broadly embraced the Commission’s approach as it held that²¹³

the degree of participation by users in the development of that [essential] structure and the outlay, particularly in terms of cost, on the part of potential

²¹⁰ For the relationship of the essential facilities doctrine with the rules on concerted practices, on the one hand and on dominant position, on the other, see below 2.2.1.1 Relation of the doctrine with other competition rules.

²¹¹ For the concept of externalities, see below 2.1.2.4. The existence of IPRs – externalities in general are not described in that section, only network externalities.

²¹² For the issue of market externalities, see below 2.1.2.4. The existence of IPRs

²¹³ *IMS Health v NDC Health* above n 37, para 29 and operative part.

users [...] on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable.

In the *Microsoft* case currently pending before the Court, one of the main arguments invoked by the defendants (Microsoft) in order to deny the disclosure obligation imposed by the Commission, is precisely the extremely high creative effort and economic value embodied by the information concerned.

In this respect the judgment of the Court in *KPN Telekom* may be of some interest. In this case the new entrants in the market for directory listings were requiring the incumbent monopolist to give them access to information. They requested not only the basic client information (name, phone number and address) directly linked to the activity of providing telecommunication services, but also access to value added information gathered by the monopolist committing extra resources, such as the profession, fax number, mobile phone number, etc of listed people. The Court did not rule out that such information could be the object of a compulsory foreclosure, but made clear that the effort necessary for its collection and organization should be compensated for by the access fee.

2.1.2.4. The existence of IPRs

The above issue, concerning the creative effort of the facility holder, gives rise to lively theoretical controversy where, as in *Magill*, *IMS* and more importantly *Microsoft*, the facility is protected by IPRs. Contrary to material property rights, which are obtained randomly through the unilateral initiative of their owner, IPRs are awarded and protected by the public authorities. They embody policy choices concerned with fostering innovation and long term economic development. The question arises whether the policy considerations lying behind competition law – and more particularly, the doctrine of essential facilities – may legitimately counter those underlying the system of IPR protection. The present author agrees with the approach followed by the Commission and EC Courts,²¹⁴ according to which the existence of

²¹⁴ In *Magill* above n 28, *IMS* above n 37, and *Microsoft* above n 91.

IPRs should not exclude altogether the application of the doctrine of essential facilities.²¹⁵ This finding is based on a series of (at least) five arguments.²¹⁶

First, IPR and the essential facilities doctrine are entirely different policy instruments and, therefore, the existence of the former does not prevent the application of the latter. Differences are to be found in, at least three respects:

- the theoretical background of IPR, on the one hand and the doctrine of essential facilities, on the other, are completely different: protection of IPRs is linked to the personality of the creator and tends to reward invention, while the essential facilities doctrine aims to protect or enhance the competitive structure of the market;
- the economic aim of IPRs is to ensure monopoly profits for the owner thereof, in order to foster research and encourage creativity. By contrast, the essential facility doctrine is designed to prevent the holder of the facility from receiving such exorbitant profits;
- the regulatory pattern followed by IPRs is objectively oriented (reward invention in order to foster research, etc), while the essential facilities doctrine is procedure oriented (maintain the competitive structure of the market, keep the market going).

²¹⁵ The theoretical debate is vivid: Completely opposed to any meddling with IPRs are, among others, A Lipsky & G Sidak, 'Essential Facilities' (1999) *Stanford Law Review* 1187, also available at <http://www.criterioneconomics.com/documents/essentialfac.pdf>; V Korah, 'Access to Essential Facilities under the Commerce Act in the Light of Experience in Australia, the European Union and the United States' (2000) *Virginia University World Law Review* 231 and 'The Ladbroke Saga' above n 47. On the opposite edge, see R Pitofsky, 'The essential Facilities Doctrine Under US Antitrust Law' above n 118, and F Fine, 'NDC/IMS: A Logical Application of the Essential Facilities Doctrine' above n 36, as well as the American Committee for Interoperable Systems, *ACIS Comments on Draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property*, available at <http://www.interop.org/Antitrust.html>. In between the two extremes, see T Cotter, 'Intellectual Property and the essential facilities doctrine' (1999) *The Antitrust Bulletin* 211 (moderately negative) and F Denozza, 'Refusal to Deal and IPRs' above n 118 (moderately positive).

²¹⁶ Which will only be briefly spelled out here; for more substantial developments see *i.a.* T Cotter above n 215 at 217 where further references to the US doctrine; R Merkin, 'The Interface Between Anti-trust and Intellectual Property' (1985) *ECLR* 377; J Hughes, 'The Philosophy of Intellectual Property' *Georgetown Law Journal* 287; T Palmer, 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects' (1990) *Harvard Law Journal & Public Policy* 817. More recently see 'U. Bath Access to Information v. Intellectual Property Rights' (2002) *European Intellectual Property Review* 138.

- both IPRs and the essential facilities doctrine tend to establish an optimal balance between the exclusivity, the reward of innovation and long term competition, on the one hand and short term competition and consumer welfare on the other hand. However, IPRs apply in a general manner and *ex ante*, while the essential facilities doctrine applies on a case by case basis and *ex post*.²¹⁷

Second, IPRs are subject to various limitations already (both *ratione materiae* and *ratione temporis*) and exceptions (compulsory licences, exhaustion of rights etc...). Therefore, they do not provide absolute protection.

Third, the absolute protection of IPRs tends to ignore a) that the holder of the IPR does not necessarily use his right in order to satisfy demand (as was the case in *Magill*) and b) that the object of IPRs is often distorted by network externalities,²¹⁸ which allow him unjustified excess monopoly profits.

Fourth, IPRs do not provide a precise relationship or “calibration” between the initial investment of and the payoffs to the holder. Depending on the market conditions, the IP holder may be under-protected and under-rewarded (e.g. if the protected good or service was not commercially successful or was subject to fierce competition by substitutes) or, conversely, over-protected and over-rewarded (e.g.

²¹⁷ Writers are divided on whether an *ex ante* or *ex post* balancing is preferable. See C Ritter, ‘Refusal to Deal and “Essential Facilities”’: Does Intellectual Property Require Special Deference Compared to Tangible Property?’ (2005) *World Competition* 281, at 287, who argues that an *ex post* appreciation may be more accurate because a) market information about the actual value of the market is more complete after the IPR have been granted and b) antitrust enforcers and judges are less likely to be influenced by lobbying than the legislature. Also B Rotenberg, ‘The Legal Regulation of Software Interoperability in the EU’ above n 40 who argues that an *ex post* appreciation of IPRs is necessary not only for economic, but also for human rights reasons, in particular to ensure that the freedom of expression (Art 10 ECHR) is respected. *Contra see*, among many, R O’Donoghue & JA Padilla, above n 126, at 6 et seq. and also 37, who argue that innovation is crucial for economic development and that every successful good or product reaching the market corresponds to many more failed efforts, which should be compensated for and therefore, any *ex post* tampering with IPRs is undesirable. See also I Forrester, ‘The Interaction ...’, above n 8, who urges that any *ex post* intervention need to be predictable in order for it to be lawful; on a slightly different tone see J Temple Lang, ‘European Competition Policy and Regulation ...’ above n 93, who generally argues in favour of a clear separation between the *ex ante* regulatory and the *ex post* supervisory functions of State authorities.

²¹⁸ M Lemley & D McGowan, ‘Legal Implications of Network Economic Effects’ (1998) *California Law Review* 479, at 483; Lopatka, J. & Page, W., ‘Microsoft, Monopolization and Network Externalities...’ above n 43. See also the monograph by N Economides, ‘The Economics of Networks’ (1996) *International Journal of Industrial Organization*, available at <http://www.stern.nyu.edu/networks/top.html>; N Economides & L White, ‘One-way Networks, Two-way networks, Compatibility and Anti-trust’ (1993) available at <http://www.stern.nyu.edu/networks/93-14>; of the same, ‘Networks and Compatibility: Implications for Anti-trust’ (1994) *European Economic Review* 651.

where network externalities strengthen his position). The corrective application of competition law in cases of over-protection seems desirable for the general good (though not necessarily that of the IPR holder).²¹⁹

These four arguments speak in favour of the corrective – although extremely limited and restrictive – application of the doctrine of essential facilities to IPRs. The Community legislator follows this pattern: in many legislative acts which establish or protect IPRs, the legislator inserts reservations in favour of competition and, at times, provides for the imposition of forced access, to this effect (*fifth* argument).²²⁰

2.2. An EU doctrine?

According to the developments above, an essential facilities doctrine *does* exist under EC law. The question which emerges, then, is whether this doctrine is a pure transposition of the US ‘parent’ doctrine, or whether within the EU the rule has been developed differently.²²¹ It will be argued that the differences, which already exist, between the two doctrines (2.2.1) may develop further under the weight of the EU internal market requirements (2.2.2).

²¹⁹ The totality of this argument is taken by C Ritter, above n 217, at 292-294.

²²⁰ See e.g. Directive 96/9/EC of the European Parliament and the Council of 11 March 1996, for the legal protection of databases, OJ L 77/20, articles 13 and 16(3); Regulation (EC) n. 2100/94 of the Council of 27 July 1994, on plant variety rights, OJ L 227/1, art. 29; Directive 98/44/EC of the European Parliament and the Council of 6 July 1998, on the legal protection of biotechnological inventions, OJ L 213/13, art. 12; Directive 98/71/EC of the European Parliament and the Council, of 13 October 1998, on the legal protection of designs, OJ L 289/28, art 7(2).

²²¹ This is an issue which has been extensively debated by writers, see *i.a.* the excellent article by Venit, J. & Kallaugher, J., ‘Essential Facilities: A Comparative Law Approach’ above n 117, who put forward the view that within the EU the role of the doctrine should be more limited than in the US. For a different view see, J Temple Lang, ‘Defining Legitimate Competition...’ above n 155, who gives a series of arguments in favour of the doctrine occupying a more important role in the EU legal order (p. 280 *et seq.*) but explains that, in fact, the judicial applications of the doctrine are more limited in the EU than in the US (p. 309 *et seq.*). See also, for a neutral but well documented comparison between the US and the EU doctrine, E Sheehan above n 198, and A Capobianco, ‘The Essential Facility Doctrine: Similarities and differences between the American and the European Approach’ (2001) *European Law Review* 548. See more generally on the issue of freedom to deal in the two jurisdictions, J Adams, ‘Antitrust Constraints on Single Firm Refusals to Deal in the EEC and the US’ (1985) *Texas International Law Journal* 12.

2.2.1. Differences between the US and the EU doctrine of essential facilities

2.2.1.1 Relation of the doctrine with other competition rules

a) In the field of concerted practices, Section 1 of the Sherman Act, contrary to Article 81 EC, does not contain any express derogations. Section 1 has been made flexible through the application of the rule of reason. As mentioned above, the foundation case of the essential facilities doctrine, the *US v. Terminal Road Association* case,²²² was no more than an early application of the rule of reason. The Supreme Court, in that case, found that the proposed association did promote efficiency, but could hinder competition. Therefore, instead of ordering divestiture, the Supreme Court identified the essential facility at stake and imposed an access requirement.

The judicial origin and the imprecise content of the rule of reason²²³ allow for greater flexibility in the application of the relevant US provision than the express exceptions of Article 81(3) EC. Therefore, a rule which legitimises agreements between undertakings, such as the essential facilities doctrine, finds its place more easily within the US than in the EU system of competition rules.

b) In the field of abuse of dominance too, there are strong arguments in favor of a more extensive application of the essential facilities doctrine in the US than in the EU. In the US system of competition the prevailing rule, known as the ‘Colgate Doctrine’²²⁴ is that of freedom (not) to deal, provided there is no monopoly purpose. This rule covers all undertakings, even dominant ones, as long as their conduct is not dictated merely by the intent of creating or strengthening a position of dominance. Article 82, on the other hand, based on a ‘special responsibility’,²²⁵ imposes strict limitations on the behavior of dominant undertakings. The imposition of further

²²² *United States v. Terminal Railroad Association*, above n 2.

²²³ The issue of the precise content and scope of the rule of reason may not be tackled here, see however, R Whish above n 29 at 124-126; D Fasquelle, *Droit américain et droit communautaire des ententes, Etude de la règle de raison* (Paris, éd. Joly, 1993), R Kovar, ‘Le droit communautaire de la concurrence et la règle de raison’ (1987) *Revue Trimestrielle de Droit Européen* 237, G Wills, ‘Rule of reason: une règle raisonnable en droit communautaire?’ (1990) *Cahiers de Droit Européen* 19.

²²⁴ Because it was strongly asserted for the first time by the Supreme Court in *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

²²⁵ See R Whish above n 29 at 188-189.

obligations, under the EU doctrine of essential facilities, on dominant undertakings, should be made with caution so as not to overburden those undertakings.²²⁶

2.2.1.2. Conditions for the application of the doctrine

The EU doctrine has, in some respects, a wider scope of application than its US equivalent, while in others it applies in a stricter way.

a) ‘In the US the essential facilities doctrine focuses on effects in markets where a firm holds market power subject to control under Section 2 (of Sherman Act). The Article 82 EC cases, in contrast appear to apply the concept in a monopoly leveraging context without extensive consideration of the extent to which the dominant firm holds a dominant position in a downstream market.’²²⁷ Therefore, in *ICG/Morlaix (Port of Roscoff)*²²⁸ the Commission expressly applied the essential facilities doctrine and obliged the local Chambers of Commerce to allow a competitor to have access to the port facilities, in order for it to offer a completely new route, where the Chambers had no presence whatsoever. Similarly, in *Aéroports de Paris*²²⁹ the CFI and ECJ contemplated the application of the essential facilities doctrine despite the fact that the holder of the facility (ADP) was entirely absent from the ancillary market (for catering). An even clearer statement of the idea that the holder of the facility need not be present in the ancillary market is to be found in the EU telecommunications legislation. There, the idea is clearly put forward that

where an undertaking has significant market power in a specific market, it may also be deemed to have significant market power in a closely related

²²⁶ The counterargument, in favour of a more extensive application of the essential facilities doctrine in the EU, is one of strength: Article 2 of the Sherman Act intervenes at an earlier stage than Article 82 EC, since it tends to avert the creation or strengthening of a dominant position, not merely its abuse. Therefore, at this later stage, where dominant undertakings are about to abuse market power, stricter control is justified; see M Harz, ‘Dominance and Duty in the EU: A Look Through Microsoft Windows at the Essential Facilities Doctrine,’ available at <http://www.law.emory.edu/EILR/volumes/spg97/HARZ.html>.

²²⁷ Venit & Kallaugh, above n 117 at 333.

²²⁸ *ICG/CCI Morlaix (Port of Roscoff)* above n 17.

²²⁹ Case T-128/98 *Aéroports de Paris v. Commission* [2000] above n 23, and further by the ECJ, see Case C-82/01 P *Aéroports de Paris v. Commission* [2002] above n 23.

market, where the links between the two markets are such as to allow market power held in one market to be leveraged into the other market.²³⁰

b) On the other hand, after the judgment in *Bronner*,²³¹ it would seem that in the EU a facility will not be held to be essential unless it is absolutely indispensable for the competitors. In this respect the US authorities are more lenient, since they are ready to apply the doctrine of essential facilities where the refusal to give access to a facility merely creates a ‘severe handicap’ for potential competitors.²³²

2.2.1.3. Effects of the doctrine

When the US authorities apply the essential facilities doctrine, the outcome for the facility holder is the obligation to grant access to the competitor(s), for a reasonable fee. In the EU, on the contrary, more complex obligations may be imposed upon the facility holder, who is supposed to manage the facility as if he were an official authority or an independent third party. This may be seen as being reminiscent of the idea, omnipresent in the sector-specific liberalisation directives – that universal service should be maintained. Hence, in *Sea Containers v. Stena Sealink*²³³ the Commission invoked the essential facilities doctrine, not to allow the complainant access to the port facilities (which he already had), but in order to make sure that he was treated in a non-discriminatory way in relation to timetables and other conditions of use of the facility.²³⁴ These complementary conditions, described above,²³⁵ may be particularly burdensome for the holder of the facility, as they may affect not only his conduct but also his corporate structure.²³⁶ In the same vein, in *Microsoft*, the Commission required the dominant firm to make available interface information to competitors on non-discriminatory terms, although, from an economic point of view,

²³⁰ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002, framework directive for electronic communications (telecommunications), OJ L 108/33, article 14(3).

²³¹ *Oscar Bronner* above n 48.

²³² See case *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1977); this point is also made by Doherty, above n 149 at 425.

²³³ *Sea Containers/Stena Sealink*, above n 13 at 8.

²³⁴ For the duty not to discriminate between different users see also the *Aéroports de Paris* judgments, above n 23.

²³⁵ See above 1.2.2.2. Complementary obligations of the facility holder

²³⁶ Price transparency and non-discrimination may require the facility holder to proceed to accounting unbundling and, in some circumstances, to full separation of the essential facility from its other activities.

it would have made more sense to allow price differentiation related to the extent that each competitor values the assets in question.²³⁷

2.2.2. The essential facilities doctrine, rule for the internal market?

Besides the technical considerations above, there are also some more general characteristics that distinguish the EC essential facilities doctrine from its US counterpart. EC competition law is not only concerned with economic efficiency, but seeks also to promote the functioning of the EC internal market.²³⁸ The Treaty rules on free movement and competition converge and often coincide.²³⁹ The EC essential facilities doctrine may be seen as one of the fields in which convergence is more pronounced. Two examples, one from the legislative practice of the institutions, the other one from the Court's case law, will illustrate this point.

2.2.2.1. Within legislation

It has been mentioned above²⁴⁰ that the privatisation and regulation of natural monopolies within the EU has followed a legislative pattern inspired by the essential facilities doctrine. Third party access to infrastructure, together with complementary rules assuring transparency, non-discrimination, rational allocation of resources, interoperability etc, compose the EU legislator's approach in attempting to inject competition in fields where the existence of significant infrastructures has justified legal monopolies.

Unsurprisingly, there has been a constant dialogue between the EU legislator instituting the deregulation directives and the Commission and Court formulating and applying the essential facilities doctrine. This explains why the basic principles and the general conditions of the two coincide.²⁴¹ What should not be overlooked, however, is the fact that the vast majority of the deregulation directives aim primarily

²³⁷ See Lévêque above at 150.

²³⁸ See R Whish above n 29 at 20-21.

²³⁹ For an excellent discussion of the convergence of the internal market and the competition rules in the EU, see J Baquero Cruz, *Between Competition and Free Movement* above n 15. See also K Mortelmans, 'Towards convergence in the application of the rules on free movement and on competition' (2001) *CML Rev* 613; J Stuyck, 'Libre circulation et concurrence: les deux piliers du marché commun' in *Mélanges en hommage à Michel Waelbroeck*, vol II (Bruylant, 1999), 1477.

²⁴⁰ See above 2.1.1.2. A doctrine or just a legislative pattern?.

²⁴¹ See above 2.1.1.2. A doctrine or just a legislative pattern?

at the institution of an internal market in the relevant field, not the creation of competition. Reference to the legal basis of the deregulation directives dispels any doubt: Article 95 EC is the sole Treaty provision invoked in almost all directives, while very few are adopted by the Commission under Article 86(3). A further consequence of the fact that the essential facilities doctrine is being enshrined in legislation is that its addressees are not undertakings, but member states themselves.

2.2.2.2. In the Court's case law

The judgment of the Court in the *Commission v. Greece (petroleum supplies)* case²⁴² is highly relevant in this respect. The Greek petroleum market is divided into three separate markets: refining, wholesale marketing and retail distribution. Service stations may only get supplies from marketing companies, not the refineries themselves. Marketing companies are obliged to keep at all times minimum stocks of petrol within the national territory. Since stocking facilities are almost impossible to build (for environmental, urban planning, etc reasons) marketing companies have the right to require the refineries to keep these stocks on their behalf. The problem with the Greek legislation was that each marketing company could make use of such stocking capacity per refinery, as determined by reference to the quantities it had bought during the previous year from that same refinery. The effect of this legislation was that it excluded from the use of the 'essential' stocking facilities any new entrant (who did not have any quota based on his previous purchase volume) in the wholesale market.

All the elements for the application of the essential facilities doctrine were present in this case.²⁴³ Advocate General Colomer found in favor of the Commission's position, which would transform the relevant market 'in such a way that the storage of petroleum products will be governed by the laws of the market and of free competition'.²⁴⁴ The Commission for its part, in a decision approved by the Court, held that an access right to stocking facilities for a reasonable fee, should be recognized to any potential competitor. Hence, the logic which prevailed and the solution reached in this case seem to constitute a typical application of the essential

²⁴² Case C-398/98 *Commission v. Greece, petroleum supplies* [2001] ECR I-7915.

²⁴³ With the reservation that in the ancillary market there existed already quite some trading companies.

²⁴⁴ *Commission v Greece* above n 242, para 43 of the opinion, *in fine*.

facilities doctrine. This case, however, was not argued at all under the competition rules, but as a violation of Article 28 EC on the free movement of goods.

Conclusion

The developments described above lead to the conclusion that a) there is and b) there should be, such a thing as an EU essential facilities doctrine, albeit having a restricted scope of application. Moreover, an effort has been made, through a complete though brief reference to the Commission's practice and CFI's and ECJ's case law, to identify the main constitutive elements of such a doctrine.

Such an attempt, by definition, proceeds by generalizations and sometimes lacks precision. It allows, however, for a more synthetic view, passing by the specifics of each case. This is done on purpose: it is enough to know that one can, under certain circumstances, bring a claim under the essential facilities doctrine. Different Advocates General of the Court, just like officials of the EC Commission and, of course, academic writers, have divergent views on the precise conditions and effects thereof: an exciting field for trial and error.