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Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities

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Abstract

This Article considers the European Community ("Community" or "EC") antitrust law rules on the duty to supply competitors with important goods or services. It is convenient to begin, in Part I of this Article, by summarizing the relevant Treaty provisions, and the case law of the Court of Justice of the European Communities (the "Court") and the Commission of the European Communities (the "Commission") on essential facilities. Part I begins with the less specialized cases, and outlines the Court and Commission cases on telecommunications and performing rights societies, as well as some relevant Community legislation. This provides the basis for a discussion of the general principles and problems in Part II of this Article. Part II is a synthesis, based on the principle that a dominant company has, at least in some cases, a duty to supply, if refusal will cause a significant effect on competition.

DEFINING LEGITIMATE COMPETITION: COMPANIES' DUTIES TO SUPPLY COMPETITORS AND ACCESS TO ESSENTIAL FACILITIES

*John Temple Lang**

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INTRODUCTION

This Article considers the European Community (“Community” or “EC”) antitrust law rules on the duty to supply competitors with important goods or services. In general, competition law discourages competitors from cooperating with one another. However, if one competitor owns something, if access is essential to enable other competitors to do business, and if the competitors cannot be expected to provide this facility for themselves, then European Union (“EU”) competition law obliges the owner of the essential facility to give equal access to its competitors. This obligation is due to the effect of a refusal of access on competition. This principle must be treated with caution, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has legitimately acquired. Furthermore, companies are normally free to improve the bargains that they offer to customers by offering related goods or services as part of the bargain, even if this makes it difficult or even impossible for their competitors to offer comparable bargains. All the same, the 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 cru-

cial legal problem that arises after an industry is deregulated, but can arise in any industry.

These rules apply both to state-owned and to private enterprises. They may be especially important if a company has been given a privileged position by a state, such as control over an essential facility — for example, an airport or a harbor. Where the parent companies of a joint venture have considerable market power, they may be required under Article 85(3) of the Treaty Establishing the European Community¹ (the “EC Treaty”) to not discriminate in favor of their joint venture and to deal with its competitors on the same basis, even if it is not strictly essential for competitors to contract with them, and even if neither competitor is dominant. A dominant company that discriminates selectively against a particular competitor — for example, to discourage it from overly vigorous competition by denying access to an important facility on the same terms as it gives to other companies — is likely to break the law, even if the facility is not necessarily “essential.”

If a dominant company owns intellectual property rights that enable it to prevent competitors from producing directly competing products, it is not necessarily an abuse for it to refuse to grant licenses to its competitors. Licenses may be necessary to give access to an essential facility, but only if unlicensed competitors cannot enter the market. Otherwise, refusal to license infringes Article 86 of the EC Treaty² only if there is some related behavior that constitutes an abuse, whether exploitative or exclusionary. In some cases, compulsory licensing of the intellectual property rights is the appropriate remedy.

It is convenient to begin, in Part I of this Article, by summarizing the relevant Treaty provisions, and the case law of the Court of Justice of the European Communities (the “Court”) and the Commission of the European Communities (the “Commission”) on essential facilities. Part I begins with the less spe-

1. Treaty Establishing the European Community, Feb. 7, 1992, art. 85(3), [1992] 1 C.M.L.R. 573, 627 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (1992) [hereinafter TEU]. The TEU, *supra*, amended Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

2. EC Treaty, *supra* note 1, art. 86.

cialized cases, and outlines the Court and Commission cases on telecommunications and performing rights societies, as well as some relevant Community legislation. This provides the basis for a discussion of the general principles and problems in Part II of this Article.

I. TREATY PROVISIONS AND CASE LAW OF THE COURT OF JUSTICE AND THE COMMISSION

What are essentially issues of access to essential facilities have arisen frequently in Europe in connection with the liberalization of the gas, electricity, and telecommunications industries. The Commission determined, however, that these industries could not be satisfactorily liberalized using only Community anti-trust law, and that it was necessary to adopt general measures of which access to networks and grids would be only one aspect.

The case law, briefly summarized below, makes it clear that there is a duty to supply both competitors and customers in a variety of circumstances. The case law uses a number of legal principles or theories, more or less explicitly: a) dominant companies may not discriminate if the discrimination has significant effects on competition; b) dominant companies may not refuse to supply competitors or customers if the refusal has significant effects on competition; c) dominant companies may not increase or extend their dominance in the same markets or use their power in one market to monopolize another; d) an "essential facility" principle; e) dominant owners of intellectual property rights commit an abuse only if they do something more than merely exercise those rights to prevent the monopoly given to them from being infringed; f) dominant companies may not selectively treat customers or competitors with which they deal less favorably to discourage or penalize competition; g) dominant companies may not make their willingness to supply conditional on acceptance of restrictive undertakings. These principles are not, of course, mutually exclusive.³

3. This Article deliberately disregards formal legal categories such as refusal to deal, discrimination, etc. Instead, it calls attention to the economic aspects of the cases and situations described. This Article is based on the case law and practice of the EC institutions to date. Almost all of the cases that have been dealt with have been treated in a relatively straightforward manner, and no effort is made to provide a more sophisticated economic analysis. If the defendant companies had thought it appropriate to

A. *Treaty Provisions*

Article 86 of the EC Treaty states that an abuse of a dominant position may consist of, among other things, "applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage."⁴ This prohibits second line discrimination between competitors downstream from the market in which the dominant position exists, placing one or more of the competitors at a disadvantage *vis-à-vis* the others. It applies whether or not the favored competitors are associated with the dominant company, but it does not impose a duty to supply on a nondiscriminatory basis regardless of the effect on competition.

The Court has confirmed that Article 86 also prohibits discrimination between customers of the dominant company based on whether or not they deal exclusively with it.⁵ This behavior creates a competitive disadvantage for competitors of the dominant company at the same level in the market. It is not within the narrow phrase just quoted, "placing them at a competitive disadvantage."⁶ An unjustified refusal to deal is, of course, an

make more sophisticated economic arguments, there would be more practice to show how the Commission would deal with them.

4. EC Treaty, *supra* note 1, art. 86. The full text of Article 86 of the EC Treaty states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member-States.

Such abuse may, in particular, consist in:

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

Id.

5. Coöperatieve vereniging 'Suiker Unie' UA v. Commission, Joined Cases 40-48, 50, 54-56, 111, 113-14/73, [1975] E.C.R. 1663, 2002-05, [1976] 1 C.M.L.R. 295, 471-73; Hoffmann-La Roche & Co. AG v. Commission, Case 85/76, [1979] E.C.R. 461, 461-64, [1979] 3 C.M.L.R. 211, 211-15.

6. See *supra* note 4 (quoting Article 86 of EC Treaty).

extreme form of illegal discrimination.⁷

Article 86 also prohibits dominant companies from “tying-in,” defined as “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”⁸ “Tying-in” is normally practiced by horizontally-integrated companies selling different products to customers at the same level of industry or distribution. It is, in essence, an attempt by a company dominant in the market for one type of good to use its position in that market to strengthen its position in the market for other goods.

Article 66(7) of the European Coal and Steel Community Treaty⁹ (“ECSC Treaty”) prohibits abuses of a dominant position by dominant coal and steel companies, but it does so in general terms. Article 63 of the ECSC Treaty allows the Commission to take action if “discrimination is being systematically practiced by buyers, particularly as concerns orders placed by government subsidiaries.”¹⁰ This was primarily intended to allow the Commission to prevent non-ECSC companies from discriminating in favor of coal and steel producers of their own nationality. It was, in effect, a special case of what later became Article 90 of the EEC Treaty.¹¹ Under Article 63 of the ECSC Treaty¹² it is not

7. The Court has not yet had an opportunity to consider the duties of a dominant company that has never supplied the goods or services in question to anyone outside its own group.

8. See *supra* note 4 (quoting Article 86 of EC Treaty).

9. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, art. 66(7), 261 U.N.T.S. 140, 203-05 (1957), as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987) [hereinafter ECSC Treaty]. Article 66(7) of the ECSC Treaty says:

To the extent necessary, the High Authority is empowered to address to public or private enterprises which, in law or in fact, have or acquire on the market for one of the products subject to its jurisdiction a dominant position which protects them from effective competition in a substantial part of the common market, any recommendations required to prevent the use of such position for purposes contrary to those of the present Treaty. If such recommendations are not fulfilled satisfactorily within a reasonable period, the High Authority will, by decisions taken in consultation with the interested government and under the sanctions provided for in Articles 58, 59 and 64, fix the prices and conditions of sale to be applied by the enterprise in question, or establish manufacturing or delivery programs to be executed by it.

Id.

10. *Id.* art. 63.

11. EEC Treaty, *supra* note 1, art. 90. Article 90 of the EEC Treaty said:

1. In the case of public enterprises and enterprises to which Member States

necessary to prove dominance or an effect on trade between Member States.

B. *The Case Law of the Court*

1. *Commercial Solvents v. Commission*

The leading case in this area is *Commercial Solvents*,¹³ in which the Court held that the company had a dominant position for the production of a raw material used to produce a chemical because the company had a world monopoly. The abuse was the refusal to supply a downstream competitor, which Commercial Solvents had previously tried to acquire, with the raw material which it needed. The Court ruled that a dominant company's plans to begin producing the downstream product itself did not justify its refusal to supply the raw material to its competitor and former customer when the refusal would eliminate the competitor from the market. The Court confirmed the Commission's order to resume supplies. In its judgment, the Court said:

[A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as

grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and in Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance in law or in fact, of the specific tasks assigned to such them. The development of trade may not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, issue appropriate directives or decisions to Member States.

Id.

12. ECSC Treaty, *supra* note 9, art. 63.

13. Istituto Chimioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, Joined Cases 6-7/73, [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309; *see* Commission Decision No. 87/500/EEC, O.J. L 286/36 (1987) [hereinafter BBI/Boosey & Hawkes]; Gregory B. Adams, *Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States*, 20 TEX. INT'L L.J. 1 (1985). Adams correctly points out that the Court's approach in *Commercial Solvents* resembled a rule of reason analysis and says that "the legal issue of whether full forward integration may be justified by efficiency considerations . . . remained open." *Id.* at 15.

to eliminate their competition which, in the case in question, would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.¹⁴

This passage from the judgment indicates that, at least when the three stated conditions are fulfilled, there is a general rule that a dominant company may not refuse to supply a competitor if the effect would be to put the competitor out of business, even if it plans to use the products in question itself.

It is notable that *Commercial Solvents* is often cited by the Court, the Court of First Instance (the "Tribunal"), and the Commission, and is clearly regarded as an important case stating a broad principle. After *Commercial Solvents*¹⁵ and *United Brands*,¹⁶ the first two important cases on Article 86, the principle of a general duty of dominant companies to supply was so well-established that it was not necessary later to distinguish essential facility cases from other cases of exclusionary abuse.¹⁷

14. *Commercial Solvents*, [1974] E.C.R. at 250-51, [1974] 1 C.M.L.R. at 340-41. In argument the Commission said there is a duty to supply at least when: the dominant company is a monopoly; the refusal affects one of the principal users, a former customer; no objective justification is apparent; and the refusal gravely affects the conditions of competition in the EC. If there is a duty to supply, there is, under Article 86 itself, a duty not to discriminate if the buyers are in competition with one another.

Some points to note include that the case involved a refusal to supply a downstream competitor, with important effects on competition. Specifically, the customer was the only competitor of Commercial Solvents in the Community in the production of the downstream product. *Id.* at 235, [1974] 1 C.M.L.R. at 327-28. Commercial Solvents was easily able to supply the competitor's needs as it had spare capacity and did not need all its production for its own use. *Id.* at 251, [1974] 1 C.M.L.R. at 341. Furthermore, no other justification for the refusal to supply was suggested.

15. *Id.* at 223, [1974] 1 C.M.L.R. at 309.

16. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

17. John Temple Lang, *Abuse of Dominant Positions in European Community Law, Present and Future: Some Aspects*, in FIFTH ANN. FORDHAM CORP. L. INST. CONF. 25, 57 (Barry Hawk ed., 1979) (unpublished conference paper, on file with Fordham Corporate Law Institute) [hereinafter *Abuse of Dominant Positions*].

What the Commission now calls essential facility cases were simply merged with what was regarded as the general class of cases in which dominant companies have a duty to supply, and it was not thought necessary even to distinguish between supply to competitors and customers not in competition with the dominant supplier.

2. *United Brands*

In the *United Brands* case, United Brands had refused to supply Olesen, a distributor, because Olesen had taken an active part in a sales campaign for a competing brand of bananas.¹⁸ The Court stated that:

an undertaking in a dominant position for the purpose of marketing a product — which cashes in on the reputation of a brand name known to and valued by the consumers — cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.¹⁹

It was therefore necessary to see if the discontinuance was justified. In doing so, the Court stated:

Although . . . the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.

Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.

The sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise, reasonably be contemplated as a sanction for conduct similar to that for which UBC blamed Olesen.

In fact UBC could not be unaware of that fact that by acting

18. *United Brands*, [1978] E.C.R. at 217, [1978] 1 C.M.L.R. at 435; see Adams, *supra* note 13, at 29-31 (noting that test of anticompetitive purpose is essence of judgment).

19. *United Brands*, [1978] E.C.R. at 292, ¶ 182, [1978] 1 C.M.L.R. at 496.

in this way it would discourage its other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market that much more effective.

Such a course of conduct amounts therefore to a serious interference with the independence of small and medium sized firms in their commercial relations with the undertaking in a dominant position and this independence implies the right to give preference to competitors' goods.

In this case the adoption of such a course of conduct is designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependent upon the dominant undertaking to stay in business.²⁰

Although less sweeping than *Commercial Solvents*,²¹ the language seems to imply that companies in dominant positions have a duty to supply in many cases. It also suggests, however, that the duty to supply a customer or distributor may be less strict than the duty to supply a competitor and that the duty to supply does not apply in every situation. A dominant company may not stop supplies in order to discourage competition. A competitive reaction by a dominant company must be reasonable and "proportionate to the threat."²² This formula, which would not be appropriate to a refusal to supply a competitor, suggests that the rules on refusals to supply are different when competitors and other customers are involved. A dominant company must not interfere with its distributors' commercial independence, including their freedom to promote rival brands. The duty of a dominant company goes much further than merely refraining from trying to obtain exclusive purchasing arrangements.

20. *Id.* at 293, ¶¶ 189-94, [1978] 1 C.M.L.R. at 496-97. Facts to note about *United Brands* are that United Brands had a sufficient amount of bananas to supply to Olesen. *Id.* at 217. Olesen was an important distributor in Denmark. *Id.* at 216. No other justification for the refusal to supply Olesen was suggested. Further, United Brands was not a competitor of Olesen at the level of distribution. *Id.* at 216-17. The case therefore involved supply to a customer or distributor, not a competitor.

The Court did not say that merely because United Brands was dominant it was essential for distributors to be able to sell its products, or that it was essential for United Brands to supply. The Court based its holding on the specific facts of the case.

21. See *supra* notes 13-17 and accompanying text (discussing *Commercial Solvents*).

22. *United Brands*, [1978] E.C.R. at 293, ¶ 190, [1978] 1 C.M.L.R. at 496-97.

3. *BP/ABG*

In the *BP/ABG* case, the Commission considered that BP had unlawfully reduced supplies to ABG when a petrol shortage occurred during the oil crisis in 1974.²³ ABG was a petrol distributor with which BP was in competition downstream.²⁴ ABG had bought primarily from BP, and during the crisis oil companies were able to supply only their traditional customers. The Court held that, as ABG no longer had a long-term contract with BP, BP was free, in times of scarce supply, to treat it less favorably than customers that had long-term contracts.²⁵ The selective reduction of supplies to ABG was therefore justified. ABG was only an occasional buyer from BP at the relevant time, though it had previously had long-term arrangements.²⁶ There was no suggestion that the termination of ABG's long-term contract was intended to be anticompetitive or that BP's long-term contracts were open to criticism on competition grounds.

4. *Maxicar v. Renault* and *Volvo v. Veng*

A more sophisticated question of supply to downstream competitors was raised in *Maxicar v. Renault*²⁷ and *Volvo v. Veng*.²⁸ Specifically, when is the refusal to license intellectual property rights for replacement car body parts contrary to Article 86? Design and similar rights were preventing independent producers of spare parts from producing replacement spare parts in competition with car manufacturers.²⁹ The Court said that it was lawful for a dominant company to obtain exclusive rights under intellectual property legislation. However, the Court also stated that the exercise of these rights may be prohibited if it gives rise to abusive conduct by the dominant company, such as an "arbitrary" refusal to deliver spare parts to independ-

23. *Benzine en Petroleum Handelsmaatschappij BV v. Commission, Case 77/77*, [1978] E.C.R. 1513, [1978] 3 C.M.L.R. 174.

24. *Id.* at 1517, [1978] 3 C.M.L.R. at 178-81.

25. *Id.* at 1528, ¶ 32, [1978] 3 C.M.L.R. at 192.

26. *Id.* at 1527, ¶ 29, [1978] 3 C.M.L.R. at 192.

27. *Consorzio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Régie Nationale Des Usines Renault, Case 53/87*, [1988] E.C.R. 6039, [1990] 4 C.M.L.R. 265 [hereinafter *Maxicar*].

28. *Volvo AB v. Erik Veng (U.K.) Ltd., Case 238/87*, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122.

29. *Id.* at 6213, [1989] 4 C.M.L.R. at 127; *see Maxicar*, [1988] E.C.R. at 6040, [1990] 4 C.M.L.R. at 281.

ent repairers, as occurred in *Hugin v. Commission*,³⁰ fixing prices for spare parts at an unfair (i.e., an excessively high) level, or a decision to cease producing spare parts for a particular model though many cars of that model are still in use.³¹ In other words, as the Advocate General said, the mere refusal to license is not in itself automatically contrary to Article 86.³² There must be some additional element in the dominant company's behavior. The judgment deals with possible abuse of a dominant position without discussing directly the needs of companies wishing to supply competing replacement parts.

5. *Magill/RTE/BBC*

Another complex set of cases involving intellectual property issues and supply to downstream competitors was *Magill/RTE/BBC*.³³ BBC and RTE (the Irish television authority) each pub-

30. *Hugin Kassaregister AB v. Commission*, Case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345. In this case, Hugin, a cash register manufacturer, had refused to supply spare parts for its registers to a downstream competitor, a company operating a repair and maintenance service. The Commission found that the refusal was to protect its own service and maintenance activities from competition. The Court accepted that Hugin was dominant in the market for bulk purchases by service companies of spare parts that they needed for Hugin cash registers. Production of spare parts for Hugin machines by any other supplier would have been uneconomic. The Court annulled the Commission's decision ordering supplies on the grounds that no effect on trade between Member States had been proved. *Id.* at 1898-1901, [1979] 3 C.M.L.R. at 372-74. A "decision" is a strictly, legally binding recommendation. The Commission's authority to issue decisions arises under Article 155 of the EC Treaty. EC Treaty, *supra* note 1, art. 155. The Court did not rule on the question of abuse (the company to which supplies had been refused had not gone out of business) or on the justification suggested by Hugin (maintenance of the reputation of its cash registers).

31. *Hugin*, [1979] E.C.R. at 1874, [1979] 3 C.M.L.R. at 349. This is presumably because such a measure forces the owners of these models to abandon them and buy newer ones, and because it disregards consumers' needs.

32. Opinion of Advocate General Reischl, *Hugin*, [1979] E.C.R. at 1902, [1979] 3 C.M.L.R. at 347.

33. *Radio Telefis Eireann v. Commission*, Case T-69/89, [1991] E.C.R. II-485, [1991] 4 C.M.L.R. 586 (Ct. First Instance) [hereinafter RTE]; *The British Broadcasting Corporation and BBC Enterprises Ltd. v. Commission*, Case T-70/89, [1991] E.C.R. II-535, [1991] 4 C.M.L.R. 669 (Ct. First Instance) [hereinafter BBC]; *Independent Television Publications Ltd. v. Commission*, Case T-76/89, [1991] E.C.R. II-575, [1991] 4 C.M.L.R. 745 (Ct. First Instance). *Magill TV Guide Ltd.* intervened in support of the Commission. *RTE*, [1991] E.C.R. II-485, [1991] 4 C.M.L.R. 586 (Ct. First Instance). Opinion of Advocate General Gulman, *Radio Telefis Eireann v. Commission*, Joined Cases C-241-42/91 P (Eur. Ct. J. June 1, 1994) (Court decision not yet issued). The Court of First Instance's judgement in the above cited cases has been much discussed. *See, e.g.*, Ian Forrester, *Software Licensing in the Light of Current EC Competition Law Considerations*, 13 EUR. COMPETITION L. REV. 5, 5-20 (1992); André Françon, 45 REV. TRIMES-

lished their own weekly guide to their respective television and radio programs, but both refused to give details of their programs to other magazines more than a day in advance. This made it impossible for anyone to publish a single independent weekly magazine giving all the BBC and RTE programs throughout the week.³⁴ The Court of First Instance held that the BBC and RTE held dominant positions in the markets for the supply of their weekly program lists and for the magazines in which these were published.³⁵ The refusal of both television companies to provide details of their programs to a competing weekly magazine was an abuse contrary to Article 86 of the EC Treaty.³⁶ Only restrictions on competition that are inherent in the protection of the actual substance of intellectual property rights are permitted in Community law. A dominant company is not free to exercise such rights to pursue an aim contrary to Article 86. Citing *Volvo v. Veng*,³⁷ the Court said that by reserving to itself the exclusive right to publish their weekly program lists, BBC and RTE were preventing the emergence of a new product, a general TV magazine.³⁸ They were using copyright in the listing derived from broadcasting to secure a monopoly in the derivative market for weekly TV guides. This went beyond what was necessary to fulfil the essential function of copyright. The refusal was comparable to the arbitrary refusal of a car manufacturer to supply spare parts to an independent repairer in the

TRIELLE DE D. COMMERCIALE ET DE D. ECON. 372, 372-76 (1992); Marie-Angèle Hermitte, *Guides Hebdomadaires de Télévision*, J. DU D. INT'L 471, 471-77 (1992); Ronald E. Myrick, *Will Intellectual Property on Technology Still Be Viable in a Unitary Market*, 14 EUR. INTELL. PROP. REV. 298, 298-304 (1992); Jonathon Smith, *Television Guides: The European Court Doesn't Know 'There's So Much In It'*, 13 EUR. COMPETITION L. REV., 135, 135-38 (1992); Romano Subiotto, *The Right to Deal With Whom One Pleases Under EEC Competition Law: A Small Contribution to a Necessary Debate*, 13 EUR. COMPETITION L. REV. 234, 234-44 (1992); Thomas C. Vinje, *Magill: Its Impact on the Information Technology Industry*, 14 EUR. INTELL. PROP. REV. 397, 397-402 (1992); Michel Waelbroeck, *Bi-Annual Review of EEC Competition Cases 1989-1991*, in 1991 FORDHAM CORP. L. INST. 111, 134-37 (Barry Hawk ed., 1992).

34. RTE, [1991] E.C.R. II-492, [1991] 4 C.M.L.R. at 594; BBC, [1991] E.C.R. at II-561, [1991] 4 C.M.L.R. at 675.

35. RTE, [1991] E.C.R. at II-517, [1991] 4 C.M.L.R. at 614-15; BBC, [1991] E.C.R. at II-587, [1991] 4 C.M.L.R. at 691-92.

36. RTE, [1991] E.C.R. at II-522, [1991] 4 C.M.L.R. at 619; BBC, [1991] E.C.R. at II-566, [1991] 4 C.M.L.R. at 696.

37. *Volvo AB v. Erik Veng (U.K.) Ltd.*, Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122; see *supra* note 28 and accompanying text (discussing *Veng*).

38. RTE, [1991] E.C.R. at II-520, [1991] 4 C.M.L.R. at 617-18; BBC, [1991] E.C.R. at II-564, [1991] 4 C.M.L.R. at 694.

derivative market of car maintenance and repair. Also, like a car manufacturer's decision to stop production of spare parts for a model still in use, the BBC's refusal failed to take consumers' needs into consideration.³⁹

On appeal to the Court, Advocate General Gulman disagreed with the Court of First Instance.⁴⁰ In a long, careful opinion, he said that the central issue was whether, and if so, when, a refusal to license may be contrary to Article 86. Such a determination depends on whether there are:

[S]uch *special circumstances* in connection with a refusal to license that it can no longer be regarded as a *refusal to license in itself*. If Article 86 can apply where the dominant undertaking *has done no more than refuse to grant licenses*, but where there were special circumstances in connection with the refusal to license, the position will be that the infringement of Article 86 can be terminated only by granting licenses.⁴¹

He went on to point out that, in some situations, the owner of the right can terminate the violation of Article 86 without licensing the right, either by resuming supplies to people improperly denied supplies or by lowering prices. In these situations, Article 86 does not lead to interference with the specific subject matter of the right. He said later:

I consider that in fact, as the Commission has argued, unreasonable royalties and a discriminatory licensing policy are examples showing that it is possible pursuant to Article 86 to interfere with rights within the specific subject-matter

39. There are several points to note about the Magill/RTE/BBC cases. Advance information about each week's programs is essential for the publication of any weekly TV magazine or guide. *RTE*, [1991] E.C.R. at II-492-93, [1991] 4 C.M.L.R. at 594; *BBC*, [1991] E.C.R. at II-541, [1991] 4 C.M.L.R. at 675. Also, the market for magazines is quite distinct from the market for transmitting television and radio programs. *RTE*, [1991] E.C.R. at II-492-94, [1991] 4 C.M.L.R. at 594-95; *BBC*, [1991] E.C.R. at II-541-42, [1991] 4 C.M.L.R. at 675-77. The case can, therefore, be regarded either as involving refusal to make available an essential facility for entry into the market for comprehensive TV guides or an effort to extend copyright and monopoly control over program listing into the market for comprehensive TV publications. Finally, the case was dealt with on the basis of the needs of a new entrant into a new market, seeking to offer a new product which did not exist at the relevant time. *RTE*, [1991] E.C.R. at II-520, [1991] 4 C.M.L.R. at 617-18; *BBC*, [1991] E.C.R. at II-564, [1991] 4 C.M.L.R. at 694.

40. This case has not yet been decided at the time of publication.

41. Opinion of Advocate General Gulman, *Radio Telefis Eireann v. Commission*, Joined Cases C-241-42/91 P, at 14, ¶ 40 (Eur. Ct. J. June 1, 1994) (Court decision not yet issued).

where those rights are exercised in special circumstances. The dominant undertaking does not do anything more than exercise rights within the specific subject-matter, namely impose royalties and refuse to grant licenses. But the exercise of those rights takes place under special circumstances since the undertaking demands royalties which are considerably higher than in other Member States or refuses a license at the same time as licenses are in fact given to others. Application of Article 86 to the two situations would signify interference with rights falling within the specific subject-matter since the possibility for the owner [of the registered design] to freely determine his remuneration would be restricted and since the owner would be required to grant a license to the person against whom he had discriminated. There is no reason to define the charging of unreasonable royalties to operation of a discriminatory licensing policy as conduct which in general is outside the specific subject-matter of copyright.⁴²

He went on to further consider the Commission's argument that by refusing a license RTE was preventing the emergence of a new kind of product.

The Commission contends that in classifying a product as new it is not relevant whether it will compete with the copyright owner's own products.

I do not believe that the Commission's view is tenable.

I consider it appropriate to find that there is an abuse of a dominant position if a copyright owner by means of his copyright prevents the emergence of a product which *does not compete* with his product since it meets other consumer needs than those that are met by his product.

The contrary is true, in my view, if copyright is used in order to prevent the emergence of a product which is produced by means of the work protected by the copyright and which competes with the products produced by the copyright owner himself. Even if that product is new and better, the interests of consumers should not in such circumstances justify interference in the specific subject-matter of the copyright. Where the product is one that largely meets the same needs of consumers as the protected product, the interests of the copyright owner carry great weight. Even if the market is limited to the prejudice of consumers, the right to refuse licenses in

42. *Id.* at 21, ¶ 61 (citations omitted).

that situation must be regarded as necessary in order to guarantee the copyright owner the reward for his creative effort.⁴³

Additionally, he said:

The Commission has further claimed that the example from the judgments of the Court of Justice in *Volvo v. Veng* and *CICRA v. Renault* cited by the Court of First Instance is relevant to a decision in the present cases. According to the Commission the situation of *Magill* corresponds to that of an independent repairer in so far as both are dependent on the supply of products from an upstream market (in program listings and car parts respectively) in order to carry on an activity on a derivative market (the market for television guides and the market for repairing Volvo and Renault cars respectively) where they compete with their suppliers (RTE's and ITP's own weekly television guides and Volvo's and Renault's authorized repairers respectively). The Commission concedes however that the analogy is not complete since *Magill*'s situation differs in so far as the supply of a product was not sufficient for *Magill* to be able to carry out its activity as *Magill* needed to obtain a license in order to produce copies of the protected work itself.

The difference is precisely crucial. As RTE and ITP point out, a distinction must be drawn between a *refusal to supply* a product to customers who wish to use that product on a derivative market and a *refusal to grant a license* to a competitor who wishes to produce and sell products incorporating the protected work. In the first case the existence of any infringement of Article 86 does not depend on whether the products concerned are protected by an intellectual property right . . .

[I]t is appropriate to draw an analogy with the situations at issue in *Volvo v. Veng* and *CICRA v. Renault*, namely that Volvo and Renault were entitled to refuse a license to market spare parts that had been produced without Volvo's and Renault's approval. It should be noted that the Court of Justice did not see fit in that connection to distinguish between licenses for the purpose of competing on the market for the sale of spare parts and licenses for the purpose of competing on the market for repairing Volvo and Renault cars.

There is therefore no basis for treating the exercise by a copyright owner of his copyright in order to prevent competitors

43. *Id.* at 30, ¶¶ 94-97.

from using the protected work differently according to the market on which such use takes place. . . . [T]he possibility of exploiting the copyright on what is described as a derivative market must be regarded as necessary in order to obtain sufficient reward for creative effort.⁴⁴

6. *Hilti*

The *Hilti*⁴⁵ case concerned the Commission's finding that a manufacturer of nail guns and the nails and cartridge strips that are used with them had abused its dominant position in the nail gun market by practices that prevented competitors from supplying nails for use with Hilti guns.⁴⁶ The Court of First Instance upheld the Commission's decision, stating that nail guns, cartridge strips, and nails constitute three separate markets, and that there is a separate market for Hilti-compatible nails.⁴⁷ Hilti had abused its dominant position by demanding excessive fees, needlessly prolonging proceedings for the grant of compulsory licenses to competitors, and by selective and discriminatory policies. These included reducing discounts to its customers when Hilti cartridge strips were bought without Hilti nails, and refusing to fulfil orders or to honor guarantees when non-Hilti products were used.⁴⁸ Hilti had failed to ask the U.K. authorities to confirm its claim that non-Hilti nails were dangerous, and thus, had no right to eliminate their use itself.

On appeal, the Court of Justice also found against Hilti. The Commission had found that Hilti had tied the sale of nails to sales of strips, refused to supply cartridges to competing producers of nails, and refused to supply cartridges for resale.⁴⁹ Hilti also gave more favorable discounts to customers that agreed to buy only its products.⁵⁰ Hilti's practices, therefore, though intended to exclude downstream competitors, involved both its customers and its competitors. Consequently, as in *Com-*

44. *Id.* at 33-34, ¶¶ 109-12.

45. *Hilti AG v. Commission*, Case T-30/89, [1991] E.C.R. II-1439, [1992] 4 C.M.L.R. 16 (Ct. First Instance); *Hilti AG v. Commission*, Case C-53/92P, [1994] E.C.R. —, [1994] 4 C.M.L.R. 614; Commission Decision No. 88/138/EEC, O.J. L 65/19 (1988) (*Eurofix-Bauco v. Hilti*).

46. *Hilti*, [1991] E.C.R. at II-1447, [1992] 4 C.M.L.R. at 19.

47. *Id.* at II-1453, [1992] 4 C.M.L.R. at 26.

48. *Id.* at II-1452, [1992] 4 C.M.L.R. at 25-26.

49. *Id.* at II-1451, [1992] 4 C.M.L.R. at 25.

50. *Id.* at II-1452, [1992] 4 C.M.L.R. at 25.

mercial Solvents,⁵¹ there was no question of the dominant company having difficulty in supplying sufficient quantities, there was little competition downstream, and the dominant firm provided no real justification for the refusal to supply.

C. *The Case Law of the Commission*

1. *National Carbonising Company v. Commission*

Apart from the specialized Commission decisions about telecommunications and performing rights, the first relevant Commission case is *National Carbonising*.⁵² In that case, the National Coal Board (the "NCB") had a dominant position on the U.K. market both for coal, which is the raw material for making coke, and for coke. National Carbonising, a competing coke producer, claimed that the price at which the NCB sold coal for coke-making was too high, and the price of industrial coke sold by the NCB too low to enable National Carbonising to produce industrial coke and sell it at a profit in competition with the NCB.⁵³ Ultimately, the Commission rejected the complaint, essentially on the grounds that National Carbonising was unaffected in the market for domestic coke, and the case was finally dropped. However, the case illustrated the principle that a dominant company selling both a raw material and the downstream product made from it has a duty not only to supply the raw material to competitors, as in *Commercial Solvents*,⁵⁴ but also to do so at a price that, in all cases, enables its downstream competitors to remain in business if they are reasonably efficient. The Commission also considered that 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.

2. *IBM*

In the Commission's *IBM* case,⁵⁵ IBM had sold its large com-

51. See *supra* notes 13-17 and accompanying text (discussing *Commercial Solvents*).

52. *National Carbonising Co. Ltd. v. Commission*, Case 109/75R, [1975] E.C.R. 1193; [1975] 2 C.M.L.R. 457; Commission Decision No. 76/185/ECSC, O.J. L 35/6 (1976) (*National Carbonising*).

53. *National Carbonising*, [1975] E.C.R. at 1194, [1975] 2 C.M.L.R. at 458.

54. See *supra* notes 13-17 and accompanying text (discussing *Commercial Solvents*).

55. *Int'l Business Machines Corp. v. Commission*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635 [hereinafter *IBM*]; *IBM*, 17 E.C. BULL., no. 10, at § 3.4.1 (1984).

puter only with main memory and basic software, thus preventing competing suppliers of memory and software from selling these products to IBM customers, who wanted large IBM computers.⁵⁶ Additionally, IBM had refused to supply certain software to users of non-IBM mainframe computers.⁵⁷ IBM had also developed a practice of announcing new hardware and software products and taking orders for them from buyers long before the new products were delivered or the technical details of their interfaces were disclosed.⁵⁸ This meant that competing suppliers of IBM-compatible hardware or software that needed to be used with IBM's new products could not begin to modify the interfaces of their products, to make them compatible with IBM's new products, until long after IBM began to take orders.⁵⁹ IBM ultimately undertook to disclose, in good time, sufficient interface information to enable competitors to adapt their hardware and software to IBM's new products and to supply the software that it had previously refused to supply for use with non-IBM main frame computers.⁶⁰ The case was settled on the basis of IBM's undertakings, so that the Commission never had occasion to revise the position it adopted in its Statement of Objections to IBM or otherwise to elaborate on its legal analysis. The essence of the Commission's position was that by selling main memory and basic software with its large computers, IBM was in effect unnecessarily "tying" the two former products to the large computers. By refusing to supply certain software for use with non-IBM mainframe computers, IBM was denying users of non-IBM computers an important element in the IBM-based system, and thereby creating a disadvantage for its competitors selling IBM-compatible mainframe computers. By delaying disclosure of interface information on new IBM products while taking orders for them, IBM was creating an artificial advantage for itself

56. *IBM*, [1981] E.C.R. at 2642, [1981] 3 C.M.L.R. at 637.

57. *Id.*

58. *Id.*

59. *Id.*

60. Points to note about the IBM case are that IBM sold a series of hardware and software products designed to be used with one another. *Id.* It was horizontally integrated. Further, its competitors each sold some, but not all, of the same range of products, for use with IBM's products. *Id.* In its resolution of the dispute, IBM undertook to give its competitors an opportunity that it had not previously given them to adapt their products and to sell them for use with IBM's products. *IBM*, 17 E.C. BULL., no. 10, at § 3.4.1 (1984).

and denying its competitors an opportunity to adapt their products to the new IBM products.

3. *BBI/Boosey & Hawkes*

*Boosey & Hawkes*⁶¹ was an interim measures decision of the Commission under Article 86. The decision required Boosey & Hawkes to resume supplies of musical instruments and spare parts to two companies, a repairer and a retailer of musical instruments, which had set up a joint venture to supply instruments directly to bands.⁶² They needed Boosey & Hawkes products to have a complete product range, and they risked going out of business if they could not get them.⁶³ Boosey & Hawkes sold only to dealers. In its decision, the Commission said:

A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat. The fact that a customer of a dominant producer becomes associated with a competitor or a potential competitor of that manufacturer does not normally entitle the dominant producer to withdraw all supplies immediately or to take reprisals against that customer.⁶⁴

61. *BBI/Boosey & Hawkes*, O.J. L 286/36 (1987).

62. *Id.* at 41, ¶ 24.

63. *Id.* at 41, ¶ 10.

64. *Id.* at 41, ¶ 19. The Commission also stated:

A course of conduct adopted by a dominant undertaking with a view to excluding a competitor from the market by means other than legitimate competition on the merits may constitute an infringement of Article 86 The injury to competition would be aggravated where (as is alleged here) the stated purpose of the action is indirectly to prevent the entry into the market of a potential competitor to the dominant producer.

Id. at 40-41. The Commission further observed that:

There is no obligation placed on a dominant producer to subsidize competition to itself. In the case where a customer transfers its central activity to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship. However, the refusal of all supplies . . . and the other actions B&H has taken against them as part of its reaction to the perceived threat . . . would appear in the circumstances of the present case to go beyond the legitimate defence of B&H's commercial interests.

Id. at 41, ¶ 19.

4. *London European-Sabena and British Midland v. Aer Lingus*

In the *Sabena*⁶⁵ case, Sabena was dominant in Belgium in the market for computer reservation services. The Commission declared the refusal by Sabena to give a competing airline access to its computer reservation system ("CRS") to be contrary to Article 86. Sabena had refused to allow London-European access to its CRS in order to put pressure on the other airline to raise fares on the London-Brussels route or to withdraw from it.⁶⁶ The refusal was liable to prevent London-European from operating on that route.⁶⁷ The Commission's decision refers expressly to the *Commercial Solvents*⁶⁸ case and treats Sabena's behavior as a refusal, for anticompetitive reasons, to supply an essential service. There was relatively little competition on the London-Brussels route and spare capacity on Sabena's CRS.⁶⁹

The *British Midland-Aer Lingus*⁷⁰ case also concerned airlines. Aer Lingus had refused to "interline" with British Midland, which at the time of the decision was one of the only competitors of Aer Lingus on the Dublin-London route.⁷¹ Interlining is an International Air Travel Association ("IATA") practice by which almost all airlines agree to issue tickets on behalf of one another so that, for example, one airline issues a ticket for a journey, part of which will be made on another airline.⁷² Interlining also allows a passenger to use a ticket issued by one airline for a return journey on another.⁷³

Aer Lingus terminated its agreement to interline with British Midland when the latter, a strong competitor, began to compete with Aer Lingus on the Dublin-London route.⁷⁴ The Commission held that Aer Lingus was dominant on that route and that the refusal to interline with its competitor was contrary to

65. Commission Decision No. 88/589/EEC, O.J. L 317/47 (1988) [hereinafter *London European-Sabena*].

66. *Id.* at 47-48.

67. *Id.* at 52, ¶ 32.

68. See *supra* notes 13-17 and accompanying text (discussing *Commercial Solvents*).

69. *London European-Sabena*, O.J. L 317/47.

70. Commission Decision No. 92/213/EEC, O.J. L 96/34 (1992) [hereinafter *Aer Lingus*].

71. *Id.* at 36.

72. *Id.* at 35, ¶ 3.

73. *Id.* at 35.

74. *Id.* at 36.

Article 86.⁷⁵ It is important to note that interlining arrangements are normally multilateral and that, although not restrictive themselves, they are the justification for restrictive tariff consultations which are subject to Article 85. Interlining is normal industry practice except where there are, for example, doubts as to credit-worthiness that did not arise in this case. Aer Lingus claimed that having to interline would cause it to lose some passengers to British Midland.⁷⁶ The Commission ruled, however, that this did not justify imposing a "significant handicap" on British Midland.⁷⁷ Whether refusal to interline is unlawful depends on its effects on competition. It is prohibited if, objectively, it is likely to have a significant impact on the other airline's ability to start a new service or to sustain an existing service (in other words, when it causes a significant handicap or barrier to entry). Denial of interlining forces a new entrant either to operate infrequent flights, which results in a long, unprofitable start-up period, or to offer frequent flights at once, attracting passengers who want a choice of flights, but accepting low capacity utilization.⁷⁸ Either alternative means higher start-up costs.⁷⁹ In other words, for a new entrant, an interline agreement with the dominant airline, if there is one, or with the other lines operating on the routes in question, may be essential. The Commission imposed a duty to interline for two years.⁸⁰

5. Two Holyhead Harbor Cases

Another recent Commission decision on access to essential facilities was *B&I Line v. Sealink*,⁸¹ an interim measures decision under Article 86. Sealink is both a car ferry operator and the owner of Holyhead Harbor, which B&I also uses in competition

75. EC Treaty, *supra* note 1, art. 86.

76. Aer Lingus, O.J. L 96/34 at 40, ¶ 25 (1992).

77. *Id.* at 44, ¶ 43.

78. *Id.* at 41.

79. *Id.* at 41, ¶ 28.

80. *Id.* at 44. Another similar case involved a refusal by Lufthansa to interline with Air Europe. Lufthansa/Air Europe, COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 83 (1991). It was settled without a formal decision. *Id.*

81. *B&I Line plc v. Sealink Harbours Ltd. and Sealink Stena Ltd.* (Eur. Comm'n June 11, 1992), *cited in* [1992] 5 C.M.L.R. 255 [hereinafter B&I]; Sealink and B&I, Holyhead, 25 E.C. BULL., no. 6, at § 1.3.30 (1992); Luc Gyselen, *Abuse of Monopoly Power Within the Meaning of Article 86 of the EEC Treaty Recent Developments*, in 1989 FORDHAM CORP. L. INST. 597 (Barry Hawk ed., 1990).

with Sealink.⁸² B&I's berth was in the mouth of the harbor, which is so narrow that, when a Sealink vessel went by, the B&I ship had to stop loading or unloading and to lift the ramp connecting the ship to the dock.⁸³ Sealink altered its schedule of sailings in such a way that B&I's loading was interrupted more frequently.⁸⁴ This improved Sealink's schedule, but harmed B&I.⁸⁵ The Commission drew a distinction between Sealink as harbor owner and Sealink as a competing car ferry operator, and said that as a dominant harbor owner it was not free to discriminate in favor of its own car ferry activities.⁸⁶ At the time of the decision, B&I was the only competitor of Sealink on the route and B&I's requirements did not add to the demands on the capacity of the harbor.⁸⁷ In its decision the Commission stated that

a dominant undertaking which both owns or controls and itself uses an essential facility, i.e. a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favorable 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 favor of its own activities in a related market (Case C-260/89, *Elliniki Radiophonia*, ¶¶ 37-38). The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitor access to that related market on less favorable terms than those of its own services, infringes Article 86 where a competitive disadvantage is imposed upon its competitor without objective justification.⁸⁸

82. *B&I*, [1992] 5 C.M.L.R. at 255.

83. *Id.* at 259.

84. *Id.*

85. *Id.* at 260.

86. *Id.* at 259.

87. *Id.* at 266.

88. *Id.* at 255-66. The Commission further stated:

This was accepted by Sealink through its subsidiary, SHL when it stated that no agreement would be given to vary schedules if this compromised its ability to provide an acceptable level of service to all port users. This is particularly so where the physical configuration of the port has obliged operators to accept differences in the services they are offered by the operator of the essential facility, in order to maximize its efficient utilization.

This was the first statement by the Commission of a general principle using the phrase "essential facility," and it was explicitly based, as a footnote to the decision makes clear, on the case law of the Court, beginning with *Commercial Solvents*.⁸⁹

In 1992, the Commission adopted another interim measures decision concerned with Holyhead Harbor.⁹⁰ Sea Containers had requested Sealink to allow it to use the harbor for a new ferry service.⁹¹ Sealink delayed and caused difficulties, but finally, under pressure from the Commission, made an offer that the Commission regarded as reasonable and nondiscriminatory, which Sea Containers accepted.⁹² The Commission adopted a decision to clarify its view of the legal position for all the interested parties.⁹³ The Commission again stated the general principle in almost exactly the same terms as in the *B&I/Sealink* decision, but added: "This principle applies when the competitor seeking access to the essential facility is a new entrant into the relevant market."⁹⁴

The owner of the essential facility, which uses the essential facility, may not impose a competitive disadvantage on its competitor, also a user of the essential facility, by altering its own schedule to the detriment of the competitor's service, where, as in this case, the construction of the features of the facility are such that it is not possible to alter one competitor's service in the way chosen without harming the other's. Specifically where, as in this case, 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 actions make, or are primarily intended to make, its operations more efficient. Subject to any objective elements outside its control, such an undertaking is under a duty not to impose a competitive disadvantage upon its competitor in the use of the shared facility without objective justification

Id.

89. *Id.*

90. Commission Decision No. 94/19/EEC, O.J. L 15/8 (1994) [hereinafter *Sea Containers*].

91. *Id.* at 13.

92. *Id.* at 13-14.

93. *Id.* at 15-16.

94. *Id.* at 17. To prove this the Commission quoted the Court in *Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, 541.

The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of an undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has

6. *Port of Rødby*

In the *Port of Rødby*⁹⁵ decision, under Article 90 of the EC Treaty,⁹⁶ the Commission was concerned with the refusal by the Danish Minister for Transport to allow Stena to build a private commercial port near Rødby, and to allow Stena to operate from Rødby itself.⁹⁷ The Commission ruled that there is no real alternative to the port of Rødby for sea transport between eastern Denmark and Germany, and that the volume of traffic through Rødby made it a "substantial part" of the common market.⁹⁸ The Danish railway, as the port authority of Rødby, was therefore in a dominant position. The refusal to allow Stena to build a harbor or to use Rødby strengthened this dominance. Because it would have been an abuse if the state-owned Danish railways refused a competitor access to the port, it was contrary to Article 90 for the state to do the same thing. No technical constraints existed. There was no evidence that Rødby could not handle more traffic, there were only two competitors on the sea route, and Stena was willing to finance any necessary alterations.

D. *Nondiscriminatory Access to Dominant Buyers*

The Commission has adopted two decisions concerned with complaints by small, privately-owned coal mines in Britain, both claiming discrimination in various respects in favor of British

the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Sea Containers, O.J. L 15/8, at 17 (1994). The Commission then went on to state: "A decision on interim measures may be just as necessary, to ensure that any final decision of the Commission is effective, in the case of a complainant who is a new entrant as it is in the case of an already established competitor." *Id.* Points to note are 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 harbor would permit a third competitor without undue inconvenience. *Id.* at 18.

95. Commission Decision No. 94/119/EEC, O.J. L 55/52 (1994) [hereinafter *Port of Rødby*].

96. EC Treaty, *supra* note 1, art. 90.

In the case of public undertakings and undertakings to which Member States Grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

Id. art. 90(1).

97. *Port of Rødby*, O.J. L 55/52, at 52 (1994).

98. *Id.* at 54.

Coal by the big British electricity-generating companies.⁹⁹ The first of these decisions came in 1991 and was the subject of two cases before the Courts in Luxembourg.¹⁰⁰ The Commission found that the two English generating companies were jointly dominant buyers of coal for electricity generation. The Commission acted under Article 63 of the ECSC Treaty,¹⁰¹ but assumed that the substantive effect of Article 63 was the same as Article 86, which applies to electricity generators. "Dominant purchasers are required by both Article 63 of the ECSC Treaty and Article 86 of the EC Treaty not to discriminate between coal producers." ¹⁰² In this case, the discrimination was between coal producers as suppliers to dominant buyers, without whose purchases substantial British coal producers could hardly expect to survive. In each of the two cases, the Commission found that some discrimination had occurred, took action to terminate it, and rejected the remaining aspects of the complaints.

E. *Discrimination by Railways*

In its *Maritime Container Network*¹⁰³ decision, the Commission found that the German railway, the Deutsche Bundesbahn ("DB"), had discriminated against container cargo transported through Belgium and the Netherlands to ports there in favor of containers hauled only by DB to German ports, by charging lower freight rates. The relevant market was that for rail services in Germany, in particular to the downstream market of combined transport operators carrying containers.¹⁰⁴ These operators were not in a position to supply rail services themselves, but were obliged to obtain them from the national railway enterprises.¹⁰⁵ DB had used its dominant position on the rail transport market to impose discriminatory prices on the segment of that market relating to combined transport of sea-borne contain-

99. U.K. Small Mines, COMMISSION OF THE EUROPEAN COMMUNITIES, XXIST REPORT ON COMPETITION POLICY 82-83 (1991).

100. H J Banks & Co., Ltd. v. Banks v. British Coal, Case C-128/92, [1994] E.C.R. —, [1994] 4 C.M.L.R. 30.

101. ECSC Treaty, *supra* note 9; *see supra* note 10 and accompanying text (quoting Article 63 of ECSC Treaty).

102. H J Banks & Co., Ltd. v. Banks v. British Coal, Case C-128/92, [1994] E.C.R. —, [1994] 4 C.M.L.R. 30.

103. Commission Decision 94/210/EC, O.J. L 104/34 (1994) (HOV SVZ/MCN).

104. *Id.* at 35.

105. *Id.*

ers to promote its own group's services, its own rail services, and its subsidiary's combined transport services.

F. Article 85 cases

1. Spices

In its *Spices*¹⁰⁶ decision in 1978, the Commission prohibited clauses, in agreements for the sale and distribution of spices, which prevented supermarkets from selling other suppliers' brands of spices, except their own brands. Large ranges of spices can be sold only in large self-service stores, not in small retail outlets.¹⁰⁷ The supermarkets bound by these clauses sold thirty percent of all spices sold in Belgium.¹⁰⁸ Although the decision is based on Article 85 of the EC Treaty¹⁰⁹ and does not use the phrase "essential facility," it is based on the principle that access to a facility (in this case, the shelves of three major supermarkets) may be essential for competitors. In the *Langnese* and *Schöller* decisions,¹¹⁰ involving German ice cream companies, the Commission came to similar conclusions under Article 85.

2. IGR Stereo Television

The next Commission case that is of interest is *IGR Stereo Television*.¹¹¹ IGR was a company owned by all the firms produc-

106. Commission Decision No. 78/172/EEC, O.J. L 53/20 (1978) (*Spices*).

107. *Id.* at 20, ¶ 5.

108. *Id.*

109. EC Treaty, *supra* note 1, art. 85.

110. Commission Decision No. 93/406/EEC, O.J. L 183/19 (1993) [hereinafter *Langnese*]; Commission Decision No. 93/405/EEC, O.J. L 183/1 (1993) [hereinafter *Schöller*]; *Langnese-Iglo GmbH and Schöller Lebensmittel GmbH & Co. KG v. Commission*, Joined Cases T-24, 28/92 R, O.J. C 199/8 (1992) (Order of June 16, 1992) (Ct. First Instance).

111. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982) [hereinafter *IGR*]; see European Broadcasting Union, COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIRD REPORT ON COMPETITION POLICY ¶ 220 (forthcoming 1994). The Commission's decisions on trade fairs are also relevant. See Commission Decision No. 79/37/EEC, O.J. L 11/61 (1979) (*European Machine Tool Exhibitions*); Commission Decision No. 82/349/EEC, O.J. L 156/16 (1982) (*BPICA*); Commission Decision No. 83/666/EEC, O.J. L 376/1 (1983) (*SMM&T*); Commission Decision No. 85/588/EEC, O.J. L 322/10 (1994) (*UNIDI*). Also consider the Commission's decisions on auctions. *E.g.*, Commission Decision No. 74/433/EEC, O.J. L 237/16 (1974) (*FRUBO*); see *Nederlandse Vereniging voor Fruiten Groentenimporthandel, Nederlandse Bond van Grossiers in Zuiduruchten en ander Geïmporteerd Fruit 'Frubo' v. Commission and Vereniging de Fruitunie*, Case 71/74,

ing color television sets in Germany.¹¹² IGR owned the patents needed for TV sets specially equipped for stereo reception of German stereo TV.¹¹³ IGR also owned the patents for the stereo transmitters.¹¹⁴ IGR granted patent licenses to its members, but planned to license non-members only after a certain date, and for a limited number of sets.¹¹⁵ It used its patent rights to stop a competing Finnish firm, Salora, from supplying stereo TV sets to German mail order companies. Salora was thus prevented from supplying any stereo TV sets at the time when the new stereo system was coming into operation in Germany. The Commission began proceedings against IGR, which then agreed to license Salora at once, without quantity limits.¹¹⁶ The case could be considered under Article 85, as an unlawful agreement to keep Salora out of the stereo set market while the members of IGR exploited it themselves, or under Article 86 as a joint dominant position of IGR's members or a dominant position of IGR itself. On either basis, the Commission would apparently have ordered compulsory licenses if necessary.

3. *Amadeus/Sabre*

The *Amadeus/Sabre*¹¹⁷ case was an Article 85 case concerning an agreement between two airline computer reservation systems: Sabre, owned by American Airlines, and Amadeus, owned by a group of European airlines.¹¹⁸ The Commission authorized the agreement under Article 85, but was concerned that competition was being largely eliminated between Sabre and Amadeus and that there might not be effective competition between

[1975] E.C.R. 563, [1975] 2 C.M.L.R. 123; Commission Decision No. 78/66/EEC, O.J. L 21/23 (1978) (Cauliflowers).

112. *IGR*, *supra* note 111, at 63.

113. *Id.*

114. *Id.*

115. *Id.* It is also worth noting that in the *IGR* case, TV sets with other stereo receivers would not have been able to receive the stereo transmission satisfactorily. *Id.* Therefore, a license of the patents for receivers was essential to sell stereo TV sets on the German market. The fact, however, that the essential facility for market entry was a patent did not affect the outcome.

116. *Id.* at 64.

117. *Amadeus/Sabre*, COMMISSION OF THE EUROPEAN COMMUNITIES, XXIST REPORT ON COMPETITION POLICY 73-74 (1992); John Temple Lang, *Air Transport in the EEC - Community Antitrust Law Aspects*, in 1991 FORDHAM CORP. L. INST. 317, 317-22 (Barry Hawk ed., 1992) [hereinafter *Air Transport*].

118. *Amadeus/Sabre*, *supra* note 117, at 73.

Amadeus and the other European joint venture CRS, Galileo.¹¹⁹ Each of these CRSs had a strong position in the Member State where one of its shareholders was the dominant airline, and the Commission was afraid that each would find it impossible to penetrate one another's territories if the shareholders discriminated in favor of their own CRS.¹²⁰ Accordingly, the Commission obtained from the principal shareholders in both Amadeus and Galileo a series of undertakings not to discriminate against other CRSs.¹²¹ The Commission saw these undertakings as ensuring that each essential facility (the information and functions needed by each CRS) would be provided by each of the shareholder airlines.¹²²

4. *TNT/Canada Post*

Similar questions arose in a merger case, *TNT/Canada Post*.¹²³ This concerned an express delivery joint venture between five national post offices. The Commission authorized the joint venture under the Merger Regulation, but was concerned that the post offices would discriminate in favor of the joint venture and against other express delivery companies. The Commission, therefore, obtained an undertaking from the post offices not to discriminate in this way. This case can also be regarded as an essential facility case, because cooperation with post offices is essential for any express delivery company.

5. *Disma*

In *Disma*,¹²⁴ the Milan airport joined with some oil companies to set up a joint venture for storing and handling jet fuel at the airport.¹²⁵ When completed, the fixed underground pipelines will be the only means of refueling at the airport.¹²⁶ Upon considering the agreement, the Commission insisted on changes to ensure that non-shareholders would be supplied with fuel on

119. *Id.*

120. *Id.*

121. *Id.* at 74.

122. *Id.*

123. Commission Decision No. 91/C 322/14, O.J. C 322/19 (1991) (*TNT/Canada Post*, *DBP Postdienst*, *LaPost*, *PTT Post*, and *Sweden Post*).

124. *Disma*, COMMISSION OF THE EUROPEAN COMMUNITIES, XXIIIRD REPORT ON COMPETITION POLICY 223-24, ¶ 80 (forthcoming 1994).

125. *Id.*

126. *Id.*

nondiscriminatory terms. As all oil companies will have to use the installations to refuel their customers at the airport, this was essential. In the introduction to the XXIIIrd Report on Competition Policy, the Commission drew attention to the importance of this case as an example of the need to ensure nondiscriminatory access to infrastructure.¹²⁷

It is interesting to mention one other case. In 1993, Kodak and four Japanese camera companies notified agreements for the development of a new, advanced photographic system, using wholly new technology. The Commission published a notice summarizing the agreement¹²⁸ and inviting comments, without taking any position itself. The notice, however, suggests that the companies in question thought it appropriate to act on principles similar, if not identical, to the *IGR Stereo Television*¹²⁹ and *IBM*¹³⁰ cases.

G. Telecommunication Cases

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. This principle is relevant to, but not to be confused with, the principle that dominant companies must make facilities avail-

127. *Id.* at ¶ 40.

128. Commission Notification No. 94/C 68/03, O.J. C 68/3 (1994) (Canon). This notice said that the camera companies themselves proposed that

interested parties will be granted licenses on the essential design features agreed for APS products and not later than the date on which the products are announced to be commercially available.

The Partners declare that they intend that licenses be made available to interested parties in time that should be sufficient for competent and diligent manufacturers to introduce system-compatible products at approximately the same time as the partners.

Licenses would be granted to manufacturers on a non-exclusive basis, and on terms comparable to those historically available in the industry. The partners have declared that in the product licenses they will require licensees to make a lump sum initial payment and to pay a percentage royalty. Licensees would also be required to license the five partners and other licensees under blocking patents.

Id.

129. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); *see supra* notes 111-16 and accompanying text (discussing *IGR*).

130. *See supra* notes 55-60 and accompanying text (discussing *IBM*).

able when this is essential to enable competitors to compete.¹³¹

1. *Telecommunications Terminals*

In the *Telecommunications Terminals*¹³² case, insofar as it is relevant to this Article, the Court considered criticisms of a directive abolishing the exclusive rights of the national telecommunications monopolies to import, sell, put into service, and maintain telecommunications terminals.¹³³ The Court held that these exclusive rights are incompatible with the Treaty provisions on free movement of goods. The Court annulled the directive as far as it abolished "special" rights, for vagueness and lack of reasons. The Court added that for competition to be in accordance with the Treaty, competitors have to be assured equal chances, which do not exist if one competitor has power to lay down specifications for, and to approve products of, other competitors. The Commission was therefore entitled to require that this should be done by public authorities independent of any competitor.¹³⁴

131. See, e.g., *Elliniki Radiophonia Teleorassi* ('Greek Television'), Case C-260/89, [1991] E.C.R. I-2925; see also Opinion of Advocate General Darmon, *Almelo v. Energiebedrijf IJsselmij NV*, Case C-393/92, [1994] E.C.R. I-1477, 1480, ¶¶ 94, 121, 153, 171. In *Greek Television*, the Greek television transmission monopoly had a subsidiary company which produced programs. The Court said that a television monopoly can be created for non-economic reasons concerned with the public interest (this repeated the ruling in *Guiseppe Sacchi*, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177). Its operation, however, must respect the rules on competition and free movement of goods. A television monopoly must not discriminate against foreign broadcasts unless this is justified under Article 59. Article 90 prohibits exclusive rights to transmit and retransmit programs when these rights are likely to create a situation in which the monopoly is led to infringe Article 86 by discriminating in favor of its own programs. In other words, a television monopoly must give nondiscriminatory access to suppliers of programs even if they are competing with its own program producing activities.

132. *France v. Commission*, Case C-202/88, [1991] E.C.R. I-1223, [1992] 5 C.M.L.R. 552 [hereinafter *Telecommunications Terminals*]; *Spain v. Commission*, Case C-271/90, [1992] E.C.R. 5833.

133. Commission Directive No. 88/301, O.J. L 131/73 (1988) [hereinafter *Telecommunications Directive*].

134. Points to note are that the case was dealt with primarily on the basis of free movement of goods rules that, however, were expressly interpreted in the light of the Treaty's objective of free competition. Also, the Telecommunications Directive took away (and did not merely regulate the exercise of) the rights that supplemented the telecommunications monopolies.

2. *Télémarketing*

In the *Télémarketing*¹³⁵ case, the Court said that although monopolies are not prohibited, they remain subject to Article 86. The rule in *Commercial Solvents*¹³⁶ applied to a company holding a dominant position on a market in a service that is indispensable for the activities of another company in another market. If one television station makes advertising time available only to advertisers who also use the phone lines and telephonists of a phone-in marketing company associated with the TV station, then this amounts to a refusal to supply the station's services to a competing phone-in marketing company. Such a refusal is contrary to Article 86 unless justified by some technical or commercial requirements.

3. *RTT v. GB-Inno*

*RTT v. GB-Inno*¹³⁷ was also concerned with a national telecommunications monopoly with powers to adopt specifications and approve its competitors' products. Citing *Télémarketing*, the Court said that it is contrary to Article 86 for a dominant company to reserve for itself, without objective necessity, an activity on a distinct though related market that would risk the elimination of competition, because the activity in question could be carried out by other companies. Article 90 of the EC Treaty prohibits Member States from adopting measures that place privileged companies in a situation in which they could not place themselves without infringing Article 86.¹³⁸ The extension of the telephone system monopoly to phone apparatus, without objective justification, is prohibited. Competition may not be eliminated or falsified in this way.

4. Telecommunications Guidelines

In its Telecommunications Guidelines,¹³⁹ the Commission

135. Centre Belge D'Études de Marché - *Télémarketing* (CBEM) SA v. Compagnie Luxembourgeoise de Télédiffusion SA and Information Publicité Benelux SA, Case 311/84, [1985] E.C.R. 3261, [1986] 2 C.M.L.R. 558 [hereinafter *Télémarketing*].

136. See *supra* notes 13-17 and accompanying text (discussing *Commercial Solvents*).

137. Régie des Télégraphes et des Téléphones v. GB-Inno-BmSA, Case C-18/88, [1991] E.C.R. I-5941, [1994] 1 C.E.C. (CCH) 117 [hereinafter *GB-Inno*].

138. EC Treaty, *supra* note 1, art. 86.

139. Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, O.J. C 233/2 (1991).

said that refusal by national Telecommunications organizations to provide certain services, in particular network and leased circuits, to third parties, would be an unlawful abuse if it was discriminatory. Access charges would be lawful only if they were imposed on an equal basis on all users, *including telecommunications organizations themselves*. Taking advantage of a monopoly in order to limit the competition faced in services for which no monopoly exists would be unlawful. The Guidelines cite the *Télémarketing* judgment.¹⁴⁰ The Commission also made some general statements about cross-subsidizing as an abuse under Article 86.

Ritter, Braun, and Rawlinson,¹⁴¹ under the heading "access to infrastructure," state:

[I]t is arguable on the basis of the *Télémarketing* case and other precedents that the denial of access to such infrastructure or facilities is contrary to Article 86:

- if the third party depends on use of the infrastructure or facilities for supplying his customers and building his own infrastructure is not a realistic alternative;
- if the capacity of the infrastructure is adequate to carry the additional traffic, having due regard to the infrastructure operator's own requirements to provide supplies during periods of peak demand and its other long-term commitments;
- if the traffic for which a license to use the infrastructure is sought satisfies the relevant technical standards and is in sufficient quantity to meet the operating requirements of the infrastructure;
- if the party seeking access is prepared to pay the operator adequate compensation, and
- if the request is reasonable — which requires a balancing of the interests of the operator, security of supply and the public interest in competition and free trade of goods and services within the Common Market.

The Commission is considering the possibilities, means and limits of using such an approach in the energy sector.¹⁴²

140. *Id.* ¶ 86 n.23; see *supra* note 135 and accompanying text (discussing *Télémarketing* judgment).

141. L. RITTER ET AL., *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* 311 (1991).

142. *Id.* at 312.

H. *Performing Rights Societies' Cases*

All the Court and Commission cases on performing rights societies are included here because access on a nondiscriminatory basis to the services of the society in each Member State is essential for all owners of copyright and performing rights to obtain the royalties to which they are entitled. The cases concern refusals to supply services, discrimination, interference with imports, and imposition of unduly onerous obligations.¹⁴³ The case law shows that the Court treats performing rights societies, although they are essential agents for their members, in all respects as dominant enterprises, and therefore, the Court's rulings are equally applicable to other dominant companies. While these cases come under Article 86, performing rights societies are essentially large multi-member joint ventures of which the members are owners of performing rights of various kinds.

It will be seen that it is the service provided by performing rights societies in collecting royalties on behalf of their members that is the essential facility. No single composer, musician, or film producer could alone afford the cost of licensing, monitoring programs, and collecting royalties. This service is feasible only if carried out collectively. Societies are dominant *vis-à-vis* owners of performing rights and must provide their services to all owners of performing rights on a nondiscriminatory basis. If a society denies equal treatment to one class of owner, it does so, in practice, in the interests of another class of owner on whose behalf it is acting as agent, rather than in its own interests. This, however, does not seem to alter the principles involved. The nature of the duty to provide its services to all owners of performing rights is based on the same principle as are other essential facility cases.

1. *GEMA* Cases

The *GEMA*¹⁴⁴ cases concerned the German national performing rights society, which collected royalties on behalf of composers, authors, and publishers of music. The Commission

143. The two latter kinds of abuse are not, strictly, relevant to this Article.

144. *GEMA* (Gesellschaft Für musikalische Aufführungs - und Mechanische Vervielfältigungsrechte) v. Commission, Case 45/71 R, [1971] E.C.R. 791, [hereinafter *GEMA I*]; *GEMA* v. Commission, Case 125/78, [1979] E.C.R. 3173 [hereinafter *GEMA II*].

ruled that GEMA had a dominant position in Germany. There was no other similar society there, and it would not have been economical to set one up.¹⁴⁵ The Commission found that GEMA had committed several kinds of abuses that were contrary to Article 86, including discrimination against residents of other Member States by denying them full membership, independent importers of sound recordings (in comparison with producers), and importers of sound reproduction apparatus (in comparison with German producers).

2. *Ministère Public v. Tournier* and *Lucazeau v. SACAM*

In *Ministère Public v. Tournier*¹⁴⁶ and *Lucazeau v. SACAM*,¹⁴⁷ the Court was concerned with various efforts by the French copyright management society to prevent or restrict the importation of sound recordings from other Member States.¹⁴⁸ Agreements between copyright management societies by which they give each other reciprocal rights to grant licenses and collect royalties on their territories on behalf of copyright owners, who are members of the other societies, are permitted by Community antitrust law. The Court said that Article 85 would prohibit any agreement between copyright societies to refuse to grant direct access to their repertoires to users in other Member States. The Court further said that if the royalties charged to discotheques are appreciably higher than those in other Member States, without objective justification, that would be an abuse of a dominant position.¹⁴⁹

The Court in *Tournier* also said that because copyright management societies try to safeguard the rights and interests of their members *vis-à-vis* users of recorded music, their contracts

145. *Id.* at 794.

146. *Ministère Public v. Tournier*, Case 395/87, [1989] E.C.R. 2521, [1991] 4 C.M.L.R. 248.

147. *Lucazeau v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACAM)*, Joined Cases 110, 241-42/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248.

148. In a similar case, *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Éditeurs v. SV SABAM*, Case 127/73, [1974] E.C.R. 51, 313, [1974] 2 C.M.L.R. 238 [hereinafter *BRT/SABAM*], the Court said that a copyright society commits an abuse of a dominant position if it imposes on its members obligations that are not necessary to obtain its objectives, thereby unfairly limiting its members' freedom to exercise their copyright.

149. *Tournier*, [1989] E.C.R. at 2581, [1991] 4 C.M.L.R. at 292; *Lucazeau*, [1989] E.C.R. at 2831, 2833, [1991] 4 C.M.L.R. at 294-95.

with users restrict competition only if they exceed what is necessary to attain that aim. It would be unnecessary to require users to take licenses of a society's whole repertoire, if a license of a portion, such as the foreign repertoire only, as the discotheques wanted, would fully safeguard the interests of authors, composers, and publishers of music without increasing the costs of managing contracts and monitoring use. It is for national courts to decide whether this would be the case.¹⁵⁰

3. GVL

In *GVL*,¹⁵¹ the Commission ruled that refusal to conclude management agreements with non-German resident artists of other EC Member States and to manage their rights in Germany, was discriminatory and contrary to Article 86. The laws of some other Member States recognized rights of secondary exploitation similar to those under German law, and GVL's refusal to contract with non-resident artists, therefore, prevented them from obtaining royalties to which they were entitled.¹⁵² A refusal by an enterprise having a de facto monopoly, the Court said, to provide its services for all those who may need them, but who do not meet nationality or residence requirements imposed by the enterprise, is an abuse.¹⁵³

I. Computerized Airline Reservation Systems

The two large European computerized reservation systems are joint ventures owned by several airlines. To ensure that all joint venture CRSs operating in Europe were seen to be subject to the same rules, the Commission adopted a group exemption¹⁵⁴ rather than individual exemptions. The group exemption obliges the CRS to give nondiscriminatory access to any airline wishing to use it. It also prohibits any airline that owns or controls a CRS from discriminating against a competing CRS.¹⁵⁵ Although the group exemption is based on Article 85, both obligations are essentially based on the principle of nondiscrimina-

150. *Tournier*, [1989] E.C.R. at 2580, [1991] 4 C.M.L.R. at 292.

151. *Gesellschaft zur Verwertung von Leistungsschutzrechten mbh (GVL) v. Commission*, Case 7/82, [1983] E.C.R. 483, [1983] 3 C.M.L.R. 645.

152. *Id.* at 505, [1983] C.M.L.R. at 679.

153. *Id.* at 506, [1983] C.M.L.R. at 680.

154. Commission Regulation No. 3652/93, O.J. L 333/37 (1993).

155. *Id.*, art. 1, O.J. L 333/37 at 39-40 (1993).

tory access to an essential facility. For an airline, a dominant CRS is an essential facility. For a CRS, it is essential to be able to provide information, reservations, and ticket-issuing facilities on a dominant airline in the state where it is dominant. The Regulation also allows the benefit of the group exemption to be withdrawn if the CRS operator refuses to enter into a contract for the use of the CRS or denies any airline access to any facilities other than information reservations and issuing of tickets "without an objective and nondiscriminatory reason of a technical or commercial nature."¹⁵⁶ Similar obligations were imposed by another regulation applying to all CRSs, whether jointly owned or controlled or not.¹⁵⁷

J. *Landing and Takeoff Slots at Airports*

An airline's access to a congested airport depends on whether it can obtain slots for landing and takeoff at the times that it needs. Allocation of these times is made by the airport manager on the advice of a committee of the airlines using the airport. As this involves competitors influencing access to an essential facility, it needed exemption from EC antitrust law. Group exemptions under Article 85 have been given, but on condition that a certain proportion of new and unused slots are made available to new entrants.¹⁵⁸ The effect of these measures is to regulate the access of new entrants to congested airports in accordance with IATA practice. In particularly difficult situations, this might not be enough to comply with EC law and the benefit of the group exemption might have to be withdrawn. However, this has not yet occurred.

K. *Railways: The Directive Granting Access to Rail Infrastructure*

Although not legally an EC competition law measure, a directive that requires the management of railway infrastructure to be separated from the operation of rail services in each Member State must be summarized here.¹⁵⁹ This directive illustrates the essential facility principle in two respects. First, the manager of

156. *Id.*

157. Council Regulation No. 2299/89, O.J. L 220/1 (1989), as amended by Council Regulation No. 3089/93, O.J. L 278/1 (1993).

158. Commission Regulation No. 1617/93, O.J. L 155/18 (1993); Council Regulation No. 95/93, O.J. L 14/1 (1993).

159. Council Directive No. 91/440, O.J. L 237/25, at 26 (1991).

the infrastructure, which is of course an essential facility for any railway operation, is obliged to give access to the infrastructure to a specified category of railway enterprises.¹⁶⁰ Second, the operator of the rail services is obliged to provide locomotives and traction for that category of company on a nondiscriminatory basis.¹⁶¹ In Europe, because each national manager of railway infrastructure and each national provider of rail transport services is dominant, these obligations are substantially similar to the obligations that result from Article 86.¹⁶²

In addition, the Commission has taken the position that when two or more national railway companies set up a joint venture to provide transport services, they should be obliged under Article 85¹⁶³ to give the same facilities to competitors of the joint venture as they give to the joint venture itself, and on the same or equivalent terms.¹⁶⁴ The Commission has stated its position in this respect in the Eurotunnel¹⁶⁵ and Channel Tunnel Night Services¹⁶⁶ cases.

II. ESSENTIAL FACILITY AND SIMILAR SITUATIONS: AN OVERVIEW OF THE PRINCIPLES

This part of the Article is a synthesis, based on the principle that a dominant company has, at least in some cases, a duty to supply, if a refusal will cause a significant effect on competition. This is the minimum duty that can be deduced from the numerous statements and rulings by the Court and the Commission. As the effect on competition increases, it becomes harder to justify the refusal and accordingly, less weight should be given to the argument that it is in the long-term pro-competitive to allow a dominant company to decide with whom it will contract.

A company whose business is the sale of goods or services must have a reason if it refuses to sell them to a willing buyer. It might wish to use the goods or service in its own operations, or to distribute them itself. In the absence of some legitimate busi-

160. *Id.*, O.J. 237/25, at 28 (1991).

161. *Id.*, O.J. 237/25, at 27 (1991).

162. EC Treaty, *supra* note 1, art. 86.

163. *Id.* art. 85.

164. Commission Notice, O.J. C 149/10 (1993) [hereinafter Night Services]; Commission Notice, O.J. C 176/2 (1990) [hereinafter Eurotunnel].

165. Eurotunnel, O.J. C 176/2 (1990).

166. Night Services, O.J. C 149/10 (1993).

ness explanation, a refusal to supply is not what the Court calls "normal competition." A refusal to supply a customer that is not a competitor of any part of a dominant supplier's activities has anticompetitive effects only if it is an effort, directly or indirectly, to get the customer to buy exclusively from the dominant company. The *United Brands*¹⁶⁷ case presents an example of this situation.

When the 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.¹⁶⁸ 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.

The EC case law does not suggest that a refusal to supply by a dominant enterprise is always regarded as having an effect on competition. Such a strict view would probably be incorrect. There would be no basis in antitrust law for a rule requiring a dominant enterprise to supply even if a refusal caused no effect on competition. However, if the consequence of a refusal by a dominant enterprise to supply is that all or most of its competitors are excluded from the market, only strong business reasons can justify the refusal. In brief, access to a facility is "essential" when refusal would exclude all or most competitors from the market. In order to understand the present Community law fully, it is also necessary to describe some similar situations, involving other legal principles.

The difficult and developing principle of essential facilities

167. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. at 429; see *supra* notes 18-22 and accompanying text (discussing *United Brands*).

168. U.S. lawyers must remember that the principle of proportionality in EC law says that official action is justified only if it does not impose inconvenience disproportionate to the result to be achieved.

concerns companies that have a dominant position in one market, usually an upstream market, and that also provide goods or services in a downstream market. Cases that may raise issues of essential facilities, or similar issues, include:

- car ferry companies that provide harbours for other ferry companies;¹⁶⁹
- companies that provide separate but related services;
- railways that both transport goods and provide haulage for other companies that transport goods;¹⁷⁰
- television companies that sell magazines giving TV programs;¹⁷¹
- banks that control check clearing facilities;
- airlines with which other airlines wish to “interline;”¹⁷²
- airlines that own or control computerized reservation systems that are essential to enable travel agents to get flight information and make reservations;¹⁷³
- airlines that operate airports;
- telephone companies that provide mobile telephones, and long-distance wire telephone lines;
- companies that own electricity grids and power lines and gas pipelines;
- performing rights societies that are needed to collect royalties on behalf of owners of rights in musical and other works.¹⁷⁴

An essential “facility” in the sense used here may be a product, such as a raw material, a service, or access to a physical thing or place, such as a harbor or an airport.

169. See, e.g., B&I, (Eur. Comm’n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; see also *supra* notes 81-94 and accompanying text (discussing cases involving Holyhead Harbor).

170. See *supra* notes 103-05 and accompanying text (discussing factors in railway cases).

171. See, e.g., RTE, Case T-69/89, [1991] E.C.R. II-485, [1991] 4 C.M.L.R. 586 (Ct. First Instance); see also *supra* notes 33-44 and accompanying text (discussing RTE).

172. See, e.g., Aer Lingus, O.J. L 96/34 (1992); see also *supra* notes 70-80 and accompanying text (discussing *Aer Lingus*).

173. See *supra* notes 154-57 and accompanying text (discussing factors in CRS cases).

174. See, e.g., *Lucazeau v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACAM)*, Joined Cases 110, 241-42/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248; *Ministère Public v. Tournier*, Case 395/87, [1989] E.C.R. 2521, [1991] 4 C.M.L.R. 248; see also *supra* notes 148-50 and accompanying notes (discussing *Lucazeau* and *Tournier* and factors in performing rights society cases).

In the majority of cases, the relationship between the two products or services is vertical. For example, one product or service is supplied to the dominant company's own downstream operation, as well as its competitors, and the other is supplied by the downstream operations to third parties. In some of these cases, however, the relationship between the two products or services provided by the dominant company is horizontal, meaning both are simultaneously provided for use by its customers. This horizontal category of cases is considered separately below.

In all of these cases, competition law may oblige the dominant owner of the essential facility to cooperate with its downstream competitors, on competition grounds. These cases can only be resolved by reference to basic principles of antitrust economics. There are no specific legal rules that help to resolve them, and the applicable European case law has been pragmatic, cautious, and its implications not always clear.

Apart from the question of whether the company in question is dominant in the upstream market, several kinds of questions arise:

- what are the dominant company's duties to grant its competitors access to facilities that it owns or operates and that its competitors need to carry on their businesses and to compete with it?
- what are the dominant company's duties to grant licenses of intellectual property rights to its competitors to enable them to make products that compete with some of its products?
- what are the dominant company's duties to enable its competitors to adapt their products to make them compatible with the dominant company's new or altered products?

Although the company's market power in the downstream market may be relevant, the company need not be dominant on both markets for these questions to arise. Such issues may arise if the company is dominant on the market for the supply of the essential goods or the services provided by giving access to the essential facility. In practice, in most cases the dominance will be largely due to owning or controlling the essential facility. If the company is also dominant in the downstream market, so that a duty to provide access to the essential facility is required for competition in that market, the arguments for a duty to give access are much stronger.

These problems also raise a number of related difficulties. There is a conflict between the fact that it is, in general, pro-competitive to allow a company to retain for its own exclusive use advantages it has legitimately obtained, and the fact that access to certain facilities may be so essential to competitors that ownership of those facilities may give a company the power to exclude competitors entirely from a market, without having any justification other than its ownership for doing so. The dominant company has a conflict of interest between its interest as a competitor (to keep the benefits of ownership or control to itself) and its interest as owner (to maximize the profits from its ownership or the ownership of those on whose behalf it acts). This gives rise to the question of distinguishing between legitimately obtained and legitimately used competitive advantages, which a dominant company may exclusively enjoy, and advantages that are, in some sense, unfair or improper or otherwise contrary to Article 86 to use exclusively, or which competition law should not allow to be used exclusively.

Another difficulty is that, in most essential facility cases, the dominant company has denied competitors satisfactory access to a facility that it uses, without thereby improving the services offered. A dominant owner of a facility is not entitled to improve its service to recipients if there is a corresponding reduction in the quality of the service offered by its downstream competitors.¹⁷⁵ More difficult questions would arise if, for example, the dominant company is able to show that all the available capacity should be used by only one company to optimize the service to consumers. Therefore, one question can be whether the advantage to consumers outweighs the harm done to competition. A marginal benefit to consumers would not outweigh the exclusion of competitors from the market. If only one user can be efficient, the right to use might have to be auctioned at intervals.

It is also important to note that any legal principle that obliges a dominant company to make a contract with a competitor involves administrative costs for the companies and for authorities responsible for enforcing the principle. This burden is

175. See, e.g., B&I, (Eur. Comm'n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; see also *supra* notes 81-94 and accompanying text (discussing cases involving Holyhead Harbor).

significant for the EC Commission, which is already short-staffed in relation to its responsibilities.

When a dominant company owns or controls a facility access that is essential for its competitors, it has a conflict of interest that would not arise if the facility were 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. The dominant company's duty is to operate the facility in such a way that the goods and services offered by its downstream competitors are not 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 essential facility, but not merely those of its own downstream operation. The dominant company may always make its own goods or services better for consumers, but may not take steps that merely make its competitors' worse or discriminate against its downstream competitor.¹⁷⁶

A dominant company is always allowed to behave as would a separate and independent owner, or an impartial independent public authority. A standard of impartiality appropriate to an independent owner, or the still higher standard appropriate to a public authority, may seem strict, in relation to a company that is not exercising authority on behalf of the state. However, where one rule applies, it is not easy to see how any standard lower than that of an independent owner could be justified or formulated satisfactorily. Further, the duty of nondiscrimination applies only if the facility is genuinely essential.¹⁷⁷ The case law of the Court of Justice on the duties of state enterprises with regulatory powers, another situation involving conflicts of interest, is therefore relevant.¹⁷⁸

176. As mentioned above, more 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, because that would produce a net benefit for users.

177. It must be kept in mind that it is usually bad business for a dominant owner to need to discriminate in favor of its own downstream operation. It implies that its operations are less efficient than those of its competitor, and need to be subsidized.

178. The question of the extent to which Member States may confer regulatory powers on state companies has arisen in several cases, of which the following seem the most important to questions of essential facilities. *See generally* Commission of the European Communities, Towards the Personal Communications Environment: Green Pa-

While the essential legal principle is that the dominant com-

per on a Common Approach in the Field of Mobile and Personal Communications in the European Union, COM (94) 145 Final, annex D (Apr. 1994).

In *Van Eycke v. ASPA NV*, Case 267/86, [1988] E.C.R. 4769, 4791, ¶ 16, [1990] 4 C.M.L.R. 330, 339, the Court said that it would be contrary to Article 5 of the EEC Treaty if a Member State were "to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere." See John Temple Lang, *European Community Competition Law and Member State Action*, 10 Nw. J. INT'L L. & Bus. 114-32 (1989).

In *Telecommunications Terminals*, Case C-202/88, [1991] E.C.R. I-1223, a case concerned with the lawfulness of a Commission directive, the Court said:

It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

Consequently, the Commission was justified in seeking to entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

Id. at I-1271.

In *GB-Inno*, Case C-18/88, [1991] E.C.R. I-5941, [1994] 1 C.E.C. (CCH) 117, the Court said:

[T]he fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighboring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty.

However, Article 86 applies only to anti-competitive conduct engaged in by undertakings on their own initiative . . . not to measures adopted by States. As regards measures adopted by States, it is Article 90(1) that applies. Under that provision, Member States must not, by laws, regulations or administrative measures, put 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*.

Accordingly, where the extension of the dominant position of a public undertaking or undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty.

Id.

The Court then repeated the words quoted above from the *Telecommunications Terminals* Judgment and went on to add:

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

pany must not discriminate, the *National Carbonising*¹⁷⁹ case shows that other principles can be involved. For example, it would also be illegal for the dominant company to charge a combination of prices for access to the essential 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.¹⁸⁰ This would imply, unless the dominant company's downstream operations could be shown to be abnormally efficient, that it was subsidizing them in some concealed way, such as by not requiring dividends to be paid or a reasonable return on capital to be made. A dominant company could also act contrary to Article 86 by charging "unfairly" high prices for access to the essential facility. If the competitor is seeking shared access to the facility, it should act reasonably and cooperate with the dominant company and other users to seek solutions maximizing the overall benefits offered to their customers, to solve whatever difficulty it is encountering, and to negotiate the terms of the contract for use of the facility.

Where the duty to provide nondiscriminatory access to an essential facility applies, denial of access and discrimination are in themselves unlawful. Except in the case of intellectual property rights, the duty to provide access is not merely a remedy to be imposed if and when some other kind of abuse occurs.

check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.

Id.; see *Ministère Public v. Taillandier*, Case C-92/91 (Eur. Ct. J. Oct. 27, 1993) (not yet reported), summarized in *Wkly. Proc. of the Ct. of Just.* 30/93, at 10; *Ministère Public v. Decoster and Others*, Case C-69/91 (Eur. Ct. J. Oct. 27, 1993) (not yet reported), summarized in *Wkly. Proc. of the Ct. of Just.* 30/93, at 7; *Procureur du Roi v. Lagache and Others*, Joined Cases C-46/90 & C-93/91 (Eur. Ct. J. Oct. 27, 1993) (not yet reported), summarized in *Wkly. Proc. of the Ct. of Just.* 30/93, at 3.

179. *National Carbonising Co. v. Commission*, Case 109/75R, [1975] E.C.R. 1193, [1975] 2 C.M.L.R. 457; see *supra* notes 52-54 and accompanying text (discussing *National Carbonising*).

180. See, e.g., *Commission Decision No. 88/518/EEC*, O.J. L 284/41 (1988) (*Napier Brown - British Sugar*). In *Napier Brown - British Sugar*, the Commission found that British Sugar had infringed Article 86 by refusing to supply industrial sugar to Napier Brown, a producer of refined sugar, by reducing the price difference between retail and industrial sugar so that there was an insufficient margin for an efficient independent producer of retail sugar, and by discriminating against Napier Brown by refusing to supply beet sugar. *Id.* The second abuse just mentioned is similar to that considered in the *National Carbonising* case. See *National Carbonising*, [1975] E.C.R. at 1193, [1975] 2 C.M.L.R. at 457; see also *supra* notes 52-54 and accompanying text (discussing *National Carbonising*). The decision quoted the *Commercial Solvents* and *Télémarketing* judgments of the Court.

Whether the dominant company's activities are separately incorporated or not is irrelevant. A dominant company cannot avoid its duty to contract, or justify discrimination in favor of its own operation, by having a branch rather than a subsidiary.

III. *THE IMPORTANCE OF THE ESSENTIAL FACILITY CONCEPT IN EUROPE*

This Article suggests that the essential facility concept is more important in EC law than in U.S. antitrust law. In examining whether this is true and why it should be so, several points are relevant. First, one should not overstate the case. Essential facility cases involve basic principles such as the obligation to contract in some circumstances and the obligation not to discriminate. The essential facility concept may be merely a useful label for some types of case rather than an analytical tool. Second, the EU market is not as integrated economically as the United States for most products and services. Though many barriers have been removed, the European Union is not yet in fact one uniform market. So there are many more dominant positions in "substantial" parts of the European Union than there are in the United States. There are also many sectors in Europe in which markets are often regional, such as transport facilities. Third, in Europe, dominant state-owned companies are more likely to discriminate or refuse to deal for protectionist reasons (even without obtaining a benefit from doing so) than companies in the United States. Several factors including tradition, the absence, until recently, of effective competition laws, and above all the fact that most of them were designed as instruments of national or industrial policy, explain this tendency. Article 90 was included in the EC Treaty because it dealt with an important and widespread problem. Fourth, in Europe, important sectors of industry, such as energy and transport, are being deregulated or at least liberalized by the European Union. These measures would be of little value if the companies concerned, most of which are dominant in their own areas, were free to integrate forward and to discriminate in favor of their own downstream operations. Lastly, regulated or state-owned companies often own facilities that are essential for all or most of their downstream competitors. The essential facilities principle is, in effect, the follow-up of Article 90 of the EC Treaty. Next, because many

important sectors were at least partly state-owned, private utility regulation remains underdeveloped. There were and still are many national regulated monopolies in Europe.¹⁸¹ However, each is subject to its own purely national ad hoc regime, usually consisting of a board of advisers intended to determine or influence its policy without other legal control. Some of these arrangements are disappearing due to EU measures, but they are not being replaced by any overall EU measures, because there would be no majority in the European Union in favor of adopting any particular measures on such monopolies. In the resulting vacuum, antitrust law is being asked to deal with a problem that in the United States has been dealt with at least partly by regulatory legislation.

A. *Dominance in a "Substantial Part" of the Common Market*

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 question may be important where the dominance is partly or wholly due to the ownership of the facility, and where the facility is, for example, a physical harbor or airport, or airline interlining facilities on a particular route.¹⁸¹

In the *Sugar Cartel*¹⁸² case, the Court said that the economic importance of the geographical market concerned must be considered to see if it is "substantial." In this particular case, Belgium and Luxembourg, with 8%-9.5% of EC sugar production and about 5% of EC consumption,¹⁸³ were a "substantial" part of the Community market.

In the first *Port of Genova*¹⁸⁴ case, the Court said that in light of the volume of traffic in Genova and its importance in relation to maritime import and export operations as a whole in Italy, the organization of freight handling at Genova is a "substantial part"

181. See, e.g., B&I, (Eur. Comm'n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; Aer Lingus, O.J. L 96/34 (1992).

182. Coöperatieve vereniging 'Suiker Unie' UA v. Commission, Joined Cases 40-48, 50, 54-56, 111, 113-14/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

183. *Id.* at

184. *Merci Convenzionali Porto di Genova*, Case C-179/90, [1991] E.C.R. I-5889, I-5928, ¶ 15.

of the common market. In the second *Genova*¹⁸⁵ case, the Advocate General and the Court concluded that pilotage services in Genova were also a "substantial part," due to the large quantities of freight going through in Genova, its place in the total quantity of shipments imported and exported from Italy, and the fact that pilotage is required for all ships visiting Genova.

In the *Almelo*¹⁸⁶ case, the Advocate General said that a company whose activities were limited to a less populated province of a Member State was not likely to be dominant in a "substantial" part of the common market.¹⁸⁷ It would be otherwise if the activities covered the whole Member State. Where the market is one for the provision of services at or through a facility that is part of the infrastructure of the transport or other industry in question, it seems that the economic significance is more important than the geographical area involved.

The Commission, in the two *Stena Sealink*¹⁸⁸ cases, considered that the market for port facilities for car and passenger ferries on the "central corridor route" between the central part of Western Britain and Ireland, in particular Dublin, the capital, was "a substantial part" of the Community market. The Commission also considers that the larger international airports in the Community are "substantial parts" of the Community market. This is based on the volume of traffic passing through them, and the size of the catchment areas served by them. In other words, in the context of dominance in the market for widely sold goods, a substantial part of the common market usually has meant a geographical area. In the context of ports and other transport services, a "substantial" part means a route or port that carries a quantity of goods that is economically significant in relation to a Member State or an important region of the Community.¹⁸⁹

185. *Corsica Ferries Italia SRL v. Corpo dei Piloti del Porto di Genova*, Case C-18/93, ¶ 41 (Eur. Ct. J. May 17, 1994) (not yet reported).

186. *Almelo v. Energiebedrijf Ijsselmij NV*, Case C-393/92, [1994] E.C.R. I-1477.

187. Opinion of Advocate General Darmon, *Almelo*, [1994] E.C.R. at I-1496-97, ¶ 110.

188. *Sea Containers v. Stena Sealink*, O.J. L 15/8 (1994); B&I, (Eur. Comm'n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; see *supra* notes 81-94 and accompanying text (discussing *Sea Containers* and *B&I*).

189. In *Ministère Public of Luxembourg v. Hein (Port of Mertert)*, Case 10/71, [1971] E.C.R. 723, the Court seems to have assumed that a harbor on the Moselle was important enough for Article 86 to apply, but the question does not seem to have been considered.

Other service markets presumably will be assessed in the light of their geographical area or their economic importance, or both. A Community-wide market for a specialized but expensive service required by very few users, such as fire-fighting on oil rigs, would probably be "substantial" in economic terms.

B. *National Enforcement of Essential Facilities Principles*

Some cases dealt with by the Commission were primarily of significance to a single Member State. If the legal principles were known clearly enough, such cases could be dealt with by national courts, or by national competition authorities if they are empowered to apply Community law. Enforcement by national authorities does not significantly lessen the administrative cost of applying the legal principles, but it shares them. It is likely that in the future the Commission, in accordance with the *Automec II* judgment,¹⁹⁰ will say that essential facilities cases involving sites such as individual harbours or airports, and defendants that are not public authorities, should be increasingly dealt with by national authorities or courts.

C. *What are Essential Facilities?*

Broadly, any company, even if it is dominant, has a right to actively compete by all methods that are normally permitted. Thus, it is normally entitled to keep and use to the maximum any competitive advantage that it has legitimately acquired, even if its competitors do not have any similar advantages and may not realistically be able to obtain them. Legitimate competition includes obtaining and keeping exclusive access to resources such as patents or physical facilities that confer competitive advantages.

Competition law, however, also says that when a dominant company owns or controls a facility to which access is essential to enable its competitors to carry on business, it may not deny them access, and it must grant access on a nondiscriminatory basis, in certain circumstances. In these circumstances, it must not use its powers as owner to give itself advantages as a competitor. The needs of its competitors and the interests of consumers and the public in free competition override the interests of the domi-

190. *Automec Srl v. Commission*, Case T-24/90, [1992] 5 C.M.L.R. 431.

nant company in having exclusive use of the facility that it has acquired.

The duty to provide access to a facility arises if there is an insurmountable barrier to entry for competitors of the dominant company without access, in practice, or if without access competitors would be subject to a serious, permanent, and inescapable competitive handicap that would make their activities uneconomical. In other words, essential facility cases are not exceptions to normal rules, but specialized examples of general rules about discrimination and competitive handicaps created by dominant companies. It is therefore necessary to estimate the extent of the handicap and whether it would be permanent or merely temporary.

This approach does not deprive the company owning the essential facility of the benefits of ownership. It may charge a high premium for the use of the facility, provided that overall the net charges to its own operations are no less than those it charges to its competitors. It may, if it wishes, refuse to grant access to a company that does not need access in order to compete. It is free to develop the facility and to use it to provide itself with exclusive services that are not essential to competition. Business reasons may not be sufficient to justify the creation of an insuperable barrier to entry, but due weight must be given to them.

This is not a conflict between competition and ownership. Acquisition of valuable property is a legitimate form of competition, and a desirable incentive for competition, that helps the owner compete in the long-term. However, because this only indirectly causes consumers to be offered better goods or services at lower prices, EC law in some circumstances imposes a duty to make competition possible by enabling competitors to offer competing goods or services immediately.

The situation is different in cases not involving joint control of the facility, when access to the facility is merely advantageous and not essential, even though the denial of access has a substantial effect on competition. It is not normally the task of competition law on companies (as distinct from Community law dealing with government measures) to create equal conditions of competition for all companies. Competition law does not oblige even a dominant company to share, on a nondiscriminatory ba-

sis, non-essential advantages that it has obtained or developed through its own efforts (as distinct, perhaps, from those conferred on it by governmental action). The test seems to be whether the handicap resulting from denial of access is one that can reasonably be expected to make competitor's activities in the market in question either impossible or permanently, seriously, and unavoidably uneconomical. If so, that is an insurmountable barrier to entry. If competitors have an economic alternative, no such barrier to entry has been created or raised, and there is no duty to provide access. When the facility is jointly owned by otherwise independent competitors, rather different issues arise, which are discussed separately below.

If the activities of competitors are at a serious competitive disadvantage *vis-à-vis* the dominant company's activities, but this disadvantage is not due to the dominant company owning an essential facility, there is no duty to provide access. The dominant company has a legitimate advantage, which it can maintain permanently. There is no other duty to neutralize or share advantages lawfully obtained.

Technical developments, new forms of cooperation, or both combined, may create new essential facilities that no competitor previously had, or needed to have, in order to compete. Computer reservation systems in air transport are the most obvious example,¹⁹¹ but any industry-wide service might be involved. It therefore seems likely that essential facility cases will become increasingly common in the future.

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 that other companies wish to use if it is not providing them to any independent users. The key test seems to be whether its upstream and downstream operations are merely part of the same business, or separate in nature. For example, a mining company that had built a harbor for its own use to ship ore would not necessarily be obliged to make the harbor available for a car ferry, or even for another mining company. The harbor services it provides are merely part of the process of moving ore from mine to processing facility. An electricity generating company, however, which also owned an electricity grid

191. See *supra* notes 154-57 and accompanying text (discussing CRSs).

might be obliged to give access to the grid to other generators or distributors, because generation and distribution of electricity are separate activities, and it is normal practice in the industry to use a grid for electricity produced by other generators.

Because the test of whether there is a duty to deal is an objective one, it concerns competitors in general. The dominant company may not be fully aware of how serious a handicap it is imposing on the competitor by its refusal of access, or how great a sacrifice the competitor will be ready to make to overcome it. A particular competitor cannot plead that it was especially vulnerable, whether or not that fact was known to the dominant company, and the dominant firm cannot take advantage of the fact that the competitor in question was unusually willing to suffer losses or to indulge in cross-subsidizing to overcome the handicap. This objective approach is also correct for two other reasons.

First, Community law protects competition, not competitors. The fact that one particular competitor needs access to a facility in order to enter the market is irrelevant if other more normally situated competitors do not. If competition necessitates access for all except exceptional competitors, then access may be made compulsory.

Second, the lawfulness of the dominant airline's denial of access must be assessed at the time when the denial occurs. It cannot depend on what happens afterwards, and it should be capable of being assessed by the dominant company without any confidential information about its competitor's business or intentions. The question is, therefore, whether the denial of the facility was one that would make it impossible for normal or average competitors to enter the market at all, or without a handicap serious enough to make their activities uneconomic, in the sense described above. It is not dependent on the characteristics or the reaction of one particular competitor to which access has been denied.

It might, however, be a defense to say that the same companies seeking access are already in a position to provide the facility economically for themselves. So, for example, in the *British Midland/Aer Lingus*¹⁹² case, it might have been a defence if Aer

192. *Aer Lingus*, O.J. L 96/34 (1992); see *supra* notes 70-80 and accompanying text (discussing *Aer Lingus*).

Lingus could have shown that it was economic for British Midland and other airlines to put so many flights onto the route that interlining was not essential.

The reason why access to a facility is essential and why competitors cannot provide their own facility is not important, provided that this is so. The reasons can be physical, such as the lack of another harbor in the area, political, such as environmental objections that make it impossible to build another airport, or economic, such as the financial inviability of building a new harbor with access roads, or the fact that no achievable group of musicians could set up a second performing rights society that would have the necessary economies of scale. It is not necessary to show that a so-called "natural monopoly" is involved.

*D. Competitive Disadvantages, Normal Industry Practice,
and User Awareness*

It is not easy to distinguish between a mere disadvantage and a handicap that is so serious that it is essential to avoid it. The practice of the industry and the expectations of buyers or users may make it essential to have access to a facility that in other circumstances might not be essential. Dominant companies are not free to create competitive disadvantages for their competitors by denying them access to facilities and thereby making them second class citizens. In multi-company cases this is important in industries in which some mutual cooperation between competitors' networks is traditional, such as banks and airlines, and may indeed be the only way essential facilities such as cheque clearing facilities, performing rights societies, and similar facilities, can be created. Also, for example, it is not normally considered essential for horizontal competitors to have information about products of a dominant company before they become available, but it may become essential if the dominant company is able to make a practice of taking orders for them before they are in fact available.¹⁹³ It is, therefore, likely to be important whether the handicap on competitors is one that is known to customers and that affects their interests and attitudes, or is a less significant factor such as an extra cost known only to the competitor to whom access has been denied.

193. See, e.g., IBM, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635

Therefore, if all banks have equal access to check clearing facilities, the unjustifiable denial of full access by a dominant or jointly dominant bank might be a denial of an essential facility, not because the competitor could not do business without it, but because it would thereby be placed in a second class competitive category in the eyes of its customers. Similarly, if travel agents became accustomed to making all airline reservations through computerized reservation systems, it has become not merely an advantage, but essential to be included on a nondiscriminatory basis in a dominant CRS, if there is one.

In order for there to be an obligation on a dominant company to cooperate in this way, it is essential that the cooperation between competitors is not itself significantly anticompetitive. In the case of check clearing facilities and performing rights societies,¹⁹⁴ for example, this requirement is clearly met. If the cooperation is unlawful, it should be prohibited, and there would be no right to participate.

In many such circumstances, cooperation between competitors enables them to provide a more efficient service to their customers, or is needed to provide the service. In such a situation, the obligations resulting from Articles 85 and 86 are likely to be equivalent. The denial of access to the facility could be justified only on objective grounds concerned with factors including, for example, the technical working of the system or the credit-worthiness of a company excluded from it. Selective exclusion would have to be justified by the characteristics of those excluded. Exclusion creates a handicap for those excluded in comparison with a recognized category of competitors based on usual industry practice.

The discrimination, to be unlawful, must be serious enough to create a competitive disadvantage. Minor differences in treatment without economic significance are not prohibited. In practice, therefore, normal industry practice may make what would otherwise be a mere competitive handicap into a serious and even insuperable barrier to entry for a normal competitor. In particular, if the refusal to deal in accordance with normal industry practice is selective, it is likely to be unlawful if no adequate justification can be shown, and if the refusal to deal has a

194. See *supra* note 143 and accompanying text (discussing performing rights societies).

sufficient effect on competition. If normal industry practice is to deal, a dominant company cannot refuse to deal merely on the grounds that if there were no such practice it would have no duty to help its competitor overcome the disadvantage, for example, of small size, that the industry practice in fact offsets.

E. *The Need for an Effect on Competition: The Character of the Downstream Market*

There is an important consequence of the principle that a refusal to supply is contrary to Article 86 only if it has significant effects on competition, that limits substantially the apparent consequences of the broad language of the Court and that avoids the criticisms that might otherwise be made of the Community law rules discussed here. If there are a number of competitors in the downstream market and it is competitive, the refusal to supply one more will not have a significant effect on competition, unless it provides a different product or service from the others. An effect on competition cannot be deduced from the mere fact of a refusal to supply by a dominant enterprise, because the effects of the refusal occur in the downstream market and not in the market in which the enterprise is dominant. As a result, 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 it will provide a significantly new kind of product or service not provided by existing competitors, or that it is being discriminated against to discourage it from competing vigorously. The existing competitors may have provided their own facilities or obtained them from some other supplier, suggesting that the applicant could do so, or may have obtained them from the dominant company, suggesting that it is not refusing access to prevent competition downstream. In most of the single firm refusal cases in Community law, there were very few independent competitors in the downstream market.

One of the reasons why the rules on the duty to supply downstream competitors do not apply to distributors, so that a dominant firm normally has no duty to supply a potential distributor, is that except in selective refusal cases, such as *United*

Brands,¹⁹⁵ the refusal to supply a particular distributor does not have a significant effect on competition:

How should the likelihood of effects on competition be assessed? The answer, it is suggested, lies in the test outlined above: whether the refusal makes the competition objectively impossible for normal competitors, or imposes a serious permanent and inescapable handicap on them. If the refusal has either of these effects, it enables the company that is dominant in the upstream market to raise its price above competitive levels in the downstream market also.

F. *The Significance of Spare Capacity*

It is useful to distinguish between cases in which access to the facility can be given to an unlimited number of competitors,¹⁹⁶ and those in which physical or other constraints mean that only a limited number of companies can use the facility, and the facility may or may not be fully utilized.¹⁹⁷ If the capacity of the essential facility is not fully used, or if by its nature its capacity is unlimited, the inconvenience of a duty to provide access is normally small, and the justification for refusing access is harder to find. If the owner of the essential facility refuses to provide access to unused capacity and the owner or its associated company has a strong or dominant position in the downstream market, the case for a duty to provide access is very strong.

If the capacity of the facility is already fully utilized by several competitors, there would be little or no increase in competition if all the companies involved were required to reduce their operations sufficiently to let in another competitor providing the same kind of product or service. In such a situation, access should not be ordered unless, as already mentioned, the proposed new entrant can show that its entry into the downstream market would bring about a new kind of product or service not provided by any of the existing competitors.

This is partly elementary economics, and partly a result of

195. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429; see *supra* notes 18-22 and accompanying text (discussing *United Brands*).

196. Such cases include interlining air tickets, collection of fees for performing rights, patent licenses, and access to information.

197. Such cases include, for example, the size of a harbor. In some cases, such as take off and landing slots at airports, the number of companies that can economically use slots is much smaller than the total number of slots available.

the Community law principle of "proportionality." This principle says broadly that official action must not be taken if it would cause loss or inconvenience out of proportion to the objective to be obtained. This principle requires a distinction to be made between cases where there is spare capacity and where there is none. Incumbents should not be required to scale down or reorganize their existing activities unless an identifiable increase in competition can be expected as a result.

In cases where the incumbents claim to be fully using the existing capacity and, in particular, if the owner of the facility claims that the capacity is fully utilized by its own operations and it is dominant in the downstream market, it is necessary to look closely at the situation to see if the capacity is not in fact being inefficiently used (in the sense that the real capacity can be increased by more efficient use without new investments) or if the apparent use is not a real use, for example, that some slots have been allocated but are not being used, or that long-term contracts have been made primarily to make the facility unavailable to new entrants. Of course, any agreement between users and the owner of an essential facility to deny access to new entrants, or to give access only on discriminatory terms, would be clearly contrary to Article 85.

G. Access for How Many Competitors? The Character of the Facility

Even when the dominant company has a duty to provide access to essential facilities to competitors, the characteristics of the facility (as distinct from those of the downstream market) are relevant, and it is not necessarily bound to provide access to an unlimited number of competitors. Particularly in the case of physical facilities, there may be scope for only a limited number of competitors. In such a situation, the dominant company is not entitled to keep the facility for itself and to prevent all competition, but it may offer access to an appropriately limited number of competitors on terms equivalent to those of its own operations. Such an offer must itself be nondiscriminatory. The owner of the facility must decide objectively what is the optimum or maximum number of users that can satisfactorily use the facility, and then allocate them in a nondiscriminatory way, without giving preference to its own operations.

H. *New Entrants*

As mentioned above, the Commission considered in *Sea Containers*¹⁹⁸ that the duty to provide access applies to a new entrant, and in the *Magill/RTE/BBC*¹⁹⁹ cases that the duty to provide access applies to new entrants in new markets. In addition, the EC measures on airport slots specifically benefit new entrants. In the *Hoffmann-La Roche*²⁰⁰ and *Michelin*²⁰¹ cases, the Court spoke of the maintenance or "development" of competition.

If the duty to provide access was limited to companies already in the market, it would unjustifiably create a privileged category of competitors without any legal or economic rationale and would deprive consumers of what the new entrants have to offer. A distinction between a new entrant and an existing competitor increasing its capacity would not make sense. Nor would it make sense to protect entrants into new markets and not new entrants into existing markets. Where there is spare capacity, or where the nature of the essential facility is such that new entrants can always be supplied, new entrants must be given access. Where there is no or insufficient spare capacity, the legal position will depend on existing contractual commitments. Provided that these are of reasonable duration (a question discussed below), the new entrant must be given an opportunity to compete with other users or potential users for access when the contracts expire, at least when this is necessary to ensure effective competition. Where, as in the case of airports or harbours, access may require the allocation of arrival and departure times and periods in berths, the owner of the essential facility is (subject to specific Community measures, such as those on railways or airport slots) obliged to behave as an independent company would behave and to allocate or arrange slots without any dis-

198. O.J. L 15/8 (1994); see *supra* notes 90-94 and accompanying text (discussing *Sea Containers*).

199. RTE, Case 7-69/89, [1991] E.C.R. II-485, [1991] 4 C.M.L.R. 586 (Ct. First Instance); BBC, Case T-70/89, [1991] E.C.R. II-535, [1991] 4 C.M.L.R. 669 (Ct. First Instance); see *supra* notes 33-44 and accompanying text (discussing *RTE* and *BBC*).

200. *Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211; John Temple Lang, *Monopolisation and the Definition of "Abuse" of a Dominant Position Under Article 86 EEC Treaty*, 16 COMMON MKT. L. REV. 345, 356-57 (1979).

201. *NV Nederbundsche Bauden - Industrie Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

crimination in favor of its own activities or those of the existing users.

The dominant company is obliged to provide goods, services, or information only for the new entrant's own use. A company cannot claim the rights of a new entrant user 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 or middleman is entitled to buy only if there are other companies similarly placed to whom the dominant company sells. In any case, access to even a dominant company's products is rarely essential for a distributor or dealer, and a distributor does not have the same rights to be supplied as a competitor. Nor is a dealer usually as important a competitive force as a producer.

Any new entrant, and any user of a facility that wishes to change its arrangements, must give whatever notice is reasonable under the circumstances. This permits time for discussion and negotiations of the new or revised arrangements. A new entrant who only wishes to provide the most profitable services at peak periods could not claim equal rights with already established companies willing to operate throughout the year. If the practice of the industry is, for sound reasons, to provide a single service that includes highly profitable and less profitable times, there is no justification for allowing a new entrant to insist on that practice being changed. Of course, the owner of the facility could choose to auction the right to provide the service at the most profitable times separately from the right to provide it at other times, but it could not be compelled to do so.

The owner of an essential facility cannot be obliged to invest in new capacity to provide facilities for more competitors. If extra capital investment is made to provide access to a new entrant, after whatever period of amortisation and notice is appropriate, the cost of the new investment should be charged in a nondiscriminatory way to all the users. After a specially constructed new facility is amortised, it would be discriminatory to make the new entrant bear a disproportionate share of the cost merely because of the time at which it obtained access. It seems reasonable, however, that a user should have to pay, directly or indirectly, the cost of a new facility constructed for its use, even if this means that it has initially higher costs than its competitors. In such a situation, the different treatment is justified.

New entrants can be required to accept all reasonable technical requirements to ensure the safe and efficient use of the facility by all users, and to provide reasonable credit-worthiness guarantees. They cannot, however, be required to meet onerous or unjustifiable conditions, such as to provide bank guarantees for sums clearly greater than any that they might be obliged to pay.

I. *What is the Nature of the Duty?*

If a dominant company has a duty in connection with an essential facility, it is a duty to supply on nondiscriminatory terms. It is never a duty to discriminate in favor of a competitor or to incur a loss. The dominant company is free to decide the conditions on which it will supply its own and its competitors' operations, provided that they are nondiscriminatory.²⁰² A dominant company does not have a duty to do something that an independent owner of the essential facility, without any conflict of interests, would not do in its own interests. It may, therefore, choose to change the use of the facility, so that it is no longer available to its own or its competitors' downstream activities, if it is more profitable to do so. It cannot be obliged to use the facility in an uneconomical way.

J. *The Duty to Inform and Consult*

Where a dominant company has a duty to give access to an essential facility, it 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. Without these duties, the duty to give access could not be enforced. The owner of the facility has a duty to negotiate in good faith. An example

202. See *Polaroid/SSI Europe*, COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COMPETITION POLICY 95 (1984). *Polaroid* was another case of refusal to supply, involving instant film. Polaroid refused to supply without knowing where the film would be resold. After the Commission began an investigation, Polaroid agreed that it would supply SSI Europe. The case is of interest because in its annual Report the Commission said in connection with the case:

As a general principle, the Commission emphasizes that an objectively unjustifiable refusal to supply by an undertaking holding a dominant position on a market constitutes an infringement of Article 86 and will also be regarded as such when the dominant undertaking makes supply of the product conditional on his having control of its further processing or marketing.

Id.

of this issue arose in the *Sea Containers*²⁰³ decision, in which the Commission criticized Sealink for delaying and making difficulties in negotiations.

K. *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 or service may be important for several reasons. First, it may create a "now-or-never" situation in which, if the new entrant cannot launch its new product or service at about the same time as the incumbents, it will never catch up to them. This was the *IGR*²⁰⁴ situation, and the *Sea Containers*²⁰⁵ case. Second, the fact that the new entrant will provide goods or services significantly different from and more competitive than those provided by the incumbents may give it a right to access even if there is no unused capacity and there are already a number of competitors and effective competition in the downstream market. Third, the fact that the new entrant plans to provide obviously useful goods or services that do not yet exist, as in the *Magill/RTE/BBC*²⁰⁶ cases, provides a strong argument for ordering access even when intellectual property rights are involved.

L. *Interim Measures*

As already mentioned, the Commission in the *Sea Containers* case said that interim measures (i.e., interlocutory injunctions) may be just as necessary to ensure that the final decision of the Commission is effective in the case of a new entrant as in the case of an already established competitor. In *IGR Stereo Television*,²⁰⁷ the Commission had also been ready to adopt interim

203. O.J. L 15/18 (1994); *see supra* notes 90-94 and accompanying text (discussing *Sea Containers*).

204. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63 (1982); *see supra* notes 111-16 and accompanying text (discussing *IGR*).

205. O.J. L 15/8 (1994); *see supra* notes 90-94 and accompanying text (discussing *Sea Containers*).

206. RTE, Case T-69/89, [1991] E.C.R. II-485, [1991] 4 C.M.L.R. 586; BBC, Case T-70/89, [1991] E.C.R. II-535, [1991] 4 C.M.L.R. 669; *see supra* notes 33-44 and accompanying text (discussing *RTE* and *BBC*).

207. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); *see supra* notes 111-16 and accompanying text (discussing *IGR*).

measures if necessary when Salora was a new entrant in the new product market. In an unpublished interim measures decision in March 1992, *Langnese and Schöller*,²⁰⁸ the Commission ordered two ice cream makers to stop enforcing contracts requiring their ice cream cabinets in small retail outlets to be used exclusively for their products. This was done to enable Mars to enter the retail ice cream market in Germany. The President of the Court of First Instance did not object to this aspect of the Commission's decision.²⁰⁹ Although this case was under Article 85, access to the only ice cream cabinets for which there is room in many small shops is analogous to access to an essential facility for selling ice cream in single portions.

If there is a serious risk that any final decision would be pointless because the market would be no longer economically attractive for a new entrant, the only way of maintaining the likelihood of competition is by granting interim measures. Failure to grant interim measures would prejudice the effectiveness of the ultimate decision.²¹⁰

In the leading case on the Commission's power to order interim measures, *Camera Care*,²¹¹ the Court said that interim measures decisions should be *conservatoire*.²¹² This means protective and refers to the need to safeguard the effectiveness of the Commission's final decision. Contrary to what was thought at first by some commentators, it does not always or necessarily mean "maintaining the situation as it was before the infringement." The effect may be the same in many situations, but not, of course, the case of a new entrant that is refused access to the market.

It should be said, however, that interim measures are frequently thought of as preserving the status quo pending a final decision. In *Commission v Italy*,²¹³ the Court appears to assume

208. *Langnese*, O.J. L 183/19 (1993); *Schöller*, O.J. L 183/1 (1993).

209. *Langnese*, O.J. L 183/19 (1993); *Schöller*, O.J. L 183/1 (1993).

210. Of course, a Commission decision ordering interim measures in favor of a new entrant must fulfill all the normal requirements for any interim measures decision: a prima facie case, serious and irrevocable harm if no measures are taken, urgency, and the balance of interests in favor of taking interim measures. The *Sea Containers* decision illustrates these issues. O.J. L 15/8 (1994).

211. *Camera Care Ltd. v. Commission*, Case 792/79 R, [1980] E.C.R. 119, [1980] 1 C.M.L.R. 334.

212. *Id.* at 131, [1980] 1 C.M.L.R. at 348.

213. *Commission v. Italy*, Case 352/88 R, [1989] E.C.R. 267, [1990] 2 C.M.L.R. 1.

that interim measures can only be granted to maintain the existing situation or restore the status quo ante and not to protect the effectiveness of the final decision,²¹⁴ although it was not on that ground that the Commission's application was dismissed. As already mentioned, interim measures may be specially needed to let in a new entrant if it would otherwise be seriously left behind when the incumbents introduce a new kind of product or service. This was the case in *IGR Stereo Television*²¹⁵ and *Sea Containers*.²¹⁶

M. *Capital Investment and the Duration of Agreements*

If the capacity of a facility is limited to a small number of users, the agreements that they make for its use may have the effect of excluding new entrants. It follows that these agreements would restrict competition if they were for unnecessarily long periods, and if the capacity of the facility is fully used. The duration that is reasonable will depend among other things on whether either party has invested substantial sums primarily on the basis of the agreement. The duration may have to be long enough to justify the investment. Again, the normal practice in the sector in question is important. The owner may decide to make a new capital investment specifically for one user, without being obliged to offer to make the same investment for other users.

N. *Practical Consequences*

As a practical matter, although not normally required by law, when a company is the owner of a facility that it itself uses, it cannot normally expect to satisfactorily fulfill its duty to provide nondiscriminatory access and to resolve its conflicts of interest unless it takes steps to separate its management of the essential facility from its use of it. This could involve, for example, having different employees responsible for the management of the two activities, the establishment of a nondiscriminatory code of practice by the companies (not by the Commission), or a consulta-

214. *Id.* at 273, ¶ 23, [1990] 2 C.M.L.R. at 5.

215. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); see *supra* notes 111-16 and accompanying text (discussing *IGR*).

216. O.J. L 15/8 (1994); see *supra* notes 90-94 and accompanying text (discussing *Sea Containers*).

tion procedure involving other users, with an independent chairperson, and arrangements for independent arbitration in the event of disputes. It might also involve formalizing its relationships with its downstream subsidiary, so that it can be made clear that its downstream competitor is treated in the same way.

Dominant enterprises with a duty to provide nondiscriminatory access necessarily have a duty not to cross-subsidize. A dominant company should, therefore, keep separate internal accounts on an arm's-length basis and provide all services on this basis to ensure that it can prove that it treats its own operations no more favorably overall than it treats those of its competitors using the facility. As a user it should pay the same net charges as other users. Even if separate accounts have not been kept, there is discrimination unless analysis can show the same net contribution as is made by competitors. A company with a duty not to discriminate in favor of its own operations cannot complain if it has failed to keep accounts ensuring that it has not accidentally or deliberately done so. The terms on which the dominant enterprise licenses its own use of the facility should be formalized, so that the same terms can be given to competitors.

Sometimes a dominant company makes arrangements with another company that it is then obliged, by its duty not to discriminate, to extend to others. Such a situation could have been avoided with foresight and sound legal advice. The dominant company cannot avoid its duty not to discriminate by saying, however convincingly, that it would not have made the first arrangements on those terms, or at all, if it had known that it would then have to extend them to others. Sometimes it might be cheaper to renegotiate the first arrangements, or even to pay damages, than to extend them to others. This also raises the question of whether the dominant company would have been entitled to limit the number of companies with whom it entered into arrangements. The Commission could help in such situations, if it gets an opportunity to do so, by warning the dominant company of its duty not to discriminate, by suggesting open competitive tendering or, if the first agreement purports to be exclusive, by objecting to it and by requiring it to be renegotiated. There is, however, no substitute for sound legal advice at the right moment.

Difficulties may arise in negotiating the precise terms of the contract that need to be made between the owner and the user

of the essential facility. The Commission may insist on offers, not just arguments, from both sides, but will not normally fix the terms of the contract itself. Although the Commission cannot delegate its power to rule on antitrust law questions to anyone, arbitration may be a useful way of settling the terms of agreements, resolving technical issues, or the trivial cases of discrimination that are likely to arise in day-to-day operations. Some solution to these problems may be needed. The two Holyhead²¹⁷ cases illustrate the difficulty of trying to solve practical difficulties with very general legal rules when the parties are reluctant to reach agreement.

In essential facilities cases, complainants usually need to make a contract with the dominant owner of the facility. They therefore do not wish to spoil the atmosphere by making an unsuccessful complaint. For this reason, the Commission has been willing to discuss potential complaints with complainants, even on an anonymous basis, to help the complainants assess whether the chances of success were good enough to justify making the complaint. It would be an abuse if a dominant company took action against a complainant because it had made a complaint,²¹⁸ but complainants are well aware that in such situations it would be very difficult to prove that the dominant company's action was intended as a reprisal.

O. *Discrimination in Day-To-Day Operations*

The duty to provide access to an essential facility on a non-discriminatory basis in all respects makes it inevitable that in practice there may be arguments about whether the dominant company, which of course retains general control over the operation of the facility, has discriminated in day-to-day operations. This is one of the administrative costs of the principle. Factual disputes of this kind are more suited to national courts than to the Commission, because, among other reasons, the Commission has no power to award compensation. The Commission is reluctant to become involved in essentially minor disputes over day-to-day operations, if no question of principle is involved.

217. *Sea Containers v. Stena Sealink*, O.J. L 15/8 (1994); *B&I* (Eur. Comm'n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; see *supra* notes 81-94 and accompanying text (discussing cases involving Holyhead Harbor).

218. *Abuse of Dominant Positions*, *supra* note 17, at 55-57.

In some cases, the Commission has ensured that an arbitration system is set up to resolve this kind of case. This is particularly desirable if minor factual disputes are likely to be primarily over technical issues concerning the running of a railway, the operation of a harbor, or other matters where a technically qualified arbitrator could decide more quickly and satisfactorily than a non-specialist judge or the Commission itself.

While such problems are unavoidable in Article 86 cases, in Article 85 cases they could be avoided, if the Commission thought it necessary to do so, by refusing authorization for the joint venture operating the facility. The Commission may perhaps find it necessary in the future to be stricter and to refuse authorizations rather than allowing joint ventures and imposing obligations of nondiscrimination. Behavioral obligations do not necessarily provide satisfactory solutions in structural cases. This kind of problem is likely to be even greater in practice if the Commission has accepted an undertaking rather than imposing a formal condition on the parties.

P. Duopolies and Joint Dominance

One of the few near-duopoly cases raising essential facilities issues in Community antitrust law involved the two big European computer reservation systems,²¹⁹ each of which was jointly owned by several European airlines that were users of both facilities. In fact, this was really a case of two CRSs each having a dominant position in part of the Community, rather than joint dominance in a single market. Because some of the airlines were dominant in their national markets, they each had duties under both Articles 85 and 86 not to discriminate in favor of the CRS in which they had shares. Enforcement of this duty was essential in order to enable the two CRSs to compete in one another's markets. Community legislation says that the duty may be on the basis of reciprocity, that is, discrimination by one jointly dominant company may relieve the other of its duty not to discriminate against the first. The other duopoly cases were the U.K. small coal mines cases, described above.²²⁰ The legal duties of dominant buyers do not correspond precisely to those

219. Amadeus/Sabre, COMMISSION OF THE EUROPEAN COMMUNITIES, XXIST REPORT ON COMPETITION POLICY 73-74 (1992); see *Air Transport*, *supra* note 117, at 317-22.

220. See *supra* note 99 and accompanying text (discussing U.K. Small Mines case).

of dominant suppliers of goods or services, so these cases are of limited interest as precedents in this respect.²²¹

Under Community law, joint dominance seems to exist when there is little or no competition between oligopolists (whether due to collusion or otherwise) and when the oligopolists together have large market shares and the same kinds of advantages over their competitors as are required to show the dominance of a single firm. Some language used by the Court seems to suggest that collusion is necessary for joint dominance. As this would mean that the words of Article 86 add nothing to Article 85, it seems likely that when the Court needs to decide the point it will conclude that if there is little or no competition between the oligopolists, there can be joint dominance without collusion. 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.²²² Therefore, it would be unlawful for one jointly dominant company to unjustifiably refuse access, even though, if one granted access the applicant would not need to seek access from the others.

Q. Temporary Duties To Provide Access: Selective Refusal

In one case, *British Midland v. Aer Lingus*,²²³ the Commission has taken the view that access to the dominant company's interlining may be essential for a competitor at one time, such as when first entering the market in question, but not necessarily later, such as after it has had enough time to establish itself, when it has invented or produced an alternative facility or had time to reach the scale at which it should be able to pay for its own facility. Denial of access to such a facility may be a crucial barrier to entry at an early stage in a company's operations and a lesser disadvantage at another time or in other circumstances.

This would make it necessary to distinguish between essential facilities that the competitor cannot be expected to provide for itself even in the long-term (either because that is practically,

221. They are important in showing the Commission's opinion that there can be joint dominance without collusion.

222. John Temple Lang, *Trade Associations and Self Regulation*, in 1984 *FORDHAM CORP. L. INST.* 605, 652-62 (Barry Hawk ed., 1984); *Air Transport*, *supra* note 117, at 360-65.

223. *Aer Lingus*, O.J. L 96/34 (1992); *see supra* notes 70-80 and accompanying text (discussing *Aer Lingus*).

physically, or economically impossible, in the case of, for example, another harbor, or because the facility is merely a prerequisite and not a way in which the competitor could compete better) and facilities that the competitor should itself be expected to provide in due course. This distinction may depend on the economies of scale involved in providing an alternative facility, or whether a second facility would create real competition between the two facilities themselves, or whether there would be non-competition objections, such as environmental concerns, to having a second facility. If the necessary investment changes substantially, the legal position might change too.

If the competitor should be expected to provide a second facility, it may be necessary to decide how much time it should be given in which to do so. It would not be appropriate to merely wait until it was accomplished. All this would inevitably involve difficult policy questions about what kind of competition to encourage, which are not answered by traditional static economic analysis of essential facility cases. In effect, it has to be decided whether the provision of an essential facility is a barrier to entry that the competitor must itself surmount from the beginning, or whether it should be helped, temporarily or permanently, to surmount.

Two of the cases decided by the Commission are in this "temporary duty" category. In *British Midland v. Aer Lingus*,²²⁴ the Commission ruled that there was a duty to interline which lasted for several years after British Midland came on a particular air route. The duty, however, was not permanent because any such competitor could be expected to increase its own frequency of flights in due course. It was important that interlining is general industry practice as a result of arrangements between competitors, and that Aer Lingus had refused to interline when British Midland, which it regarded as an effective competitor, had attained an important route. In *B&I v. Sealink*,²²⁵ the Commission, in an interim measures decision, ruled that Sealink had a duty as a dominant harbor operator to refrain from altering its own car ferry schedules in a manner that would interfere with

224. *Aer Lingus*, O.J. L 96/34 (1992); see *supra* notes 70-80 and accompanying text (discussing *Aer Lingus*).

225. (Eur. Comm'n June 11, 1992), cited in [1992] 5 C.M.L.R. 255; see *supra* notes 81-89 and accompanying text (discussing *B&I*).

the operations of a competing ferry operator. This duty was temporary, to last until modifications had been made to B&I's ship and to the quay in order to avoid the interference, after which the problem would disappear.²²⁶

The *B&I* decision was an interim measures decision concerned with a temporary situation. Implications of the temporary nature of the duty described in the *Aer Lingus*²²⁷ decision are more difficult to foresee. Probably a new entrant is entitled to obtain from dominant companies the type of interlining agreement that is normal within the industry. Dominant enterprises are clearly not free to refuse normal interlining arrangements to discourage or handicap companies that are likely to be aggressive competitors. Interlining is always for the benefit of passengers. Common sense says that frequent flights are something that each airline should try to provide for itself. When it has done so, it will have the bargaining power to negotiate a new interlining agreement. The fact that an incumbent airline has many flights is not a barrier to entry, but rather a sign of efficiency.

Perhaps temporary duties to provide access to facilities arise only when a dominant enterprise has refused normal industry arrangements selectively in order to handicap or to discourage an active competitor. In other situations, the right to access lasts as long as the dominance, accords to multilateral arrangements, or does not exist. The Commission in the *Aer Lingus* decision mentioned the possibility that the duty to interline might continue, but did not discuss how far companies are free to refuse access to facilities based on multilateral arrangements.

R. *Selective Refusal of Access to Discourage Aggressive Competition*

As the *Aer Lingus*²²⁸ and *United Brands*²²⁹ cases show, if the dominant company discriminates against a particular competitor or if it artificially or without objective reasons²³⁰ denies a particular competitor an advantage that it was giving or could be ex-

226. *B&I* (Eur. Comm'n June 11, 1992), [1992] 5 C.M.L.R. at 255.

227. *Aer Lingus*, O.J. L 96/34 (1992).

228. *Id.*

229. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207 [1978] 1 C.M.L.R. 429; see *supra* notes 18-22 and accompanying text (discussing *United Brands*).

230. An example of a nonobjective reason would be to avoid aiding a vigorous competitor.

pected to give to others (especially if it is acting contrary to industry practice), this may be unlawful. In other words, a dominant company may retain a facility that it has lawfully obtained, but it should not be allowed to use it selectively to handicap or to injure a particular competitor, because such use is anticompetitive and is not simply a natural consequence of having obtained an advantage or of owning an important facility. Therefore, if the dominant company tries to deny access to a facility as a means of putting pressure on a competitor to compete less vigorously, it is likely to commit an abuse even if the facility is not essential. Where the reason for the denial of access is anticompetitive, this is an unlawful effort by economic pressure to inhibit or to discourage a competitor.

A second difference between these and normal essential facility cases is that in cases involving selective refusal of access, any special characteristics of the victim are relevant, at least if they are known or are likely to be known to the dominant company, because they show how likely it is to be discouraged from entering the market, from competing vigorously, or to be forced out of the market entirely.

S. Article 85 of the EC Treaty

Multi-company and joint venture cases under Article 85 constitute a third category, after essential facility and selective refusal cases. In joint venture cases, the Commission may impose an obligation on the parents to refrain from discriminating in favor of their joint venture 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. The duty may be imposed on parents if they have large, but not necessarily dominant, market shares, and even if they are not controlling an essential facility in the strict sense. The duty not to discriminate is similar to that in Article 86 cases, but it arises under Article 85(3) in a wider range of situations. The *DHL/Lufthansa case*, *IGR Stereo Television*,²³¹ and computer reservation

231. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); see *supra* notes 111-16 and accompanying text (discussing *IGR*).

systems group exemptions²³² are examples of this result of Article 85. The result is therefore similar whether the case is analyzed under Article 85 or Article 86, although it is easier to justify an obligation to grant access under Article 85.

Yet another category of cases are those in which exclusive supply contracts that would normally be permissible are unlawful because they tie up too many of the available outlets. The *Langnese* and *Schöller*²³³ cases are recent examples of this.

Under Article 85, it may be useful in analysis to distinguish between five types of cases: (1) those in which cooperation between competitors is essential to carry out the operations in question, such as banks' arrangements for clearing checks, airlines' arrangements to interline (mutual horizontal cooperation); (2) cases in which the joint venture owning the essential facility is essentially in a dominant position, and the fact that the downstream users are also its shareholders does not significantly affect the position;²³⁴ (3) cases in which 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; (4) those cases in which the cooperation is essential to provide some service for all the participants for reasons such as the impossibility of otherwise achieving the necessary economies of scale;²³⁵ and (5) cases in which the facility (ice cream cabinets, 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.

When the Commission imposes a condition of nondiscriminatory behavior in an individual exemption under Article 85(3), it exercises a wider discretion than when it insists on nondiscrim-

232. See *supra* notes 154-57 and accompanying text (discussing CRSs).

233. *Langnese*, O.J. L 183/19 (1993); *Schöller*, O.J. L 183/1 (1993).

234. See, e.g., *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); see also *supra* notes 111-16 (discussing *IGR*). These are analogous to the cases in which U.S. courts have accepted the physical inevitability of a "bottleneck."

235. Performing rights societies are an example of this type of case. See, e.g., *GEMA I*; Case 45/71 R, [1971] E.C.R. 791; see also *supra* note 143 and accompanying text (discussing performing rights society cases). The third type of case above can develop into this situation. These are analogous to the cases in which U.S. courts have accepted the benefits of cooperation. In cases of this kind the benefits usually increase as the number of participants increases.

inatory behavior under Article 86. Nevertheless, there is a need to reconcile the three policy objectives of: first, ensuring access to essential services for other competition; second, not unduly limiting the advantages of ownership or other advantages sought by the parties; and third, minimizing administrative costs. One difference is that under Article 85²³⁶ the Commission can, if appropriate, clearly impose an obligation to submit day-to-day discrimination issues to arbitration. More important distinctions are that Article 85 applies if the parties have sufficiently large market shares, even if they fall short of dominance, and that it is administratively simpler 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.

T. *Horizontally-Integrated Dominant Companies*

Horizontally-integrated companies are companies that supply two or more products or services that have to be bought or used together by their customers. The horizontally integrated company may be dominant in the market for one or both of the products or services. Antitrust law issues may arise in such situations if it has competitors that sell one product or service that needs to be used with the other product or service of the dominant company. For them, access for themselves or for their customers to the product or service of the dominant company can raise issues that are at least similar to essential facility issues. The dominant company may try to make its products incompatible with those of its competitors, or may try by other means to prevent its customers from using its competitors' products with its products.

These cases include: (a) companies that sell equipment in modules, selling both components and complete products; (b) companies selling computers, software and peripherals, sound reproducing equipment and tapes, videos and cassettes, cameras and films, radio transmitting, and receiving equipment; (c) companies selling equipment and the consumables to be used with it.

The first principle in connection with horizontally integrated dominant companies is that they may not tie in unrelated

236. EC Treaty, *supra* note 1, art. 85.

products. Article 86 prohibits this.²³⁷ It does so, it has been suggested above, because tying-in is an effort to use power in the market to strengthen the company's position in other markets. In effect, this is the two market or leverage argument, which, insofar as it is valid, may also apply when the two products, though in separate markets, need to be used together. It is only when two products must be used together that the argument can be made that one is an essential facility for the use or sale of the other.

For products that need to be used together, the basic rules are the same as those discussed already. The dominant company has a duty to supply the competitor or its customers and cannot refuse without specific technical or other justification to supply a user who chooses to combine its competitors' product with its own. The dominant company has also a duty to not discriminate against users who choose to combine products, or to make difficulties for its competitors, such as by refusing its competitors compulsory licenses or altering the interfaces of its products without improving them. The *Hilti*²³⁸ and *Decca*²³⁹ cases are authorities for these rules.

Even if the company is dominant in the supply of both products, it is always free to improve either or both of them. If it improves product A, and as an incidental and necessary result product A becomes incompatible with all previous versions of product B, the company will modify its product B to make it compatible. When this has been done, even if B has not otherwise been modified, B (as well as A) has a new advantage over the competitors' versions of B, merely because it works with the new improved version of A. This advantage is legitimate, even if the company is dominant in the supply of both products. How-

237. *Id.* art. 86.

238. *Hilti AG v. Commission*, Case T-30/89, [1991] E.C.R. II-1439, [1992] 4 C.M.L.R. 16 (Ct. First Instance); see *supra* notes 45-51 and accompanying text (discussing *Hilti*).

239. Commission Decision No. 89/113/EEC, O.J. L 43/27 (1989) [hereinafter *Decca*]. In the *Decca* case, the Commission found that Decca had deliberately changed the signals transmitted by its navigation equipment so that they could not be properly received by non-Decca receivers. *Id.* ¶ 108, O.J. L 43/27, at 43 (1989). It took two months to modify the software of the competitors' receivers to make them fully compatible with the altered Decca signals. *Id.* ¶ 110, O.J. L 43/27, at 43 (1989). Decca's exclusionary behavior denied users of non-Decca receivers proper access to Decca's navigation signals (the essential facility). This infringed Article 86.

ever, the dominant company may not otherwise put a user who chooses to combine its product with its competitors in a less satisfactory position than if the user used both of its products.

The main problem arises over disclosure of interface information. As already mentioned, in the absence of exclusionary product innovation or design, 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*²⁴⁰ case, IBM was able to take orders for its new products before the detailed information about their technical characteristics, which its competitors required, became available. Competitors needed this information to adapt their products to make them fully compatible with IBM's new products.²⁴¹ IBM thus could foreclose the market before the competitors could begin to adapt their 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. Nor did the Commission explicitly choose the essential facility theory as the basis of a final position, although that seems to be one of the best rationales for the view that it took. Assuming that IBM was dominant, IBM's control over its own system gave it a duty to do what was needed to enable competitors to compete within that system by offering IBM-compatible products. Access to interface information was essential for this purpose. At the time, it was not economically feasible for any competitor to compete with IBM in providing whole systems, and the Commission's view was that disclosure of interface information would not have unreasonably disclosed the non-interface characteristics of IBM's new products.

The second possible rationale for the Commission's position in the *IBM* case is the rule that a company dominant in one

240. *IBM*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635; see *supra* notes 55-60 and accompanying text (discussing *IBM*).

241. *Id.* at 2642, [1981] 3 C.M.L.R. at 637.

market may not use its position there to exclude competitors from a second related market. This rule is well established in EC case law, but whether it could be said that IBM had used its position in one market to exclude competitors from the other is less clear. It will be seen that 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 that 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.

U. *Possible Justifications for Discrimination or Refusal of Access to Essential Facilities*

The case law summarized above has done little to clarify the circumstances in which discrimination or a refusal can be justified. However, the Commission has never said anything to suggest that a dominant company could not take advantage of 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 worse for consumer welfare rather than better. A dominant company never has a duty to offset a competitive advantage that it has lawfully obtained, although it cannot use exclusive access to an essential facility to obtain such an advantage. There are probably not very many cases in which such advantages of vertical integration could be shown.

However, in one such case, details of which cannot be published at present, the Commission informally took the position that the dominant owner of an essential facility could not be criticized for taking advantage of economies of scale in 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. The Court's decision in *Hugin*,²⁴² a case involving the supply of spare parts, may perhaps indicate a reluctance to prevent a company from trying to maintain its reputation and goodwill by having its products serviced only by companies whose employees it had trained.

242. *Hugin Kassaregister AB v. Commission*, Case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345; see *supra* note 30 and accompanying text (discussing *Hugin*).

In the *IBM*²⁴³ case, the Commission seems to have been sympathetic to the argument that compulsory disclosure of interfaces would be inappropriate if it would disclose new features of IBM's designs.

In other cases, it would certainly be a defense 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. If this occurred, the question whether the available places should then be auctioned or otherwise reallocated would arise. In the *Port of Rødby*²⁴⁴ decision, 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. In the *Port of Rødby* decision, the Commission also rejected the argument that competition would not be increased by the new entrant because the existing port could not handle more ship movements. The Commission stated that even if that were true, competition in quality of service would be possible.

V. *Compulsory Licensing of Intellectual Property Rights*

An economics-based approach is also appropriate to the question of when a dominant company is obliged to grant licenses of intellectual property rights to competitors. A dominant company is normally free to acquire and retain for its own exclusive use intellectual property rights that give it advantages. However, if the rights in question give control of something without which competitors are not able to compete at all, there can be a duty to license. The right is an essential facility. This is true only if the license is essential to produce any goods to compete in a whole market. An intellectual property right does not

243. *IBM*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635; see *supra* notes 55-60 and accompanying text (discussing *IBM*).

244. *Port of Rødby*, O.J. L 55/52 (1994); see *supra* notes 95-98 and accompanying text (discussing *Port of Rødby*).

normally or necessarily create a monopoly in a whole product market. Licenses in general need not be given merely to produce a specific design of goods, such as components that would otherwise infringe the dominant company's designs, copymark, or trademark rights. If licenses are needed only for such purposes, there is a duty to license only if there is some related exploitative or exclusionary behavior in addition to the refusal to license, and for which the granting of a license is an appropriate competition law remedy. In fact, the law will be unclear until the Court gives judgment in *RTE/Magill*, and the following comments can only be tentative. No doubt the final result of the *RTE/Magill* case will considerably clarify the law.

A detailed analysis of the long opinion of the Advocate General in *RTE* would not be appropriate here, but some points can be made. A monopoly that results from an intellectual property right, a monopoly given by statute, and a monopoly due to the acquisition or construction of an essential facility may perhaps have different consequences under Community antitrust law, but they are all monopolies given, or protected, by law. There should be clear reasons for distinguishing between them. The Advocate General said that

[a] specific exercise of rights which in principle are within the specific subject-matter may be incompatible with Article 86 The third example in *Volvo v. Veng* [ceasing to make spare parts for models still in use, which the Court said was an abuse] shows that the Court has accepted that it is possible pursuant to Article 86 to interfere with rights falling within the specific subject-matter of an intellectual property right.²⁴⁵

A duty to give access to an asset of any kind that constitutes an essential facility is always an interference with the ownership of that facility which needs to be, but which of course sometimes can be, justified under antitrust law. The only question is, therefore, whether the circumstances of the *RTE/Magill* case made it appropriate to order licensing.

If Magill had claimed a right to obtain only RTE's programs in advance for a week at a time, so as to set up a magazine merely in competition with RTE's magazine, it would not have been of-

245. Opinion of Advocate General Gulman, *Radio Telefis Eireann v. Commission*, Joined Cases C-241-42/91 P, 52-58, ¶¶ 18-20 (Eur. Ct. J. June 1, 1994) (Court decision not yet issued).

fering a wholly new product, and its case would have been much weaker. The stronger argument was that Magill, by combining the programs of BBC and RTE, was offering a new product. The new product to be offered by Magill, however, was essentially program lists of several TV stations put together. It was apparently not a market distinct from the separate program guides that already existed. If Magill had a right to obtain program lists from either BBC or RTE, it would follow that BBC could have obliged RTE to disclose its programs to enable the BBC to produce a comprehensive TV guide, and that RTE could have obtained BBC's programs for the same purpose. If either had done so, Magill's product would not have been a new product.

The Advocate General accepted that it is an abuse if the copyright owner refuses a license for a product that does not compete with his product, i.e., which is in another market, but, the Advocate General gave no reasons. This is essentially the third kind of situation visualized in *Veng v. Volvo*.²⁴⁶

Thus, there are several situations. First, the plaintiff's product would compete with the owner's product in that product's own market (which may be the *Magill* situation).²⁴⁷ Second, the plaintiff's product is in a separate market where the owner has no product, in which case refusal to license is unjustifiable and an abuse, if there is a sufficient effect on competition. The third situation is one in which the plaintiff's product would compete with the owner's product, but in a downstream or related market and not in the primary market in which the copyright or other protected goods are sold. So, for example, if a company sought to preserve a monopoly in the market for servicing and maintenance of its product by refusing to supply spare parts for use by competing service companies, this would be an abuse, if the effect on competition was sufficiently great.

On this view, therefore, the main question is not primarily whether the plaintiff's product or service is new, but rather whether it is in a product or service market distinct from, though related to, the market in which the intellectual right primarily operates. More precisely, the plaintiff needs to show that it wishes to launch a product or a service for which a supply of the

246. *Volvo AB v. Erik Veng (U.K.) Ltd.*, Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122; see *supra* note 28 and accompanying text (discussing *Veng*).

247. See *supra* notes 33-44 and accompanying text (discussing *RTE*).

owner's goods or services are necessary, but that its product or service is not merely the kind of product or service protected by the right. If the plaintiff is in a position to show this, then it can rely on the principle that a dominant company cannot use its position in one market to restrict competition or give itself advantages in another. This principle applies if the goods or services offered in the second market are not covered by the intellectual property rights of the company that is dominant in the first market.

What if the products in the second market are partly covered by the intellectual property right? The Advocate General considered that the crucial test is whether the plaintiff needs a license of the intellectual property right to enter the second market. If it does, then the Advocate General said that the existence of a separate market is irrelevant. In effect, on this view the owner of an intellectual property right is free to use all the leverage that it can exercise, *irrespective of the effects of its refusal to license on competition in the second market*. On this point, the conclusions of the Advocate General are open to question. If Article 86, as it clearly does, allows compulsory licensing of intellectual property rights on nondiscriminatory terms in order to end discrimination between licensees (an anticompetitive or exclusionary abuse), it is hard to see why compulsory licensing would never be justified when refusal to license means that all competitors are excluded from the downstream market, so that the effect on competition is even greater.

Analysis of the third situation envisaged in the *Veng v. Volvo*²⁴⁸ judgment leads to the same conclusion. It is an abuse if a dominant company refuses both to make and to license production of goods or services that are needed. This is an abuse because it denies consumers access to something that they could usefully be offered. However, there is always some reason why a company refuses to grant a license that would generate royalties. If a licensee would not be competing with the existing products of the owner of the intellectual property right, the reason will usually be that the owner either wishes to force users to abandon its old product and buy its new one (and so ceases to produce spare parts for the old product), or that it is thinking about pro-

248. *Veng*, [1988] E.C.R. at 6211, [1989] 4 C.M.L.R. at 122; see *supra* note 28 and accompanying text (discussing *Veng*).

ducing a new product and does not wish to complicate the product launch. If compulsory licensing is justified under Article 86 in such circumstances, as the Court has said and as the Advocate General accepts, it is hard to see why compulsory licensing could never be justified when the plaintiff's product competes with the owners, *if the effect on competition of the refusal to license is serious enough.*

Based on the Advocate General's view, it looks as if there would be scope for manipulation of the two markets by a dominant company, if it was able to introduce any device subject to intellectual property rights into an essential facility. The *IBM*²⁴⁹ and *Decca*²⁵⁰ cases are probably situations in which, if a dominant company had no duty to license intellectual property rights, the companies could have made use of that fact to monopolize the related markets. Other cases can be imagined.

If the Advocate General is correct, it would follow that the legal result would be radically different depending on whether Article 85 or Article 86 applies. Nothing that the Advocate General has said would suggest that compulsory licensing could not be ordered in situations involving a patent pool or any other arrangement under Article 85, in cases such as *IGR Stereo Television*.²⁵¹ The Court, however, said in *Continental Can* that Articles 85 and 86 should be applied consistently with one another.²⁵²

When is ordering a compulsory license an appropriate remedy? At first sight, a remedy ought to fit the abuse as well as possible. If refusing a license is not an abuse, a compulsory license is *prima facie* not the right remedy. On this basis, the remedy should be to order the dominant company to end the additional exploitative or exclusionary behavior that makes the refusal to license unlawful. This theory is not necessarily correct for a number of reasons. It treats the two kinds of behavior as if they were unconnected, which is wrong. There are situations in

249. *IBM*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635; *see supra* notes 55-60 and accompanying text (discussing *IBM*).

250. *Decca*, O.J. L 43/27 (1989); *see supra* note 239 and accompanying text (discussing *Decca*).

251. *IGR Stereo Television*, COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982); *see supra* notes 111-16 and accompanying text (discussing *IGR*).

252. *Europemballage Corp. v. Commission*, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

which the refusal to license either increases the seriousness of the other behavior or makes it possible.

The theory is an inadequate solution because, frequently, only granting a compulsory license will create competition and ensure that the abuse is less likely to be committed again. Limiting the remedy to the precise abuse committed means that the competition authorities must be ready to prohibit other or repeated abuses if they occur. Ordering the granting of a license is a market solution, not a bureaucratic one. Remedies ought to provide long-term and effective solutions, not merely short term and partial ones.

In many cases, the combination of the abuse and refusal to license unlawfully strengthens the position of the dominant company in a way that will not be corrected merely by ordering an end to the current abuse and by paying the competitors damages. A dominant company should not be allowed to keep an advantage that it has unlawfully obtained, as the Commission ruled in the *Irish Distillers*²⁵³ case. In some circumstances, only a compulsory license will take away this advantage. The number of licenses, and their terms, could if necessary be adjusted to achieve this as precisely as circumstances would permit.

Compulsory licenses would be especially appropriate when the dominant company attempts to use the intellectual property right to restrict competition in a second related market, separate from that in which it is dominant. In most cases, the second market would be the market in which the abuse would be committed. If the intellectual property right was not inherently intended to create a monopoly in the second market,²⁵⁴ a compulsory license would probably be appropriate.

It seems to be generally accepted that compulsory licensing is appropriate under Article 85 if a patent pool or other restrictive arrangement would otherwise create "second class citizens." The economic result, however, should, as far as possible, be the same under Articles 85 and 86. Of course, competition law does not authorize the authorities to put an end to dominance, but only to abuses. However, the license should not seek to end the

253. *Irish Distillers Group*, COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH REPORT ON COMPETITION POLICY 85 (1989).

254. An example is when copyright in TV programs was used to restrict competition in the market for TV magazines.

dominance, but merely to create some competition in the market other than that in respect of which the intellectual property right originated. The dominance may not be (and in most cases is not) due to the intellectual property right, even if the dominance exists in the market to which that right primarily relates. Thus, a license will not put an end to the dominance.

It may also be contended that compulsory licenses put an end to the monopoly conferred by the intellectual property right. This is the reason why licenses are ordered only if there is some related abuse other than mere refusal to license. Also, licenses would not be ordered generally to all competitors. They would be given only as far as the circumstances made them necessary — for example, only insofar as was needed to create competition in the second market.

W. *Cross-Subsidizing*.

Community law has not yet fully answered the question of when a dominant company is allowed to charge low prices for the products for which there is competition, and high prices for the products for which there is none. Cross-subsidizing, without more, is legal in itself, so the behavior can normally be unlawful only because the low price is exclusionary (i.e., below cost) or the high price is exploitative. This is true whether or not the products need to be used in combination. Cross-subsidizing, however, is probably often associated with monopoly pricing or with predatory pricing, or both. Also, cross-subsidizing can be an abuse in itself. In the *Port of Genova*²⁵⁵ case, the Court said that certain companies with exclusive rights were led, by that fact, either to require payment for services that were not required, to charge excessive prices, to refuse to use modern technology, or to extend price reductions to some users offsetting these reductions by an increase of the prices charged to other users.²⁵⁶ The Court clearly regarded all these kinds of behavior as equally capable of being unlawful under Article 86, though the Court did not find it necessary to say precisely in what circumstances they would be unlawful.

Although the Court did not say so, if a dominant company

255. *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Case C-179/90, [1991] E.C.R. I-5889.

256. *Id.* at I-5929.

cross-subsidized selective price cuts targeting a particular competitor, that might be unlawful if it was objectively likely that the competitor would be forced out of the market, or if there were circumstances that indicated that the price cuts were intended to warn the competitor off and, therefore, 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. The difficulties of distinguishing satisfactorily between legitimate and improper competition are obvious.

If a dominant company consistently lowered its prices in response to new market entrants and maintained them at low levels until the competitors had been forced out, even if the prices were not predatory in themselves, the effect might be exclusionary by creating a barrier to entry. It is true that the dominant company's costs and those of its competitors would not necessarily be the same, and a dominant company usually has greater scope for cross-subsidizing than non-dominant companies have. As suggested above, the tests are objective. Would the dominant company's behavior be likely to make the competitor's activities uneconomical? Is the dominant company selectively targeting a particular competitor because it is a new entrant and thereby perhaps warning off another potential entrant, or because it is particularly competitive? Selective price reductions are probably not prohibited under Article 86²⁵⁷ unless they are below cost. Dominant incumbents can usually afford to operate at or near cost longer than new entrants.

A specific, if extreme, example of selective pricing arises with what are known as "fighting ships." Maritime line conferences are price-fixing agreements that also organize their members' sailing dates. When faced with competition from non-members, conferences have arranged for special ships to sail at the same time as the non-member's ship and to offer extremely low freight rates, well below normal conference rates, which tend to be high. This is contrary to Article 86, because it is intended to squeeze out or frighten off competition, as well as con-

257. EC Treaty, *supra* note 1, art. 86.

trary to Article 85.²⁵⁸

Under Community competition law, "unfairly" high super-competitive profits are prohibited by Article 86, and customers forced to pay them can claim compensation. If such profits are used to cross-subsidize predatory prices, competitors can also claim compensation. The amount of the compensation would be different for each category of plaintiff, of course, but the cost to the dominant company might be considerable.

X. U.S. Law and the Views of Professor Areeda

It would be an impossibly long task to compare fully the Community law discussed here with the U.S. law, but it is worthwhile to look at the Community law in the light of the views of Professor Areeda. In a recent paper he made several points which are relevant to this Article. He said about multi-company cases under U.S. law:

(1) whenever competitors jointly create a *useful facility*, (2) that is essential to the *competitive vitality of rivals*, (3) and (perhaps) essential to the *competitive vitality of the market*, (4) and the admission of rivals is *consistent* with the *legitimate* purposes of the venture, then (5) the collaborators must admit rivals on *relatively equal* terms.²⁵⁹

Areeda points out that the words in italics are imprecise. Making allowance for this fact, there is no obvious reason to see a difference between U.S. law and Community law in multi-firm cases. He rightly observes that some U.S. unilateral refusal cases have gone much further than genuine monopoly situations. The Community unilateral refusal cases have certainly not gone so far, and seem unlikely to do so.

He suggests that in U.S. law under Section 2 "[t]here is no general duty to share. Compulsory access, if it exists at all, is and should be exceptional."²⁶⁰ This is not the approach of the Court under Community law. The Court clearly considers that there is often a duty to supply. This is no doubt very important in the-

258. Commission Decision No. 93/82/EEC, O.J. L 34/20, at 33-34, ¶¶ 73-83 (1993).

259. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 844 (1989) (emphasis added) (discussing *Associated Press v. United States*, 326 U.S. 1 (1945)); see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

260. Areeda, *supra* note 259, at 852; see 15 U.S.C. § 2 (1988 & Supp. V 1993).

ory. It remains to be seen how much difference it makes in practice.

Areeda suggests that “[a] single firm’s facility, as distinct from that of a combination, is ‘essential’ only when it is both critical to the plaintiff’s competitive vitality and the plaintiff is essential for competition in the marketplace.”²⁶¹ The Community law definition of what is “essential” is narrower, if it is correctly stated above.

Community law has not explicitly said that the plaintiff must be essential for competition. However, much the same result has probably been reached by saying that access to a facility may be required only if the effects described above would otherwise result not for the plaintiff in particular, but for competitors in general, and that access will not be ordered if there is already effective competition in the market. Areeda says that even when all the other conditions are satisfied, legitimate business purpose always saves the defendant. This is certainly true in Community law, although there is relatively little case law on what constitutes legitimate business justification.

The defendant’s intent is seldom illuminating. Rather, according to Areeda, it is always to avoid helping a competitor. The Community law is the same on this point. Abuse under Article 86 is normally objective and intent is irrelevant. A duty to deal that cannot be adequately and reasonably supervised, Areeda says, should not be imposed. The Commission is aware of this requirement, but has so far not had to deal with an acutely difficult case.

Areeda also said:

No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist’s gains; or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources.²⁶²

By way of explanation for the last point, he said that a mo-

261. Areeda, *supra* note 259, at 852.

262. *Id.*

nopoly newspaper in town can charge the monopoly price whether or not another distributes it.

These points all require discussion. Obliging the owner of a facility to grant access to it, against its will, always runs some risk of reducing the value of legitimately acquired assets. The ability to retain such assets is pro-competitive. Areeda's test is therefore too vague and, as stated, goes too far. His second case, under Community law, would not normally give rise to any duty on the dominant company to supply. In the third case, there is no benefit to competition and Community law would probably not require access to be given, although no such case seems to have arisen. The fourth case seems over-simplified, at least with respect to service markets. A port owner that used the port for ferry operations could, if the port was a monopoly, charge monopoly price harbor dues, which would have to be passed on by ferry operators. There would still, however, be more competition in the ferry business if another ferry company was allowed to use the port.

The key issue seems to be one not raised by Areeda, except implicitly the issue of how important competition is in the downstream market for the price or the bargain obtained by consumers. If the downstream market is the local distribution of newspapers and distributors are paid out of the price shown on the newspaper, cost savings at the distribution level, which would probably be small anyway, will not be passed on to consumers. However, it would be quite different if the profit margins of the downstream competitors were a sufficiently large proportion of the total price paid by consumers to make it worthwhile to promote competition in the downstream market.

CONCLUSION

A number of conclusions can be drawn from this Article. In Community law, there is a broad general principle that companies in dominant positions must not refuse to supply their goods or services if refusal to supply would have a significant effect on competition. This principle applies to both customers and competitors. Though neither the scope or the exceptions to this principle have been fully clarified yet, it initially made it unnecessary to develop a special category for essential facilities cases.

In situations in which access to a facility is essential, the

Commission has now recognized that a strict rule is necessary, requiring supply on nondiscriminatory terms to competitors. Where this rule applies, there will be few exceptions. Because this rule requires close relations between competitors, due to its administrative costs and the risk of discouraging legitimate competition, the terms of this rule and the exceptions to it need to be clarified as much as possible. This can be done only by case law and analysis. There is a duty to provide access to essential facilities if the effect of refusal to supply on competition is serious enough, notably where there is little competition in the downstream market. Prohibitions on discriminatory behavior in day-to-day operations, under either Article 85 or Article 86,²⁶³ are likely to be troublesome to supervise. The Commission is already taking steps to try to ensure that controversies are dealt with by arbitration or otherwise without formal Commission action.

Therefore, the key questions in determining whether there is a duty to give access to facilities in single firm refusal cases are:

- 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, does it have 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?

263. EC Treaty, *supra* note 1, arts. 85-86.