

POLICY ROUNDTABLES

The Essential Facilities Concept

1996

Introduction

The OECD Competition Committee debated the essential facilities concept in February 1996. This document includes an analytical note by Ms. Sally Van Siclen of the OECD, written submissions from Australia, Canada, the European Commission, Italy, Japan, Sweden, the United Kingdom, and the United States and an aide-memoire of the discussion.

Overview

An essential facilities doctrine specifies when the owner(s) of an “essential” or “bottleneck” facility must provide access to that facility, at a reasonable price. For example, it might specify when a railroad must be made available on reasonable terms to a rival rail company or an electricity transmission grid to a rival electricity generator.

Topics covered include the access regime, interoperability (that different systems, products, and services work together transparently), standards, the importance of market definition in defining an essential facility, single versus joint ownership of an essential facility, legitimate reasons to deny access and possible remedies.

There is an important distinction among public, private but regulated, and private unregulated facilities because mandatory access can diminish private incentives to invest and to innovate.

Related Topics

OECD Guiding Principles for Regulatory Quality and Performance (2005)
Regulating Market Activities by the Public Sector (2004)
Competition Issues in the Electricity Sector (2003)
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THE ESSENTIAL FACILITIES CONCEPT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1996

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FOREWORD

This document comprises proceedings in the original languages of a roundtable on the essential facilities concept which was held by Working Party No. 2 of the Committee on Competition Law and Policy in February 1996. It is published as a general distribution document under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This is the fifth compilation published in a new OECD series named "Roundtables on Competition Policy".

PRÉFACE

Ce document rassemble la documentation, dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur le concept des installations essentielles qui s'est tenue en février 1996 dans le cadre du Groupe de travail n°2 du Comité du droit et de la politique de la concurrence. Il est mis en diffusion générale sous la responsabilité du Secrétaire général afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation est la cinquième diffusée dans la nouvelle série de l'OCDE intitulée "Les tables rondes sur la politique de la concurrence".

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BACKGROUND NOTE

Sally Van Siclen, OECD Secretariat

1. Introduction

The term "essential facilities doctrine" originated in commentary on United States antitrust case law and now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access. The variance in definitions is great. Indeed, commentators cannot even agree on which U.S. cases come within the purview of "essential facilities."[1] Among countries, the variance is even larger. Hence, one purpose of this note is to make readers aware of that variance.

An "essential facilities doctrine" (EFD) specifies when the owner(s) of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price. For example, such a doctrine may specify when a railroad must be made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of "essential facilities" requires there to be two markets, often expressed as an upstream market and a downstream market. (The case of two complementary products is logically the same, but confusing in exposition.) Typically, one firm is active in both markets and other firms are active or wish to become active in the downstream market. (See below for a fuller discussion of the market configurations found by some commentators to be relevant to an EFD.) A downstream competitor wishes to buy an input from the integrated firm, but is refused. An EFD defines those conditions under which the integrated firm will be mandated to supply.[2]

While essential facilities issues do arise in purely private, unregulated contexts, there is a tendency for them to arise more commonly in contexts where the owner/controller of the essential facility is subject to economic regulation or is State-owned or otherwise State-related.[3] Hence, there is often a public policy choice to be made between the extension of economic regulation and an EFD under the competition laws. Further, the fact of regulation of pricing through economic regulation, State-control, or a prohibition of "excessive pricing" in the competition law, has implications for the nature of an EFD.

The remainder of the note proceeds as follows. Section 2 presents concise formulations of the EFDs in the United States, Australia, and the European Union, illustrating the variation found within the OECD area. Section 3 presents a basic economic analysis of the issues. Section 4 is a discussion of some other relevant issues. Section 5 concludes the note.

2. Three statements of essential facilities doctrines

Essential facilities doctrines vary significantly among legal regimes. They may vary according to the types of "facilities," ownership and market structures to which they may apply, and according to who makes the determination that a facility is "essential." This section very briefly looks at three of the EFDs that apply within the OECD area. The first one examined is that of the United States, where the term originated and on which much commentary is available. The relatively uncrystallized EFD of the European Union is examined second. The third EFD presented is that of the "Hilmer Report" of Australia, which is a recent re-examination of the Australian approach to competition and regulation.

United States

The leading U.S. essential facilities case is *MCI Communications Corp. v. AT&T.* (708 F.2d 1081, 1132 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983)) The Seventh Circuit said that there were four elements necessary to establish liability under the essential facilities doctrine:

1) control of the essential facility by a monopolist;
2) a competitor's inability practically or reasonably to duplicate the essential facility;
3) the denial of the use of the facility to a competitor;
4) the feasibility of providing the facility. (708 F.2d at 1132-33)

Commentators do not agree on which cases constitute *the* EFD cases. If one takes the American Bar Association commentary as the closest thing to consensus regarding the identity of cases, then the facilities deemed essential have included: railway bridges, etc. into the city of St. Louis, a nationwide telecommunications network, a local electricity transmission network, a sports stadium and a multi-day skipass scheme.[4]

The second element, that duplication be impractical or unreasonable, is a higher standard than being "more economical" than alternatives. (ABA, p. 249) "As the word 'essential' indicates, a plaintiff must show more than inconvenience, or some economic loss; he must show that an alternative to the facility is not feasible." (*Twin Labs v. Weider Health & Fitness*, 900 F.2d 566,570 (2d Cir. 1990), quoted in ABA, p. 249) The third element, denial of access, may be unreasonable changes in service provided or rates charged, as well as outright denial. (ABA, p. 250) The fourth element is fact-intensive and no general standards have emerged from the jurisprudence.

"Essential facilities" cases are a subset of refusal to deal cases, the other types being "intent" and "monopoly leveraging" cases.[5] The essential facilities and monopoly leveraging cases are distinguished by there being no intent to monopolise, and they are themselves distinguished by the degree of downstream market power by the integrated firm. Some commentators also distinguish between multi-firm refusals to deal and single-firm refusals to deal.

European Union

There appears to be no clear statement on essential facilities in the jurisprudence of the European Union. Three sources of possible enlightenment exist: two European Court of Justice (ECJ) decisions on refusals to deal by a dominant firm (which were not essential facilities cases), the first published Commission decision to use the term, and a recent statement by a senior DG IV official.

The two ECJ decisions -- *Commercial Solvents* and *United Brands* -- can be interpreted as providing a broad duty to supply by firms in a dominant position.[6] Whish writes (p. 619), "Dominant firms must therefore be aware that they may have to justify any refusal to supply. It is not enough that the refusal was in the firms' best commercial interests; it must be objectively justified it if is to escape condemnation under Article 86." Venit and Kallaugher (pp. 332-3) write, "In the United States the essential facility doctrine creates an exception to a broad general rule that allows firms to deal with whom they choose, even if that choice limits competition, provided that their choice has some business justification. Article 86, in contrast, imposes broad duties to deal on dominant firms."

The first published Commission decision to use the term "essential facility" is *Sea Containers v. Stena Sealink.* (OJ L 15/8 (1993)) The Commission ruled that an undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e., a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on

terms less favourable than those which it gives to its own services, infringes Article 86 if the other conditions of that Article are met. (OJ L para. 66, 15/8 (1993))

The third element that may shed light on the still-developing EFD in the EU is a recent paper by a senior DG IV official. He writes that,

> [A] dominant company has, at least in some cases, a duty to supply, if a refusal will cause a significant effect on competition....When a customer is also a competitor of the dominant company in some market, usually downstream from the point at which the refusal to supply occurs, the effect on competition largely depends on three factors:
>
> 1) whether the buyer can obtain the goods or service elsewhere;
> 2) whether there are other downstream competitors; and
> 3) how important the goods or services are to the buyer's business.
>
> If the buyer has another satisfactory source of supply, if the goods or services are not essential, or if one more competitor will not add significantly to competition, antitrust law should not oblige the dominant company to supply. If, however, in practice, the refusal by the dominant company to supply means that one of very few competitors is forced out of the market, EC antitrust law requires the dominant company to supply....In brief, access to a facility is "essential" when refusal would exclude all or most competitors from the market. (Lang, pp. 475-6)
>
> [W]hat the Commission has said so far...is...that the dominant owner of the facility must provide access on a nondiscriminatory basis." (Lang, p. 364)

The sorts of facilities that were key in "cases that may raise issues of essential facilities, or similar issues," include: harbour facilities, television programme listings, bank check clearing facilities, computer reservations systems, airports, telecommunications networks, electricity transmission grids, natural gas pipelines, and performing rights societies. Other potential essential facilities, according to the same official, are interface information, intellectual property rights that span an entire market, "a raw material, a service, or access to a physical thing or place, such as a harbour or an airport." "A natural monopoly is not necessary for a facility to be essential." (Lang, pp. 477, 511, 513, 490)

Australia

In Australia, the report on National Competition Policy (the "Hilmer Report," pp. 250-253) recommended that the following criteria must be met for the Minister to declare a right of access:

> "1. Access to the facility in question is essential to permit effective competition in a downstream or upstream activity. [Access must be essential rather than merely convenient.]
>
> 2. The making of the declaration is in the public interest, having regard to:
> a) the significance of the industry to the national economy; and
> b) the expected impact of effective competition in that industry on national competitiveness.
>
> These criteria may be satisfied in relation to major infrastructure facilities such as electricity transmission grids, major gas pipelines, major rail-beds and ports, but not in relation to products, production processes or most other commercial facilities. [footnote deleted] While it is difficult to define precisely the nature of the facilities and industries likely to meet these requirements, a frequent feature is the traditional involvement of government in these industries, either as owner or as extensive regulator.

[Due regard must be given to the potential to deter infrastructure investments.]

3. The legitimate interests of the owner of the facility must be protected through the imposition of an access fee and other terms and conditions that are fair and reasonable, including recognition of the owner's current and potential future requirements for the capacity of the facility."

The three examples above -- from the United States, the EU and Australia -- illustrate some of the differences among EFDs. These differences may have various origins, including different degrees of integration, histories of ownership and regulation, and weightings of objectives of competition policy.[7]

3. Economics

As the above introduction suggests, there are many examples where the concept of essential facilities could conceivably apply. We turn now to some of the economic analysis of such policies.

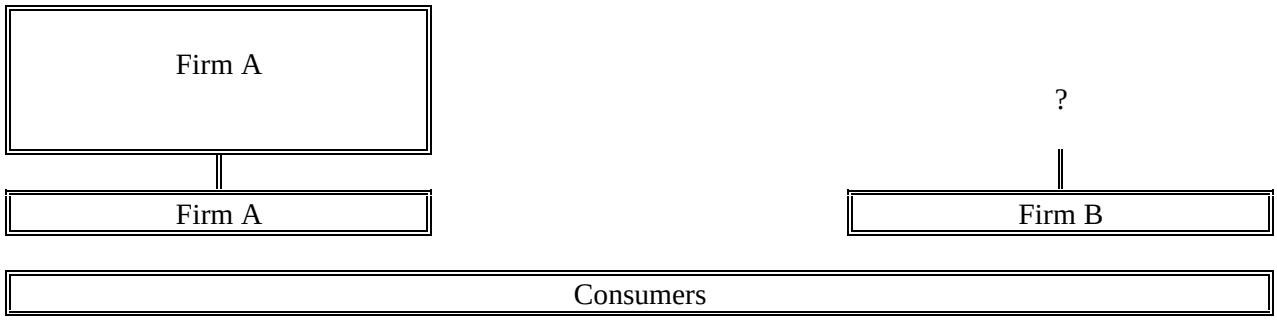
Various factors affect the welfare analysis of a refusal to deal in particular industries. One factor is the nature of regulation, especially that available for relief, and the nature of subsidies. Another factor is whether the technology is fixed proportions, i.e., whether a given quantity of the upstream product goes into each unit of the downstream product. A final important factor is the prospects for enhanced competition. (Werden, p. 473)

The following diagrams illustrate some market structures where an essential facilities assertion might be made.

Vertical integration downstream by an unregulated monopolist

Diagram 1 shows two unregulated markets: Firm A is a monopolist in the upstream market and A and B are duopolists in the downstream market. B buys an input, which it can get nowhere else, from A. If A does not supply B, but rather vertically integrates downstream, then this action may affect consumer welfare, positively or negatively.

Diagram 1. Upstream monopoly, downstream duopoly



In a world of complete information and no uncertainty, where the upstream firm has an uncontested and unregulated monopoly, sells to identical downstream buyers who use the input in fixed proportions and employ a constant returns to scale production technology, then there is no effect on welfare if the monopolist integrates downstream. The monopolist can appropriate all the monopoly profits in either scenario. (Ordover and Saloner, p. 564) If any of these conditions is not met, then it may be profitable for the upstream firm to downstream integrate. This may or may not decrease welfare. For

example, if all the other conditions are met and if the input is not used in fixed proportions and if the price of the input is not at marginal cost (which is likely given the upstream monopoly position), then vertical integration (which presumably would result in an internal transfer price equal to marginal cost) would increase welfare. If downstream firms are not identical, perhaps facing differing demands, then vertical integration may make price discrimination possible, which has an ambiguous effect on welfare. If the downstream firm is a monopoly or a monopsony, then vertical integration increases the quantity of the input sold and downstream output, raising welfare. If there is uncertainty or incomplete information, then vertical integration presumably diminishes contracting costs and losses due to agency problems. ("Presumably" because the relative efficiency of a market mechanism and an internal corporate control mechanism is an empirical issue.) Vertical integration may raise entry barriers -- through increasing risk of capital and necessary managerial skills -- but the effect on welfare of raising entry barriers is minimal when the essential facility is a natural monopoly. (Werden, pp. 467-8)

How might differences in "nationality" of A and B affect the analysis, if countries try to maximise "national welfare"? If there is complete information, no uncertainty, the upstream monopoly is unregulated and uncontested, and downstream buyers are identical and use a constant returns to scale technology, then there is no change: still, the upstream monopoly extracts all the rents so vertical integration would not affect the national welfares. If vertical integration makes price discrimination possible and the consumers facing the higher prices are of a nationality different from that of the integrated monopolist, then their welfare is diminished by the vertical integration; but if the consumers facing the higher prices are of the same nationality as the monopolist then the change in their total welfare (consumer welfare plus producer welfare) is ambiguous but the welfare of the consumers facing lower prices increases. For those cases in which vertical integration increases internal efficiency of the monopolist, the welfare gains cannot, in general, be assigned to one country or another. In sum, even in this special case there is no general rule about the effect on national welfare of vertical integration -- refusal to supply a downstream competitor -- by a monopolist which takes place across national boundaries.

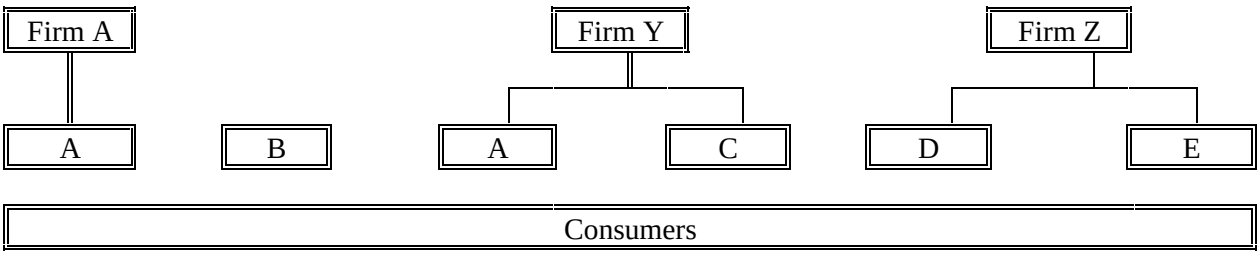
Should the EFD be limited to natural monopolies? Werden argues yes, even though a natural duopoly or triopoly would raise similar issues, and even though a natural monopoly does not necessarily have downstream market power, because the rule would be simple. (Werden, p. 476)

In discussing "putting the rival at a disadvantage" as a less extreme form of foreclosure of an essential input, two economists posit three conditions that must be met for a firm to find it feasible and profitable to place its rivals at such a disadvantage. First, the value of the exclusion must be greater to the excluding firm than to the rival. Second, the rivals must not be able to find substitute suppliers which would restore their competitiveness. Third, the excluding firm must have some market power. (Ordover and Saloner, p. 566)

Competition in unregulated upstream market

Diagram 2 shows another possible scenario: there is competition among Firms A, Y and Z in the upstream market and among Firms A, B, C, D and E in the downstream market.

Diagram 2. Upstream competition



Whether Firm B can acquire the needed input and compete may have little effect on consumer welfare: Competition among A-A (input from Firm A combined with distribution or transformation by A), Y-A, Y-C, Z-D and Z-E may be sufficient so that the absence of B has little effect.

Market definition

These two examples illustrate the important role played by market definition in assessing the static welfare effects of mandating access. The role of market definition is clear in the first element of the *MCI* formulation -- that the firm be a *monopolist* -- because that status can occur only in a market. The second element seems to refer to a degree of non-substitution even greater than that used in defining the boundaries of a market -- that the facility be impractical and unreasonable to duplicate, as compared with, in the U.S. Merger Guidelines, not substitutable with a small but significant nontransitory price increase.[8] The ECJ decisions on the broad duty to supply refer to dominant firms, which implies a defined market. However, the Commission decision in *Sealink* refers to an "undertaking which occupies a dominant position in the provision of an essential *facility* [emphasis added]." Whether this implies that an essential facility is, by definition, a market is not clear. Finally, the formulation offered in the Hilmer Report refers to facilities, rather than markets.

The relatively obscure role market definition plays in some EFDs may reflect the contexts in which the EFDs operate. In the Australian example, essential facilities are limited to natural monopolies and "almost all cases of essential facilities identified...were in the public sector" (Hilmer, p. 239). Here, the safeguard to an overly broad finding of a duty to deal is provided, rather than by a market test, by a cost structure test -- natural monopoly -- and a "significance test" which explicitly excludes "products, production processes or most other commercial facilities."[9]

Mandating access and private investment

The above dealt only with static situations. A key issue in formulating an efficiency-enhancing EFD, however, is the effect of mandating access on dynamic efficiency. Imagine a purely private, unregulated, non-aided firm contemplating a sunk investment, such as a port. Assume that the future demand for that port is unknown until after it is built. Then the firm may face three possible outcomes: a negative return on investment in the port in any case (low demand), a negative return if access is mandated but positive if it can exclude competitors (medium demand), and a positive return even when access is mandated (high demand). It may be the case that if the firm expects access to be mandated, then it would not build the port, but if it expects access not to be mandated, then it would build the port. (The box below explains this point in greater detail.) Hence, a duty to provide access can deter initial investment in such a facility.

Box 1. Dynamic effects of mandating access

Assume that the port costs 7 currency units to build and the decision to build must be made before the quantity of demand is known. Assume that demand can be high, medium or low, that the corresponding revenues are as shown, and that the probability of each of these outcomes is 33%. For example, assume that if demand is "high" then the port would have revenues of 8 if access were mandated and revenues of 10 if access were not mandated. In this example, the port would be built if demand were known in advance to be "high" whether or not access is mandated. The port would not be built if demand were known in advance to be "low." In this example, the expected profits from building the port if access is mandated is -1 = (0.33 x 1 - 0.33 x 1 - 0.33 x 3) and expected profits if access is not mandated is +1. Therefore, assuming risk neutrality, the firm will build the port if it expects not to be forced to provide access but will not build the port if it expects to be forced to provide access.

Demand	Probability	Access Mandated		Access Not Mandated	
		Revenues	Profits	Revenues	Profits
High	1/3	8	1	10	3
Medium	1/3	6	-1	8	1
Low	1/3	4	-3	6	-1

Regulation and aid

When firms are or have been recipients of State aid or economic regulation, then the public policy towards them may take account of these features.[10]

The regulation of an upstream monopolist affects the analysis of its vertical integration in four ways. (Werden, pp. 466-467)[11] Regulation of price in the downstream market may diminish or eliminate any price-enhancing effects from vertical integration. Second, integration when there is price regulation in the monopoly market creates monopoly where there was none before, with the usual welfare effects.[12] Third, upstream vertical integration by a regulated monopolist may enable it to evade profit regulation by charging itself an inflated price for the input. Fourth, if vertical integration by a regulated monopolist leads to more extensive regulation, then the resulting administrative costs and inefficiencies are a welfare cost.

On the other hand, "[R]equiring firms to deal may permit a reduction in the scope of regulation. Deregulation may appear to be an attractive proposition, at least superficially, but it is not clear that regulation of the facility alone is particularly advantageous....Unfortunately, this solution would not solve the most difficult problems of...regulation [allocating joint and common costs]." (Werden, p. 471)

The deterrence effect of mandating access on investment in "facilities" is also affected by economic regulation and state aid. In particular, if firms are state-owned and not subject to a hard budget constraint or if they are regulated according to a cost-plus scheme, then the negative dynamic effect of mandating access as noted in Box 1 is diminished: a negative return on investment may be recoupable elsewhere.

Finally, economic regulation of the essential facility may imply that the mechanism for setting access conditions pre-exists, thereby reducing the regulatory costs of mandating access.

To reinterpret the results above, if the upstream regulated monopolist is of one "nationality" and downstream firms are of another and if competition officials maximise "national welfare," then downstream integration by the monopolist reduces national welfare in the downstream market. If, instead,

price is regulated in the downstream market, then downstream national welfare is reduced by the amount of the former downstream profits.

Venit and Kallaugher (p. 343) explicitly recommend a different EFD for different types of property, and point out the relationship between deregulation and an EFD:

> "Ultimately, the area where an essential facility analysis may prove to be of greater value concerns cases under Article 90. As a practical matter, many facilities in Europe that are at least arguably "essential" are either controlled by the state or state-owned undertakings or are operated subject to regulation by the state. As a result, many of the general points made above regarding the application of the essential facility doctrine may have direct application in Article 90 cases, particularly in respect of telecommunications or transport infrastructure. Moreover, in the case of state-owned monopolies, application of the essential facilities doctrine to deregulate and open up markets may prove less controversial than application of that doctrine to private company conduct."

This section has examined the economic analyses underlying an essential facilities doctrine. Note that the conditions ensuring, in general, no welfare effect of vertical integration are quite specific -- no price regulation (either through formal economic regulation or a prohibition of "excessive prices"), constant returns to scale technology downstream, fixed proportions use of the input, and some limits on the information environment. Note, too, how the existence of price regulation affects the welfare results. These are all issues that would bear further research.

4. Other issues

This section will briefly address some of the other political economy issues that might be raised in an essential facilities discussion.

Should having a custom of selling to the downstream firm affect the analysis? There are arguments for and against an effect. If the downstream firm must make relationship-specific but transferable investments, e.g., advertising of a downstream product that can only be made with this upstream product, then one wants to discourage upstream firms from cutting off supply and appropriating these investments. On the other hand, if there is a general duty to continue to supply, then firms may be shy about ever beginning to do so, which can retard expansion of capacity and the development of new products and services.

Should there be a different treatment of single firm v. multiple firm/joint venture essential facilities treatment? Two arguments for treating single firm refusals more leniently are: 1) single firm activity is ubiquitous, so enforcement of any rule would be difficult; 2) it may be easier to remedy a refusal by multiple firms, by setting the access price at that charged the incumbent members.

Should it matter if the upstream monopolist regulates itself, as contrasted with having an independent regulator? This question raises the issue of whether economic regulation is an obligation of the State, whether the State can efficiently delegate this authority and, if it does so, whether an entity that acts both commercially and as the regulator can efficiently fulfil the dual roles. This issue seems beyond that of essential facilities.[13]

Do differing objectives of competition policy result in differing EFDs? Some commentators point out that differences in objectives of competition policy can lead to differences in EFDs. Bright mentions that maximising consumer welfare, fairness and economic dependency might be involved in

EFDs. (Fordham Corporate Law Institute, p. 358)[14] Given the difficulty of valuing other objectives, if neither a consumer welfare nor a total welfare standard is applied then an economic analysis of an EFD is difficult.

Some commenters suggest that firms that were or are advantaged by State behaviour should be treated under a broader EFD.[15] This could arise either from a "fairness objective" or -- from an efficiency standpoint -- from a wish to reduce the risk of inefficient non-market allocations. The first is more obvious: Just because a firm was granted an advantage in one market by the State does not mean that the State intended the firm also to be advantaged in other markets, and that unintended extension of advantage is "unfair." From an efficiency point of view, if a firm inherited an advantaged position from a period of State ownership and economic control, then that allocation may have been inefficient -- the most efficient operator may not have been granted the facility -- and mandating equal access means that at least the downstream market will be disciplined by efficient firms.

Access terms

Venit and Kallaugher (p. 333) contrast two philosophies of access terms in EFDs:

> "Insofar as the principal role of the essential facility doctrine as articulated in *Sealink* is to impose a stricter requirement of non-discrimination and certain procedural obligations (the independent operator standard) on the company controlling the essential facility, the emerging EC doctrine may be at odds with the essential facility doctrine as it has developed in the United States because there is no suggestion in the U.S. cases that a firm controlling an essential facility is under an obligation other than to provide [the] facility, where feasible, on reasonable terms."

The above brief points on the same entity holding both regulatory and commercial interests and the objective of fairness may serve to explain the differing standards for access in the two jurisdictions. But the issue of effective remedies is a complex one.

5. Conclusion

This brief note has illustrated the various approaches that have been taken to the issue of when a monopolist or dominant firm can be mandated to provide access to a facility. The economic analysis suggests that, where there is no price regulation, the static welfare effects of mandating access can be positive or negative. On the other hand, private investment is discouraged when there is a threat of mandatory access. Where there is price regulation, there appear to be more circumstances in which mandating access would have positive effects. Hence, the relationship between an essential facilities doctrine and economic regulation is important to an efficient formulation. Finally, the objectives of competition laws and the incidence of dual regulator/commercial actor roles greatly influence the nature of an essential facilities doctrine.

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Notes

1. "Which cases are essential facilities cases is subject to dispute." (Werden, p. 441)

2. Some confusion can be created by the word "essential." Kewalram (p. 198) quotes the Federal Court in Australia in rejecting the application of an essential facilities doctrine in *Queensland Wire*, "Thirdly, we have some difficulty, at least in cases where a monopoly of electric power, transport, communications or some other 'essential service' is not involved, in seeing the limits of the concept of 'essential facility'; in *Fishman v Wirtz* it was a sports stadium in Chicago." On p. 199, Kewalram replies that, "It is not for the courts to determine whether an industry is essential, only whether a facility within an industry is essential to the competitive vitality of the industry."

3. "[T]he principle that companies in dominant positions have a legal duty to provide access to genuinely essential facilities on a nondiscriminatory basis is one of great and increasing importance in telecommunications, transmission of energy, transport, and many other industries. It is often the principal or most crucial legal problem that arises after an industry is deregulated, but can arise in any industry." (Lang, pp. 439-440)
"In designing the regime the Committee was conscious that almost all cases of essential facilities identified by the Committee were in the public sector because of the history of government ownership of infrastructure." (Hilmer Report, p. 239)

4. The relevant cases are: (railway bridges) *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912); (nationwide telecommunications network) *MCI Communications Corp. v. AT&T*, cited above; (electricity transmission network) *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973; (sports stadium) *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (9178); (multi-day skipass) *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *affirmed on other grounds*, 472 U.S. 585, 611 n.44 (1985).

5. Venit and Kallaugher. In a search for consistency, other commentators would create even more categories of unilateral refusal to deal cases, distinguishing cases where the refusal was to buy/sell to a customer/supplier who also bought/sold to a competitor, refusal to jointly buy/sell with a competitor, refusal to license technology to a competitor, refusal because of a plan to vertically integrate downstream/upstream, and more. (Glazer and Lipsky)

6. In *Commercial Solvents* ([1974] ECR at 250-1, [1974] 1 CMLR at 340-1), the ECJ said,

   [A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.

   In this case, the upstream firm had been supplying the customer for five years, was about to vertically integrate downstream, and other products competed with the downstream product. (Venit, p. 327)

   The second ECJ case on duty to supply by a dominant firm -- labelled by some as the leading case involving dependency analysis (see below) -- is *United Brands*. ([1978] ECR at 217, [1978] 1 CMLR at 435) This case dealt with the suspension of supply to a customer which was not a competitor. The Court said,

[I]t is advisable to assert positively from the outset that an undertaking that is in a dominant position for the purpose of marketing a product - which cashes in on the reputation of a brand name known and valued by the consumers - cannot stop supplying a long-standing customer who abides by normal commercial practice, if the orders placed by this customer are in no way out of the ordinary. Such conduct is inconsistent with the objectives laid out in Article 3(f) of the Treaty, which are set out in detail in Article 86, especially in paragraph (b) and (c) since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market.

Regarding dependence analysis, Venit and Kallaugher (pp. 325-6) say, "[T]he Court's judgement focuses on preserving the 'independence of small and medium sized enterprises in their commercial relations with the firm in a dominant position.' The Court's emphasis is highlighted by its reliance on paragraph (c) of Article 86, which focuses on the impact of conduct on customers of the dominant company in downstream markets regardless of whether the dominant firm is vertically integrated." They note that this is a broader interpretation than that given by Lang, who instead argues that United Brand was obligated to supply because its refusal had been in order to force the customer to buy exclusively from it.

7. Lang (pp. 483-4) argues that the economic situation in Europe and the US differ and implies that this is the reason the corresponding EFDs differ. He notes that dominant state-owned companies are more likely to discriminate or refuse to deal than companies in the US, that deregulation of regionally dominant companies would be of little value if they were allowed to vertically integrate and discriminate in their own favour, that regulated or state-owned companies often own facilities that are essential to downstream competitors, and that regulation is relatively undeveloped. Hence, an EFD in Europe would deal with a problem which had partly been dealt with in the US by regulatory legislation.

   The Hilmer Report (p. 239) also makes explicit mention of the political economic situation for which its EFD is defined: "In designing the regime the Committee was conscious that almost all cases of essential facilities identified by the Committee were in the public sector because of the history of government ownership of infrastructure. While the public interest rationale for providing an access right is the same irrespective of ownership, the proposed regime takes account of the special considerations that can arise when the facility is owned by a State or Territory government."

8. See Blumenthal, pp. 856-860, who discusses various issues in market definition for essential facilities that might be suggested by the U.S. case law.

9. Since welfare theory has developed in a market context, formulating an EFD with an efficiency objective, but without reference to markets, is problematic.

10. By contrast, the Hilmer Report (p. 239) says that "[T]he public interest rationale for providing an access right is the same irrespective of ownership...."

11. See also Venit and Kallaugher, pp. 321-2, where they note that if a monopoly is subject to control for excessive pricing, so that it cannot already extract all the monopoly profits, then denial of access can affect consumer welfare.

12. Indeed, Venit and Kallaugher (pp. 321-2) state that, "Insofar as commentators have recognized a policy basis for preserving a separate essential facility offense under section 2, they have focused

on the possible efficiency-enhancing impact of an obligation to share access to essential facilities particularly where the market for providing the facility is subject to price regulation."

13. Venit (Fordham, p. 355) says that, "In a real sense, the problem of an essential facility often arises because the regulator has decided not to separate the operation of infrastructure and the operation of competitive activities utilising that infrastructure. As soon as that decision is made, you create an essential facility-type situation, of a very specific kind, which I would call the "dual-role" situation." At p. 357 he continues, "As soon as you permit one operator to manage the infrastructure and to operate on it, and until such time as you have rival operators, you will need to impose strong nondiscrimination obligations or a code of conduct on the sole operator...."

14. E.g., Venit and Kallaugher (p. 320) say that there have been several cases where "fairness" rather than "the type of economic analysis appropriate to antitrust law, appears to have predominated." Apparently, the authors feel that a consumer welfare standard or a total welfare standard should apply.

15. For example, Lang (p. 479) argues that there is a distinction between legitimately obtained and legitimately used competitive advantages, which a dominant firm may legitimately enjoy, and otherwise. Similarly, United States law distinguishes between a monopoly gained through business acumen and otherwise.

NOTE DE RÉFÉRENCE

Sally Van Siclen, Secrétariat de l'OCDE

1. Introduction

La théorie des installations essentielles a été énoncée pour la première fois aux Etats-Unis dans un commentaire sur la jurisprudence antitrust et l'expression a actuellement plusieurs acceptions, qui toutes se rattachent à l'idée selon laquelle l'accès à quelque chose doit être obligatoirement assuré aux personnes qui, sans cela, n'y accéderaient pas. Les définitions sont extrêmement diverses. En fait, les commentateurs ne sont même pas d'accord sur les cas qui, aux Etats-Unis, entrent dans la catégorie "installations essentielles"[1]. Les différences sont encore plus importantes d'un pays à l'autre. L'un des objectifs de la présente note est donc de sensibiliser le lecteur à cette diversité.

L'une des théories définit les cas dans lesquels le(s) propriétaire(s) d'une installation essentielle est(sont) tenu(s) d'en assurer l'accès à un prix "raisonnable". Elle précisera, par exemple, dans quels cas une voie ferrée doit être mise à la disposition d'une compagnie ferroviaire concurrente à des conditions "raisonnables", ou encore un réseau de transport de l''électricité à un producteur d'électricité concurrent. La notion d'"installation essentielle" implique qu'il y ait deux marchés, un marché en amont et un marché en aval, selon les expressions souvent utilisées. (L'argumentation pour deux produits complémentaires est logiquement la même, mais plus difficile à exposer). En général, l'une des entreprises exerce des activités sur les deux marchés et d'autres entreprises exercent ou souhaitent exercer des activités sur le marché en aval. (Voir ci-après pour un examen approfondi des configurations de marché qui, pour certains commentateurs, peuvent s'appliquer aux installations essentielles). Un concurrent en aval souhaite acheter un moyen de production à l'entreprise intégrée, mais se heurte à un refus. La théorie des installations essentielles définit dans quelles conditions cette dernière sera tenue de le lui vendre[2].

La notion d'installation essentielle soulève des problèmes dans des contextes purement privés, non réglementés, mais en général, ces problèmes se posent plus communément lorsque le propriétaire de l'installation essentielle ou celui qui la contrôle est soumis à une réglementation économique, appartient aux pouvoirs publics ou est lié de quelque autre manière à l'Etat[3]. C'est pourquoi, les pouvoirs publics sont souvent amenés à faire un choix entre la politique consistant à élargir une réglementation économique et celle qui consiste à appliquer la théorie des installations essentielles dans le cadre des lois sur la concurrence. Par ailleurs, la réglementation de la fixation des prix par le biais de la réglementation économique, du contrôle de l'Etat ou d'une interdiction de "prix excessifs" prévue par le droit de la concurrence, a des conséquences sur la nature d'installation essentielle.

La présente note sera organisée de la façon suivante. Dans la section 2 on présentera succinctement les théories des installations essentielles ayant cours aux Etats-Unis, en Australie et dans l'Union européenne, ce qui illustre la diversité observée dans la zone de l'OCDE. La section 3 présentera une analyse économique fondamentale des problèmes rencontrés. Dans la section 4, on examinera certains autres problèmes pertinents. La section 5 énoncera les conclusions.

2. Les installations essentielles : les trois théories

Les théories des installations essentielles varient sensiblement selon les régimes juridiques. Elles peuvent différer selon les types d'"installations", le régime de propriété et les structures commerciales

auxquelles elles peuvent s'appliquer et peuvent également varier en fonction de l'instance déclarant que l'installation est essentielle. On examinera très rapidement dans cette section trois de ces théories qui ont cours dans la zone de l'OCDE. La première est celle qu'appliquent les Etats-Unis, d'où l'expression est originaire et où elle a donné lieu à un grand nombre de commentaires. La deuxième, comparativement moins structurée, est celle dont se réclame l'Union européenne. La troisième est celle sur laquelle s'appuie le rapport Hilmer dans lequel était récemment ré-examinée la façon dont l'Australie aborde les problèmes de concurrence et de réglementation.

Etats-Unis

La principale affaire aux Etats-Unis en matière d'installations essentielles est l'affaire *MCI Communications Corp. c/AT&T* (708 F.2d 1081, 1132 (7ème circuit) *demande de recours rejetée*, 464 U.S. 891 (1983). Le Tribunal du Septième circuit a déclaré que pour établir la responsabilité au regard de la théorie des installations essentielles, quatre éléments doivent être réunis :

1) contrôle de l'installation essentielle par un monopoleur,
2) impossibilité pour un concurrent de doubler concrètement ou raisonnablement l'installation essentielle,
3) refus d'utiliser l'installation opposée à un concurrent,
4) possibilité de mettre l'installation à disposition (708 F.2d à 1132-33).

Les commentateurs ne sont pas tous d'accord sur les cas types d'installations essentielles. Si l'on considère que, sur ce point, le commentaire formulé par l'American Bar Association (Association des avocats américains) reflète la plus grande unanimité de vues, ont été réputées pour essentielles les installations suivantes : les ponts de chemins de fer, etc., desservant la ville de St. Louis, un réseau de télécommunications national, un réseau local de transmission de l'électricité, un stade sportif et un système de cartes de ski valables plusieurs jours[4].

Le deuxième élément, à savoir qu'il est impossible ou déraisonnable de recourir à un doublement, constitue un critère plus rigoureux que le fait d'être "plus économique" que les solutions de rechange. (ABA, p. 249) "Comme l'indique le terme "essentielle", le requérant doit pouvoir prouver plus qu'une incommodité, ou quelque perte économique ; il doit prouver qu'il n'est pas possible de trouver une alternative à l'installation essentielle" (*Twin Labs c/Weider Health & Fitness*, 900 F.2d 566,570 (2ème Cir. 1990), cité dans ABA, p. 249). Le troisième élément, le refus d'accès, peut consister aussi bien en des modifications déraisonnables dans la prestation de services ou des prix pratiqués, qu'en un refus pur et simple. (ABA, p. 250). Le quatrième élément est factuel et aucune norme de caractère général n'a été définie par la jurisprudence.

Les cas mettant en cause des installations essentielles sont une sous-catégorie des refus de vendre, les autres étant ceux où il existe un élément "intentionnel" et ceux où il y a "monopole induit"[5]. Les premiers et les troisièmes cas se caractérisent par l'absence d'intention d'exercer un monopole, et ils se distinguent par le degré de pouvoir de marché qu'exerce l'entreprise intégrée en aval. Les commentateurs établissent également une distinction entre les refus de vendre par plusieurs entreprises, et les refus de vendre par une seule entreprise.

Union européenne

La jurisprudence de l'Union européenne ne semble pas avoir défini expressément la notion d'installation essentielle. Des précisions peuvent éventuellement être obtenues auprès de trois sources : deux décisions de la Cour Européenne de Justice (CEJ) visant les refus de vendre opposés par une entreprise dominante (il n'y était pas question d'installations essentielles), la décision dans laquelle la Commission a pour la première fois utilisé l'expression, enfin une déclaration récente d'un haut fonctionnaire de la DG IV.

Les deux décisions de la CEJ -- *Commercial Solvents* et *United Brands* -- peuvent être interprétées comme faisant aux entreprises occupant une position dominante une obligation de vendre[6]. Pour Whish, (p. 619), "les entreprises dominantes doivent par conséquent bien savoir qu'elles peuvent avoir à justifier tout refus de vendre. Il ne suffit pas que le refus intervienne dans l'intérêt commercial de l'entreprise ; il doit être objectivement justifié si l'on veut éviter d'être poursuivi pour infraction à l'article 86". Pour Venit et Kallaugher (p. 332-3), "aux Etats-Unis, la théorie des installations essentielles crée une exception à la règle générale qui autorise les entreprises à avoir des relations d'affaires avec le partenaire de leur choix, même si ce choix limite la concurrence, à condition que ce choix puisse être justifié de quelque façon sur le plan commercial. A l'inverse, l'article 86 impose aux entreprises dominantes de larges obligations en matière commerciale.

C'est dans la décision qu'elle a rendu dans l'affaire *Sea Containers c/Stena Sealink* que la Commission a utilisé pour la première fois l'expression "installations essentielles" (JO L 15/8 (1993)). La Commission a jugé qu'une entreprise qui occupe une position dominante pour la mise à disposition d'une installation essentielle, qui utilise elle-même cette installation (c'est-à-dire des installations ou des équipements sans l'utilisation desquels les concurrents ne peuvent servir leur clientèle) et qui refuse à d'autres entreprises l'accès à cette installation, sans raison objective, ou ne le leur accorde qu'à des conditions moins favorables que celles qu'elle réserve à ses propres services, commet une infraction à l'article 86 si les autres conditions prévues audit article sont réunies (JO L para. 66, 15/8 (1993)).

Le document qu'a établi récemment un haut fonctionnaire de la DG IV est le troisième élément qui peut contribuer à mieux définir la notion d'installation essentielle que l'UE continue à préciser. On peut y lire :

> “Une entreprise dominante a, du moins dans certains cas, une obligation d'approvisionnement, dans la mesure où son refus aurait des effets sensibles sur la concurrence... Lorsqu'un client est également l'un des concurrents de l'entreprise dominante sur l'un des marchés, situés généralement en aval du niveau auquel intervient le refus de vendre, l'effet sur la concurrence dépend en gros des trois facteurs suivants :
>
> 1) l'acheteur peut-il obtenir ailleurs les biens ou les services,
> 2) existe-t-il d'autres concurrents en aval, et
> 3) quelle est l'importance des biens et des services pour les activités de l'acheteur ?
>
> Si l'acheteur dispose d'une autre source satisfaisante d'approvisionnement, si les biens ou les services ne sont pas essentiels, ou si un concurrent supplémentaire n'accroît pas sensiblement la concurrence, le droit antitrust ne devrait pas faire à l'entreprise dominante obligation de vendre. Mais si dans la pratique, le refus de vendre, opposé par l'entreprise dominante, revient à évincer du marché l'un des concurrents, lesquels sont très peu nombreux, le droit antitrust communautaire fait à cette entreprise obligation de vendre... En bref, l'accès à une installation est "essentiel" dès lors que le refus de vendre exclut du marché la totalité ou la plupart des concurrents. (Lang, page 475-6).
>
> Ce que la Commission a déclaré jusqu'à présent, c'est “que le propriétaire de l'installation qui occupe une position dominante doit en assurer l'accès sur une base non discriminatoire" (Lang, p. 364).”

Parmi les installations, dites essentielles dans les affaires où peuvent se poser des problèmes liés à ce caractère essentiel, ou des problèmes similaires, figurent : les installations portuaires, les listages des programmes de télévision, les installations des banques de compensation, les systèmes de réservation informatiques, les aéroports, les réseaux de télécommunications, les réseaux de transport de l'électricité, les canalisations de gaz naturel ainsi que les sociétés des droits d'auteur. Selon le même fonctionnaire, il peut s'agir aussi des informations interface, des droits de propriété intellectuelle couvrant tout un marché,

"d'une matière première, d'un service ou encore de l'accès à un lieu ou un objet, par exemple un port ou un aéroport". "Pour qu'une installation soit dite essentielle, il n'est pas nécessaire qu'il y ait monopole naturel". (Lang, p. 477, 511, 513, 490).

Australie

En Australie, le rapport sur la politique nationale de la concurrence ("Rapport Hilmer", pages 250-253) recommandait au Ministre de se référer aux critères ci-après pour déclarer qu'il existe un droit d'accès :

> "1. Il est essentiel de pouvoir accéder à l'installation en cause si l'on veut qu'il y ait concurrence réelle dans une activité en aval ou en amont. [L'accès doit être essentiel, et pas simplement commode].
>
> 2. La déclaration est d'intérêt général, compte tenu :
> a) de l'importance de la branche d'activité pour l'économie nationale ; et
> b) l'effet escompté sur la compétitivité nationale d'une concurrence effective.
>
> Ces critères peuvent être satisfaits lorsqu'il s'agit des principales infrastructures telles que les réseaux de transport de l'électricité, les principales canalisations de gaz, les principaux réseaux ferroviaires et les principaux ports, mais non lorsqu'il s'agit de produits, de procédés de production ou de la plupart des autres installations commerciales [note supprimée]. S'il est difficile de définir exactement la nature des installations et des branches d'activité susceptibles de satisfaire à ces conditions, il arrive souvent que dans ces branches d'activité, les pouvoirs publics y soient par tradition impliqués à titre de propriétaire ou de principale instance de réglementation.
>
> [Il faut tenir dûment compte de la capacité à dissuader les investissements dans les infrastructures.]
>
> 3. Les intérêts légitimes du propriétaire de l'installation doivent être protégés par l'imposition d'une taxe d'accès, ainsi que par d'autres conditions, justes et raisonnables, notamment la reconnaissance des besoins actuels et futurs du propriétaire concernant la capacité de l'installation".

Les trois exemples ci-dessus -- pris aux Etats-Unis, dans l'UE et en Australie -- illustrent certaines des différences observées entre les diverses théories. Ces différences peuvent avoir des origines diverses, notamment une intégration plus ou moins forte, les antécédents en matière de propriété et de réglementation, ainsi que les objectifs plus ou moins affirmés de la politique de la concurrence[7].

3. Aspect économique

Comme le donne à entendre l'introduction ci-dessus, les exemples auxquels on pourrait éventuellement appliquer le concept d'installations essentielles sont nombreux. Examinons maintenant certaines des analyses économiques dont ces politiques ont fait l'objet.

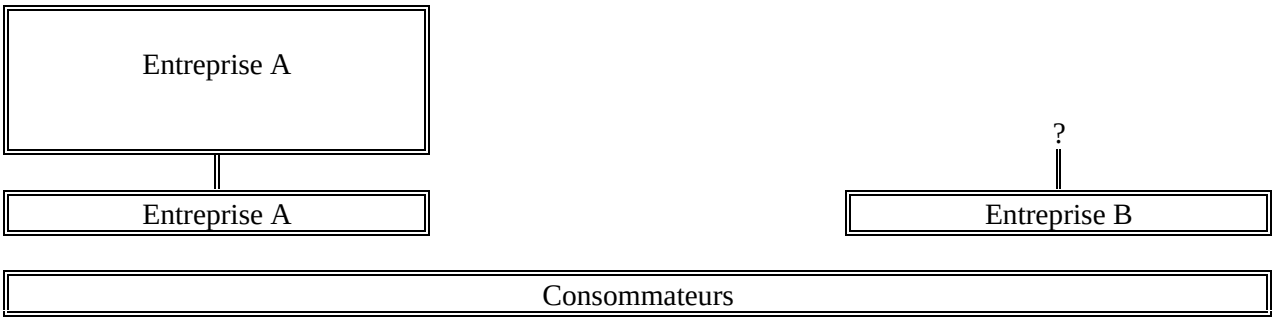
Divers paramètres jouent dans l'analyse d'un refus de vendre dans certaines branches d'activités du point de vue du bien-être. L'un de ces paramètres est la nature de la réglementation, en particulier celle qui s'applique aux aides, ainsi que la nature des subventions. Autre paramètre : la question est de savoir si la technologie fait l'objet d'une répartition fixe, c'est-à-dire si une quantité donnée du produit en amont entre dans la production de chaque unité du produit en aval. Les possibilités d'améliorer la concurrence sont un facteur final important (Werden, p. 473).

Les diagrammes ci-après illustrent certaines structures du marché dans lesquelles on pourrait évoquer la notion d'installation essentielle.

Intégration verticale en aval par un monopoleur non soumis à réglementation

Le diagramme 1 montre deux marchés non réglementés : l'entreprise A est une entreprise monopolistique qui opère sur le marché en amont, A et B opèrent en duopole sur le marché en aval. B achète à A un facteur de production qu'il ne peut obtenir nulle part ailleurs. Si au lieu d'approvisionner B, A procède à une intégration verticale en aval, cette intégration peut avoir des effets positifs ou négatifs sur le bien-être des consommateurs.

Diagramme 1. Monopole en amont, duopole en aval



Dans des conditions d'information totale, où il n'existe aucune incertitude, où l'entreprise en amont détient un monopole non contesté et non réglementé, où elle vend à des acheteurs identiques situés en aval qui utilisent le facteur de production dans des proportions déterminées et qui affectent une marge constante à l'amélioration des techniques de production, l'intégration du monopoleur en aval n'aura pas d'effet sur le bien-être. Le monopoleur peut dans l'un et l'autre scénarios s'approprier tous les profits de monopole (Ordover et Saloner, p. 564). Si l'une de ces conditions n'est pas remplie, il peut alors être rentable pour l'entreprise en amont de procéder à une intégration en aval. Cette intégration ne va pas nécessairement diminuer le bien-être. Par exemple, si toutes les autres conditions sont remplies et si le facteur de production n'est pas utilisé dans des proportions déterminées et si son prix n'est pas égal au coût marginal (ce qui est probablement le cas étant donné la situation de monopole en amont), l'intégration verticale (qui entraînerait vraisemblablement un prix de transfert interne égal au coût marginal) accroîtrait le bien-être. Si les entreprises en aval ne sont pas identiques, peut-être parce qu'elles sont confrontées à des demandes différentes, l'intégration verticale peut alors susciter une discrimination par les prix, ce qui a un effet ambigu sur le bien-être. Si l'entreprise en aval est un monopole ou un monopsone, l'intégration verticale accroît alors la quantité de facteurs de production vendue ainsi que la production en aval, ce qui augmente le bien-être. S'il existe une incertitude ou si les informations sont incomplètes, l'intégration verticale diminuera alors vraisemblablement les coûts contractuels ainsi que les pertes liés aux problèmes d'agence. ("Vraisemblablement" car l'efficience relative d'un des mécanismes du marché et d'un mécanisme interne de contrôle de la société est un problème empirique). L'intégration verticale peut élever des barrières à l'entrée -- par le biais d'un accroissement des risques de capital et des capacités de gestion indispensables -- mais les effets sur le bien-être sont minimes lorsque l'installation essentielle est un monopole naturel. (Werden, p. 467-8).

Comment les "nationalités différentes" de A et de B pourraient-elles influer sur l'analyse, si les pays s'efforcent de maximiser le "bien-être national" ? Si l'information est complète, s'il n'y a pas d'incertitude, si le monopole en amont n'est pas réglementé ni contesté, si les acheteurs en aval sont identiques et affectent une marge constante à l'amélioration des techniques, il n'y aura alors aucun

changement : pourtant, le monopole en amont s'approprie toutes les rentes de sorte que l'intégration verticale n'affecterait pas les bien-être nationaux. Si une intégration verticale rend possible une discrimination par les prix et si les consommateurs confrontés à la hausse des prix sont d'une nationalité différente de celle du monopoleur intégré, leur bien-être est alors diminué par l'intégration verticale ; mais si les consommateurs confrontés à la hausse des prix sont de même nationalité que le monopoleur, le changement observé dans leur bien-être total (bien-être du consommateur + bien-être du producteur) est ambigu mais le bien-être des consommateurs confrontés à une baisse des prix augmente. Lorsqu'il s'agit de cas dans lesquels l'intégration verticale augmente l'efficience interne du monopoleur, on ne peut en général attribuer les gains de bien-être à l'un des pays ou à un autre. En résumé, même dans ce cas particulier, on ne peut poser de règle générale concernant l'effet, sur le bien-être national, d'une intégration verticale (refus de vendre à un concurrent en aval) réalisée par un monopoleur par-dessus les frontières nationales.

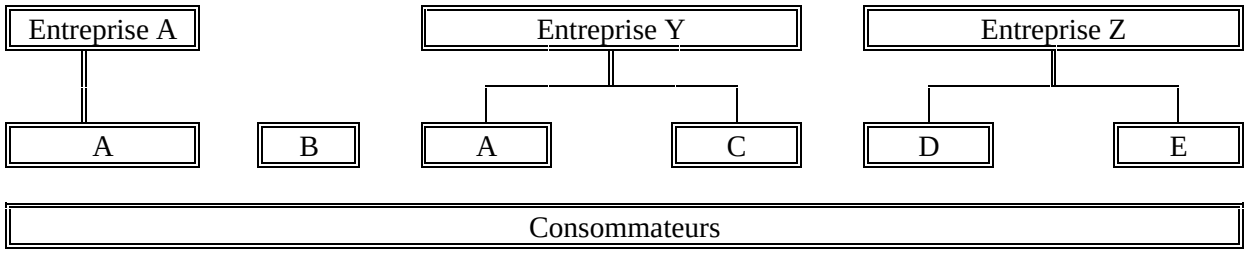
Faut-il limiter la théorie des installations essentielles aux monopoles naturels ? Pour Werden, la réponse est oui, bien qu'un duopole ou un triopole naturel soulèverait les mêmes problèmes, et même si un monopole naturel ne détient pas nécessairement un pouvoir de marché en aval, car la règle serait simple (Werden, p 476).

Deux économistes pour lesquels le fait de mettre un concurrent en position désavantageuse constitue la forme la moins poussée d'interdiction d'accès à un facteur de production essentiel, posent en principe trois conditions qui doivent être réunies pour qu'une entreprise estime possible et rentable de recourir à ce type d'action. En premier lieu, l'intérêt de l'exclusion doit être plus important pour l'entreprise qui y procède que pour le concurrent exclu. En second lieu, les concurrents ne doivent pas être en mesure de trouver des fournisseurs de remplacement qui leur permettraient de rétablir leur compétitivité. En troisième lieu, l'entreprise qui procède à l'exclusion doit détenir un certain pouvoir de marché. (Ordover et Saloner, p. 566).

Concurrence sur un marché en amont déréglementé

Le diagramme 2 présente un autre scénario possible : sont en concurrence les entreprises A, Y et Z sur le marché en amont et les entreprises A, B, C, D et E sur le marché en aval.

Diagramme 2. Concurrence en amont



Le point de savoir si l'entreprise B peut acheter le facteur de production dont elle a besoin et si elle peut soutenir la concurrence n'a pas grand effet sur le bien-être des consommateurs. La concurrence entre A-A (facteur de production provenant de l'entreprise A associé à la distribution ou à la transformation par A), Y-A, Y-C, Z-D et Z-E peut être suffisante, de sorte que l'absence de B a peu d'incidence.

Définition du marché

Ces deux exemples illustrent le rôle important joué par la définition du marché dans l'évaluation des effets statiques sur le bien-être qu'entraîne l'obligation d'accès. Ce rôle apparaît clairement dans le premier élément de la formulation *MCI* -- à savoir que l'entreprise doit être un *monopole* -- car cette situation ne peut se produire que sur un marché. Le second élément paraît viser un certain degré de non-substitution plus élevé même que celui utilisé pour définir les limites d'un marché -- à savoir qu'il est peu commode et déraisonnable de reproduire l'installation, à comparer avec les dispositions des Lignes directrices américaines sur les fusions, c'est-à-dire que l'installation ne peut être remplacée que moyennant une légère mais sensible augmentation des prix pendant une période durable[8]. Les décisions de la CEJ sur l'obligation de vendre visent des entreprises dominantes, ce qui implique un marché défini. Toutefois, la décision de la Commission dans l'affaire *Sealink* vise "une entreprise en situation de position dominante pour la mise à disposition d'une *installation* essentielle [c'est nous qui soulignons]". La question est de savoir si cela veut dire que l'installation essentielle est par définition un marché. Enfin, dans le rapport Hilmer, il est question d'installations plutôt que de marchés.

La façon assez imprécise dont certaines théories sur les installations essentielles définissent le rôle du marché peut s'expliquer par les contextes dans lesquelles elles s'appliquent. Dans l'exemple australien, les installations essentielles sont limitées aux monopoles naturels et "la presque totalité des cas d'installations essentielles identifiées se situait dans le secteur public" (Hilmer, p. 239). Là, la limite à une définition trop large de l'obligation de vendre est fixée non par le critère du marché, mais par un critère fondé sur la structure des coûts -- monopole naturel -- et un critère d'importance qui exclut expressément "les produits, les procédés de production ou la plupart des autres installations commerciales"[9].

Obligation d'accès et d'investissement privé

Jusqu'à présent, la discussion n'a porté que sur des situations statiques. Mais l'un des problèmes fondamentaux lorsque l'on veut élaborer une théorie et sur les installations essentielles de nature à accroître l'efficience est de déterminer l'effet de l'obligation d'accès sur l'efficience dynamique. Imaginons une entreprise purement privée, non réglementée, non subventionnée, qui envisage de réaliser un investissement irrécupérable, par exemple un port. Supposons que l'on ignore, jusqu'à sa construction, la demande future dont ce port fera l'objet. L'entreprise peut alors se trouver devant trois résultats éventuels : un rendement négatif des investissements réalisés dans le port dans tous les cas (demande faible), un rendement, négatif si l'accès est obligatoire, mais positif s'il peut écarter les concurrents (demande moyenne), un rendement positif même si l'accès est obligatoire (demande forte). Il se peut que l'entreprise ne construise pas le port si elle s'attend à ce que l'accès en soit rendu obligatoire, mais elle le construira si elle s'attend à ce que l'accès n'en soit pas rendu obligatoire (ce point est expliqué avec plus de détails dans l'encadré ci-après. De ce fait, l'obligation d'assurer l'accès peut dissuader l'investissement initial dans une installation de ce genre.

Encadré 1. Effets dynamiques de l'obligation d'assurer l'accès

Supposons que la construction du port soit évaluée à 7 unités monétaires et que la décision de le construire soit prise avant que l'on connaisse l'importance de la demande. Supposons que la demande puisse être forte, moyenne ou faible, que les recettes correspondantes atteignent le montant indiqué ci-après, et que l'on évalue à 33 pour cent la probabilité de chacun de ces résultats. Par exemple, supposons que, la demande étant "élevée", le port réalisera des recettes de 8 si l'accès devait en être obligatoire, de 10 dans le cas contraire. Dans cet exemple, le port serait construit si l'on sait par avance que la demande sera "élevée", que l'accès en soit ou non obligatoire. Le port ne serait pas construit si l'on ne sait par avance que la demande sera "faible". Dans cet exemple, le bénéfice attendu de la construction du port est -1=(0.33x1-0.33x1-0.33x3) et +1 si l'accès n'en est pas rendu obligatoire. Par conséquent, en supposant des risques neutres, l'entreprise construira le port si elle espère ne pas être obligée d'en assurer l'accès, mais elle ne le construira pas si elle pense être contrainte d'en assurer l'accès.

Demande	Probabilité	Accès obligatoire		Accès non obligatoire	
		Recettes	Bénéfices	Recettes	Bénéfices
Forte	1/3	8	1	10	3
Moyenne	1/3	6	-1	8	1
Faible	1/3	4	-3	6	-1

Réglementation et aide

Lorsque les entreprises sont ou ont été bénéficiaires d'une aide publique ou d'une réglementation économique, la politique des pouvoirs publics à leur égard peut alors tenir compte de ces caractéristiques[10].

La réglementation visant un monopoleur en amont affecte de quatre façons l'analyse de son intégration verticale (Werden, p. 466-467)[11]. La réglementation des prix sur le marché en aval peut réduire ou supprimer tous les effets résultant de l'intégration verticale, et qui se manifestent par une hausse des prix. En second lieu, l'intégration, décidée alors que les prix sont réglementés sur le marché monopolistique, crée un monopole là où il n'en existait pas auparavant, avec les effets habituels qui en résultent pour le bien-être[12]. En troisième lieu, lorsqu'une entreprise monopolistique réglementée procède à une intégration verticale en amont, elle peut alors échapper à la réglementation des bénéfices en pratiquant elle-même un prix majoré pour le facteur de production. En quatrième lieu, si l'intégration verticale à laquelle procède une entreprise monopolistique réglementée entraîne une réglementation plus rigoureuse, les coûts administratifs et les inefficiences qui en résultent sont alors préjudiciables pour le bien-être.

En revanche, "obliger les entreprises à vendre peut permettre de réduire le champ d'application de la réglementation. La déréglementation peut, tout au moins à première vue, paraître constituer une proposition attrayante, mais il n'est pas sûr que la réglementation de l'installation seule soit particulièrement avantageuse... Malheureusement, cette solution ne résoudrait pas les problèmes les plus difficiles de la réglementation [répartition des coûts conjoints et communs]". (Werden, p. 471).

L'effet de dissuasion de l'obligation d'accès aux investissements réalisés dans les "installations" dépend lui aussi de la réglementation économique et de l'aide publique. Notamment, s'il s'agit d'entreprises publiques qui ne sont pas soumises à des contraintes budgétaires rigoureuses, ou s'il s'agit d'entreprises réglementées selon la méthode du coût majoré, l'effet dynamique négatif de l'obligation d'accès, tel qu'on l'a noté dans l'Encadré 1, diminue : un rendement négatif de l'investissement peut être récupérable ailleurs.

Enfin, la réglementation économique de l'installation essentielle peut vouloir dire que le mécanisme consistant à fixer les conditions d'accès existe au préalable, ce qui réduit les coûts liés à la réglementation de l'accès obligatoire.

Pour réinterpréter les résultats ci-dessus, si l'entreprise monopolistique réglementée en amont est ressortissante d'un pays donné, si les entreprises en aval le sont d'un autre pays, et si d'autre part les responsables chargés de la concurrence maximisent le bien-être national, l'intégration à laquelle procède le monopoleur en aval réduit le bien-être national sur le marché situé en aval. Si au contraire, les prix sont réglementés sur le marché en aval, le bien-être national en aval est réduit du montant des bénéfices réalisés précédemment en aval.

Venit et Kallaugher (p. 343) préconisent expressément pour les différents types de propriété, une théorie différente sur les installations essentielles et insistent sur la relation existant entre la déréglementation et l'une des théories :

> "En définitive, le domaine dans lequel l'analyse des infrastructures de base peut s'avérer plus utile est celui des cas relevant de l'article 90. Concrètement, bon nombre d'installations en Europe dont on peut dire à tout le moins qu'elles sont "essentielles" sont soit contrôlées par l'Etat ou des entreprises publiques, soit exploitées en application des réglementations édictées par l'Etat. De ce fait, bon nombre des observations générales formulées ci-dessus à propos de l'application de la théorie des installations essentielles peuvent s'appliquer directement dans les cas relevant de l'article 90, surtout lorsqu'il s'agit des télécommunications ou de l'infrastructure des transports. En outre, lorsqu'il s'agit de monopoles publics, l'application de cette théorie pour dérèglementer ou ouvrir des marchés peut s'avérer moins controversée que lorsque l'on applique cette même théorie au comportement des entreprises privées".

On a examiné dans cette section les analyses économiques sur lesquelles reposent les théories des installations essentielles. On notera que les conditions garantissant en général, que l'intégration verticale n'a pas d'effet sur le bien-être sont très précises -- pas de réglementation des prix (que ce soit par le biais d'une réglementation économique officielle ou par l'interdiction des "prix excessifs"), des bénéfices constants pour améliorer la technologie en aval, répartition déterminée des facteurs de production, certaines limites enfin en ce qui concerne les conditions d'information. On notera également la façon dont la réglementation des prix affecte les résultats sur le bien-être. Toutes ces questions pourraient faire l'objet de travaux plus approfondis.

4. Autres questions

On examinera rapidement dans cette section, certains autres problèmes d'économie politique qui pourraient être évoqués dans un débat sur les installations essentielles.

L'habitude de vendre à l'entreprise en aval devrait-elle avoir des effets sur l'analyse ? Certains estiment que cet effet existe, d'autres pas. Si l'entreprise en aval doit réaliser des investissements purement relationnels mais transférables, par exemple de la publicité sur un produit en aval qui ne peut être fabriqué qu'avec ce produit en amont, on peut alors vouloir dissuader les entreprises en amont de supprimer les approvisionnements et de s'approprier ces investissements. Par contre, s'il existe une obligation générale de ne pas interrompre les approvisionnements, les entreprises peuvent alors même hésiter à commencer à le faire, ce qui peut retarder le développement de la capacité et la mise au point de nouveaux produits et services.

Faut-il prévoir un régime différent pour les installations essentielles d'une entreprise unique, par opposition à celles d'une entreprise commune/entreprise multiple ? Deux arguments sont avancés en faveur de régimes moins rigoureux lorsqu'il s'agit de refus de vendre opposés par une entreprise unique :

1) les activités des entreprises uniques sont omniprésentes, de sorte qu'il serait difficile d'appliquer une règle donnée, 2) il peut être plus facile de remédier à un refus opposé par des entreprises multiples, en alignant le prix d'accès sur celui que pratiquent les entreprises déjà sur le marché.

Est-il important que l'entreprise monopolistique située en amont s'autoréglemente, plutôt que d'avoir une réglementation émanant d'une instance indépendante ? Cette question conduit à se demander si la réglementation économique est une obligation de l'Etat, celle de savoir si l'Etat peut déléguer ce pouvoir de façon efficiente et, dans l'affirmative, si l'instance qui intervient à la fois sur le plan commercial et à titre d'instance de réglementation peut remplir efficacement ce double rôle. Cette question ne paraît pas s'inscrire dans le cadre des installations essentielles[13].

Des objectifs différents de la politique de la concurrence entraînent-ils des théories différentes sur les installations essentielles ? Certains commentateurs font observer que les différences au niveau des objectifs de la politique de concurrence peuvent entraîner des différences au niveau des théories. Bright note qu'en maximisant le bien-être des consommateurs, les théories des installations essentielles pourraient mettre en jeu des questions d'équité et de dépendance économique (Fordham Corporate Law Institute, p. 358)[14]. Vu la difficulté qu'il y a à évaluer d'autres objectifs, il est difficile de faire l'analyse économique d'une théorie des installations essentielles si l'on n'applique ni un critère de bien-être des consommateurs, ni un critère de bien-être total.

Pour certains commentateurs, des entreprises qui ont été ou qui sont avantagées par le comportement de l'Etat devraient être examinées au regard d'une théorie élargie[15]. Ceci pourrait résulter soit d'un "objectif d'équité", soit -- du point de vue de l'efficience -- du désir de réduire le risque de répartitions inefficientes sans caractère commercial. Ce n'est pas parce que l'Etat a accordé un avantage à une entreprise sur un marché qu'il avait l'intention d'avantager cette entreprise sur d'autres marchés, et l'extension non délibérée de cet avantage est "inéquitable". Du point de vue de l'efficience, si une entreprise a conservé une situation privilégiée après la période où l'Etat était propriétaire ou exerçait un contrôle sur l'économie, cette répartition peut alors avoir été inefficiente -- l'installation a pu ne pas être accordée à l'exploitant le plus efficient -- et le fait de rendre obligatoire l'égalité d'accès à cette installation veut dire qu'au moins le marché en aval sera sous le contrôle d'entreprises efficientes.

Modalités d'accès

Venit et Kallaugher (p. 333) opposent deux philosophies en ce qui concerne les modalités d'accès :

> "Dans la mesure où le rôle principal de la théorie des installations essentielles telle qu'elle est énoncée dans l'affaire *Sealink* est d'imposer à l'entreprise dominante des conditions plus rigoureuses de non-discrimination ainsi que certaines obligations de procédure (critère de l'exploitant indépendant), la nouvelle doctrine communautaire peut aller à l'encontre de la théorie des installations essentielles, telle qu'elle a été élaborée aux Etats-Unis, car rien ne laisse entendre dans la jurisprudence américaine qu'une entreprise contrôlant une installation essentielle soit tenue par d'autres obligations que celles de mettre à disposition ladite installation, si possible, dans des conditions raisonnables".

Les brèves remarques formulées ci-dessus à propos de l'entité unique qui détiendrait à la fois les intérêts commerciaux et les pouvoirs de réglementation, ainsi que de l'objectif d'équité, peuvent permettre d'expliquer la diversité des normes d'accès américaines et communautaires. Mais la question de l'efficacité des voies de recours est d'une grande complexité.

5. Conclusion

On a montré dans ce court document les diverses façons dont a été abordée la question de savoir si un monopoleur ou une entreprise dominante peut avoir l'obligation d'assurer l'accès à une installation. L'analyse économique donne à penser que dès lors qu'il n'y a pas de réglementation des prix, les effets statiques sur le bien-être qu'entraîne l'obligation d'accès peuvent être positifs ou négatifs. En revanche, les investissements privés sont découragés lorsqu'il y a menace d'obligation d'accès. Lorsqu'il y a réglementation des prix, les cas dans lesquels l'obligation d'accès aurait des effets positifs paraissent plus nombreux. C'est pourquoi les relations entre une théorie des installations essentielles et la réglementation économique ont leur importance, si l'on recherche l'efficience. Enfin, les objectifs des lois sur la concurrence et l'effet que peut avoir le double rôle d'instance de réglementation/d'acteur commercial influent grandement sur la nature de ces théories.

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Notes

1. "Un sujet controversé : dans quels cas est-on en présence d'installations essentielles" ? (Werden, page 441).

2. Le terme "essentielle" peut créer quelque confusion. Kewalram (page 198) cite la Cour fédérale d'Australie qui refuse d'appliquer la théorie des installations essentielles dans l'affaire *Queensland Wire*, "Troisièmement, il nous est assez difficile, du moins dans les affaires dans lesquelles n'est pas impliqué un monopole de l'électricité, des transports, des communications ou quelque autre "service essentiel", de situer les limites de la notion d'installation essentielle ; dans l'affaire *Fishman c/Wirtz*, il s'agissait d'un stade sportif de Chicago". Page 199, Kewalram répond que "ce n'est pas aux tribunaux de déterminer si une branche d'activité est ou non essentielle, ils doivent seulement dire si une installation dans un secteur d'activité donné est essentielle à l'activité concurrentielle".

3. "Le principe selon lequel les entreprises occupant des positions dominantes ont une obligation légale d'assurer l'accès aux installations véritablement essentielles, et cela dans des conditions de non-discrimination, a une grande importance, et il a d'ailleurs de plus en plus d'importance dans les secteurs des télécommunications, de la transmission d'énergie, du transport et bien d'autres branches d'activité. C'est souvent l'un des problèmes juridiques principaux, voire cruciaux qui se pose après qu'une branche d'activité ait été dérèglementée, mais il peut se poser dans n'importe quelle branche d'activité". (Lang, Pages 439-440).

   "En concevant ce régime, le Comité n'ignorait pas que presque tous les cas d'installations essentielles qu'il a identifiés relevaient du secteur public car auparavant, ces installations étaient la propriété de l'Etat" (Rapport Hilmer, p. 239).

4. Il s'agit des affaires suivantes : (ponts de chemins de fer) *Etats-Unis c/Terminal Railroad Association*, 224 U.S. 383 (1912) ; (réseau national des télécommunications) *MCI Communications Corp. c/AT&T*, cité plus haut ; (réseau de transport de l'électricité) *Otter Tail Power Co. c/Etats-Unis*, 410 U.S. 366 (1973) ; (stade sportif) *Hecht c/Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *demande de recours rejetée*, 436 U.S. 956 (1978) ; (carte de ski valable plusieurs jours) *Aspen Highlands Skiing Corp. c/Aspen Skiing Co.*, 738 F.2d 1509 (10ème Cir. 1984), *confirmé pour d'autres motifs*, 472 U.S. 585, 611 n.44 (1985).

5. Venit et Kallaugher. Dans un souci d'harmonisation, d'autres commentateurs ont créé un nombre plus élevé encore de catégories de refus de vendre unilatéraux en distinguant les cas dans lesquels il y avait refus d'acheter/de vendre à un client/fournisseur ayant également acheté/vendu à un concurrent, refus d'acheter/de vendre conjointement avec un concurrent, refus d'accorder sous licence une technologie à un concurrent, refus d'accès au marché en raison d'un projet d'intégration verticale en aval/en amont, etc. (Glazer et Lipsky).

6. Dans l'affaire *Commercial Solvents* ([1974]ECR à 250-1, [1974]1 CMLR à 340-1), la CEJ a déclaré :

   "[U]ne entreprise qui occupe une position dominante sur le marché des matières premières et qui, pour les réserver à sa propre fabrication des dérivés, refuse d'approvisionner un client, lui-même producteur de ces dérivés, au risque d'éliminer toute concurrence de la part de ce client, abuse de sa position dominante au sens de l'article 86."

   Dans cette affaire, l'entreprise en amont qui avait approvisionné le client pendant cinq ans, était sur le point de réaliser une intégration verticale en aval, et d'autres produits faisaient concurrence au produit fabriqué en aval. (Venit, p. 327).

La deuxième affaire de la CEJ, sur l'obligation d'approvisionner faite à une entreprise dominante -- pour certains, il s'agit là de la principale affaire fondée sur l'analyse de la dépendance (voir ci-après) -- est l'affaire *United Brands*. ([1978] ECR à 217, [1978] 1 CMLR à 435). Dans cette affaire, il s'agissait de l'interruption d'approvisionnement d'un client qui n'était pas un concurrent. La Cour a déclaré :

Une entreprise disposant d'une position dominante pour la distribution d'un produit -- bénéficiant du prestige d'une marque connue et appréciée des consommateurs -- ne saurait cesser ses livraisons à un client ancien et respectant les usages commerciaux, lorsque les commandes de ce client ne présentent aucun caractère anormal. Un tel comportement serait contraire aux objectifs énoncés à l'article 3(f) du traité, explicités par l'article 86, notamment aux paragraphes (b) et (c), puisque le refus de vendre limiterait les débouchés au préjudice des consommateurs et établirait une discrimination pouvant aller jusqu'à l'élimination d'un partenaire commercial du marché en cause.

En ce qui concerne l'analyse de la dépendance, Venit et Kallaugher (p. 325-6) déclarent : "La décision de la Cour met l'accent sur la protection de l'indépendance des petites et moyennes entreprises dans leurs relations commerciales avec l'entreprise qui occupe une position dominante". L'importance donnée à ce facteur par la Cour est mise en évidence par le fait qu'elle se réfère au paragraphe (c) de l'article 86, qui insiste sur les effets du comportement, sur les clients, de l'entreprise dominante sur les marchés en aval, indépendamment du point de savoir si l'entreprise dominante est intégrée verticalement". Les deux auteurs notent qu'il s'agit là d'une interprétation plus large que celle donnée par Lang, qui soutient plutôt qu'United Brand était obligée d'approvisionner le client car son refus de le faire visait à obliger celui-ci à s'approvisionner exclusivement auprès de lui.

7. Lang (p. 483-4) soutient que la situation économique en Europe est différente de celle des Etats-Unis et il y voit la raison pour laquelle les théories correspondantes des installations essentielles diffèrent. Il observe que les entreprises publiques occupant une position dominante sont davantage incitées à opérer des discriminations ou à opposer des refus de vendre que les entreprises aux Etats-Unis, que la déréglementation des entreprises dominantes dans une région ne serait guère utile si celles-ci étaient autorisées à réaliser une intégration verticale et à opérer une discrimination pour leur compte, que les entreprises publiques ou réglementées sont souvent propriétaires des infrastructures qui sont essentielles pour les concurrents situés en aval, et enfin que la réglementation est relativement peu développée. C'est pourquoi, en Europe, une théorie des installations essentielles traiterait d'un problème que le législateur a déjà en partie traité aux Etats-Unis.

Le rapport Hilmer (p. 239) se réfère aussi expressément à la situation politique et économique pour laquelle il définit sa théorie des installations essentielles : "En élaborant le régime, le Comité n'ignorait pas que presque toutes les installations essentielles qu'il avait identifiées se trouvaient dans le secteur public, car dans le passé les infrastructures étaient la propriété du gouvernement. Alors que l'argument de l'intérêt général pour accorder le droit d'accès est le même quel que soit le propriétaire, le régime proposé tient compte de considérations spéciales selon que l'infrastructure est la propriété du gouvernement d'un Etat ou d'un Territoire".

8. Voir Blumenthal, p. 856-860 qui examine divers points dans la définition du marché des installations essentielles auxquels pourrait donner à penser la jurisprudence des Etats-Unis.

9. Comme la théorie du bien-être s'est développée dans un contexte de marché, énoncer une théorie des installations essentielles en fixant un objectif d'efficience, mais sans se référer à des marchés, est aléatoire.

10. Inversement, le Rapport Hilmer (p. 239) déclare que "l'argument de l'intérêt général d'assurer le droit d'accès est le même quel que soit le régime de propriété...".

11. Voir également Venir et Kallaugher, P. 321-2, qui notent que si un monopole est soumis à un contrôle pour fixation des prix excessifs, de sorte qu'il ne peut déjà retirer du monopole tous les bénéfices qui y sont liés, le refus d'accès peut alors affecter le bien-être des consommateurs.

12. De fait, Venit et Kallaugher (p. 321-2) déclarent que : "dans la mesure où ils ont reconnu que les responsables peuvent avoir des raisons de prévoir un délit distinct visant les installations essentielles, par application de l'article 2, les commentateurs ont mis l'accent sur l'éventuel accroissement de l'efficience que pouvait entraîner une obligation de partager l'accès aux installations essentielles, surtout lorsque le marché où l'installation est mise à disposition est soumis à une réglementation des prix.

13. Pour Venit (Fordham, p. 355) : "Concrètement, le problème des installations essentielles se pose souvent parce que l'instance de réglementation a décidé de ne pas séparer le fonctionnement de l'infrastructure de celui des activités concurrentielles qui utilisent ladite infrastructure. Dès que l'on prend cette décision, on crée des conditions qui caractérisent une installation essentielle, conditions de caractère très spécifique, que j'appellerai les conditions de dualité". Page 357, il poursuit "Dès que l'on permet à un exploitant de gérer l'infrastructure et de l'utiliser, et tant que n'apparaissent pas d'exploitants concurrents, il faudra imposer à l'exploitant unique des obligations sévères de non-discrimination ou bien un code de conduite..."

14. Venit et Kallaugher (p. 320) déclarent par exemple que dans plusieurs cas "l'équité" plutôt que "le type d'analyse économique correspondant au droit antitrust paraît avoir prédominé". Apparemment, les auteurs estiment qu'il conviendrait d'appliquer un critère de bien-être du consommateur ou un critère de bien-être global.

15. Lang (p. 479) soutient par exemple qu'il existe une distinction entre les avantages concurrentiels obtenus légitimement et les avantages concurrentiels utilisés légitimement, ceux dont les entreprises peuvent jouir légitimement, et les autres. De même, la loi aux Etats-Unis distingue les monopoles constitués grâce à un sens aigu des affaires des monopoles constitués par un autre moyen.

AUSTRALIA

1. Introduction

This paper describes the recent legislation enacted in Australia which establishes a general national access regime to 'essential' infrastructure facilities. Following the enactment of the *Competition Policy Reform Act 1995*, the national access regime is embodied in a new Part IIIA of the *Trade Practices Act 1974*. The paper provides some general comments on how the regime addresses each of the issues raised in the Secretariats paper *Possible Issues in Essential Facilities* circulated to delegates. The new regime has, as yet, not been tested in the courts nor have the administrative procedures established under the regime been triggered by formal industry applications; as such, we provide qualified comments.

2. Background

National Access Regime

The importance of access to certain key facilities, such as electricity grids or gas pipelines, in encouraging competition in related markets, such as electricity generation or gas production/ distribution, is recognised in Australia's National Competition Policy.

In general the owners or operator of such a facility will have the incentive to refuse or restrict access in order to:

- restrict competition in upstream or downstream markets where the owner/ operator is a supplier in those markets; and
- charge monopoly prices for access.

Vertical separation or control of natural monopoly facilities and participants in upstream markets is generally preferable to regulation of access terms and conditions. Such structural separation is a key feature of current deregulation and privatisation initiatives in some public sector network industries. However, in some cases, vertical separation might not occur, including in the case of private sector vertically integrated firms. In these cases regulated provision of third party access might be appropriate. Further, even with vertical separation, there is still an incentive to charge monopoly prices. By reducing an access provider's ability to refuse or restrict access, through charging monopoly prices, the Part IIIA regime in effect provides for prices oversight, regardless of industry structure.

Australia has specifically chosen not to rely on further judicial development of refusal to deal principles under the 'abuse of market power' provisions of general competition law to deal with access issues. These provisions are only enforceable in the Courts and the Courts are not regarded as the best institutions to regulate ongoing commercial relationships. Rather, Australia has enacted an administrative regime for access.

The *Competition Policy Reform Act 1995* inserts new Part IIIA into the *Trade Practices Act 1974* which establishes a legal regime providing for third party access to a range of facilities of national importance. A single facility might provide a number of services to which access may be essential for

enhanced competition in some cases but not in others. For this reason, the legislation focuses on access to a *service* provided by means of a facility rather than access to a facility itself.

There are two mechanisms for the provision of third party access:

(a) First, a potentially compulsory process, whereby the service is 'declared'. Declaration represents a 'right to negotiate' access backed up by compulsory arbitration if the parties cannot agree on any aspect of access.
(b) And, second, a voluntary process, whereby a service provider can offer the Australian Competition and Consumer Commission[1] (ACCC), an undertaking which sets out the terms and conditions on which it will offer third party access.

Compulsory Declaration Process

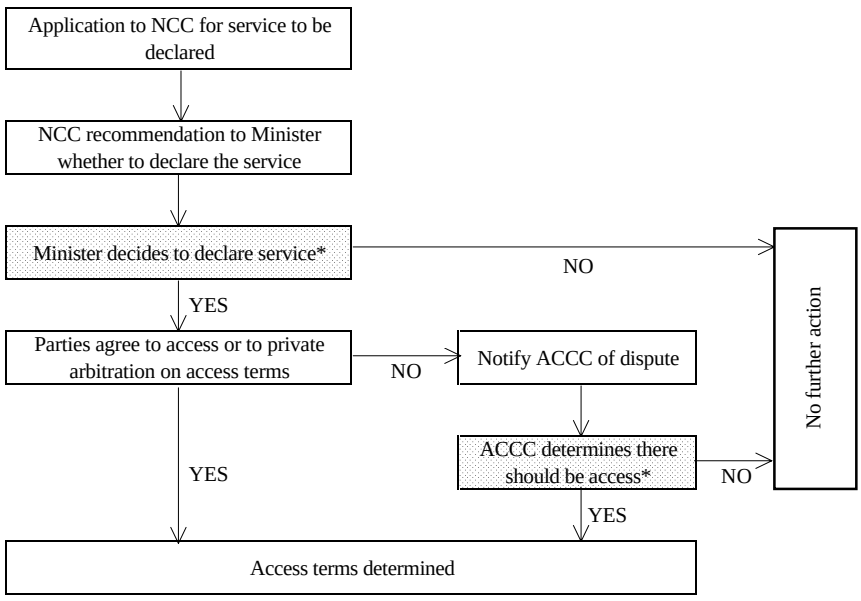
Any person may apply to the newly created National Competition Council[2] ("the Council") for a recommendation as to whether the service should be declared. There are a number of matters, all of which the Council must be satisfied on before it can recommend the declaration of a service. These are:

(a) that access to the service would promote competition in a market (other than a market for the service);
(b) that it would be uneconomical for anyone to develop another facility to provide the service;
(c) that the facility is of national significance having regard to its size, the importance of the facility to interstate or overseas trade and commerce, or its importance to the national economy;
(d) that access to the service can be provided without undue risk to health or safety;
(e) that access to the service is not already subject to an effective access regime; and
(f) that access to the service would not be contrary to the public interest.

The compulsory process is shown diagrammatically in Figure 1.

These are threshold criteria which must be met before the Council can recommend that the service can be declared. Mere satisfaction of these criteria does not, however, automatically lead to a recommendation to declare. The Council can consider any other relevant matter. It must then recommend to the 'designated Minister' whether or not the service be declared. (The designated Minister is a State or Territory Minister in the case of a facility owned or operated by a State or Territory government body, and the Commonwealth Minister otherwise.) Following receipt of the recommendation, the Minister must then decide whether or not to declare the service, and must give reasons for the decision.

Figure 1 - Compulsory (i.e. Declaration) Access Process



* subject to review by the Tribunal

The Minister cannot declare the service if the service is the subject of an operative access undertaking. Further, the Minister cannot declare a service unless satisfied of all of the matters set out above. There is a right of review by the Australian Competition Tribunal of Ministers' decisions, exercisable within 21 days of publication of the decision of the Minister.

Declaration of a service does not mean that there is an automatic right of access to the service for third parties. Rather, it represents a right for third parties to negotiate terms of access backed up by compulsory ACCC arbitration if the parties cannot agree on any aspect of access. Where the parties cannot agree on access (or the terms of access), they may decide to refer the dispute to private arbitration. If they do not agree to refer the dispute to private arbitration, an access dispute may be notified to the ACCC. The ACCC must then consider the dispute and make an access determination. The Part IIIA provisions outline the constraints and matters the ACCC must take into consideration when making an access determination.

There are a number of <u>constraints</u> on the terms of determinations.

The ACCC must not make a determination that would have any of the following effects:

(a) preventing an existing user from being able to obtain its reasonably anticipated requirements for the declared service as at the time the dispute was notified;
(b) preventing a person from using the service by the exercise of a right under a contract or determination that was in force at the time the dispute was notified ('a pre-notification right') in so far as the person will actually use the service;
(c) depriving a person of a protected contractual right under a contract that was in force at the beginning of 30 March 1995 (being the date of introduction of the legislation to Parliament);
(d) resulting in a third party becoming the owner, or part-owner, of the facility or extensions to it without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility to meet the access requirements of the third party.

There are a number of matters which the ACCC must take into account when making a determination including, the interests of the service provider, users and the public. These matters include the following:

- the legitimate business interests of the provider or owner/operator (this does not include the direct costs of increased competition);
- the public interest (including the public interest in having competitive markets); and
- the interests of all persons who have existing rights to use the declared service;
- the direct costs of providing access to the service;
- the value to the provider of extensions to the facility paid for by someone else;
- the requirement for the safe and reliable operation of the facility;
- the requirement for the economically efficient operation of the facility;
- any other matters the Commission thinks relevant.

After taking these matters into consideration the ACCC can then make a determination which may set out the appropriate terms and conditions for access. There are rights of review by the Tribunal of determinations by the ACCC, exercisable within 21 days of the determination.

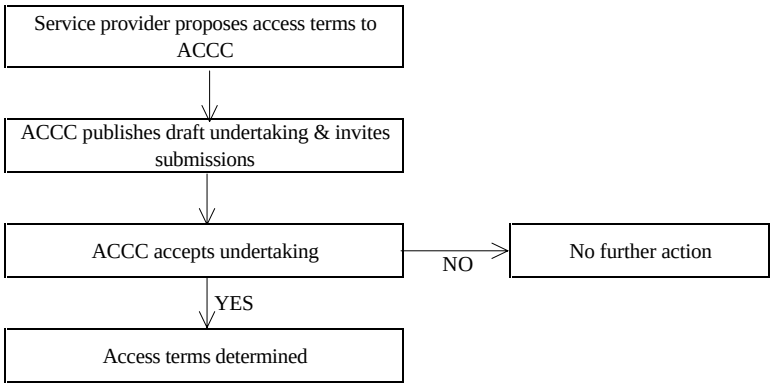
There is a provision which prohibits anyone from engaging in conduct for the purpose of preventing or hindering another person's access to a declared service under a determination.

Voluntary (access undertakings) Process

As an alternative to the declaration process, the owner of a facility can offer an undertaking to the ACCC about the terms and conditions on which it will provide access to third parties to a service. If the ACCC accepts such an undertaking, that service provided by the facility cannot be declared. This provides a means by which the owner can obtain certainty about access arrangements, before a third party seeks access.

This voluntary approach is shown diagrammatically in Figure 2. The reform processes in the telecommunications, electricity and gas industries in Australia are developing access regimes which are being pursued through this, or a similar, undertakings route.

Figure 2 - Voluntary (Access Undertaking) Process



Before accepting an undertaking, the ACCC must publish a draft of the undertaking for public comment. At the end of the period for public comment, the ACCC can decide whether to accept the undertaking. In making this decision it must consider submissions received during the public comment period and have regard to a number of matters including the interests of the service provider, users and the public, and whether there is an existing access regime.

The ACCC can accept an undertaking in respect of services which are already covered by an access regime. This may be desirable where (say) the existing regime is not fully effective.[3] The ACCC cannot, however, accept an undertaking in respect of declared services.

The ACCC need not accept an undertaking. It might decline to accept an undertaking if it believed that the terms and conditions of access were inappropriate.

Enforcement

The undertaking essentially establishes the regime for access to the particular services covered by the undertaking. It sets out terms and conditions on which the provider is obliged to provide access to third parties. Third parties can then negotiate access contracts with the provider. If the provider refuses to enter into a contract on the terms of the undertaking, the ACCC can take Court action for breach of the undertaking.

New Part IIIA also includes provisions for the enforcement of access determinations and the prohibition on hindering access to a service. Enforcement action is taken in the Federal Court. For contraventions of determinations, any party may sue.

Recognising that in some instances, once a service has been declared, the third party and the provider may negotiate an access agreement or refer the matter to private arbitration, the legislation contains a provision for registration by the ACCC of access contracts for declared services. The ACCC has a discretion whether to register the contract; in exercising this discretion it must take into account the interests of the public and users. Once registered, the contract can be enforced as if it were an access determination of the ACCC.

3. Issues

The following discussion of issues address the compulsory declarations process of the above regime (unless otherwise stated). The discussion groups the issues into four subject areas, Treatment of partnerships and joint ventures, Coverage of the regime, Use of the regime and Limitations of the regime.

4. Treatment of Partnerships and Joint Ventures

Question 1: Do the same standards apply for single versus jointly owned facilities?

The Part IIIA access regime applies the same standards to single versus jointly owned facilities. Because of constitutional constraints at least one provider in a partnership or a joint venture must be a corporation.

5. Coverage of the Regime

Questions 2 and 3: What constitutes control of a facility? What constitutes a facility?

Part IIIA focuses on access to *services provided* by means of a limited class of facilities, as such services constitute the focus of the essential facility regime in Australia. As noted above, the reason for this is that a facility may be used to provide more than one service: it may only be 'essential' for one of those services. Part IIIA defines such a service to include the use of an infrastructure facility such as a road or railway line, handling or transporting things such as goods or people, and a communications service or similar service.[4]

The definition specifically excludes any production processes, intellectual property, or the supply of goods, except to the extent any of these are an integral but subsidiary part of the service in question. Examples of facilities which may be covered by the voluntary or compulsory provisions of Part IIIA include (subject to case-by-case assessments of their individual market circumstances) gas transmission, water pipelines, telecommunication networks and certain sea ports.

In terms of what constitutes control of a facility, the Part IIIA regime focuses on the providers of their services. By definition, 'provider' is not limited to the owner of the facility, but extends to the operator of the facility that is used (or to be used) to provide the service.

The Part IIIA legislation does not state whether the operator must control the facility. While ultimately a matter for judicial interpretation, it is suggested that an operator must at least be able to have control (exclusive or non-exclusive) over that part of the facility which is used to provide the service.

Question 4, 5 and 6: What constitutes essential - must the facility have 100 per cent of the market? What constitutes essential - must the facility be a natural monopoly? What cost of duplication makes a facility essential?

The class of facility covered by the compulsory process in Part IIIA has certain distinguishing features, which render such facility 'essential', including:

- that access to the service would promote competition in a market (other than a market for the service);
- that it would be uneconomical for anyone to develop another facility to provide the service;
- that the facility is of national significance having regard to its size, the importance of the facility to interstate or overseas trade and commerce, or its importance to the national economy;

A facility may be 'essential' with something less than 100 per cent of the relevant market.[5] In essence, the regime is directed at services which are characterised by a natural monopoly production technology even though the market may not be monopolised. For example, there may be two airport terminals in a capital city, each operated separately. If it was uneconomical for anyone to develop another terminal, the operators may each have an incentive to refuse access if there is a degree of vertical integration. Accordingly Part IIIA does not require that a facility constitute 100 per cent of the relevant market in order to be essential; rather it focuses on the economics of developing an additional facility.

In considering whether it is economical to develop another facility to provide the service, the cost of duplicating the facility may not necessarily be relevant. For instance:

- it may not be necessary to exactly replicate the facility in order to provide the service;
- only part of the facility may be used to provide the service; or

- a new facility might be able to provide a range of services, including the service in question, which cannot be provided by the existing facility; thus, it may be economical to develop another facility.

In this regard, Part IIIA also specifies that the Minister considering the declaration must consider whether it would be economical for anyone to develop another facility that could provide *part of* the service.[6] Where this is the case, the compulsory process may be limited to that part of the service which cannot be economically provided by developing another facility.

Question 7 and 14: Must the facility enjoy substantial market power downstream in order to be essential? Should treatment be different if the denial of access is part of a strategy by the owner of the facility to vertically integrate?

Part IIIA was designed to allow sufficient flexibility of approach guided by broad statutory principles, such as promoting competition and economic efficiency while having regard to the interests of the facility owner, users of its services and the wider public. In effect, the regime applies to all nationally significant essential facilities whose services are necessary for effective competition in another market. That is, the service needs to have an influence on competition in upstream or downstream markets before it can be considered an essential facility.

The Part IIIA regime does not focus on the reason for refusing access: it focuses on 'effect' not 'purpose'. Accordingly, it is irrelevant if the owner/operator is refusing access in order to vertically integrate. Of course, any proposal to vertically integrate, which involved acquisition of another business in an up or downstream market, would fall for consideration under the mergers and acquisitions provisions of Australian competition law.[7]

6. Use of the Regime

Question 8, 9, 11 and 12: What constitutes denial of physical access? What constitutes denial of access - are access price and quality relevant requirements? Should there be asymmetric treatment between denial of access and denial of further access? Should there be asymmetric treatment between refusal to buy and sell?

Unlike regimes based on general competition law, denial of access[8] *per se* is not a necessary condition to trigger Part IIIA. Accordingly, the regime does not incorporate a concept of actual or constructive[9] denial of access. However, the Minister cannot declare the service unless satisfied that the access regime for the service is 'ineffective'.

Under the Part IIIA regime, a person who already has access (or to whom an offer of access has been made) can use the compulsory process to obtain increased access. There is no asymmetry in this regard. The legislation also provides that the Council can decide to recommend that a service not be declared if it thinks the application was not made in good faith. While the term 'good faith' is not defined it may cover situations where the third party has made no attempt to negotiate access with the provider.

As noted above, under the compulsory process there are two distinct stages: declaration and arbitration. Following declaration by the appropriate Minister, there is no right of access. But, if the parties cannot agree on access one of them can notify the ACCC: the ACCC then arbitrates and determines whether access should be provided. If the ACCC decides access should be provided it then determines the terms of access, including price.

The arbitration determination is binding on the parties. If the determination provides for access, then it may provide that the provider must *grant* access and the third party must *pay* for access and *accept* access.

For this reason, the ACCC gives a draft determination. If at that stage, the third party cannot live with the terms and conditions of access it can terminate the arbitration. The third party can do this, even if the provider notified the access dispute. On the other hand, the provider can only terminate the arbitration if it notified the dispute; it cannot terminate the arbitration if the third party notified the dispute. In this regard, there is asymmetric treatment of the buyer and seller.

Question 10 and 17: How is feasibility of sharing established? What constitutes reasonable access?

In considering whether to grant access, the ACCC must consider the operational and technical requirements for the safe and reliable operation of the facility. Further, Part IIIA contains a 'priority' system for ranking the order of access: the ACCC cannot make a determination which would prevent:

- an existing user including the provider from being able to attain its reasonably anticipated requirements for the declared service at the time the dispute was notified; and
- a person from using the service by the exercise of a right under a contract or determination that was in force at the time the dispute was notified (a 'pre-notification' right) in so far as the person will actually use the service.[10]

That is, third parties using the compulsory arbitration route may, in some instances, only get interruptible supply.

Part IIIA does not define reasonable access. Rather Part IIIA sets out a number of factors which the ACCC must take into account when arbitrating a dispute. These include, the legitimate interests of the provider, the public interest and the interests of other users.[11]

It is possible that, under the Part IIIA access regime, third party access terms and conditions may not necessarily need to be totally consistent (reflecting different circumstances) between different third parties.

If, following a determination by the ACCC, one of the parties wants to alter the determination, one of them can notify the ACCC if the parties cannot agree on a variation of the determination. The ACCC then re-arbitrates unless it decides to terminate the arbitration. The ACCC can terminate the arbitration if it believes there is no sufficient reason why the previous determination should be varied.

Question 13: Does intent to behave anticompetitively matter?

As noted above, intent is not relevant under the national regime. This is because the regime is not based on the abuse of market power provision of the general competition law; ie s.46 of the *Trade Practices Act 1974*.

Section 46 of the *Trade Practices Act 1974*, prohibits the misuse of market power, and provides that a corporation with a substantial degree of market power cannot take advantage of that power for the purposes of:

- eliminating or damaging a competitor in that or any other market;
- preventing entry to that or any other market; or,
- inhibiting competition in that or any other market.

The Australian public policy debate focused on whether this section provided a sufficient basis for regulating access to essential facilities or whether more direct regulation of natural monopoly markets was warranted. The Hilmer Report addressed this issue and concluded that this provision alone was unable to deal with third party access effectively. The reasons included:

- the inability of s.46 to deal directly with monopoly pricing that is not for a 'proscribed purpose'. (In contrast, the new legislative access regime operates in a non-proscriptive manner);
- the cost, the possibility of lengthy delays, and risks involved in obtaining a court resolution of commercial access disputes; and
- doubts about the capacity of the courts to determine optimal prices, terms and conditions of access to essential facilities.

Thus the Hilmer Report recommended the establishment of a national access regime for declared monopoly industries as part of a three-pillar approach for the regulation of monopolies (including vertically integrated utilities). The other two pillars were the structural reform of public monopolies to separate natural monopoly and competitive services and a prices oversight of monopoly industries in certain circumstances.

7. Limitations of the Regime

Question 15: Does prior existence of regulation affect the analysis?

The national access regime recognises other Commonwealth, State and Territory legislated access regimes. Where there is a State or Territory access regime that covers the service provided by the facility in question, it is expected that parties seeking access will use that process. The general regime only applies where the other regime is ineffective.

With respect to State and Territory regimes, Part IIIA provides for State and Territory governments to formally seek recognition of their access regimes as being 'effective' in accordance with the Competition Principles Agreement[12] (an agreement between the Commonwealth, States and Territories that defines, *inter alia*, the principles to be followed to achieve consistent and complementary access arrangements across jurisdictions), and therefore, not subject to the compulsory declaration process in the *Trade Practices Act 1974*. This mechanism allows for consideration in advance of any application for declaration, thus providing certainty that any existing State/Territory regime will have sole coverage, or providing an opportunity for the government to remodel its access regime to achieve the necessary coverage.

ANNEX

Competition Principles Agreement:
Effective Access Regime Principles

With respect to State and Territory regimes, Part IIIA of the *Trade Practices Act 1974* provides for State and Territory governments to formally seek recognition of their access regimes as being 'effective' in accordance with the Competition Principles Agreement. The relevant sub-clauses of the Competition Principles Agreement include:

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) incorporate the principles referred to in subclause (4).

(4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;
(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
(iv) the interests of all persons holding contracts for use of the facility;
(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
(vii) the economically efficient operation of the facility; and
(viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
(ii) the owner's legitimate business interests in the facility being protected; and
(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

(p) Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

Notes

1. The Australian Competition and Consumer Commission (ACCC) was formed on 6 November 1995 to assume the functions of the former Trade Practices Commission and the Prices Surveillance Authority.

2. The National Competition Council was formed on 6 November 1995.

3. For example, where part of a service is not covered by an access regime.

4. Section 44B.

5. The term 'relevant market' is taken to mean the market for the service which is provided by means of the facility.

6. Section 44F(4).

7. Section 50 of the *Trade Practices Act 1974* prohibits mergers and other acquisitions of assets or shares which are likely to substantially lessen competition in a substantial Australian market.

8. Denial of access can simply mean denial of further access, and need not mean entire exclusion from the market.

9. Constructive denial of access could occur if the terms (including price) were set at a prohibitive level.

10. Section 44W(1)(a) and (b).

11. Section 44X(1).

12. See Annex.

CANADA

Excerpted from a Submission of the Director of Investigation and Research[1]

"[...]

The issue of access to scarce or monopolised facilities by competitors and others is a serious competition policy issue and one that Parliament has found necessary to address through legislation. Provisions protecting the public against monopoly abuse of scarce resources exist in the form of framework legislation such as in the *Competition Act* as well as in industry-specific legislation such as the *Telecommunications Act*.

From a competition policy perspective the important point to be stressed is that it is not the ownership of the monopoly facility that raises immediate competition policy concerns. Rather, the emphasis is on behaviour and the incentive and ability to create or maintain market power. Is control over this facility being used by a dominant firm (or group of firms) to create or maintain market power in other relevant markets by substantially preventing or lessening competition or precluding the ability of someone to carry on business?

This idea also lies at the centre of Stentor's definition of an essential facility. Stentor's definition makes it clear that the essential facility or component is needed by a competitor as an input to provide telecommunications services. These services may or may not be in the same market as the one in which the facility operates. For example, the facility could operate at the wholesale level of an industry while the affected markets are upstream or downstream. Hence to determine whether the facility is essential or not will require an examination of the state of competition in all relevant markets impacted by the facility. If they are competitive, the fact someone cannot economically or technically replicate the facility does not raise any competition policy concerns.

Here the Director would draw the Commission's attention to the conclusions of the former Restrictive Trade Practices Commission on this specific topic in its 1986 report on the state of competition in the Canadian petroleum industry are noteworthy. In that report the RTPC provides its reasoning for concluding that petroleum refineries and terminals are essential facilities. In addition he reviews the provisions in the *Competition Act* relating to a denial of access to scarce or essential facilities. Finally, the Director identifies the relevant factors he considers when assessing refusal to supply and abuse of dominant position allegations by a potential competitor against the owner of a scarce facility.

The RTPC and the Duty to Supply

The issue of access to a scarce or essential facility was addressed by the Restrictive Trade Practices Commission (RTPC)[2] in its 1986 report *Competition in the Canadian Petroleum Industry*. In a chapter entitled "The Duty to Supply" the RTPC examined the issues associated with major oil company dominance of petroleum refineries, product terminals and pipelines and their vertical integration downstream into petroleum product marketing where they competed against rivals who were dependent upon the refiners for their supplies of heating oil and gasoline.

This "dual distribution" characteristic of vertically-integrated petroleum companies is similar to that of a telephone company which wholesales network services to a competitor and then competes with that competitor for end users.

Dual distribution increased the risks, and certainly raised the apprehension among rivals, that refiners would make supply decisions that discriminated against a rival on the basis of the rival's actual, probable or possible resale or distribution practices, or on the basis of his affiliations or lack thereof. This led the RTPC to observe:

> "The discrimination could take any of a number of forms such as price, quantity limitations, delivery or pick-up restrictions, or other collateral terms. The apprehension of discrimination is itself a more important market fact than whether or not discrimination has ever actually occurred, because it is the apprehension of future supply difficulties that dampens a pricing or other distribution initiative." [3]

In assessing the issues raised by the potential for anti-competitive behaviour by owners of scarce facilities in vertically-integrated industries, the RTPC asked itself the questions: What, if any, is the proper scope of a duty to supply? What is the proper balance between the freedom of a person to operate his own business and investment as he wishes and an unacceptable prejudice to the functioning of markets that are dependent on supply from that person?

In answering these questions the Commission concluded that questions of access to capacity cannot be separated from questions of price and other terms and conditions of supply. "If the terms of supply do not permit the customer to compete he will not take the product or service even though in form it is offered to him."[4]

The RTPC then went on to provide its own views on the duty to supply by a person with market power, relying on the American "essential facilities" doctrine:

> "In the Commission's view power over supply, particularly in markets characterised by pervasive vertical integration, carries with it a responsibility not to refuse supply unless there is a legitimate business reason for doing so, or what the United States Supreme Court has referred to an "efficiency justification". Arbitrary refusals to supply in such circumstances inhibit entry and expansion and dampen market forces. The public suffers, although not necessarily in any predictable or measurable way, as a result of the unreasonable reduction of pressures upon firms in the market to strive continuously to give consumers whatever they may want or whatever they may be attracted to, at all times, in the best, fastest, and cheapest way."
>
> "The Courts in the United States have developed a set of principles ... known as the 'essential facilities' or 'bottleneck' doctrine, which define more precisely the duty to supply on the part of one or more firms who control a scarce facility, access to the benefits or output of which is necessary to compete effectively. The doctrine imposes on firms the obligation to make a facility reasonably available to others on non-discriminatory terms where four elements are established:
>
> (1) control of an essential facility by a monopolist;
> (2) a competitor's inability practically or reasonably to duplicate the essential facility;
> (3) the denial of the use of the facility to a competitor, and
> (4) the feasibility of providing the facility.
>
> Any limitations on timely, non-discriminatory access must be justified by those who control the facility. Further the duty to supply is independent of proof of intent to monopolise ... The Commission considers that it would also be desirable, in cases where the supplier holds a high degree of market power, to require the supplier to supply others unless sufficient reasons for not doing so is established. In other words, as the market power over supply increases there would be less need to prove that failure to supply injured someone or that it substantially injured

competition, and greater focus would be placed on the adequacy of the supplier's reasons for refusing supply."

The RTPC also set out the relevant markets factors that it believed must be considered when assessing a refusal to supply matter. These included the number of supply alternatives in the market, the reasonableness with which supply facilities in the market could be duplicated by others, the extent if any to which the supplier and the customer compete, the extent to which the prospective customer is likely to be prejudicially affected in his business by an inability to obtain supply from the supplier on usual or reasonable trade terms, and the suppliers reasons for refusing supply on usual or reasonable trade terms.

Applying the US "essential facility" doctrine, the RTPC found the refineries and large terminals in the Canadian petroleum industry to be essential facilities[5]. At the same time it concluded that effective assurance of supply to efficient independent petroleum marketers and to potential entrants would be sufficient to ensure competitive downstream petroleum markets. In its view, this would negate the need for more costly and disruptive structural remedies such as divestiture or structural separation.

Essential Facilities and the Competition Act

In the *Competition Act*, the concept of access to a scarce or essential facility is addressed in two sections: refusal to supply and abuse of dominance. Both of these sections are civil provisions and target the behaviour of firms acting individually or jointly. Where the Director concludes that the specific criteria listed in the *Act* have been met, an application may be made to the Competition Tribunal for a remedial order against the person controlling the facility seeking to make either the facility or the products of that facility available to competitors or customers.

Section 75 relates to refusals to deal. This is a situation where a person is substantially affected in his or her business or is precluded from carrying on business by the refusal to make a product (article or service) available; the person is willing and able to meet the usual trade terms of the supplier; the product is in ample supply; and the inability to obtain adequate supply is due to insufficient competition among suppliers of the market.

The Competition Tribunal has made remedial orders against Xerox Canada Inc. and Chrysler Canada Ltd. under this provision of the *Act*. In both cases the incumbent was required to supply the party seeking supply of products. As these cases involved monopoly suppliers, the Tribunal did not have to rule on the issue of "insufficient competition among suppliers" under this provision of the legislation.

Sections 78 and 79 relate to abuse of dominant position. This section is applicable where one or more persons substantially or completely control a class or species of business, and have engaged in or are engaging in a practice of anti-competitive acts which have the effect of preventing or lessening competition substantially. The *Act* provides a non-exhaustive list of types of conduct which would constitute an anti-competitive act. Included is the pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from the market. In determining whether a practice has had, is having, or is likely to have the effect of preventing or lessening competitive substantially, the Tribunal must consider whether the practice is the result of superior competitive performance.

The Competition Tribunal has made remedial orders against The NutraSweet Company, Laidlaw Waste Systems Ltd., and The D & B Companies of Canada Ltd. under this provision of the legislation. These cases have involved the use of long-term exclusive contracts between dominant firms and customers to blockade entry into their business. While the Tribunal has yet to rule on the issue of "joint control" under this provision of the legislation, it has issued an order involving joint dominance in the telephone directory advertising market.

Whereas the definition of essential facility proposed by Stentor relates solely to a facility owned or controlled by a monopolist, Canadian competition law encompasses the possibility of joint dominance by more than one person whose ownership of scarce facilities lessens or prevents competition. The abuse of dominance section refers explicitly to substantial or complete control by "one or more persons" of a class or species of business. The refusal to deal section provides grounds for the Competition Tribunal to order supply whenever it is established that there is "insufficient competition among suppliers of the product in the market". Hence, Canadian competition law focuses on firms that are dominant and not just monopolies.

It is significant to note that in the case of The D & B Companies of Canada Ltd. the Competition Tribunal found that access to information (i.e. scanner data) was considered necessary for effective competition to develop:

> "Given the critical nature of the input, the scanner data, tied up by Nielsen's exclusives with retailers, the exclusives constitute a *prima facie* barrier to entry. If the data necessary to produce a scanner-based market tracking report on either a national or a regional basis are tied up by an exclusive, the would-be entrant is not able to provide the service in question. In contrast, in the absence of exclusives the retailers would be free to provide their data to more than one firm." [6]

Canadian competition law is, thus, concerned not only with access to physical facilities in the production process but non-physical inputs as well.

Relevant Factors Considered by the Director in Assessing Refusal to Supply and Abuse of Dominant Position Allegations by Potential Competitors Against Owners of Scarce Facilities

In the absence of significant barriers to entry into a relevant product or geographic market the owner of a facility is unlikely to be able to use it to earn monopoly rents. Any attempt to do so would cause other competitors to enter the market and the additional supplies created in that manner would constrain the ability of the owner of the facility to continue earning these rents for any prolonged length of time. The owner of the firm can only exercise market power if barriers to entry are of sufficient height that new entry is unlikely to be forthcoming over the foreseeable future.

The Director receives many complaints each year in which competitors and others allege that an owner of a facility is engaging in anti-competitive behaviour by denying access to the facility or refusing to supply a product or service. In examining these allegations under the refusal to supply or abuse of dominant position provisions of the *Competition Act* the Director considers the following factors to assess the ability of the owner of the facility to exercise market power in the relevant product and geographic market:[7]

- -- How practical and reasonable would it be for competitors to enter the market and compete effectively in the relevant product and geographic market either by constructing their own facilities or obtaining access to alternative facilities?
- -- How long will it take competitors to construct their own facilities or to obtain access to alternative facilities to be able to compete effectively? This time consideration may differ between *de novo* entry and firms expanding from other geographic areas or using existing facilities in the relevant market.
- -- Is there any reason competitors would not be able to compete effectively?
- -- Assuming competitors are able to obtain access to their own facilities within a reasonable time frame, would they face any significant distribution or marketing difficulties that would impede their ability to compete effectively?
- -- Do competitors face any certification, licensing, or other regulatory barriers (e.g. obtaining access to rights-of-way) to be able to compete effectively? If so, how long will it take to

overcome these barriers and how costly will it be? Government policies, at all levels, could have a major and even decisive impact on whether and how fast competition will develop.

-- Is new entry conditional upon attaining minimum scale or scope economies before effective competition can occur? Do buyers place a premium on buying a full line of products or services such that sellers of only one of these products would not be an effective competitor?
-- Are competitors able to serve a wide range of customers throughout the relevant geographic market, or are they limited to niche markets?
-- To the extent that not all customers have competitive alternatives available to them, could the owner of the essential facility discriminate against just those customers that have no alternative? Or would anticompetitive behaviour against those customers necessarily cause it to lose so many other customers that it could not profitably persist in the anticompetitive behaviour?

The reason for carrying out this examination is twofold. First, to determine where, when and under what circumstances new entry is likely or even probable. Second, to determine if this entry is likely to be of sufficient size to effectively constrain the alleged market power of the owner of the facility in the relevant product and geographic market. To be effective there must be sufficient actual competition or a real threat of pending competition to provide an empirical basis for concluding a firm will not possess market power that could be used to earn monopoly rents or prevent or lessen competition substantially. This generally means more than a single competitor serving niche product or geographic markets.

[...]”

Notes

1. This Canadian contribution is excerpted from Submission of the Director of Investigation and Research to the Canadian Radio-Television and Telecommunications Commission; Re: Telecom Public Notice Crtc 95-36. Local Interconnection and Network Component Unbundling.

2. The Restrictive Trade Practices Commission was one of two separate agencies created under the *Combines Investigation Act* for its administration. The other agency was the office of the Director of Investigation and Research. The RTPC was abolished when the *Competition Act* and the Competition Tribunal came into effect in 1986.

3. The Restrictive Trade Practices Commission, *Competition in the Canadian Petroleum Industry*, Supply and Services Canada, 1986, p. 447.

4. Ibid., p. 451.

5. Ibid., p. 453; A discussion of the essential facilities doctrine in the U.S. , Europe, Australia, and New Zealand may be found in Kerrin M. Vautier, *The Essential Facilities Doctrine*, Occasional Paper No. 4, March 1990, New Zealand Commerce Commission

6. Director of Investigation and Research and The D&B Companies of Canada Ltd. and Information Resources, Inc., Canadian Council of Grocery Distributors, p. 82.

7. These factors are also considered by the Director when assessing the competitive impact of mergers and acquisitions under the *Competition Act*. See, Director of Investigation and Research, *Merger Enforcement Guidelines*.

ITALY

Despite its elusiveness, the concept of essential facility has been used quite frequently in antitrust cases in the United States and the European Union and, in recent years, the concept has also been cited in several rulings and proceedings by the Italian Antitrust Authority. In contrast with the United States, where the so-called essential facility doctrine has acquired a crucial role in assessing the antitrust relevance of refusals to deal, in the EU and in Italy the concept has generally played an ancillary role in assessing cases of refusals to deal by a dominant firm, since the provisions of article 86 of the Treaty of Rome and article 3 of the 1990 Italian Antitrust Act, respectively, are quite straightforward on this issue.

The frequent mention of the concept of essential facility in antitrust rulings and the tendency to extend its scope beyond that of a convenient term of reference to a class of cases involving attempts by an upstream monopolist to extend its dominant position in a downstream market, suggests that a discussion of its rationale and implications is in order. In this note the concept and its definitions are briefly reviewed, some of the pitfalls of its extension and mechanical application are pointed out and its relevance for antitrust policy is discussed, focusing on specific Italian cases.

1. Definitions and scope

Definitions of antitrust abuses involving essential facilities differ across countries. Examples of facilities termed essential in antitrust cases range from transportation bottlenecks - such as railways terminals, harbours and airports - and network infrastructures - such as pipelines, electricity transmission lines and telecommunication lines - to data collections - such as news gatherings, customer lists, real estate multiple listing services, airline reservation systems, TV guides and title plants.

The European Commission defines "essential" any facility or infrastructure without access to which competitors cannot provide services to their customers (*Sea Containers vs Stena Sealink* (OJ, 18/1/94, L15 p.8)). Denial of access to it or the imposition of discriminatory access conditions by an undertaking having a dominant position (or a group of undertakings with monopoly power) who also operates on the downstream market which is made accessible by the facility is termed unlawful, under provisions of art. 86 of the Treaty, when this behaviour is not justified by objective reasons and harms consumers. In the United States, the main elements of sentences involving essential facilities have been characterised as follows:[1]

- control of the facility by a monopolist or a group of competitors with monopoly power,
- the inability practically or reasonably for the foreclosed competitor to duplicate the facility or its economic function,
- the denial of use of the facility or the imposition of restrictive terms with the consequence of substantial harm to competition in a relevant market in which the monopolist competes (or would be forced to compete absent the discriminatory practice),
- the absence of a valid business reason.

In the US definition, it is quite clear that a facility is essential only if the services it can provide belong to a relevant market (no duplicability at reasonable costs) controlled by a monopolist. At the same time, the behaviour of such a monopolist is deemed abusive only insofar as it affects substantially the competitive conditions of the downstream market. The EC definition, which is usually referred to in

rulings of the Italian Antitrust Authority, appears to be more extensive since it is sufficient for the owner of the facility to be in a dominant position. Furthermore, there is no explicit reference in the law either to the possibility (or the cost) of duplication of the facility or to the competitive conditions characterising the downstream market. In addition, the US requirement of a "valid business reason" leaves more room for motivating discriminatory behaviour than the EU "objective justification". In general, the latter requirement has been interpreted as including only technical feasibility (such as the lack of unused capacity) or compliance with public interest objectives imposed upon the owner of the facility, while commercial reasons, such as efficiency goals, have seldom been taken into account and the "wish to avoid helping competitors" has been explicitly excluded as a valid motivation (*British Midland vs Aer Lingus* (OJ 10/4/92, L 96 p. 34)). Finally, a refusal to deal is deemed unlawful whenever the defendant cannot prove that such a behaviour benefits consumers of the downstream product.

Antitrust cases involving the notion of essential facilities generally concern refusals to deal by the owner(s) of the facility. In the US, state and federal courts (but neither the FTC nor the Supreme Court) have resorted to the essential facility doctrine in order to tackle a wide class of cases involving refusals to deal by monopolists (unilateral refusals) and groups of firms with monopoly power (concerted refusals) as well as by monopolists not competing downstream with the firm that was denied access to the facility (arbitrary refusals)[2]. The EC and, for that matter, the Italian Antitrust Authority have seldom mentioned this concept in the context of refusals to deal or denials of access by an undertaking having a dominant position when the latter does not compete in a downstream market with the plaintiff (so-called arbitrary refusals to deal). Both at the Community and national level, most of the cases so far have involved the attempt by an undertaking which has legal or *de facto* monopoly power over the facility to extend its dominant position in a secondary market characterised either by actual or potential competition.

2. Italian cases involving the essential facility concept

The totality of cases involving essential facilities in Italy concerned control of the facility by a legal monopolist. In the Italian system, legal monopolies are subject to the civil code provision which imposes an obligation to deal with third parties on a non-discriminatory basis (art. 2597)[3], and are exempted from the application of the Antitrust Law only if the alleged anti-competitive behaviour derives from an obligation imposed on them by some rule or regulation. Moreover, anticompetitive behaviour by legal monopolies can be exempted from the applications of the law in exceptional circumstances when it can be shown to be unavoidable in order to fulfil the public interest tasks attributed to them in their license. In the context of EC and national antitrust laws, refusals to deal are explicitly contemplated among the possible offences deriving from the abuse of a dominant position, since they may prevent a competitor from accessing a relevant market to the detriment of consumers or represent a discriminatory practice putting a competitor at a competitive disadvantage (art. 86 of the Treaty and art. 3 of the Italian Antitrust Act). In Italy, where exclusive rights and legal monopolies are widespread, the need to closely monitor refusals to deal and market foreclosures by regulated monopolists is particularly strong in view of the likely detrimental effects on consumer welfare.

So far, explicit reference to the concept of an essential facility has been made only in cases involving refusals to deal by a monopolist. The defendants, who enjoyed legal monopolies over the relevant upstream markets, were charged with abuse of a dominant position (art. 3 of the Antitrust Act) because, without an objective justification, they denied access to an essential facility (*Telsystem vs Sip* (Provv. n. 2662, 10/1/95, A71, Boll. 1-2/95), *De Montis Catering Roma vs Aeroporti di Roma (*Provv. n. 2854, 2/3/95, A61, Boll. 9/95)) or refused to sell an essential resource (*Sign vs Stet-Sip (*Provv. n. 2970, 27/4/95, A65, Boll. 17/95)) in order to preserve their dominant position on a relevant downstream market, contiguous but different from that in which they held exclusive rights. In all of these cases the legal monopolist was subject to price regulation.

In *Telsystem vs Sip*, the national PTO, which has a legal monopoly over the public switched network (PSN) as well as a *de facto* monopoly in the downstream market for communications among closed user groups, refused to lease lines to the plaintiff company, Telsystem, who was wishing to compete with the defendant in the provision of closed user groups services, a set of services liberalised by EC directive 388/90. Denial of access by the PTO caused losses and foreclosed the market to the potential competitor, preventing the provision of a service to consumers which appeared to be more technologically advanced than the service supplied by the PTO. In its final judgement, the Antitrust Authority termed the PSN an essential facility, using for the first time the EC definition, and, referring explicitly to previous EC judgements (*CBEM vs CLT-IPB* (Case 311/84, 1985, ECR 3261) and *Sea Containers vs Stena Sealink*), stated that "the unjustified refusal to provide access to an essential facility on behalf of a legal monopolist, aimed at preserving a dominant position on a relevant market, contiguous but different from that in which the monopolist has exclusive rights, represents an abuse of a dominant position".

In *De Montis Catering Roma vs Aeroporti di Roma*, a state-owned joint-stock company controlling the airport of Rome and having an exclusive license to provide a range of maintenance and terrestrial services, denied access to the airport premises to a company wishing to compete for airline catering, a service in which the licensee had a *de facto* monopoly but which is not covered by its exclusive rights. The Antitrust Authority defined the airport premises as an essential facility without access to which entry into the catering market by the potential competitor was impossible. Despite the defendant's claim that access was not technically feasible, no objective justification was found for the refusal to deal and the defendant was charged with the attempt to extend its monopoly power in a contiguous market, hindering competition and damaging users of catering services due to the higher prices and lower quality of services supplied by the incumbent to airlines.[4] Loosening a bit the language used in *Telsystem vs Sip*, the final judgement stated that "it is an abuse of a dominant position for a firm having such a position in a market to refuse to provide to existing and potential competitors a good or a service which is needed for the competitor's activity". Referring to a previous EC case (*Rødby vs Denmark (*OJ 26/2/94, L 55 p. 52)), the judgement explicitly affirmed that "a firm owning or operating an essential facility cannot deny, without objective justification, access to the facility".

Another case involving exclusive rights granted to state-owned companies, *Sign vs Stet-Sip*, concerned access to telephone subscribers' lists by a would-be competitor in the market for information services to subscribers. The case presented two facets, both interesting from the point of view of the scope for using the essential facility doctrine in Italy. The national PTO and its parent company Stet share exclusive rights over the production and distribution of subscribers' lists and also hold dominant positions in downstream activities that use these lists to sell services to consumers and businesses. Both companies repeatedly refused either to sell lists in a CD-ROM format or to provide access to their on-line database to prospective new entrants in the market for on-line and off-line information about telephone users.

The Antitrust Authority charged both of them with abusing of their dominant position in order to prevent the provision of new technologically-advanced services by competitors, with substantial harm to consumers. In assessing the case, it was noted first that, given the existence of exclusive rights in the provision of subscribers' lists, no company could duplicate the database and sell the information on the market. On account of that, Stet, which had a legal obligation to produce and distribute the lists, was accused of foreclosing the downstream market to a competitor, without the need to refer to the essential facility doctrine.[5] On the other hand, the PTO was charged with violating art. 3 of the Antitrust Act on the grounds that denial of access to an essential resource for the provision of a service in a potentially competitive market, distinct from that in which the PTO has a legal monopoly, represents an abuse of a dominant position.

With respect to the PTO violation, the Antitrust Authority defined subscribers' lists as an essential resource for downstream activities and found no objective justification for the refusal to provide the data to the plaintiffs, despite the defendant's objections as to the need to preserve the value of its investment, the purported copyrights on the data base and the alleged possibility of its duplication.

Explicit reference was made to the previous essential facility cases and, especially, to the EC case concerning access to TV listings by a would-be competitor in the market for TV guides (*Magill TV Guide vs ITP-BBC-RTE (*OJ 1989 L 75 p. 43 and Court of Justice *ITP-BBC-RTE vs EC* 6/4/96.0)). In particular, it was affirmed that "a firm that owns an essential resource and denies access to it without objective justifications, or imposes discriminatory and/or unreasonable conditions for access, abuses of its dominant position".

In other cases, no explicit reference to the concept of essential facility was made, although the arguments leading to the Authority's decision relied on some elements of the essential facility doctrine. For instance, in *ANCIC vs. CERVED (*Provv. n. 452, 10/4/92, A4, Boll. 7/92) a company supplying computerised information services based on data collected by local Chambers of Commerce was found to abuse of its dominant position on the market for raw data to discriminate among companies depending on this data to supply similar services. An exclusive arrangement with Chambers of Commerce gave the company a *de facto* monopoly over computerised raw data, which was subsequently used to compete on the market for information services. The company used its market power to impose discriminatory access prices on other companies wishing to provide the same services.

3. Some pitfalls of the essential facility doctrine

There is much debate over whether and when the concept of essential facility should be used in the implementation of competition policy. The extent and scope of the debate is not surprising since the so-called essential facility doctrine can be interpreted as a limitation to the full use of property rights through the imposition, under certain conditions, of the duty to share assets with competitors. The debate has revolved around two interrelated issues:

- -- what are the economic justifications for and implications of the application of the so-called essential facility doctrine?
- -- how can such a doctrine be ring-fenced and disciplined in order to avoid its overzealous application?

Economic issues

The notion that, under certain conditions, a monopolist should be forced to share with competitors the essential facility it controls is based on the presumption that the denial of access to the facility can be motivated by anti-competitive aims possibly leading to losses in consumer welfare. Economic theory suggests that, in principle, this presumption is often wrong. An unregulated firm having monopoly power over an upstream “bottleneck” market which is essential for accessing a potentially competitive downstream market, has good reasons for letting competition unfold, irrespective of whether she competes or not in this market.[6] This is because its total profits are maximised the stronger is competition in the downstream market, while they are reduced by double marginalisation effects when competition is lacking. Of course, this proposition is correct only if the monopolist is sufficiently well informed about demand conditions in the downstream market to be able to extract all industry profits by perfectly price discriminating among different users of the facility it owns and if the cost of gathering this information is less than the loss in profits it would suffer when competition downstream is reduced.

It follows that, as in the assessment of vertical restraints, refusals to deal can neither be assumed to be invariably motivated by anti-competitive aims nor to lead necessarily to efficiency losses. This is particularly true when the bottleneck monopolist is not competing for the supply of goods or services in the downstream market and, therefore, has no apparent incentive to limit access to the facility. In this case, anti-competitive behaviour may be the result of collusion between the bottleneck monopolist and some (or all) the users of the facility. For instance, the monopolist may have an incentive to deny access to a

potential new entrant in the downstream market and share rents with incumbents when these, but not the new entrant, are in a position to duplicate the facility.[7]

On the other hand, when the monopolist is integrated with a firm competing in the downstream market, the wish to restrict competition in this market can result from the monopolist's inability to extract profits from competitors due, for instance, to problems faced in gathering the necessary information on demand and costs. Since these problems are likely to be larger the smaller is the extent of existing competition and the more innovative are services supplied in the market, refusals to deal by bottleneck monopolists having a dominant position in the downstream market are more likely to be motivated by anti-competitive reasons.

In the case of regulated bottleneck monopolists, subject to regulation of tariffs but not of access to the essential facility or resource, incentives for extending dominant positions and restricting access to downstream markets may be motivated by the wish to side-step regulatory provisions concerning tariffs, which may prevent the monopolist from maximising its profits.

In this respect, a case in point are vertically-integrated legal monopolies whose downstream activities are being liberalised. These usually operate in markets formerly thought to be natural monopolies, but where the scope for monopoly has been reduced by regulatory reform on account of developments in technology and of the evolution in the structure of demand. With bottleneck activities usually remaining sheltered from competition, duplication of facilities which are essential for accessing the downstream market may be prohibited and liberalisation is often hindered by the tendency of the legal monopolist to maintain or extend its dominant position in downstream markets by overtly or surreptitiously denying access to the facility.

Although there are cases in which a refusal to deal by a bottleneck monopolist may be an anti-competitive practice harming consumers, any proposal to mandate access to an essential facility should be weighed against the implied distortions to the firms' incentives to invest and innovate. A basic element of these incentives in a well-functioning market economy is the full disposal of one's assets at each point in time, including the right to deal with whom one pleases. Consistent departures from this institutional context, such as those resulting from imposing a systematic obligation to deal on owners of essential facilities, may lead to serious inefficiencies and welfare losses in the long-run, even though mandating access may have been motivated by the wish to enhance competition and benefit consumers in the short run.

Ring-fencing the doctrine

When reference to the concept of essential facilities is made, several procedural devices should be adopted in order to minimise the risk of an unjustified extension of the corresponding "doctrine".

First, a two-step definition of the relevant market is needed. One step concerns the definition of the downstream market, the subsequent step concerns the definition of the "market" for the services of the facilities enabling access to the downstream market. In practice, these steps are interrelated: for instance, if the relevant downstream market is such that the foreclosed firm can side-step the facility and still be a competitor, the facility is not essential and the refusal to deal cannot have efficiency consequences. On the other hand, one can imagine situations in which this is not possible, but the facility can be duplicated at a reasonable cost.

Second, in essential facility cases one should be careful not to confuse injury to competition, which is harmful for consumers, with injury to individual competitors.[8] In any case, the mere absence of an objective reason should not imply that the refusal to deal is unlawful when consumer welfare is not reduced by such a behaviour.

Third, mandatory access to the facility should be matched by adequate and reasonable supervision. The fact that this often requires continuous monitoring strengthens the case for circumscribing the use of the essential facility doctrine and mandatory access provisions to situations of regulated bottleneck monopolies.

Notes

1. See TYE (1987), "Competitive access: a comparative industry approach to the essential facility doctrine", *Energy Law Journal*, 8, quoted in Blumenthal W. (1990), "Three vexing issues under the essential facilities doctrine: ATM networks as an illustration", *Antitrust Law Journal*, Vol. 58, p. 858.

2. WERDEN, G. J. (1987) "The law and economics of the essential facility doctrine", *Saint Louis University Law Journal*, Vol. 32:433.

3. NIVARRA L. (1992), *La disciplina della concorrenza. Il monopolio. Art. 2597,* Giuffrè, Milano, p. 240. No such obligation has been imposed so far on *de facto* monopolies (*Snam/Agraria Fides*).

4. An interesting facet of this case is that the cost structure of the incumbent firm in the catering market was heavily influenced by extremely high labour costs, presumably due to rent sharing with unionised workers.

5. It is interesting to note in this respect that the Italian Antitrust Authority has been able in the past to solve cases involving the denial of access to airport premises by a legal monopolist competing with the foreclosed competitor in the downstream market for airport services without any reference to the essential facility doctrine (*Gruppo Sicurezza vs Aeroporti di Roma*, Provv. 1587, 17/11/93, A44, Boll. n. 35).

6. WERDEN, G. J. (1987) "The law and economics of the essential facility doctrine", *Saint Louis University Law Journal*, Vol. 32:433.

7. HOVENKAMP, H. (1994), *Federal Antitrust Policy*, West Publishing Co., St Paul Minnesota, p. 276, n. 21.

8. AZGUENAGA, M. L. (1990), “Essential facilities and regulation: court or agency jurisdiction?”, *Antitrust Law Journal*, Vol. 58, p. 885.

JAPAN

1. Definition

The definition of an "essential facility" is generally considered to be a tool used when judging the presence of an illegality such as a monopolistic action, particularly a refusal to deal.

In Japan, for instance, refusal to deal is prohibited as an unfair trade practice in the following cases.[1]

> "A. (Concerted Refusal to Deal)
>
> Without proper justification, taking an action specified in one of the following paragraphs concertedly with another entrepreneur with whom one is in a competitive relationship:
>
> (i) Refusing to deal with a certain entrepreneur or restricting the quantity or substance of a commodity or service involved in a transaction with a certain entrepreneur; or
>
> (ii) Causing another entrepreneur to take such an action.
>
> B. (Other Refusals to Deal)
>
> Unjustly refusing to deal or restricting the quantity or substance of a commodity or service involved in a transaction with a certain entrepreneur, or causing another entrepreneur to take any action which comes under one of these categories."

In other words, an entrepreneur is basically free to select his clients; however, when a refusal to deal falls into one of these constituent categories, it is considered illegal in that it is an unfair trade practice. In the definitions of the two types of actions stated above, "without proper justification" in clause A means that there are some exceptional types of action which do not impede fair competition among those which appear to impede fair competition, from an external viewpoint. In contrast, "unjustly" in clause B refers to types of action which are finally revealed as unfair trade practices following individual judgement of the presence of an impediment to fair competition, and which cannot directly be said to impede fair competition from the point of view of stipulations that exclude the word "unjustly".

In concrete terms, the "Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices"[2] describe concerted refusal to deal as shown below.

> "In cases where a firm or firms, concertedly with their customers, suppliers, etc. engage in the following types of conduct, and if the conduct makes <u>it very difficult for any firm that has experienced a refusal to deal to enter the market, or its effect is to exclude the refused firm from the market</u>, thereby resulting in substantial restraint of competition in the market, such conduct constitutes unreasonable restraint of trade[3] and violates Section 3 of the Antimonopoly Act.
>
> (i) - (ii) omitted.

(iii) Distributors and a manufacturer concertedly, in an attempt to prevent other distributors from entering a market, undertake such conduct that the latter refuses to supply products to new entrants and the former refuses to deal in the products of those manufacturers which have supplied their products to new entrants.

(iv) omitted.

Any type of conduct described in (i) through (iv) above, undertaken by any firm concertedly with its customers, suppliers, etc. even though the conduct does not cause substantial restraint of competition in a market, is in principle an unfair trade practice[4] and therefore illegal."

On the contrary, the Guidelines state the following regarding individual refusals:

"In cases where a firm engages in such conduct as (i) below as a means to secure the effectiveness of an illegal practice under the Antimonopoly Act, such conduct is illegal as it is an unfair trade practice.

(i) An influential manufacturer[5] in a market, by causing its distributors not to deal with its competitors, reduces the business opportunities of the competitors and prevents them from easily finding alternative trading partners, and with a view to ensuring the effectiveness of such conduct, refuses to deal with distributors not yielding to this request."[6]

2. Enforcement

When judging the influence on fair competition, it is not necessary to analyse whether or not the action concerned is a refusal to deal with an essential facility. Basically, the legality or illegality of the action of the party concerned who owns the facility and prevents another party from being able to utilise it is judged comprehensively according to whether or not the action substantially restrains competition in the market. At this time, the market share of the party concerned, the existence of competitors, the market structure, etc. are considered, as well as the characteristics of the facility and the reason behind and the role of the refusal to utilise the facility. In the "essential facility doctrine", the refusal to deal by the concerned party is considered to restrain freedom of trading, the refusal to deal itself being considered to be an illegal action, except in the case that if the concerned party did not refuse to deal confusion would arise in its own business, regardless of the existence of the intent or objective of achieving superiority in competition or monopoly. In Japan, however, the existence of the objective of achieving superiority in competition is stated as one of the factors to be considered prior to judging a refusal to deal[7] in order to judge whether or not the concerned action substantially restrains competition. The approach that if a refusal to deal is made to an essential facility, the purpose for legitimising the refusal is strictly understood, is therefore not adopted in Japan.

As mentioned above, the Fair Trade Commission (FTC) judges whether or not the refusal to deal violates the Antimonopoly Act by whether the refusal action substantially restrains or tends to impede fair competition. At this time, the FTC also judges the influence of the refusal to deal on the fair competitive order. Therefore, even when the refusal of access to a facility which is considered an essential facility is concerned, the action is evaluated from the viewpoint of whether or not the refusal to trade is an illegal act relative to the fair competitive order.

Notes

1. Section 2(9) of the Antimonopoly Act stipulates that the FTC shall designate unfair trade practices among the trading methods which tend to impede fair competition. Based on this, 16 types of unfair trade practices have been stipulated by the 1982 Notification of the FTC, no.15.

2. July 1991, from the Executive Office, FTC.

3. An important matter regarding the unreasonable restraint of trade is the "mutual restriction of business activities" by an entrepreneur jointly with another entrepreneur. (Section 2 (6) of the Antimonopoly Act). The content of the action to mutually restrict business activities does not need to be the same for each party as long as such action does restrict the business activity of each party, and the action is carried out to achieve the common purpose which is, for instance, to exclude a specified entrepreneur; this is sufficient for the action to fall into the category of unreasonable restraint of trade described here.

4. Part 1, Chapter 2-3, Distribution Guidelines.

5. Whether a firm is "influential in the market" is in the first instance judged by a market share of the firm, that is, whether it has no less than 10% or its portion is within the top three in the market (meaning a market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors).

   Nevertheless, even if a firm falls under this criterion, the firm's conduct is not always illegal. In a case where the conduct may result in reducing the business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, such conduct is illegal.

   In the case of a low-ranked or newly-entered firm which has a market share of less than 10% and whose position is the 4th or later, the conduct usually would not result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners and such conduct is not illegal.

6. Part 1, Chapter 3-2, Distribution Guidelines.

7. For instance, whenever the FTC issues decisions, the objectives of the concerned illegal action are described in the written decision.

SWEDEN

According to the invitation the discussion will be limited to private essential facilities. Thereby sectors such as postal services and telecommunications in which the Swedish Competition Authority (the Authority) has dealt with several cases concerning the state-owned monopolists, are excluded. In our contribution we will make short comments on some of the questions which were attached to this invitation. We will focus on a case which was discussed and dealt with during the last year. The case is related to the banking sector and concerns the co-operation between seven business banks in Sweden and regards credit transfer system via Automatic Telling Machines (ATM), in Sweden known as the Bankomat-system.

The Swedish Competition Act conforms with Articles 85 and 86 of the Treaty of Rome. In its application of the Competition Act, the Authority shall take the EC case law into account. Consequently some references to EC cases are made below.

1. Short comments to the questions

1. Do/should the same standards apply both when the facility is owned by a single firm and when it is jointly-owned by several firms?

Yes. It does not matter whether the essential facility is owned by a single company or if the facility is jointly-owned. The important issue is who is controlling the facility (see question 2). A competitor shall be allowed to use the essential facility if he is entitled to it, according to the essential facility doctrine applied in the EC case law.

If control over the essential facility is divided between the owners and none of them alone can control the facility, certain problems may arise. Can a new competitor be allowed to conclude a bilateral agreement with one owner and get access to the facility that way? Can the owners hinder each other from letting a competitor use the essential facility by signing bilateral agreements? We will consider this problem more carefully when analysing the Bankomat-case below.

2. Is "control" of an essential facility limited to ownership, or might "control" be through an exclusive contract with the owner of the facility? If the latter, then which party is liable?

That someone is "controlling" an essential facility and not giving other parties access is a requirement for the essential facility-doctrine to apply. When the controlling company owns the essential facility and also owns a vertical outlet, which is the only party permitted to use the facility, it clearly falls under the doctrine (see Commercial Solvents, European Court of Justice, 6 and 7/73, 1973 ECR 3755, and Stena Sealink, Commission Decision 1993, OJ L 15 p. 8).

If the controller does not own the facility, but rents it from somebody else with exclusive rights on commercial conditions, certain problems arise. The renter is normally not allowed to grant permission to the facility to a third party (even if he would like to do so). The actual owner can in his turn not control the facility and he cannot, on contractual grounds, allow competing companies to share the essential facility. In order to do so he is forced to break the agreement with the original renter. The liable party will normally be the renting company since it has an

exclusive access to the facility and in reality controls it. He will be responsible for granting third party access to the essential facility. This question arises in most of the essential facility-cases and has to be decided on a case-by-case basis. It can be difficult to determine who actually controls the facility and to find possible links between the owner and the controlling company.

6. What cost of duplication makes a facility essential?

This is a question that must be solved on a case-by-case basis. When the essential facility constitutes a publicly owned facility, the costs to duplicate the facility usually are prohibitively high (e.g. railroads, telecommunication networks). If the cost of duplicating the facility is too high for every competitor, the problem is easily solved - everybody should generally have the right to access to the essential facility on acceptable, if not equal, terms. The problem with a publicly-owned essential facility will not, however, be taken into consideration during this Round Table meeting.

Problems arise when the essential facility is expensive to build up, but not impossible for "bigger companies". Should then a small company have the access right to the existing facility while the "bigger companies" have to build up their own facility? This can easily lead to a discrimination of the "bigger companies", which is a most unwanted solution of the problem and it is an aspect to consider carefully before the Competition Authorities declares that a facility is essential.

8. To what extent must denial of access affect the (potential) competitor?

An absolute precondition is that the potential competitor must be denied access to the relevant market. A mere disadvantage vis a vis a competitor is not a sufficient condition for the existence of an essential facility, because that would lead to a possible intervention whenever a company gained a competitive advantage that its competitor envied. If the essential facility is such that it hinders the potential competitor from entering another, closely related market, it is possible that access to the facility must be granted in order to enhance competition.

11. Should there be an asymmetric treatment between denial of access and denial of further access after having granted access in the past?

No, the Authority holds the position that both situations should be treated equally. According to decisions by the European Commission it seems to have taken a more interventionist stance in defence of existing trading partners and does not seem to have favoured new potential competitors (Commercial Solvents, Stena Sealink). The problem for the Authority is to evaluate to what extent new competitors might improve competition on the relevant market. Does a new competitor really need access to a facility that is owned by an already established competitor, or can a parallel system be developed?

17. What constitutes "reasonable access"? E.g. is "reasonable access" access such that the competitor has access on the same terms as the owner? Must "reasonable access" be granted to all competitors? How are the terms and conditions of access monitored?

The Commission stated (Magill, 76, 77 and 91/89, 1989 ECR 1141) that access should be non-discriminatory and reasonable. Those criteria do not give any workable principles for how the pricing is supposed to function. A pure negotiation between the owner and the complainant rarely seems to provide a satisfactory solution. If the asset constitutes of a de facto monopoly, the owner is likely to set an access price that is prohibitively high, which in practice equals a refusal to supply. The terms of access is however a problem, that even the European Commission seems to avoid. In Stena Sealink, for example, the Commission avoided to specify

the terms of access in detail. The parties therefore reached a compromise themselves, which resolved the dispute.

The Authority holds the view that the terms of access should in principle be established by the parties, not by the Authority. Otherwise it is likely that parties demand the Authority to resolve disputes, that really should be settled in court or by an arbitrator. The Authority's obligation is to establish a competitor's right to access to the essential facility - the terms of access will thereafter be a case for the parties or the court!

In the few cases that the Authority has decided to date, we have not yet determined any terms of access.

2. A Recent Case Concerning a Privately Owned Essential Facility - The Bankomat-Case

Seven of the largest business banks in Sweden are stockholders in a jointly owned company, Bankomatcentralen. The purpose of Bankomatcentralen is to connect the banks that own the ATM system with each other, so that their customers get access to the other business banks ATMs. The co-operation is based on a multilateral agreement, settled 1972. Every participating bank in Bankomatcentralen, owns their ATMs. In order to guarantee your customers access to the Bankomat-system you must be a member of Bankomatcentralen. The connected banks have approximately 60 per cent of the ATM market. A chain of savings banks also has an ATM system (Minuten-system) and controls the additional 40 per cent of the market. Bankomatcentralen submitted an application to the Swedish Competition Authority applying for a negative clearance/exemption for their co-operation. At the time of the application no rules for access to Bankomatcentralen existed and it was commonly known that it was difficult for other banks to become part of the agreement.

During the Authority's investigation of the Bankomat-case, Skandiabanken, a newly established bank on the market and not a member of any of the two ATM agreements issued a complaint against Bankomatcentralen, claiming that they should have the right to join Bankomat-centralen under objective conditions. Skandiabanken competes with the business banks on the "market for bank accounts for citizens" (not companies). They claimed that in order to be competitive with the other banks, already established on the market, they needed access to the Bankomat-system.

Question 1: Can ATMs be regarded as an essential facility?

The cost for Skandiabanken to create a parallel ATM system would be so high that it would be virtually impossible for them (prohibitive). Skandiabanken insisted that they should be given a chance to join the bankomat-system. Its potential customers were used to ATMs and there were no possible alternative to the Bankomat-system. There are however two ATM systems in Sweden; the Bankomat-system and the Minuten-system.

Question 2: Can two essential facilities exist on the same market?

The members of the Bankomat-system, during the case handling procedure, altered their agreement and implemented possibilities to enter the system through bilateral agreements. Skandiabanken could thereby be admitted to enter the Bankomat-system on a bilateral basis. Systems that offer possibilities for everyone to join the essential facility, as long as the access is provided on non-discriminatory grounds, do not usually constitute a restriction of competition. The Bankomatcase is still pending and the Authority has not yet reached a decision.

Comments on the case

The Authority's expressed a similar view on a nearby market in the banking sector first approach was that ATMs could jointly constitute an essential facility. The Commission has expressed a similar view on a nearby market in the banking sector in a notice (95/C 251/03) - Notice on the application of the EC competition rules to crossborder credit transfer. The conditions for access to such a system should be objectively justified and applied in a non-discriminatory manner.

Bankomat-centralen changed their agreement during the negotiations with the Authority. Thereby the Authority did not have to decide *1)* whether an ATM system can be regarded as an essential facility or *2)* if the existence of two systems exclude the applicability of the essential facility doctrine. Due to the alterations in the agreements, we now face a new question in the still pending Bankomat-case: *3)* Can the possibility to get access to some of the ATMs exclude the applicability of the essential facility doctrine?

UNITED KINGDOM

Summary

The concept of an 'Essential Facilities Doctrine' has featured implicitly or explicitly in a number of decisions made by competition authorities, notably in the transport sector. Throughout the world as utility and other such markets begin to become open to competition the scope for applying this doctrine may expand. Judgements will therefore increasingly need to be made about the means to control restrictions on competition without depressing initiative and investment by large undertakings.

The attached paper reviews some of the limited US, EC and UK case law in this area. It seeks to extrapolate from the case law to identify a number of guiding principles based on economic analysis to which competition authorities may have regard when assessing individual cases.

In particular the paper addresses two key points:

- the importance of ensuring that an essential facility is correctly defined; and
- the bases on which to formulate remedies once an essential facility has been correctly defined.

It suggests that the doctrine should be applied only in cases of abuse of market power to create the opportunity for competition in the provision of services but that it is inappropriate to apply the doctrine where the restrictive effect of an agreement is only to transfer market power from one undertaking to another, without creating or enhancing it. The views expressed in this paper should not, however, be taken as an indication of how UK competition authorities might take decisions in individual cases.

We conclude that the essential facilities doctrine is potentially of benefit to competition authorities in giving them a policy framework to determine regulatory remedies where problems arise from competitive activity involving such facilities. However as Professor Areeda[1] has observed:

> "As with most instances of judging by catch-phrase, the law evolves in three stages: *(1)* An extreme case to which a court responds. *(2)* The language of that response is applied - often mechanically, sometimes cleverly - to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of language, with little regard to policy. *(3)* Such expansion ultimately becomes ridiculous, and the process of cutting back begins."

If it is accepted that we are now in the second of these stages, the future usefulness of the doctrine will depend on avoiding falling into the trap which takes us to stage three. In the course of the accompanying paper we explore the key issues with the object of seeking to identify a number of guiding principles to which competition authorities may have regard when assessing individual cases on their merits and applying the relevant competition law. These are set out below and should assist competition authorities maintain the integrity of the essential facilities doctrine. However, the doctrine should not be used as a reason to misapply or misinterpret the relevant competition law.

Definition of an essential facility

Fundamental characteristics of an essential facility are:

(a) competitors must have access because it is essential for the provision of goods or services in that related market; and

(b) it is not economically efficient or may not be feasible for new entrants to replicate.

Market definition

The definition of the market must be reasonably justified, particularly taking account of supply- and demand-side substitutes. An artificial market definition risks producing a fallacious finding that the essential facilities doctrine should or should not apply.

Access to essential facilities

(a) There is likely to be an obligation on the essential facility operator to grant access on transparent and economically efficient terms.

(b) Any refusal to grant such access should be scrutinised by competition authorities.

(c) Refusal by an essential facility operator to grant access on transparent and economically efficient terms where there is spare capacity is an abuse, unless the operator can demonstrate objective justification.

(d) Refusal to facilitate the creation of additional capacity should be treated as an abuse, as should refusal to grant access to an essential facility where capacity becomes available through competitive displacement of the incumbent(s) in the related market.

(e) Cases where there is no spare capacity, and no additional capacity can be created, are likely to be exceptional.

(f) It is <u>not</u> an abuse to refuse to reserve capacity to potential new entrants without evidence that the capacity is required.

Market liberalisation

(a) Competition law is not always capable of dealing satisfactorily with potential abuse. If Governments are concerned that the risk of abuse in the future is unacceptable, the appropriate action may be to regulate through legislation or other administrative action. Such action may include breaking up a monopoly into competing enterprises.

(b) General competition law is an important adjunct to any sector specific legislation.

A Priori Access Rules

(a) Clear rules on access are highly desirable.

(b) For networks, prior rules should be established. This may be necessary also for other essential facilities.

(c) Competition law and/or other legislation may be necessary to achieve this.

1. Introduction

The concept of an 'Essential Facilities Doctrine' is assuming an increasing importance in a number of decisions made by competition authorities throughout the world because of:

- the liberalisation of utility markets which feature a number of possible essential facilities; and
- the desire of governments to establish new infrastructure funded by private investment.

Judgements about the means to control restrictions on competition will therefore increasingly need to be made which do not have the effect of depressing initiative and investment by large undertakings.

2. Definition of an essential facility

Modern and efficient essential facilities are key infrastructure features which are fundamental to economic growth in both developed and developing economies. For the purposes of this paper an essential facility is taken as a facility to which access is essential for the provision of goods or services in a related market and where it is not economically efficient or feasible for a new entrant to replicate the facility.
A range of facilities have been represented by commentators as "essential":

- railways (track, stations);
- airports (slot allocation; ground handling services) and airline computer reservations systems;
- ports;
- utility distribution networks e.g. electricity wires and gas pipelines;
- bus stations;
- some intellectual property rights.

The development of a doctrine

The "essential facilities doctrine" is a formulation of the application of general competition law in the particular circumstances of essential facilities. This doctrine is still in the process of development in the European Community through the European Commission's decisions on individual cases, but it is already well established in the United States. At its simplest, one US commentator[2] has described the doctrine as "...a firm or group of firms that possess exclusive access to a cost-reducing facility must be prepared to share such access on fair terms with competitors."[3]

Although the consistent application of a doctrine could be beneficial in terms of providing certainty in an area where the issues are complex and important for business, concerns arise where facilities are too readily or loosely defined as essential, leading to the inappropriate application of the doctrine in place of general competition law. Indeed, one concern which arises is that the relatively indiscriminate application of an essential facilities doctrine may compromise or supplant the proper application of the relevant competition law and consideration of the relevant competition policy issues.

Regulatory decisions which enforce access to essential facilities have implications for the investors, builders and operators of major infrastructure projects. Some projects, such as sub-sea gas and electricity interconnectors, may not proceed unless the investors can reduce the risk attached to the significant outlay by ensuring that advance contracts are in place for a commercial level of usage of the facility.

While it may be possible in principle to discriminate between the treatment of such projects and the treatment of established facilities operating in mature, low risk, markets, in practice it may be difficult to apply such a policy. For example, there may be high risk innovations in services supplied through pre-existing facilities, or a new facility might quite quickly come to dominate a market, leading competition

authorities to judge that access has become essential for any third party wishing to remain in a related market. Uncertainty over future regulatory action may add to the perceived risk attached to such investments, and lead to a chilling effect on entrepreneurial activity in these important facilities. A coherent intellectual framework which will inform analysis in a range of cases is therefore desirable.

It is beyond the scope of this paper to consider in detail intellectual property rights. There is a degree of commonality between some intellectual property rights and other "essential facilities", some of which involve the exercise of landed property rights or the operation of a network based on wayleave rights. But intellectual property rights cannot bear the blanket description "essential facilities" because competitors may be able to develop alternative intellectual property in order to compete in the market.

3. Market definition

Crucial to the determination of whether or not a particular facility is essential is the market definition. A number of different approaches can be adopted when determining the relevant market in a case. A given market definition inevitably leads to conclusions which are germane only to that defined market; an alternative market definition based on a different analysis of barriers to entry and market power may produce different findings. In the majority of cases more than one possible market definition may face the authorities. As a general comment on market definition, Asch[4] observed that monopoly power does not exist in relation to a product, but to a relevant product market, and the definition of this relevant product market must meet two criteria: it must be sufficiently narrowly drawn to exclude non-substitutes and it must be sufficiently broadly drawn to include all substitutes.

In the EC, ports have been the principal vehicle for the development of the essential facilities doctrine by the Commission. In Sealink/B&I - Holyhead (1992 (9) CMLR 255), B&I's operation of a ferry service out of Holyhead was said to be compromised by the itinerary adopted for its own ferry services by Sealink, who also owned the port facility. In another case involving Holyhead in 1992 (*Sea Containers v Stena Sealink: OJ No L 15/8, 18 January 1994*), Sea Containers had requested use of the harbour for a new ferry service; under pressure from the EC Commission, Sealink made an offer which Sea Containers accepted. John Temple Lang[5] noted in a paper that Sea Containers was only the third competitor on the route, with B&I and Sealink itself, and that the Commission considered that the capacity of the harbour would permit a third competitor without undue inconvenience.

However, Derek Ridyard of NERA has commented[6] on the decision relating to Sea Containers that the Commission had defined the relevant market as the "central corridor" of ferry journeys between Great Britain and Ireland, within which Holyhead was the only available British port. He considered that this was a narrow market definition, and one which arguably was not justified. He pointed to the possibility that Sea Containers might have found an alternative port to operate in the central corridor and raised the question of whether there were sufficient differences between the central, northern and southern corridors to justify the definition of separate markets for each. In his view, it was the narrowness of the market definition that led to Holyhead being held to be an "essential facility". This highlights the importance of market definition in substantiating the essential nature of the facility. Commenting on the Port of Genoa case (Case C-179-90, [1991] ECR I-5889), Daniel Glasl[7] said that the Court had implicitly applied the essential facilities doctrine. He went on to say "...this approach might indeed replace the definition of the relevant geographical and product market" (emphasis added).

More recently market definition has been at issue in the EC Commission decisions was that relating to the Channel Tunnel Usage Contract. The contract between Eurotunnel and BR and SNCF provided for BR and SNCF to have entitlement to 50 per cent of the capacity of the fixed link, per hour, in each direction, to operate international passenger and goods trains. They were required to surrender part of their entitlement if requested, any withholding of such agreement requiring justification. The term of the contract was 65 years. The Commission decided that the usage contract breached Article 85(1) of the EC

Treaty, but nevertheless promoted economic progress. The contract was therefore exempted under Article 85(3) EC, but subject to conditions designed to ensure that the parties did not eliminate possible future competition.

The Commission's decision is subject to appeal. The railway companies have argued that the Commission defined the market so narrowly that the Channel Tunnel became self-evidently an essential facility.

4. Access to essential facilities

Access

In the UK the issue of access to the Pentagon Bus Station in Chatham arose in the MMC monopoly inquiry into Mid Kent Buses[8]. The MMC's report applied the same principles as an essential facility doctrine, but used different language; the MMC's own consultants advised that access to the bus station was not essential, but merely desirable. In reaching its decision to open access to the bus station, the MMC recognised that there were differing expert views on whether there was spare capacity in the bus station, but concluded that: "if equal access for all operators were held to be desirable, it might be necessary in some circumstances to provide access even at the cost of ejecting some of the incumbent's operations" (paragraph 6.54; emphasis added).

Another UK bus market case in which the question of essential facilities arose was the Competition Act investigation into Southern Vectis, the former monopoly supplier of bus services on the Isle of Wight. Following deregulation of the local bus market, the OFT upheld the complaint of Gange - a small new entrant bus operator - that it could not gain access to the bus station owned by Southern Vectis in the centre of Newport, the main hub of the Isle of Wight bus network. Ridyard[9] has observed that the locational advantages of the bus station could have been replicated by Gange's own bus stop, which was positioned adjacent to the Southern Vectis station. He criticised this as an "extremely weak test for the essential facility".

An EC case highlights the dangers of loosely defining "essential facility" through insufficient consideration of the relevant market and barriers to entry. In its Spices decision in 1978, the Commission prohibited clauses in agreements for the sale and distribution of spices which prevented supermarkets from selling only their own brands of spices. Observers have noted that large ranges of spices could be sold only in large self-service stores, not in small retail outlets, and that the supermarkets bound by the clauses accounted for 30% of all spices sold in Belgium. Although the decision did not use the phrase "essential facility", it has been suggested by some commentators that it was based on the principle that access to a facility (the supermarket shelves) may be essential for competitors.

It can be argued that if the supply of a wider range of goods and services can be brought within the definition of essential facilities, this may anticipate an overly regulatory role for competition authorities as managers of markets generally. The concern is that a wider application of the doctrine may replace the normal case by case analysis in cases of refusal to deal, in which the competition analysis may be similar but is not identical.

Within the US there have been several significant cases relating to utility networks. David M Podell[10] quotes MCI Communications v American Telephone & Telegraph Co (708 F.2d 1081 (7th Cir. 1983)) as an example of the application of the essential facilities doctrine to utilities. In this case, the Seventh Circuit Court of Appeals outlined four elements necessary to establish liability under the essential facilities doctrine:

(1) control of the essential facility by a monopolist;

(2) a competitor's inability practically or reasonably to duplicate the essential facility;

(3) the denial of use of the facility to a competitor; and

(4) the feasibility of providing the facility.

The court held that these conditions were satisfied in this case, and that AT&T's refusal to provide interconnections constituted a breach of US antitrust laws.

Clearly for networks, as with other essential facilities, the "feasibility of providing the facility" is crucial in US antitrust law , and is demonstrated by another US utilities case - The City of Anaheim v Southern California Edison Co (955 F.2d 1373 (9th Cir. 1992)).

If a facility is legitimately designated as essential there should be a requirement for competitors to have access at economically efficient prices in order to compete in a related market (see Section 2 above). The ease with which third party access is afforded to an essential facility will depend on the availability of spare capacity within the facility. Questions arise as to what is a legitimate obligation on the owner or operator of the essential facility to make capacity available in various circumstances. The principal types of cases which arise are described below.

Spare capacity

Where there is spare capacity within the essential facility, not assigned to current or planned services, it is reasonable to oblige the owner to release capacity for new entrants or new services by competitors.[11] We submit that refusal to grant access in these circumstances is likely to constitute an abuse. The economic analysis in such cases is analogous to refusal to supply cases as in the EC case Commercial Solvents (Commercial Solvents 1974 ECR 223). The abuse of the dominant position comprised the company's refusal to supply a competitor in a related market with the raw material which it needed. The Court ruled that a dominant company's plans to begin itself manufacturing the product in the related market did not justify its refusal to supply the raw material to its competitor, when that refusal would eliminate the competitor from the market.

Commenting on the Commercial Solvents case, John Temple Lang[12] observed:

- the case involved refusal to supply a downstream competitor, with important effects on competition: the customer was the only competitor of Commercial Solvents in the Community in the production of the downstream product;

- Commercial Solvents was easily able to supply the competitor's needs: it had spare capacity and did not need all its production for its own use;

- no other justification for the refusal to supply was suggested.

Care must be taken where the dominant operator in the related market has firm plans to utilise additional capacity over time and cannot easily create new capacity. Establishing a new essential facility, or putting an existing essential facility to new use, may engender considerable risk for the owner or operator. Full utilisation of the facility may be central to the economics of both the facility and the service provision by the incumbent in the related market. But the start-up position may be one of partial utilisation while the market is developed. Whether a new competitor should be granted access against the wishes of the incumbent in these circumstances may require a judgement of the viability of the facility and of the incumbent, and appropriate account must be taken of investment commitments, e.g. in specialised

craft or rolling stock. Where the facility is well-established, these considerations are likely to weigh less heavily.

Creation of additional capacity

Should there be an obligation to create more capacity if feasible? In the case of UK utility networks, there are licence obligations on network operators to connect new customers and to provide access to competitors (subject to conditions). To the extent that connection has implications for overall capacity of the network system, it could be argued as a matter of policy that the obligation on the utilities under general competition law extends to the provision of additional capacity, subject to planning constraints. Whether the investment to create the additional capacity is undertaken by the owner of the essential facility or by the new entrant to the related market is not of concern, so long as the owner is adequately compensated for any investment he has to make, and his need to be rewarded for his main investment in the facility is recognised. It may not be unreasonable to insist on guarantees from the proposed user, depending on normal practice in the related market and ease of entry to that market. Refusal by the essential facility owner to permit the creation of additional capacity to accommodate competitors is likely to constitute an abuse unless the facts show clearly that it would not be feasible to do this.

Surrender of capacity by the incumbent

Should owners of essential facilities be obliged to give up capacity to accommodate new entrants where there are capacity constraints? This question is particularly relevant to cases where the owner competes in the related market, but also has implications for owner/operators who merely provide facilities which are used to full capacity by other parties. To facilitate new entry by forcing the withdrawal or partial withdrawal of an incumbent, however, may be an act of faith that the new entrant will provide the anticipated benefits to consumers. The new entrant could merely replace the services withdrawn, rely on the market niche so created, and follow the price leadership of the incumbents. It is arguable that such judgements are for legislators rather than competition authorities in the absence of actual abuse.

The preferred approach by competition authorities when faced with cases where capacity is fully utilised should be to assess whether the current usage of the essential facility has led to some form of abuse. The abuse may take a number of forms, including a refusal of access to spare capacity freed by competitive displacement, e.g. when supply is first liberalised. Another typical concern which may arise is the inefficiency of the incumbents.

The greater likelihood is that the incumbent's dominance in a related market results from his ownership of the essential facility being abused. In such cases that dominance may best be corrected through regulatory action to enforce access by competitors to the essential facility. Generally, remedies should focus on correcting the abuse without necessarily abrogating the incumbent's property rights.[13] The maintenance of an adequate rate of return on investment and the viability of the incumbent must be important considerations in framing possible remedies.

Reservation of capacity for new entry

Should capacity be reserved for any future new entry? This question goes direct to the heart of the Channel Tunnel Usage Contract case mentioned earlier. The purpose in reserving capacity would be to prevent foreclosure of a market to new entrants by ensuring that a major barrier to entry did not develop. With the guarantee of competitive entry, without the need for further regulatory action, the incumbent would have a strong incentive to optimise consumer benefits and behave as though it was in competition.

However, we have argued above that competition concerns should arise only where there is some abuse in relation to the usage of the facility, the services provided through it or a closely related market.

In the absence of this, there is no basis for action under general competition law: if Governments are concerned that the risk of abuse in the future is unacceptable, the appropriate method of regulation is through legislation, privatisation, or by some other administrative procedure to produce competing services. If the owner of the essential facility has transferred the right of access to another undertaking on an exclusive basis the same criteria should apply to the new owner of the rights. It is not appropriate to seek to apply restrictive agreement law in order to place obligations on the new owner which could not be applied to the original undertaking.

Moreover, in economic terms, a proportion of reserved capacity maintains uncertainty for both the operator and user of the essential facility. Both parties are likely to want to maximise utilisation of the facility, and should do so to gain optimum economic efficiency. Incumbents may plan to phase in new services over time, as the market is developed, and require headroom in capacity to facilitate the implementation of their investment strategy. Artificial constraints on commercial utilisation of a facility can only compromise the success of the facility and the services which are contracted to use it.

Summary

Where a facility is properly designated as essential in relation to a relevant market it is the facility owner who should be required to prove that his refusal to supply is based on an objective justification. This has been the approach which the European Commission has tended to adopt in the past. Cases where the refusal to supply can be objectively justified are rare (other than the normal commercial reasons, such as creditworthiness) and must be regarded as exceptional.

In general competition law, the principles set out in this section need to be related to the powers available under the law to enforce them. This is discussed in relation to abuse, in section 5 below.

5. Market liberalisation

The usefulness of the essential facilities doctrine in pursuing the objective of liberalisation may be constrained in two ways. First, under EC law where the Commission or the European Court accepts that a service is of general economic interest or of a revenue producing character, Article 90(2) may provide a defence. In most countries, the ability of competition law to attack statutory monopolies is severely constrained. Second, general competition law alone should not be used to facilitate entry where there is no abuse. If structural separation is regarded as desirable in such cases there may be a need to rely on EC Directives or specific new legislation. In some of the examples shown in the list of cases involving essential facilities in Section 3, there is a danger that the doctrine is developing almost as a parallel set of rules, without any firm roots in established legislation or precedents.

General competition law is designed to detect and correct abuse or anti-competitive practices and agreements. The difficulty is to create wide-ranging powers to promote competition effectively which is particularly difficult under EC law. Sector specific legislation may be used in parallel with general competition law as in the UK with the utility regulatory regimes.

6. *A priori* rules

Clear rules and conditions for access to essential facilities promote competition by reducing uncertainty and increasing transparency. Rules can be established in some sectors by competition authorities, following an inquiry into a specific case of alleged abuse. Alternatively, the authorities may require the operator to publish conditions, against the threat of an abuse finding. Another approach, followed by the UK in electricity privatisation and in telecommunications since the duopoly policy was

abandoned, has been to have clear rules on access to networks or to specific parts of networks, and to grant operating licences to new entrants with minimal conditions.

These *a priori* rules were established in the UK by the relevant Privatisation Acts. Coupled with the statutory duty placed on sectoral regulators to promote competition, and backed by the parallel powers in general competition law, the sectoral regulators assumed greater and wider powers to open up markets and facilitate competition than would have been possible under general competition law alone.

7. Pricing

The benefits of affording access by competitors to an essential facility derive from the increased competition in the supply of goods and services to final users, and the stimulus to dynamic efficiency provided by that competition. In principle access pricing is the means of ensuring that the owner of an essential facility is adequately remunerated and thus has no difficulties in admitting new entrants to the related market. In practice, economically efficient access prices are difficult to establish and an optimum solution cannot be prescribed to meet every eventuality. Where an essential facility gives rise to a competition problem, a vertically integrated incumbent will have an incentive to overstate the cost of access and hence the access price. The balance to be struck is between affording access for third parties and enabling the owner of the essential facility to cover the actual costs of the facility, and in some cases the potential risk of establishing the facility.

These considerations will be especially relevant in the development of <u>new</u> essential facilities, where it is policy to encourage private investment. In other cases, where the essential facility may have been funded by the state while the incumbent was in public ownership or was granted special or exclusive rights which are no longer necessary for the provision of a service of general economic interest, the essential nature of the facility may arise from the inability of private sector competitors to fund competing facilities economically. If the sector is governed by special regulation such circumstances may give rise to wider policy considerations designed to bear down on access prices in recognition of the past public funding of the facility and the objective of securing greater competition in the related market.

8. Exceptional cases

Rare cases may arise where, because of the nature or technical characteristics of the market, or (for example) there is new investment required in a novel high-risk facility, essential facility owners may decline to provide access to third parties, because there is no spare capacity and no additional capacity can be created. If competition authorities accept that the refusal of access is objectively justified on these grounds and, therefore, the refusal has not in itself constituted an abuse, further scrutiny is still necessary to determine whether there is:

(a) <u>inevitable abuse</u> (which may be tackled in a European context through Article 90 in appropriate cases); or

(b) other <u>actual abuse</u> in the operation of the essential facility or in a related market; or

(c) <u>potential abuse</u> which <u>can</u> be tackled (at least under UK general competition law).

If no abuse is revealed which is actionable under the general competition law, it is a question of policy as to whether a specific directive or legislation is needed to address a potential abuse, for example to provide sufficient certainty to potential entrants in the related market.

In cases where capacity is not currently fully utilised by the incumbent, the issue arises as to whether competition authorities may in such cases legitimately limit the ability of the essential facility operator to expand his provision of services. We submit that this would only rarely be appropriate under general competition law.

Consideration also needs to be given as to whether the essential facility operator should be guaranteed a certain level of usage. Again, we submit that in general this would be inappropriate. However it should be recognised that in order to promote private sector investment in a new facility which entails considerable risk, some assurance over access to capacity may have to be given.

9. The position of UK competition authorities

The views expressed in this paper should not be taken as an indication of how UK competition authorities might take decisions in individual cases.

Notes

1. *"Essential Facilities: An Epithet In Need of Limiting Principles"*: Antitrust Law Journal Vol 58 990; 841-853.

2. Keith N HYLTON: *"Economic Rents and Essential Facilities"*, Brigham Young University Law Review 1991.

3. The most frequently cited (and more comprehensive) statement of the essential facilities doctrine as it applies in the US is provided by A D Neale in "The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law" (2nd ed. 1970): *"The Sherman Act requires that where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility."*

4. *"Economic Theory and the Antitrust Dilemma"*.

5. John Temple LANG: *"Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities"*; Fordham International Law Journal Vol.18 No.2, December 1994.

6. Derek RIDYARD: *"Essential facilities and the obligation to supply competitors under UK and EC competition law"*. NERA Paper September 1994, pages 7-8.

7. *Essential Facilities Doctrine in EC Anti-trust Law:* [1994] 6 ECLR.

8. Monopolies and Mergers Commission report: *"The supply of bus services in Mid and West Kent"*; August 1993 (Cm 2309).

9. Derek RIDYARD: Op. Cit. Pages 10/11.

10. David M PODELL: *"The Essential Facilities Doctrine"*, Tulsa Law Journal Vol. 24:605 1989.

11. Public telecommunications operators are required to provide open and efficient access to their networks under the terms of two EC directives introduced through the Open Network Provision programme (ONP). The ONP Leased Lines Directive 92/44 has already been adopted; the ONP Voice Telephony Directive will come into force shortly.

12. John Temple LANG: *"Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities"*; Fordham International Law Journal Vol.18 No.2, December 1994.

13. The first-best remedy is generally to remove the source of the dominance. If not feasible (as in the case of natural monopoly), second-best remedies involve trying to modify the abusive behaviour without offsetting losses of efficiency or welfare.

UNITED STATES
FEDERAL TRADE COMMISSION (FTC)

1. Introduction

Beginning October 12, 1995, the Federal Trade Commission held hearings in order to assess whether changing economic factors, such as the globalization of trade and the increased importance and pace of technological change, suggest the need for adjustments to current antitrust and consumer protection enforcement policies. The Commission began with the proposition that the core provisions of antitrust and consumer protection law serve as effective tools against the exercise of unrestrained economic power and the deception and abuse of consumers. To learn as much as possible, the Commission issued a notice requesting comments from the public on issues involving the changing nature of competition. A variety of witnesses, including business, government, legal and academic representatives, appeared at the hearings which lasted for approximately two months. Additional testimony was submitted in writing. The following is a summary that is submitted to this Working Party with the aim of making delegates aware of issues and views aired during these hearings that relate in particular to the essential facilities doctrine. It does not reflect in any way the views of the Commission or any individual Commissioner.

Discussion of the essential facilities doctrine under U.S. antitrust law arose in various contexts during the course of the hearings, though most often in connection with how antitrust enforcers assess access and foreclosure issues relating to networks and standards. Many witnesses focused on issues related to the computer industry, with some testimony on the lessons to be learned from other network industries such as telecommunications and financial services.

2. The role of the essential facilities doctrine in network industries

Several computer industry representatives proposed a role for the essential facilities doctrine in promoting innovation and dynamic growth of the industry. Some analogize the traditional "essential facility" of a railroad terminal (that other railroads must use to compete) to the interface standards that permit one computer system to interact with another system. Others compared an interface standard to the local switch needed for the provision of long distance telephone services.

Some advocated that interface standards should be available only to those intending to make products complementary to the original product; others advocated access for potential competitors as well as producers of complementary products.

Much of the industry testimony emphasized the importance of interoperability[1] and industry-wide standards to ensuring vigorous competition. Such witnesses advocated the development of open interfaces at the critical junctures in the network as the mechanism for achieving interoperability. Open interfaces were said to foster the development of new products and services built and operated by competing providers, resulting in more competition. On the other hand, there was also testimony that proprietary systems and interfaces would better serve as a spur to further innovation. Some testimony pointed out that innovation could be deterred if a standard were adopted too soon in a network industry. In addition, some cautioned against the potential for standard-setting organizations to exclude new

competitors with product innovations or to subject new competitors to restrictive intellectual property confidentiality provisions that could effectively deter some types of innovation by those new competitors.

Those who favored interoperability identified lack of access to critical interface standards as a major obstacle that smaller, better, competitors must overcome in order to introduce better, faster or cheaper alternatives. One executive of a computer company testified that control over the underlying interfaces is a "very powerful and potentially anticompetitive tool," effectively a "bottleneck." According to some witnesses, control of an interface may be in the hands of either a limited access joint venture (such as a standards-setting group), or a single company whose proprietary technology has been adopted as a de facto industry standard. Denial of access may take the form of withholding all (or just timely and complete information) about critical interfaces, extracting prohibitive royalty rates, refusing to license the technology, or abusing intellectual property rights, particularly with respect to reverse engineering. Some emphasized that, especially in network industries, there tends to be a large installed base of customers who have invested substantial sunk costs in complementary products that operate under the same standard, and that offering a new and even better product based on a new standard may not be enough to persuade such customers to abandon their own investments in the old standard.

Even those who advocated use of the essential facilities doctrine to address interoperability and access problems, however, acknowledged that considerable controversy and confusion exists over the doctrine's application. Various witnesses noted the confusion over its application to unilateral versus joint conduct, the complications that may arise when intellectual property is asserted to be an essential facility, and the need to clarify the scope and limits of the doctrine as applied to standards activities. One industry representative viewed the disagreement over the doctrine's application as stemming from underlying tensions that exist between those who have invested substantial sums to develop proprietary technology that is adopted as an industry standard and those who need reasonable access to the proprietary technology in order to produce follow-on innovation for that standard. Several witnesses pointed out that one of the most sensitive and difficult issues is how to establish the terms of access.

Testimony from academics underscored the controversy over the essential facilities doctrine. One antitrust scholar and former enforcement official discussed key essential facilities cases and concluded that, with the exception of one case involving a stadium, it was hard to find any truly "essential" facilities. He viewed the doctrine as "not making any sense."

Another academician believed that the essential facility doctrine has been "excessively" applied to multiple-sponsor networks such as joint ventures or functionally equivalent organizations (e.g., ATM and bank credit card systems). Such a tendency would focus unduly on exclusionary issues, making it likely that exclusionary practices would be condemned, absent an efficiency justification. In his view, however, the competitive evaluation of a joint venture's membership rules should balance potential threats to competition from both exclusion and inclusion -- for example, over-inclusion might result in one joint venture with significant market power, whereas exclusion might result in the development of two competing joint ventures. Thus, according to this analysis, an efficiency-enhancing joint venture should be required to admit a new member on reasonable terms only when it can be shown that doing so is essential for effective competition in some market.

3. What constitutes "reasonable access?"

Much testimony addressed the thorny issues of defining open access and specifying reasonable terms for such access. With respect to defining open access, the view of several computer industry representatives was that an interface is open if its specifications and applicable intellectual property rights are readily available for license on a reasonable and non-discriminatory basis. (Some argued that granting intellectual property rights for interface standards is overprotection and diminishes competition.) One academic testified that a technical definition of an open system is impossible, because it is essentially a

rule of reason problem. He also noted the past problem of defining an open airline reservation system and observed that designers of software interfaces with anticompetitive goals have great flexibility to evade a technical definition.

Some industry representatives proposed that a firm that dominates a market with an interface standard should be required to promptly and fully disclose to developers of complementary products all information regarding the standard -- i.e., compulsory licensing of the source code that implements the interface standard. Others underscored the general importance of an open standards-setting process. A warning, however, was raised about efforts by some firms to "game" the standards-setting process in order to gain access to the technology of a firm poised to gain control of a market through superior innovation.

Various other witnesses outlined reasons against imposing compulsory licensing as a solution. Some argued that compulsory licensing has the adverse effect of diluting incentives to innovate. An academic argued that the remedies of compulsory licensing, mandatory admission, or imposition of a duty to deal with a would-be competitor present a difficult issue -- "basically the problem of confiscation, incentive dulling." He cautioned enforcers to be "very, very slow ever to require licensing." In his view, such a solution would only be appropriate in the case where control of a network was acquired illegally through predation. He added that licenses of know-how are very complex arrangements, and that effective court orders would have to involve extensive judicial regulation of the kind found in the Modified Final Judgement in the AT&T case. Another witness added that a blanket approach of compulsory licensing might dilute all intellectual property and thereby hurt the entire industry, not just the firm that engaged in abusive conduct or constituted the "bottleneck."

By contrast, an economist who has researched such issues for the past forty years reported on a large variety of empirical studies, which consistently have shown that, in general, the compulsory licensing of patents pursuant to antitrust decrees has not led to reduced innovation efforts. However, compulsory patent licensing as an antitrust remedy also failed to lead to any significant impact on the market structure of the affected industries, with a few exceptions. The economist reported that a new study is being performed that may reveal more information about the importance of intellectual property protection to businesses in the 1990s.

There were different views on whether providing access to would-be entrants offering a complementary product posed the same concerns as providing access to a rival. One computer industry representative discerned a difference between allowing a second firm to replicate an operating system designed by the owner versus allowing the second firm to introduce its own value-added product on the other side of the interface (and gathering economic rents only on its own product). Another witness disagreed, contending that access to the interface standard gives value to the complementary products, and that the innovator of the system is entitled to that value. Yet another argued that today's complementary product may be tomorrow's competitor, and compulsory licensing may simply protect competitors, not the competitive process.

Of particular interest was the testimony of representatives of the telecommunications industry on the lessons to be learned from their experiences. This testimony highlighted the key issues and practical problems in defining the terms of access. One telecom representative testified that his industry is a good example of the need for open architecture and interconnectivity. In his view, the basic questions are: How far to go in interconnection? What do you pay for it? Who will resolve disputes?

On the first question, one important issue is defining where the firm will interconnect, and whether or not there should be a right to connect anywhere the entrant wants in someone else's system or network, regardless of cost to the owner or the effect on the owner's system or network. As to pricing, the witness said that regulation of the telecom industry has resulted in the industry selling a lot of services below cost. On the question of dispute resolution, one recommendation was that the first step should be private discussion rather than regulation, so that solutions are tailored to actual problems and do not result

in unnecessary and overly broad regulatory solutions. Where the consensus effort failed, arbitration might be a reasonable next step, followed by resort to a regulatory agency, according to this witness.

Another witness gave his views on the lessons to be learned from the Federal Communications Commission's decision involving its so-called "open network architecture" ("ONA") policy. He stated that the FCC's concern was the same as in other network industries -- i.e., an entity that controls the bottleneck or essential facility could leverage that control to dominate other potentially competitive markets. He identified four elements of the ONA policy that highlight the problems with which regulators or antitrust authorities must deal: 1) the disclosure of technical information; 2) uniformity among networks; 3) definition of interfaces; and 4) pricing of assets. Noting that not all of these elements will be present, or present to the same degree, in every network industry, he offered the following conclusions.

First, the policy of requiring the provision of information to rivals raises the issues of how much information must be provided and how far in advance of making any change. The more and earlier the information, the more effectively rivals can compete; requiring very long lead times may reduce substantially the rate at which new technologies and services are introduced. A policy of early disclosure, however, could have the effect of reducing the returns to innovation, precisely because it would make rivals more effective competitors.

Second, open systems may not be sufficient to promote effective competition if different firms offer different open systems. There may be economies of scale in providing complementary products, and some of these economies will be lost if rival suppliers must offer products with different specifications to different networks. As a result, the number of competitors is likely to be much smaller if the geographic market is local or regional rather than national or global.

Third, the number and identity of interfaces that are available for interconnection may count as much as the availability of information about their technical specifications. Competition may fail not because competitors do not know how to connect to a network, but because they cannot connect where they want. Fourth, widely-known and available technical specifications are not enough to produce competitive outcomes if the price of access to key interfaces is too high. Limits on pricing may be accomplished either by regulation as in telecommunications, or by standard-setting bodies as a condition of adopting a particular technology as a standard in industries where standards are developed cooperatively.

On the issue of regulatory solutions, an AT&T representative testified that the l982 consent decree is one of the most successful remedies in antitrust history and has significance for other network industries. The decree was formulated on the basis of evidence that divestiture rather than regulation was the appropriate remedy for the antitrust problem created by the combination of local exchange monopolies and related competitive businesses. The decree also imposed mandatory equal access and nondiscrimination duties on the local exchanges. The lesson for other industries is that, where services or facilities essential to competition in network industries are subject to the bottleneck control of a monopoly provider or providers, it would be appropriate to consider whether market forces alone are sufficient to assure access.

Finally, on the important issue of access pricing, there were specific suggestions. One academic suggested a compensatory pricing rule under which the terms of access to a network must be nothing less than fully compensatory. Under this notion, the baseline compensatory level for access price and terms is that which compensates the network not only for the direct and immediate costs of conferring access on an outsider, but also that compensates the network or its members for the lost mark-up, the lost contribution, or even the lost profits that the entry of the new player would cause those who are already members of the network. The stated rationale for this formulation is that it avoids the confiscation problem and tends to conduce to efficiency. Others argued that where terms are already available to others, such as in the case of joint ventures, it may be easier to define reasonable access terms for new members.

As the foregoing summary reveals, the testimony was conflicting and no clear consensus emerged. Both the strengths and the weaknesses of the essential facilities doctrine were recognized in particular fact situations. The witnesses acknowledged that what is perhaps most perplexing, when one moves beyond railroad terminals and stadiums, is the difficulty of devising reasonable remedies and access solutions in the context of rapidly evolving network industries.

Note

1. Interoperability means that different systems, products, and services work together and do so transparently.

UNITED STATES

The essential facilities doctrine in the United States is not so much a separate and distinct doctrine as an outgrowth and specific application of the theory and policy underlying section 2, and to a more limited extent, section 1 of the Sherman Act. Section 2 prohibits monopolization and attempted monopolization -- the acquisition, attempted acquisition, or maintenance of monopoly power through anticompetitive means. In certain circumstances, a monopolist's denial of access to a facility that is essential to effective competition when it would be feasible to provide such access constitutes a form of anticompetitive conduct. In at least some cases, such a denial impedes competition and thereby harms consumer welfare by making it substantially more difficult, or even impossible, for competitors to survive and succeed in the market, without sufficient countervailing procompetitive justification. Similarly, an agreement between firms that has the effect of denying others access to an essential facility can also be the basis for liability under section 1. As with most areas of antitrust law, however, difficult issues arise on both a theoretical and practical level in determining when liability should attach and, interrelatedly, what remedies are appropriate.

The United States Supreme Court has never actually recognized a distinct "essential facilities" doctrine. However, lower federal courts in the United States have found the Supreme Court's opinions consistent with the view that the denial of an essential facility can, under certain circumstances, constitute an antitrust violation. Indeed, a considerable body of case law has developed in the United States from lower court opinions regarding "essential facilities" claims, although not all of it is entirely consistent.

The United States Supreme Court has established a rule that there is no general duty on the part of a monopolist to cooperate with rivals and that in the vast majority of cases, a monopolist may "deal with whom he pleases."[1] Such a rule is sound. A firm might want the monopolist to agree to terms allowing it to become a supplier, a customer, a producer of a complementary good, or even a competitor. The theory is that a monopolist should be permitted considerable latitude in making decisions as to with whom it will deal and how it will structure its dealings. Nevertheless, the Supreme Court has also made very clear that "[t]he absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance or that it may not give rise to liability in certain circumstances."[2] In other words, in at least some cases in which a firm with monopoly power refuses to deal with an actual or potential rival, that refusal may give rise to, or provide evidence in favor of, antitrust liability. Similarly, in at least some cases where firms engage in a contract, combination, or conspiracy, the result of which is to refuse to deal with other firms, liability may attach.[3]

"Essential facilities" cases involve refusals to deal of a special type: in such cases, the defendant refuses to provide other firms with access to something that is vitally important to competitive viability in a particular market. Usually, the situation is one in which a vertically integrated firm owns an input (the "facility"), uses that input to compete in a relevant market, and denies requests for access to the input by other firms in the same market. A number of Supreme Court cases are commonly viewed as implicitly supporting liability based on the denial of access to an essential facility. In the first of these, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912), the Supreme Court approved an order requiring a group of railroads, which jointly controlled access and terminal facilities permitting traffic across the Mississippi River, to allow other railroads to join the combination or to use the facilities in a non-discriminatory manner.[4] In Associated Press v. United States, 326 U.S. 1 (1945), a sharply divided Court held that the defendant, an association of 1200 newspapers in which news generated by one member was distributed to the others, could not discriminate against competitors in its admissions policy. Both Terminal R.R. and

Associated Press involved concerted action; two subsequent cases, however, reached the issue of a unilateral refusal to deal.

In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Supreme Court held that a utility violated section 2 when, for the purpose of eliminating competition, it refused to allow municipalities to use its power lines in cases where the municipality was operating its own retail distribution facilities instead of relying on the defendant.[5] More recently, in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), the Court upheld a jury finding of liability where the defendant who owned three ski mountains in Aspen, Colorado, discontinued offering a joint lift ticket with the plaintiff who owned a fourth. Although the Court of Appeals in Aspen Skiing upheld liability on an "essential facilities" theory as well as finding an "ordinary" refusal to deal of a type condemned by section 2, the Supreme Court affirmed solely on the basis of the latter theory. The Court looked at "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'"[6] It considered both the effect and intent of the practice and examined effects with respect to consumers, competitors, and the defendant itself. The Court found particularly probative the facts that there was strong consumer demand for the discontinued joint ticket, the defendant was apparently sacrificing "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival,"[7] and the defendant's purported justifications were particularly unconvincing. Although the Supreme Court in Aspen Skiing explicitly declined to address the issue of denial of an essential facility to a competitor by a monopolist, it did deal with the related issue of a monopolist's refusal to deal with a competitor.

Most essential facility cases considered by lower courts in the United States during the past decade rely on the four prong test enunciated in MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983), a case challenging AT&T's use of local telephone networks to thwart competition in the long distance telephone service market. There, the court held that "to establish liability under the essential facilities doctrine [a plaintiff must show]: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." Id. at 1132-33. This formula highlights many of the key issues involved in "essential facilities" claims.

The first element in this four prong test raises the significant questions of whether the defendant is a monopolist and whether the monopolist controls an "essential facility." The requirements for showing monopoly power are the same as for any monopolization claim under U.S. law.

What constitutes an "essential facility" is perhaps the most problematic question raised by the first element of the MCI test. The "facility" in litigated cases typically has been something requiring a substantial investment, and has historically usually been something large and tangible; there also have been a few cases involving intangible things like intellectual property. Accordingly, U.S. courts have not given much guidance on what may or may not be considered a "facility." There has been substantially more consideration of whether a facility is or is not "essential" to effective competition. There is no single accepted formulation as to how necessary or useful something must be to qualify as "essential"; however, courts are clear that the standard for essentiality is necessarily a high one as a monopolist will almost always possess something its competitors or potential competitors want. Generally, courts have agreed that the facility must be more than merely useful or helpful to be "essential."[8]

A closely related question to whether a facility is "essential" is whether the facility can be reasonably or practically duplicated -- the second part of the four-part test employed by many U.S. courts. Obviously, if a competitor can duplicate the facility at a reasonable cost, it cannot be essential for the competitor to receive access to the facility from the monopolist.[9] For this reason, facilities found to be essential often have been utilities, natural monopolies, or some other sort of asset involving large sunk costs which would be expensive and inefficient to duplicate.[10] Nevertheless, although in many cases the practicality of duplication may be clear, in many cases it is not, and difficult factual and theoretical issues

arise. There is no clear answer as to how “reasonableness” or “practicality” should be measured. In particular, it is not clear under current U.S. law whether “reasonableness” should be evaluated in terms of whether it is reasonable for the complaining firm or firms to duplicate the facility or for any firm to duplicate the facility.

Establishing the third prong of the four-prong test -- that the monopolist denied the essential facility to a competitor -- is usually straightforward. However, difficult issues may arise in cases where a monopolist has not denied access to a facility outright, but rather granted access only under particular conditions and terms. A number of U.S. courts have suggested that a refusal to grant access to a facility on reasonable terms is equivalent to a denial of access.[11] The theory is that a monopolist should not be permitted to circumvent liability simply by offering access on terms and conditions that it knows cannot be accepted. What constitutes “reasonable terms,” however, is a very difficult and fact-specific determination. In particular, it may be difficult to distinguish an "unreasonable" denial of access from a case in which a monopolist simply reaps the benefits of a legitimate monopoly by charging the monopoly price.[12]

The last element in proving an essential facility claim is showing that the provision of the facility was feasible. This element expressly recognizes at least one form of the "legitimate business justification" defense that typically allows monopolists to avoid liability for challenged conduct. If sharing an essential facility "would be impractical or would inhibit the defendant's ability to serve its customers adequately," the defendant's refusal to grant access to the facility cannot provide the basis for a successful monopolization claim.[13] Although in many cases, the feasibility or infeasibility of providing access may be clear, in others it raises very difficult issues, largely because "feasibility" typically refers not only to technical feasibility but to feasibility as a business matter as well. As suggested by Aspen Skiing, a history of providing access may well be strong evidence that such access is feasible.[14] However, in cases where there was no such prior access, or where conditions have changed, the quantitative and qualitative costs a monopolist can be reasonably expected to bear in providing access are typically open questions.[15]

Notes

1. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 (1985).

2. Id. at 601; see also Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992).

3. Concerted refusals to deal and unilateral refusals to deal involve somewhat different issues, and under U.S. law are evaluated under different statutory provisions. For this reason, and because more recent applications of the "essential facilities" doctrine in the United States largely involve unilateral refusals to deal, this paper will focus primarily on single firm refusal to deal.

4. See id. at 410-11.

5. See id. at 377-78.

6. Id. at 602.

7. Id. at 610-11. The defendant discontinued a long-standing practice when it stopped offering joint lift tickets and went so far as to refuse to sell the plaintiff tickets at the regular price.

8. See, e.g., Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568, 570 (2d Cir. 1990) (explaining that denial of the facility must place competitor at a "severe handicap"; "[a]s the word 'essential' indicates, [the plaintiff] must show more than inconvenience or even some economic loss; [it] must show that an alternative to the facility is not feasible"); accord City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648 (10th Cir. 1992), cert. denied, 506 U.S. 831 (1992).

9. See, e.g., City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992) ("[I]f the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all.").

10. See, e.g., MCI Communications, 708 F.2d at 1133 (interconnection to local phone networks deemed essential); Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1987) (large sports stadium); Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 175, 179 (2d Cir. 1990) (large stretches of train track), cert. denied, 500 U.S. 928 (1991).

11. See, e.g., Delaware & Hudson Ry., 902 F.2d at 179-80 (refusal to provide facility at a reasonable price); see also City of Chanute 955 F.2d at 648 (stating that "[a]ccess to an essential facility must be `upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies'" (quoting Terminal R.R. Ass'n, 224 U.S. at 411)).

12. The question of what constitutes "reasonable" terms also bears heavily on the issue of remedy if liability is established.

13. Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978); see also Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 368-69 (9th Cir.) (denial of essential facility legitimate where it would have been "uneconomical" to provide the facility), cert. denied, 488 U.S. 870 (1988); MCI Communications, 708 F.2d at 1138 (defendant

could deny essential facility if it "had a reasonable basis in regulatory policy to conclude, and in good faith concluded, that denial of interconnection is required by concrete articulable concerns for the public interest").

14. See, Delaware, 902 F.2d at 1795 ("feasibility demonstrated by fact that use was permitted prior to restriction").

15. Compare Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 545 (4th Cir.) (section 2 did not compel CSX to make its tracks available to a short-line railroad on the same terms available to CSX; it was sufficient for CSX to offer a reasonable rate for hauling even if "trackage rights were preferable"), cert. denied, 502 U.S. 814 (1991) with Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 300, 304 (11th Cir. 1989) (requiring retail-level natural gas company to "sell or transport natural gas" to its competitor at a "reasonable price" as a remedy for a course of conduct that included, inter alia, a refusal to deal), reinstated after vacated, 912 F.2d 1262 (11th Cir. 1990) (en banc) (per curiam), vacated as moot, 499 U.S. 915 (1991).

COMMISSION OF THE EUROPEAN COMMUNITIES

Defining what is legitimate competition in the context of companies' duties to supply competitors and to grant access to essential facilities

1. Introduction

Although, in general, competition law discourages competitors from co-operating with one another, this paper considers the development in European Community case law of competition law principles which, in certain circumstances, impose duties on companies to supply competitors with important goods or services. In particular it reviews the more recent principle imposing a duty to grant access to an essential facility on non-discriminatory terms. Essential facility cases are not exceptions to normal rules, but specialized examples of general rules about discrimination and handicaps created by dominant companies.

To ensure that companies are not deprived of the legitimate use of their competitive advantages, Community law has been cautious and pragmatic in its application of these general principles. Although their scope is not fully clarified, this paper seeks to identify from the cases the likely situations and conditions in which these principles will apply and the key issues which need to be examined.

The principles concerning duties to supply and to grant access to essential facilities have evolved mainly from Article 86 cases involving an abuse of a dominant position, but also from Articles 85 and 90 cases as these also implement the fundamental objective of Article 3(f) of the EC Treaty, to ensure that competition in the common market is not distorted. Accordingly, these principles apply to both State-owned and private enterprises.[1] Although, different issues arise for jointly owned facilities, the Commission must reconcile the same policy objectives as when it insists on non-discriminatory behaviour under Article 86: ensuring access for other competitors to essential services, not unduly limiting the advantages of ownership or otherwise sought by the parties, and minimising administrative costs for all concerned.

The development of such principles, which are not mutually exclusive, is shaped by other legal principles in accordance with which Articles 85 to 94 must be applied. These include the principles of proportionality, that is, action by the Community institutions should not exceed what is necessary to achieve the objective sought, of equality, and of non-discrimination.

2. General: The duty to supply competitors on non-discriminatory terms

The minimum which can be deduced from Community case law so far is that there is a broad principle that companies in dominant positions must not refuse to supply their goods or services to either competitors or customers if the refusal would have a <u>significant</u> effect on competition which cannot be legitimately justified.[2] The leading authority is the Court's judgement in *Commercial Solvents*, which resembled a rule of reason analysis and the principle has been subsequently applied by the Court, Tribunal of First Instance and Commission in many cases. Where there is a duty to supply, Article 86 itself requires a duty not to discriminate if the buyers are in competition with one another.[3]

Assessing the effect on competition in each case requires factual analysis and is subject to the principle of proportionality, weighing any justifications submitted by the dominant company for its

conduct against the effect on competition.[4] When the customer is also a competitor of the dominant company in some market (usually downstream) the effect on competition depends largely on whether the buyer can obtain the goods or service elsewhere, on whether there are other downstream competitors, and on how important the goods or services are to the buyer's business.

If the buyer has another satisfactory source of supply or if the goods or services are not essential, or if one more competitor will not add significantly to competition, antitrust law should not oblige the dominant company to supply. The case law shows that if, in practice, the refusal by the dominant company to supply means that one of very few competitors is forced out of the market and there is spare capacity, there is a duty to supply and only strong business reasons can justify the refusal.

3. The duty to provide access to "essential" facilities on non-discriminatory terms

The broad principle, imposing a duty to supply where there is a significant and unjustified effect on competition, initially made it unnecessary to develop a special category for essential facility cases. "Essential facility" cases are not exceptions to normal rules, but specialized examples of general rules about discrimination and handicaps created by dominant companies; the concept may be merely a useful label for some types of cases rather than an analytical tool. In brief, the principle is that dominant companies must make facilities available when this is essential to enable competitors to compete. In the Commission's first statement of a general principle using the phrase "essential facility", explicitly based on the case law of the Court, beginning with *Commercial Solvents,* it said:[5]

> "a dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that Article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market ... without objective justification."
>
> "Specifically where...the competitor is already subject to a certain level of disruption from the dominant undertaking's activities, there is a duty on the dominant undertaking not to take any action which will result in further disruption. That is so even if the latter's action make, or are primarily intended to make, its operations more efficient."

This principle applies when the competitor seeking access to the essential facility is a new entrant into the relevant market.[6] A decision on interim measures may be necessary, to ensure that any final decision of the Commission is effective.

Determining what are essential facilities is a question of estimating the extent of the handicap to competitors, and whether it would be permanent or merely temporary. There are no specific legal rules to resolve these cases; it requires application of basic principles of antitrust economics. The duty to provide access to a facility arises if the effect of the refusal to supply on competition is objectively serious enough: 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.[7] Hence, access to a facility is "essential" when refusal to supply would exclude all or most competitors from the market.

In most cases, the dominance will be largely due to owning or controlling the essential facility. Although the company need not be dominant on both markets, if it is dominant also on the downstream market, the arguments for a duty to provide access are very much stronger.

The test of whether there is a duty to deal is an objective one such that a particular competitor cannot plead that it was especially vulnerable, whether or not that fact was known to the dominant company. Community law protects competition, not competitors and the dominant company should be able to assess the lawfulness or otherwise of its decision to deny access at that time without any confidential information about its competitor's business or intentions.

It might be a defence to argue that some companies seeking access are already in a position to provide the facility for themselves. However, the reasons as to why they cannot may be physical (e.g. harbor), political (environmental objections) or economic (insufficient economies of scale). It is not necessary to show that what is called a "natural monopoly" is involved.

Situations raising issues concerning essential facilities

The duty requiring access to be granted to an essential facility can arise in any industry but is of increasing importance in telecommunications, the transmission of energy, transport and is a crucial legal problem arising after an industry is deregulated.[8] However, it should be noted that the Commission has considered that these industries could not be satisfactorily liberalized using only Community antitrust law, and that it is necessary to adopt general measures of which access to networks and grids would be only one aspect. As the EU is not yet in fact one uniform market and has many national regulated monopolies or State-owned companies with their own facilities which are essential for all or most of their downstream competitors, the essential facilities principle is, in effect, the follow-up of Article 90 EEC Treaty. It is also important where technical developments or new forms of co-operation, or both combined, may create new essential facilities which no competitor previously had, or needed to have, in order to compete. As illustrated by case law, an essential facility may be either a product, for example a raw material, or a service or access to a physical thing or place such as a harbour or an airport.

Cases which may raise issues concerning essential facilities include, for instance:

- car ferry companies which provide harbours for other ferry companies;
- companies which provide separate but related services;
- railways which both transport goods and provide haulage for other companies which transport goods;
- banks which control cheque clearing facilities;
- airlines which own or control Computerised Reservation Systems which are essential to enable travel agents to obtain flight information and make reservations;
- airlines which operate airports;
- telephone companies which provide mobile telephones, and long-distance wire telephone lines;
- companies which own electricity grids and power lines and gas pipelines;[9]
- performing rights societies which are needed to collect royalties on behalf of owners of rights in musical and other works;
- television companies which sell magazines giving TV programs.

This last example involves the use by a dominant company of its intellectual property rights to prevent competitors from producing directly competing products.[10] Although a refusal by the owner of an intellectual property right to grant a license cannot in itself constitute an abuse of a dominant position, "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct".[11] The remedy of compulsory licensing may be imposed if necessary but in accordance with the principle of proportionality.

The cases on telecommunications show that, in general, a company in a dominant position in one market may not use its power to extend its dominance or monopoly into other markets.[12] This principle is relevant to, but not to be confused with, the principle that dominant companies must make facilities

available when this is essential to enable competitors to compete. Access issues have arisen in many recent Commission cases concerning the newly liberalised markets in the telecommunications, media and information technology sectors. In the field of media, the central issue in several cases has been access to program content. With the development of pay-TV and the convergence toward multi-media, conditional access systems and access to set top boxes have begun to play a major role.[13] This was the case in two recent decisions in the fields of telecommunications and media, in which the Commission prohibited the creation or strengthening of a dominant position which would foreclose a market before it had begun to develop.[14]

When does the duty to grant access arise?

Key questions in determining whether there is a duty to give access to facilities in refusal cases are (apart from whether the company in question is dominant in the upstream market):

- is the facility created or established jointly by competitors, or unilaterally by a single dominant enterprise?
- is the facility one with unlimited capacity or, if not, has it unused or spare capacity?
- how many competitors, if any, are there in the downstream market, in addition to the company associated with the dominant owner of the essential facility?
- does competition in the downstream market significantly affect the price paid or the value for money obtained by the buyer in the downstream market?
- what legitimate business justification is suggested for the refusal to supply?

It is useful to distinguish between cases in which access to the facility can be given to an unlimited number of competitors (e.g. interlining air tickets, collection of fees for performing rights, patent licences, access to information), and those in which physical or other constraints (e.g. the size of a harbour) mean that only a limited number of companies can use the facility, and the facility may or may not be fully utilised.

Several difficult questions arise: what are the dominant company's duties to its competitors in granting access to its facility, in granting licences of intellectual property rights to enable them to compete with its products or in enabling its competitors to adapt their products to make them compatible with the dominant company's new or altered products? These require a distinction to be drawn between the legitimate use of its legitimately obtained competitive advantages, which a dominant company may exclusively enjoy, and advantages which are contrary to Article 86 to use exclusively or which competition law should not allow to be used exclusively. A further difficulty with imposing a duty to contract is the administrative costs for the companies and for the authorities responsible for enforcing the principle.

Duties which arise in granting access

Commission case law has recognised that in situations in which access to a facility is essential, the rule to supply on non-discriminatory terms to competitors is to be strictly observed. There will be few exceptions to this rule where it applies. The terms of this rule and its exceptions need to be clarified as far as possible and this can only be done by case law and analysis.

A dominant owner of a facility is not entitled to operate the facility or improve its services to buyers in such a way that the goods or services offered by its downstream competitors are made less satisfactory or less readily available unless there is some sufficient overriding benefit to consumers or some reason based on the dominant company's objective interests as the owner of the facility, but not merely those of its own downstream operation.[15] Difficult questions about business justification would arise if it was possible to improve the dominant company's service greatly at the cost of a small deterioration in its competitor's service, producing a net benefit for users. If it chooses to change the use

of the facility such that it is no longer available to either its own or its competitors' downstream, the dominant company has a duty to provide users in time with the information they need to exercise their rights, and to consult with them to make the necessary arrangements; this is a duty to negotiate in good faith.[16]

When a dominant company owns or controls a facility, access to which is essential for its competitors, and also uses that facility itself, it has a conflict of interest which would not arise if the facility was owned by an independent public utility which would have a duty of impartiality, or by a separate owner which, even if dominant, would be entitled to protect its interests as owner. It is not easy to see how any standard lower than that of an independent owner could be justified or formulated satisfactorily.[17] Thus, the Court of Justice's case law on the duties of state enterprises with regulatory powers is relevant, particularly where these bodies have conflicting interests in operating a public infrastructure and also offering competing goods and/or services in a related market.[18]

While the essential legal principle is that the dominant company must not discriminate, other legal principles may also apply such as its charging "unfairly" high prices for access to the essential facility, contrary to Article 86, which is discussed in more detail below.

4. Key issues arising in essential facility cases

Scope of the duty to provide access

A company has a duty under Article 86 to provide access to an essential facility only if it is dominant in at least "a substantial part" of the Community market. This may be an important question where the dominance is partly or wholly due to the ownership of the facility and where the facility is physical (e.g. a harbour or airport) on a particular route. The economic importance of the geographic market concerned must be considered to see if it is "substantial".[19] In the context of ports and transport services, several ECJ and Commission decisions show that a route or port which carries a quantity of goods which is economically significant in relation to a Member State or an important region of the Community, can be considered a "substantial" part of the Community market.

Competition law does not oblige a dominant company to share, on a non-discriminatory basis, non-essential advantages which it has obtained or developed through its own efforts, such as when access to the facility is not essential but merely advantageous. As outlined above at the first paragraph in Section 3, access to a facility is essential to competition if the handicap resulting from denial of access is such that it can reasonably be expected to make a competitor's activities in the relevant market either impossible or permanently, seriously and unavoidably uneconomic, thereby creating an insuperable barrier to entry. However if competitors have an economic alternative, no such barrier to entry has been created or raised, and there is no duty to provide access.

A company has a duty to provide access to competitors only if it is in the business of providing services they need. A vertically integrated company is not necessarily obliged to provide access to a facility which other companies wish to use if it is not providing them to any independent users. The key test seems to be whether its upstream or downstream operations are merely part of the same business or separate in nature.

The practice of the industry concerned and the expectations of buyers or users may make it essential to have access to a facility which in other circumstances might not be essential (e.g. banks[20] and cheque clearing facilities, airlines and computerised reservation systems, performing rights societies). However, it is essential that the co-operation between competitors is not itself significantly anti-competitive. The duration of any long term contract between the owner and a particular user of the facility

must be reasonable and this will depend, *inter alia*, on whether either party has invested substantial sums primarily on the basis of the agreement.

This approach does not deprive a dominant company owning the essential facility of the benefits of ownership, including making a profit. However the net charges to its own operations must not be less than those it charges to its competitors. Regarding the question of the legal level of pricing, Article 86(a) expressly prohibits a dominant undertaking from imposing "unfair" prices or "unfair trading conditions", including low prices which are exclusionary (i.e. below cost) and high prices which are exploitative.[21] The Court regards prices as unfair when they are excessive in relation to the economic value of the service actually provided.[22] To determine whether a dominant company is imposing unfair conditions, the Court has compared the dominant company's rates to those applied by similar companies in other Member States; if these are significantly higher, without objective justification, its imposition of such rates will infringe Article 86.[23]

The Commission has stated that it does not normally in its decision-making practice control or condemn the high level of prices which a dominant company may charge. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrant who would normally bring about effective competition and the price level associated with it.[24] A dominant company therefore has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition or to prevent unfairly the emergence and growth of new or existing competitors. It is not the Commission's task to decide either the level of prices or which criteria should govern the setting by the dominant firm of its prices; its duty is to ensure that these are applied in a non-discriminatory and objective way.

The need for an effect on competition - the character of the downstream market

In single firm cases, there is no duty to supply if the downstream market is competitive, even if there is spare capacity, unless the company seeking the supply can show that:

(a) it will provide a significantly different product or service not provided by existing competitors, or
(b) it is being discriminated against to discourage it from competing vigorously.

Except in selective refusal cases,[25] the rules about the duty to supply downstream competitors do not apply to distributors since a refusal to supply a particular distributor does not have a significant effect on competition.

The significance of spare capacity

Economics and the Community law principle of proportionality require a distinction to be made between cases where there is spare capacity and where there is none. If the capacity of the essential facility is not fully used, or if by its nature its capacity is unlimited, the justification for refusing access is harder to find, especially where the owner of the facility or its associated company has a strong or dominant position in the downstream market. Incumbents should not be required to scale down or reorganise their existing activities unless an identifiable increase in competition can be expected as a result. It is necessary to assess whether the capacity which the owner claims is fully utilised, is not in fact being inefficiently used or whether the apparent use is not real use or whether the purpose of long term contracts is primarily to make the facility unavailable to new entrants (which would be contrary to Article 85).[26]

Access for how many competitors?

When the dominant company has a duty to provide access to its facility for competitors, it must objectively decide what is the optimum or maximum number of users which can satisfactorily use the facility, and then allocate them in a non-discriminatory way, without giving preference to its own operations. The duty to provide access applies to a new entrant[27] and also to new entrants in new markets on the ground of the "development" of competition.[28] New entrants must be given access where there is spare capacity but where there is no or insufficient spare capacity, the legal position will depend on existing contractual commitments. Provided that these are of reasonable duration, the new entrant must be given an opportunity to compete with other users or potential users for access when the contracts expire.

A company cannot claim the rights of a new entrant user in order to sell them to others; a proposed dealer is not fulfilling the same function as a buyer who buys essential raw materials or components for its own use. A new entrant dealer is entitled to buy only if there are other companies similarly placed to whom the dominant company sells. The owner of the essential facility cannot be obliged to invest in new capacity to provide facilities for more competitors.

New kinds of services or products

The fact that either the existing competitors or the proposed new entrant may be about to introduce a new substantially altered product may be important for determining whether a right to access arises, even if there is effective competition downstream and there is no spare capacity. This will be so in the following situations:

- if the entrant cannot launch its new product or service at the same time as the incumbents, it will never catch up on them; interim measures (i.e. interlocutory injunctions) may be necessary to ensure that the final decision of the Commission is effective;[29]
- the new entrant will provide goods or services significantly different from and more competitive than those provided by the incumbents;
- the new entrant plans to provide obviously useful goods or services which do not yet exist at all.[30]

Temporary duties to provide access - selective refusal

It must be decided whether the provision of an essential facility is a barrier to entry which the competitor must itself surmount from the beginning, or should be helped, temporarily or permanently, to surmount. Whether or not a competitor cannot ever be expected to provide for itself may depend on the economies of scale involved or whether a second facility would create real competition between the two facilities. It may be that temporary duties to provide access to facilities arise only when a dominant enterprise has refused normal industry arrangements selectively to handicap or discourage an active competitor.[31]

Duopolies and joint dominance

A jointly held dominant position can be abused, contrary to Article 86, by one duopolist or oligopolist even if the others have not acted unlawfully. It would therefore be unlawful for one jointly dominant company to refuse access unjustifiably. In the case involving the two big European computer reservation systems,[32] each had a dominant position in part of the Community rather than joint dominance in a single market. As they were jointly owned by several European airlines which were users of both facilities and some of the airlines were dominant in their national markets, they each had duties under both Articles 85 and 86 not to discriminate in favour of the CRS in which they had shares. Community legislation says that the duty may be on the basis of reciprocity; discrimination by one jointly dominant company may relieve the other of its duty not to discriminate against the first.

Cross-subsidising

Community law has not yet fully answered the question of when a dominant company is allowed to charge low prices for products for which there is competition, and high prices for products for which there is none. Under Article 86, cross-subsidising will be unlawful when the low price is exclusionary (i.e. below cost) or the high price is exploitative,[33] regardless of whether or not the products need to be used in combination. A dominant enterprise with a duty to provide non-discriminatory access necessarily has a duty not to cross-subsidise in this way.[34] It must ensure that it can prove that it treats its own operations no more favourably than it treats those of its competitors using the facility, paying the same net charges as other users.

Selective price reductions are probably not prohibited under Article 86 unless they are below cost.[35] It may be unlawful for a dominant company to cross-subsidise selective price cuts targeting a particular competitor, if it was objectively likely that the competitor would be forced out of the market, or if there were circumstances which indicated that the price cuts were intended to discourage aggressive competition. The key issue seems to be whether the dominant company's action is a rational competitive response or goes further than is likely to be profitable and amounts to a demonstration of the dominant company's determination to ensure that the new competitor cannot establish itself.

Under Community competition law, customers forced to pay "unfairly" high super-competitive profits, prohibited by Article 86, can claim compensation. If such profits are used to cross-subsidise predatory prices, competitors can also claim compensation.

5. Selective refusal of access to discourage aggressive competition

A dominant company must not selectively discriminate against a particular customer or competitor to discourage or penalise competition.[36] If it denies access to an important and not necessarily essential facility in order to handicap or injure a particular competitor, it is likely to infringe Article 86, especially if it is acting contrary to industry practice. In contrast to normal essential facility cases, in cases involving selective refusal of access, any special characteristics of the victim are relevant, at least if they are or are likely to be known to the dominant company, because they show how far it is likely to be discouraged from entering the market or from competing vigorously, or forced out of the market entirely.

6. Multi-company and joint venture cases under Article 85

In joint venture cases, the duty not to discriminate is similar to that in Article 86 cases, but arises under Article 85(3) in a wider range of situations.[37] The Commission may impose an obligation on the parents not to discriminate in favor of their joint venture if they have large market shares (even if they are not dominant) and even if they are not controlling an essential facility in the strict sense if:

- the existence of the joint venture would otherwise mean that the parents would deal in the goods or services in question only with the joint venture; or
- if the existence or operations of the joint venture would otherwise impose a serious handicap on competitors excluded from access to it.

Under Article 85, it may be useful in analysis to distinguish between the following types of cases:

- co-operation between competitors is essential to carry out the operations in question e.g. banks' arrangements for clearing cheques, airlines' arrangements to interline (mutual horizontal co-operation);[38]

- the joint venture owning the essential facility is essentially in a dominant position, and this position is not significantly affected by the fact that the downstream users are also its shareholders;[39]
- an essential facility has been developed by a company for its own use, and later shared with other companies as owners and not merely as users;
- co-operation is essential to provide some service for all the participants as, for example, the necessary economies of scale could not have been achieved otherwise (e.g. performing rights societies[40]);
- the facility (ice cream cabinets,[41] petrol pumps etc.) are provided by one party to be used exclusively for the sale of its products. Such an agreement gives rise to the problems discussed here only if other suppliers cannot in practice provide their own facilities.

Although the result is similar whether the case is analysed under Article 85 or Article 86, it is easier to justify an obligation to grant access under Article 85. Under Article 85, the Commission can if appropriate impose an obligation to submit day-to-day discrimination issues to arbitration. It is administratively simpler under Article 85 to require an outsider to be licensed or otherwise given access on the same terms as existing members than to draw up the terms for a kind of contract not previously made.

7. Horizontally integrated dominant companies

Horizontally integrated companies supply two or more products or services which have to be bought or used together by their customers. Access for competitors or for their customers to the product or service of the dominant company can raise issues which are at least similar to essential facility issues. These cases include companies which sell equipment in modules, selling both components and complete products; computers, software and peripherals, sound reproducing equipment and tapes, videos and cassettes, cameras and films, radio transmitting and receiving equipment; equipment and the consumables to be used with it.

Article 86 prohibits horizontally integrated dominant companies from tying-in unrelated products as this is an effort to use power in the market to strengthen the company's position in other markets. This may apply also when the two products, though in separate markets, need to be used together. If so, the basic rules apply for imposing a duty to supply the competitor or its customers and the duty not to discriminate against users who choose to combine products. The dominant company may not put a user who chooses to combine its product with its competitor's in a less satisfactory position than if the user used both of its products. It also has a duty not to refuse its competitors compulsory licences or alter the interfaces of its products without improving them.[42]

The main problem arises over disclosure of interface information. It is not normally necessary for a dominant company to give its competitors information about its forthcoming products, even if its competitors' products may have to be used with them. However, in the IBM case [43] the Commission took the view that disclosure of interface information would not have unreasonably disclosed the non-interface characteristics of IBM's new products. Although it did not explicitly choose the essential facility theory (i.e. that access to interface information was essential for competition) as the basis of a final position, it seems to be one of the best rationales. It is only when two products must be used together that it can be argued that one is an essential facility for the use or sale of the other.

Horizontally integrated dominant companies are able in effect to deny access to an essential facility in the course of their relations with their customers, and they need not have contractual arrangements with their competitors in order to provide access to essential facilities if they are willing or are obliged to do so.

8. Possible justifications for discrimination or refusal of access to essential facilities

The case law so far done little to clarify the circumstances in which discrimination or a refusal can be justified. However it is still open for a dominant company to use genuine advantages of vertical integration either to give itself an advantage over its downstream competitor or to argue that it was not obliged to give the competitor access because the result would be less consumer welfare rather than more. There are probably not many cases in which such advantages of vertical integration could be shown.[44]

It would certainly be a defence in a refusal of access case that the proposed use is inconsistent with the safety or technical standards of the facility or would otherwise interfere with its proper use, or would interfere with the efficient use of the facility by the existing users. If the use of the facility by a new entrant would genuinely cause serious congestion, access can be refused temporarily, and the question whether the available places should then be auctioned or otherwise reallocated would arise.[45]

9. Scope of Commission's role and practical consequences

Factual disputes as to whether in day-to-day operations, the dominant company has discriminated are more suited to national courts than to the Commission - the Commission has no power to award compensation. In some cases, the Commission has ensured that an arbitration system is set up to resolve these kinds of cases, especially where the disputes concern primarily technical issues. It is likely that in the future the Commission will say that essential facilities cases, for example involving individual harbours or airports, when the defendants are not public authorities should be dealt with increasingly by national authorities or courts.[46]

The owner of a facility which gives rise to a duty to grant access to competitors, may be required to separate its management of the facility from its own use of it in order to satisfactorily fulfil its legal duty to provide non-discriminatory access.[47] If it licenses its own use of the facility, the terms should be formalised so that the same terms can be given to competitors. Companies in these situations should seek sound legal advice. The Commission could help by warning the dominant company of its duty not to discriminate, by suggesting open competitive tendering, or objecting to an agreement where necessary and requiring it to be renegotiated. It has also been willing to discuss potential complaints with complainants.

Notes

1. Article 90(1) prohibits Member States by means of laws, regulations or administrative measures, from placing public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86: Case C-18-88, *RTT v. GB-INNO-BM* 1991 ECR I 5941. (See further discussion below at footnote 14.) This may be specially important if a company has been granted control over an essential facility such as an airport or a harbor.

2. Cases 6 and 7/73 *Commercial Solvents* 1974 ECR 223: "an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86." Case 77/77 *BP v. Commission* 1978 ECR 1513: e.g. justified refusal to supply. Case 22/78 *Hugin* 1979 ECR 1869:e.g. unjustified refusal to supply. In the Commission decision *Boosey & Hawkes* O.J. N° L 286, October 9, 1987 the refusal to supply was unjustified as it would prevent a potential competitor's entry into the market of the dominant producer. In *National Carbonising*, O.J. N° L 35/6, Feb. 10, 1976, Case 109/75 R, 1975 ECR 1193, the Commission said that the dominant company has a duty not only to supply the raw material to competitors but also to do so at a price which, in all the circumstances, enables its only downstream competitors to remain in business if they are reasonably efficient. In the Commission's view, a dominant company in this situation has a duty to trade with its subsidiary on the same basis in all respects as it trades with its subsidiary's competitors: any subsidy would be discriminatory. In the *IBM* case EC Bulletin (1984) N° 10, point 3.4.1, the Commission found that IBM, by delaying disclosure of interface information on new IBM products while taking orders for them, was creating an artificial advantage for itself and denying its competitors an opportunity to adapt their products to the new IBM products. See also the undertakings by *Microsoft*, European Commission Press Release, IP/94/653 in order to prevent foreclose the markets for software by means of restrictive licensing practices.

3. Article 86 provides that an abuse of a dominant position may consist, *inter alia*, in "applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage." e.g Case C-18/93, *Corsica Ferries v Corpo dei Piloti del Porto de Genova* [1994] ECR I-1783.

4. In a case of refusal to supply a customer or distributor, the duty may be less strict than the duty to supply a competitor as the Court has held that a competitive reaction by a dominant company must be "reasonable" and "proportionate to the threat taking into account the economic strength of the undertakings confronting each other" provided that the objective effect of the refusal is not to strengthen its dominant position: Case 27/76 *United Brands* 1978 ECR 207. In that case, the objective effect of the dominant company's refusal to supply a distributor, which had actively participated in a sales campaign for a competitor of the dominant company, was to discourage other distributors from promoting competing brands, hence strengthening its dominant position. Article 86 prohibits a dominant company from discriminating between its customers based on whether or not they deal exclusively with it, which creates a competitive disadvantage for competitors of the dominant company at the same level in the market: Case 40-48/73 and others, *Sugar Cartel* 1975 ECR 1663 at p. 2002-2005, Case 85/76, *Hoffmann La Roche* 1979 ECR 461. In Case T-39/90, *Hilti* 1991 ECR II 1439: (Tribunal of First Instance) and judgment of the Court March 2, 1994, Hilti's abusive practices, though intended to exclude downstream competitors, involved both its customers and its competitors.

5. *Sealink/B&I - Holyhead* 1992 (9) Common Market Law Reports 255.

6. *Sea Containers v. Stena Sealink* O.J. N° L 15/8 Jan. 18, 1994 at para. 67, relying on *Hoffmann La Roche* 1979 ECR 461.

7. *London European Sabena* O.J. N° L 317/47 Nov. 24 1988: the Commission relied on *Commercial Solvents* and regarded Sabena's refusal to grant a competing airline access to its computer reservation service as a refusal to supply an essential service. In *Aer Lingus - British Midland*, OJ No. L96/34 April 10, 1992, the Commission considered that the dominant airline's refusal to interline, which was normal industry practice, imposed a "significant handicap" on a new competitor for one of the dominant company's route. Accordingly, in *Lufthansa/SAS* OJ: C201/2 August 5, 1995, the Commission imposed conditions on an agreement between these two large European airlines such that they must (i) on reasonable terms and in accordance with normal industry conditions, interline with new entrants for a period of 5 years; (ii) grant both the opportunity to participate in their frequent flyer programme on non-discriminatory financial terms; (iii) grant slots to other carriers where such cannot be obtained from the slot coordinator.

8. As emphasised in the Twenty-Third Competition Policy Report (1993), paras. 39-41. Regarding, the central issue of access in the field of telecommunications, see H. Ungerer, "EU Competition Law in the Telecommunications, Media and Information Technology Sectors", 22nd Fordham International Anti-Trust Law and Policy Conference, 1995, paras, 98-105.

9. The Commission in its Twenty-Third Competition Policy Report (1994) paras. 80, 223-224, cited *Disma* as an important case example of the need to ensure non-discriminatory access to infrastructure, which in that case, consisted of underground pipelines for supplying fuel to aircraft from the airport, installed by the airport and certain oil companies.

10. Citing Case 238/87 *Volvo v. Veng* 1988 ECR 6211, *RTE and another v European Commission* (joined cases C-241-242/91P) judgment of 6 April 1995. Case C 260/89, *Elliniki Radiophonia Teleorassi (Greek Television)* 1991 ECR I 2925 applied Article 90 and imposed a duty on a television monopoly with exclusive rights to transmit and retransmit programmes to grant non-discriminatory access to suppliers of programmes which were competing with its own programme producing activities. See also Case C-393/92, *Almelo*, Judgment dated April 27, 1994, Conclusions of the Advocate General at paras. 94, 121, 153 ff., 171.

11. *RTE and another v European Commission* (joined cases C-241-242/91P) judgment of 6 April 1995, at paragraph 50. Applying the *Commercial Solvents* principle, the Court held that it is abusive conduct under Article 86 if a dominant company, by relying on copyright protection conferred by national legislation, denies "access to the basic information which is the raw material indispensable for the compilation of " a new product, and thereby reserves to itself a secondary market and excludes all competition on that market, without justification. It is also contrary to Article 86(b) if this refusal to supply basic information prevents the appearance of a new product, which the dominant company does not offer and for which there is a potential consumer demand.

12. In *Telemarketing* , Case 311/84, 1985 ECR 3261, the Court said that although monopolies are not prohibited, they remain subject to Article 86 and that the *Commercial Solvents'* principle applies to a dominant company on a market in a service which is indispensable for the activities of another company in another market.

13. See H. Ungerer, ante, at para. 98.

14. Two decisions under Council Regulation No. 4064/89, on the control of concentrations between undertakings, OJ: L395/1 (1989), corrected in OJ: L257/13 (1990): (i)*MSG Media Services GmbH (MSG)*, OJ: L364 (1994), in which the proposed joint venture would, inter alia, have obtained a lasting dominant position on the market for supplying administrative and technical services for pay-TV in Germany, especially after the possible introduction of digital television. It would also have strengthened the dominant positions of Deutsche Telekom (one of the parties) on TV cable infrastructure and also that of the leading pay-TV suppliers. (ii) *NSD (Norsk Telekom A/S, TeleDanmark A/S, Industriforvaltnings AB Kinnevik)*, not yet reported, see *European Commission Press Release*: IP/95/801. In this case, the vertical integration of the proposed joint venture was such that the downstream markets (for cable TV operations and pay TV) and those upstream (for satellite transponders and the provision of programmes) would have been mutually reinforcing. The parties would have achieved such strong positions that they would have been able to foreclose the Nordic satellite TV market for competitors. In both of these decisions, it was important that due to the imminent liberalisation of telecommunication markets and the fact that new technologies and services are currently under development, the affected markets are currently in a transitional phase and future market structures are being defined.

15. *Sealink/B&I - Holyhead* 1992 (9) Common Market Law Reports 255.

16. *Sea Containers v. Stena Sealink* O.J. N° L 15/8 Jan. 18, 1994, paras. 74 - 75 where the Commission criticised Sealink for delaying and making difficulties in negotiations.

17. In *Sea Containers v. Stena Sealink* O.J. N° L 15/8 Jan. 18, 1994, the Commission criticised Sealink for failing to ensure that it carried out its duties as a harbour operator to other ferry operators. It contrasted Sealink's failure to consult with other ferry operators about its intended harbour redevelopment plans and changes in allocated slot times with the behaviour of "an independent harbour authority", with an interest in increasing revenue at the port, which would at least have considered whether the interests of existing and proposed users of the port could be best reconciled by introducing modest changes.

18. In Case 267/86, *Van Eycke v. ASPA*, 1988 ECR 4769, the Court said that it would be contrary to Article 5 EEC Treaty if a Member State were to delegate to private traders "responsibility for taking decisions affecting the economic sphere". In Case C-202-88, *France v. Commission* 1991 ECR I at p. 1271, the Court upheld the legality of an obligation imposed by a Commission Directive on Member States to entrust responsibility for determining which terminal equipment may be connected to a public telecommunications network to a body independent of public or private undertakings offering competing goods and/or services. Applying this in Case C-18-88, *RTT v. GB-INNO-BM* 1991 ECR I 5941, the Court said: "Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment." See in general, EC Commission, Towards the Personal Communications Environment: Green Paper on a common approach in the field of mobile and personal communications in the European Union (1994) Annex D. See also, Case C-92/91 *Taillandier*, Case C-69/91 *Decoster* and joined Cases C-46/90 and C-93/91 *Lagauche and Evrard*, all four judgments dated October 27, 1993.

19. Case 40-40/73 and others, *Sugar Cartel* 1975 ECR 1663.

20. E.g. the Commission's Guidelines for cross-border transfer systems (adopted in September 1995) focus on payment systems which the Commission considers to constitute an essential facility.

21. In Case C-179.90 *Merci Convensionali Port of Genoa* 1991 ECR I 5889, the Court considered that the following kinds of pricing behaviour (which in that case resulted from the exercise of exclusive rights granted to a company by a Member State) can be unlawful under Article 86: requiring payment for services which were not required; or charging excessive prices; or refusing to use modern technology (if it results in higher costs for customers and prolongs performance of the service); or extending "price reductions to some users offsetting these reductions by an increase of the prices charged to other users". The Court did not specify in what circumstances they would be unlawful.

22. *General Motors v Commission* [1975] ECR 1367 at para.12; *United Brands v Commission* [1978] ECR 207 at para. 250.

23. *Lucazean/Sacem* Joined cases 110/88, 241/88 and 242/88, Judgment of 13 July 1989, relying on Case 402/85 *Basset v Sacem*, judgment of 9 April 1987, Seventeenth Competition Report, point 108. These cases each concerned the rates charged by a copyright society which enjoyed a *de facto* monopoly on the territory of a Member State; the Court held that its exploitation of the scope afforded by its national copyright, may infringe Article 86 as a result of the level of royalties charged.

24. E.g. *DB* case, as discussed in the Twenty-Fourth Report on Competition Policy (1994), point 210. Another cited example is the *Microsoft* case at point 208.

25. Discussed below p. 99.

26. In *Eurotunnel*, OJ L354/66 31.12.94, concerning a joint venture agreement reserving 50% of the tunnel's capacity to British Rail and SNCF, the Commission ruled that the tunnel's infrastructure is an essential facility and that other railway companies must be allowed to utilise 25% of these parties' international train slots for the first 12 years. The companies have appealed this decision arguing that they paid an elevated price which justifies the amount of capacity reserved: Cases T-79/95 and T-80/90. Appeals have also been lodged against another Commission decision *Night Services* OJ 1994 L259/20, concerning its conditional exemption of a joint venture agreement between several railway companies for the overnight carriage of passengers through the Channel Tunnel: *Cases T-384/94, 374/94. 375/94, 388/94*. The Commission required that the railway companies supply, on the same technical and financial terms, to any international grouping of railway companies or any transport operator wishing to operate night passenger trains through the Channel Tunnel, the same services as they have agreed to supply to the joint venture.

27. *Sea Containers v. Stena Sealink* O.J. N° L 15/8 Jan. 18, 1994.

28. *RTE and another v European Commission* (joined cases C-241-242/91P) judgment of 6 April 1995 at paragraph 54, relying on Article 86(b) EC Treaty.

29. E.g. *IGR* Television, EC Commission Eleventh Competition Policy Report (1982) p. 63 and *Sea Containers v. Stena Sealink* O.J. N° L 15/8 Jan. 18, 1994, relying on *Hoffmann La Roche*, Case 85/76 [1979] ECR 461.

30. *RTE and another v European Commission* (joined cases C-241-242/91P) judgment of 6 April 1995.

31. *Sealink/B&I - Holyhead* 1992 (9) Common Market Law Reports 255; in *Aer Lingus - British Midland* O.J. N° L 96/34 April 10 1992, the duty of the dominant company to interline was not permanent since any competitor could be expected to increase its own flight frequency in due course. It was important that interlining is general industry practice based on arrangements between competitors and that an effective competitor had begun operating on an important route.

32. *Amadeus Sabre,* Twenty-first Competition Policy Report (1991) p. 73-74.

33. See Article 86(a) and (c). As mentioned above in footnote 17, in Case C-179.90 *Merci Convensionali Port of Genoa* 1991 ECR I 5889, the Court considered extending "price reductions to some users offsetting these reductions by an increase of the prices charged to other users" to be capable of infringing Article 86. Certain undertakings imposed by the Commission in the case of *Infonet*, Case No. IV/33.361: OJ C 7/3 (1992), (concerning an agreement between numerous telecommunication operators which would lease their lines to Infonet to provide global value added network services) related to cross-subsidising, including recording and reporting requirements.

34. As discussed above in footnote 2, in *National Carbonising*, O.J. N° L 35/6, Feb. 10, 1976, Case 109/75 R, 1975 ECR 1193, it would be contrary to Article 86 for a dominant company to charge a combination of prices, for access to a facility and for its downstream products or services, such that no reasonably efficient downstream competitor could make a reasonable return on capital on that basis; this would imply that the dominant company was subsidising its downstream operations.

35. An extreme example of selective pricing was that of maritime line conferences: Commission decision *CEWAL*, OJ N° L 34/20, February 10, 1993 paras. 73-83, where the intention of selectively offering extremely low freight rates, which were well below normal conference rates, was to eliminate or reduce competition from non-members, contrary to both Articles 85 and 86.

36. Case 27/76 *United Brands* 1978 ECR 207, see discussion in footnote 4 above. Another example is *Aer Lingus British Midland* O.J. N° L 96/34 April 10 1992.

37. E.g. computer reservation systems group exemptions; *Lufthansa Air Europe*, Twentieth Report on Competition Policy (1991) p. 83; *IGR* Television, EC Commission Eleventh Competition Policy Report (1982) p. 63.

38. E.g. *Aer Lingus British Midland* O.J. N° L 96/34 April 10 1992.

39. E.g. the *IGR Stereo Television* case.

40. Case 127/73 *BRT v SABAM* 1974 ECR 51 and 313.

41. *Langnese and Schöller* OJ N° L 183/1 and O.J. N° L 183/9, July 26 1993 and T-24/92 and T-28/92, Order dated June 16, 1992.

42. The *Hilti* and *Decca* cases are authorities for these rules.

43. EC Bulletin (1984) N° 10, point 3.4.1. IBM could foreclose the market as it was able to take orders for its new products before the technical information became available which its competitors needed to adapt their products to make them fully compatible with IBM's new products. The Commission considered that IBM should disclose interface information when it announced its new products and began to take orders for them. As no decision was ever adopted

in the Commission's IBM case, it is not possible to say how the Commission would finally have balanced the welfare losses resulting from IBM's conduct against the welfare losses resulting from eliminating part of the advantages of innovation, and the administrative costs of a legal rule requiring disclosure.

44. The Commission has in one case informally taken the position that the dominant owner of an essential facility could not be criticised for taking advantage of economies of scale in the construction of several new facilities (if they were available only to it) and refusing to allow a downstream competitor to develop a single facility for itself on the dominant company's land.

45. In *Port of Rødby* OJ N° L 55/52, Feb. 26 1994, the Commission rejected, on the facts, the argument that giving access to a new entrant would prevent the existing users from expanding their activities, but in any case they have no guaranteed right to do so unless their usage contracts provide for expansion. Such provision might, if it was unreasonably broad or for too long a period, be contrary to Article 85 as exclusionary. Another rejected argument was that competition would not be increased by the new entrant because the existing port could not handle more ship movements, saying that even if that was true, competition in quality of service would be possible.

46. This would be in accordance with the *Automec II* , Case T-24/9 1992 ECR; judgment dated 18 September 1992.

47. E.g. engaging different employees in each activity, establishing a non-discriminatory code of practice and a consultation procedure involving other users and arrangements for independent arbitration in the event of disputes.

AIDE-MEMOIRE OF THE DISCUSSION

Note by the Secretariat

Market definition and essentiality of a facility

The Chairman noted that, while the physical characteristics of a facility such as a port can be important, it is necessary to identify the relevant market to know whether the physical characteristics are such that the facility itself is, for that case, a relevant antitrust market. Networks, especially of public utilities, are often referred to as essential facilities. Horizontal agreements such as ATM networks, clearinghouses, performing rights societies, computer reservation systems have been considered to be essential facilities. Another class of assets that might be considered to be essential facilities are intellectual property such as computer standards and patents.

He noted that, when the essentiality of a facility is assessed, both the cost and the time necessary to duplicate it should be evaluated.

The delegate from Australia began by saying that Australia had just passed a general national access regime law aimed, mainly, at essential infrastructure facilities but he noted that, in principle, the concept of an essential facility is not limited to publicly-owned, nor to infrastructure, facilities though, given the way the law is written, probably the application will, in practice, largely be limited to infrastructure, especially in the early years. The problem of access to essential facilities is important in the deregulatory process. There are three anticompetitive possibilities that should be guarded against:

-- refusal of access
-- monopoly pricing of access
-- collusion between the owner of the infrastructure and the competing service provider which results in integrated monopoly profits.

Before introducing the Australian method for dealing with these potential problems, he noted that New Zealand chose to deal with them under their general competition law.

Under the new Part IIIA of the *Trade Practices Act*, there are two mechanisms for the provision of third party access. One is a potentially compulsory process whereby the service is "declared" by the designated Minister. Declaration represents a "right to negotiate" access backed up by a compulsory arbitration if the parties cannot agree on any aspect of access. The second mechanism is a voluntary process whereby a service provider can offer the Australian Competition and Consumer Commission (ACCC) a legally-binding undertaking which sets out the terms and conditions on which it will offer third party access. If those terms and conditions are acceptable to the ACCC, then they become the framework for access.

Any person may apply to the National Competition Council for a recommendation as to whether a service should be declared. The Council must be satisfied on a number of matters before it can recommend the declaration of a service. One of these conditions is that access to the service would promote competition in a market (other than a market for the service). Here, "market" is interpreted in a competition context rather than an engineering meaning, e.g., if natural gas were considered to be a relevant product market then access to a natural gas pipeline might be mandated, but this would not be so if natural gas were simply part of a wider energy market. Another of the conditions is that it would be

uneconomical for anyone to develop another facility to provide the service. Here, there could be more than one incumbent. A third but not final condition is that access to the service would not be contrary to the public interest. One of the considerations here would be whether further investment by the owner or a potential infrastructure competitor might be deterred.

He notes that the new Part IIIA of the *Trade Practices Act* does not apply to, for example, intellectual property rights, production facilities such as factories or the supply of goods. However, access to such facilities could be mandated under the general competition law.

The delegate from the United States noted that the Federal Trade Commission had recently held hearings on, among other topics, the antitrust treatment of essential facilities. She noted that the issues of essential facilities arise frequently in consideration of interface standards among computers or software.

During the aforementioned hearings, several computer industry representatives proposed a role for the essential facilities doctrine in promoting innovation and growth, some likening the interface standards to a railway terminal and others to the local telecommunications switch. Some advocated that interface standards should be available only to those intending to make products complementary to the original product; others advocated that they be available to potential competitors, as well.

Much of the industry testimony emphasised the importance of interoperability -- that different systems, products and services work together transparently -- and industry-wide standards to ensuring competition. Some witnesses advocated open interfaces as the mechanism for achieving interoperability for products offered by competing providers. Other witnesses said that proprietary interfaces would better spur further innovation. Some pointed out that innovation could be deterred if a standard were adopted too early in a network industry. Some cautioned against the potential for standards-setting organisations to exclude innovating competitors or to write restrictive intellectual property confidentiality provisions that deter some types of innovation by new competitors.

To those advocating interoperability, lack of access to critical interface standards is a major obstacle. Denial of access can take the form of withholding all or just timely and complete information about critical interfaces, demanding exorbitant royalty rates, refusing to license technology or abusing IPRs particularly with respect to reverse engineering.

In network industries, there may be a large number of customers who have invested in products conforming to one standard, so that subsequently introducing improved products conforming to an incompatible standard may not a viable option.

One computer company executive testified that control over the underlying interfaces is a “very powerful and potentially anticompetitive tool,” effectively a “bottleneck.” According to some witnesses, control of an interface can be in the hands of, e.g., a standards-setting group or a single company whose proprietary technology has been adopted as the *de facto* industry standard.

There are four issues in the application of the essential facilities doctrine:

-- unilateral versus joint conduct
-- complications when intellectual property is asserted to be an essential facility
-- the need to clarify the scope and limits as applied to standards
-- how to establish the terms of access.

The Italian delegate described the *De Montis Catering Roma v Aeroporti di Roma* case. In this case, a state-owned joint-stock company controlling both of the Rome airports and having an exclusive license to provide a range of terrestrial and maintenance services, denied access to the airport premises to a company wishing to compete in the market for airline catering, a service in which the licensee had a *de*

facto monopoly but which is not covered by its exclusive rights. The Competition Authority defined the airport premises as an essential facility without access to which entry into the catering market by the potential competitors was impossible. No objective justification for the refusal to deal was found. The final judgement state that "it is an abuse of a dominant position for a firm having such a position in a market to refuse to provide to existing and potential competitors a good or a service which is needed for the competitor's activity." The judgement explicitly affirmed that "a firm owning or operating an essential facility cannot deny, without objective justification, access to the facility."

He noted that it is not possible to define an essential facility without reference to the market for which access to the facility is essential. The first step is to define the downstream market which in this case was airline catering services on flights beginning at Rome. The second step is to define the upstream market, the market in which the essential facility lies. In this case, the Authority found this market to be one of the Rome airports. While one might imagine that catering could be done at an earlier airport of a flight, it turns out that that is not technically feasible. Hence, *Aeroporti di Roma* was charged with a violation of Art. 3 of the Italian Competition Act.

The delegate from the Commission of the European Communities said that the Commission has, over the past few years, developed jurisprudence on essential facilities via a series of cases dealing with airports and ports and one railway case in Germany. The Holyhead case was the first use of the term, "essential facility," although this was used in reference to prior case law. In EC law, essential infrastructure is a sub-category of a more general principle of a requirement to grant access to certain essential goods, under Art. 86 as well as Art. 85. In that case, the port belonged to Sealing Harbour. Sealink Ferries and B&I were the two users of that port. Sealink Harbour and Sealink Ferries had common ownership. To perhaps oversimplify, Sealink boats arrived when there were trains in the port; B&I boats arrived when there were no trains in the port. There was not an issue of "access" -- B&I had it -- but rather an issue of discrimination. An expert found that it would be technically feasible for B&I to schedule its sailings to be present during the periods when the trains were also in the port. B&I was willing to carry out the additional investments to facilitate its access to the port. Given there were only two ferry companies at this port, hindering the activities of one of them had a large effect on competition.

Geographical market definition was an important aspect of the case. In the Holyhead case, the important aspects were the time of crossing and the users of the ferry service. The location of Holyhead was an important feature as it meant that the crossing took only three hours, which was two hours less than the next fastest crossing. The service was primarily for food. For food and especially for vegetables, the timing was critical in order to get them delivered to the markets. Hence, the short time of crossing implied that Holyhead was a relevant market.

In the Port of Rødy (Denmark) case, there was no other crossing with such a short crossing time between Denmark and Germany. However, these points on geographic market definition are not specific to the issue we are discussing today.

The Chairman begged to differ, saying that if an essential facility is defined in terms of its physical characteristics -- a port, for example -- then it is important to know "what is next door." Then geographic market definition becomes critical.

The delegate from Ireland responded that the Magill case is a very narrow decision. In that case, the intellectual property created was necessary for the work of the television companies. Most commonly, countries are concerned about the disincentive effect of treating intellectual property as an essential facility. However, that effect was not relevant in this case, given the characteristics of the intellectual property.

The delegate from the United Kingdom said that the European Court of Justice did not accept the intellectual property at issue in the Magill case as an essential facility. It determined the case on other factors.

The United Kingdom wishes to continue its path of economic liberalisation, but at the same time the Treasury wishes infrastructure projects to be primarily or completely privately funded. Hence, the investment deterrence effect of declaring an asset an "essential facility" and mandating access must be balanced.

The relevant market must be identified first, before an asset can be assessed as being an essential facility or not.

In its evaluation of Mid-Kent Buses, the Monopolies and Mergers Commission found that access to the Pentagon Bus Station in Chatham was not essential but merely desirable. Land use planning constraints and the availability of land made impractical the duplication of the bus station at a suitable location. In considering the public interest, the MMC mandated access. This decision did not rest on an "essential facilities doctrine." Further, the MMC concluded that, "if equal access for all operators were held to be desirable, it might be necessary in some circumstances to provide access even at the cost of ejecting some of the incumbent's operations." (para. 6.54)

With respect to the importance of geographic market definition in determining whether an facility is essential, the delegate from the United Kingdom contrasted the market definition in one case involving a port, in which there were found to be three corridors and three markets for crossing the Irish Sea but, in another case involving a port, there was found to be one corridor and one market for the crossing between Britain and the Continent. Here, it is clear that the geographic market definition plays a vital role in identifying substitutes.

With respect to the definition of the market(s) which the Channel Tunnel supplies, the extremes of possible market definitions encompass "transport services between Britain and continental Europe" and "train tunnels between Folkestone, Kent and Calais, France." There, the market might be further divided in into freight trains, business travellers, leisure travellers. For business travellers, airlines might compete, as the delegate from the United Kingdom notes that 40 per cent of air business travel between London and Paris has disappeared since the Channel Tunnel train service has begun. For leisure travellers, the ferries may be substitutes.

The delegate from the United States suggested that one keep in mind the upstream/downstream distinction, where the alleged essential facility is an input into the downstream market. Then one would not define an essential facility in terms of a technical installation or specific location but rather would look at the effects in the downstream market of having access to that facility (such as cost advantage as a percentage of downstream price) to evaluate the "essentiality" of the facility.

Single v. joint ownership of an essential facility

The Canadian delegate said that there is no entrenched essential facilities doctrine in Canadian competition law although reference is occasionally made to the jurisprudence of other jurisdictions. Under Canadian law, refusal of access to an essential facility could be addressed either under an abuse of dominance (including joint dominance) provisions or under a unilateral refusal to deal provision. Under these provisions, the concept of essential facilities is not sweepingly applied to sole suppliers but rather is limited by various market power tests. Even where there is a sole supplier of an input, where there are no significant entry barriers then the situation raises no competition concerns. Even where there are significant upstream entry barriers, mandating access is not necessarily the preferred solution.

He discussed a case involving an automatic teller machine (ATM) network. Interact is owned and operated by the major Canadian banks and includes all banks and some major trust companies as members. It has well over 95% of all shared electronic funds transfer transactions. Interact allegedly engaged in the following practices:

-- denial of access to the network by potential entrants/members
-- collusive setting of access charges for new entrants
-- collusive setting of consumer charges at ATMs
-- deterrence of creation of a competing network
-- preventing, through the master network agreement, bilateral upgrading of service.

It may be that the members restrict access to non-members as a means to reduce their ability to compete in downstream markets. In that last regard, it is widely perceived that having direct access to this network is critical to the provision of a variety of financial services in Canada.

The Swedish delegate presented a case in which ATM networks were at issue. In Sweden, there was one ATM network for commercial banks and a separate but parallel network for savings banks. After financial sector deregulation, some niche banks became established. These banks take advantage of recent changes in technology and do not open "bricks and mortar" branches but rather they operate electronically. It is essential to their customers to have access to ATMs. The niche banks said they could not create a third network and that the savings bank network was unsuitable. The commercial bank network denied them access. The niche banks claimed that the two networks were, collectively, an essential facility to which they should have access.

This raised the question, what is the appropriate perspective, the short run or the long run? Infrastructure, especially almost a national monopoly, is another issue. But here, one may consider the commercial viability of entry without access to the ATM network.

The Competition Authority concluded that the two ATM networks could be a joint essential facility to which access is needed by the niche banks. The Competition Authority told the network that, in its co-operation agreement, there must be provision for access to new members. Ultimately, the commercial banks' network was dissolved and a web of bilateral agreements replaced it. Hence, the question arises, can these bilateral agreements be collectively an essential facility? Now, the niche banks have concluded some bilateral agreements. Another question is, what degree of access is sufficient?

Legitimate reasons for refusal to deal

The Chairman asked, once a facility has been found to be essential, the next question is, What sort of refusal of access is anticompetitive? That is, what is a legitimate business reason to refuse to provide access? Are these limited to technical reasons or economic or efficient reasons.

The delegate from the United States said that, if an essential facility has been found and if a refusal to provide access has been found to affect competition, then the refusing firm may offer, in its defence, a legitimate business reason for its refusal, which is in itself pro-competitive. Reasons that might be offered include that the firm makes higher profits if it refuses to provide access (this would not be accepted as a legitimate business reason); that granting access results in a return on investment which is lower than the level that would have made the investment worthwhile (absent showing that the return on investment was moderate would not be accepted as a legitimate business reason); that there is limited capacity; and that the firm's reputation or quality may suffer (this might be accepted as a legitimate business reason but is very fact-specific). Another important factor in deciding whether a refusal of access is legitimate is whether there is a history of dealing and then there is a change in policy and withdrawal of supply. This issue was raised both in the *Aspen Ski* case and the *Kodak* case. [A history of supply

indicates that sharing is feasible. Further, withdrawal of supply may result in "stranding" of assets.] A related question is whether a refusal to deal, except on the offered terms and conditions, is justified?

The delegate from the Commission of the European Communities said that an "objective reason" can be either technical or commercial.

In the *Commercial Solvents* case, the fact that the upstream firm intended to vertically integrate into the downstream activity was not considered to be an "objective reason" for it not to continue to supply the downstream firm.

In the IBM case at the beginning of the 1980s, the interface was considered to be an essential facility for providers of peripheral devices. As a remedy, IBM was asked to commit to provide interface information of new products in advance to manufacturers of peripheral devices.

The delegate from the Commission of the European Communities said that there is no European jurisprudence on whether a vertically-integrated firm could be forced to sell its intermediate product to a downstream competitor, even though it has never before sold the intermediate product. In such a case, an important question would be whether the two activities were "distinct."

The obligations to offer access terms and conditions by a firm that is dominant in the upstream market and active both in the upstream and downstream markets may be no greater than those obligation of an owner of an essential facility that is active only in the upstream market.

A difficulty arises if a denial of access to a facility results in a small decrease in consumer surplus and a large increase in the welfare of the downstream competing firms. This sort of trade-off has not yet been dealt with at the Commission.

In the nail guns case, in which the producer of the guns alleged that it must also sell the nail cartridges in order to ensure the safety of the system, the Commission said that it was not for the private firm to set safety standards.

The Australian Delegate said that, under Australian law, there is no "business defence" but rather that the Commission is to look at the economic effects of a refusal to provide access to an essential facility. There is a provision under the Australian law that enables the regulator to require the owner of an essential facility to extend that facility at the expense of the user of the new capacity. For example, a fully used gas pipeline could increase its capacity by an increase in the compression of the gas. Under such a situation, it would be possible to issue an order requiring the various upgrades at the expense of the new user.

The delegate from the United Kingdom posited that it was rare for a facility to be fully utilised or for its capacity to be difficult to expand. Once there is a finding of an essential facility, the provision of access or the expansion or upgrading of that facility should then be an obligation.

Further, in the United Kingdom's view, where capacity cannot be expanded, there is a concept of "competitive displacement". According to this concept, if a competitor gains a contract to supply at the expense of the owner of the fully-utilised essential facility, then that owner no longer needs all the capacity and can be mandated to provide it to the competitor.

Remedies, access terms and conditions

The Australian delegate said that there is provision for "de-declaration" in circumstances when a facility that was once thought to be uneconomic to duplicate becomes economic to duplicate as a result of technical change, or some other cause.

The Australian law is set up to facilitate owners of a "declared facility" and would-be users reaching a commercial agreement about terms and conditions of access. One criticism of this part of the law has been that this agreement could take a collusive aspect with a sharing of monopoly profits.

If the parties do not reach an agreement and arbitration is used, there are various aspects that must be considered by the arbiter. Among these is that, if the owner has a reasonable use or if there is a contractual user, then these have priority over another firm's use. As noted earlier, if capacity must be expanded then the user pays the cost of such expansion. He referenced a paragraph of his note regarding those matters which must be taken into account before a determination of access can be made. The price at which access should be mandated is, in theory, indeterminate. Should one use an efficient component pricing rule? an avoidable cost rule? or some level in between? There is increasing interest in not letting new entrants get a continuing free ride from the incumbent but rather to give the entrants incentive to make their own investments and provide competition in the provision of other services, so some adjustment to the pricing rule is being made.

The delegate from the United States noted that there is a concern with stifling private investment so rules on access terms should reflect these long-term concerns. Where there are public monopolies, these concerns are diminished; in these cases, cost-based terms seem to be "correct." Where there is a privately-owned, regulated monopolist, then access terms and conditions can be approached through regulatory bodies. But where there is a private unregulated monopoly, not granted through government license, then the competition authorities should be sensitive to the possibility that private investment can be deterred.

The extremes of pricing terms can be avoidable costs (incremental costs imposed on the facility owner by providing access, including the costs of providing additional capacity) and fully compensatory costs (including the loss of monopoly profits). Setting these prices would entail looking at cost and revenue data and has a "regulatory flavour." Non-price terms and conditions of access are messier and there is a need for an arbitration process, perhaps a court, especially in industries where there is rapid technological change. For example, the Federal Communications Commission will determine local network interconnection terms and conditions, which will consist largely of detailed technical terms of inter. In another example, computer interfaces, one might require the disclosure of technical information and specify the timeliness of that disclosure. In each of these cases, there would be continuing oversight in addition to the initial determination to ensue that the access terms and conditions change as technology changes.

The Chairman noted that it may be difficult to identify who should engage in these essentially regulatory activities, a regulator or the competition agency either itself or acting through the judiciary. Hence, some consideration should be given to a structural solution.

The Australian delegate said that a structural solution is sometimes appropriate but warned that structural separation may result in the loss of economies of vertical integration or scale or scope. The question of who sets the access price is not so important as the acknowledgement of its inherent difficulty. There is a case for competition officials to be involved in this because they are more likely to give more weight to long term competition outcomes. Others believe that competition officials may lose their focus if given regulatory oversight.

The delegate from Germany said that German law does not distinguish between a "essential facility" and all other cases of refusal to deal. Further, the German law does not differentiate between whether the firm refused access is a competitor or not. Section 22 regarding abuse of a dominant position is relevant, but that there is also a provision against discrimination, as well as a special provision regarding unfair denial of access to energy transmission networks. A firm can be dominant based on an exclusive license. A denial of access constitutes an abuse if it impairs the competitive possibilities of other companies, absent justification. Moreover, dominant firms or "powerful" firms are prohibited from unfairly hindering other firms or treating them differently, absent facts justifying such differentiation. The firms concerned can bring civil suit for damages. The law weighs the interests of the parties in view of the intent of the law, which is to safeguard the freedom of competition. Firms cannot be forced to promote their competitors or to engage in unprofitable activities. Special account is taken of the purpose of the competition law to safeguard free market access.

In one recent case, access to a gas pipeline network was denied when that access would have resulted in competition between the market dominating incumbent and a new competitor. The Federal Supreme Court found that the owner of a market dominating gas or electricity transmission network may, in principle, be ordered to grant third party access for the purpose of transmission. The Court based its decision entirely on the special energy sector provision mentioned above.

In another recent case, the German national railway, which dominates the German market(s) for long-distance rail passenger travel, refused to permit Sabre, an American computer reservation system, to list and make reservations. The national railway is part owner of a computer reservation system, Start, which was the only computer reservation system that could provide German railway tickets. At the time, Start had about 90 per cent of the computer reservation services market in Germany. This refusal of access was considered to be a significant barrier to entry for Sabre. The refusal was taken to imply a violation of the law. After a warning letter from the Federal Cartel Office, the German railway discontinued its practice.

The Japanese delegate said that there is no essential facilities doctrine, as such, in Japan. Rather, refusal to deal is found to be an unfair trade practice when it impedes competition or it is found to be monopolising when it substantially restrains competition. The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices state that an example of an refusal that may be illegal is a case where, "An influential manufacturer in a market, by causing its distributors not to deal with its competitors, reduces the business opportunities of the competitors and prevents them from easily finding alternative trading partners, and with a view to ensuring the effectiveness of such conduct, refuses to deal with distributors not yielding to this request."

Basically, the refusal to deal is judged comprehensively according to whether or not the action substantially restrains competition in the market or impedes fair competition. The market share of the party concerned, the existence of competitors, the market structure, the characteristics of the facility and the reason behind the refusal to allow access to the facility are considered.

In one example, a trade association had built a specialised storage facility for imported timber. Duplication of this facility or use of another port was not economically feasible. The trade association limited the number of members and prohibited non-members from using the facility. Therefore, there was no competition from outside the trade association. The JFTC told the trade association to quit limiting the number of members under unreasonable conditions.

The JFTC can, under some conditions, mandate structural separation under the Antimonopoly Law. Among other criteria, an excess profit rate would be included in the assessment. The JFTC has not yet exercised this power.

The delegate from BIAC said that this is an important issue for business, going to very major investment decisions. He said that it is difficult for business to understand the differing policies in each of the various jurisdictions regarding an essential facility. There is a need to "take this issue forward" because of the absence of uniformity but not necessarily with the goal of uniformity as that is impossible given the different policy goals and legal regimes. The United States and the European Union have different objectives; in the former it is more oriented towards economic welfare and in the latter it is complicated by integration goals as well as the protection of small and medium-sized enterprises.

One must not get lost in the concept of a "doctrine." Nor should one engage in further legal formalism with simple rules. Rather, one must rely on economic analysis with a clear understanding of the economic goals of the policy. We should explore the boundaries of the "doctrine."

It is notable that this discussion has focused on vertical integration. Within the European Communities, there is a clearly established doctrine on abuse of a dominant position and a concept of a "conflict of interest" of a firm that is dominant in the upstream market and is a downstream user of the intermediate input. A lot of the cases go to that issue, but firms are not necessarily vertically integrated, i.e., the dominant firm may not be active downstream. An question is whether the same principles apply in both sets of cases. In the European Communities, they are treated the same because it operates from a broad system of abuse of dominance and essential facility is just a subset, not being a separate doctrine at all.

The definition of a relevant market is critical; he thinks that the Commission of the European Communities has been overly focused on physical facilities. The business community pleas for market share guidelines and consistency in approach to market definition, not only with respect to "essential facilities cases" but more broadly.

One should focus on the question not only of "What is an essential facility" but on the question "For whom is the facility essential? Some claims seem to be attempts to expropriate the legatee competitive advantage of the incumbent. It is not relevant if an asset is essential to an entrant, but rather the issue should be whether the entrant is essential to increasing consumer welfare or achieving another policy goal.

From an economic perspective, there should not be different rules or a distinction between unilateral and joint ownership of a facility. However, the relevant legal rules --- sections 1 and 2 of the Sherman Act in the United States and articles 85 and 86 of the Treaty of Rome -- are different. Would it be rational for the differing legal rules to result in different treatment of unilateral and joint ownership?

A legitimate business justification is critical to business. Competition authorities need to distinguish between new entrants and incumbents in utilities in terms of legitimate business justifications. For example, does a party who builds a new railway line over which to operate its own trains have an obligation to build enough capacity for competitors' trains? Must it permit competitors to run trains over that line immediately, or after a period of time, or ever? When is it legitimate to constrain entry in such a situation?

In private conversations with officials from the Commission of the European Communities, it has come out that he should build spare capacity for competitors.

In the United Kingdom, sector-specific regulators have the duty to promote competition.

Private financing is important in the United Kingdom and the European Union. The impact of an essential facilities doctrine on major infrastructure projects, involving billions of pounds in expenditure, is quite severe. For example, the EuroTunnel decision limiting usage rights makes planning very difficult.

Hence, it is critical that competition officials determine the boundaries of an essential facilities doctrine and that they communicate that to business.

General Discussion

The delegate from France noted that in 1995 there had been a series of workshops on "public services," emphasising network industries. Some of these industries may be considered essential facilities.

The Italian delegate wished to clarify that an essential facilities concept is only a minor subset of cases dealing with the refusal by a vertically-integrated monopolist to deal with downstream competitors. For example, the concept would not apply in "arbitrary refusals to deal," when the monopolist does not compete in the downstream market. Under Italian law, refusal to deal is explicitly listed among abuses of dominance. This is consistent with the Treaty of Rome. Further, all the Italian cases that have mentioned essential facilities concerned legal monopolies. When these legal monopolies are economically regulated, the investment deterrence effect of mandating access is attenuated. Increased competition in the secondary market reduces the scope for regulatory evasion. The question of duplicability in these industries does not arise. Finally, a regulatory mechanism is already in place, making remedies and monitoring easier to apply.

The delegate from Ireland noted that the discussion made clear that competition authorities were aware of the potential disincentives to invest from mandating access but that, in the process of turning economic theory into legal rules, some of the economic theory is lost and one ends up with legal rules which do not reflect this awareness. Reading, as a lawyer, the rules contained in the country contributions, the issue of disincentive to investment or innovation does not come across very clearly. She noted in that connection that, in the paper by the Commission of the European Communities, the standard to be applied by an owner of an essential facility is that of "independent ownership" by a public body.

She cautioned that a change in policy from removing restrictions on competition towards "helping" entrants is dangerous, asking what the limits of such a policy would be. She asked, with respect to the ATM network case in Sweden, what would be the minimum requirement to get access? She further noted that, in the *British Midlands-Aer Lingus* case, the incumbent, *Aer Lingus*, was required to interline with *British Midlands* for two years. She asked, At what stage should interlining be ordered, e.g., would an airline with one flight a day would qualify for such assistance?

She noted that there seems to have been an assumption that it is better to force two competitors to come to an agreement themselves regarding access terms and conditions. While this may mostly be true, this could also be a forum for exchanging information that may facilitate collusion. In *National Carbonising*, the Commission told the firm to supply the intermediate product and to set its own downstream price so that its competitor, if reasonably efficient, can make a profit. If a competition authority abdicates responsibility for setting the access price then it must be aware of some possible negative consequences.

The delegate from the Commission of the European Communities asked, with respect to the case from Sweden, whether the increase in competition resulting from the access by the niche banks to the ATM network was significant. He agrees that a competition authority does not want to diminish the value of assets legitimately acquired by undertakings, but rather to retain the balance between access to essential facilities but not to provide disincentives to invest in, e.g. a railway line.

The Magill decision was very narrow, in that the television stations were refusing to supply a product for which there was demand. It was not an essential facility case.

If the owner of a mine and a port builds a railway between them, and the railway is designed only to haul ore, then it is part of an integrated undertaking. On the other hand, if one built the only railway line between Paris and Marseille and operated it without allowing any competitors, then this is a different situation: there are two different services, operating a network and providing a service which uses that network. We should arrive at the common conclusion that the network should be available to competitors so that they may offer the network service. The manager of the railway line, acting as an independent operator, should want to open up the railway to as many competitors as possible in order to enhance his investment.

The proportionality principle, integral to European Community law, applies also to the transitory nature of an essential facility. A facility can be essential to an undertaking at a specific point in time. For example, Aer Lingus was required to provide interlining to British Midland for only two years because this was anticipated to be the time needed for British Midland to get established on the market. If British Midland had not had this from the outset, then it would have had either to put up too few flights or have many half-empty planes.

The Chairman summarised the discussion by noting, first, that one must take into account the economic context in which the "essential facility" operates. These include defining the relevant market, identifying whether and why the facility is "essential," and considering legitimate business reasons for refusals to deal. He noted that there is an important distinction among public, private but regulated, and privately-owned facilities because mandatory access can diminish private incentives to invest and to innovate. Mandating access to publicly owned facilities would not have these results.

He noted, further, that terms and conditions for access can be very difficult to specify. Where structural changes are made, they are also difficult to specify, take time to implement, and the outcomes may not always be positive.

Finally, the Chairman said that an essential facilities doctrine is widely used and does not greatly vary among jurisdictions. The differences in incidence of application of an essential facilities doctrine can be attributed to differences in the structures of the economies and in whether the competition law is applied through an administrative system.

AIDE-MÉMOIRE DE LA DISCUSSION

Note du Secrétariat

Définition du marché et caractère essentiel d'une installation

Le Président remarque que, si les caractéristiques physiques d'une installation, un port par exemple, peuvent être importantes, il est nécessaire d'identifier le marché en cause afin de savoir si ces caractéristiques physiques sont telles que l'installation elle-même constitue, en l'occurrence, un marché à prendre en compte du point de vue de la concurrence. Les réseaux, particulièrement les réseaux de services publics, sont souvent qualifiés d'installations essentielles. Les accords horizontaux tels que les réseaux de GAB, chambres de compensation, sociétés de droits de représentation, systèmes de réservation informatisés, sont également considérés comme des installations essentielles. Parmi les autres catégories d'actifs susceptibles d'être considérés comme tels, on peut citer des droits de propriété intellectuelle tels que les normes et brevets informatiques.

Le Président précise que lorsqu'on veut déterminer le caractère essentiel d'une installation, il convient d'évaluer à la fois les coûts et le temps nécessaires à sa duplication.

Le délégué australien ouvre la discussion, déclarant que l'Australie vient d'adopter une loi générale sur le régime d'accès national qui vise principalement les infrastructures essentielles, mais il précise qu'en principe, le concept d'installation essentielle n'est limité ni aux installations appartenant à une collectivité publique, ni aux infrastructures, même si, dans la pratique, étant donné la manière dont cette loi est rédigée, son application sera sans doute largement limitée aux infrastructures, notamment les premières années. La question de l'accès aux installations essentielles constitue un volet important du processus de déréglementation. Trois attitudes anticoncurrentielles doivent être évitées :

-- refus d'accès
-- tarification monopolistique de l'accès
-- entente entre le propriétaire de l'infrastructure et le prestataire de services concurrent, aboutissant à l'intégration des bénéfices intégrés de monopole.

Avant de présenter la méthode retenue par l'Australie pour traiter ces problèmes potentiels, il indique que la Nouvelle-Zélande a choisi de leur appliquer son droit général de la concurrence.

En Australie, la nouvelle partie IIIA de la *Loi sur les pratiques commerciales* prévoit deux mécanismes pour l'octroi de l'accès à des tiers. Le premier est un mécanisme pouvant devenir obligatoire selon lequel le service est "déclaré" par le Ministre de tutelle. Cette "déclaration" représente un "droit de négocier" l'accès, assorti d'un arbitrage obligatoire si les parties n'arrivent à s'accorder sur aucun aspect de l'accès. Le second est un mécanisme volontaire par lequel un prestataire de services soumet à la Commission australienne de la concurrence et de la consommation (Australian Competition and Consumer Commission, ACCC) un engagement ayant force obligatoire qui précise les conditions dans lesquelles il permettra l'accès à des tiers. Si ces conditions sont jugées acceptables par l'ACCC, elles servent de cadre à l'accès.

Toute personne peut saisir le Conseil national de la concurrence (National Competition Council) en vue d'une recommandation de déclaration. Avant de recommander la déclaration d'un service, le Conseil doit vérifier le respect d'un certain nombre de conditions. L'une de ces conditions est que l'accès

au service doit favoriser la concurrence sur un marché (autre que le marché de ce service). Ici, le terme de "marché" est interprété dans un contexte de concurrence et non dans un contexte technique, c'est-à-dire que si le gaz naturel par exemple était considéré comme un marché de produit, l'accès à un gazoduc pourrait être obligatoire, mais ce ne serait pas le cas si le gaz naturel était considéré simplement comme faisant partie du marché plus vaste de l'énergie. Une autre de ces conditions est que la mise au point, par toute autre personne, d'une installation destinée à fournir le service serait anti-économique. Dans ce cas, il peut y avoir plusieurs entreprises en place. On peut citer encore une troisième condition : que l'accès au service ne soit pas contraire à l'intérêt public. Ici, l'un des éléments à prendre en compte est la possibilité éventuelle de dissuader le propriétaire ou un concurrent potentiel de procéder à des investissements supplémentaires.

Le délégué australien précise que les dispositions de la nouvelle partie IIIA du la *loi sur les pratiques commerciales* ne s'appliquent pas, par exemple, aux droits de propriété intellectuelle, aux installations de production telles que les usines ou à la fourniture de marchandises. Toutefois, l'accès à de telles installations pourrait être rendu obligatoire aux termes du droit de la concurrence général.

Le délégué américain note que la Federal Trade Commission a tenu récemment des auditions consacrées, entre autres thèmes, au traitement antitrust des installations essentielles. Elle précise que des questions liées aux installations essentielles se posent fréquemment lors de l'étude des normes d'interface entre ordinateurs ou logiciels.

Au cours de ces auditions, plusieurs représentants du secteur informatique ont proposé que la doctrine des installations essentielles serve à favoriser l'innovation et la croissance, certains comparant les normes d'interface à un terminal ferroviaire, d'autres à un commutateur de télécommunications locales. Certains ont plaidé pour que les normes d'interface ne soient mises qu'à la disposition de ceux ayant l'intention de fabriquer des produits complémentaires du produit original ; d'autres ont soutenu qu'elles devaient être également mises à la disposition de concurrents potentiels.

Pour la plupart, les témoignages émanant de professionnels ont insisté sur la nécessité de l'interopérabilité (le fait que différents systèmes, produits et services puissent travailler ensemble dans la transparence) et de l'existence de normes communes à tout le secteur, garantes de la concurrence. Certains témoins ont plaidé en faveur d'interfaces ouvertes permettant d'assurer l'interopérabilité des produits offerts par des fournisseurs concurrents. D'autres ont soutenu que des interfaces exclusives permettraient mieux de dynamiser l'innovation. Certains ont souligné que l'innovation pourrait être bloquée si une norme était adoptée trop tôt dans un secteur fondé sur des réseaux. Enfin, certains ont mis en garde contre la possibilité, pour des organismes de normalisation, d'exclure des concurrents innovants ou d'adopter en matière de confidentialité de la propriété intellectuelle des dispositions restrictives ayant pour effet de dissuader de nouveaux concurrents de se lancer dans certains types d'innovations.

Pour les tenants de l'interopérabilité, l'absence d'accès à des normes d'interface essentielles constitue un obstacle majeur. Le refus d'accès peut prendre plusieurs formes : rétention d'informations sur les interfaces essentielles, qu'il s'agisse de la totalité des informations ou seulement d'informations récentes et complètes, exigence de taux de redevance exorbitants, refus d'accorder des licences technologiques ou abus de droits de propriété intellectuelle, particulièrement en ce qui concerne la rétroconception.

Dans les secteurs fondés sur des réseaux, il peut arriver qu'un grand nombre de clients aient investi dans des produits conformes à une même norme, si bien qu'introduire ensuite des produits améliorés mais conformes à une norme incompatible avec la première ne sera pas une option viable.

Un responsable d'une entreprise informatique a indiqué que le contrôle des interfaces de base constituait un "outil très puissant et potentiellement anticoncurrentiel", en réalité un "goulet d'étranglement". Selon certains témoins, le contrôle d'une interface peut être entre les mains par exemple

d'un groupe en situation d'imposer des normes ou d'une entreprise individuelle ayant développé une technologie qui a été adoptée *de facto* comme norme par son secteur.

Quatre problèmes se posent dans l'application de la doctrine des installations essentielles :

-- pratiques unilatérales ou conjointes ;
-- complications lorsqu'on affirme qu'une propriété intellectuelle constitue une "installation" essentielle ;
-- nécessité de clarifier la portée et les limites des normes ;
-- comment établir les conditions de l'accès.

Le délégué italien évoque l'affaire *De Montis Catering Roma contre Aeroporti di Roma*. Dans cette affaire, une société par actions détenue par l'Etat contrôlant les deux aéroports de Rome et ayant une licence exclusive pour la fourniture d'un éventail de prestations au sol et de maintenance a refusé l'accès aux aéroports à une société souhaitant s'implanter sur le marché de la restauration à bord, activité non couverte par les droits exclusifs du titulaire de la licence, mais pour laquelle il exerçait un monopole de fait. L'autorité chargée de la concurrence a défini l'enceinte des aéroports comme une installation essentielle ; sans accès à celle-ci, il était impossible à des concurrents potentiels d'entrer sur le marché de la restauration des passagers. Aucune justification objective n'a pu être trouvée au refus d'accès. Le jugement définitif établit que " le refus, par une entreprise en position dominante sur un marché, de fournir à des concurrents existants et potentiels un bien ou un service nécessaire à l'activité de ces concurrents, constitue un abus de position dominante." Le jugement affirmait explicitement qu'une "entreprise possédant ou exploitant une installation essentielle ne peut, sans justification objective, refuser l'accès à cette installation."

Le délégué italien remarque qu'il est impossible de définir une installation essentielle sans faire référence au marché pour lequel l'accès à cette installation est essentiel. La première étape consiste à définir le marché en aval qui, dans ce cas, était celui des services de restauration à bord sur les vols au départ de Rome. La deuxième étape consiste à définir le marché en amont, celui sur lequel se situe l'installation essentielle. Dans ce cas, les autorités ont estimé qu'il s'agissait de l'un des aéroports de Rome. On aurait pu imaginer que les activités de restauration pouvaient être effectuées dans un aéroport de provenance précédent, mais il se trouve que ceci n'est pas faisable techniquement. En conséquence, *Aeroporti di Roma* a été convaincu de violation de l'article 3 de la loi italienne sur la concurrence.

Le délégué de la Commission de Communautés Européennes indique que la Commission a, au cours des dernières années, développé une jurisprudence sur les installations essentielles par le biais d'une série d'affaires impliquant des aéroports et des ports et une affaire de chemins de fer en Allemagne. C'est dans l'affaire Holyhead que le terme "d'installations essentielles" apparaît pour la première fois, même s'il avait déjà été utilisé dans des jugements antérieurs. En droit communautaire, une infrastructure essentielle est une sous-catégorie d'un principe plus général qui prévoit l'obligation d'accorder l'accès à certains biens essentiels aux termes des articles 85 et 86. Dans cette affaire, un port appartenait à Sealink Harbour. Sealink Ferries et B&I étaient tous deux utilisateurs de ce port. Sealink Harbour et Sealink Ferries avaient un actionnaire commun. Pour simplifier à l'extrême, disons que les bateaux Sealink arrivaient lorsque les trains étaient au port ; les bateaux B&I, en revanche, arrivaient alors qu'il n'y avait aucun train sur place. Dans ce cas, ce n'était pas une question "d'accès" (B&I l'avait), mais plutôt une question de discrimination. Un expert a estimé qu'il était techniquement possible à B&I de programmer ses arrivées de façon que ses bateaux soient présents au port en même temps que les trains. B&I était prêt à effectuer les investissements supplémentaires destinés à faciliter son accès au port. Etant donné qu'il n'y avait que deux compagnies de ferries dans ce port, gêner les activités de l'une d'elles avait des conséquences significatives sur la concurrence.

La définition du marché géographique joue un rôle important. Dans l'affaire Holyhead, les aspects significatifs étaient l'heure de la traversée et les utilisateurs du service de ferry. La situation de

Holyhead était une caractéristique importante, car elle signifiait que la traversée ne prenait que trois heures, soit deux heures de moins qu'au point de traversée le plus proche. Le transport concernait essentiellement des produits alimentaires. Pour ces produits, et en particulier pour les légumes, l'horaire était un facteur déterminant, parce qu'ils devaient pouvoir être livrés sur les marchés. Ainsi, la faible durée de la traversée impliquait que Holyhead constituait le marché pertinent.

Dans l'affaire du port de Rødy (Danemark), il n'existait pas d'autre traversée durant aussi peu de temps entre le Danemark et l'Allemagne. Toutefois, ces éléments de définition géographique ne sont pas spécifiques à la question examinée aujourd'hui.

Le Président intervient pour dire que si une installation essentielle est définie du point de vue de ses caractéristiques physiques (un port par exemple), alors il est important de connaître "ce qui existe à côté". Ainsi, la définition du marché géographique devient essentielle.

Le délégué irlandais répond que l'affaire Magill a donné lieu à une décision de portée très étroite. Dans cette affaire, la propriété intellectuelle créée était nécessaire aux travaux des sociétés de télévision. Comme cela est courant, les pays sont préoccupés par l'effet dissuasif de l'assimilation de la propriété intellectuelle à une installation essentielle. Toutefois, cet effet ne s'appliquait pas à cette affaire, compte tenu des caractéristiques de la propriété intellectuelle concernée.

Le délégué du Royaume-Uni déclare que la Cour européenne de justice n'a pas admis que la propriété intellectuelle concernée dans l'affaire Magill constituait une installation essentielle. Elle a jugé l'affaire en fonction d'autres facteurs.

Le Royaume-Uni souhaite poursuivre sur la voie de la libéralisation économique, mais dans le même temps, le Trésor britannique souhaite que les projets d'infrastructure soient principalement ou totalement financés par des fonds privés. En conséquence, il convient d'équilibrer l'effet dissuasif de l'assimilation d'un actif à une "installation essentielle" et de l'obligation d'assurer l'accès.

Le marché concerné doit être d'abord identifié avant que l'on puisse juger si un actif constitue ou non une "installation essentielle".

Dans son évaluation des Mid-Kent Buses, la Monopolies and Mergers Commission a estimé que l'accès à l'arrêt de bus de Pentagon, à Chatham, n'était pas essentiel, mais simplement souhaitable. Du fait des contraintes en matière d'occupation des sols et de disponibilité de terrains, il était difficile d'installer une autre station de bus dans un lieu adéquat. En prenant en compte l'intérêt du public, la MMC a obligé à assurer l'accès. Cette décision n'était pas fondée sur une "doctrine des installations essentielles". En outre, la MMC a conclu que "si l'on devait soutenir que l'égalité d'accès pour tous les opérateurs est une chose souhaitable, il pourrait être nécessaire, dans certains cas, d'autoriser l'accès même au détriment de certaines activités de l'entreprise en place." (paragraphe 6.54)

En ce qui concerne l'importance de la définition du marché géographique pour déterminer si une installation est essentielle, le délégué du Royaume-Uni oppose la définition du marché utilisée dans une affaire impliquant un port, dans laquelle on a estimé qu'il existait trois couloirs de traversée de la Mer d'Irlande et donc trois marchés, à la définition retenue dans une autre affaire, concernant également un port mais dans laquelle on a jugé qu'il existait un seul couloir et donc un seul marché pour la traversée entre la Grande-Bretagne et le continent. Ici, il est clair que la définition du marché géographique joue un rôle fondamental lorsqu'il s'agit d'identifier des concurrents possibles.

En ce qui concerne la définition du ou des marchés desservis par le tunnel sous la Manche, les définitions possibles peuvent, d'un extrême à l'autre, couvrir les "services de transport entre la Grande-Bretagne et le continent européen" ou les "tunnels ferroviaires entre Folkestone (Kent) et Calais (France)". Dans ce dernier cas, le marché pourrait être encore divisé entre trains de marchandises, passagers

voyageant pour des raisons professionnelles et touristes. Pour les passagers en déplacement professionnel, les compagnies aériennes pourraient être concurrentes, car le délégué fait remarquer que sur la ligne Londres-Paris, le nombre des passagers transportés pour des raisons professionnelles a diminué de 40 pour cent depuis que le tunnel sous la Manche est entré en service. Pour les touristes, ce sont les ferries qui pourraient jouer le rôle de concurrents potentiels.

Le délégué des Etats-Unis suggère que l'on garde en mémoire la distinction amont/aval lorsque l'installation essentielle présumée est un facteur de production sur le marché en aval. Ainsi, pour évaluer le caractère essentiel d'une installation, l'installation essentielle ne serait pas définie en termes d'installation technique ou d'emplacement spécifique, mais on examinerait plutôt les conséquences, sur le marché en aval, de l'accès à cette installation (par exemple avantage au niveau des coûts exprimé en pourcentage du prix en aval).

Propriété individuelle ou conjointe d'une installation essentielle

Le délégué du Canada déclare que le droit de la concurrence canadien ne contient pas une doctrine très arrêtée sur les installations essentielles, bien qu'il soit fait occasionnellement référence à la jurisprudence d'autres juridictions. En droit canadien, le refus d'accès à une installation essentielle pourrait être traité soit comme un abus de position dominante (y compris de position dominante conjointe), soit comme un refus de vente unilatéral. Dans les dispositions concernées, le concept d'installation essentielle n'est pas appliqué de manière systématique aux fournisseurs uniques, mais est plutôt limité par divers critères de puissance sur le marché. Même lorsqu'il n'existe qu'un seul fournisseur pour un facteur de production, la situation ne pose pas de problème de concurrence s'il n'existe pas d'obstacles significatifs à l'entrée. En outre, même dans les cas où il existe des obstacles significatifs à l'entrée en aval, l'obligation d'accorder l'accès n'est pas nécessairement la solution privilégiée.

Le délégué canadien évoque une affaire impliquant un réseau de guichets automatiques de banques (GAB). Interact appartient aux principales banques canadiennes qui en assurent l'exploitation et compte parmi ses membres toutes les banques et quelques grandes sociétés de fiducie. Ce réseau réalise plus de 95 pour cent de toutes les opérations de transfert électronique de fonds. Interact a été accusé des pratiques suivantes :

-- refus de l'accès au réseaux à des entrants/membres potentiels
-- entente sur la fixation des redevances d'accès pour les nouveaux entrants
-- entente sur la fixation des frais facturés aux clients aux GAB
-- dissuasion à la création d'un réseau concurrent
-- blocage, par le biais de l'accord de réseau maître, de l'amélioration bilatérale du service.

Il se peut que les membres limitent l'accès par des non-membres afin de réduire la possibilité, pour ceux-ci, de leur faire concurrence sur les marchés en aval. De ce point de vue, on estime généralement que le fait d'avoir un accès direct à ce réseau est essentiel à la prestation d'un éventail de services financiers au Canada.

Le délégué suédois présente une affaire portant également sur des réseaux de GAB. En Suède, il existait un réseau de GAB pour les banques commerciales et un autre réseau parallèle pour les caisses d'épargne. Après la déréglementation du secteur financier, certaines banques spécialisées ont été créées. Ces banques, profitant de l'évolution technologique récente, n'ouvrent pas de succursales "en dur", mais opèrent de manière électronique. Il est donc fondamental que leurs clients aient accès aux guichets automatiques. Ces banques spécialisées ont indiqué qu'elles ne pouvaient pas créer un troisième réseau et que le réseau des caisses d'épargne n'était pas adapté. Le réseau des banques commerciales leur a refusé l'accès. Les banques spécialisées ont soutenu que les deux réseaux constituaient, collectivement, une installation essentielle à laquelle elles devaient avoir accès.

Ceci amène à se demander quelle est la perspective appropriée, court ou long terme ? Les infrastructures, particulièrement lorsqu'elles constituent quasiment un monopole national, sont un autre problème. Mais ici, on peut étudier la viabilité commerciale de l'entrée sans accès au réseau de GAB.

Les autorités de la concurrence ont jugé que les deux réseaux de GAB pouvaient constituer une installation essentielle commune à laquelle il était nécessaire que les banques spécialisées aient accès. Elles ont fait savoir au réseau que son accord de coopération devait prévoir d'accorder l'accès à de nouveaux membres. Finalement, le réseau des banques commerciales a été dissous et remplacé par un ensemble d'accords bilatéraux. D'où la question : ces accords bilatéraux peuvent-ils constituer collectivement une installation essentielle ? Par ailleurs, les banques spécialisées ont désormais conclu des accords bilatéraux, ce qui amène à cette autre question : quel est le degré d'accès suffisant ?

Motifs légitimes d'un refus de vente

Le Président pose la question suivante : une fois qu'il a été établi qu'une installation est essentielle, quelle sorte de refus d'accès est anticoncurrentiel ? Autrement dit, qu'est-ce qui constitue un motif commercial légitime pour refuser l'accès ? Ces motifs se limitent-ils à des raisons techniques, ou économiques, ou des raisons d'efficience ?

Le délégué des Etats-Unis déclare que, si une installation a été jugée essentielle et si on estime qu'un refus d'accès affecte la concurrence, l'entreprise auteur du refus peut, pour sa défense, avancer un motif commercial légitime à son refus qui aille lui-même dans le sens de la concurrence. Parmi les raisons qui pourraient être invoquées, on peut citer les justifications suivantes : l'entreprise réalise des bénéfices plus importants si elle refuse d'autoriser l'accès (ceci ne passerait pas pour un motif commercial légitime) ; autoriser l'accès aboutit à une rentabilité de l'investissement inférieure à celle qui l'a motivé (ceci ne peut passer pour un motif commercial légitime si on ne démontre pas que la rentabilité de l'investissement est modeste) ; la capacité est limitée ; la réputation ou la qualité de l'entreprise risquent d'en souffrir (ceci pourrait être admis comme un motif légitime, mais dans des conditions très spécifiques). Un autre facteur joue un rôle important lorsqu'il s'agit de décider si un refus d'accès est légitime : la question de savoir si l'accès a déjà été autorisé dans le passé et si l'on se trouve en présence d'un changement de stratégie et d'un arrêt de fourniture. Cette question a été soulevée dans l'affaire *Aspen Ski* et dans l'affaire *Kodak*. [L'examen des modalités de fourniture passées montre que le partage est faisable. En outre, l'arrêt de la fourniture risque d'aboutir à une "marginalisation" d'actifs]. Ceci amène à se demander si un refus de vendre autrement que selon les termes et conditions offerts est légitime.

Le délégué de la Commission des Communautés Européennes déclare qu'une "raison objective" peut être soit technique, soit commerciale.

Dans l'affaire *Commercial Solvents*, le fait que l'entreprise en amont avait l'intention de s'intégrer verticalement sur l'activité en aval n'a pas été considéré comme une "raison objective" pour qu'elle ne continue pas à fournir l'entreprise en aval.

Dans l'affaire IBM, au début des années 80, l'interface a été considérée comme une installation essentielle pour les fournisseurs d'équipements périphériques. A titre de dédommagement, IBM a dû s'engager à fournir à l'avance aux fabricants d'équipements périphériques, pour ses nouveaux produits, des informations en matière d'interface.

Le délégué de la Commission des Communautés Européennes indique qu'il n'existe pas de jurisprudence européenne sur la question de savoir si une entreprise verticalement intégrée pourrait être forcée à vendre son produit intermédiaire à un concurrent en aval, même si elle n'a jamais vendu ce produit intermédiaire auparavant. Dans un tel cas, il serait important de savoir si les deux activités sont "distinctes".

L'obligation d'assurer l'accès qui est faite à une entreprise dominante sur un marché en amont et opérant à la fois sur le marché en amont et sur le marché en aval n'est peut-être pas plus importante que l'obligation qui est faite au propriétaire d'une installation essentielle opérant uniquement sur le marché en amont.

Un problème se pose si un refus d'accès à une installation entraîne une légère diminution de la rente du consommateur et une forte augmentation du bien-être des entreprises concurrentes en aval. Cette sorte de phénomène n'a pas encore été abordée par la Commission.

Dans l'affaire des pistolets à grenaille, dans laquelle le fabriquant des armes soutenait qu'il devait également vendre les cartouches afin d'assurer la sécurité du système, la Commission a déclaré qu'il n'appartenait pas aux entreprises privées de fixer les normes de sécurité.

Le délégué australien indique qu'en droit australien il n'existe pas de "défense commerciale", mais que la Commission examine plutôt les conséquences économiques d'un refus d'accès à une installation essentielle. Le droit australien contient une disposition qui permet aux autorités de réglementation d'obliger le propriétaire d'une installation essentielle à étendre celle-ci aux frais de l'utilisateur des nouvelles capacités ainsi créées. Par exemple, la capacité d'un gazoduc totalement utilisé pourrait être augmentée par une plus grande compression du gaz. Dans un tels cas, il serait possible d'imposer la réalisation des différentes améliorations aux frais du nouvel utilisateur.

Le délégué du Royaume-Uni remarque qu'il est rare qu'une installation soit totalement utilisée ou que sa capacité soit difficile à étendre. Une fois qu'une installation a été jugée essentielle, l'autorisation d'accès ou son extension ou amélioration devrait être une obligation.

De plus, du point de vue du Royaume-Uni, lorsque la capacité ne peut pas être étendue, il existe la notion de "déplacement concurrentiel". Selon ce concept, si un concurrent remporte un marché de fourniture aux dépens du propriétaire d'une installation essentielle intégralement utilisée, alors le propriétaire n'a plus besoin de la totalité de la capacité et il peut être contraint d'assurer l'accès à son concurrent.

Recours et conditions d'accès

Le délégué de l'Australie précise qu'il existe une disposition de "dé-déclaration" pour les cas où la duplication d'une installation, jugée à l'origine anti-économique, deviendrait économiquement justifiable du fait d'une évolution technique ou pour toute autre raison.

La loi australienne est conçue pour aider les propriétaires d'une "installation déclarée" et ses utilisateurs potentiels à conclure un accord commercial sur les conditions d'accès. Cette partie de la loi a été notamment critiquée parce qu'un tel accord pourrait prendre la forme d'une entente, avec un partage des bénéfices de monopole.

Si les parties ne parviennent pas à s'entendre et si on a recours à l'arbitrage, divers aspects doivent être pris en compte par l'arbitre. En particulier, si le propriétaire fait un usage raisonnable de l'installation ou s'il existe un utilisateur contractuel, ceux-ci ont la priorité sur toute autre entreprise souhaitant l'utiliser. Comme indiqué plus haut, si la capacité doit être étendue, l'utilisateur supporte le coût de cette extension. Le délégué australien se réfère à un paragraphe de sa note concernant les aspects qui doivent être pris en compte avant que l'accès puisse être décidé. Le prix auquel l'accès devrait être obligatoire est, en principe, indéterminé. Devrait-on utiliser une règle de tarification efficiente des composants, une règle des coûts évitables ou une solution intermédiaire ? De plus en plus, l'objectif consiste non pas à laisser les nouveaux entrants bénéficier d'une totale liberté d'accès de la part de l'entreprise en place, mais plutôt à inciter les entrants à procéder à leurs propres investissements et à être

concurrentiels dans la prestation d'autres services, si bien que la règle de fixation des prix est quelque peu ajustée.

Le délégué des Etats-Unis fait remarquer qu'il faut se garder d'étouffer l'investissement privé et que les règles relatives aux conditions d'accès devraient refléter ces préoccupations à long terme. Lorsqu'il existe des monopoles publics, ces préoccupations sont moins importantes : de fait, dans ce cas, les conditions fondées sur les coûts semblent "correctes". Lorsque l'on est en présence d'un monopoleur à capitaux privés soumis à une réglementation, les conditions de l'accès peuvent être appréhendées par l'intermédiaire des autorités de réglementation. En revanche, lorsqu'on est en présence d'un monopole privé non réglementé, ne découlant pas d'une autorisation des pouvoirs publics, les autorités chargées de la concurrence devraient être sensibles à la possibilité d'une dissuasion de l'investissement privé.

Les facteurs retenus pour la fixation des prix peuvent être soit des coûts évitables (coûts supplémentaires imposés au propriétaire de l'installation, notamment les coûts liés à la fourniture d'un supplément de capacité) soit, à l'autre extrême, des coûts intégralement compensatoires (y compris la perte des bénéfices liés au monopole). La fixation de tels prix supposerait un examen des coûts et des recettes, et a un "parfum de réglementation". Les conditions d'accès autres que tarifaires sont plus confuses et nécessiteraient un mécanisme d'arbitrage, éventuellement un tribunal, notamment dans les secteurs où l'évolution technique est rapide. Par exemple, la Federal Communications Commission définira les conditions d'interconnexion au réseau local, qui consistent pour l'essentiel en une description détaillée des conditions techniques d'interconnexion. Dans un autre exemple, celui des interfaces informatiques, on pourrait exiger la publication d'informations techniques et spécifier le calendrier d'une telle publication. Dans chacun de ces cas, la surveillance se poursuivrait de manière continue après la décision initiale de manière à assurer que les conditions d'accès évoluent au fur et à mesure de l'innovation technologique.

Le Président remarque qu'il sera peut-être difficile d'identifier qui devrait exercer ces activités essentiellement réglementaires, une autorité de réglementation ou l'autorité chargée de la concurrence, agissant soit directement, soit par l'intermédiaire du pouvoir judiciaire. En conséquence, il conviendrait peut-être d'envisager une solution de nature structurelle.

Le délégué australien déclare qu'une solution structurelle pourrait être quelquefois appropriée, mais met en garde contre la perte des économies d'intégration verticale, d'échelle ou de gamme qui pourrait résulter d'une distinction structurelle. La question de savoir qui fixe le prix d'accès n'est pas aussi importante que la reconnaissance de sa difficulté intrinsèque. Certains plaident pour que les autorités chargées de la concurrence s'y intéressent, parce que ce sont elles qui seraient le mieux à même de donner plus de poids aux retombées à long terme sur la concurrence. D'autres estiment au contraire que les autorités chargées de la concurrence se disperseraient si elles se voyaient confier une mission de surveillance réglementaire.

Le délégué de l'Allemagne indique que le droit allemand n'établit pas de distinction entre une "installation essentielle" et d'autres affaires de refus de vente. En outre, en droit allemand, il importe peu qu'une entreprise ait refusé l'accès à un concurrent. L'article 22 relatif à l'abus de position dominante peut s'appliquer, mais il existe également une disposition relative à la discrimination, ainsi qu'une disposition spéciale relative au refus déloyal d'accès aux réseaux de transmission d'énergie. Une entreprise peut être dominante en vertu d'une licence exclusive. Un refus d'accès constitue un abus s'il bloque sans justification les possibilités de concurrence d'autres entreprises. En outre, il est interdit à des entreprises dominantes ou "puissantes" de faire obstacle de manière déloyale à d'autres entreprises ou de les traiter de manière différente en l'absence de faits justifiant cette différence de traitement. Les entreprises concernées peuvent intenter une action en dommages et intérêts. Les intérêts des parties sont jugés en se fondant sur l'esprit de la loi, qui vise à sauvegarder la liberté de la concurrence. Les entreprises ne peuvent pas être contraintes de favoriser leurs concurrents ou de s'engager dans des activités non rentables. La finalité du droit de la concurrence, qui est de préserver la liberté de l'accès au marché, est tout particulièrement prise en compte.

Dans une affaire récente, l'accès à un réseau de gazoducs avait été refusé, alors que cet accès aurait abouti à une concurrence entre l'entreprise installée dominant le marché et un nouveau concurrent. La cour suprême fédérale a estimé que le propriétaire d'un réseau de transmission de gaz ou d'électricité dominant le marché pouvait, en principe, être contraint d'accorder l'accès à des tiers dans un but de transmission. La cour a fondé entièrement sa décision sur la disposition spéciale relative au secteur de l'énergie évoquée au paragraphe précédent.

Dans une autre affaire récente, les chemins de fers nationaux allemands, qui dominent le(s) marché(s) allemand(s) du transport longue distance de voyageurs, ont refusé d'autoriser Sabre, système américain de réservation informatisé, à faire des réservations. La compagnie de chemins de fer est l'un des actionnaires de Start, système de réservation informatisé qui était le seul système informatique pouvant délivrer des billets de chemin de fer allemands. A cette époque, Start détenait quelque 90 pour cent du marché des services de réservation informatisée en Allemagne. Ce refus d'accès a été considéré comme un obstacle à l'entrée significatif pour Sabre. On a considéré qu'il y avait violation de la loi. Après une lettre d'avertissement de l'Office fédéral des cartels, les chemins de fer allemands ont renoncé à leur pratique.

Le délégué japonais indique qu'au Japon, il n'existe pas de doctrine des installations essentielles en tant que telle. Les refus de vente sont considérés comme des pratiques commerciales déloyales lorsqu'ils font obstacle à la concurrence ou si on estime qu'ils aboutissent à un monopole en restreignant considérablement la concurrence. Les Lignes directrices de la loi anti-monopole concernant les systèmes de distribution et les pratiques des entreprises donnent comme exemple de refus de vente illégal un cas où " un fabricant influent sur un marché, en obligeant ses distributeurs à ne pas traiter avec ses concurrents, réduit les perspectives professionnelles de ses concurrents et les empêche de trouver facilement d'autres partenaires commerciaux et, dans le but d'assurer l'efficacité de ce comportement, refuse de vendre aux distributeurs ne se conformant pas à cette exigence".

Fondamentalement, le refus de vente est jugé globalement selon que la mesure prise réduit ou non de manière substantielle la concurrence sur le marché ou empêche l'exercice d'une concurrence loyale. La part de marché de la partie concernée, l'existence de concurrents, la structure du marché, les caractéristiques de l'installation et le motif du refus de l'accès à l'installation sont pris en considération.

Dans une affaire, une association professionnelle avait construit une installation spécialisée destinée au stockage de bois importé. Il n'était pas économiquement faisable de dupliquer cette installation ou d'utiliser un autre port. L'association professionnelle limitait le nombre de ses membres et interdisait à des non-membres d'utiliser l'installation. En conséquence, il n'y avait aucune concurrence venant de l'extérieur de l'association. La JFTC a demandé à cette association d'arrêter de limiter le nombre de ses membres selon des critères non raisonnables.

En outre, la JFTC peut, sous certaines conditions, imposer une distinction structurelle en vertu de la loi anti-monopole. Un taux de profit excédentaire constitue, parmi d'autres critères, un élément pris en compte dans l'évaluation. La JFTC n'a pas encore exercé ce pouvoir.

Le délégué du BIAC indique qu'il s'agit d'une question importante pour les entreprises, qui touche aux décisions d'investissement les plus importantes. Selon lui, il est difficile pour les entreprises de comprendre la diversité des stratégies adoptées par les différentes juridictions en matière d'installations essentielles. Il est nécessaire de "faire avancer cette question" du fait de l'absence d'uniformité, sans toutefois que l'objectif soit nécessairement de parvenir à une uniformisation, d'ailleurs impossible compte tenu des différences d'objectifs et de régimes juridiques. Les Etats-Unis et l'Union européenne poursuivent des buts différents : les premiers sont plus orientés sur le bien-être ; dans la seconde, la question est rendue plus complexe par les objectifs d'intégration et de protection des petites et moyennes entreprises.

Il ne faut pas se perdre dans le concept de “doctrine”, ni s’engager dans un formalisme juridique censé déboucher sur des règles simples. Au contraire, il faut se baser sur l’analyse économique et bien comprendre les objectifs économiques de l’action des pouvoirs publics. Nous devrions explorer les limites de la “doctrine”.

Il convient de remarquer que les débats ont été centrés sur l’intégration verticale. Au sein des Communautés européennes, il existe une doctrine clairement établie sur l’abus de position dominante et le concept de “conflit d’intérêts” d’une entreprise dominante sur le marché en amont et utilisatrice en aval du facteur de production intermédiaire. Bon nombre d’affaires concernent cette question, mais les entreprises ne sont pas nécessairement intégrées verticalement, c’est-à-dire que l’entreprise dominante peut ne pas être présente en aval. La question est de savoir si les mêmes principes s’appliquent aux deux types d’affaires. En Europe, elles sont traitées de la même manière, parce que le droit communautaire fonctionne à partir d’un large système d’abus de position dominante et que les installations essentielles, loin de constituer une doctrine distincte, n’en sont qu’une sous-partie.

La définition du marché concerné est essentielle : le délégué du BIAC pense que la Commission des Communautés Européennes s’est trop focalisée sur les installations physiques. Les entreprises sont à la recherche de lignes directrices en matière de parts de marché et d’une approche cohérente de la définition des marchés, non seulement pour les affaires concernant les “installations essentielles”, mais aussi sur un plan plus général.

La question fondamentale n’est pas seulement “qu’est-ce qu’une installation essentielle”, il faut aussi se demander “pour qui l’installation est-elle essentielle ?” Certains semblent vouloir déposséder l’entreprise en place de l’avantage concurrentiel dont elle bénéficie. L’important n’est pas tant qu’un actif soit essentiel pour un entrant et la question doit plutôt consister à savoir si l’entrant joue un rôle essentiel dans l’augmentation du bien-être des consommateurs ou dans la réalisation de tout autre objectif.

Du point de vue économique, il ne devrait pas y avoir de règles différentes ou de distinction entre la détention individuelle ou conjointe d’une installation. Toutefois, les règles juridiques concernées (chapitres 1 et 3 du Sherman Act aux Etats-Unis et articles 85 et 86 du Traité de Rome) diffèrent. est-il rationnel que des règles juridiques différentes aboutissent à un traitement différent de la détention individuelle ou conjointe ?

Une justification commerciale légitime est essentielle pour l’exercice d’une activité. Les autorités chargées de la concurrence doivent distinguer entre nouveaux entrants et entreprises en place dans les services publics en termes de justifications commerciales légitimes. Par exemple, une entreprise qui construit une nouvelle ligne de chemins de fer sur laquelle elle exploitera ses propres trains a-t-elle l’obligation de construire une capacité suffisante pour les trains de ses concurrents ? Doit-elle autoriser des concurrents à exploiter des trains sur cette ligne immédiatement, ou après un certain délai, ou jamais ? Quand est-il légitime de rendre une entrée obligatoire dans une telle situation ?

Des entretiens privés avec des fonctionnaires de la Commission des Communautés Européennes ont fait apparaître que l’entreprise devrait construire une capacité supplémentaire pour ses concurrents.

Au Royaume-Uni, des autorités de réglementation spécifiques à chaque secteur ont pour devoir de favoriser la concurrence.

Le financement privé est important au Royaume-Uni et dans l’Union européenne. L’impact d’une doctrine des installations essentielle sur les gros projets d’infrastructure, pour lesquels les dépenses se chiffrent en milliards, est très lourd. Par exemple, la décision d’Eurotunnel limitant les droits d’usage rend la planification très difficile.

En conséquence, il est essentiel que les responsables de la concurrence déterminent les limites d'une doctrine des installations essentielles et qu'ils les communiquent aux entreprises.

Débat général

Le délégué de la France remarque qu'en 1995 ont eu lieu une série d'ateliers consacrés aux services publics, en particulier aux secteurs fondés sur des réseaux. Certains de ces secteurs peuvent être considérés comme des installations essentielles.

Le délégué italien souhaite préciser que le concept d'installations essentielles ne représente qu'une petite sous-catégorie des affaires de refus de vente opposés à des concurrents en aval par des monopoleurs intégrés verticalement. Par exemple, ce concept ne s'appliquerait pas à des "refus de vente arbitraires" où le monopoleur ne serait pas en concurrence sur le marché en aval. En droit italien, le refus de vente est explicitement cité parmi les abus de position dominante. Cette disposition est conforme au Traité de Rome. En outre, toutes les affaires italiennes ayant impliqué des installations essentielles concernaient des monopoles légaux. Lorsque ces monopoles légaux sont réglementés économiquement, l'effet dissuasif, sur l'investissement, de l'obligation d'assurer l'accès est atténué. L'intensification de la concurrence sur le marché secondaire réduit les possibilités d'évasion réglementaire. La question de la duplication possible dans ces secteurs ne se pose pas. Enfin, il existe déjà un mécanisme réglementaire qui facilite les recours et la surveillance.

Le délégué irlandais remarque que les débats ont clairement montré que les autorités chargées de la concurrence étaient conscientes de l'effet dissuasif potentiel, sur l'investissement, de l'obligation d'assurer l'accès, mais que, lorsqu'il s'agit de traduire la théorie économique dans des règles juridiques, une partie de la théorie est perdue et on aboutit à des règles juridiques ne reflétant pas cette prise de conscience. Si l'on examine avec l'oeil d'un juriste les règles exposées dans les contributions préparées par les pays, la question de l'effet dissuasif sur l'investissement ou l'innovation n'apparaît pas de manière très claire. Elle note à cet égard que, dans la note de la Commission des Communautés Européennes, la norme devant être appliquée par le propriétaire d'une installation essentielle est celle de la "détention indépendante" par une entité publique.

Elle signale que toute modification visant non plus à lever les obstacles à la concurrence mais à "aider" les entrants serait dangereuse, en s'interrogeant sur les limites d'une telle approche. Elle demande par exemple quelle serait la condition minimale pour obtenir l'accès dans l'affaire du réseau de GAB en Suède. Elle fait en outre remarquer que dans l'affaire *British Midlands-Aer Lingus*, l'entreprise en place, *Aer Lingus*, a été contrainte de conclure des accords interlignes avec *British Midlands* pendant deux ans, et pose la question suivante : A partir de quel moment des accords interlignes devraient-ils être imposés, c'est-à-dire qu'une compagnie effectuant un vol par jour aurait-elle droit à une telle assistance ?

Selon elle, il semble que l'on parte de l'hypothèse selon laquelle il vaudrait mieux obliger deux concurrents à conclure eux-mêmes un accord relatif aux conditions d'accès. Ceci est peut-être vrai dans la plupart des cas, mais pourrait également être l'occasion d'un échange d'informations susceptible de faciliter les ententes. Dans l'affaire *National Carbonising*, la Commission a demandé à l'entreprise de fournir le produit intermédiaire et de fixer son propre prix en aval de façon à ce que son concurrent, en étant raisonnablement efficient, puisse réaliser un bénéfice. Si une autorité chargée de la concurrence abdique toute responsabilité dans la détermination des prix d'accès, elle doit avoir conscience des conséquences négatives possibles.

Le délégué de la Commission des Communautés Européennes demande si, pour l'affaire concernant la Suède, l'accroissement de la concurrence résultant de l'accès des banques spécialisées au réseau de GAB a été significatif. Il admet qu'une autorité chargée de la concurrence n'a pas pour objectif de diminuer la valeur des actifs légitimement acquis par des entreprises, mais doit plutôt souhaiter assurer

un équilibre en favorisant l'accès à des installations essentielles sans pour autant dissuader l'investissement, par exemple dans une ligne de chemin de fer.

La décision Magill avait une portée très restreinte, au sens où les stations de télévision refusaient de fournir un produit pour lequel il y avait une demande. Il ne s'agissait pas d'une affaire d'installation essentielle.

Si le propriétaire d'une mine et d'un port construit pour les relier une ligne de chemin de fer conçue uniquement pour le transport du minerai, alors celle-ci fait partie d'une activité intégrée. En revanche, si quelqu'un construit l'unique voie de chemin de fer reliant Paris à Marseille et l'exploite sans autoriser aucun concurrent, la situation est différente : on est en présence de deux services, l'exploitation d'un réseau et la prestation d'un service utilisant ce réseau. Nous devrions arriver à une même conclusion : le réseau devrait être mise à la disposition de concurrents de manière qu'ils puissent également offrir le service utilisant le réseau. Le gestionnaire de la ligne de chemin de fer, agissant en qualité d'opérateur indépendant, devrait souhaiter ouvrir son réseau au plus grand nombre de concurrents possible afin de rentabiliser son investissement.

Le principe de proportionnalité, qui fait partie intégrante du droit communautaire, s'applique également au caractère transitoire d'une installation essentielle. Une installation peut être essentielle à une activité à un moment donné. Par exemple, *Aer Lingus* a été obligé de conclure des accords interlignes avec *British Midlands* pendant uniquement deux ans, parce qu'on estimait que c'était le temps nécessaire à BM pour s'établir sur le marché. Si *British Midlands* n'avait pas pu bénéficier de cette mesure dès le départ, elle aurait dû soit prévoir trop peu de vols, soit faire voler nombre d'avions à moitié vides.

Le Président résume la discussion en remarquant que l'on doit d'abord tenir compte du contexte économique dans laquelle se situe "l'installation essentielle". Ceci signifie qu'il faut définir le marché concerné, vérifier si l'installation est vraiment "essentielle" et pourquoi, et examiner les motifs commerciaux légitimes des refus de vente. Il note qu'il existe une distinction importante entre les installations publiques, privées mais réglementées et privées et non réglementées, parce que l'obligation d'assurer l'accès risque de moins inciter les opérateurs privés à investir et à innover. Rendre obligatoire l'accès à des installations du secteur public n'a pas les mêmes conséquences.

Il rappelle par ailleurs que les conditions d'accès peuvent être très difficiles à définir. En cas de modifications structurelles, celles-ci sont également très difficiles à définir, longues à mettre en oeuvre et les résultats peuvent ne pas toujours être positifs.

Enfin, le Président indique que la doctrine des installations essentielles est largement utilisée et ne varie pas beaucoup d'une juridiction à l'autre. Les différences dans l'incidence d'application d'une doctrine des installations essentielles peuvent être attribuées à des différences dans la structure des économies et dans l'application du droit de la concurrence, selon qu'elle est ou non confiée à un système administratif.

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