

UNIVERSITY OF LONDON

UNIVERSITY COLLEGE LONDON

Ph.D. THESIS

**ACCESS TO TELECOMMUNICATIONS MARKETS:
THE INTERRELATION BETWEEN GENERAL
COMPETITION RULES AND SECTOR-SPECIFIC RULES
IN THE EU AND JAPAN**

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March 2003

ABSTRACT

Vassilios MOUSSIS - Access to telecommunications markets: the interrelation between general competition rules and sector-specific rules in the EU and Japan

The starting point of the thesis is the key competition law issues that arise in relation to access to telecommunications markets in the EU and Japan. This issue is presently regulated in the EU and Japan by a dual regime combining general competition law regulation and sector-specific regulation aimed at opening up the markets. Chapter 1 analyses the relevant general competition rules (i.e. dominance and its abuse, including the doctrine of essential facilities) and the relevant sector-specific rules (i.e. interconnection) that apply to access to EU telecommunications markets. Chapter 2 does the same exercise for Japan through the analysis of the relevant general competition rules (i.e. refusal to deal) and sector-specific rules (i.e. general market access regulation and interconnection) that apply to access to Japanese telecommunications markets.

The analysis described above leads to the core object of the thesis which is the study, undertaken at Chapter 3, of the interrelation between general competition rules and sector-specific rules as they apply to access to telecommunications markets in the EU and Japan. This thesis will argue that the dual regime presently regulating access to the EU and Japanese telecommunications industries needs to be maintained. However, the increasing complexity and dynamic character of the telecommunications industry means that a change in the current interrelation between the two types of regulation is necessary. It will be argued that the future balance between the two types of regulation should be one where sector-specific rules will increasingly serve limited functions and where general competition rules will progressively take precedence over the regulation of third party access to telecommunications markets.

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LIST OF ABBREVIATIONS

| | |
|-----------------|--|
| AMA | Anti-Monopoly Act |
| CFI | Court of First Instance |
| DGCOMP | The European Commission's Directorate General for Competition |
| DGINFOSOC | The European Commission's Directorate General for Information Society |
| DSBP Guidelines | Guidelines on Distribution System and Business Practices |
| ECJ | European Court of Justice |
| EC | Treaty of Rome as consolidated by the Treaty of Amsterdam |
| EU | European Union |
| GPCT Guidelines | Guidelines for Promotion of Competition in the Telecommunications Business Field |
| JFTC | Japanese Fair Trade Commission |
| JT | The Joint Team (between DGCOMP and DGINFOSOC) |
| IP | Internet Protocol |
| ISP | Internet Service Provider |
| Member States | The Member States of the European Union |
| METI | Ministry of Economy Trade and Industry |
| MITI | Ministry of Trade and Industry (the predecessor of the METI) |
| MPHPT | Ministry of Public Management Home Affairs and Telecommunications |
| MPT | Ministry of Posts and Telecommunications (the predecessor of the MPHPT) |

| | |
|-----|--|
| NCA | National Competition Authority |
| NCC | New Common Carrier |
| NRA | National Regulatory Authority |
| OJ | Official Journal of the European Communities |
| ONP | Open Network Provision |
| SMP | Significant Market Power |
| TBL | Telecommunications Business Law |
| TC | Telecommunications Council |
| WTO | World Trade Organisation |

INTRODUCTION

1. The context of the thesis

The recent liberalisation of the European Union ('EU') and Japanese telecommunications industries was aimed at achieving a more competitive environment through the break down of monopolies and the removal of legal barriers to entry for new entrants. The end result of liberalisation should be the achievement of better telecommunications services at more competitive prices. However, liberalisation creates a variety of legal problems. In the telecommunications industry, the size of the investments required to operate a service means that at least one essential part of the production process - namely the telecommunications infrastructure and network facilities - are economically close to impossible to duplicate by new entrants. In this context, the main competitive concern that arises is third party access, i.e. how to ensure that new entrants can gain access on equal terms to an infrastructure such as a telephony network. Given these characteristics of the telecommunications industry, competition in downstream service markets will continue to depend on pricing and on conditions of access to network services and only gradually reflect competitive market forces. It is because of this that regulatory intervention is necessary in order to develop effective competition in telecommunications markets.

2. The object of the thesis

The starting point of the thesis is the key competition law issues that arise in relation to access to telecommunications markets in the EU and Japan. The behaviour of market players in the EU and Japanese telecommunications industries is regulated as to competition aspects by a dual regulatory regime. The dual regime is the combination of general competition law regulation and sector-specific regulation aimed at opening up the markets. The object of the thesis is to analyse the interrelation between general competition rules and sector-specific rules as they apply to access to telecommunications markets in the EU and Japan. The telecommunications industry is used as the model from which the analysis is conducted and is not analysed as such otherwise. To that extent, many of the findings of this thesis on the interrelation between general competition rules and sector-specific rules apply equally to other recently liberalised industries, such as the energy or transport industries.

This thesis will argue that the rate at which technological developments occur in the telecommunications industry justify that the current regulation of access needs to be adapted to the increasing complexity and dynamic character of this industry. The recent trend in the EU to reduce sector-specific regulation in favour of the stronger application of competition rules is aimed at achieving regulation that is better focused on actual market conditions. It is argued that

the flexibility and cross-sector nature of general competition regulation means that it is best placed to respond to the rapidly changing market environment.

3. The choice of the subject of the thesis and of the EU and Japan as the relevant jurisdictions for the analysis

Competition and sector-specific regulators have at their disposal two sets of rules in order to achieve competitive telecommunications markets - general competition rules and sector-specific rules. The interrelation between these rules has been recognised as a key regulatory issue for telecommunications liberalisation to succeed.¹ This is because the policy choices made by the EU and Japan as to the relationship between sector-specific rules and competition rules have a direct impact on the success of the liberalisation effort. Liberalisation should result in the creation of a competitive telecommunications environment characterised by unencumbered access to telecommunications infrastructure and network facilities, thereby leading to the free interplay of market forces. The reason why the telecommunications industry is used as the model for the analysis of the interrelation between general competition rules and sector-specific rules is because it is a sector where liberalisation started relatively early and as a result sector-specific and competition rules are sufficiently developed for such an analysis.

Choosing the EU and Japan as the models for the study of the interrelation between general competition rules and sector-specific rules was driven by the belief that these jurisdictions are particularly well suited for the analysis of this interrelation and that their study side-by-side can therefore contribute to the advancement of knowledge on this subject in the EU and Japan but also, perhaps, in other jurisdictions sharing similar market and regulatory characteristics. First, both systems have mature competition regimes dating back to the middle of the twentieth century. Second, both Japan and the EU have gone through full liberalisation of their telecommunications industries. Although Japan liberalised its telecommunications industry more than ten years earlier than the EU, there are enough similarities between the two systems so as to be able to analyse them in conjunction. On the other hand there are enough differences between the EU and Japanese approach to this interrelation so as to justify a thesis on this basis. Finally, the study of the interrelation between general competition rules and sector-specific rules using the EU and Japan as the models for the analysis has not, to our knowledge, been undertaken before.

¹ The importance of this interrelation was recognised in the EU by the European Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector, framework, relevant markets and principles, OJ C256/2 of 22.8.98 (hereafter the "Access Notice"). Part I of that Notice focuses exclusively on the interrelation between competition rules and sector-specific rules.

4. Qualifications as to the choice of the EU and Japan as reference points of the analysis

Although the EU is a supra-national body and not a State such as Japan, for the purposes of the analysis undertaken in this thesis it is considered as being on the same constitutional level as Japan. Therefore, no specific distinctions are made in the thesis to deal with the fact that the EU is not a State.

The reason for the choice of the EU, rather than each of its Member States, as the European point of analysis is that in terms of substance EU general competition rules and sector-specific rules form the basis of all competition and telecommunications legislation in the EU Member States.

5. Sources used for the analysis

In the EU there are sufficient materials analysing general competition rules and sector-specific rules as they apply to access to telecommunications markets both in terms of regulation, jurisprudence and legal writings. Most of the materials analyse either general competition or sector-specific rules individually but some also address the question of the interrelation between these rules. In particular, the European Commission addressed this issue in its 1998 Notice on the application of the competition rules to access agreements in the telecommunications sector² as did some legal writings. As to the latter source, it should be noted that the most analytical on this issue, i.e. P.Larouche's *Competition Law and Regulation in European Telecommunications* (2000)³ and L.Garzaniti's *Telecommunications Broadcasting and the Internet - EU Competition Law and Regulation* (2000)⁴, predate the adoption of the EU's new regulatory regime and to that extent are not analysing the interrelation between general competition rules and sector-specific rules under the new EU sector-specific regime.⁵ General telecommunications law textbooks

² See Chapter 1, Section A of this thesis for an analysis of the Access Notice, supra note 1.

³ Hart publishing.

⁴ Sweet & Maxwell.

⁵ P.Larouche's and L.Garzaniti's analysis of the interrelation between general competition rules and sector-specific rules stop with the European Commission's Communication: "Toward a New Framework for Electronic Communications Infrastructure and Associated Services": the 1999 Communications Review, COM(1999) 538, 10 November 1999.

such as I.Walden's and J.Angel's *Telecommunications Law* (2001)⁶ or D.Giles' and R.Marshall's *Telecommunications Law* (1997)⁷ do not address the theme of this thesis in detail. However, there are legal writings which are recent and address, albeit succinctly, the topic of this thesis from the EU perspective. In particular, H.Ungerer's articles on *Ensuring efficient access to bottleneck network facilities - The case of telecommunications in the European Union* (1998)⁸ as well as *Access Issues under EU Regulation and the Anti-Trust Law - The Case of Telecommunications and Internet Markets* (2000)⁹ are particularly helpful in that they devote some analysis to the core issues of this thesis. K. Grewlich's article on "*Cyberspace*": *sector-specific regulation and competition rules in European telecommunications* (1999),¹⁰ is also useful in that it addresses in more detail the issues analysed in this thesis from the European perspective but presents the drawback of being outdated.

In Japan, English language sources on general competition rules are available although case law is relatively limited. As to sector-specific regulation, all of the relevant telecommunications sector-specific regulation is published in English and updated regularly by the relevant Ministry. The same is generally true of general competition and sector-specific policy papers although some are only translated in a summary version or not at all. The specific question of the interrelation between Japanese general competition rules and sector-specific rules has not, to our knowledge, been the object of any specific study. Reference textbooks on general Japanese competition law - such as Iyori and Uesugi's *The Antimonopoly Laws and Policies of Japan* (1994),¹¹ do not specifically address the interrelation between general competition rules and sector-specific rules. Therefore, much of the analysis on this interrelation in Japan is conducted by using statements or guidelines such as the 2001 *Guidelines on the Promotion of Competition in the Telecommunications Field*¹² produced jointly by the Japanese Fair Trade Commission ('JFTC') and the Ministry of Public Management Home Affairs and Telecommunications ('MPHPT'). Some very useful material can also be found in policy reports such as the study group on Government Regulations and Competition Policy's 2001 report on *Deregulation and*

⁶ Blackstone Press.

⁷ Butterworths.

⁸ http://europa.eu.int/comm/competition/speeches/text/sp1998_056_en.html.

⁹ http://europa.eu.int/comm/competition/speeches/text/sp2000_012_en.pdf.

¹⁰ Common Market Law Review 1999, 36, p. 937 to 969.

¹¹ Federal Legal Publications.

¹² JFTC and MPHPT, November 2001; <http://www.jftc.go.jp/e-page/guideli/011130telecomGL.pdf>.

Competition Policy in the Public Utilities Sector and in its 2002 report on *Regulatory Reform and Competition Policy in the Telecommunications Business Field*¹³ or the study group on Competition Policy Relating to Information and Communications Industries' 1996 report on *Issues Relating to Competition Policy in the Telecommunications Industry*.¹⁴

6. Key concepts of the thesis

The two basic approaches to regulation of market power - ex ante v. ex post

The *ex ante*, or preventative, regulatory approach relies on detailed, prescriptive control of business conduct. Intervention by *ex ante* regulation requires policy makers to take forward looking views of the consequences of different types of business conduct, and to place restrictions on firms that are intended to prevent anticipated adverse effects.

The *ex post*, or harm based approach, does not impose precise restrictions on conduct in advance, but companies can be penalised *ex post* if their conduct is found later to have had adverse effects. The *ex post* approach requires policy makers to take a backward look at business conduct and to intervene only in the event it is determined that a particular conduct has given rise to appreciable harm, as defined by the relevant policy criteria.¹⁵ Sector-specific rules apply by their nature *ex ante* whereas general competition rules generally apply *ex post*.¹⁶

Ex post general competition rules

General competition rules are aimed at protecting consumer interests by prohibiting businesses from hindering competition through anti-competitive conduct such as collusion, the abuse of market power or even mergers which result in the creation or strengthening of a dominant position. The term '*general competition rules*' is used within the context of this thesis to make a clear distinction between the basic competition rules that are meant to cover all sectors of the economy and other competition rules within the wider sense that could be embodied in other

¹³ [Http://www.jftc.go.jp/e-page/report/survey/2001/20010110deregulation.pdf](http://www.jftc.go.jp/e-page/report/survey/2001/20010110deregulation.pdf). The 2002 report can be found at: <http://www.jftc.go.jp/e-page/press/2002/november/telec1115.html>.

¹⁴ JFTC views, No.24, March 1996.

¹⁵ C.Decker and G.Yarrow, Summary: Ex ante v. ex post approaches to the regulation of market power, Regulatory Policy Institute, Oxford, 2000.

¹⁶ These concepts are used by the European Commission itself, for example in its new interconnection Directive that will enter into force in July 2003; Directive 2002/19/EC on access to, and interconnection of electronic communications networks and associated facilities, OJ L108, 24.04.2002, recital 13.

regulation such as sector-specific regulation. General competition rules, with the notable exception of merger control rules¹⁷, apply *ex post*, i.e. after the occurrence of a specific market conduct.¹⁸ The notion of '*general competition rules*' carries a different meaning when applied to the EU or Japan. With regard to access to EU telecommunications markets the term '*general competition rules*' is to be understood as covering the analysis of dominance and abuse of dominance (including the analysis of the doctrine of essential facilities)¹⁹ under Article 82 EC.²⁰ With regard to Japan, the analysis of '*general competition rules*' as they apply to access to telecommunications markets consists in the analysis of refusal to deal.²¹

Ex ante sector-specific rules

Two types of sector-specific regulation can be distinguished.²² On the one hand, certain rules are aimed at protecting specific public interest objectives such as universal service or affordable pricing. These so-called '*public interest*' rules promote social justice or consumer or environmental interests (e.g. human dignity, privacy and security). In that sense, because they pursue different objectives, these rules have little in common with competition rules and are applied somewhat independently. The sector-specific rules aimed at protecting specific public interest objectives have not been covered in detail in this thesis.²³ On the other hand, another type of sector-specific regulation involves regulation of matters such as network access (e.g. interconnection²⁴) or price control. These so-called '*preparatory*' sector-specific rules have been

¹⁷ EC and Japanese merger control rules are in fact prior notification systems and therefore apply *ex ante*. However, they are competition rules within the meaning of this thesis and are therefore considered to be part of *ex post* rules.

¹⁸ Another exception to the *ex post* nature of competition rules are sectoral investigations conducted *ex ante* by national competition authorities, for example the UK's Competition Commission report on New Cars of April 2001, Cm 4660.

¹⁹ Dominance and its abuse were recognised in the European Commission's 1998 Access Notice as the main competition concern that can arise in relation to access to the EU telecommunications markets, *supra* note 1, paragraph 63.

²⁰ I.e. of the Treaty of Rome as consolidated by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ C340, 10.11.1997 (hereafter referred to as 'EC').

²¹ Refusal to deal was recognised as early as 1989 as the main competition concern that can arise in relation to access to the Japanese telecommunications markets; see the Study Group report on Issues relating to competition policy in the telecommunications sector, JFTC/Japan views, No.8, March 1990, p. 69.

²² K.Grewlich, *supra* note 10, p. 947 and L.Garzaniti, *supra* note 4, pp. 277 and 278.

²³ See however, Chapter 3 of the thesis on the future interrelation between sector-specific and general competition rules that also emphasises the distinction between the two types of sector-specific rules and their likely future regulatory role.

²⁴ Interconnection is the linking of telecommunications (or other) networks in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation. See the interconnection section of Chapter 1 and Chapter 2.

adopted by regulators on the assumption that market forces alone, even under the threat of the *ex post* application of competition rules, would not suffice at least in the short term, to achieve full market liberalisation.²⁵ In this sense, they complement general competition rules and have been covered in this thesis. Accordingly, the term '*sector-specific regulation*' within the meaning of this thesis only covers '*preparatory*' sector-specific regulation both in the EU and in Japan. This mainly covers the analysis of interconnection, which is the key sector-specific issue for access to telecommunications networks and infrastructure. Sector-specific regulation applies *ex ante*, i.e. before the occurrence of specific market conduct. In addition, because in Japan sector-specific regulation has played a key role in providing access to the markets, the Japanese sector-specific section also analyses more generally the development of market entry through sector-specific regulation including through the use of structural measures.

7. Structure of the thesis and summary of the legal issues analysed

The structure of the analysis consists in having for each of the EU and Japan a chapter (Chapter 1 for the EU and Chapter 2 for Japan) within which a specific section analyses general competition rules and another one sector-specific rules. Chapter 3 is the key chapter of the thesis because it analyses for each of the EU and Japan the interrelation between general competition rules and sector-specific rules. The final part of the thesis draws general conclusions from the preceding three chapters.

Although the same method of analysis is used for the EU and Japan, this does not necessarily mean that the structure of the EU and the Japanese chapters will be identical. This is because the EU and Japan do not always use the same regulatory instruments to regulate access to telecommunications markets. In addition, the different balance achieved in each system between regulation by general competition rules and by sector-specific regulation means that certain sections are not identical between the EU and Japanese chapters and that in some cases specific sections in one chapter have no counterpart in the other chapter. Chapter 3 builds on Chapters 1 and 2 and to that extent uses a uniform structure of analysis.

EU

Chapter 1, Section A: General competition rules

Dominance and its abuse are still the major concerns of competition authorities in the post-liberalised telecommunications industry. The development of the doctrine of essential facilities is

²⁵ L.Garzaniti, *supra* note 4, p.277 to 278.

highly relevant to the analysis of access to telecommunications markets. Because of this, a significant part of the analysis of EU general competition rules is devoted to the analysis of this doctrine.

The legal analysis is centred on the following themes:

- the assessment of dominance in the telecommunications industry;
- the possible abuses of dominant position that might arise in relation to access to telecommunications infrastructure and network facilities;
- the doctrine of essential facilities, its application to the telecommunications sector following the European Courts' jurisprudence limiting its scope, and the impact of the Access Notice.

Chapter 1, Section B: Sector-specific rules

In the telecommunications sector, the incumbent competes on the market for the provision of telecommunications services whilst retaining the infrastructure necessary to provide the service. In this context and given the prohibitive costs of building new infrastructure, interconnection is fundamental to the viability of competition in the telecommunications industry and as such is the key sector-specific concept analysed in this section.

The legal analysis is centred on the following themes:

- the EU legislative framework within which the interconnection rules have been adopted;
- the analysis of the main interconnection rules;
- the study of the future interconnection rules and the impact they will have on access.

Japan

Chapter 2, Section A: General competition rules

In Japan, refusal to deal is the anti-competitive practice most likely to arise in the context of access to telecommunications infrastructure and network facilities by new entrants. The Japanese Anti-Monopoly Act contains three basic prohibitions which can all apply to situations of refusal to deal. For this reason all three basic prohibitions are briefly analysed at the start of this section.

The legal analysis is centred on the following themes:

- the general prohibitions of the Japanese Anti-Monopoly Act;
- the analysis of refusal to deal;
- the trend by the JFTC to apply tougher sanctions against refusal to deal;
- the comparison between refusal to deal in Japan and the EU doctrine of essential facilities.

Chapter 2, Section B: Sector-specific rules

When compared to the EU, Japan liberalised its telecommunications industry significantly earlier. In addition, Japanese regulators have preferred a more sector-specific based approach to regulation of access to the telecommunications industry. For these reasons this section in addition to analysing the critical issue of interconnection analyses the practical access problems faced by new entrants in the Japanese telecommunications industry and the way in which the Japanese regulators have responded to these challenges.

The legal analysis is centred on the following themes:

- the evolution of market access rules in Japan;
- the persistent access problems throughout the liberalisation process;
- the regulatory measures taken in order to address the persisting competition problems;
- the analysis of the regulation of interconnection in Japan and in particular the measures forcing dominant operators to provide access.

Chapter 3: The interrelation between general competition rules and sector-specific rules in the EU and Japan

The question of the interrelation between general competition rules and sector-specific rules is at the heart of this thesis and the previous parts of this study were drafted with this question in mind.

The legal analysis is centred on the following themes:

- the analysis of convergence of electronic communications and its impact on the regulation of access to telecommunications markets;
- the policy choices made by each of the EU and Japan as to the interrelation between general competition rules and sector-specific rules;

- the potential conflicts that may arise between authorities enforcing general competition rules and sector-specific rules both in the EU and Japan;
- the analysis of the possible reasons why general competition rules have not played as important a role in Japan as they have in the EU in forcing access to telecommunications infrastructure and network facilities;

Conclusion

The final part of the thesis appraises the interrelation between general competition rules and sector-specific rules in each of the EU and Japan. In addition, conclusions are drawn as to the future interrelation between general competition rules and sector-specific rules for both the EU and Japan and in particular as to the correct balance that needs to be achieved between *ex ante* sector-specific regulation and *ex post* general competition law regulation.

CHAPTER 1: ACCESS TO TELECOMMUNICATIONS MARKETS IN THE EU - GENERAL COMPETITION RULES AND SECTOR-SPECIFIC RULES

This chapter focuses on the EU and analyses the general competition rules²⁶ and the sector-specific rules²⁷ that apply to access to telecommunications infrastructure by new entrants. The first section analyses the general competition rules that apply to access to EU telecommunications infrastructure and network facilities and in particular dominance and its abuse as well as the essential facilities doctrine. The second section analyses the sector-specific rules that apply to access to EU telecommunications infrastructure and network facilities and in particular the interconnection rules. In each section the analysis consists in identifying the relevant rules and analysing how they apply to access to the EU telecommunications industry. This analysis will lead to the study in Chapter 3 of the interrelation between general competition rules and sector-specific rules in the EU and Japan.

SECTION A: General competition rules on access to EU telecommunications markets

With regard to access to EU telecommunications markets the term ‘general competition rules’ is to be understood as covering the analysis of Article 82 EC. This is because dominance and its abuse are the main competition rules that apply to issues of access to telecommunications infrastructure and network facilities.²⁸ Because of its importance, the doctrine of essential facilities will be analysed separately in sub-section 2.

1. Dominance and abuse of dominance

Article 82 EC prohibits any abuse²⁹ of a dominant position by one or more firms in a substantial part of the Common Market that may affect trade between Member States. Joint dominance is not specifically studied in this thesis given that in the vast majority of cases the type of

²⁶ As noted in the introduction of this thesis, the term “*general competition rules*” within the meaning of this chapter means the analysis of dominance and its abuse.

²⁷ As noted in the introduction of this thesis the term ‘*sector-specific*’ telecommunications rules within the meaning of this thesis means the ‘*preparatory*’ sector-specific regulation as defined in the Introduction of the thesis.

²⁸ This is the basic approach taken by the European Commission in the Access Notice even though some thought is given to the analysis of Article 81 EC (that prohibits agreements between competitors, which may affect trade between Member States and which have the object or effect of preventing, restricting or distorting competition), supra note 1, see in particular paragraphs 63 to 130.

²⁹ A distinction can be made between exploitative types of abuses of dominant position and exclusionary types of abuse. It is the latter type of abuse, which prohibits conduct by a dominant undertaking aimed at excluding competitors from the market, which will be the most relevant to this thesis.

dominance that is encountered in the EU is single firm dominance, usually by the incumbent.³⁰ By its very essence, the Article 82 EC prohibition runs the risk of not distinguishing good competition, which brings better value for customers, and bad competition which does the opposite. Achieving a dominant position through strong competition is not in itself prohibited and can be considered the result of good competition. Article 82 EC forbids, as an abuse of a dominant position, the exploitation of market power which harms customers and suppliers.³¹ The European Court of Justice ('ECJ') has defined a dominant position under Article 82 EC as: "...a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers".³²

1.1 The Commission's approach to assessing dominance in the telecommunications industry

The general statements made above as to dominance and its abuse have been refined by the European Commission, in relation to their application to the telecommunications sector, in the 1998 Notice on the application of the competition rules to access agreements in the telecommunications sector (the 'Access Notice').³³

In the telecommunications sector, access to facilities means access to leased lines, networks, exchanges, etc. Despite the liberalisation of the sector, control of access to facilities will likely be considered as a strong indicator of dominance of incumbent telecommunications network operators in their respective national infrastructure markets. This is mainly due to the long years of monopoly during which incumbents had the opportunity to build the necessary infrastructure. The Access Notice recognised this by stating that: "*As regards access agreements, dominance stemming from control of facilities will be the most relevant factor to the Commission's appraisal*".³⁴ It is only when new entrants will be able to duplicate those networks that control of

³⁰ This is the approach taken by the European Commission in the Access Notice, supra note 1, paragraph 16. See also R. Pitofsky, Competition policy in communications industries: new antitrust approaches, Washington D.C., 10 March 1997, p.2, <http://www.ftc.gov/speeches/pitofsky/newcomm.htm>.

³¹ See for example L.Ritter, W.Braun and F.Rawlison, European competition law: a practitioner's guide, second edition, 2000, p.327.

³² Case 322/81 Michelin v Commission [1983], E.C.R. 3461. For some recent developments on the notion of dominance itself see; CRA Competition Policy Discussion Papers 2, Dominance: meaning and measurement, December 2001.

³³ Access Notice, supra note 1, OJ C256/2 of 22.8.98.

³⁴ Ibid., paragraph. 63.

access to facilities will become of lesser importance in the assessment of dominance.³⁵ The Access Notice therefore recognises that some time will be needed before alternative network operators with adequate capacity and geographic reach appear on the markets.

In the Access Notice the Commission takes an innovative approach to dominance based on the *Tetra Pak II* judgment.³⁶ In that case, the Court affirmed a Commission decision finding that the firm with a dominant position in the market for aseptic packaging could abuse that position through its pricing policies in the market for non-aseptic packaging. The Court referred to previous cases such as *AKZO*, where abuses were found on wider markets than the dominated market.³⁷ In *Tetra Pak II*, the Court held that given the extremely close links between the dominated and non-dominated market, and given the extremely high market share on the dominated market, Tetra Pak was “*in a situation comparable to that of holding a dominant position on the markets in question as a whole*”. The *Tetra Pak II* case concerned closely related horizontal markets. The analysis is equally applicable, however, to closely related vertical markets which will be common in the telecommunications sector where it is often the case that a particular operator has an extremely strong position on infrastructure markets and on markets downstream of that infrastructure. Infrastructure costs also typically constitute the single largest cost of the downstream operations. Further, operators will often face the same competitors on both the infrastructure and downstream markets. It is therefore possible to envisage a number of situations where there will be closely related markets, together with an operator having a very high degree of market power on at least one of those markets.³⁸

This means that if, for example, an ex-monopolist in one of the Member States continues to operate after the opening-up of the markets, it is more than likely to have been allowed to retain its assets. That operator will, following the *AKZO* judgment³⁹, where a presumption of dominance over a market share of 50 per cent. was established, be probably considered dominant on the upstream market. The Access Notice implies that the Commission should

³⁵ See the section on essential facilities for a detailed analysis of this question.

³⁶ Case C-333/94 P, *Tetra Pak International SA v. Commission*, [1996] ECR I-5951.

³⁷ In the *AKZO* case, *AKZO* was dominant on the organic peroxides market for use in the plastics industry. When ECS, a smaller competitor began to sell organic peroxides to the makers of plastics *AKZO* made direct threats against ECS with the aim of ECS withdrawing from the plastics sector. The Court found an abuse of a dominant position by *AKZO* in the organic peroxides market as a whole, although it was only dominant in the organic peroxides for use in the plastic sector; *AKZO Chemie BV v Commission (C-62/86)*, 3 July 1991, [1991] E.C.R. I-3359.

³⁸ Access Notice, *supra* note 1, paragraphs 64 and 65.

³⁹ *AKZO Chemie BV v Commission (C-62/86)*, *supra* note 37.

follow the *Tetra Pak II* judgment.⁴⁰ In *Tetra Pak II*, dominance on a closely related market was found on a horizontal market level but the Access Notice clearly extends this to vertical closely related markets. This would mean that the operator in question will not only be considered dominant on the upstream market but also on the downstream one where it also operates. This approach is a very pragmatic one. Often, an operator will be dominant in a market which is upstream of another where it is one among several competitors. The intention is to facilitate the finding that a dominant operator was in a situation comparable to that of holding a dominant position on the markets in question as a whole (not only the upstream market, where incumbents traditionally enjoy very strong market share, but also the downstream market in which they operate). The effect of the Commission's use of this '*closely related market*' approach to dominance is likely to be the further promotion of competition. This is because in industries such as the telecommunications industry where infrastructure costs are prohibitive and ex-monopolists remain largely dominant in the upstream infrastructure and network facilities markets, the easier finding of dominance in the downstream market will promote competition in the telecommunications industry generally. The easier finding of dominance in the downstream closely related markets will mean that third parties will have a better chance to reach adequate capacity and geographic reach than under normal dominance rules.

1.2 Criticisms to the Commission's approach in the Access Notice

One study concludes that the finding by the ECJ that dominance can extend into a market where a firm is not dominant through the use of the closely related markets doctrine, "*very troubling*".⁴¹ The criticism of the use of the '*closely related markets*' doctrine in the process of determining whether dominance exists, is based on the fact that often dominance will be easier to establish using the doctrine than under traditional rules. The study heavily criticises the *Tetra Pak II* judgment by saying that it questions all conduct by firms deemed dominant designed to exclude or eliminate competitors in any relevant market and that competition policy should instead focus on restrictions between competitors. The author goes on to say that: "*the very nature of competition is to win in the market and thereby eliminate one's competitors*".⁴²

⁴⁰ Case C-333/94 P, *supra* note 36, paragraph 7-11 and 110. See in particular paragraph 65 of the Access Notice, *supra* note 1.

⁴¹ M.Naftel, Assistant General Counsel Tele Danmark, Competition, Not Competitors: *Promoting Consumer Welfare in European Telecommunications Markets*, Paper presented at the IBC Third Annual International Conference on Telecommunications & EC Competition Law, 24-25 September 1998, p.7.

⁴² *Ibid*, p.7.

This view is itself open to criticism, as third parties will face increased risks of abusive conduct by ex-monopolists benefiting from their inherent dominant position in the infrastructure market. Rather than '*handicapping*' competitors considered dominant and subsidising inefficient firms, as is claimed by the author, the Commission's approach is more likely to put *the 'balance of competition'* right in a market where the ex-monopolists start with the considerable advantage of owning the upstream facilities whilst competing with third parties in the downstream markets. The author's claim that: "*Punishing legitimate competition can only lead to less competition and therefore higher prices for consumers, less technical innovation and choice*"⁴³ reflects what would happen if third parties were not put in a position where they can effectively compete, rather than the result of the Commission's approach. The whole process of liberalising network industries started because the absence of competition resulted in high prices and stifled innovation, so that the Commission's approach, although interventionist,⁴⁴ should result in increased competition and benefits to consumers.

1.3 Abuse of dominant position

In the Access Notice⁴⁵, the Commission made a lengthy analysis of abuses of dominance in the telecommunications industry taking as a starting point the fact that it will often be necessary in the telecommunications sector to examine a number of associated markets, one or more of which may be dominated by a particular operator. The Commission indicates a number of possible situations where abuses could arise:

- conduct on the dominated market having effects on the dominated market;
- conduct on the dominated market having effect on markets other than the dominated market;
- conduct on a market other than the dominated market and having effects on the dominated market;
- conduct on a market other than the dominated market and having effects on a market other than the dominated market.

⁴³ Ibid, p.8.

⁴⁴ See Chapter 3 of the thesis and in particular the conclusions on the present EU regulatory regime where the Commission's interventionist approach is criticised.

⁴⁵ Access Notice, supra note 1, paragraph 81.

The Access Notice then analyses three different categories of abuse of dominant position in the telecommunications sector which are analysed below.

1.3.1 Refusal to grant access to facilities and application of unfavourable terms

Incumbent telecommunications operators will usually be dominant in the market for access to facilities because of their control of facilities. In *Hoffmann-La Roche*⁴⁶, the Court ruled that a refusal may have: “*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*”.

A refusal will only be abusive if it has exploitative or exclusionary effects which are considered anti-competitive. Service markets in the telecommunications sector, initially, have few competitive players and refusals will therefore generally affect competition on those markets. It has to be noted that the Commission could allow a refusal to grant access to facilities if it is based on an objective justification such as physical capacity or refusal to comply with reasonable terms by the party requesting access.⁴⁷

Broadly, the Commission recognises three scenarios of refusal to grant access to facilities and application of unfavourable terms:

- (a) A refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market

This scenario amounts to discriminating between equivalent transactions. An example of such a situation would be a dominant facilities owner already supplying one or more customers operating in the downstream market and refusing to supply a new customer wishing to access the same downstream market. Often, network operators offer the same, or similar, retail services as the party requesting access and therefore have the incentive and the opportunity to restrict competition and abuse their dominant position in this way. However, as mentioned earlier, the Commission will be careful to distinguish cases of abuse from cases of objective justification for refusing to give access.⁴⁸ It results from this, that the dominant company’s duty is to provide access in such a way that the goods and services offered to downstream

⁴⁶Case 85/76, *Hoffmann-La Roche & Co., AG v Commission (Vitamins)*, February 13, 1979, [1979] E.C.R. 461.

⁴⁷See in relation to this the analysis of the doctrine of essential facilities below.

⁴⁸ Access Notice, *supra* note 1, paragraph 87.

companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

The distinction between this scenario and the next one is based on whether an operator has been given access by the access provider to operate on the services market. However, the Access Notice does not make it clear whether this other operator could also be the downstream operation of the dominant operator. Whichever way one chooses to interpret this question there are problems arising. If the downstream operations of the access provider are not considered as '*other operators*', then a dominant company will want to adopt the most restrictive approach possible by supplying its own operations but no one else. As soon as it supplies to a third party, it is obliged to supply others failing what it will be discriminating between operators thereby abusing its dominant position. If on the other hand the correct interpretation is that supply to downstream operations are considered as '*other operators*' then the access provider will be discriminating if it does not allow access to a third party. The risk that this interpretation entails is that discrimination arguments will be used to un-pick the network of the incumbent at any or all levels.⁴⁹ There is no clear answer as to which of the two interpretations is correct. However, the recent jurisprudence of the ECJ on essential facilities limits the cases where access is forced upon an access provider. On this basis, it is likely that a future case in front of the European courts might decide that the correct interpretation is that supplying to a downstream operation does not entail an obligation to supply to third parties.⁵⁰

- (b) A refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market

This scenario raises the question whether the access provider should be obliged to contract with the service provider in order to allow it to operate on a new service market. This question, which is of crucial importance to the study of access to telecommunications networks by new entrants, raises the issue of essential facilities which will be analysed in depth in the following section.⁵¹

- (c) A withdrawal of access from an existing customer

⁴⁹ Faull & Nickpay, *The EC law of competition*, Oxford University Press, 1999, p. 826, paragraphs 11.260 to 11.263.

⁵⁰ See the essential facilities section of this chapter and more particularly the analysis of the *Oscar Bronner* judgment where the plaintiff, Bronner, argued that Mediaprint had discriminated against it in so far as it allowed another daily newspaper to have access to its home-delivery service.

⁵¹ The section below on the position of the Access Notice on essential facilities details the conditions that have to be fulfilled for access to be granted under the Access Notice.

In *Commercial Solvents*⁵² the Court, ruling on a question of withdrawal of a product rather than a service, ruled that: “*an undertaking which has a dominant position on 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 its customers, is abusing its dominant position within the meaning of Article 82*”. The Access Notice provides that there is no difference in principle between this case and the withdrawal of access. The unilateral termination of access agreements raises substantially similar issues to those examined in relation to refusals. Withdrawal of access from existing customers will usually be considered by the Commission as abusive with the proviso that objective justifications may exist for such a withdrawal such as breach of contract by the downstream operator.⁵³

1.3.2 Other forms of abuse recognised by the Access Notice

The previous set of abuse scenarios concerned abuse in relation to access to a network but abuse may also arise once access has been granted. The following are examples of situations where a dominant network operator behaves in a discriminatory manner or its actions otherwise limit markets or technical developments:

(a) Network configuration

This is the scenario where a dominant network operator makes access objectively more difficult for service providers unless such behaviour could be objectively justified. Such a justification could be the fact that the action of the network operator improves the efficiency of the network generally. Examples of abuses arising from network configuration include; limiting the number and location of points of connection or abuses related to the type or level of interconnection.⁵⁴

(b) Tying

⁵² Joined Cases 6 and 7/73, *Commercial Solvents v Commission*, ECR (1974).

⁵³ See also the section of this chapter on essential facilities below.

⁵⁴ See for more details a study that was commissioned as a preparatory document to the drafting of the Access Notice; European Commission, *Competition aspects of interconnection agreements in the telecommunications sector*, Coudert Brothers, 1995. Under sector-specific rules, i.e. the interconnection Directive, specific provisions exist to prevent abuses arising in relation to technical standards. Article 13 of the Interconnection Directive entrusts to National Regulatory Authorities the task of ensuring that operators follow the technical standards published in the OJ so as to avoid abuses linked to such standards.

This is of particular concern where it involves the tying of services for which the telecommunications operator is dominant with those for which it is not.⁵⁵ Typically, tying involves a vertically integrated network operator which obliges the party requesting access to purchase one or more services (including those services which are superfluous to the competitor, or those which may constitute services the competitor itself would like to provide to its customers) without adequate justifications. This may exclude competitors of the dominant network provider from offering these elements of the package independently. The ECJ held in *Tetra Pak II* that: “even where tied sales of two products are in accordance with commercial usage or there is a link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 (now Article 82 EC) unless they are objectively justified”.⁵⁶ Therefore, in order to demonstrate tying, it would be necessary to show:

- dominance;
- two or more discrete elements that are being sold together;
- an effect on competition resulting from the refusal to unbundle;⁵⁷
- there is no objective justification for the refusal to unbundle.

In relation to network infrastructure, a refusal to provide unbundled access to the network would appear difficult to justify in many cases. However, there must be some element of reasonableness in the Commission’s assessment as a dominant operator cannot be required to unbundle all elements of its network at the request of every third party.⁵⁸

(c) Pricing

In determining whether there is a pricing problem under the competition rules, the Commission will examine whether the costs and revenues are allocated in an appropriate way. Three abuses of dominant positions may arise from unfair pricing. First, excessive pricing is a practice susceptible to arise in network industries as they are often characterised by the absence of viable alternatives to the facility to which access is being sought by service providers. The ECJ

⁵⁵ In this regard see also the interconnection section of this chapter that deals with this question as well.

⁵⁶ Case C-333/94 P, *Tetra Pak International SA v. Commission*, supra note 36.

⁵⁷ See the section of this chapter on unbundling.

⁵⁸ Faull & Nickpay, supra note 49, p. 823, paragraph 11.246.

has defined “excessive price” as being a price: “*excessive in relation to the economic value of the service provided*”.⁵⁹ Moreover, in *United Brands*, the Court said that: “*this excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production*”.⁶⁰ Therefore, the Commission will need to determine what are the actual costs for the relevant product.

Second, predatory pricing. This occurs where a dominant firm sells a good or service below cost for a sustained period of time, with the intention of deterring entry, or putting a rival out of business, enabling the dominant firm to further increase its market power and later its cumulated profits. The ECJ in *AKZO*⁶¹ and *Tetra Pak II*⁶² ruled that subsidising prices in a related market can be an abuse under Article 82 EC. The ECJ held that where prices were below average variable cost predation had to be presumed as on every sale the dominant firm would be losing fixed costs and at least part of the variable costs relating to the unit produced. The ECJ did not say that the presumption could never be rebutted, but it will clearly be very difficult to do so. When prices are above average variable costs but below average total costs the undertaking will be guilty of predatory pricing if the prices are fixed in the context of a plan which is aimed at eliminating a competitor.⁶³ Those cases also establish, however, that a price is only abusive for purposes of Article 82 EC if it is either below average variable costs or below fully allocated cost and part of an anti-competitive scheme or plan. The ECJ’s judgment makes it clear that this distinction is meant to reflect the fact that in many cases pricing at less than fully allocated cost is normal, performance-based behaviour, even when engaged in by a dominant firm.

The Commission has interpreted widely the AKZO rules in some of its more recent cases. In *Brown Napier/British Sugar*⁶⁴ the Commission found that British Sugar had reduced the margin between industrial sugar prices and retail sugar prices to the point where a purchaser of industrial sugar with packaging operations equally efficient to those of British Sugar could not profitably serve the retail sugar market. The Commission asserted that where a company is

⁵⁹ CFI, Case 26-75, *General Motors Continental NV v Commission of the European Communities*, [1975] ECR1367, paragraph.12.

⁶⁰ Case 27/76, *United Brands Co. and United Brands Continental B.V. v Commission*, February 14, 1978, [1978] E.C.R.207.

⁶¹ *AKZO Chemie BV v Commission (C-62/86)*, supra note 37.

⁶² Case C-333/94 P, *Tetra Pak International SA v. Commission*, supra note 36.

⁶³ *AKZO Chemie BV v Commission (C-62/86)*, supra note 37, paragraph 72.

⁶⁴ Commission Decision 88/518, O.J. No. L 284/41, 19 October 1988.

dominant in the markets for both a raw material and a corresponding derived product, it is abusive to charge a price that does not provide a sufficient margin to cover the company's own costs of transformation. The Commission considered this to constitute predatory pricing and an abuse of a dominant position. It appears therefore that a dominant firm has an obligation to fix its prices at such a level that a reasonably efficient competitor on the derivatives market is able to survive. In *Irish Sugar*, the Commission took the position that predatory pricing could occur when a dominant firm undertakes selectively targeted price reductions in order to eliminate competition, while retaining its prices above its total costs. This suggests an evolution from a test of predation based on the relationship between cost and price to a test where selectivity of prices is the main criterion to identify predatory pricing.⁶⁵

Moreover, in the Access Notice the Commission said that in network industries,⁶⁶ a simple application of the AKZO test would not reflect the economic reality of such industries. This is because the sunk costs of the network (e.g. the cost of the telecommunications infrastructure) represent a significant part of the costs of offering a service. Instead, the Commission recommends examining the total incremental costs of offering a service over an appropriate time frame (generally over one year).⁶⁷

Third, price squeeze, arising where the operator is dominant in the product or services market, could constitute an abuse. A price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company.⁶⁸ Alternatively, a price squeeze could be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient).⁶⁹

⁶⁵ *Irish Sugar*, Case No IV/34.621, O.J. [1997] L258/1.

⁶⁶ Network industries are industries characterised by infrastructures to which access is necessary in order to compete on the market. Because of the very high costs involved in putting such networks together and the fact that they cannot be shifted to another use easily they involve very high 'sunk costs' i.e. investments that have no use save for a single purpose.

⁶⁷ Access Notice, supra note 1, paragraphs 110 to 116.

⁶⁸ *Ibid*, paragraph 117.

⁶⁹ *Brown Napier/British Sugar*, Case 88/518/EEC, 18 July 1988, OJ 1988, 284/41.

(d) Discrimination

Here, discrimination would arise not in relation to access to the network of the service provider but rather between the parties to different access agreements. Such discrimination could take the form of imposing different conditions, including the charging of different prices, or otherwise differentiating between access agreements, except where such discrimination would be objectively justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels.

Therefore, in order for discrimination to exist, there must be different treatment of equivalent transactions. In terms of telecommunications networks, the starting point of the analysis is to determine exactly which network elements are required in each case. In this regard it is the demand of the company requesting access that is important and not the supply by the network operator. There must also be an effect on competition. This condition can be fulfilled either on the market for the product being sold or on the downstream market on which the product is being used. The clearest case of an effect on competition is if the operators between whom there is discriminatory treatment compete on the same downstream market, such as that for voice telephony. Refusing to provide one with access, or supplying one at different prices will affect competition as the refusal might limit the possibility for that operator to enter the market or expand its operations on that market.

The analysis will be more difficult where the operators between whom there is discriminatory treatment operate on different downstream markets or as the Commission calls them, on “*closely related downstream markets*”.⁷⁰ Where two distinct downstream product markets exist, but one product would be regarded as substitutable for another, save for the fact that there was a price difference between the two products, discriminating in the price charged to the providers of these two products could decrease existing or potential competition. For example, although fixed and mobile voice telephony services at present probably constitute separate product markets, the markets are likely to converge.⁷¹ Charging higher interconnection charges⁷² to mobile operators as compared to fixed operators would tend to hamper this convergence, and

⁷⁰ See above the analysis of the Commission’s approach to defining dominance in the Access Notice where the use by the Commission of the closely related markets doctrine is analysed.

⁷¹ In this regard, see the section of this chapter on convergence.

⁷² In this regard, see the section of this chapter on interconnection. Article 7 of the Interconnection Directive provides that: “*Different tariffs, terms and conditions for interconnection may be set for different categories of organisations which are authorised to provide networks and services, where such differences can be objectively justified on the basis of the type of interconnection provided and/or the relevant national licensing conditions...*”.

would therefore have an effect on competition.⁷³ Discrimination can relate to elements such as pricing, delays, technical access, routing, numbering, restrictions on network use exceeding essential requirements and use of customer network data. There is in this context a general duty on the network operator to treat independent customers in the same way as its own subsidiary or downstream service arm.

A more difficult issue arises where discrimination is between different geographic markets. In that case, there will be no direct effect on competition as by definition such effects occur within one and the same geographical market. Also, indirect effects on competition will be more difficult to justify based on the use of the closely related markets approach. However, the finding of an indirect effect on competition in cases involving discrimination between different geographic markets cannot be ruled out entirely as discrimination in these circumstances could increase national partitioning of markets, thereby reducing potential competition between the operators on the national markets.⁷⁴

1.3.3 Other forms of abuse not specifically mentioned by the Access Notice

The list of abuses of dominant position in the telecommunications sector mentioned in the Access Notice is meant to cover the main abuses that could occur in the sector and is not exhaustive. Some other relevant abuses that could occur in relation to access to the EU telecommunications market are briefly analysed below.

(a) Cross-subsidisation

Cross-subsidisation occurs when a business allocates all or part of the costs of its activities on one product or geographic market to its activity in another product or geographic market.⁷⁵ In the telecommunications industry, cross-subsidisation could occur when an operator cross-subsidises competitive operations (such as value-added downstream services) with the revenues derived from a market on which it is dominant or where it holds exclusive rights (such as network provision). The abuse would be that the dominant operator could offer better conditions than its competitors on the competitive market, not as a result of efficiency or performance but rather by the cross-subsidy. The market effect of such a practice would be to

⁷³ Access Notice, *supra* note 1, paragraph 121.

⁷⁴ J.Faull & A.Nickpay, *supra* note 49, p.822, paragraph 11.246.

⁷⁵ European Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, 91/C 233/02, OJ C 233/2, 06/09/91, paragraphs 102 to 108.

negatively affect the competitive position of value-added service providers and to discourage new entrants to enter.

The Access Notice does not mention cross-subsidisation probably because following the full liberalisation of telecommunications markets in the EU as of 1 January 1998, it could be argued that cross-subsidisation should no longer be a concern in the European telecommunications industry.⁷⁶ This is because cross-subsidisation could only be considered as anti-competitive when funds taken out of incomes generated by activities conducted pursuant to exclusive or special rights granted by the State are used to subsidise competitive activities.⁷⁷ Therefore, cross-subsidisation should no longer be an issue in the EU except for the duration of the limited extension that some Member States have obtained in applying the full liberalisation measures.

However, the Commission seems to have taken a wide interpretation of the notion of cross-subsidisation in its *Unisource* and *Uniworld* decisions.⁷⁸ There, the Commission decided that cross-subsidisation was still an abuse for a dominant operator despite the abolition of exclusive or special rights. The Commission's and the courts decisional practices in this regard will have to be followed closely in the future as to more clues of what is the correct interpretation of the application of the cross-subsidisation abuse in the EU telecommunications sector.

(b) Abuses of intellectual property rights

The mere holding or even the exercise of an intellectual property right by a dominant firm is not an abusive practice. However, the following practices of dominant firms in relation to their intellectual property rights have been found to be abusive: the abusive registration of trademarks to divide markets, the imposition of unfair licensing terms, the abusive bringing of infringement actions to force the defendant to enter into restrictive licensing arrangements, the charging of an excessive price for a product or service protected by an intellectual property right.⁷⁹

(c) Refusal of licences

⁷⁶ This thought is reinforced by the fact that the 1991 Guidelines, supra note 75, do mention cross-subsidisation as a possible abuse of a dominant position.

⁷⁷ L.Graziani, *Telecommunications Broadcasting and the Internet*, EU Competition Law and Regulation, Sweet & Maxwell, 2000, p. 116.

⁷⁸ *Unisource* and *Uniworld*, Commission Decisions of 29 October 1997, O.J.[1997] L318/24 and 318/1 respectively.

⁷⁹ Bellamy & Child, *Common Market law of competition*, Sweet & Maxwell, fourth edition, paragraph. 5-01, note 2, par 9-064.

In exceptional circumstances, a refusal to grant a licence to an intellectual property right could be deemed abusive and a compulsory licence imposed. The main case in this area is the *Magill* case which is analysed below in the essential facilities section.

(d) Abuses of dominant purchasing position

Based on the premise that incumbents are still likely to be considered as holding a dominant position on their national markets as to the purchase of equipment and services, Article 82 would prevent practices such as excessively favourable trading conditions or a requirement to be appointed as the exclusive distributor for the purchased product. Such practices would indirectly impede market entry by new entrants.⁸⁰

(e) Abuses of joint dominant positions

These are recognised by the Access Notice in that behaviour by one of several jointly dominant companies may be abusive even if others are not behaving in the same way.⁸¹ Moreover, the possibility of a National Regulatory Authority ('NRA')⁸² resolving the problem by ordering one or more of the companies to offer access, under the terms of the relevant Open Network Provision ('ONP')⁸³ Directive or national law, is envisaged in addition to remedies under the competition rules.

(f) Access restrictions to essential facilities

This kind of abuse of a dominant position is of great importance in the telecommunications sector. The following section will analyse it in detail.

(g) Abuses related to access to the local loop

The Commission has produced a Communication on unbundled access to the local loop⁸⁴ in which it details the application of the competition rules to access to the local loop. The local loop

⁸⁰ 1991 Guidelines, supra note 75, paragraphs 116 to 120.

⁸¹ Access Notice, supra note 1, paragraphs 129 and 130.

⁸² See the interconnection section of this chapter as well as Chapter 3 of the thesis on the interrelation between general competition rules and sector-specific rules in relation to access to telecommunications markets.

⁸³ See Chapter 3 for an explanation of the notion of ONP.

⁸⁴ Commission Communication, Unbundled Access to the Local Loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet, COM (2000) 237 final.

refers to the physical circuit between the customer's premises and the telecommunications operator's local switch or equivalent facility. A competitor that has the benefit of unbundled access to the local loop effectively takes over the customer from the incumbent operator and provides both origination services from and termination services to that customer. The big advantage of local loop unbundling is that it allows new entrants to start operations without incurring the large sunk investment which would have been necessary to set up a competing local loop.

The Commission sees access to the local loop as a priority area and it has followed up its Communication by a Recommendation⁸⁵ and a Regulation⁸⁶ on access to the local loop. The Commission was prompted to draft rules in this area by the realisation that incumbent operators control the local loop which remains one of the least competitive segments of the liberalised telecommunications market. The incumbents' local loop networks have been developed nation-wide in each of the Member States and whilst the bottleneck situation does not prevent new entrants from developing local networks, they cannot compete nation-wide on an equal footing with incumbents. In *Telia/Telenor*,⁸⁷ the Commission approved a merger between the incumbent telecommunications operators in Norway and Sweden only after the Swedish and Norwegian governments had committed to introduce local loop unbundling in both countries.

The Commission hopes that with the recent introduction of a Regulation in this area it will achieve its objective of a harmonised framework of unbundled access to the local loop in order to enable the competitive provision of an inexpensive, world-class communications infrastructure and a wide range of services for all businesses and citizens in the Community. The Commission's aim is to ensure fair access to the local loop. Public fixed network operators designated by the national regulatory authority as having significant market power are the prime targets of the Commission's efforts.⁸⁸ It should be mentioned here that the Commission is dissatisfied with the pace of implementation of the Regulation on access to the local loop. The Commission recommends that the pace should be speeded up to open up the local networks to competition. This requires hands on monitoring from the NRAs, the setting of binding deadlines

⁸⁵ Ibid.

⁸⁶ Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ L 366, 30.12.2000, pp. 4 to 8. The terms of the Regulation became mandatory within the Member States as of 1 January 2001.

⁸⁷ *Telia/Telenor*, paragraph. 1-80, note 46.

⁸⁸ See the section of this chapter on interconnection for a full explanation of the notion of "*designated operator*".

and the imposition of credible financial penalties on incumbents not complying with the requirements imposed.⁸⁹

In its Communication the Commission lists the possible abuses of dominant position that would result from a refusal to grant access to the local loop to competitors requesting access as well as abuses that could occur once access has been given. Although the Access Notice should cover all access problems in the telecommunications area it is interesting to briefly analyse these in order to see if new ideas have been put forward by the Commission in its Communication on unbundled access to the local loop.

(h) Refusal to deal

On the relevant market for access to the local loop (the fixed telephony retail service market, the emerging high speed telecommunications market, and the local loop itself as a commodity which can be priced and rented to competitors) where the incumbent is the only provider of services over the local loop, a refusal to let competitors have access may constitute an abuse if it would prevent any competition on the relevant nation-wide markets and if it is indispensable for the provision of nation-wide services to end-users. If that would be the case the dominant operator would have to provide access to the local loop on no less favourable terms than those for its own downstream operations. The diminished requirements for access to be forced upon the access provider might reflect the Commission's policy to make access to the local loop a priority area for action.

Under the Commission's Communication on unbundled access to the local loop access may be requested if the following conditions are fulfilled:

- sufficient capacity must be available in the incumbent's network to provide access;
- a refusal of access would limit the emergence of new services or prevent any competition on the relevant markets;
- the requesting party is ready to pay a non-discriminatory price for the access;
- and there is no objective justification for refusing access.⁹⁰

⁸⁹ Seventh Report on the implementation of the telecommunications regulatory package, COM(2001) 706, p.20.

⁹⁰ Communication on unbundled access to the local loop, supra note 84, p. 8.

Compared to the Access Notice's section on abuse of a dominant position for refusal to grant access, all of the requirements are the same except for the requirement that the access to the facility in question is essential which is not asked here for access to be given.⁹¹ What is asked is that the refusal limits the emergence of new services or prevents any competition on the relevant markets. Therefore, it seems that access to the local loop is facilitated by the Commission through the use of wider conditions for access to be imposed upon the incumbent operator.

- (i) Limitation of production, markets, or technical development to the prejudice of consumers

This abuse consists in limiting the development of emerging markets such as high speed telecom and internet services, or impede the development of competition on existing markets such as traditional voice telephony services by refusing shared access or full unbundling. The distortion of competition that would occur consists in limiting the possibility for competitors to enter the markets or develop their activities, and, given, the fact that full unbundling has successfully been introduced in a number of countries, it would need to be objectively justified.⁹²

This type of abuse is also new and seems to show the Commission's willingness to promote key industries of the future such as multimedia and internet services.

- (j) Other abuses

These are abuses that would occur once access has been granted (as opposed to as a condition to access as analysed above under the Access Notice) but where dominant operators define a set of conditions of access which restrict competition. The following practices may constitute abuses:

- unjustifiable delays;⁹³
- price abuses (such as predatory pricing);⁹⁴

⁹¹ See below the five criteria necessary for access to be made compulsory under the Access Notice which are analysed in the essential facilities section of this chapter.

⁹² Communication on unbundled access to the local loop, supra note 84, p.9.

⁹³ This is a sub-category of discrimination but which has proved of sufficient importance in practice so as to be listed separately.

- tying in terms of the unjustifiable bundling of services.⁹⁵

1.4 Appraisal of dominance and abuse of dominance

The prohibition of abuse of dominance is the basic EC general competition rule that applies to access issues in the telecommunications sector. The primary role of EC general competition rules in this area is to ensure that the benefits anticipated by liberalisation are not jeopardised by restrictive or abusive practices. New entrants must be guaranteed the right to have access to the networks of incumbent telecommunications operators. The specific rules drafted by the Commission in the Access Notice for the analysis of dominance and its abuse in the telecommunications sector are aimed at tackling the most common competition problems arising out of access to telecommunications infrastructure and network facilities in the Commission's experience. In addition to these, other abuses (as analysed above) can occur in the telecommunications sector although in more rare cases. These rules are the application of the generally accepted principles of dominance and its abuse to the telecommunications sector. However, the Access Notice innovates in that it sets down for the first time in a policy document the Commission's position as to the application of the doctrine of essential facilities to the telecommunications sector. In fact, the doctrine of essential facilities is listed in the Access Notice as one of the potential abuses that can occur with regard to refusal to grant access to telecommunications facilities and application of unfavourable terms. However, because of its practical importance the doctrine of essential facilities is studied separately in the next subsection.

2. The doctrine of essential facilities

The European Commission has defined an essential facility as a: "*facility without access to which competitors cannot provide services to their customers*".⁹⁶ The jurisprudence of the European courts and the Commission establishes that it may be an abuse for a dominant undertaking to refuse to give access to essential facilities needed to allow new customers to compete with existing services already on offer. The essential facilities doctrine has emerged because in some instances the regulator has decided not to separate the operation of

⁹⁴ Investigations of pricing practices will be facilitated by the obligations under the ONP directives to have transparent cost-accounting systems. See the section above for an explanation of predatory pricing.

⁹⁵ This abuse was identified in a study for the Commission on the Part II of the local loop unbundling sectoral inquiry. The study provides that respondent operators identified tying as a behavioural obstacle generated by fixed incumbents to the timely and effective provision of unbundled local loops, Squire Sanders, February 2002.

⁹⁶ Commission decision Sea Containers/Stena Sealink, OJ 1994 L 15/8.

infrastructure and the operation of competitive activities utilising that infrastructure. This results in situations where the operator of the infrastructure (e.g. a telecommunications infrastructure) is also using that infrastructure to compete in the downstream market and it is in an effort to balance this situation that the essential facilities doctrine emerged. Because the essential facilities doctrine is especially suited for applications to large infrastructures, which in many cases have recently been the object of liberalisation or are in the process of being liberalised, the essential facilities doctrine can play an essential role in the liberalisation process. It is arguable that the European Commission progressively introduced the doctrine with this objective in mind.⁹⁷

Although the European Commission seems to have adopted the doctrine, the European Courts have recognised it but significantly limited its scope of application. The doctrine of essential facilities is a relatively new concept and is far from universally recognised. In Japan, for example, where the doctrine is not recognised, it is traditional competition law rules that apply to any case of refusal to deal independently of it involving facilities essential or not.⁹⁸

The analysis of the application of the essential facilities doctrine in EC competition law will focus on the origins of the doctrine, its introduction and development by the European Commission and its limitation by the recent jurisprudence of the European Courts.

2.1 The doctrine of essential facilities in the EU

2.1.1 The origin of the doctrine: the US paradigm

The essential facilities doctrine was first introduced by US courts as an attempt to resolve certain situations of refusal to deal to infrastructure or facilities that are not easily duplicable.⁹⁹ The doctrine is generally thought to have been derived from two older US Supreme Court cases dealing with collective refusals to deal.¹⁰⁰ Although there is no single definition of the concept, the clearest statement of the doctrine was made by the court of Appeal for the 7th Circuit in *MCI Communications Corp. v AT&T* (a telecommunications case involving interconnection) applied a

⁹⁷ This idea is further explored below as well as at Chapter 3 of the thesis.

⁹⁸ See Chapter 2 of the thesis and in particular the section analysing refusal to deal.

⁹⁹ For a comparison of the similarities and differences between the American and the European Approach see; A.Capobianco, The essential facility doctrine: similarities and differences between the American and the European approach, *E.L.Rev.*, 26, 2001, p.548 to 564.

¹⁰⁰ These are; *US v. Terminal Railroad Association of St.Louis*, 224 US 383 (1912) and *Associated Press v. US*, 326 US 1 (1945).

four part test for determining whether a refusal to deal in respect of an essential facility constitutes actionable monopolisation:

- control of an "essential facility" by a monopolist;
- inability on the part of the competitor practically or reasonably to duplicate the essential facility;
- denial of the use of the facility to the competitor; and
- feasibility of providing the facility.¹⁰¹

It has been pointed out that due to the courts of Appeals lack of reasoning in applying the essential facilities doctrine, there has been considerable analytic inconsistency in its application in the US.¹⁰² The US Supreme Court has so far carefully avoided dealing with it. Moreover, academic commentary on the development of the doctrine has been largely unfavourable with some authors challenging the validity of the essential facility concept by saying that it is indistinguishable from the general rule on refusals to deal under section 2 of the Sherman Act.¹⁰³ As a result of this, the essential facilities doctrine cannot be considered an established feature of US antitrust law and is now only applied in the US in rare and exceptional circumstances.¹⁰⁴

2.1.2 The starting point in the EU

Article 295 EC provides that: "*the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*". This has to be read in conjunction with the principle of freedom to contract. In the *Oscar Bronner* case¹⁰⁵, Advocate General Jacobs stated that: "*the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with*

¹⁰¹ 708 F.2d 1081, 1132-33 (7th Cir.1982), cert.denied, 464 U.S. 891 (1983).

¹⁰² also J.Venit and J.J.Kallaugh, *Essential facilities: a comparative law approach*, Fordham Corporate Law Institute, 1994, Chapter 13, p. 319.

¹⁰³ Ph.Areeda, *The Law and Economics Of The Essential Facility Doctrine*, S.t Louis U.L.J.,No.32, 1987, p.433.

¹⁰⁴ R.Pitofsky, FTC, *The essential facilities doctrine under US antitrust law*, <http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf>.

¹⁰⁵ See below the analysis of the ECJ's *Oscar Bronner* judgment.

constitutional status. Incursions on those rights require careful justification."¹⁰⁶ Therefore, the right to freely dispose of one's property and the freedom to contract are the two principles against which the doctrine of essential facilities has been developed first by decisions of the European Commission importing the notion into the EU from the US and then by the European Courts adopting the doctrine but then limiting its application.

2.1.3 Article 82 EC and refusal to supply

The wider debate triggered by the question of essential facilities is the question of how far competition rules reach and which obligations they impose on economic operators when third parties apply for making use of products, services and facilities held by the former. Article 82 EC does not provide directly for the answer to that question but provides that an abuse of a dominant position may consist in, among other things, "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage...*". The main effect of this clause is to prohibit secondary 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. In the context of essential facilities, an unjustified refusal to deal, because of the necessary access to the facility for the survival of competitors, is an extreme form of illegal discrimination and is condemned as such.

2.1.4 The introduction and development of the essential facilities doctrine by the European Commission

The Commission imported the doctrine of essential facilities into EC competition law from the US and although it did this progressively, the following analyses of the relevant decisions show the Commission's progressive adoption and later extension of the doctrine. All of the following decisions constitute inroads into the basic principles of freedom to contract and of freedom to dispose of one's property. The first four cases analysed below do not formally refer to the concept of essential facilities but are illustrative of how the Commission progressively expanded the traditional limits of dominance and its abuse in order to introduce the doctrine into EC competition law.

(a) The progressive expansion of the traditional rules on abuse of dominance

¹⁰⁶ Opinion of Advocate General Jacobs on Case C-7/98, delivered on 28 May 1998, paragraph. 56.

In the *IBM* case, which dates back to 1981¹⁰⁷, IBM sold its large computers only with main memory and basic software, thus preventing competing suppliers of memory and software from selling those products to IBM large computer customers. IBM also refused to supply certain software to users of non-IBM mainframe computers. Finally, IBM 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. This made it very difficult for competing suppliers of IBM-compatible hardware or software to 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. The Commission found these practices to be abusive. As a result of an undertaking imposed by the Commission, IBM agreed 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 it had previously refused to supply for use with non-IBM mainframe computers. In this and in the following three cases (analysed below), the Commission does not refer to the notion of essential facilities in its decision but rather uses existing categories of abuse of dominant position (such as tying and discrimination) to put an end to the conduct blamed on IBM which was considered as coming close to the conduct of a company which has a dominant position in a market and abuses it by refusing access to an essential facility which in this case is software and interface information.

Following the *IBM* case the next Commission decision which laid the path for the introduction of the essential facilities doctrine is the 1984 *Polaroid* case.¹⁰⁸ Polaroid refused to supply dealers without knowing where the film would be resold. Although Polaroid agreed that it would supply SSI Europe, the Commission emphasised that an objectively unjustifiable refusal to supply by an undertaking holding a dominant position on a market constitutes an infringement of Article 82 EC 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. This case is of interest because it puts forward the idea that only an objectively justifiable refusal to supply will be allowed thereby taking a stricter approach than the traditional refusal to supply doctrine of *Commercial Solvents*¹⁰⁹ which provides that "*no other justification for refusing to supply must exist*" which means that the justification must not necessarily be objectively justifiable to be a valid one. This means that the Commission could, starting with the *Polaroid* case, have started

¹⁰⁷ International Business Machines Corp. v Commission, Case 60/81, ECR (1981), p.2639.

¹⁰⁸ Polaroid/SSI Europe, Thirteenth Report on Competition Policy, 1984, p.95.

¹⁰⁹ See below the section of the chapter on the case law of the ECJ and CFI on essential facilities for an analysis of this case

thinking that in some cases, such as essential facilities cases, stricter conditions must be imposed on competitors for them to be able to refuse access.

In 1988, the *London European-Sabena* decision followed the previous two cases' line of thinking.¹¹⁰ 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)¹¹¹ to be contrary to Article 82 EC. Sabena had refused to allow London European access to its computer reservation system, to put pressure on the other airline to raise fares on the London-Brussels route or to withdraw from it. The refusal was liable to prevent London European operating on that route. The Commission's decision refers expressly to one of the classical cases on abuse of a dominant position - *Commercial Solvents*¹¹² - to come to the conclusion that Sabena's behaviour is an anti-competitive refusal to supply an essential service. There was relatively little competition on the London-Brussels route (at the time), and spare capacity on Sabena's computer reservation system so that it could not be said that there was an objective reason to refuse access.

The last decision prior to the formal introduction of the essential facilities doctrine by the Commission in EC competition law was the 1992 *British Midland-Aer Lingus* case.¹¹³ Aer Lingus had refused to 'interline'¹¹⁴ with British Midland, which at the time of the decision was one of the only competitors of Aer Lingus on the Dublin-London route. Aer Lingus terminated its agreement to interline when the latter, a strong competitor, began to compete with Aer Lingus on the Dublin-London route. The Commission held that Aer Lingus was dominant on that route and that the refusal to interline with its competitors was contrary to Article 82 EC. Aer Lingus said that having to interline would cause it to lose some passengers to British Midland. But the

¹¹⁰ *London European-Sabena*, O.J. L317/47, 1988, Commission.

¹¹¹ Council Regulation No 2299/89 of 24 July 1989 on a code of conduct for computerised reservations systems OJ 1989 L 220/1. Council Regulation No 3089/93 of 29 October 1993 amending Regulation No 2299/89 on a code of conduct for CRSs, OJ 1993 L 278/1. The Council Regulation setting out a code of conduct with regard to CRSs is thus a Community act which is clearly inspired by the competition rules contained in the Treaty notwithstanding the fact that it has been adopted pursuant to the specific Treaty provisions on transport policy. As discussed above, it leaves Articles 81 and 82 EC untouched and appears thus to allow the Commission to keep flexibility in the application of the specific competition rules in the event that certain practices regarding CRSs would not be covered directly by the code of conduct. See also Commission Regulation No 3652/93 of 22 December 1993 on the application of Article 81(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservations systems for air transport services, OJ 1993 L 333/37.

¹¹² See below the section of this chapter on the case law of the ECJ and CFI on essential facilities for an analysis of this case

¹¹³ *British Midland v Aer Lingus*, O.J. L96/34, 1992, Commission.

¹¹⁴ Interlining is an 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. Interlining also allows a passenger to use a ticket issued by one airline for a return journey on another.

Commission ruled that this did not justify imposing a "*significant handicap*" on British Midland. The effect on competition of the refusal to interline was the crucial point in the consideration of the anti-competitiveness of the refusal and the Commission considered that if the refusal is objectively likely to have a significant impact on the other airline's ability to start a new service or to sustain an existing service then it would be considered an unlawful abuse of a dominant position. The fact that refusal to interline left British Midland with the option to either operate infrequent flights or to offer frequent flights at once with low capacity utilisation meant higher start-up costs. In other words, from the position of a new entrant, an interline agreement with the dominant airline (if there is one) or with the other airlines operating on the routes in question, may be essential.¹¹⁵

(b) The formal introduction of the doctrine into EC competition law: the three harbour cases

The concept of '*essential facilities*' was clearly referred to by the Commission for the first time in the three so-called '*harbour cases*'. In the 1992 *B&I Sealink* case¹¹⁶, Sealink, which is both a car ferry operator and the owner of Holyhead Harbour, was competing with B&I on the car ferry business at Holyhead, Wales. B&I's berth was in the mouth of the harbour, which due to its narrowness, 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. It was argued that Sealink altered its schedule of sailings in such a way that B&I's loading was interrupted more frequently thereby improving Sealink's schedule but harming B&I's position.

The Commission drew a distinction between Sealink as harbour owner and Sealink as a car ferry operator, and said that as a dominant harbour owner it was not free to discriminate in favour of its own car ferry activities. As to the abuse of the dominant position the Commission said: "*a dominant undertaking which both owns or controls and itself uses an essential facility, i.e., a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 82 EC, if the other conditions of the Article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market (Case C-260/89, Elliniki Radiophonia). The owner of an essential facility which uses its power in one market in order to strengthen its position in*

¹¹⁵ J. Temple Lang, *Defining legitimate competition*, Fordham Corporate Law Institute, 1994, p.261.

¹¹⁶ *B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd.*, Case IV/34.174, Commission, 25 EC Bull., 1992, no.6 at paragraph. 1.3.30.

another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article 82 EC when a competitive disadvantage is imposed upon its competitor without objective justification". This was the first explicit reference by the Commission to the concept of essential facilities and the definition given as well as the application of the principle are based on the case law of the court developed through the *Commercial Solvents* judgement.¹¹⁷

It is interesting to note that in its decision the Commission said that Article 82 EC may be invoked only to the extent that the alleged abuse lies in conjunction with a "*dominant position within the common market or a substantial part of it*". However, one could legitimately think that the port of Holyhead is not a substantial part of the common market. The Commission recognised this and stated that: "*it is important to stress that a port, an airport or any other facility, even if it is not itself a substantial part of the common market, may be considered as such in so far as reasonable access to the facility is indispensable for the exploitation of a transport route which is substantial*". This means, and the Commission has accepted this, that this argument can be extended to any infrastructure and therefore can play an essential role in the process of liberalisation.¹¹⁸ For example, an airport could be considered a substantial part of the common market and the application of the doctrine of essential facilities to it could help the liberalisation of the air transport industry.¹¹⁹

In the 1994 *Stena Sealink* case¹²⁰, the Commission's decision concerned a dispute between Sea Containers and Sealink regarding the access to be given by Sealink to the port of Holyhead for the operation of high-speed ferries. The Sealink group was refusing to grant Sea Containers access to the port of Holyhead, under the conditions requested by Sea Containers, for the purpose of commencing a high-speed ferry service. This had the effect of protecting Sealink's own high-speed ferry service from competition. Although the Commission eventually rejected Sea Containers' application for interim measures since the parties had arrived at a compromise solution which was acceptable to both of them, the Commission issued a decision in principle concerning the access by third parties to essential facilities and concerning the power of the Commission to adopt interim measures ordering such access. The Commission considered *Stena* to hold a dominant position on the market for the provision of port services for passenger

¹¹⁷ See below the section of the chapter on the case law of the ECJ and CFI on essential facilities for an analysis of this case

¹¹⁸ M.Furse, The 'Essential Facilities' Doctrine in Community Law, E.C.L.R., 1995, Issue 8, p.471 and 472.

¹¹⁹ See in this regard the analysis below of the *Frankfurt Airport* case.

¹²⁰ *Sea Container v Stena Sealink*, O.J. L15/8, 1994, Commission.

and vehicle ferries between the port of Holyhead in Wales and Dun Laoghaire in Ireland. This is an essential route since it is the shortest route between the United Kingdom and Ireland and accounts for between 50% and 60% of the traffic between the two countries. The Commission held that Sealink had *prima facie* abused its dominant position because a company which both owns and uses an essential facility (i.e. according to the Commission's definition in *B&I Sealink*, a facility or infrastructure, without access to which competitors cannot provide services to their customers) may not refuse its competitors access to that facility or grant access on less favourable terms than those it gives to its own services. Sealink had refused such an access by blocking any negotiation or proposition made by Sea Containers and by offering unsuitable slots to it. The Commission concluded that Sealink had to give access to the essential port facilities under reasonable and non-discriminatory conditions (which meant, in the particular circumstances of the case, under conditions at least equally favourable to those granted to its own services).

In the third of the '*harbour cases*', the 1994 case of *Rodby*¹²¹, the Danish Transport Minister's refusal to allow Stena, a Swedish shipping group, to build a private commercial port in the immediate vicinity of the port of Rodby and to operate from Rodby itself to provide ferry services, was considered by the Commission as incompatible with the EC Treaty. The Commission found that this refusal amounted to the extension of a dominant position held by DSB (a Danish public undertaking) jointly with Deutsche Bundesbahn ('DB'). DSB held, by virtue of the exclusive right granted to it by the State in its capacity as port authority, a dominant position in Denmark on the market for the organisation of port operations with regard to the transport of passengers and vehicles by ferry between Rodby and Puttgarden. It also operated, in conjunction with DB, as a carrier on the Rodby-Puttgarden route. As the only two ferry companies on this route, the Commission found DSB and DB to be jointly dominant. The Commission qualified the port facilities held by DSB to be an essential facility defined as in *B&I Sealink*. It then considered that an undertaking which owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a ship-owner wishing to operate on the same maritime route access to that facility without infringing Article 82 EC. Since the refusal to give access to Stena was due to a State measure and not to DSB's behaviour, the Commission then referred to the case law according to which the extension, resulting from a State measure, of the dominant position of a public undertaking or undertaking to which a state has granted special or exclusive rights, constitutes an infringement of Article 86(1) EC read in conjunction with Article 82 EC.

¹²¹ Rodby, O.J. L55/52, 1994, Commission.

(c) S.W.I.F.T.

In the S.W.I.F.T. telecommunications network case¹²², the Commission recognised that cross-border transfer systems could be considered essential facilities even though it was arguable that alternatives to S.W.I.F.T. existed. On 13 October 1997, the Commission accepted an undertaking from the Society for Worldwide Interbank Financial Telecommunications s.c. (S.W.I.F.T.) to allow non-discriminatory access to its communications network to all entities qualified to have access to EU third party fund transfer systems, and no longer to limit full access to its network and services to banks.¹²³

S.W.I.F.T. is a co-operative owned by some 2000 banks throughout the world. It owns a telecommunications network and provides an electronic message transfer system to its users, which use the S.W.I.F.T. network for various types of interbank messages, including national and cross-border payment messages. Only banks and "*entities in the same type of business*" had full access to the totality of the network, products and services of S.W.I.F.T. In 1996 the French Post Office ('La Poste') complained to the Commission that S.W.I.F.T. had refused it access to its network on the ground that La Poste was not a bank. The Commission took the position that S.W.I.F.T. was in a quasi-monopolistic position on the market for "*international payment message transfer networks*" and was an '*essential facility*'. According to the Commission, the denial of membership deprived La Poste of access to what it called the international money transfer market. S.W.I.F.T. decided apparently for commercial reasons, to settle the case by undertaking to broaden access to its network beyond banks to all financial institutions admitted to EMI¹²⁴-reviewed payment systems.

The Commission's decision to consider S.W.I.F.T. an essential facility can be criticised on the ground that there were alternatives, especially other telecommunications carriers, other bank consortia (such as Eurogiro) and the correspondent banking system that could have been used by institutions such as La Poste. Furthermore, access to S.W.I.F.T.'s network was not required to compete in the downstream market: the complainant already competed in the French banking and fund transfer market. Finally, it was pointed out that the French banking market is highly

¹²² Press release OP/97/870, 13 October 1997.

¹²³ For a copy of the undertaking, see O.J. No C 335, 6 November 1997, p.3.

¹²⁴ European Monetary Institute.

competitive with thin margins, and direct access of La Poste to the S.W.I.F.T. network did not appreciably improve the structure of competition.¹²⁵

(d) Frankfurt Airport

In the 1998 *Frankfurt Airport* case¹²⁶ the Commission pushed further its interpretation of the essential facilities doctrine. The origin of the case is a complaint by three European air carriers (Air France, KLM and British Airways) against the operator of Frankfurt airport (Flughafen Frankfurt AG, hereafter 'FAG') who had monopolised the market for the provision of ground handling services at that airport. The Commission found that two service markets were involved:

- the market for the provision of airport facilities for the landing and take-off of aircraft; and
- the market for the provision of ramp-handling services.

In both cases the relevant geographic market was defined as Frankfurt airport as beyond a certain distance airports are not considered as substitutable (in this case Amsterdam-Schiphol and Zurich airports are both over 300 km away); which was found to constitute a substantial part of the common market.¹²⁷

The Commission considered, on the basis of the ECJ's *Telemarketing judgment*¹²⁸, that an undertaking can be holding a dominant position on a particular market, even where the position is not due to the activity of the undertaking itself, but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market. Having established that FAG holds a dominant position in the first market, the Commission found that FAG abused that position in order to reserve the ramp handling services market for itself. FAG had thus extended its dominant position from the airport facilities market to the ramp-handling services market. FAG argued that its decision to bar independent ramp-handlers and to prohibit self handling was justified for four reasons: physical constraints, property rights, organisational rights and historical rights. However, upon analysis, the Commission found that none of these

¹²⁵ M. Dolmans, Cleary, Gottlieb, Steen & Hamilton; Brussels, Essential Facilities After the *Oscar Bronner* Case, Fourth IBC annual conference, Telecommunications and EC Competition Law, Brussels, 17 September 1999, p. 8.

¹²⁶ FAG - Flughafen Frankfurt/Main AG, Commission decision 98/190/EC, [1998] OJ L072/30.

¹²⁷ *Ibid.*, paragraph.56.

¹²⁸ *Telemarketing*, Case 311/84, 3 October 1985, [1991] ECR 3261.

arguments was convincing except the one on physical constraints but only for a small part of the airport. Since the justifications put forward to explain the decision to reserve the ramp handling services market for FAG failed, this decision constituted an abuse of a dominant position. FAG was asked by the Commission to terminate its abuse and to submit to the Commission, within three months of the date of the decision, a precise plan for opening-up the market to independent third party handlers and self-handling airlines.¹²⁹

The Commission's decision requesting FAG to allow its competitors on the ramp also constitutes a further step in the application of the essential facilities doctrine to physical infrastructure. In the cases it handled so far, the Commission made it clear that the operator of an essential facility (e.g. the Port of Rodby) had the obligation to grant access to all potential users of that infrastructure on a non-discriminatory basis. In other words, the essential facility doctrine has so far been applied only to the primary function of the infrastructure in question, in so far as it put an obligation of neutrality on the infrastructure operator with regard the users of that infrastructure (e.g. the passengers/freight carriers operating from/to the port of Holyhead). The innovation brought about by the FAG decision is that it extends this obligation to granting access to potential operators who are not users of the infrastructure in question but are willing to render services to the users of that infrastructure. In FAG the Commission does not address the situation where FAG would have discriminated between the airlines operating from its airport (i.e. the primary users of the airport), but a situation where the airport operator had not granted the right of access to potential operators who wanted to provide ancillary services to the airlines operating from the airport. The Commission subsequently stated that in its view, a facility may be characterised as essential not only from the perspective of the users of that facility, but also from the perspective of any kind of operator who attempts to meet a demand which originates within the facility.¹³⁰ This implies that, unless a valid justification may be invoked (such as physical constraints invoked successfully in FAG), the EC competition rules impose on the operator of such a facility an obligation to grant access to its infrastructure not only to potential users of the facility but also to potential service providers within that facility. The *Frankfurt Airport* case demonstrates, once again, the importance the Commission attaches to access to infrastructure for the liberalisation of the industries concerned and the promotion of fair competition.

(e) IMS

¹²⁹ The Commission adopted a second decision (not relevant to essential facilities) the same day related to the issue of access to the ground handling market at Community airports; FAG - Flughafen Frankfurt/Main AG, Commission decision 98/387/EC, [1998] OJ L173/32.

The latest essential facilities case to have been decided by the Commission is the 2001 *IMS* case.¹³¹ Although that decision has now been appealed and the CFI has granted an interim injunction suspending the decision until the judgment¹³², it is worth briefly mentioning it as it illustrates the Commission's latest thinking on essential facilities.

IMS Health Incorporated ('IMS') is a market research company that provides a broad range of market research, marketing, and sales management services to the pharmaceutical industry. In particular, it provides, through its German subsidiary, regional wholesaler data report services to interested pharmaceutical companies in respect of sales of pharmaceutical products by pharmacies throughout Germany. The services are based on a '*brick structure*'.¹³³ The complainant, National Data Corporation Health Information Services ('NDC') also supplies database services mainly in the US, specialising in the pharmaceutical sector. On 26 October 2000, NDC requested a licence from IMS to use the 1860 brick structure in return for an annual licence fee. IMS rejected the request and in a further letter refused to enter into negotiations arguing that it was not essential for NDC to have the use of the 1860 brick structure to compete against it on the German market.

In analysing whether IMS' conduct constituted an abuse of a dominant position, the Commission referred back to the jurisprudence established by the European Courts on this area of the law and more specifically to the cases of *Commercial Solvents*, *United Brands*, *Volvo/Veng*, *Magill*, *Ladbroke and Oscar Bronner* (see the following section). The last three cases are of particular relevance because they concerned alleged abuses of dominant positions in relation to the use of intellectual property rights. Based on the *Oscar Bronner* jurisprudence¹³⁴, the Commission held that the criteria for establishment of abuse under Article 82 in cases relating to the exercise of a property right are:

- whether the refusal of access to the facility is likely to eliminate all competition in the relevant market;
- whether such refusal is not capable of being objectively justified; and

¹³⁰ European Commission, Competition Policy Newsletter, 3 October 1999, Number 3, page 18.

¹³¹ NDC Health/IMS Health, Commission Decision COMP D3/38.044, 03.07.2001.

¹³² See Order of the President of the CFI, 10 August 2001, 171791.

¹³³ Brick structures divide a country into artificially designated geographic areas or '*bricks*' that are used to report and measure sales of individual pharmaceutical products.

- whether the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility.

In *IMS* the Commission had to decide whether the 1860 brick or compatible structure is indispensable to compete on the relevant market. The ‘*indispensability*’ of the 1860 brick or compatible structure was assessed by analysing whether there is a realistic possibility for undertakings wishing to offer regional sales data services in Germany to employ - instead of the 1860 brick or compatible structure - another structure which would not infringe *IMS*’ copyright. The Commission found that the conditions mentioned above were all satisfied. The applicant’s “*refusal of access to the 1860 brick structure is likely to eliminate all competition in the relevant market, since without it is not possible to compete on the relevant market*”.¹³⁵ This finding is based on its conclusion that the said structure constitutes a “*de facto industry standard*”.¹³⁶ It also considered, on the basis of the evidence before it, that “*there is good reason to suppose that unless NDC is granted a licence to the 1860 brick structure its German operation will go out of business, and that there will be intolerable damage to the public interest*”.¹³⁷ The latter assessment is based primarily on the Commission’s belief that aside from the serious and irreparable harm to NDC there will be, in the absence of interim measures, a serious risk “*for the continued presence of the IMS’s other current competitor, AzyX, on the market*”.¹³⁸

However, the *IMS* case clearly illustrates that the Commission still uses the essential facilities doctrine albeit within the limits prescribed by the ECJ in the *Oscar Bronner* judgment, which is analysed below.

(f) Summary and conclusions on the Commission’s position on essential facilities

The Commission starting in 1981 with the *IBM* case progressively laid the ground for the introduction of the doctrine through the expansion of the traditional concept of dominance and abuse of dominance. The Commission felt that while there existed 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, there were increasingly situations in which

¹³⁴ See the section below analysing the *Oscar Bronner* judgment.

¹³⁵ *NDC Health/IMS Health*, supra note 131, paragraph 181.

¹³⁶ *Ibid*, paragraph 180.

¹³⁷ *Ibid*, paragraph 190.

¹³⁸ *Ibid*, paragraph 195.

access to a facility was essential thereby warranting the introduction of the doctrine into EC competition law. The fact that the Commission saw an increasing number of facilities as being essential can probably be linked to the liberalisation wave that swept Europe in the 1980s and culminated in the telecommunications sector in 1998 with the full liberalisation of all telecommunications services in the EU. Liberalisation meant that an increasing number of infrastructure and facilities was opened-up to competition and that therefore competition law had to ensure access to these facilities in cases where the owners of the facility were not forthcoming in providing access. 1998 is also the year in which the European Courts limited the scope of the doctrine developed by the Commission, as analysed in the next sub-section.

2.1.5 The case law of the ECJ and CFI

Having analysed how the European Commission introduced and developed the doctrine of essential facilities, this section analyses how the European courts reacted to this development. The Community courts up until recently shied away from recognising the concept of essential facilities even though the Commission openly used the notion in the decisions analysed above. Until the *Oscar Bronner* judgment the courts had not made any explicit reference to the concept of essential facilities although a number of judgements, decided on the basis of traditional Article 82 EC rules,¹³⁹ had involved elements which can be considered similar to an essential facility doctrine. In order to correctly understand the present position as to the application of the essential facilities doctrine in EC law it is necessary to start with the first European courts' cases on refusal to supply under Article 82 EC.

(a) Cases on refusal to deal

The leading case on refusal to supply is the 1974 *Commercial Solvents* case¹⁴⁰ where the ECJ found that a refusal to supply a raw material to a competitor in a downstream market was an abuse of dominant position. The court found that Commercial Solvents was in a dominant position for the production of a raw material, over which it had a world monopoly, for the production of a specific chemical. The practice pursued by Commercial Solvents was to refuse supply to a downstream competitor, which was the only competitor of Commercial Solvents in the Community in the production of the downstream product, which needed the raw material for the production of the chemical and which had been a customer of Commercial Solvents previously. The court considered that the plans of a dominant undertaking to begin producing

¹³⁹ As analysed above in sub-section 1, section A of this Chapter.

¹⁴⁰ *Commercial Solvents v Commission*, supra note 52, p.223.

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 specific market.

From the judgment it can be understood that three conditions need to be satisfied for refusal to supply to constitute an abuse of a dominant position under Article 82 EC:

- there must be a refusal to supply a downstream competitor and this refusal must have important effects on competition. This condition was satisfied in this case as the customer was the only competitor of Commercial Solvents in the Community in the production of the downstream product;
- the dominant undertaking must be easily able to supply the competitor's needs. This condition was also fulfilled as Commercial Solvents had spare capacity and did not need all of its production for its own use;
- no other justification for the refusal to supply must be offered. It seems that the Court will consider any type of justification as a possible way to render the refusal to supply legal and not like in the US justifications as to capacity or disruption of the owner's activities.

Once these three conditions are fulfilled, a refusal to supply would be prohibited by EC competition law if the effect would be to put the competitor out of business, even if the dominant undertaking plans to use the products in question itself. However, as Advocate General Warner remarked in *Commercial Solvents* if the raw material being itself a manufactured product that exists only thanks to the efforts in research and development of the dominant undertaking and that undertaking decides to sell it to no-one, but to maximise its profits by itself supplying all the demand for the end product, then that practice would not constitute an abuse of a dominant position.¹⁴¹ This statement makes business sense as undertakings would find no motivation in investing in research and development if they had to supply the product of their efforts to their competitors.¹⁴²

In the 1978 *United Brands* case¹⁴³, the court found that a refusal to supply an existing customer who had started to market a competing brand of bananas amounted to an abuse of a dominant

¹⁴¹ Opinion of Advocate General Warner, delivered on 22 January 1974 in the Joined Cases 6 and 7/73, *Commercial Solvents v Commission*, supra note 52, p.268 and 269.

¹⁴² This idea will be further developed in the section on the criticisms to the essential facilities doctrine in the EU.

¹⁴³ Case 27/76, *United Brands v Commission*, supra note 60, p.207.

position since it was not proportional to the threat to the legitimate business interests of the dominant undertaking, if one took into account the economic strength of the competing undertakings confronting each other. Although this case concerned mainly a practice harmful to a dependent customer, the court found that an abusive practice by United Brands would also have indirect anti-competitive effects on the position of its competitors and therefore, on the market structure. The court considered that the conduct of United Brands could have exclusionary effects on its competitors since it would discourage other distributors to promote competing brands and therefore strengthen United Brands' position. As in the case of *Commercial Solvents*, the three conditions that need to be present for an abuse of a dominant position to be found for refusing to supply were fulfilled in this case:

- United Brands had no shortage of bananas to supply Olesen;
- Olesen was an important distributor in Denmark;
- no other justification for the refusal to supply Olesen was suggested.

Therefore, the *United Brands* case reinforces the *Commercial Solvents* judgement and adds a reasonableness test through the "*proportionality to the threat test*". However, it has been pointed out that this test would not be appropriate to a refusal to supply a competitor (as opposed to a customer as in *Commercial Solvents* and *United Brands*).¹⁴⁴ It seems 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.

Commercial Solvents and *United Brands* are the two primary cases on refusal to deal under EC competition law, and they each form a sub-category of such refusal. *Commercial Solvents* is the leading case involving vertical integration of companies as Commercial Solvents used its dominance in the upstream market (the market for supply or etambutanol) to forge a competitive advantage in a related market without any requirement that there be market power in the downstream market. *United Brands* is the leading case on termination of supplies to a dependent firm (United Brands terminated banana deliveries to Olesen).

Commercial Solvents and *United Brands* are the two leading cases on refusal to supply because they established that 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

¹⁴⁴ J. Temple Lang, *supra* note 115, p.251.

and competitors. This initially made it unnecessary to develop a special category for essential facilities cases. However, the subsequent introduction and development of the doctrine of essential facilities by the Commission prompted the European Courts to react and limit the doctrine. The analysis of the next four judgments shows how the European courts progressively came closer to recognising the existence of the essential facilities doctrine prior to the *Oscar Bronner* case where the doctrine was recognised and its scope was limited.

(b) Telemarketing

In the 1981 *Telemarketing* case¹⁴⁵, the Court reiterated the *Commercial Solvents* paragraph on refusal to supply and added that the ruling also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. The court considered that: "*if telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, and if those activities mainly consist in making available to advertisers the telephone lines and team of telephonists of the telemarketing undertaking, to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 82, provided that the other conditions of that Article are satisfied*".¹⁴⁶ This extract from the judgement is in line with *the Commercial Solvents* and *United Brands* judgements and the three conditions required to find an abuse of a dominant position for refusal to supply can be easily identified in the above paragraph.

(c) Volvo/Veng

In the 1988 *Volvo / Veng* case¹⁴⁷, the court considered the question whether the refusal to license intellectual property rights for replacement car body parts was contrary to Article 82 EC. The court said that the refusal by a proprietor of a registered design in respect of body panels to grant third parties, even in return for reasonable royalties, a licence for the supply of parts

¹⁴⁵ Case 311/84, CBEM/CLT and IPB, ECR (1981), p. 3261.

¹⁴⁶ Joined cases 6 and 7/73, supra note 52

¹⁴⁷ Case 238/87, Volvo/Veng, ECR (1988), p.6211,

incorporating the design could not itself be regarded as an abuse of a dominant position within the meaning of Article 82 EC. The court made it clear that Article 82 EC did not automatically lead to the property right being reduced to a right to a reasonable royalty. Although it is lawful for a dominant company to obtain exclusive rights under intellectual property legislation (this was also pointed out by Advocate General Warner in *Commercial Solvents*), 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 independent repairers, fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model though many cars of that model are still in use.

(d) Magill

Continuing on the question of the relation of intellectual property rights and refusal to deal, the 1995 case of *Magill*¹⁴⁸ merits some attention. In *Magill*, the BBC and RTE (the Irish television authority) each published its own weekly guide to its own TV and radio programs, but both refused to give details of their programs more than a day in advance to other magazines, making it impossible for anyone to publish a single independent weekly magazine giving all the week's BBC and RTE programs. Magill was thus prevented from publishing a comprehensive weekly television guide. After having found an infringement of Article 82 EC, the Commission ordered the three television organisations to put an end to that breach of the competition rules in particular "*by supplying...third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties*". The Commission's Decision provided that, if the television organisations chose to grant licenses, any royalties requested should be reasonable. The Court of First Instance found 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 they were published. According to the CFI the refusal of both television companies to provide details of their program to a competing weekly magazine was an abuse contrary to Article 82 EC. 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 its copyright on TV programs so as to pursue an aim contrary to Article 82 EC. The CFI's judgement made it clear that advance information about each week's program was essential for the publication of any weekly TV magazine or guide. The market for magazines was considered as distinct from the market of transmission of television and radio programs.

¹⁴⁸ Joined cases C-242/91 P and C-242/91 P, *Radio Televis Eiremann and Independent Television Publications Limited v Commission*, Judgment of 6 April 1995, ECR (1995) I-743..

The case went on appeal to the ECJ and on 1 June 1994, Advocate General Gulmann delivered his opinion in which he indicated that although he considered that the result obtained by the CFI judgement was very reasonable, he disagreed with the CFI as to whether such result could be obtained through the application of Article 82 EC. Although the Advocate General invited the ECJ not to rule out the possibility that the exercise of an intellectual property right could constitute an abuse of a dominant position, he emphasised that precedence over intellectual property rights should only be given to the competition rules where the exercise of such rights is not necessary to fulfil the essential function of the intellectual property right. The Advocate General considered that this was not the case here.

However, the ECJ in its *Magill* judgement of 6 April 1995, did not follow the Advocate General and refused to set aside the judgement of the CFI. The court qualified the basic information on programme scheduling as "*the indispensable raw material for compiling a weekly television guide*" and found that the TV companies were the only sources of the basic information. The Court then considered that the TV companies' refusal to provide basic information by relying on national copyright provisions prevented the appearance of a new product which the TV companies did not offer and for which there was a potential consumer demand. It concluded that such refusal constituted an abuse of a dominant position under Article 82(b). Furthermore, the court found that there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines. The court also referred to *Commercial Solvents* when it concluded that, by their conduct, the television companies reserved to themselves the secondary market of weekly television guides by excluding all competition on that market since they had denied access to the basic information which was the raw material indispensable for the compilation of such a guide.

(e) Ladbroke

The *Magill* judgement caused many reactions by authors on its effects and many criticisms towards it surfaced.¹⁴⁹ However, it seems that a recent judgement from the CFI tends towards a narrow interpretation of *Magill*. In the 1997 *Ladbroke*¹⁵⁰ case the ten French associations that organise horse-races collectively licensed their performing rights in the films of the races with

¹⁴⁹ Both President Koopmans of the ECJ (at interim measures) and Advocate General Gulman several years later (on appeal from the Court of First Instance) criticised the judgment. See also I. Forrester, *Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?*, presentation to the US DOJ/FTC, Washington D.C., 22 May 2002. See also V. Korah, *The Ladbroke Saga*, ECLR, 1998, Issue 3, p. 173.

¹⁵⁰ *Tierce Ladbroke v Commission*, (1997), 5 CMLR 309, T-504/93.

commentaries for marketing live by PMU. PMU's subsidiary, PMI, was licensed to grant licenses outside France only with specific consent of the racecourse associations on each occasion. PMI granted an exclusive licence to DSV Ltd for the territory of the former Federal Republic of Germany and Austria and required it not to transmit the films outside its territory. DSV promised PMI that its sub-licensees would not transmit or relay the pictures and information to another place, agent or party. PMI refused to grant a sub-licence to Ladbroke's Belgian subsidiary for use in Belgium. The copyright holders were not operating in Belgium even through a licence, both by DSV, which had no right to sub-licence, and by the copyright holders.

The CFI refused to apply *Magill* on the grounds first, that *Ladbroke* was already the largest provider of betting services in Belgium and did not need a licence to use the films to enter that market. The refusal to licence was thus considered as not preventing the supply of a new product for which there was a demand. Secondly, the availability of films of the races was not essential for a betting shop, although it might be helpful. Thirdly, films were not indispensable, since they are shown after the bets on the race have been placed. The second reason for refusing to apply *Magill* has been considered by an author¹⁵¹ as a possible reference, by the CFI, to the doctrine of essential facilities. If this is correct, the CFI may have tried in *Ladbroke* to limit the *Magill* doctrine to situations where the doctrine of essential facilities applies. The same author goes on to say that this doctrine should be applied only in extreme circumstances, mainly in cases where a group of competitors has acquired a bottleneck facility that they did not have to create. In the US there is a tendency to apply the essential facilities doctrine in extreme cases only, but that practice does not necessarily fit the EU application of the doctrine.¹⁵² This means that the US practice of limiting the application of the doctrine to extreme cases though it could be appropriate to a system which has as basic rule the freedom to deal and faces specific challenges, it is not necessarily so in the EU which is more restrictive on this point. What is clear from the CFI's judgement in *Ladbroke* is that the court did not articulate its reasoning on essential facilities which makes any comment on it very difficult and hypothetical.

(f) European Night Services

Following *Ladbroke* in 1998 the CFI ruled in the *European Night Services* case.¹⁵³ Although an Article 81 case, *European Night Services* is a very important case on essential facilities and it

¹⁵¹ V. Korah, *The Ladbroke Saga*, supra note 149, p. 173.

¹⁵² Ph. Areeda, supra note 103, p.433. For a comparison of the similarities and differences between the American and the European Approach see; A. Capobianco, supra note 99, p.548 to 564.

¹⁵³ *European Night Services v. Commission*, (1998), CMLR 718, T-374/94.

therefore merits to be analysed here. In *European Night Services*¹⁵⁴, the Commission granted an exemption to a joint venture ("ENS") created between a number of railway companies for the overnight carriage of passengers by rail between points in the UK and the Continent through the Channel Tunnel. ENS was found to be a co-operative joint venture which restricted competition between the parents and which resulted in important foreclosure effects. The Commission granted an exemption for a period of 8 years imposing several conditions on the parents with the aim of reducing foreclosure. In particular, the railway undertakings party to the ENS agreement must supply to any international grouping of railway undertakings or any transport operator wishing to operate night passenger trains through the Channel Tunnel the same necessary rail services as they have agreed to supply to ENS. These services (which consist of the provision of the locomotive, train crew and path on each of the national networks and in the Channel Tunnel) must be supplied on the same technical and financial terms as those which are applied by the undertakings to ENS.

The parties considered that these conditions were not justified and therefore appealed to the CFI. On the issue of essential facilities, the Court specified that: "*a product or service cannot be considered necessary or essential unless there is no real or potential substitute*" and "*an infrastructure can be considered an essential facility only when such infrastructure, product or service is not interchangeable and only, by reason of their special characteristics - in particular the prohibitive costs of/and time reasonable required for reproducing them – there are no viable alternatives available to potential competitors, which are hereby excluded from the market*".¹⁵⁵

The CFI appears therefore to adopt a two-pronged test. First, there must be absence of interchangeability, i.e. when taking into account the relevant end-user (downstream market), lack of access to the facility must affect competition on the relevant market, since such a facility is necessary in order for competitors to be active on that market. Second, there must be absence of viable alternatives, i.e. it must be impossible concretely to duplicate the facility (for reasons of cost or time). This means that as long as the facility can be viably duplicated or replicated by an "objective competitor" (rather than by the specific complainant), it does not matter how much disadvantage the complaining competitor would suffer because access to the facility in question is denied.

¹⁵⁴ *European Night Services*, O.J. L259/20, 1994, Commission.

¹⁵⁵ Joined case T-374/94, T-384/94, *European Night Services LTD (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union Internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Societe des chemins de fer francais (SNCF) v Commission of the European Communities*, judgment of 15 September 1998.

(g) Oscar Bronner

The latest and crucial development in the European courts' jurisprudence on refusal to deal and essential facilities is the 1998 *Oscar Bronner* case¹⁵⁶ that has seriously limited the application of the doctrine as put forward by the Commission.

The facts of the case are as follows:

Oscar Bronner GmbH & Co. KG (The plaintiff) is the publisher of the daily newspaper *Der Standard*. In 1994 the newspaper's share of the Austrian daily newspaper market was 3.6% of circulation and around 6% of advertising revenues. The defendant in the main proceedings is Mediaprint Zeitungs-und Zeitschriftenverlag GmbH and Co.KG which is the publisher of the daily newspapers *Neue Kronen Zeitung* and *Kurier* and carries on the marketing and advertising business of those newspapers through its wholly owned subsidiaries, *Mediaprint Zeitungsvertriebsgesellschaft GmbH and Co. KG* and *Mediaprint Anzeigengesellschaft GmbH and Co. KG*, (respectively the second and third defendants in the main proceedings). In 1994 the combined market share of the two newspapers was 46.8% of total circulation and 42% of total advertising revenues. In addition they reached 53.3% of the population from the age of 14 in private households and 71% of all newspaper readers.

Oscar Bronner made an application in front of the Austrian courts for an order requiring Mediaprint group to refrain from abusing its alleged dominant position on the market and to allow him access to its nation-wide home-delivery service for daily newspapers against payment of a reasonable remuneration. It appears that while there are a number of regional or local networks, Mediaprint's network is the only home delivery that can ensure arrival of the daily newspaper to the subscriber in the early morning hours. In view of its small number of subscribers it would be unprofitable for Bronner to organise its own home-delivery service. Bronner argues that Mediaprint has discriminated against it in so far as it allows another daily newspaper *Wirtschaftsblatt*, not published by Mediaprint, to have access to its home-delivery service.

Oscar Bronner referred to *Commercial Solvents* and *Magill* to justify that under the doctrine of essential facilities access to Mediaprint's network of distribution should be given to him. The Court answered to that by saying first that in *Commercial Solvents* the court held the refusal by an undertaking holding a dominant position in a given market to supply a competitor in a neighbouring market with raw materials and services respectively, which were indispensable to

¹⁵⁶ *Oscar Bronner v Mediaprint*, C-7/97, Judgment of the Court (sixth chamber), 26 November 1998.

carrying on the rival's business, to constitute an abuse. The Court distinguished that case from the present one by saying that in *Commercial Solvents* the conduct in question was likely to eliminate all competition on the part of that undertaking. In *Magill*, the Court held that the refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position, but that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse. The court found such exceptional circumstances to arise if the following conditions arise:

- the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it or offer it for sale;
- the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand, and;
- the fact that it was not justified by objective considerations, and that it was likely to exclude all competition in the secondary market of television guides.¹⁵⁷

The court applied the criteria identified above to the facts of the case before it and found that for access to the distribution network of Mediaprint to be imposed the following elements must be shown:

- the refusal of the service comprised in home delivery is likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service (this is the equivalent to the CFI's "interchangeability" test in *European Night Services*); and that
- such refusal be incapable of being objectively justified; and that
- the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme service (this is the equivalent to the CFI's "absence of viable alternative" test in *European Night Services*).

¹⁵⁷ Also, it has to be remembered that *Magill* concerned the law of intellectual property and that the principles that apply there do not automatically apply to all goods.

It is interesting to note here that the ECJ went perhaps further than the CFI in defining what is a “viable alternative” to the facility to which access is requested. This is because the ECJ said that in order for a facility such as Mediaprint’s home-delivery scheme to be essential, it must be economically not viable for an “objective competitor” of a size comparable to Mediaprint to create a similar scheme. This means that it is not sufficient for a smaller competitor to argue that it does not have the economic capacity of its bigger competitor to create a specific infrastructure or facility for it to fulfil the test of the absence of viable alternative.¹⁵⁸ Rather, the undertaking requesting access must establish that the market could not sustain a competing system at all and not just that it would not be economic for it to establish a competing system. The court, in assessing whether a national daily distribution system constituted an essential facility, found that there are alternatives to home delivery such as delivery by post or kiosks, even though they may be less advantageous for the distribution of certain newspapers. Moreover, the court pointed out that it does not appear that there are technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in co-operation with other publishers, its own nation-wide home-delivery scheme and use it to distribute its own daily newspapers. Hence, the denial of access to Mediaprint’s system even though the alternatives may be less advantageous, does not threaten the continued operation of Bronner’s business.

In its judgment although the ECJ carefully avoided the use of the words “essential facility”¹⁵⁹ it followed Advocate General Jacobs’s Opinion by saying that the primary purpose of Article 82 EC is to prevent the distortion of competition, and in particular to safeguard the interests of consumers rather than to protect the position of a particular competitor. The Advocate General considered that the essential facilities doctrine could be abused by invoking it in cases where facilities were not really ‘essential’. The risk of such misuse of the doctrine is that it could stifle the efforts of competitors who have spent time and resources in creating these facilities. The Advocate General’s Opinion emphasised the need to correctly balance the interests of all competitors on the market and as such advocates the limitation of the scope of the doctrine to ‘real’ essential facilities cases and as such it is of great importance here even though the court did not go as far as its Advocate General in restricting the application of the essential facilities doctrine. In so far as the Opinion reflects the basic thinking behind the court’s judgment it is important to briefly summarise it.

¹⁵⁸ P.Larouche, *supra* note 3, p.195.

¹⁵⁹ It is mentioned only in the summary of Bronner’s arguments at recital 24.

The Opinion traces the essential facilities doctrine from its origins in US antitrust law to the Commission decisions supporting the finding of an EU essential facilities doctrine, a position increasingly found in the national law of the Member States as well. Against that line is contrasted the right of private property and contract, recognised throughout the EU and often conferred with constitutional status. Given these competing considerations, the Advocate General was reluctant to interfere with the commercial decision of a firm, even a firm that is dominant in a particular market. It should be stressed that the question before the Advocate General was only a refusal to supply. There were no other factors “*such as cut-off supplies, tying of sales or discrimination between independent customers*”. *Magill* was distinguished “*by the special circumstances of that case*” specifically the prevention of the emergence of a new product.

Most striking is the Opinion’s statements regarding competition law policy. While not specifically recommending a judgment to the effect that the essential facilities doctrine does not exist in Community Law, the Opinion expresses grave reservations about its wholesale application. First, the Opinion recommends that courts should be extremely careful about interfering with commercial decisions regarding the identity of one’s trading partners.¹⁶⁰ Generally, a firm can sell to whomever it wishes. Furthermore, the facilities in question may be the result of substantial investment. Habitually compelling competitor access to facilities created only with considerable effort and expense will not create incentives for such efforts in the future. Second, the effect of forcing a firm to supply its competitors should be considered: In the long term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus, while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.

The Advocate General also put the accent on consumer welfare by saying: “*The primary purpose of Article 86 (now Article 82 EC) is to prevent distortion of competition-and in particular to safeguard the interests of consumers-rather than to protect the position of particular competitors*”.¹⁶¹ Furthermore, there should be proper focus on the state of competition in the

¹⁶⁰ This is in line with the basic principles of freedom of contract mentioned earlier as the starting point (together with the freedom to dispose of one’s property) of the analysis of the application of the essential facilities doctrine in the EU.

¹⁶¹ Opinion of Advocate General Jacobs on Case C-7/98, delivered on 28 May 1998, paragraph. 58.

downstream market rather than in the upstream market, where the dominant firm might control access to raw materials. If there is sufficient competition, perhaps through available substitutes, in the downstream market, then it is not an abuse for the dominant firm to refuse to supply the potential downstream competitors. This goes to the heart of what competition law is all about. If consumers are not suffering because there is adequate competition, the law should not intervene to give to a particular competitor access to raw materials. The key here may be the assessment of adequate competition. Presumably, if the benefits of competition in the downstream market exist, and an essential facility upstream is alleged, then the facility is not really essential, substitutes are readily available in the downstream market, or the market is relatively easy to enter. The Opinion also stresses that the essential needs of all competitors, rather than one that might not be able to duplicate the facilities in question should be determinative.¹⁶²

(h) Summary and conclusions on the European Courts position on the essential facilities doctrine

The European Courts have generally been cautious with regard to the use by the European Commission of the essential facilities doctrine. First the CFI in *European Night Services* and then the ECJ in *Oscar Bronner* have set down a test which severely restricts the application of the essential facilities doctrine in the future. It is now necessary to show two elements in order to successfully invoke the doctrine of essential facilities. First, that the refusal of access to the facility has an effect on competition on the relevant market because access to the facility is necessary in order for competitors to be active on the market (i.e. what the CFI in *European Night Services* referred to as the absence of “interchangeability”). Second, the complainant must show that it is not economically viable for an “objective competitor” comparable in size to the holder of the alleged essential facility to replicate or duplicate the actual facility in question (i.e. what the ECJ in *Oscar Bronner* referred to as the “viable alternative” prong). This two-pronged test is the new standard that needs to be met under EC competition law for the essential facilities doctrine to apply.

2.1.6 The position of the Access Notice on essential facilities

In the analysis conducted above on the abuse of dominant position concerning access to the telecommunications sector it was mentioned that the European Commission’s Access Notice¹⁶³

¹⁶² Ibid, paragraph. 65.

¹⁶³ Access Notice, supra note 1.

recognises three main different categories of abuse of dominant position in the telecommunications sector. The second category, the refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market, is analysed here because it raises the issue of essential facilities.

The Access Notice does not have force of law but is otherwise binding to the extent that it reflects the Commission's thinking in this area. An important qualification needs to be made here. The Access Notice was adopted in 1998 and does not take specifically into account the European Courts' judgments in *European Night Services* and *Oscar Bronner*. It is clear that under EC law these judgments are binding upon the Commission and to the extent that they differ from what is provided in the Access Notice, the European Courts' jurisprudence will take precedence. Generally, the Access Notice does not contradict the jurisprudence of the European Courts but, as will be shown below, it might not be going as far as the former in limiting the scope of the doctrine.

In a situation where no other operator has been given access by the access provider to operate on the services market there is normally no duty to give access on the access providers' behalf. The exception to this rule arises where access to the network is essential for the company requesting access in order to compete on a downstream market. The Commission seems to be concerned that refusal in such a situation would limit the development of new markets, or new products on those markets (contrary to Article 82 (b) EC) or impede the development of competition on existing markets. As a result, the Commission believes that a refusal having these effects is likely to be considered an abuse of a dominant position.¹⁶⁴

The Access Notice makes clear reference to the Commission's decisions in the transport field¹⁶⁵ where the Commission ruled that a firm controlling an essential facility must give access in certain circumstances. The same principles apply to the telecommunications sector.

The following elements will be used by the Commission to determine whether access to an essential facility should be ordered:

- (a) Access to the facility in question is generally essential in order for companies to compete on that related market

¹⁶⁴ Ibid, paragraph 88.

¹⁶⁵ The Stena Sealink and port of Rodby decisions analysed above.

This means that it will not be sufficient that the position of the company requesting access would be more advantageous if access were granted. The refusal of access should make the activity on the downstream market impossible or seriously and unavoidably uneconomic. Such a situation will arise when duplication of a facility is not possible due to physical, geographical or legal constraints or public policy considerations.¹⁶⁶ This test is in line with the jurisprudence of the European Courts and in particular the first test set out under *European Night Services* which provides that the refusal of access to the facility must have an effect on competition on the relevant market because access to the facility is necessary in order for competitors to be active on the market (i.e. there is absence of “interchangeability”). In similar language to the one used in the *Oscar Bronner* case, the Commission adds that it would not be sufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory.¹⁶⁷ In this regard the Access Notice is in line with the criterion of “objective competitor” set out by the CFI in *European Night Services*. However, it does not go as far as the ECJ in *Oscar Bronner* which added that the complainant must show that it is not economically viable for an “objective competitor” comparable in size to the holder of the alleged essential facility to replicate or duplicate the actual facility in question. The stricter test of *Oscar Bronner* therefore applies here and has to be read in conjunction with the Access Notice.

An additional point that needs to be made here is that although the Commission sets strict standards for the application of the essential facilities doctrine, it adds that in the telecommunications sector, even though infrastructures may, since 1996, be used for liberalised services, it will be some time before there is a satisfactory alternative to the facilities of the incumbent operator. At present, the alternative infrastructure does not offer the same dense geographic coverage as that of the incumbent telecommunications operator’s network. This means that although the Commission generally favours a strict interpretation of the essential facilities doctrine, it leaves the door open for a wider application of the essential facilities doctrine in the telecommunications sector because it believes that access to the incumbent’s infrastructure will be necessary until alternative infrastructures develop further.

(b) There is sufficient capacity available to provide access

¹⁶⁶ In the transport sector, that test would be satisfied for airports or ports which for public policy, environmental and even geographical reasons cannot be duplicated. See below for an analysis of the meaning of “true barrier to entry” after *Oscar Bronner* and the Access Notice.

¹⁶⁷ Access Notice, supra note 1, endnote 68.

There is a certain overlap between this criterion and the fifth (the absence of an objective justification) and it is not clear why the capacity limit is considered separately. The requirement that there be sufficient capacity for the essential facilities doctrine to apply contrasts to the Commission's position in the *Port of Rodby*¹⁶⁸ case where it held that the inability to accommodate a new entrant on the basis of existing capacity would not be a sufficient justification for refusing access to an essential facility.¹⁶⁹

Moreover, the Access Notice is silent as to the legal conclusion to be drawn where capacity is limited. If capacity cannot be increased, the competition rules would argue for an allocation of capacity on an objectively justifiable basis. A different solution would risk encountering the charge of discrimination.¹⁷⁰ In certain circumstances there may be an obligation on the dominant operator to expand the available capacity. This would appear to be a legitimate result where only the dominant operator is in a position to expand capacity, indeed where such a company may be the only company in a position to do so, and has a guaranteed return on its investment through third parties wishing to purchase access.¹⁷¹

- (c) There is a restriction of existing or potential competition or failure to meet demand for an existing or new service

This criterion can be summed up as the effect on competition or market development criterion. It is quite wide in its nature as it envisages not only direct effects on competition but the impeding of technical development by preventing the development of a new product or service.

The Access Notice also clarifies the *Magill* judgment¹⁷² in that it makes it clear that preventing the emergence of a completely new market would be considered as having an effect on competition or on market development (in *Magill* the refusal to provide information prevented the publishing of a single independent weekly magazine giving all the week's BBC and RTE programs which was not a clear completely new product). This means that a refusal which prevents the emergence of a new product market could be abusive, which by implication would

¹⁶⁸ *Port of Rodby*, supra.

¹⁶⁹ *Ibid*, paragraph. 7-20, note 30.

¹⁷⁰ J.Faull & A.Nickpay, supra note 49, p. 820, paragraph 11.235.

¹⁷¹ This was the conclusion reached by the Commission in *FAG-Flughafen Frankfurt/Main AG*, supra.

¹⁷² Joined cases C-242/91 P and C-242/91 P, *Radio Telefis Eiremann and Independent Television Publications Limited v Commission*, supra.

mean that refusals to provide access could be abusive even where the essential facility operator is not present on the market for which access is being requested.¹⁷³

- (d) The company seeking access is prepared to pay the reasonable and non-discriminatory price and accept non-discriminatory terms and conditions for access

This is a straight-forward criterion whereby the party requesting access must be prepared to accept non-discriminatory terms and conditions of access.

- (e) There are no objective justifications for refusing to provide access

The concept of objective justification has been used by the Commission to justify situations which would have otherwise been considered an abuse of a dominant position.¹⁷⁴ Objective justification was also specifically mentioned by the ECJ in *Oscar Bronner* as a possible reason for refusing to grant access. As indicated above, there is a certain overlap between this criterion and the criterion of limited capacity. Examples of objective justification include an overriding difficulty of providing access to the requesting company¹⁷⁵, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place the new product or service on the market. It would thus seem that the possibility of a return on investment is recognised as a legitimate justification for a refusal to grant access. This is in contrast to the Commission's earlier decision in *British Midland/Aer Lingus*, where it seemed to refuse that a loss in revenues could be a legitimate justification to refuse access.¹⁷⁶

According to the Access Notice, a careful case-by-case analysis will be necessary as it is particularly important in the telecommunications sector that the benefits to end-users which will arise from a competitive environment are not undermined by the actions of the former state monopolists in preventing competition from emerging and developing.¹⁷⁷ In determining whether an abuse of a dominant position has occurred with regard to refusal to grant access for the

¹⁷³ Faull & Nickpay, supra note 49, p.821, paragraph 11.236.

¹⁷⁴ '*Objective justification*' has been considered by the Commission as justifying what otherwise would have been considered an abuse of a dominant position in, among others, the Frankfurt airport case analysed above, supra.

¹⁷⁵ The term "*overriding difficulty*" will probably include the essential requirements which are laid down in the Interconnection Directive, i.e. security of network operations, maintenance of network integrity, interoperability of services and protection of data; see below the interconnection section for a more detailed analysis.

¹⁷⁶ *British Midland/Aer Lingus*, supra, paragraph. 7-32, note 94.

¹⁷⁷ Access Notice, supra note 1, paragraph 91 (e).

purposes of a service where no other operator has been given access by the access provider to operate on that services market, the Commission will take into account both the factual situation in the relevant and other geographical areas, and where relevant, the relationship between the access requested and the technical configuration of the facility.

Finally, the Access Notice notes that there are three important elements relating to access which could be manipulated by the access provider in order to refuse access. These are:

(f) Delays

The Commission will seek to compare the response to a request for access with (i) the usual time frame and conditions applicable when the responding party grant access to its facilities to its own subsidiary or operating branch, (ii) responses to requests for access to similar facilities in other Member States, (iii) the explanations given for any delay in dealing with requests for access;

(g) Issues of technical configuration

In principle, competition rules provide that the party requesting access must be granted access at the most suitable point for the requesting party, provided that this point is technically feasible for the access provider. In that regard, questions of technical feasibility may be objective justifications to a refusal to give access.

(h) Excessive pricing

As well as being abusive in itself¹⁷⁸, excessive pricing may also amount to effective refusal to grant access.

2.1.7 The relationship between refusal to supply and the doctrine of essential facilities

As to the relation between the essential facilities doctrine and refusal to supply one could think that the essential facilities doctrine is either a special instance of refusal to supply or, a complete restatement of earlier law. It seems that by looking at cases such as *Commercial Solvents* which is the typical refusal to supply case, the essential facilities doctrine has fairly similar effects as a refusal to supply case. However, looking at *United Brands*, it is clear that the supply of bananas by United Brands was not essential, as alternative reasonable sources of supply

¹⁷⁸ See above in the list of abuses of dominant position relevant to access in the telecommunications sector.

existed. This suggests that the essential facilities doctrine is not intended to replace existing law but rather is viewed as an additional refinement to the principles of Article 82 EC. This is further evident from the Commission's decision in *Sealink* which falls squarely within the tradition of monopoly leveraging/refusal to deal cases under Article 82 EC. Although it appears that *Sealink* may have held a dominant position in the market for ferry services, the Commission based its Article 82 EC analysis on dominance in the market for providing harbour services. The Commission could have found an abuse based on the unjustified refusal to allow access to the port without invoking the essential facility concept but preferred using the essential facilities doctrine. Therefore, the introduction of the doctrine by the Commission in its decisions was clearly intentional and establishes new principles of EC competition law.

A distinction has been proposed for cases that might come under the ambit of the essential facilities doctrine.¹⁷⁹ On the one hand there are the 'classical' cases and on the other 'bottleneck' cases. Classical cases are cases such as *Commercial Solvents* where the facility is a well-identified good or service that is traded in a separate and established market, as was the case in *Commercial Solvents* with aminobutanol, the raw material used to produce ethambutol. Bottleneck cases, such as *Oscar Bronner*, are cases where the facility is part of a firm, often not very clearly identified as a separate item, such as the home delivery network of *Mediaprint* in *Oscar Bronner*, or intellectual property in the *Magill* case or even network components such as the local loop in a telecommunications network. A category of cases could be placed somewhere in between these two types of cases, with *Telemarketing* as an example of that category. There, the facility is already individualised to some extent, but it is not really traded on a wide scale, as was the case with advertising on RTL. Other examples of such 'middle' cases include computer reservation systems, as in *London European/Sabena*, the S.W.I.F.T. data communications network for financial institutions and slots at ports such as in *Rodby* or *Sea Containers*.

The distinction between the above categories of cases is reflected throughout the competition analysis. First, as to the determination of the competitive concern that should be addressed by the law in each case. In the classical cases, the concern is the dominant position of the owner in the market for the facility, and the possibility to restrict competition on the end-user market by cutting off the supply of the facility.¹⁸⁰ Intervention by the authority which enforces competition is therefore concerned with maintaining trade flows in order to protect the end-users interests. In bottleneck cases, dominance becomes far less meaningful, and it is replaced by the notion of

¹⁷⁹ P.Larouche, supra note 3, p.203 and 204.

¹⁸⁰ See for example the facts of *Commercial Solvents* and *United Brands*, supra note 52 and 60.

essentiality as the key competitive concern. Here, attention is focused on access to the essential facility and not to the question of supply. Intervention by the authority is aimed at securing access for competitors.¹⁸¹

Differences between classical and bottleneck cases also exist as to the grounds for intervention. Although, cases like *Sealink* appear very similar to classical refusal to supply cases there are significant differences as to situations which led the Commission to intervene in each case. In classical cases, the intervention responds to anti-competitive behaviour such as a discrimination, price squeeze or some other behaviour amounting to refusal to deal resulting in the reduction or elimination of competition. In contrast, bottleneck cases such as *Sealink* suggest that, where a firm controls an essential facility, it is under a strict duty not to discriminate that may go beyond the prohibition of discrimination under Article 82(c). This means that a firm controlling an essential facility has greater obligations than generally apply to dominant firms and reflect the fact that such firms are both administrators of an infrastructure and operators on a market utilising that infrastructure. Second, another consequence of a firm being considered as controlling an essential facility is the suggestion that Article 82 EC imposes special procedural obligations on firms that control an essential facility. The Commission, in *Sealink* found it unnecessary to consider whether there were factual justifications for refusing access and found that the fact that *Sealink* had failed to negotiate with its customers as an independent operator sufficed to create at least a presumption of abuse. Owners of bottleneck facilities are under a general duty to deal with third parties that require access to such facilities, and that this duty is independent of behavioural considerations. The duty is positive, i.e. it binds the owner of the facility to help its competitors, and not merely to refrain from anti-competitive conduct towards them.¹⁸² The grounds for intervention in bottleneck cases appear therefore more structural in nature when compared to classical cases where behavioural grounds for intervention are used.

Finally, remedies also differ between classical and bottleneck cases. In classical cases, the remedy imposed by the authority usually consists in ordering that trade flows be resumed on former conditions. For the owner of the facility this typically consists in an obligation to reactivate a customer relationship (or not terminating it), adding a customer to an existing list or even opening an existing interface to a new party. In contrast, in bottleneck cases, the remedy usually consists in opening the facility to third parties. As the remedy applies to a specific property, the difficult issue of access pricing has to be tackled. Enforcement will also be complicated as the

¹⁸¹ This means that a firm can be found to be in a dominant position just because it controls a facility which is considered essential. This finding implies that the notion of dominance has been extended beyond its traditional understanding.

¹⁸² Opinion of Advocate General Jacobs in *Oscar Bronner*, supra, note 206 at paragraph 34 and 50.

intervention order will be complicated and might even be open-ended with regard to some issues.¹⁸³

The debate as to the relation between refusal to supply and the doctrine of essential facilities loses much of its relevance after the *Oscar Bronner* judgment. This is because by restricting the number of cases where a competitor can successfully invoke the doctrine to cases where it can be proven that the market could not establish a competing system, the ECJ limited the number of 'true' essential facilities cases to very limited situations. If a facility is retained by a dominant undertaking for its own use it will not be forced to give access to it provided that a theoretical competitor (what the ECJ called the "objective competitor" comparable in size to the holder of the alleged essential facility) can enter the market and compete.

2.1.8 Rationale of the essential facilities doctrine and relationship with Article 86 EC

It is arguable that the rationale for the introduction of the doctrine in EC competition law was to facilitate liberalisation. In the Commission's 22nd Report on Competition Policy¹⁸⁴, the Commission said that its *British Midland/Aer Lingus* decision was taken within the context of a period when "*the European air transport industry was being liberalised*" and argued that "*airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to established carriers*". This reflects the fact that the introduction and development of the essential facilities doctrine in the EU coincided with an important liberalisation effort in industries such as telecommunications and transport. These liberalisation measures would be of little value if the dominant incumbents were free to integrate forward and discriminate in favour of their own downstream operations. Regulated or state-owned companies often own facilities that are essential for all or most of their downstream competitors. In fact, it is correct to say that the essential facilities doctrine is the follow-up of Article 86 EC (previously Article 90 EC) which basically prohibits any measures taken or maintained by the Member States in relation to public undertakings which are contrary to the Treaty.¹⁸⁵ The Commission in *Rodby* considered that the refusal to give access to Stena was due to a State measure and not to DSB's behaviour. This led the Commission to refer to the ECJ's case law on this area, which provides that: "*where the extension of the dominant position of a public undertaking or an undertaking to which the State has granted exclusive rights resulted from a*

¹⁸³ P.Larouche, supra note 3, p.203 to 211.

¹⁸⁴ European Commission, 22nd Report on Competition Policy, 1992, point 219.

¹⁸⁵ J.S.Venit and J.J.Kallaugher, *Essential Facilities: A Comparative Law Approach*, Fordham Corporate Law Institute, 1994, p.343.

*State measure, such a measure constituted an infringement of Article 90 (now Article 86 EC), read in conjunction with Article 82 EC".*¹⁸⁶

2.1.9 Characteristics of the essential facilities doctrine

One of the fundamental principles of the Treaty of Rome is that any company, even a dominant one, has a right to compete actively by all permitted methods. Thus, it is normal that it is entitled to keep and use any competitive advantage it might have acquired through research and development, intellectual property or other methods. However, a duty to provide access to a facility arises if without such access there is an insuperable barrier to entry for competitors of the dominant company. The same duty arises if without access competitors would be subject to a serious, permanent and inescapable competitive handicap that would make their activities uneconomic. The ECJ with *its Commercial Solvents* and *United Brands* judgments¹⁸⁷ established that 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 nor the exceptions to this principle have yet been fully clarified, it initially made it unnecessary to develop a special category for essential facilities cases. Subsequently, the Commission recognised that in situations in which access to a facility is essential, a strict rule is necessary requiring supply on non-discriminatory terms to competitors. Essential facilities cases have been developed therefore as specialised examples of general rules about discrimination and competitive handicaps created by dominant companies. The rationale behind the application of the doctrine in the EU is that it will cause consumers to be offered better services or goods at better prices.

One could wonder how access to a facility owned by the dominant company takes place. In fact, the Commission's approach does not deprive the dominant company from ownership of the essential facility. The dominant company may charge for the use of the facility provided that overall net charges are not less than those it charges to its competitors. It is important to be able to distinguish access that is essential from access that would merely give a competitive advantage. In the latter case the Commission would not intervene to impose access, as it is not the task of competition law on companies to create equal conditions of competition for all companies. The test to distinguish one situation from the other seems to be whether the

¹⁸⁶ Judgment of 13 December 1991 in case C-18/88, paragraph 10 and 21, confirmed in the Judgement of 17 November 1992 in cases C-271, 281 and 289/90, paragraph 36.

¹⁸⁷ See above for an analysis of these cases.

handicap resulting from the denial of access is one that can reasonably be expected to make competitors activities in the market in question either impossible or permanently, seriously and unavoidably uneconomic.¹⁸⁸ This is an objective test which denies the application of the doctrine to a competitor merely arguing that duplicating the facility is difficult or expensive for it.

2.1.10 The meaning of 'true barrier to entry' after *Oscar Bronner* and the Access Notice

It is worth analysing what the meaning of a true barrier to entry means under *Oscar Bronner* and *European Night Services* as well as under the Access Notice. In *Oscar Bronner*, the Advocate General suggested to limit the application of the essential facilities doctrine to cases in which the dominant undertaking has "a genuine stranglehold" on the downstream or related market. Therefore, for an asset to be an essential facility, two aspects must be proven as necessary but not sufficient conditions for mandatory access:

- the owner of the facility must be the only source of access to the asset; and
- the asset must be the only means of accessing the downstream or related market.¹⁸⁹

The latter condition will arise if there is an insuperable barrier to entry. This will be the case where duplication of the facility is impossible or extremely difficult owing to the physical, geographical or legal constraints, particularly in cases in which the creation of the facility took place under non-competitive conditions, for example through public funding.¹⁹⁰ This could clearly be relevant to the telecommunications sector where the demands of universal service¹⁹¹ required telecommunications operators to connect all end-users regardless of the individual cost involved. Universal service is explicitly recognised under both the ONP rules and the Commission's liberalisation directives as a continuing issue in the sector. In those Member States where there is a continued universal service obligation imposed on a particular operator,

¹⁸⁸ J. Temple Lang, supra note 115, p.284.

¹⁸⁹ M. Dolmans, supra note 125, p. 11.

¹⁹⁰ Opinion of Advocate General Jacobs on Case C-7/98, supra note 161, paragraph 66.

¹⁹¹ A universal service obligation will typically consist of providing a basic voice telephony service to all who require it. This obligation, without more, would raise no specific regulatory problem other than ensuring that tariffs were not anti-competitive (i.e. that they are out of line with the costs incurred to provide the service). Moreover, an operator would willingly supply all customers irrespective of location, assuming that it could recover the costs of doing so. This is the point where universal service obligations take all their importance. The requirement to supply all customers irrespective of location is normally coupled with a duty to supply at uniform cost of access, coupled with geographically averaged tariffs or at least an obligation to supply at a reasonable cost. This means that there will be a certain percentage of customers, the provision of services to whom will be on a loss-making basis for the operator. It is quite clear that the provisions of services to those customers would not be made if the market was left to itself.

it could be said that certain aspects of the network of that operator fall within the Access Notice's definition of facilities which are not duplicable. The imposition of the universal service obligation almost serves as proof of the fact that certain networks would not have been created without some kind of coercion and hence are not duplicable.¹⁹² This reasoning should also apply to Member States which imposed a universal service obligation in the past but no longer do so as it is unlikely that the 'duplicability' of certain networks will have changed.

The language of the Court in *Oscar Bronner* shows that it is concerned only with true "*long-term barriers to entry*" in the economic sense. This probably excludes a wide interpretation of what constitutes a barrier to entry. Thus, an incumbent's economies of scale should not always be considered as a barrier to entry.¹⁹³ The incumbent had to invest time and money into growing to its current size to achieve its current economies of scale, and there is no reason why the new entrant would not have to do the same, so long as the costs and time frame associated with that are comparable. This might not be the case if demand is stagnant and there is a minimum efficient scale of operation that does not allow room for more than one market player. Also, if entry involves very significant sunk costs (such as duplicating a fixed telecommunications network) and the incumbent might engage in long term price cutting, then the new entrant is facing large risks that the incumbent did not have to face and a situation of genuine stranglehold might arise.

In practice, economic viability is a relative concept that will have to be analysed on a case by case basis based, perhaps, on the criterion of whether a reasonable investor would invest in market entry. If it could be shown that a reasonable investor would invest in market entry then it is probable that no genuine stranglehold will be considered to exist and the dominant firm will have no duty to provide access. Also, no duty to provide access exists if the dominant company is vertically integrated so that it does not provide the facility to independent users. The key test is whether the company's downstream and upstream operations are merely part of the same business, or separate in nature. If the operations are separated, a duty to provide access arises. So, for example, an electricity generating company, which also owns an electricity grid, might be obliged to give access to the grid to other generators or distributors, because the generation

¹⁹² In that regard see: M. Cave and P. Crowther, Meeting Universal Service Obligations in a Competitive Market: European Union Plans and Experience, Paper presented to the Wissenschaftliches Institut für Kommunikations- und Informationsdienste Conference on the Future Organisation of Telecommunications in Europe, 11-12 December 1995.

¹⁹³ The Court specified clearly that "*it is not enough to argue that it is not economically viable by reason of the small circulation of the...newspapers to be distributed*", but that the analysis should be based on the assumption that the new entrant would achieve alone or together with others "*a circulation comparable to that of the daily newspapers distributed by the existing scheme*", *Oscar Bronner*, *supra*.

and the distribution of electricity are separate activities, and it is normal practice in the industry to use a grid for electricity produced by other generators.

The ECJ in its *Oscar Bronner* judgment took on board the criticisms voiced against the use by the Commission of the doctrine and severely restricted its application by putting forward a new test for the application of the doctrine. In the future, for the essential facilities doctrine to apply it is not enough for a plaintiff to argue that duplicating the facility is difficult or expensive for it. Rather, the plaintiff should show that the duplication is impossible or unreasonably difficult for all efficient new entrants.

In the Access Notice, the Commission seems to recognise the basic thinking behind *Oscar Bronner* as to the 'essential' element of the facility to which access is requested, but it adds that in the telecommunications sector it will be some time before alternative infrastructures will be able to be satisfactory alternatives to the facilities of the incumbent operator.¹⁹⁴ This thinking is further reinforced in the Communication on unbundled access to the local loop.¹⁹⁵ There, the Commission looked into the question of whether *Oscar Bronner* would be satisfied if applied to the question of access to incumbents' local networks. The Commission described in some detail why the local loop infrastructure satisfied the *Oscar Bronner* test,¹⁹⁶ in particular by providing that: *"Given the size of the investment required, the absolute cost of nation-wide duplication of the incumbents' network with a similar population coverage is likely to be a barrier to entry for any competitor. The infrastructure appears to be with present technologies economically unfeasible, or unreasonably difficult to duplicate at a nation-wide level, in a reasonable time period. A refusal from an incumbent to give access to competitors on its local loop is thus likely to eliminate the possibility for new entrants to compete at all on the nation-wide market"*.¹⁹⁷

The Commission's position in the Access Notice (and the Communication on unbundled access to the local loop) means that it still feels that there is room for future applications of the essential facilities doctrine in the telecommunications sector. This is even though the Commission recognises that under *Oscar Bronner* the test for the application of the essential facilities doctrine has become stricter than it used to be. Of importance is also the fact that the Commission stresses that there will be a duty to provide access to a new entrant which intends

¹⁹⁴ Access Notice, supra note 1, paragraph 89.

¹⁹⁵ Communication on unbundled access to the local loop, supra note 84, chapter 3.2.

¹⁹⁶ H.Ungerer, Access Issues under EU Regulation and the Anti-Trust Law - The Case of Telecommunications and Internet Markets, supra note 9.

¹⁹⁷ Communication on unbundled access to the local loop, supra note 84, paragraph 38.

to provide a new product or commence a new service. Therefore, in the telecommunications sector, the Commission will favour requesting access to the dominant access provider in cases where the new entrant wishes to introduce new products or services in existing markets.¹⁹⁸

2.1.11 Assessment and criticisms of the European Commission's policy on essential facilities

The Commission has defined an essential facility as being a "*facility or infrastructure, without access to which competitors cannot provide services to their customers*".¹⁹⁹ This definition has been coupled with a general prohibition of those holding such facilities not to treat the activities of other economic operators less favourably than own activities unless such discrimination can be objectively justified. In order to determine whether there is discrimination and whether the conduct of the dominant undertaking is abusive, the Commission introduced in the Access Notice a test which consists of comparing the behaviour of the dominant undertaking with that of an independent body which would hold the activity without being active on related markets. This test is welcome as it regulates the application of the essential facilities doctrine. However, as for refusal to supply, the scope and exceptions to the principle should be clarified as much as possible.

There are clearly risks carried by the Commission's approach of using the essential facilities doctrine. European competition authorities could see a rise in the number of complaints alleging that a competitor holds an essential facility and that access should be provided. As was pointed out above in the analysis of the *Commercial Solvents* case, such claims have the potential to seriously undermine the incentive for firms to innovate. A company that invests very significant sums of money in developing a facility that is later considered essential by the Commission or the Court faces the risk of incurring very significant sunk costs that will not give any competitive advantage. This could result in innovations not occurring at all, or being delayed, or occurring on a lesser scale than otherwise. The monopoly be it temporary, given by a new product through intellectual property protection or just novelty, often is necessary for the viability of a new project. Some authors²⁰⁰ suggest that the essential facilities doctrine should not be applied to new assets where these have been developed in a risky commercial environment as it will result in

¹⁹⁸ For a critical review of the Commission' approach see; N.Nikolinakos, Access Agreements in the Telecommunications Sector - Refusal to Supply and the Essential Facilities Doctrine under E.C. Competition Law, ECLR, 1999, Issue 8, p.408.

¹⁹⁹ B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd., supra note 116, paragraph 1.3.30.

²⁰⁰ A.Overd and B.Bishop, Essential Facilities: The Rising Tide, ECLR, 1998, Issue 4, p.181.

less investment in research and development which in turn harms consumers. This point has been accepted by the European Courts.²⁰¹

The European Courts' *European Night Services* and *Oscar Bronner* judgments²⁰² limit severely the application of the Commission's essential facility doctrine. The fact that the undertaking requesting access must establish that the market could not sustain a competing system at all and not just that it would be uneconomic to establish a competing system answers the criticisms voiced above as to the risk of the doctrine being used to avoid the competition rules. However, the application of the essential facilities doctrine in the telecommunications sector raises the general telecommunications policy issue of knowing whether to promote the creation of alternative infrastructure or the access by competitors to existing infrastructures thereby promoting service competition. In stark contrast to the ECJ's ruling in *Oscar Bronner*, the Commission in the Access Notice elected to favour access to existing networks by competitors. This is in line with the policy choice made in the liberalisation legislation such as the interconnection Directive (a sector-specific Directive which regulates the linking together of telecommunications networks and infrastructure).²⁰³ The Commission's recent drive to unbundle the local loop is a further example of a policy aimed at service rather than infrastructure competition. This choice was probably dictated by the realisation that infrastructure competition is very slow in developing and that therefore the only way to bring in more competition is to force incumbents to give access to their networks. The Access Notice reinforces this point by recognising a similar principle for forcing entry to infrastructures as in *Oscar Bronner* but adding that in the telecommunications sector there are monopolies or virtual monopolies in the provision of network infrastructure for most telecom services. Competition in the downstream markets will continue to depend upon the pricing and conditions of access to upstream network services that will only gradually reflect competitive market forces. Therefore, situations can arise where new entrants seek to offer new products or services which are not in competition with products or services already offered by the dominant access provider, but for which this operator is reluctant to provide access. This would be an abuse of a dominant position which may lead the dominant access provider to be forced to give access to its facility.

The down side of the Commission's pro-access attitude to telecommunications infrastructure is that it will even further discourage new entrants from investing in infrastructure to the extent that they can get cheap and immediate access to existing infrastructure. Competition could thereby

²⁰¹ *Oscar Bronner*, supra note 156.

²⁰² See above for an analysis of these cases.

²⁰³ See the next section of this chapter for an analysis of the interconnection Directive.

be exclusively focused at the service level and be dependent to a certain extent from the incumbents networks which could reduce consumer choice in terms of network infrastructures. Moreover, the promotion of service-based competition necessitates a heavier sector-specific regime which controls access pricing and conditions with the inevitable shortcomings that this brings.²⁰⁴ It could therefore be argued that competition and consumer interest would be better served in the long term by a policy promoting infrastructure competition which would result in competitor network independence. On the other hand, there are concerns as to possible abuses of the essential facilities doctrine by the dominant access provider through a loose interpretation of the objective justifications allowing for access to be refused in true cases of essential facilities. The case law is not clear in this area and although the Access Notice makes an effort in trying to better define the notion of objective justification, more detailed guidelines could help in further alleviating the risks of abusing the objective justifications exception.

A further area that will need care is the difficulty of defining what is a new telecommunications service or product for the purposes of the Access Notice. This relates to the Commission's special care of possible abuses of dominant position resulting from refusing access to operators wishing to introduce new products or services. If a product or service is found to be new too easily, it could lead to uncertainty for firms which are considering investing in new infrastructure and services. This, in turn, could jeopardise the efficient development of new services over the network. On the other hand, if the interpretation of the element of newness of a product or service is too narrow there is a risk that operators which can make a valuable contribution to the telecommunications industry will be excluded from the market.

All these areas of concern will have to be addressed by the Commission either through guidelines or recommendations or through a consistent string of case law in the future so as to give certainty to new entrants. The clear application of the competition rules to issues of access to telecommunications infrastructure will also help to achieve the Commission's long term goal in the sector to progressively replace *ex ante* sector-specific regulation with the *ex post* application of competition rules.²⁰⁵

²⁰⁴ In this regard see Chapter 3 of the thesis.

²⁰⁵ In this regard see Chapter 3 of the thesis and in particular the section analysing the future interrelation between general competition rules and sector-specific rules in the EU.

SECTION B: Sector-specific rules on access to EU telecommunications markets

European sector-specific rules on access to telecommunications markets is not a self-contained category of regulation and can comprise a variety of rules depending on the angle from which they are examined.²⁰⁶ ‘Sector-specific rules on access to telecommunications markets’ has to be understood, within the meaning of this thesis, as covering the ‘*preparatory*’ sector-specific regulation as defined in the Introduction of the thesis. Within ‘*preparatory*’ sector-specific rules, it is only the interconnection rules that will be analysed given that they are at the epicentre of competition law in the telecommunications sector.²⁰⁷

3. Interconnection

Interconnection is the linking of telecommunications (or other) networks in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation. The liberalisation of the previous public utility monopolies in the EU created the possibility for new entrants to compete head on with the old state monopolies. The very significant costs involved in building a network and the efficiency principles that prescribe the connection of networks between operators as opposed to the creation of new ones, means that interconnection has become a prerequisite of a competitive telecommunications market. Not surprisingly, regulators are looking very closely at this issue. As this section will show, the traditional rules of competition law play an increasingly central role in the regulation and control of interconnection agreements.

Depending on the degree of liberalisation of a country, interconnection can take various forms such as network infrastructure interconnection or higher level services-based connections. In each case, the competitive circumstances of interconnection will largely depend on the status and market position of the interconnecting parties. In situations where one operator is still dominant, interconnection conditions could be subject to anti-competitive practices, whereas the same is less likely to happen in fiercely competitive situations where strict market rules are more likely to prevail. In countries like Japan where liberalisation is well advanced, it is multi-operator, multi-service providers that will form the telecommunications environment and it will be common

²⁰⁶ Sector-specific rules on access to telecommunications can be classified in two categories. First, liberalisation measures adopted under Article 86(3) EC which is aimed at ensuring that Member States comply with the EC Treaty and in particular competition rules. Second, harmonisation measures adopted under Article 95 EC which is aimed at ensuring the establishment and functioning of the internal market by harmonising the various laws of the Member States; see L.Garzaniti, *supra* note 4, p.4 to 5.

²⁰⁷ Chapter 3 of the thesis will analyse in more detail the regulatory framework of EU sector-specific rules for the purposes of the analysis of the interrelation between general competition rules and sector-specific rules in the EU.

for customers to have connections to different networks. Without interconnection between the various networks those customers will not be able to inter-communicate which will result in inefficiencies.

The ideal is to reach a fully competitive market that provides the best possible deal for customers in terms of quality, choice and value for money. Competition at the network level ensures competitive supply of the network services and consequently promotes competition at the service level. It will also lead to a market where competition is the driving force at all levels and where regulation can ultimately pull-back as competition takes over. Inevitably, interconnection agreements will multiply as companies see new opportunities cropping-up as a result of the liberalisation process.

3.1 Interconnection basics

3.1.1 The nature of interconnection

Interconnection is the linking together of networks and as such is the cornerstone of modern telecommunications networks. As the world's telecommunications infrastructure has grown, so has the drive for what is termed '*interconnectivity*', the linking together of those networks. This international networking is now a very mature and sophisticated aspect of the telecommunications scene. Liberalisation has acted as an agent promoting interconnection as the gradual opening-up to competition of telecommunications infrastructure and services increases.

The development of new technology, especially quick in the telecommunications sector, means that new services such as mobile telephony and new advanced services such as the internet have developed alongside the traditional fixed telecommunications network. The new services may be fixed, mobile and satellite-based or serving a specialised requirement with one common characteristic - the necessity to reach and be reached by the consumers of the traditional telephony network. However, the ability to reach and be reached by the general public (so-called '*ubiquity*') is traditionally enjoyed by what used to be the national monopoly provider (the incumbent), which during the monopoly years built the telephony network that covers the whole nation. Interconnection between one network and another puts the incumbent in a position of being a '*messenger*' for the operator of that network in that it both collects and delivers calls passed to it by the new operator of that network or destined for the operator's customers. Equally, the new operator is also a messenger for the incumbent with respect to calls passed to it by, or destined to it and its customers.

These arrangements by their nature involve the provision of a service (the conveyance of a message) by one party to another, which should be supported by a set of technical, procedural

and financial arrangements, not least of which is the remuneration for the provision of these services, i.e. interconnection charges. The interconnection charges are given a binding nature by enclosing them in an interconnection agreement.²⁰⁸

An interconnection agreement can be defined as: "*the physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation. Services may be provided by the parties involved to other parties who have access to the network*".²⁰⁹ One can distinguish two types of interconnection, the one physical, involving engineering work at a specified interface at a point of connection, the other functional, involving a high level interface accessed through a computer terminal. The physical interconnection would apply in the case of connection between two network infrastructures (fixed link facilities) and support all types of basic and enhanced services. Typically high-level interfaces would support intelligent network features such as freephone or account/credit card calling.

3.1.2 Types of interconnection agreements

Interconnection agreements are not fixed in their variety and undoubtedly new types will emerge in the future. However, a minimum of common services can be distinguished:

- fixed-to-fixed (including incumbents and alternative infrastructure providers);
- fixed-to-mobile/ mobile-to-fixed;
- mobile-to-mobile;
- fixed-to-satellite/ satellite-to-fixed;
- public-to-private (e.g. closed user group)/ private-to-public);
- public-to-specialised (e.g. terrestrial flight telephone system)/ specialised-to-public);

²⁰⁸ European Commission, Competition aspects of interconnection agreements in the telecommunications sector, Coudert Brothers, 1995, p.14.

²⁰⁹ Definition taken from EC Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199/32, 26/07/97.

- public-to-reseller (e.g. single ended PSN connection).

3.2 Competition and interconnection in the EU

Competition in liberalised services can be effective only in so far as service providers are allowed to install their own networks or at least to use alternative networks. Telephony networks cannot be operated in isolation on any meaningful scale, so that new and existing networks will inevitably have to conclude interconnection agreements between themselves, as is already the case between mobile network operators and fixed network operators. The ability to conclude fair and transparent interconnection agreements will be a key to effective competition in the sector.

If new entrants are to benefit significantly from the opening of the market to competition, there is a need to avoid uncertainty as to the form that interconnection agreements may take in compliance with the competition rules. The European Commission identified the relation between interconnection and competition rules in its Guidelines on the application of EC competition rules in the telecommunications sector. The Guidelines provide that: *"Given the competition context in the telecommunications sector, the telecommunications operators should be allowed, and encouraged, to establish the necessary co-operation mechanisms, in order to create - or ensure-Community-wide full interconnectivity between public networks, and where required between services to enable European users to benefit from a wider range of better and cheaper telecommunications services. This can, and has to be done in compliance with, and respect of, EEC competition rules in order to avoid the diseconomies which otherwise could result. For the same reasons, operators and other firms that may be in a dominant market position should be made aware of the prohibition of abuse of such positions."*²¹⁰

Although the Guidelines date back to 1991 they are of great importance as they established the basic principle that EC competition rules will apply to interconnection and the telecommunications sector generally. The Access Notice²¹¹ complements the 1991 Guidelines and analyses competition issues raised by access issues which includes interconnection.²¹²

3.3 EU Regulatory framework for interconnection agreements

²¹⁰ 1991 competition guidelines, supra note 75.

²¹¹ Access Notice, supra note 1.

²¹² See in particular the abuse of dominance section above which analyses abuses that apply to access situations such as interconnection.

The following sections will mainly analyse the framework of the interconnection Directive 97/33/EC²¹³ that sets out a Europe-wide set of rules on interconnection in telecommunications. This Directive will be replaced by a new access and interconnection Directive which will enter into force in July 2003. However, the core provisions of Directive 97/33/EC will continue to have effect in order to ensure continuity of existing agreements and avoid a legal vacuum. Therefore, the analysis of these core provisions is still necessary and is the object of the following paragraphs of this section.

The interconnection Directive is taken in application of the so-called ONP framework. ONP is defined as "*the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services*".²¹⁴ In short, ONP rules and their transposition into national legislation are the sector-specific rules that lay down the regulatory framework for access to the EU's telecommunications industry. The ONP rules are thus intended to facilitate the provision of services using public networks and/or public services. The relationship between ONP rules and competition rules is the object of a specific section of Chapter 3 of this thesis on the interrelation between competition rules and sector-specific rules in the EU and Japan and is therefore not further studied here.

3.3.1 The interconnection Directive 97/33/EC

(a) ONP and the interconnection Directive

The Directive in its recitals makes a clear reference to ONP provisions and on the need to harmonise interconnection conditions throughout the EU as an essential prerequisite for the establishment and proper functioning of the internal market for telecommunications services.

(b) The aim of the Directive

The interconnection Directive aims at establishing a regulatory framework for securing in the Community the interconnection of telecommunications networks and in particular the interoperability of services, and with regard to ensuring provision of universal services in an environment of open and competitive markets.²¹⁵ It concerns the harmonisation of conditions for

²¹³ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).

²¹⁴ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ 1990 L 192/1.

²¹⁵ *Ibid.*, art. 2.1 (b) and (c).

open and efficient interconnection of and access to public telecommunications networks²¹⁶ and publicly available telecommunications services.²¹⁷

In the recitals of the Directive clear reference is made to competition principles. Fair, proportionate and non-discriminatory conditions for interconnection and interoperability are key factors in fostering the development of open and competitive markets. Therefore, the Directive has a double aim. First, it aims at providing for the establishment of a framework for interconnection. Second, it aims at ensuring universal service. Universal service is a fundamental concept of telecommunications policy and is defined as a minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price.²¹⁸

(c) The regime established by the interconnection Directive

Article 3 of the Directive provides that Member States shall take all necessary measures to remove any restrictions that prevent organisations authorised by Member States to provide public telecommunications networks and publicly available telecommunications services from negotiating interconnection agreements between themselves. Clear reference is made to competition rules as rules subject to which any agreement between operators should take place. The framework set by Article 3 is one where operators agree between themselves technical and commercial arrangements for interconnection but subject to the provisions of the Directive, especially Article 4.

Article 4 is the core provision of the Directive as it provides for the rights and obligations for interconnection. Subject to some qualifications certain organisations have established rights to

²¹⁶ Telecommunications networks means transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means (therefore this definition encompasses telecommunications networks operated by cellular carriers).

²¹⁷ Public telecommunications network means a telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services.

²¹⁸ Universal service is a '*public interest*' sector-specific rule as defined in the introduction to this thesis. See Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ 1990 L 192/1, art. 2.1(g); see also the Council Resolution of 7 February 1994 on universal service principles in the telecommunications sector, OJ No C 48, 16.2.1994,p.1. Traditionally the universal service obligation came as an obligation of the ex-monopolists, the incumbents, which did not have to face any competition but had the obligation to build and run efficiently telecommunications services for the whole of the population of a nation. The application of the universal service obligation in the post-liberalised telecommunications industry comes as no surprise considering that it is recognised as being a fundamental policy of telecommunications regulation.

interconnect with other providers. Annex II of the Directive defines the organisations which have a right to interconnect:

- organisations which provide fixed and/or mobile public switched telecommunications networks and/or publicly available telecommunications services, and in so doing control the means of access to one or more network termination points identified by one or more unique numbers in the national numbering plan;
- organisations which provide leased lines to users premises;
- organisations which are authorised in a Member State to provide international telecommunications circuits between the Community and third countries, for which purpose they have exclusive or special rights;
- organisations providing telecommunications services which are permitted in this category to interconnect in accordance with relevant national licensing or authorisation schemes.

The obligations to negotiate interconnection will come into play when one of the above organisations requests interconnection to another such organisation. This means that the above organisations both have the right and the obligation to negotiate interconnection. On a case-by-case basis the National Regulatory Authority ('NRA') may agree to limit this obligation on a temporary basis and on the grounds that there are technically and commercially viable alternatives to the interconnection requested, and that the interconnection requested is inappropriate in relation to the resources available to meet the request. The role of the NRA is important in that the correct balance between a strict implementation of the Directive's rules and a lenient approach easily allowing limitations to the right or obligation to interconnect is left to it. The Directive, in an effort to limit excessive lenience, provides that any limitation imposed by a NRA shall be fully reasoned and made public.

Perhaps the most radical provision of the Directive is the imposition of tougher interconnection obligations on operators considered as having Significant Market Power ('SMP'). Specifically, the Directive provides that organisations authorised to provide public telecommunications networks and publicly available telecommunications services which have SMP shall meet all reasonable requests for access to the network including access at points other than the termination points offered to the majority of end-users. The Directive sets-out a presumption of SMP when an organisation has a market share in excess of 25% of a particular telecommunications market in the geographical area in a Member State within which it is authorised to operate. Moreover, NRAs may determine that an organisation with a market share of less than 25% in the relevant market has SMP. They can also determine that an organisation with over 25% market share is not an operator with SMP. In either case, the factors to take into

account are the organisation's ability to influence market conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market. To the extent that the Directive imposes different rules depending on the size of the operator concerned, it is considered as imposing a system of '*asymmetrical regulation*'.²¹⁹

Clearly, any ex-monopolist will be well in excess of the 25% benchmark and this provision imposes an obligation to negotiate interconnection for such powerful operators. It is especially small operators with no significant bargaining power that will find this obligation the most useful. Even more stringent obligations are provided for organisations which have SMP in that they cannot refuse interconnection if asked upon reasonable request. Such operators would have to provide interconnection even at points other than the network termination points offered to the majority of end-users. There is a clear link here with general competition rules as one of the possible competition problems that interconnection could raise is offer of interconnection at points which are difficult to reach or uneconomical to reach for new entrants.²²⁰

3.3.2 The new interconnection regime

(a) Background to the reform - the 1999 Review and the adoption of a new telecommunications regulatory framework

On 10 November 1999, the Commission adopted a Communication setting out proposals for reform of the telecommunications regulatory framework ('the 1999 Review').²²¹ The aim of this review was to adapt the existing regulatory framework to rapid technological changes (and in particular the phenomenon of convergence of electronic communications)²²² and to reinforce competition (particularly at local level) in order to maintain and improve Europe's competitive position in the information society.

Following the 1999 Review, a new regulatory framework was adopted. This consists of four Directives and one Decision, which were adopted on 7 March 2002 by the European Parliament

²¹⁹ See in this regard the section of this chapter on abuse of dominant position. See also Chapter 3 of the thesis generally.

²²⁰ See Chapter 3 of the thesis for the analysis of the interrelation between general competition rules and sector-specific rules in relation to access to telecommunications markets.

²²¹ European Commission, Communication on the results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework, COM (2000) 239 final, 26.04.2000.

²²² See Chapter 3 of this thesis for an explanation of convergence of electronic communications.

and the Council. These are the framework Directive, the access and interconnection Directive, the authorisation Directive, the universal service Directive and the radio spectrum Decision.²²³ The data protection Directive, which was part of the initial package proposed by the Commission will be adopted later.²²⁴ In addition, a Regulation on unbundled access to the local loop was adopted in December 2000 and entered into force in January 2001.²²⁵ To these legislative measures should be added accompanying non-binding measures including recommendations, guidelines, codes of conduct and other non-binding measures to provide flexibility within a framework of general principles set out in Community legislation. Under the new regime there will be greater reliance on general competition rules allowing much of the sectoral regulation to be replaced as competition becomes effective.²²⁶

The new regulatory framework was created on the basis of the following policy principles: (i) that it should be based on clearly defined policy objectives; (ii) be the minimum necessary to meet those objectives; (iii) strike the right balance between legal certainty and flexibility; (iv) be technologically neutral; and (v) be enforced as closely as practicable to the activities being regulated.²²⁷ This new regulatory framework will replace in July 2003 the existing framework consisting of 26 legislative texts that comprise the basis of the sector-specific regulation of EC telecommunications, media and information technology.

The reason why the reform was necessary is because the existing regulatory framework has reached its limits in view of technological changes in the telecommunications sector. The existing framework was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants. It has been successful in achieving those aims. But in part because of the success of liberalisation at European level, the market is now changing with increasing speed. The main technological change that was the driver behind the push for reform is the convergence of telecommunications, media and information technology. The Commission considers that the reform was necessary in order to take account of this phenomenon which has

²²³ All published in OJ L108 of 24 April 2002.

²²⁴ The data protection Directive has been the object of an ongoing dispute between the Commission and the Parliament and for that reason has been separated from the new framework package and will be adopted later.

²²⁵ Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ L 366, 30.12.2000, p. 4 to 8. The terms of the Regulation became mandatory within the Member States as of 1 January 2001.

²²⁶ See Chapter 3 of this thesis for an analysis of the interrelation between *ex ante* sector-specific regulation and *ex post* competition rules in the EU and Japan.

²²⁷ European Commission, Communication on the 1999 Review, *supra* note 221.

shaped the information technology, media and telecommunications industries over the last years by bringing together under one single definition all electronic communications services and/or networks involved in the transmission of electromagnetic signals (i.e. fixed and wireless telecommunications, cable television and satellite networks).²²⁸ As a result of convergence, the Commission believes that a single regulatory framework is now necessary.²²⁹ Reflecting this new policy, the terminology that is used makes reference to '*electronic communications services*' rather than the terms used under the current regime of '*telecommunications services*' and '*telecommunications networks*' that restrict telecommunications sector-specific legislation to voice telephony only.

(b) Towards less *ex ante* regulation?

The new interconnection Directive²³⁰ is part of the regulatory framework adopted on 7 March 2002 by the European Parliament and the Council.²³¹ The new interconnection Directive provides that the interconnection and access obligations imposed under the present Directive 97/33/EC shall remain in force until the necessity to maintain these obligations has been reviewed (see below).²³² The new measures will not provide a set of ready-made solutions to pre-defined problems; instead they lay down criteria for regulatory intervention, a maximum list of obligations that a NRA can impose, and identifies those undertakings upon which obligations can be placed. With regard to this last point, the Commission proposes a new definition of '*operator having significant market power*' based on the competition law concept of dominance.²³³ However, it is also made clear that under the new regulatory framework it is the intention of the Commission that the range of obligations that are imposed on undertakings with SMP (i.e. transparency, non-discrimination, accounting separation, access and price control including cost orientation) should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings, in order to avoid over-

²²⁸ Draft Commission Directive on competition in the markets for electronic communications services, (2001/C 96/02), O.J. C96/2, 27.03.2001.

²²⁹ See below the section of Chapter 3 on convergence of electronic communications.

²³⁰ OJ L108 of 24 April 2002.

²³¹ See the section of this chapter on the 1999 Review and beyond for more details on the new regulatory framework.

²³² Article 7 of the new interconnection Directive, *supra* note 230.

²³³ The new definition of SMP will include single company dominance, joint dominance and the leverage of a dominant position onto an associated market. See Chapter 3 of the thesis for an analysis of the new SMP and the consequences this has on the interrelation between general competition rules and sector-specific rules in relation to access to EU telecommunications markets.

regulation.²³⁴ The Commission's aim is to reduce *ex ante* sector-specific rules progressively as competition in the market develops.

(c) A longer transitory period?

A study carried out for the Commission²³⁵ indicates that it may be some time before effective competition becomes a reality in all markets and that therefore the interconnection and access obligations imposed under the current regime are likely to remain in place for some time albeit subject to immediate review by the NRAs in the light of prevailing market conditions (see below). In its new legislation the Commission explains that a number of factors constrain the competitiveness of the market at present. One is the existence of former monopolists that still provide the majority of connections, giving them a degree of bargaining power significantly greater than that of their competitors; another is the existence of bottleneck resources controlled by one or a few operators, such as the local access network; and yet another is the existence of legal barriers to market entry that exist in the mobile sector, where currently the limited availability of spectrum means that the number of competitors has been limited to four or five which has not been enough to ensure competitive pricing in all segments.²³⁶

A novelty of the new legislation is that internet service providers would be covered under the generic approach to access and interconnection outlined above, with NRAs required to ensure fair and non-discriminatory treatment, in particular when an incumbent operator is also an internet service provider.²³⁷

(d) The Review System

Article 7 of the new interconnection Directive provides for a review system of obligations for access and interconnection that were in force prior to the entry into force of the Directive. This concerns mainly measures taken under the core provisions of Directive 97/33/EC. Member States will have to ensure that, as soon as possible after the entry into force of the interconnection Directive, and periodically thereafter, NRAs undertake a market analysis to

²³⁴ Recital 14 of the new Access Directive, *supra* note 223.

²³⁵ European Commission, Report on an assessment of the situation of interconnection in telecommunications in the European Union and the need to review the Interconnection Directive, October 1999.

²³⁶ Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, *supra* note 230, p. 4.

²³⁷ Commission Communication: "Toward a New Framework for Electronic Communications Infrastructure and Associated Services": the 1999 Communications Review, COM(1999) 538, 10 November 1999, p. 30 and 31.

determine whether to maintain, amend or withdraw these obligations. The Commission foresees a procedure whereby the decision by a NRA, subject to advance consultation with the Commission, to lift a particular *ex ante*²³⁸ obligation would be taken in accordance with criteria laid down in Community legislation, such as the market power of the operator and the degree of competition in the relevant markets, once it could be shown that competition was sufficiently strong to guarantee equivalent outcomes.²³⁹ As it is quite likely that some areas will require more *ex ante* regulation than others and that all Member States will not have the same competitive conditions, the Commission should be able to ensure harmonised application of the provisions of the Access Directive. In this regard NRAs and NCAs should co-ordinate their actions to ensure that the most appropriate remedy is applied.²⁴⁰ The new legislation will come into force in July 2003.

3.3.3 Appraisal of interconnection and competition law in the EU

Liberalisation being a relatively new concept for the European telecommunications sector it is clear that interconnection is still in its early days. Competition and interconnection are two concepts that are inter-related so closely that one can say that interconnection is the single most important factor in a liberalised telecommunications environment. The Commission quickly realised that and has moved to ensure that the regulatory framework for interconnection takes this into account.

The interconnection Directive empowers the NRAs with the role of supervision and in many instances organisation of the interconnection measures introduced by the Directive. This power is to be welcomed as national regulators will know better the local conditions and represent an independent source of control of the incumbents. The role that the NRAs will play in the new telecommunications environment cannot be overemphasised and the success of the Directive will depend very much on them. Ultimately, the real measure of the success of the Directive is the extent to which consumers will be able to benefit from lower prices coupled with better services brought about by increased competition in their national telecommunications markets. The challenge that the existing and future regulation of interconnection faces is to ensure effective access to telecommunications markets. In addition, specific attention must be given to

²³⁸ See the final chapter of the thesis for an analysis of the relationship between *ex ante* and *ex post* competition rules in relation to access to telecommunications infrastructure and network facilities.

²³⁹ See also recital 16 of the new Framework Directive, *supra* note 223, which provides that NRAs should work under a harmonised set of objectives and principles as well as, where necessary, co-ordinate their actions with the regulatory authorities of other Member States in carrying out their tasks under this regulatory framework.

²⁴⁰ Recital 13 of the new Access Directive, *supra* note 223.

the European scale of the project. There is a real risk of unequal application of the interconnection rules throughout the fifteen Member States of the EU. Effective access to telecommunications markets can only be achieved when a level playing field of interconnection can be ensured throughout the EU. Achieving that might be the real challenge that European regulators need to focus on, especially on the eve of the accession of more Member States in 2004. This makes the task of NRAs all the more important.

CHAPTER 2: ACCESS TO JAPANESE TELECOMMUNICATIONS MARKETS - GENERAL COMPETITION RULES AND SECTOR-SPECIFIC RULES

The study of the interrelation between general competition rules and sector-specific rules with regard to access to telecommunications infrastructure and network facilities has to be approached slightly differently when analysing the Japanese situation as compared to the EU situation. The Japanese approach to the interrelation between general competition rules and sector-specific rules is characterised by a stronger preference towards sector-specific regulation of access to telecommunications infrastructure and network facilities when compared to the EU approach. Because of this preference for regulation by sector-specific rules, the first section of this chapter, which analyses the general competition rules that apply to access to telecommunications infrastructure and network facilities (i.e. refusal to deal) contains less telecommunications-specific analysis when compared to Chapter 1. The second section analyses sector-specific rules that apply to access to telecommunications infrastructure and network facilities and in particular the interconnection rules as well as the development of market entry in Japan through sector-specific regulation. In each section, the analysis consists in identifying the relevant rules and analysing how they apply to access to the Japanese telecommunications industry. This will help in the analysis at Chapter 3 of the interrelation between general competition rules and sector-specific rules in Japan.

SECTION A: General competition rules on access to Japanese telecommunications markets

1. Overview of the Anti-Monopoly Act

In order to study the general competition rules on access to the Japanese telecommunications market, it is necessary to start the analysis with an overview of what constitutes a prohibited conduct under the Japanese general competition rules contained in the Anti-Monopoly Act ('AMA') and the relevant case law. This is necessary because all three of the basic AMA prohibitions could be used to analyse a complaint of refusal to give access to a telecommunications infrastructure or network facility to a third party.²⁴¹ There are three prohibited conducts under the AMA which form the three prohibition pillars of Japanese competition law. Each of these pillars is analysed below.

²⁴¹ It should be noted, however, that the unreasonable restraint of trade prohibition of the AMA is used to prohibit collective refusals to deal. Within the context of this thesis it is refusal to deal by the incumbent that is the relevant general competition rule that applies to access to Japanese telecommunications markets as that type of refusal is the one that has created most problems in practice. Therefore, collective refusals to deal are not further analysed in this thesis.

1.1 The three pillars of the AMA

The AMA contains three basic prohibitions, the prohibition of private monopolisation, the prohibition of unreasonable restraint of trade and the prohibition of unfair trade practices. These are referred to as the ‘three pillars of the AMA’. Among these, the prohibitions of private monopolisation and of unfair trade practices are the relevant tools for the analysis of the general competition rule that applies to access to telecommunications markets in Japan, i.e. refusal to deal.

1.1.1 Prohibition of private monopolisation

(a) Definition

Section 2(5) of the AMA provides that: “*private monopolisation as used in this Act shall mean such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade*”.

It is important to note that the definition above contains a conduct requirement of excluding or controlling other entrepreneurs. This conduct requirement is what distinguishes monopoly from private monopolisation. It means that some condonable activities that could establish, maintain or strengthen the monopoly position of certain entrepreneurs in a market must exist. Such activities should be distinguishable from those of the normal means of competition.²⁴² In addition, there must be a ‘*substantial restraint of competition*’ for private monopolisation to exist. Therefore, private monopolisation is illegal when an entrepreneur substantially restrains competition by excluding or controlling the business activity of another entrepreneur. The four core elements of private monopolisation - exclusion or control of business activities in a particular field of trade and a substantial restraint of competition as a result - are each analysed below.²⁴³

(b) Definitions from the case law of the two types of private monopolisation

²⁴² H.Iyori and A.Uesugi, *supra* note 11, p.100.

²⁴³ In addition, the notion of ‘*public interest*’ is analysed below in the section on unreasonable restraint of trade.

The two types of private monopolisation - exclusion of business activities and control of business activities - are not defined in the AMA. However, it is possible to establish the legal meaning of these concepts by analysing the relevant case law.

Exclusion of business activities: this has been defined as a situation where: “*the concerned entrepreneur puts other entrepreneurs in a position of great difficulty with regard to carrying out their business activities by unreasonably restraining their business, for instance, by obstructing other entrepreneurs from entering the market or by forcing its customers to agree to exclusive conditions prohibiting them from dealing with the concerned entrepreneur’s competitors*”.²⁴⁴ Although these words could lead to think that they only mean the actual exclusion of other entrepreneurs from a market this is not the practice as decided by the JFTC and the Courts. Indirect exclusion falls under the ambit of private monopolisation.

In the 1950 *Saitama Bank* case²⁴⁵ it was decided that giving a loan on condition that the borrower will sell its products only to an affiliate of the lender was an exclusion of its affiliate competitors. In the 1956 *Snow Brand Dairy Co.* case²⁴⁶, it was decided that having two financial institutions limit loans for buying milk cows only to agricultural co-operative associations that agreed to sell all of their raw milk to the Snow Brand Dairy or the Hokkaido Butter companies amounted to private monopolisation. In the 1972 *Toyo-Seikan* case, a tin producing company which had a market share of 74 per cent on the market for food cans in Japan, in conjunction with its subsidiaries forced other companies to give up a plan to produce some types of cans in-house by threatening to supply other types of cans which could not be produced in-house. The JFTC found this conduct to be an ‘*exclusion of business activities*’.²⁴⁷ Moreover, the exclusive conduct was found to emanate from one powerful business or from a group of businesses acting in concert to exclude their competitors.²⁴⁸ The JFTC ordered that Toyo Seikan must not prevent manufacturers of canned foods with which it dealt from starting to manufacturing food cans for their own use by stopping its supply of food cans to them, and that Toyo Seikan must divert some portion of the stock of can manufacturers under the control of Toyo Seikan, which

²⁴⁴ OECD Roundtable on abuse of dominance and monopolisation, OECD/GD(96) 131, No. 8, p.2.

²⁴⁵ July 13, 1950, 2 KTIS 74. This case is analysed in more detail below in the section on exclusionary refusal to deal.

²⁴⁶ July 28, 1956, 8 KTIS 12. This case is analysed in more detail below in the section on exclusionary refusal to deal.

²⁴⁷ The Anti-Monopoly Law in Japan; Recommendation Decision of the JFTC, 18 September 1972 (Shinketsushu, 19-87), edited by H.Oda.

²⁴⁸ M.Matsushita, An outline of economic law, 1986, p.118.

was owned by another affiliated company of Toyo Seikan, and must not intervene in the business activities of the can manufacturer.

In 2000, the JFTC issued a warning against NTT East because it suspected it of preventing new DSL (i.e. high speed digital data communication via traditional telephone circuits) operators from entering the market. NTT attached conditions to the connection and deliberately prolonged the negotiations to delay the start of the new businesses operations. The JFTC also suspected that NTT used the newcomers' business information to its own benefit. Although the JFTC did not publish more factual information on this case, it did publish the fact of the issuance of the warning in December 2000.²⁴⁹

Finally, some cases of private monopolisation aimed at excluding competitors from the market were briefly reported by the JFTC in its annual report. First, the private monopolisation prohibition was used against a practice which consisted in excluding competitors by concluding long term exclusive supply contracts of radioactive materials of pharmaceutical products with the customers. Second, the exclusion of the business activities of the computer manufacturers was also considered a private monopolisation in December 1998 by the JFTC and action was taken under this ground. In 2000 the JFTC reported that it took action against a newspaper publishing company which was blocking entry of one of its competitors into the market. This act was considered to amount to private monopolisation aimed at excluding competitors.²⁵⁰ The JFTC also took action the same year against the unvarnished ampoule tube dealers which effected private monopolisation aimed at excluding competitors.²⁵¹

From the above cases, it can be understood that exclusion of business activities means actions which make the continuation of business by competitors or entry into the market by newcomers difficult.

Control of business activities of other entrepreneurs: this has been defined as a situation where: *“an entrepreneur makes other entrepreneurs obey its will by making it difficult for them to make decisions freely, for example, through combined relationships involving stockholding, the*

²⁴⁹ JFTC, Promotion of regulatory reform and the JFTC's position on competition policy at the time of the three years program for the promotion of regulatory reform, 30 March 2001. The facts mentioned above were reported under the heading: "Impediments of market access and exclusion of competitors cases".

²⁵⁰ JFTC, Decision, February 2000, Recent activities of the JFTC 2001, p. 3.

²⁵¹ Ibid.

interlocking of directorates or the abuse of the concerned entrepreneur's dominant position vis-à-vis its trade partners".²⁵²

In the 1955 *Noda Soy-Sauce* case²⁵³ the JFTC decided that Noda controlled the business activities of the other two national producers because it held a 30.5% market share in the Tokyo area and due to a market structure particular to soy sauce made it impossible for its competitors not to follow its pricing policy. The Tokyo High Court confirmed the JFTC's decision and added that it was due to a very strong brand image among consumers that Noda's competitors had to follow its pricing policy. The High Court defined control as "*an act taking away from other entrepreneurs their free decision in business activities*".²⁵⁴

In the above mentioned 1972 case of *Toyo-Seikan*²⁵⁵, the Toyo-Seikan company held 29 per cent shares of another tin-producing company in the northern part of Japan. Toyo-Seikan imposed various restrictions on the activities of the other company such as confining the market to the northern region and blocking the construction of a plant in the mainland by this company. The construction was allowed only when the other company agreed to accept various restrictions as to the capacity of the plant and the secondment of a representative director from Toyo-Seikan. The JFTC found that under the above-mentioned circumstances, Noda Soy substantially restrained competition in the soy sauce market by forcing wholesalers and retailers to maintain the resale prices of Noda's products.²⁵⁶ As such, this practice was considered to be an exercise of '*control*' by Toyo-Seikan. Toyo-Seikan was ordered to cease and desist such acts, and specifically ordered to dispose of part of the shares which it held in the company.²⁵⁷

The *Toyo-Seikan* case is an example of direct control of business activities. However, '*control*' of the business activities of other entrepreneurs also includes '*indirect control*'. Generally speaking, indirect control indicates conduct of an entrepreneur which engenders parallel conduct by other entrepreneurs because of the specific factors involved in the market concerned, such as the rigidity of an oligopolistic market. In such a situation, the controlling company doesn't exert direct pressure on the controlled companies, but the conduct of the

²⁵² OECD Roundtable on abuse of dominance and monopolisation, supra note 244, p.2.

²⁵³ *Noda Soy-Sauce Co. case*, JFTC, December 27, 1955, 7 KTIS 108.

²⁵⁴ *Noda Soy-Sauce Co. case (appeal)*, December 25, 1957, 9 KTIS 57.

²⁵⁵ The Anti-Monopoly Law in Japan; Recommendation Decision of the JFTC, supra note 247.

²⁵⁶ OECD Roundtable on abuse of dominance and monopolisation, supra note 244, p.3.

²⁵⁷ The Anti-Monopoly Law in Japan; Recommendation Decision of the JFTC, supra note 247.

controlling company automatically produces similar restrictive conduct by other entrepreneurs.²⁵⁸

The most recent case of private monopolisation amounting to control of activities of other entrepreneurs and which led to a full-blown procedure by the JFTC dates back to 1996. The case involved a foundation whose purpose was to conduct research on medical food as well as improve and disseminate information on it. The foundation was delegated the power to test medical foods by the Ministry of Health. In this market, Nisshin Medical Food and Nax Medical Food were the only wholesalers. These companies, together with companies within their network, supplied medical foods to virtually all medical institutions in Japan. The foundation and Nax colluded to exclude the entry of other companies in the business by introducing a certificate system and registration system of companies supplying medical foods. Nisshin was allowed to take part in the certification and registration process and effectively excluded competitors. When the monopoly by Nisshin came to be criticised, the foundation and Nisshin decided to allow Nax to enter the wholesale market. The foundation, based upon the proposal of Nisshin, prepared an agreement with Nax under which, Nax's entry was limited to areas where medical food was not much in demand, and Nax was obliged to co-operate with Nisshin in blocking new entrants in the market. The foundation did not certify other wholesalers unless recommended by either Nisshin or Nax. Faced with this practice, the JFTC ruled that the foundation and Nisshin "*excluded business activities of producers and suppliers of medical food*" and "*controlled...supply prices and territory of producers*". This conduct was considered to constitute private monopolisation.²⁵⁹

From the above cases it can be understood that control of other entrepreneur's activities means depriving another entrepreneur of the freedom of decision-making in its business activities. In the *Toyoy-Seikan* case, Toyoy-Seikan used typical methods of control against its competitor such as the holding of its shares, sending in directors, and abuse of bargaining power.

(c) The notion of 'substantial restraint of competition'

In order for the prohibition of private monopolisation to be found to exist it is necessary that in addition to exclusion or control of business activities there is also a '*substantial restraint of competition*'. The AMA does not define the notion of '*substantial restraint of competition*'. In an

²⁵⁸ M.Matsushita, Private Monopolization and monopolistic situations, Doing Business in Japan, Zentaro Kitagawa, 1988, IX-2-8.

²⁵⁹ The Anti-Monopoly Law in Japan; Recommendation Decision of the JFTC, supra note 247.

OECD contribution²⁶⁰, the JFTC said that ‘*substantial restraint of competition*’ means that, “*without referring to individual actions, competition has been decreased as well as a situation in which a specific entrepreneur or group of entrepreneurs can control the market by freely manipulating various conditions, including price, quality and quantity, at will has appeared or is about to appear*”.²⁶¹ The test for judging substantial restraint of competition is more of a qualitative test rather than a quantitative one.²⁶² To give precise quantitative criteria for determining what constitutes a substantial restraint of competition is not straight forward. Such factors as the kind of business, the conditions of the market, and the manner of competition in the market in question must be considered in deciding whether competition in a particular field of trade has been substantially restrained.²⁶³

(d) Particular field of trade

The definition of private monopolisation provides that, to constitute private monopolisation, competition “*in any particular field of trade*” must be substantially restrained. “*Particular field of trade*” means the market segment in which competition and the restraint thereof occur.²⁶⁴ The determination of a particular field of trade depends on the factors involved in each case. Such factors include the object, stage, and geographical area of transactions and the kind of customers.²⁶⁵

(e) Limited number of private monopolisation cases

There have only been less than ten full-blown cases where the JFTC investigated and found private monopolisation to exist. Two of them relate to very exceptional practices over scarce goods by a private control association dating back to 1947.²⁶⁶

²⁶⁰ OECD Roundtable on abuse of dominance and monopolisation, supra note 244, p.1 and 2.

²⁶¹ Toho-Subaru case September 19, 1951 Judgement made by the Tokyo High Court.

²⁶² JFTC, Guidelines for interpretation on the stipulation that “The effect may be to substantially to restrain competition in a particular field of trade” concerning M&As, 21 December 1998.

²⁶³ M.Matsushita, Private Monopolization and monopolistic situations, supra note 258, IX-2-14.

²⁶⁴ Ibid, IX-2-15 and 16.

²⁶⁵ See Nihon Sekiyu Hoka v JFTC, Tokyo High Court, 7 Gyosei Reishu 2849, November 9, 1956.

²⁶⁶ *Kimura Risaburo* Case, March 27, 1948, 1 KTIS 13; H.Iyori and A.Uesugi, supra, 1994, p.100.

This limited number of cases becomes even more evident when compared to the number of cases under the second prohibition of the AMA, the prohibition of unreasonable restraint of trade²⁶⁷ or that of the third prohibition, unfair trade practices²⁶⁸ which are substantially more numerous. One reason for this disparity is the possible use of the third prohibition under the AMA, the prohibition of unfair trade practices for situations that could also be considered as private monopolisation. This is because most conduct to exclude or control other entrepreneurs may fall under any one of the conducts designated as unfair trade practices. However, recent trends show that this situation is changing.

The trend has been, up to now, for the JFTC to prefer the use of the unfair trade practices prohibition in situations where both it and the private monopolisation prohibition could be used.²⁶⁹ However the JFTC has indicated its willingness to increasingly use the prohibition of private monopolisation in the future. As mentioned above, in December 2000, the JFTC issued a warning (based upon a potential violation of the private monopolisation prohibition) to NTT East (the NTT operator for the East region of Japan which came into existence following the break-up of NTT into three units) against blocking entry into a high-speed telecommunications service (ADSL).²⁷⁰ This has to be coupled with policy statements made recently by senior officials of the JFTC pointing towards a stricter enforcement of the antimonopoly rules in the telecommunications field which is seen as key for the '*IT revolution*'.²⁷¹

The trend to increase the use of the private monopolisation prohibition can be seen in a recent surge in the number of reported cases of private monopolisation aimed at excluding the business activities of other entrepreneurs. The increasing use of the private monopolisation prohibition in such situations would tend to indicate a willingness within the JFTC to use the private monopolisation prohibition in cases where the European Commission would perhaps consider using the essential facilities doctrine to put an end to exclusionary behaviour and force access to a specific market. In the last four years alone the JFTC reported four cases of private monopolisation aimed at excluding competitors.²⁷² In addition to these cases formally reported

²⁶⁷ See the next section of this chapter analysing unreasonable restraint of trade.

²⁶⁸ See below the section of this chapter analysing unfair trade practices.

²⁶⁹ See the next section of this chapter for an explanation of the relationship between these two prohibitions.

²⁷⁰ JFTC, Promotion of regulatory reform and the JFTC's position on competition policy at the time of the three years program for the promotion of regulatory reform, 30 March 2001.

²⁷¹ A.Yamada, Secretary General of the JFTC, Competition Policy in the Future, Speech given before the American Chamber of Commerce in Japan, February 2, 2001, p.9.

²⁷² See above the section on private monopolisation aimed at excluding business activities of other entrepreneurs.

by the JFTC, it was recently reported that the MPHPT is pressing NTT to discontinue the practice of letting one unit offer discount phone services by using the networks of its two regional carriers under preferential terms.²⁷³ Although there is no clear reference to a possible private monopolisation practice at this stage the facts reported indicate that should the JFTC take up this case it would analyse the conduct in question as a possible situation of private monopolisation.²⁷⁴ The press release added that NTT Communications Corp. will be asked to terminate five types of discount services within two to three years. In one such service, NTT East and NTT West enable NTT Communications to provide out-of-city phone services at discounts of 10 to 30 per cent., thereby sharply undercutting rates charged by other competitors. The MPHPT will also urge NTT Communications, which shares a customer data management system with NTT East and NTT West, to set up its own system. The MPHPT took action following a complaint by competitors that the sharing of the customer data enables the NTT units to pool resources to market their services. The customer data management system enables NTT regional carriers and NTT Communications to share such information as the kinds of services customers are receiving and the carriers they have used so far.²⁷⁵

1.1.2 Unreasonable restraint of trade

(a) Definition

Section 2(6) of the AMA provides “*that the term unreasonable restraint of trade as used in this Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade*”.

The prohibition of unreasonable restraint of trade aims at clamping down on cartels and as such is aimed mainly at horizontal restraints. This definition carries common elements with the definition of private monopolisation. The words ‘*entrepreneur*’ and ‘*competition*’ bear the same

²⁷³ The Nikkei Weekly, February 18, 2002, p.8.

²⁷⁴ The prohibition of unfair trade practices could also be used in this case. In this regard see the following sub-section explaining the relationship between private monopolisation and unfair trade practices.

²⁷⁵ See below Section B of this chapter explaining the sector-specific regulation of access to Japanese telecommunications networks and the role and functions of the MPHPT. See also Chapter 3 of this thesis explaining the interrelation between sector-specific and general competition rules as well as the respective roles of the JFTC and MPHPT in regulating access to the telecommunications industry.

meaning as in the definition of private monopolisation. The notion of '*substantial restraint of competition*' remains undefined but has otherwise the same meaning as for the private monopolisation prohibition.²⁷⁶

(b) The notion of 'concerted activities'

The JFTC requires some kind of liaison of wills for a concerted activity to exist. This means that a mere external uniformity in the behaviour of two companies will not be enough to find a cartel.²⁷⁷ However, the JFTC has been quite liberal in the extent of the evidence required for a liaison of wills to be recognised.

1.1.3 Unfair trade practices

(a) Definition

Section 2(9) of the AMA provides that an act will be an unfair trade practice:

- 1) if it comes within one of the following paragraphs;
- 2) if it tends to impede fair competition, and;
- 3) if the JFTC has designated the activity as an unfair trade practice.

The situations provided for in the AMA are the following:

- unjustly discriminating against other entrepreneurs;
- dealing at unjust prices;
- unjustly inducing or coercing customers of a competitor to deal with oneself;
- dealing with another party on such terms as will restrict unjustly the business activities of the said party;
- dealing with another party by unjust use of one's bargaining position;

²⁷⁶ See however the sub-section above on the analysis of private monopolisation, attempting to explain the concept.

²⁷⁷ Yuasa Lumber Co. case, August 30, 1949, 1 KTIS 62.

- unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his transacting party; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.

(b) Designations

Section 2(9) of the AMA provides that the JFTC will designate the unfair trade practices that will fall under the AMA's ambit. There are 16 practices listed as unfair trade practices by the general designations, one of which is refusal to deal.²⁷⁸

(c) Tendency to impede fair competition

The third essential element of unfair trade practices, the tendency to impede fair competition, comes into play in the general designations of the JFTC. Tendency to impede competition means the possibility that conduct will impede fair competition so that the actual necessity that competition will be impeded is not requested for the prohibition to come into play.²⁷⁹

Three types of tendencies to impede fair competition have been identified by the Study Group on unfair trade practices:²⁸⁰

- situations where free competition among entrepreneurs is restricted and where there are measures preventing an entrepreneur from entering into free competition with other entrepreneurs (e.g. refusal to deal with a new entrant in the telecommunications market);
- situations where competition is not centred on price, quality and service thus preventing the maintenance of fairness and the competitive order (e.g. unjust low price sales by the incumbent to its subsidiary harming new entrants in the telecommunications market);
- situations where trading partners cannot engage in transactions based on free and voluntary decision-making thus preventing the maintenance of the basis of free competition (e.g. concerted refusal to deal with a new entrant in the telecommunications market).²⁸¹

²⁷⁸ Fair Trade Commission Notification No. 15, Unfair Trade Practices, 18 June 1982.

²⁷⁹ M.Matsushita, *supra* note 248, p.148.

²⁸⁰ Antimonopoly Law Study Group, *Hokusei na Torihiki Hoho ni Kansuru Kihonteki na Kangaekata* (Basic Thinking on Unfair Trade Practices), July 8, 1982.

(d) Overlap between unfair trade practices and the other two pillars of the AMA

Unfair trade practices can overlap with the other two basic prohibitions of the AMA. This is because the practices that are considered unfair trade practices are a set of prohibited practices *per se* but can also be considered to constitute private monopolisation or unreasonable restraint of trade provided some additional element can be found to exist. For an unfair trade practice to be considered a private monopolisation or an unreasonable restraint of trade it is necessary to show that as a result of the practice in question there has been a '*substantial restraint of competition*' and not only an '*impediment to competition*' as required for the unfair trade practices prohibition.²⁸² Showing that there is a '*substantial restraint of competition*' is a harder task than showing that a certain practice amounted to an '*impediment to competition*'. Although, the exact determination of the effect on competition that a practice may have will inevitably vary from case to case, the JFTC considers that a practice is likely to impede fair competition if: "*there is a possibility of exerting bad influence on competition to obtain clients by providing good quality products and services at cheap prices*" - i.e. if a practice is likely to restrict normal competitive conditions on a market.²⁸³ In practice however, it is difficult to judge whether a certain conduct falls under the category of private monopolisation or unfair trade practices, because some of the conduct dealt with under the prohibition of unfair trade practices could be dealt with under the prohibition of private monopolisation.²⁸⁴

All three prohibitions carry the sanction of a cease and desist order which can be ordered by the JFTC once an infringement has been found. However, unfair trade practices, unlike private monopolisation or unreasonable restraint of trade do not carry criminal sanctions. As a corollary of the lower sanctions attached to their infringement, unfair trade practices require a lower standard of proof for an infringement to be found when compared to the other two prohibitions.

In overlapping cases the JFTC seems to prefer finding a private monopolisation or unreasonable restraint of trade over an unfair trade practice as the latter does not carry criminal

²⁸¹ Cases on unfair trade practices include the case against *Fuji Photo Film Co. Ltd* and others reported in JFTC Decision Collection, Vol.28, p.10.; the case against *France Bed Co. Ltd.* reported in; OECD Roundtable on abuse of dominance and monopolisation, OECD/GD(96) 131, No. 8, p.7; and the case against *Mitsukoshi Ltd.* reported in JFTC Decision Collection, Vol.22, p.127.

²⁸² See above the sub-section on '*substantial restraint of competition*' which is part of the private monopolisation section.

²⁸³ OECD Roundtable on abuse of dominance and monopolisation, supra note 244, p.4.

²⁸⁴ M.Matsushita, supra note 258, IX-2-17 and 18.

sanctions.²⁸⁵ This is likely to be because of the significantly greater deterrent effect carried by the criminal sanctions that can be applied for private monopolisation or unreasonable restraint of trade. This might be the reason why the JFTC has indicated that it is willing to expand the use of the private monopolisation prohibition in the future.²⁸⁶

2. Application of the AMA to access to telecommunications markets - Refusal to deal

The anti-competitive conduct that is most likely to arise in the context of access to telecommunications markets by new entrants is refusal to deal. In the majority of cases this will involve a refusal by the incumbent to provide access to its telecommunications infrastructure or network facilities with the aim of excluding the new entrant. Other anti-competitive practices that may occur in relation to access to telecommunications markets are not specifically studied here but they will generally fall within the prohibition of private monopolisation or unfair trade practices both of which are analysed above.

2.1 Preliminary considerations

2.1.1 Freedom of choice

The starting point of the analysis of refusal to supply in Japan is that there is freedom of choice for a firm to decide which firm it does business with. This is in accordance with the spirit of the AMA and more specifically of the freedom of choice of trading partners. A firm is left free to select its trading partners and to have or not have a business relationship.

2.1.2 The 1991 DSBP Guidelines

Refusal to deal is listed as one of the unfair trade practices under the AMA. Refusal to deal in Japan was the object of a study by the Advisory Study Group on Distribution Systems, Business Practices and Competition Policy (the 'Advisory Study Group'), which resulted in the drafting of a report on Distribution Systems, Business Practices and Perspective of Competition Policy – for the Promotion of Free and Fair Competition and the Protection of Consumer's Interests (the 'DSBP Report').²⁸⁷ The DSBP report served as the basis upon which the JFTC drafted the 1991

²⁸⁵ This recent trend of preferring to use the private monopolisation prohibition over the other two types of prohibitions is a recent change of policy within the JFTC. It is studied further in this chapter (in particular in the section analysing single refusal to deal) and in Chapter 3 of this thesis.

²⁸⁶ See above the analysis of private monopolisation.

²⁸⁷ The Advisory Study Group On Distribution Systems, Business Practices and Competition Policy.

Guidelines on Distribution System and Business Practices (the 'DSBP Guidelines').²⁸⁸ The DSBP Guidelines were adopted as a result of US pressure which culminated in the 1989 Structural Impediments Initiative ('SII'),²⁸⁹ a bilateral trade agreement between the government of Japan and the government of the USA whereby both parties agreed to reduce trade barriers. The basic philosophy behind the prohibition of refusal to deal is summarised in the section of the DSBP Report on the direction of competition policy. This provides that: *"It is necessary to promote free and fair competition, thereby to make the Japanese market truly develop its function, in order that the interests of consumers can be assured and that Japanese and foreign companies can freely do business in an internationally open place.*

Concretely, it is necessary to assure:

- *free entry into the Japanese market;*
- *competition on the basis of price, quality and service;*
- *freedom of doing business by firms, with no restrictions imposed by others;*
- *elimination of excessive regulations that impair the functioning of the market.*
- *competition policy must be carried out with the objective of realising these goals".*²⁹⁰

The DSBP Guidelines were therefore aimed, among others, at improving trade practices in Japan by clarifying as concretely and clearly as possible the rules for the enforcement of the AMA to anti-competitive practices impeding trade such as refusal to deal.²⁹¹ The DSBP Guidelines are important because, although not formally binding they have in practice been followed and have helped in the promotion of competition and the development of market access in Japan.²⁹²

²⁸⁸The Advisory Study Group on Distribution Systems, Business Practices and Competition Policy, Guidelines on Distribution System and Business Practices, July 11, 1991.

²⁸⁹ See chapter 3 for more details on the SII.

²⁹⁰ The Advisory Study Group on Distribution Systems, *supra* note 287, p. 7.

²⁹¹ Trade Compliance Centre, Joint report on the SII Talks, http://199.88.185.106/tcc/data/commerce_html/TCC_Documents/Japan_Structural_impediments_Initiative/Japan_Structural_Impediments_Initiative.html.

²⁹² T.Kikkawa, Organized markets in Japan - an attempted assessment and typology, Social Science Japan, No.1, July 1994, <http://web.iss.u-tokyo.ac.jp/newslet/SSJ1/kikkawa.html>.

2.2 The application of the three pillars of the AMA to refusal to deal

Refusal to deal in the wide sense (not simply as one of the unfair trade practices) is the most relevant general competition rule that applies to competition issues arising from access to Japanese telecommunications markets. This was specifically recognised by a Study Group report commissioned by the JFTC on issues relating to competition policy in the telecommunications industry.²⁹³ When analysing refusal to deal it is important to note that the basic rule of freedom to choose with whom to deal does not mean that any refusal to deal will be justified. The general principle is that if a company refuses to deal with another one in order to secure the effectiveness of its illegal conduct under the AMA the refusal might well be an infringement of the competition rules. For example, if a company refuses to deal with another as a means to block the latter's access to a market, then the competition rules are infringed.

Japanese competition law distinguishes between single and collective refusal to deal depending on the number of competitors engaged in refusal to deal. The distinction is of importance because if the refusal is considered illegal, each type of refusal falls within a separate category of anti-competitive practice. Single refusal to deal generally falls within the prohibition of unfair trade practices.²⁹⁴ Collective refusal to deal falls within the category of unreasonable restraint of trade except if the refusal to deal does not cause substantial restraint of trade in a market in which case it will be treated as an unfair trade practice. Given that in the vast majority of cases refusals to deal in the telecommunications sector are from incumbents enjoying a single dominant position (i.e. in Japan NTT or its subsidiaries), collective refusal to deal and the AMA prohibition that applies to it (i.e. the prohibition of unreasonable restraint of trade) are not further studied in this thesis.²⁹⁵

Depending on which AMA prohibition will be used to prohibit a specific refusal to deal, different sanctions may apply against the business at fault. A finding of private monopolisation or unreasonable restraint of trade can carry sanctions of a cease and desist order as well as

²⁹³ The study group on competition policy relating to information and communications industries, JFTC/Japan Views, Issues relating to Competition Policy in the Telecommunications Industry, No.24, March 1996, p.91. See section B of this chapter for a more detailed analysis of this report.

²⁹⁴ However, there is a clear willingness from the JFTC to move away from this practice and use whenever possible the private monopolisation prohibition especially in cases of single refusal to deal aimed at excluding competitors, i.e. the most relevant refusal to deal for this thesis (since such a refusal is clearly aimed at preventing market access to telecommunications infrastructure and network facilities). See also the comments made as to this question in the analysis of private monopolisation above and single refusal to deal below.

²⁹⁵ This was indirectly recognised by the Study Group on competition policy relating to information and telecommunications services' report on issues relating to current competition in the telecommunications services, *supra*, p. 69. The same approach has been taken in the chapter of this thesis analysing the EU.

criminal sanctions whereas a finding that an unfair trade practices has occurred can only carry the sanction of a cease and desist order. However, as a corollary of the lesser sanctions carried by unfair trade practices, the standard of proof required for establishing such a violation are lesser when compared to private monopolisation or unreasonable restraint of trade.

2.3 Increasing use of the private monopolisation prohibition in cases of exclusionary refusal to deal

In the past, refusal to deal by a market-dominating firm in order to maintain or strengthen its market dominating position (i.e. the most relevant anti-competitive practice for cases of access to telecommunications infrastructure) was prohibited primarily by the unfair trade practices prohibition and in more limited cases by the prohibition of private monopolisation. Subsequently, it was only the unfair trade practices prohibition that was used against cases of exclusionary refusals to deal. However, recently, the JFTC has indicated that it intends to apply the private monopolisation prohibition for single refusal to deal cases wherever possible.²⁹⁶ The corollary of this statement is that where the refusal to deal falls short of private monopolisation, the JFTC will try to use the prohibition of unfair trade practices instead in order to prohibit the refusal. The complementary role of private monopolisation and unfair trade practices was confirmed by a previous Commissioner of the JFTC who explained that an unfair trade practice can be a refusal to deal: “*which does not amount to private monopolisation*”.²⁹⁷

One way to rationalise the above practice is to try to establish in which situations of refusal to deal each of the two types of prohibition will apply by focusing on the power of the firm refusing to deal. This could be the crucial distinction in that when a dominant firm refuses to deal for an illegitimate reason its conduct will be prohibited under the private monopolisation prohibition as was the case in *the Saitama Bank* and *Snow Brand Dairy* cases.²⁹⁸ Where however, the refusal to deal is operated by a firm which is merely influential in a market²⁹⁹ then the JFTC will still be able to prohibit that conduct under the unfair trade practices prohibition.

The reason why the JFTC prefers, where possible, to use the prohibition of private monopolisation for an individual refusal to deal aimed at excluding a competitor is twofold. First, it does not promote legal certainty for the JFTC to be able to use either the prohibition of private

²⁹⁶ H.Iyori and A.Uesugi, supra note 11, p.112.

²⁹⁷ M.Ariga, Unfair Business Practices, Doing Business in Japan, Zentaro Kitagawa, IX 6-10.

²⁹⁸ See above for an explanation of the cases.

²⁹⁹ When it has no less than 10 per cent or its position is within the top three in the market

monopolisation or of unfair trade practices in order to prohibit the same conduct. A clear policy had to be decided as to which type of prohibition would be used for a given situation. This is a point that has also been made by legal authors.³⁰⁰ Second, the prohibition of private monopolisation carries heavier sanctions, including criminal sanctions when compared to the prohibition of unfair trade practices.³⁰¹ In that respect, the JFTC appears to prefer to be able to apply the heavier sanctions carried by the private monopolisation prohibition wherever possible in order to deter future illegal conduct.

The trend towards the use wherever possible of the private monopolisation prohibition and of unfair trade practice as a 'back-up' should the heavier burden of proof of the former not be met is also visible in the 2001 Guidelines³⁰² on the Promotion of Competition in the Telecommunications Field ('GPCT Guidelines').³⁰³ In these guidelines it is clearly stated that where practices substantially restrict competition they are prohibited under the private monopolisation prohibition. However, even if those practices are not substantially restraining competition they might be caught by the unfair trade practices prohibition.

The following practices hamper new entrants and make their business operations difficult;³⁰⁴ telecommunications carriers with relatively large numbers of subscribers reject a competitors request to connect to their subscriber line networks³⁰⁵ and to allow collocation³⁰⁶ without legitimate reasons.³⁰⁷ When those practices are found to be substantially restraining competition, they are regarded as private monopolisation. However, the GPCT Guidelines provide that even if those practices are not substantially causing restraint of competition in the market, they tend to impede fair competition and are regarded as unfair trade practices.

³⁰⁰ M.Arigo, supra note 297, IX 6-10.

³⁰¹ For an overview of the differences between private monopolisation and unfair trade practices as well as the sanctions that apply to them see; OECD Roundtable on abuse of dominance and monopolisation, OECD/GD(96) 131, No. 8.

³⁰² Guidelines are in every respect binding.

³⁰³ JFTC and MPHPT, supra note 12, p. 8. See, in particular Chapter 3 of this thesis for an analysis of these guidelines.

³⁰⁴ Among those instances is a case where a telecommunications carrier finds it difficult to launch a new telecommunications service because an incumbent competitor dominating subscriber line networks rejects a request to connect to its networks.

³⁰⁵ "*Interconnection to their subscriber line networks*" includes those cases in which only part of the networks necessary to the competitors - communication transmission or switchboard functions, for example - are used.

³⁰⁶ "*Collocation*" means offering physical space where equipment for interconnection can be installed, to those who want interconnection.

Finally, the JFTC recently proposed an amendment to the AMA, which was passed by the Diet, to increase the upper limit of criminal fines on juridical persons for private monopolisation (and unfair trade practices) from Yen 100 million to Yen 500 million. The requested increase in the amount of fines is a further indication of the JFTC's focus of deterring anti-competitive conduct by applying the heavier sanctions of private monopolisation against anti-competitive conduct wherever possible.³⁰⁸ The combination of the elements above is part of a larger project by the JFTC to accelerate competition in Japan through the active creation of conditions for competition, law enforcement corresponding to structural reform and the creation of an orderly environment for competition.³⁰⁹

2.4 Refusals to deal by a single firm

The 1991 DSBP Guidelines distinguish between two types of single refusal to deal. The first type of individual refusal consists of cases where a firm refuses to deal as a means to secure the effectiveness of its illegal conduct under the AMA. The second type of individual refusal to deal consists of cases where the firm refuses to deal as a means to achieve such unjust purposes under the AMA as excluding its competitors from a market.³¹⁰ Under the JFTC's general designations³¹¹, both types of refusal to deal are prohibited as unfair trade practices.³¹² These two types of refusal to deal are studied separately below.

2.4.1 Refusal to deal (by a single firm) as a means to secure the effectiveness of illegal practices under the AMA

This type of refusal to deal applies in situations where the refusal to deal is not aimed at excluding a competitor but rather at supporting other illegal practices under the AMA. This would

³⁰⁷ Legitimate reasons for rejection include a case in which interconnection is technically impossible or difficult. However, judgment is made case by case by the JFTC to decide if such claims can be acknowledged as reasonable.

³⁰⁸ Approval of the amendment of the Antimonopoly Act by the Diet, 22 May 2002, <http://www.jftc.go.jp/e-page/press/2002/may/020522amendment.pdf>.

³⁰⁹ See Chapter 3 of the thesis and in particular the section analysing the reasons of the past weakness of the JFTC and the likely future developments. JFTC, The Japan Fair Trade Commission will accelerate competition in Japan, Grand-design for competition policy in the 21st century, 29 August 2001.

³¹⁰ The Guidelines Concerning Distribution System and Business Practices, *supra* note 288.

³¹¹ See above the section on unfair business practices.

³¹² However, see above the section on the JFTC's practice to use whenever possible the prohibition of private monopolisation for refusals to deal aimed at excluding competitors.

occur, for example, where an influential manufacturer in a market,³¹³ causes its distributors not to deal with its competitors thereby reducing business opportunities of the competitors and preventing them from easily finding alternative trading partners, and with a view to ensuring the effectiveness of such conduct, refuses to deal with distributors not yielding to this request.³¹⁴

The actual prohibition that will be used by the JFTC to render the first type of individual refusal to supply illegal is the prohibition of unfair trade practices. In this regard, the JFTC has stated that it will apply various items (under its designations) relevant to a particular case as much as is feasible in order to render the conduct illegal.³¹⁵ For example, if an entrepreneur threatens to refuse to deal (which strictly speaking does not constitute an actual refusal to deal) in order to compel other entrepreneurs to do something which constitutes an unfair trade practice, only the later unfair trade practice will be attacked by the JFTC in order to render the conduct illegal.³¹⁶

2.4.2 Refusal to deal (by a single firm) as a means to achieve such unjust purposes as excluding competitors from a market

Among Japanese general competition rules that apply to access to telecommunications markets, this is the type of refusal to deal most likely to apply in practice. The DSBP Guidelines give examples of conduct aimed at excluding competitors from a market. If such conduct may make it difficult for the refused firm to carry on normal business activities, the traditional prohibition used to put an end to this practice used to be the prohibition of unfair trade practices. However, this is changing in favour of an increased use by the JFTC of the prohibition of private monopolisation to prohibit such conduct.³¹⁷

For the conduct to be prohibited under this type of refusal to deal, the effect of the refusal to deal must be such that makes it difficult for the refused firm to carry on normal business

³¹³ The notion of '*influential firm in a market*' is in the first instance judged by the market share that the firm in question holds in the relevant market, that is whether it has no less than 10 per cent or its position is within the top three in the market. Nonetheless, even below these thresholds a conduct may be considered illegal if it results in reducing competitors' business opportunities and making it difficult for them to easily find alternative trading partners.

³¹⁴ The Guidelines Concerning Distribution System and Business Practices, supra note 288, p. 503.

³¹⁵ H.Iyori and A.Uesugi, supra note 11, p.112.

³¹⁶ Example given by M.Ariga, supra note 297, IX 6-10 and 11.

³¹⁷ See the analysis of the private monopolisation prohibition and the section above on the increasing use of the private monopolisation prohibition in cases of exclusionary refusal to deal.

activities. There is no condition for the prohibition to apply that the refusal to deal is effected by a market-dominating firm, it is sufficient that the firm is influential on a market.³¹⁸

The JFTC has given guidance as to the criteria it will consider when analysing whether or not a refusal to give access to a facility substantially restrains competition in the market.³¹⁹ Some of the elements taken into consideration by the JFTC in appraising this are the following:

- the market share of the party concerned;
- the existence of competitors;
- the market structure;
- the characteristics of the facility;
- the reason behind the refusal to grant access; and
- the role of the refusal to grant access.³²⁰

The cases usually cited by textbooks as examples of refusal to deal to exclude competitors from a market are the following two cases. First, the 1950 *Saitama Bank* case³²¹. The Saitama Bank tried to effect control over the raw silk export business in the Saitama prefecture, one of the most prominent raw silk producing districts. In making a loan agreement to silk mills to purchase cocoons, the Saitama Bank made the loan available to silk mills on condition that they sold all their raw silk to the Marusa Raw Silk Co., an affiliated company of the Saitama Bank. Thus, through its lending policy, the respondent bank attempted to exclude the competitors of Marusa and to establish substantial control over the raw silk market. The JFTC found this conduct to constitute private monopolisation. Second, the 1956 *Snow Brand Dairy Co. case*.³²² Snow Brand and the Hokkaido Butter Co. (these two companies together controlled more than 80% of

³¹⁸ See in this regard the sub-section above on the increasing use by the JFTC of the private monopolisation prohibition (which requires a refusal to deal by a market dominating firm rather than by a mere 'influential firm') for single refusals to deal.

³¹⁹ See above the section analysing the notion of '*substantial restraint of competition*' in the unfair trade practices section.

³²⁰ OECD, roundtable on the essential facilities concept, Working Party No 2, February 1996.

³²¹ Saitama Bank, July 13, 1950, KTIS 74.

³²² Snow Brand Dairy Co., July 28, 1956, KTIS 12.

the purchase of raw milk in Hokkaido, the largest milk producing district in Japan) tried to exclude the purchase of raw milk from other dairy companies. They acted to maintain their monopolistic position regarding the purchase of raw milk in Hokkaido, in collusion with the Agriculture and Forestry Central Bank and the Federations of Hokkaido Agricultural Credit Co-operative Associations, by having them limit loans for buying milk cows only to agricultural co-operative associations that agreed to sell all their raw milk to Snow Brand or the Hokkaido Butter Co. This conduct was also found to constitute private monopolisation. Importantly, in both of these cases, the JFTC used the prohibition of private monopolisation to put an end to the practices rather than the unfair trade practices prohibition. Although these cases were decided almost fifty years ago, they are in line with the current trend within the JFTC to use the private monopolisation prohibition whenever possible as part of its tougher stance against refusals to deal.³²³

More recently, the JFTC briefly reported that it took action against a supplier of radioactive material for medical use which excluded competitors by concluding a long term exclusive contract with users.³²⁴

2.4.3 Legitimate reasons

The 2001 GPCT Guidelines provide that an exception to the finding of an illegal refusal to deal are situations qualified as '*legitimate reasons*'. This is an example of the interplay between general competition rules and sector-specific rules³²⁵ as the GPCT Guidelines refer to the sector-specific legitimate reasons that can be found in legislation on interconnection rules.³²⁶ Although not specifically recognised by general competition law, those legitimate reasons described in the GPCT Guidelines give an indication of arguments that could be put in front of the JFTC in order to justify a specific refusal to deal. A characteristic example given by the GPCT Guidelines is the refusal of interconnection based on technical/physical reasons (e.g. for reasons of lack of physical space) making interconnection impossible.

³²³ H.Iyori and A.Uesugi, *supra* note 11, p.112. See also the analysis of the private monopolisation prohibition above and the section above on the increasing use of the private monopolisation prohibition in cases of exclusionary refusal to deal..

³²⁴ Recommendation decision issued in September 1998, Fair Trade Commission, promotion of deregulation and our position on competition policies at the time of revising the three year program for the promotion of deregulation, March 31 2000, p.3.

³²⁵ See Chapter 3 of this thesis on the interrelation between general competition rules and sector-specific rules in the EU and Japan in relation to access to telecommunications markets

³²⁶ See the Interconnection section of this chapter.

2.5 Comparison between refusal to deal in Japan and the EU doctrine of essential facilities

In the EU the essential facilities doctrine³²⁷ was initially introduced and developed by the European Commission and then restricted in its application by the European Courts. However, the doctrine might see a revival under the new EU regulatory framework of electronic communications which emphasises a shift from *ex ante* sector-specific regulation to *ex post* general competition rules.³²⁸

The term ‘*essential facility*’ has been used in Japanese sector-specific regulation such as the GPCT Guidelines. The Guidelines give the following examples of essential facilities: *“Among such essential facilities are fixed subscriber line networks owned by telecommunications carriers with relatively large market shares. The networks are made up of switchboards located close to subscribers, telecommunications lines that link subscribers to subscribers switchboards, switchboards, and telecommunications lines that connect subscribers switchboards to relay switchboards”*.³²⁹ However, despite the explicit reference to the notion of essential facilities in the GPCT Guidelines, it is clear from these Guidelines that the position is that the essential facilities doctrine, as known in the EU, is not recognised in Japan.

The non-recognition of the concept of essential facilities in Japan means that there is no obligation on the owner of a facility that would be considered essential under EU law, to grant access to competitors. By implication, the stricter non-discrimination obligations in EU cases involving essential facilities do not apply in Japan. Rather, it is the prohibition of refusal to deal that constitutes the competition law prohibition applying in cases of unjust refusal of access in the telecommunications sector. This means that if a competitor refuses to deal with another competitor this refusal will be prohibited only if following an analysis of the market, which includes behavioural as well as structural factors, the conduct in question is found to be anti-competitive *per se* as an illegal refusal to deal and no further obligations (i.e. stricter non-discrimination obligations) will be imposed. The Japanese position is that when judging the influence on fair competition, it is not necessary to analyse whether or not the action concerned is a refusal to deal with an essential facility. This means that all refusals to deal are treated

³²⁷ See Chapter 1 of the thesis for more details on the essential facilities doctrine. The notion of essential facilities was defined by the European Commission as a facility or infrastructure without access to which competitors cannot provide services to their customers.

³²⁸ See Chapter 1 of the thesis and in particular the section on essential facilities.

³²⁹ GPCT Guidelines, *supra* note 12, p. 8.

equally and that special rules do not apply to a refusal to deal by an owner of an essential facility.³³⁰

According to the essential facilities doctrine, the refusal to deal by the concerted party is considered to restrain freedom of trading (the refusal itself being considered to be an illegal action) except in the case of objective justification (such as refusal of access due to the limited capacity of the network). This is regardless of the intent or objective of achieving superiority in competition or monopoly. In Japan, however, the existence of the objective of achieving superiority in competition is stated as one of the factors to be considered prior to assessing whether a refusal to deal substantially restrains competition. The JFTC will assess whether or not a refusal to deal violates the AMA by looking at whether the refusal substantially restrains or tends to impede fair competition.³³¹ At the same time, the JFTC will also consider the influence of the refusal to deal on the fair competitive order. Therefore, even when the refusal concerns access to a facility considered essential, the action is evaluated from the viewpoint of whether or not the refusal to trade is an illegal act relative to the fair competitive order. However, it is more than likely that the end result in both cases will be the same, i.e. that the conduct in question will be prohibited. The difference is that the standard of proof is higher under refusal to deal in Japan than under the essential facilities doctrine in the EU.

The fact that the doctrine of essential facilities is not applied in Japan might comfort the position of those who criticise the application of the doctrine in the EU. These authors fear that investment in innovation will be limited by the application of the doctrine of essential facilities. Also, they point to the fact that there is a risk that a liberal application of the doctrine could blur the distinction between mere competitive advantage (which should be kept by its owners) and a facility necessary to exploit a given market. Japanese competition policy by not recognising the doctrine of essential facilities minimises the risk that competition law may prevent innovation or is used to negate a legitimate advantage enjoyed by a competitor. On the other hand the benefits that the application of the doctrine may bring, such as increased competition by the opening-up of a market and as a consequence, lower prices and better service for consumers, cannot be seen in Japan.

However, it should be noted that following the CFI's *European Night Services* and the ECJ's *Oscar Bronner* judgment, the differences between Japan and the EU in their approach to

³³⁰ OECD, roundtable on the essential facilities concept, supra note 320.

³³¹ See Chapter 2 of the thesis and in particular the section explaining the notion of '*substantial restriction of competition*' as well as the section on refusal to deal as a means to exclude competitors from a market.

essential facilities have been severely minimised. Under the new test established by the European Courts for the essential facilities doctrine to apply, the undertaking requesting access must establish that the market could not sustain a competing system at all and not just that it would not be economic to establish a competing system. This means that forcing a competitor to allow access to its network must be considered as a last resort, to be applied only when all hope of normal competition has been abandoned.³³² This new test drastically reduces the number of 'real' essential facility cases thereby limiting the differences between the EU and Japanese general competition rules applying to access to telecommunications markets.

2.6 Conclusions on refusal to deal

The Japanese general competition rule which is most likely to apply to issues of access to telecommunications infrastructure and network facilities is refusal to deal. More specifically, the most relevant type of refusal to deal to access issues is refusal aimed at excluding competitors from a market. The analysis above showed that with regard to such refusal to deal there is a trend within the JFTC to apply whenever possible the tougher sanctions that come with a finding of private monopolisation. However, as illustrated by the 2001 GPCT Guidelines wherever the burden of proof for a finding of private monopolisation cannot be met, the JFTC will try to apply the prohibition of unfair trade practices. Although the trend towards the application of tougher sanctions for illegal refusals to deal is to be welcomed, care will have to be taken in applying strictly the legitimate reasons that allow under the 2001 GPCT Guidelines to justify what would have otherwise been an illegal refusal to deal.

Although the doctrine of essential facilities is not recognised in Japan this does not have a significant impact in practice for two reasons. First, in Japan the use of sector-specific regulation (as studied in section B below) can achieve similar results to the essential facilities doctrine in that it can force access to infrastructure and network facilities albeit through a different regulatory structure and are different conditions. Second, the cases in which a complainant can successfully invoke the essential facilities doctrine in the EU have been very severely limited by the European Courts. It is more likely that in the future traditional competition rules (i.e. refusal to supply as a category of abuse of dominance under Article 82 EC) will be the relevant EC competition rule that will prohibit a refusal of access to a telecommunications infrastructure or network facility just like as in Japan currently.³³³

³³² See Chapter 1 of the thesis and in particular the section analysing the *Oscar Bronner* judgment and its consequences.

³³³ This idea will be further analysed in Chapter 3.

SECTION B: Sector-specific rules on access to Japanese telecommunications markets

As explained in the introduction to this chapter the question of access to the telecommunications industry (and the interrelation between general competition rules and sector-specific rules) has to be approached differently in Japan than in the EU. The application of general competition rules to access to telecommunications networks is more restrained when compared to the EU situation where there has been a greater emphasis on general competition rules and policy. In Japan, a significant number of competition rules are embodied in sector-specific regulation and form an integral part of it. Also, as Japan has a longer experience of liberalised network industries the thematic issues in relation to third party access are more practical than in the EU where the whole liberalisation process is a more recent phenomenon. Therefore, the appropriate method of study here is more sector-specific weighted compared to the EU analysis.

The remaining sections of this chapter will therefore focus on the analysis of sector-specific regulation. First, the development of sector-specific regulation introducing competition in the Japanese telecommunications industry will be analysed. This is necessary in order to correctly understand the present balance between general competition rules and sector-specific rules in regulating access to telecommunications infrastructure and network facilities in Japan (which is the object of Chapter 3 of the thesis). Second, as in Chapter 1, the interconnection rules also need to be analysed as they are the relevant sector-specific rules regulating access to telecommunications infrastructure and network facilities.

3. Development of market entry in the Japanese telecommunications industry - from monopoly to the 1985 reform

3.1 The monopoly years

Telecommunications in the modern sense can be traced back to 1870 when the Meiji restoration brought an opening to Western influences in Japan. The telegraph and telephone infrastructure which had been successfully built since that time was however completely destroyed as a result of the second world war. Consequently, the government's priority at that time was to create an entity which did not have to worry about competitors and that could just concentrate on rebuilding the old network and extending it. Nippon Telegraph and Telephone Corporation ('NTT') was established in 1952 as a monopoly provider to assume control from the government in order to centralise the reconstruction of Japan's telecommunications industry after the

Second World War. According to official sources, NTT achieved its two initial goals of eliminating the backlog of applications for subscriber telephones in March 1978 and providing nationwide automatic direct dial network services in April 1979.³³⁴

Kokusai Denshin Denwa Co.Ltd ('KDD') was created by the government in 1953 as the exclusive international telecommunications provider in Japan. Japan's originality was therefore that instead of having one giant monopolistic company it had two; one for the national market and one for the international market. This situation remained unchanged until the 1985 reforms.

3.2 The need for change - background to the 1985 reform

Starting in 1972 a growing number of discussions were held as to the efficiency of public corporations in Japan. The national railway company called '*Kokutetsu*' was in the mind of many people a clear example of bad management in a public corporation. In the early 1980's significant technological evolutions took place and the liberalisation process gathered pace as a result.³³⁵ This technological evolution had a double impact in changing the telecommunications environment. First, technological evolution helped the telecommunications monopolists achieve their goals of universal service and rapid installation of new lines. Second, technological evolution had the effect of accelerating the liberalisation movement by giving a theoretical chance to new competitors to create their own infrastructure or even leasing the public entity's infrastructure.

The Ad Hoc Committee on administration, which dealt mainly with public corporations was created and in 1982 produced a report containing the following recommendations;

- introduction of market principle of competition;
- privatisation of NTT;
- Reorganisation of NTT (break-up into a central company and a number of regional companies).³³⁶

³³⁴ MPT, Open, Telecommunications Overview of Japan, February 1995, p.5.

³³⁵ A good example of the revolution brought about by new technology is the cellular phone market. The number of new subscribers has been growing at a furious rate and does not show any sign of tiring-off. Cellular phone operators are multiplying because of the ease with which they can set-up a network and get it up and running.

³³⁶ Ad Hoc Committee on Administration Report, July 30, 1982, 1-1.

The views of the Ad Hoc Committee were reflecting real concerns in Japan as NTT's monopolistic position in the telecommunications market faced increased criticisms:

- demand grew for the establishment of a system that could provide a greater variety of telecommunications services to satisfy the ever-diversifying and more sophisticated needs of the nation;
- the private sector acquired the economic ability to construct telecommunications networks, and technological progress made it easy to connect several networks, thereby diminishing the need for a centralised telecommunications network operated by NTT.

In addition, the general background to the power play behind the main actors on the telecommunications scene gives a useful insight into further possible reasons for the 1985 reforms. After the second World War, the Ministry of Communications was divided into a Ministry of Telecommunications and a Ministry of Posts. Then, in 1952, the Ministry of Telecommunications became NTT, a public corporation, with a monopoly over domestic telecommunications. The Ministry of Posts became the MPT (now called MPHPT³³⁷), with supervisory responsibilities for NTT. However, NTT rather than the MPT emerged as the dominant force in Japanese telecommunications. NTT itself set technical and safety standards for equipment, handled relations with the Diet on telecommunications policy, and controlled the telecommunications R&D system. Meanwhile, the MPT only maintained a small Telecommunications Supervision Office, with a staff of 30-40, to oversee the whole of NTT. The few MPT bureaucrats in this office gradually became frustrated with their lack of authority, and this frustration ultimately motivated their drive for reform.³³⁸

3.3 The 1985 reform

1985 signified the start of a new era in Japan's telecommunication history. Three laws formed the back bone of the liberalisation effort in the telecommunications market - the Telecommunications Business Law ('TBL'), the Nippon Telegraph and Telephone Corporation law ('NTT Law') and the Kokusai Denshin Denwa Company Ltd, Law ('KDD law').³³⁹ Each of these laws is analysed below in the following sub-section. It should be noted here that the 1985

³³⁷ The MPT was restructured and merged with other Ministries in January 2001 to create the Ministry of Public Management, Home Affairs, Posts and Telecommunications ('MPHPT') as part of the central government reform.

³³⁸ S.Vogel, Creating competition in Japan's telecommunications market, Japan Information Access Project Working Paper, 3 May 2000, p.5.

³³⁹ The 1985 reform is referred to by the Japanese regulator as the "*first info-communications reform*".

reform is considered by the Japanese regulators as the first stage of the deregulation of the telecommunications industry.³⁴⁰ The use of the term “deregulation” to describe a situation where new regulation (i.e. the 1985 TBL) was enacted is somehow misleading.³⁴¹ In order to avoid confusion the term “liberalisation” is used instead to analyse the various stages of the opening up of the Japanese telecommunications markets to competition and the term “deregulation” is used in cases where regulation has actually been reduced or simplified in order to promote competition.³⁴²

NTT Public Corp. was privatised as NTT Corp and competition was introduced in both domestic and international telecommunications markets. This signified the end of NTT’s and KDD’s respective monopolies. New entrants were allowed to compete with the former monopolists under a new regulatory system detailed below. Another liberalisation measure concerned terminal equipment under which users were allowed for the first time to install their own telephone sets rather than leasing them from NTT Public Corp.³⁴³

3.3.1 The legislative framework underpinning the 1985 reform - the TBL, the NTT law and the KDD law

(a) The TBL

The TBL enacted on April 1, 1985³⁴⁴ establishes the framework in which telecommunications operators are allowed to operate. The regulatory framework that it put in place remains basically unchanged to date. The following paragraphs describe the basic regulatory framework under which telecommunications operators have to operate in Japan.

The purpose of the TBL is: *“considering the public nature of telecommunications business, by ensuring the proper and reasonable operation of such business, to secure the consistent provision of telecommunications service, to protect the interests of its users, and thereby to*

³⁴⁰ See for example, Ministry of Foreign Affairs, Japan’s approach to deregulation to present, April 1999.

³⁴¹ Deregulation is normally understood as being the process of reducing regulation.

³⁴² The MPHPT is presently implementing the “Three year deregulation program for the promotion of deregulation” determined at the cabinet meeting held on 31 March 1998 as revised on 30 March 1999. This program contains deregulation measures for various industries, including the telecommunications industry. The relevant parts of this program are studied below.

³⁴³ G.L.Pictrell and M.Okamoto, Chapter 24 Japan, in Telecommunications law and Practice, Second Edition, 1995, Collin D.Long, p.505.

³⁴⁴ Telecommunications Business Law, Law No.86 of 25 December 1984, amended last by Law No 82 of 8 May 1995.

ensure both the sound development of telecommunications and the convenience of the people, and to promote the public welfare".³⁴⁵ The principle of fairness in the provision of telecommunications services by telecommunications carriers is established by article 7 of the law.

The telecommunications business is categorised into Type I Telecommunications businesses that provide telecommunications services using their own telecommunications circuit facilities³⁴⁶ and Type II telecommunications carriers that provide services by leasing telecommunications circuit facilities from Type I carriers. Type II carriers are further divided in two categories. First, 'special Type II providers' which are operators wishing to engage in either providing voice services through the interconnection of both leased circuits with public switched networks or providing telecommunications facilities for overseas communications. Second, all other carriers using leased lines are 'general Type II carriers'.³⁴⁷ These categories are analysed in more detail below.

Type I telecommunications businesses: the provision of Type I telecommunications business by any person is subject to permission from the MPHPT. Type I licences are the broadest in scope but the most difficult to obtain because of the highly public nature of the services provided. For example, NTT (the former monopoly for national telephony) and KDDI (the former monopoly for international telephony, KDD which merged with DDI Corporation and IDO Corporation to form KDDI in October 2000) are Type I operators. As of September 2000, there were about 320 Type I operators in Japan.³⁴⁸

Type II telecommunication businesses: A Type II telecommunications business is a telecommunications business other than that described as Type I telecommunications business.³⁴⁹ As mentioned above, the law makes a distinction between General Type II telecommunications business and Special Type II Telecommunications Business. Special Type II telecommunications business is a Type II telecommunications business (i.e. a telecommunications business other than a telecommunications business which provides

³⁴⁵ TBL, Chapter 1, article 1.

³⁴⁶ Telecommunications facilities mean transmission line facilities connecting transmitting points with receiving points, switching facilities installed as inseparable units there from, and other facilities accessory to such facilities, Chapter II. Article 6(2) of the Telecommunication Business Law.

³⁴⁷ MPT, Open, Telecommunications Overview of Japan, February 1995, p.11.

³⁴⁸ M.Kamiya, Getting the deal through, Japan, Telecoms in 30 jurisdictions worldwide, 2001, p. 108.

³⁴⁹ MPT, Open, Telecommunications Overview of Japan, February 1995, p.11.

services through its own facilities) which provides voice services for an unspecified number of general subscribers through the interconnection of both ends of leased circuits with public switched networks³⁵⁰ (i.e. those telecommunications facilities installed by Type I carriers which include switching facilities),³⁵¹ or a Type II telecommunications business which provides telecommunications facilities designed for communications between Japan and foreign points for the communications use of others.³⁵² A general Type II telecommunications business is any Type II telecommunications business other than Special Type II telecommunications business. As of September 2000, there were about 110 special Type II operators and about 8,650 general type II operators in Japan.³⁵³

(b) The NTT law

The NTT Law of 25 December 1985³⁵⁴ replaces the previous 1953 Nippon Telegraph and Telephone Public Corporation Law that created NTT, a government-owned corporation with a monopoly over domestic telecommunications. The NTT law makes of NTT a joint stock company (*Kabushiki Kaisha*) whose purpose it is to operate a domestic telecommunications service. This does not prohibit NTT from offering services in other countries. NTT has entered into the business of building networks in other countries, such as Thailand.³⁵⁵ Moreover, NTT has offices in twelve countries around the world and owns 140 subsidiary companies operating in a wide variety of businesses that help NTT achieve its purpose of providing domestic communications.³⁵⁶

³⁵⁰ The so-called, 'Ko-Sen-Ko' interconnections, MPHPT, Manual for Market Entry into Japanese Telecommunications Business, March 2000, p. 3.

³⁵¹ A Ministerial Ordinance provides that a Type II telecommunications carrier must have a scale of facilities that exceed the minimum standard of 500 circuits for 1,200 bps conversion; MPHPT, Open, Telecommunications Overview of Japan, February 1995, p.11.

³⁵² The second possibility for a carrier to be classified as a Special Type II telecommunication business is if it offers international VAN service using an international leased circuit.

³⁵³ M.Kamiya, supra note 348, p. 90.

³⁵⁴ Law No.85 of 25 December 1985.

³⁵⁵ On November 12 1992, NTT took a 20% stake in TT&T. NTT will assist in the building of a one million line telephone system in Thailand that will be transferred to the Thai government upon competition and then operated by TT&T, with NTT remaining as a shareholder. Future expansions could undergo the same process, with a six million line plan set for installation between 1997 and 2001. Keisuke Nakasaki, Thai Tel.&Tel.Public Corp.Ltd., TT&T and the One Million Telephone Line Expansion Project-Experience from Thailand, January 9 1995.

³⁵⁶ R.E.Nohe, A Different Time, A Different Place: Breaking Up Telephone Companies in the United States and Japan, *Federal Communications Law Journal*, Vol.48, No.2, March 1996, p.334.

Article 4 of the NTT law provides that the government shall always hold one-third or more of the total number of the outstanding shares of the company. The Ministry of Finance still holds a majority equity interest of 53 per cent of NTT.³⁵⁷ After recent deregulation, the only Japanese telecommunications operator subject to the foreign ownership restriction (no more than 20 per cent.) imposed by law is NTT.

NTT's business program must be authorised by the Minister of the MPHPT.³⁵⁸ Moreover, the company is placed under supervision of the Minister of the MPHPT who may, if he determines it to be especially necessary in enforcing the NTT law, issue to the company orders necessary for the supervision with respect to its business activities.³⁵⁹

As a result of the NTT law, consumers no longer must purchase a standard telephone set from NTT.³⁶⁰ The NTT law continues the previously existing prohibition on NTT to manufacture its own equipment, thereby forcing private NTT to continue purchasing its equipment from third parties.³⁶¹

NTT's obligations: Article 3 of the NTT law provides for NTT's obligations that can be summarised as the:

- obligation for NTT to manage its business to give consideration to the maintenance of its proper and efficient management and;
- to contribute to the establishment and provision of stable nation-wide telephone services indispensable to the people's life;
- at appropriate conditions and impartially;
- NTT shall endeavour to contribute to the creative advancement and development of telecommunications in Japan through promoting its basic research and development activities in telecommunications technology;

³⁵⁷ M.Kamiya, supra note 348, p.107.

³⁵⁸ Article 12 of the NTT law.

³⁵⁹ Article 15 of the NTT law.

³⁶⁰ Japan's Home Telephone Revolution, *Business Japan*, July 1985, p. 21.

³⁶¹ A specific procurement program was set up to this effect.

- and through disseminating the results thereof, and thereby to promote the interests of the public.

(c) The KDD law

The KDD law dates back to 1952 at a time when the government had a monopoly over communication services.³⁶² Article 1 of the KDD law provides that KDD shall be a limited company whose purpose is to operate international telecommunications business.³⁶³

As a result of the 1985 reform, the business activities of KDD have to be authorised by the Minister of the MPHPT if they are other than ones expressly authorised and are necessary to achieve the purposes of the company. Incidental business activities are expressly authorised by article 2 of the law.

3.4 The impact of the 1985 reform

The 1985 reform should have produced a telecommunications market where the principle of competition was introduced in all types of services. The reforms had two aims.³⁶⁴ First, the establishment of a system enabling market entry in all areas. This was to be achieved by:

- the introduction of the principle of competition to the area where carriers offer services by establishing their own telecommunications circuit facilities (Type I telecommunications carriers);
- liberalisation of circuit usage (Type II telecommunications carriers);
- liberalisation of terminal equipment market (liberalisation of telephone sets).

Second, the improvement of business efficacy by the privatisation of NTT. This was to be achieved by:

- abolition of the principle of legal rates (i.e. of rates imposed by the government);

³⁶² Kokusai Denshin Denwa Company, Ltd. Law, (Law No.301 of 7 August 1952).

³⁶³ The KDD law was abolished in July 1998 as a result of further liberalisation. Further, KDD merged with DDI Corporation and IDO Corporation to form KDDI in October 2000; see the section below on the second information communications revolution.

³⁶⁴ MPHPT, Open, Telecommunications Overview of Japan, February 1995, p.6.

- abolition of the budget system;
- abolition of the regulation of investment.

The above objectives of the 1985 reform have to be measured against the actual results it has had both in achieving new entry into the market (for Type I and Type II operators) and on the structure of the market itself in terms of the provision of new services, the lowering of prices, etc.

3.4.1 New entry into Type I telecommunication business markets following the 1985 reform

Following the initial opening-up of the telecommunications market in Japan, competition was introduced in the following markets:³⁶⁵

The regional market: After Tokyo Telecommunication Network Co., Inc (TTNet) started leased-circuit services in the Kanto area in November 1986, New Common Carriers entered the market in the Kansai, Chubu, Shikoku, Kyushu and Hokkaido areas. In October 1993, Chugoku Telecommunication Network Co., Inc (CT net) started leased-circuit services in April 1989 and was followed by IDC that May. Both companies started telephone services in October 1989;

The long distance market: Japan Telecom Co., Ltd (JT) started leased-circuit services in August 1986, followed by DDI Corp. (DDI) in October of the same year, and Teleway Japan Corp. (TWJ) that November. JT, DDI and TWJ started providing telephone services from September 1987. This resulted in rate reductions and the diversification of services including discounts;

The international market: Besides the former monopoly provider, KDD, there were two new entrants in the international telecommunications market: International Telecom Japan Inc. (ITJ) and International Digital Communications Inc. (IDC). Both companies started telephone services in October 1989. ITJ started leased-circuit services in April 1989 and was followed by IDC in May of the same year;

The satellite communications market: NTT and two so-called New Common Carriers ('NCCs'), i.e. new entrants, - Japan Satellite Systems Inc. (JSAT) and space Communications Corp. (SCC) - provided leased-circuit services using communications satellites. JSAT is a new company resulting from the merger of Japan Communications Satellite Co.,Inc. and Satellite Japan Corp. in August 1993;

³⁶⁵ MPHPT, Open, Telecommunications Overview of Japan, February 1994, p.17 to 19.

The cellular phone market: As of February 1994, there were 24 carriers (except for Aviacom Japan Co.,Ltd) providing cellular phone services. NTT separated its mobile services as a subsidiary, NTT DoCoMo group, in July 1993. New cellular phone carriers include Nippon Idou Tsushin Corp. (IDO), which serves metropolitan Tokyo and the Chubu area, and eight cellular phone companies, including Kansai Cellular Telephone Co.Ltd, which operate on other areas, with two carriers competing per area;

The radio paging market: The NTT DoCoMo group provides radio paging services on a regional basis, while 31 new carriers provide services on a regional basis in Metropolitan Tokyo and the Kansai, Chubu and Tohoku areas, and on a prefectural basis elsewhere. In 1994 two carriers were competing in each area or prefecture.

3.4.2 New entry into Type II telecommunication business markets following the 1985 reform

As to Type II telecommunications operators, the MPHPT reports that eighty-five Type II telecommunications carriers started business in April 1985 when the market was liberalised, and by the end of 1986 the number of carriers had increased about 2.5 fold to 209.

In 1986, nine Special Type II telecommunications carriers and 38 Special Type II telecommunications carriers started business. As of January 1, 1994, there were 1.459 General Type II telecommunications carriers and 38 Special Type II carriers. Twenty-seven of these Special Type II carriers are providing international VAN services.³⁶⁶ The number of General Type II telecommunications carriers has been growing at a pace of 100 to 200 per year. Most of these do not specialise in telecommunications services but manage other business fields as well. The other business fields of the General Type II carriers include online communications,

³⁶⁶ Type II telecommunications carriers can be classified into the following seven type-categories:

- Online information processing services: 348 companies;
- distributors including wholesalers and warehouses: 75 companies;
- transportation companies: 17 companies;
- publishing, advertising companies: 28 companies;
- electronic equipment manufacturers, software houses: 149 companies;
- trading companies: 14 companies;
- others: 828 companies.

distribution, transportation, publishing and advertising, the manufacturing and marketing of electronic equipment, and the development and marketing of software

3.4.3 Market impact of 1985 reform for Type I telecommunications businesses

The following are indicators of the effect that the introduction of competition has had on the Japanese telecommunications market:

Domestic telecommunications market: In the telephone service market the MPHPT reports that NTT had a 92.2% share and the NCC's had 7.8% of the market. Generally NTT remained by far the dominant player on all domestic telecommunications markets except in the cellular phone market where NTT DoCoMo had a share of 63.2% and the NCCs had 36.8%.

International telecommunications markets: In the international telephone service market, KDD accounted for 74.3% and the two NCCs took 25.7%. In the international leased-circuit services market KDD had an 80.3% share and the NCCs had 19.7%.

Rate trends: Price rates are a direct indicator of the competitive state of the telecommunications industry of a given country. Measures such as the ones taken by the Japanese government in 1985 have produced falling rates. Domestic long-distance rates have gone down every year since 1987, when NTT's competitors first began operating. For example, the three-minute rate for a call between the two most distant calling areas (i.e. the most expensive possible long-distance call) was 400 yen in 1985 just before deregulation; by November 1993, NTT's rate was 180 yen and that of the NCCs 170 yen. Three long-distance NCCs started leased-circuit services in 1986, offering rates 20-30% lower than those of NTT. For example, NTT's leased-circuit tariff between Tokyo and Osaka was 1.1 million yen, while the NCCs offered the same service for 796,000 yen. Both NTT and the NCCs further repeatedly reduced their rates, then in March 1990 NTT reduced its rate to 385,000 yen and in April 1990 the NCCs reduced theirs to 344,000 yen. These rates remained unchanged as of July 1993. In just six years since the NCCs began offering leased-circuit services, the cost of high speed leased circuit between Tokyo and Osaka fell by nearly one-third. Clearly, the deregulation of the international market has brought its results as tariffs have been going down in every sector of the telecommunications market including long-distance call rate basic charges of cellular phone services, radio paging service charges and international telephone charges.

Diversification of services: Another indicator of the competitive state of the telecommunications market is the variety of the services offered in both the domestic and the international telephone market. At domestic level, the first indications of diversification of services date back to April 1992 when NTT started a discount service by which a user who contracted to pay a fixed sum of money each month would have all calls made at certain times (all day on weekends and

holidays, 10.00 p.m. to 8.00 a.m. on weekdays) charged at a special discount rate. The NCCs responded by introducing optional pricing services by which the user pays a fixed monthly charge which entitles him to make as many calls as he likes within the appointed duration provided they begin within specified times (all day on weekends and holidays, 7.00 p.m. to 8.00 a.m. on weekdays). Discount rate-systems have also been introduced in the mobile communications field. In addition, various advanced network services were made available in Japan. A typical service which is generating demand is the 'Free Dial 0120 Service', started in December 1995, which is equivalent to the '800 Service' of AT&T in the U.S. Contracting parties are assigned a telephone number with the '0120' prefix, and the charges of incoming calls are paid by the called party. With this toll-free service too, discount rate systems involving monthly fixed payments have been introduced since June 1990. Another service is the 'Dial Q2 Service', a consigned information charge collection service available since July 1988, which is equivalent to AT&Ts '900 Service'. NTT has introduced the provision of a telephone polling service equivalent to a '900 Service' in the U.S. called 'MultiQuest Call Counter', and of a service for providing large volumes of information, corresponding to the 'MultiQuest Broadcaster' service. At international level, the following are indicators of diversification of services. Services which KDD and the two NCCs (ITJ and IDC) compete to provide include:

- international autodial calling, by which any NTT subscriber can place an international telephone call at any time;
- credit card automatic calling, by which people who have registered can place international autodial calls without using cash when away from home;
- incoming credit card automatic calling, by which people who have registered can place international autodial calls to Japan from overseas which are then charged at the Japanese rate;
- third party billing, by which international calls to Japan from a registered telephone number can be charged automatically to another specified telephone number;
- auto-collect calling, by which the called party automatically pays for international calls;
- and VPN service which provides extension telephone functions by public network. They also provide discount services by which the user's telephone is connected directly to the carrier's switching system using a subscriber line, with the names 'Route KDD', 'Link ITJ' and 'IDC Straight'.

Equipment investment: Finally, the amounts spent by telecommunications carriers in equipment investment are also representative of the level of competition in the Japanese

telecommunications industry. The more competitive an industry is, the more competitors have to invest money to take some market share from their competitors. The MPHPT reports that to maintain, manage and improve the telecommunications infrastructure, NTT and KDD have been investing steadily in facilities equipment, with NTT investing from 1.50 trillion yen to 2 trillion yen annually, and KDD investing about 60 billion annually. As for the NCCs, from about 1987, long-distance NCCs have been actively investing in the construction of nation-wide networks, and NCCs offering mobile communications services have been investing in base stations to expand and enhance their networks to accommodate rapid growth in the number of subscribers. Equipment investment by Type I telecommunications carriers in FY 992 totalled 3.57 trillion yen, up 3.7% from the amount spent in FY 1991.

3.4.4 Market impact of the 1985 reform for Type II telecommunications business

For Type II operators, the introduction of competition had effects on:

Services offered: Special Type II telecommunications carriers provide three kinds of service: communications-related services (VPN, packet switching, facsimile, E-mail, etc.), info-communications services (online information processing, online databases, etc.), and related services (system integration, equipment sales, consulting, etc.). Among these, communications-related services and info-communications services fall into the category of telecommunication businesses;

Sales: Sales in FY 1992 by Special Type II telecommunications carriers totalled 1.18 trillion yen. Related service businesses accounted for the largest share with sales of 724.6 billion yen (61.4%), followed by info-communications services at 314.7 billion yen (26.7%), and communications-related services at 141.1 billion yen (26.7%).

4. The shortcomings of the 1985 reform

4.1 Assessment of the 1985 reform

The 1985 reform is the first landmark point of the introduction of competition into the Japanese telecommunications industry. The essential purpose of the 1985 regulatory reform was to transform the industry from a monopoly to a competitive market and to allow new services and technologies to enter and develop. All types of telecommunications markets experienced a surge of new entrants with the cellular phone market experiencing particularly dynamic competition indicated by a six-fold increase in new monthly subscribers in 1995. The effects of the new competitive environment quickly brought their fruits. Prices, often the clearest indicator of healthy competition in a market, have been constantly falling since 1985 whilst in the same time services have been diversifying at a rapid pace. On the down side, experience has shown that it is almost impossible to ignore the fact that the old public monopolies remain dominant on

their markets and are likely to remain so in the near future. NTT is a clear example of this phenomenon as it not only clearly dominates the fixed telephony market with a share close to 90% but also the cellular phone market where new entry is easiest due to the lower costs and barriers to entry.

The regime introduced by the TBL is very much based and dependent on the existing NTT and KDD infrastructure and network facilities which are leased or interconnected to competitors in order for them to provide services to the public. In the short term it is unlikely that many operators will endeavour to assemble the prohibitive costs of building their own comprehensive networks and will therefore remain dependant of NTT. Some competitors are able to create their own network but only for local service and still have to use the NTT network to provide nationwide service. Experience showed that one of the main reasons why NTT was keeping its dominant position is linked to the crucial issue of interconnection³⁶⁷ and the way in which it was provided. Rather than being decided by an independent body such as the MPHPT, as would have been expected, interconnection was left to commercial negotiation between NTT and the new entrant desiring to interconnect with the NTT infrastructure and network facilities. This meant that NTT could control its competitors by agreeing or not to interconnect with them or perhaps agreeing to interconnect but at conditions which were all but prohibitive for new entrants. Experience has shown that unless interconnection conditions are fully transparent and controlled by an independent body it is all too easy for the incumbent to make 'life difficult' for the new entrants by, for example, asking for very high interconnection prices, accepting to interconnect but only at points of interconnection which cannot be reached by the new entrant, etc. Since NTT owns the widest and most comprehensive telecommunications network in Japan this is indeed a worrying power.

4.2 Shortcomings of the TBL

4.2.1 State of the telecommunications industry after the 1985 reform

It is clear from the above section of this thesis that the telecommunications environment has changed dramatically since the 1985 reform with a very significant number of competitors entering the market. In that regard the 1985 reform and the key legislation behind it, the TBL, have been a success. However, the following sections will show that the system is not perfect and it has significant shortcomings. In addition, the very rapid pace of technological progress in

³⁶⁷ Interconnection can be defined as the linking of telecommunications (or other) networks in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation. See the section of this chapter below on interconnection.

the telecommunications industry means that regulation has to adapt as well. As a result of this constant technological change, further expansion and diversification of the market is inevitable to respond to users needs.

4.2.2 Basic concepts for the promotion of competition

The importance of the telecommunications industry as a cornerstone of the Japanese economy was quickly recognised by policy groups. One such policy group (composed of experts in the area) set up by the JFTC is the Study Group on competition policy relating to information and communication industries (the 'Study Group'). The function of the Study Group was to evaluate competition policy in the information and communications industries. It produced three reports on this subject in 1988³⁶⁸, 1989³⁶⁹ and, the most detailed one, in 1996³⁷⁰ which evaluate competition in the telecommunications sector and give recommendations as to how to improve competitive conditions.

From the competition point of view, competition was formally introduced by the 1985 reform. The JFTC's observations of specific markets such as long distance telecommunications, mobile telecommunications, and international telecommunications have shown that the introduction of competition has had some effects, such as the increasing share of the market held by the NCCs and the steady lowering and diversification of rates, but in the domestic telecommunications market as a whole, NTT still enjoys a monopolistic position. The JFTC believes that the forces of competition are still not functioning sufficiently, since rates for various services are high in comparison with those of foreign countries and each company generally sets its services in line with those of other companies. To stimulate competition, it is necessary to review government regulations, to equalise the conditions of competition, to study the management form of NTT, to strictly enforce the AMA, and so forth.

³⁶⁸ JFTC/Japan Views, The Study Group Report on Competition Policy in Telecommunications Services, No.2, April 1988, p. 25 to 31

³⁶⁹ JFTC/Japan Views, Issues relating to Competition Policy in the Telecommunications Services, No 8, March 1990, p.66 to 80.

³⁷⁰ JFTC/Japan Views, Issues relating to Competition Policy in the Telecommunications Industry, No.24, March 1996, p.59.

The following sections analyse the competition policy thinking of the JFTC, mainly through the aspects of the Study Group's 1996 report which focus on promoting access to telecommunications infrastructure and network facilities.³⁷¹

4.2.3 Study of ideal government regulations in terms of competition policy

(a) The Study Group's basic viewpoint concerning regulations in telecommunications industry

The Study Group emphasises the need to review drastically regulations in order to promote fair and free competition between companies. Regulations affecting business should be enacted in exceptional cases only when the government cannot achieve its political aims, allowing companies to conduct their business freely. NTT, due to its continuing local monopoly and to the fact that it is the only company that owns comprehensive local communications networks, has justified the creation of legislation that applies to it but that should not apply to its competitors (this concept, studied later on, is known as '*asymmetrical regulation*'). Because the telecommunications market is constantly changing due to rapid technological innovation, it is important to set a term of validity for the regulations and to maintain a system of reviewing the regulations within a certain period after they have been enforced.

(b) The Study Group's recommendations on regulations for entry into and withdrawal from Type I telecommunications business

- Concept of conditions necessary for adjusting supply and demand;³⁷²
- Division of long-distance (inter-prefectural) from local (intra-prefectural);³⁷³
- Limitation of areas;³⁷⁴

³⁷¹ Ibid.

³⁷² The Study Group recommends that conditions necessary for adjusting supply and demand, which are considered to be important for licensing prior to entry into the Type I telecommunications business, should be abolished.

³⁷³ The Study Group recommends that the technical reasons for dividing telecommunications into long-distance and local no longer apply and there is no reason to classify inter-prefectural telecommunications as long-distance telecommunications; therefore, the government should take measures to allow the scope of telecommunications services to be freely determined by each company. This would in turn promote local telecommunications competition by giving to local companies a wider business scope.

³⁷⁴ The Study Group notes that although each local system NCC is developing its business in its own business area, without any division into inter-prefectural communications and intra-prefectural communications, there is no

- Division of international telecommunications from domestic telecommunications;³⁷⁵
 - Enforcement of the AMA.³⁷⁶
- (c) The Study Group's recommendations on regulations for rates and services of Type I telecommunications businesses
- Scope of regulation;³⁷⁷
 - Method of regulation;³⁷⁸
 - Enforcement of the AMA.³⁷⁹
- (d) The Study Group's recommendations on regulations of types of businesses

In its 1996 report the Study Group repeats what is said in its 1988 report,³⁸⁰ i.e. that there is no rationale for setting up different regulations for rates and services between Type I telecommunications business and Type II telecommunications business; therefore, the regulation level should be the same for both the Type I telecommunications business and the

interconnection between local system NCCs. Expansion of the business area of each local system NCC would undoubtedly promote competition in the telecommunications industry, therefore interconnection of the local-area-based NCCs should be freely allowed.

³⁷⁵ The Study Group believes that there is no rational reason for dividing international telecommunications from domestic telecommunications; therefore, the concurrent operation of international telecommunications business and domestic telecommunications business should be authorised if companies so desire. Applying this to KDD, it is not necessary to limit the scope of business of KDD only to international telecommunications, and this division of telecommunications should be quickly abolished. Entry of NTT into the international telecommunications market should be authorised when it is judged that conditions inside and outside of NTT for connection with local communications network can be kept equal.

³⁷⁶ The Study Group notes that companies which mutually limit their business scope and business area violate the AMA. It is therefore necessary to keep a close watch on such actions.

³⁷⁷ The Study Group believes that it is no longer necessary to regulate services other than the basic service (telephony) related to the local communications network which is currently monopolised by NTT.

³⁷⁸ The Study Group recommends that when NTT's rate system is regulated, a more flexible control method of regulation should be used, instead of authorising a system based on the existing blanket cost method (Full Cost Principle).

³⁷⁹ The Study Group believes that while the regulations affecting rates are being relaxed or are abolished in the future, it will be necessary to be on the watch for and prevent activities that violate the AMA. If NTT sets predatory prices, such activities must be cracked down strictly by the AMA.

³⁸⁰ JFTC/Japan Views, The Study Group Report on Competition Policy in Telecommunications Services, No.2, April 1988, p. 26 and 27.

Type II telecommunications business. The classification differentiating between Special Type II telecommunications business and General Type II telecommunications business should be abolished quickly.

Further, the Study Group found that when a Type I telecommunications company rents its private lines to a Type II telecommunications company, and the Type I telecommunications company imposes unreasonable restrictions on the services that can be provided by the Type II telecommunications company using the above-mentioned private lines, the activity of the Type I telecommunications company violates the AMA, and such action must be closely watched.

(e) The Study Group's recommendations on the NTT law and KDD law

NTT law: Universal service can be maintained by taking other supplementary measures, and there is no rationale for setting such regulations only for NTT. Also, the excessive regulations on NTT should be abolished.

KDD law: At the time of the Study Group's report (i.e. before 1996), the conditions for competition in the international telecommunications market for KDD and the NCCs are considered to be roughly equal. Therefore the KDD law should be reviewed and drastically revised, and its abolition considered.

4.3 Appraisal of the Study Group's remarks on the TBL

The Study Group's remarks relate mainly to the law that puts in place the regulatory framework, i.e. the TBL. Although it has been amended, e.g. as a result of the 1985 reform, its basic structure dates back to 1953, when the telecommunications industry was characterised by the two big public monopolies of NTT and KDD. The criticisms of the Study Group are mainly aimed at the structure imposed by the TBL distinguishing between Type I and Type II telecommunications carriers as well as between Special and General Type II carriers. This criticism seems founded as it is generally true that less regulation facilitates new entry which in turn should bring more competition and hence benefit the end users through the introduction of new services, lower prices and a greater focus on their needs.

The Study Group underlined the importance, particularly for the telecommunications industry, of the dramatic changes brought about by technological innovation and the rapid diffusion of information. This is a very important point as technological developments can radically change the competitive situation on a given market. Therefore, the JFTC and the legislator have to stay on top of the technological innovations constantly introduced in high technology areas such as telecommunications. The application of the AMA to the telecommunications sector is encouraged by the Study Group. A realistic approach is taken when putting forward proposals for promoting competition in the telecommunications industry. For example, when it deals with

the ideal government regulations in terms of competition policy the Study Group does not overlook the possibility of 'back door' regulation through the use of administrative guidance issued by the various government Ministries. Although the use of administrative guidance has, since 1995, been discouraged by the government, there is still a genuine power play between the Ministries themselves but also, more importantly, between the Ministries and the JFTC. Often, co-operation between the Ministries and the JFTC is not ideal and that is something that has to be addressed.³⁸¹

In general the Study Group emphasised the weaknesses of the present system but can be criticised in that it fails to propose a viable alternative solution. Moreover, such advisory study groups only have the power to recommend policies to Ministries (which can propose legislation) or the JFTC (which can issue enforcement decisions).

4.4 The Study Group's recommendations on NTT related issues

4.4.1 Characteristics of NTT's extraordinary status and ensuing competition issues

Back in 1989, the Study Group was already concerned that NTT, the only carrier in Japan with a nation-wide circuit network, was enjoying an overwhelming advantage in the field of basic telecommunications services vis-à-vis its competitors and might abuse its market power. In that report, the Study Group singled out the following characteristics that illustrated NTT's extraordinary status:³⁸²

- Circuit network;³⁸³
- Internal cross subsidy;³⁸⁴
- Information.³⁸⁵

³⁸¹ See Chapter 3 of this thesis for a more in-depth analysis of the reasons of this difference in power between the MPHPT and the JFTC as well as to its consequences on the interrelation between general competition rules and sector-specific rules with regard to access to telecommunications markets in the EU and Japan.

³⁸² JFTC/Japan Views, Issues relating to Competition Policy in the Telecommunications Services, No 8, March 1990, p.67.

³⁸³ With the exception of exclusive line services, new carriers face difficulty in providing their own circuit exchange-type telecommunications services without connection to NTT's circuit network. The huge costs involved in the construction of new circuit networks are prohibitive for the new carriers that will have to rely on NTT's network instead.

³⁸⁴ Cross subsidy within different entities of the same company could amount to unfair competition vis-à-vis new entrants. The possibility exists that NTT service divisions are internally providing mutually with economic gains and making mutual use of information.

The Study Group identified possible impediments to free and fair competition in the telecommunications services that could occur should NTT abuse its market power. Translated into competition terms the three characteristics that make-up the extraordinary status of NTT can lead to the following three abuses:

- refusal of request for connecting to the NTT network;
- predatory pricing dependant on internal cross-subsidies; and
- utilisation of intellectual property to eliminate other carriers.

In response to those fears of anti-competitive conduct by NTT, the Study Group studied an effective way to ensure fair competitive conditions in the telecommunications services. The reform of the market structure in the telecommunications services, as outlined below, is one such way.

4.4.2 Proposed remedies

In view of the shortcomings of the 1985 reform and the state of the telecommunications industry in the following years, the Study Group put forward in its 1996 report a series of proposals in order to try and remedy the situation (analysed below). Unsurprisingly, NTT is the central focus of the proposed measures. The more radical measure proposed involved the break-up of NTT into regional entities. Such a break-up can be accomplished through various alternative methods, each with its advantages and disadvantages. Other measures that do not go as far as a break up were also proposed and are also outlined below.³⁸⁶

- (a) Break-up of NTT's activities into a local communications network and a long-distance network

³⁸⁵ Information is one of the characteristic of NTT's extraordinary status because:

- without NTT's information regarding circuit network and communications volumes, etc., other carriers may face some difficulties in operating communications businesses;
- without NTT's disclosure of technical information in certain areas, other carriers may face some difficulties in operating communications businesses;
- because NTT is able to use customer-related information obtained from its network divisions in marketing communications equipment, etc., there is fear that NTT may use this advantage to undermine fair competition among the sellers of communications equipment.

³⁸⁶ JFTC/Japan Views, Issues relating to Competition Policy in the Telecommunications Services, No.24, March 1996, p.66 to 80.

Should NTT be broken-up into a local communications network and a long-distance network, the Study Group anticipated the following advantages:

- enhancement of fair competition among all long-distance carriers through the imposition of equal conditions on NTT's long-distance communication enterprises (post-separation) and other long-distance carriers with regard to connections to local-circuit networks;
- enhancement of fair competition among NTT's long-distance communication enterprise (post separation) and other long-distance carriers by prohibiting internal mutual assistance between NTT's local communication service and NTT's long-distance communication service;
- enhancement of fair competition among NTT's long-distance communication enterprises (post separation) and other long-distance carriers, by equalising their conditions to access to network and customer information obtained from local-circuit carriers;
- enhancement of fair competition among NTT's long-distance communication enterprise (post separation) and other long-distance carriers by prohibiting NTT's long-distance communication enterprise to use information relating to NCC's customers, servicing plans, etc., which is possessed by NTT's local-line communication enterprise (post separation).

The following were the anticipated disadvantages of such an option:

- by separating long-distance and local communication services, economical efficiency in scale which is realised by operating these services simultaneously will be diminished and may possibly result in economic loss;
- smooth operation among long-distance and local communications enterprises (post-separation) may be hindered. The quality of consumer services may also deteriorate, accompanied by confusion resulting from areas of responsibility becoming unclear;
- NTT's research and development capability may decline. Superficially, aforementioned anticipated disadvantages may occur from the point of NTT management. However, in view of NTT's impact on the entire telecommunications industry, they may also result in a decline in efficiency of Japan's telecommunications industry as a whole.

Other considerations that the Study Group identified if this option was to go ahead would be that if a local phone service were in deficit, separation might cause an increase in the local phone rate or basic line-subscription rate.

- (b) Regional break-up of local communications network in addition to separation to local communications network and long-distance one

This option attempts to even further curb NTT's market power by promoting more structural separation of the NTT group.

The Study Group anticipated the following advantages from such a measure:

- enhancement of fair competition among NTT's long-distance communications enterprise (post separation) and other local carriers by prohibiting internal mutual assistance among NTT's local line communications enterprises;
- making it impossible for NTT to monopolise network and customer information.

The Study Group anticipated the following disadvantages from such a measure:

- decrease in economical efficiency in scale; loss of uniformity of network; increase in transaction costs and decrease in detour circuit routes, may all result in economic losses;
- damage to smooth liaison among local carriers may be incurred;
- NTT's research and development capability may decline.

Other factors to take into consideration are that while increased competitive awareness among regional local carriers may heighten incentive to streamline operations, maintaining uniform, nation-wide communications rates may become difficult.

- (c) Separation of NTT's mobile communications division, satellite communications division, etc. from NTT

Following the same line of thought as for the local and long-distance markets, the Study Group recommended the separation of the mobile, satellite and other divisions from NTT which would do much to promote free and fair competition in the telecommunications market.³⁸⁷ The Study Group was in favour of the implementation of substitute measures and only if these prove insufficient to secure fair competitive condition, then, concrete measures to reform the market structure should be considered.

³⁸⁷ Ibid, p.57 to 97.

(d) Separation of NTT's terminal equipment sales division

The Study Group recognised the advantages of the separation of NTT's terminal equipment sales division as a measure to promote free and fair competition in the terminal equipment sales market. But there are also drawbacks such as the possible decrease in terminal equipment research and development and effect on consumer convenience. Therefore, the Study Group recommended further study in order to produce a blueprint for separation that would minimise the negative effects of such a separation.

4.4.3 Potential issues arising from a possible break up of NTT

The Study Group also warned against the possible negative consequences of a break up of NTT. When studying the separation of NTT, there is a need to assess its influence on research and development and on the content of NTT's services, whether the cost involved could be too great compared to the results, and whether or not splitting NTT up would eventually benefit consumers. If NTT is divided based on separating it into a long-distance communications company which operates inter-prefectural calls, and a local communications company which operates intra-prefectural calls, and further dividing this local communications company into multiple companies, the following issues need to be considered:

- The rigid classification into long-distance telecommunications (inter-prefectural) and local telecommunications (intra-prefectural) does not make much sense in the light of technological innovations which allow companies to offer all of the services at once;
- Even if NTT is divided up, unless measures are taken to accelerate competition in the local telecommunications market, the bottleneck monopoly in this market will not be eliminated and it will still be necessary to secure fair conditions for interconnection to NTT's telecommunications network (simply dividing a local telecommunications company into multiple companies merely creates multiple companies each having its own bottleneck monopoly). If the measures for deregulation and equalisation of conditions for competition (see below) are not taken simultaneously, dividing NTT will not be effective in promoting competition in the entire telecommunications industry;
- In any case, when studying the structural division of NTT, it is with the primary aim to accelerate competition in the local telecommunications market. The measures proposed for deregulation and equalisation of conditions of competition (see below) are an essential prerequisite and must be adopted before the separation of NTT is implemented.

4.4.4 Equalisation of conditions for competition between NTT and other companies

(a) The Study Group's basic viewpoint

In addition to the structural measures proposed by the Study Group in order to limit NTT's power a series of behavioural (as opposed to structural such as a break-up) recommendations were put forward. These were aimed at equalising the conditions of competition between NTT and its competitors. The Study Group considered that it is important in order to promote competition that NTT provides services, equal to those within NTT, to all other companies, including Type II telecommunications companies, concerning connection to the NTT local communications network and rental of NTT's private lines, by opening the NTT local communications network to those companies.

The Study Group's basic view point was that it is not the proper time to judge the measures necessary to determine NTT's long term future. However, the Study Group recommended that the alternative measures to realise the advantages of competition policy should be implemented now and only if those steps would fail to secure more competitive conditions, then, the first two options proposing a structural reform (i.e. a break up of NTT) of the market structure should be considered.

(b) The Study Group's recommendation for equalisation of conditions of competition

The following behavioural concepts were considered as appropriate in order to achieve a level playing field:

Opening of NTT's local communications network: At present, the interconnection points between NTT's lines and other companies lines are limited to one location in each prefecture. The opening of NTT's local communications network should be promoted in order to increase competition at the local level, so that other companies can fairly and smoothly connect their lines to the NTT network anywhere they desire.

Establishment and surveillance of interconnection rules: Basic rules regarding interconnection have not yet been clarified, and this lack of clear rules impedes smooth negotiations between the parties concerned. Therefore, specific rules for interconnection regarding the method for interconnection with NTT's network and the method of sharing expenses must be set, and mechanisms for ensuring the rules to be complied with must be established (the interconnection rules have since been enacted).³⁸⁸ This comment has to be linked to the remark made at the beginning of this section concerning the lack of independent authority supervising the interconnection. The 1985 reform did not put in place any such authority but rather left it to NTT to negotiate terms of interconnection with new entrants. This is obviously not a satisfactory

³⁸⁸ See below the section of this Chapter on interconnection.

solution given the clear disincentive for NTT to provide access on fair and equal terms to its new competitors. This is why the Study Group recommended the establishment and surveillance of interconnection rules.

Establishment of transmission line rental department and customer service department: The separation of accounting should be made clearer by dividing NTT's local communications business division into a transmission line rental department (wholesale, for which the major business is the maintenance and control of transmission lines and the rental and connection of transmission lines to other communications companies), and a customer service department (retail, for which the major business is the provision of services to end users). The transmission line rental department should provide its services, including renting out transmission lines, under equal conditions to both inside or outside NTT.

Enforcement of the AMA: If NTT commits the act of refusing to interconnect lines in order to obstruct new provision of services or new entry by another telecommunications company, this falls into the category of unfair trade practice or private monopolisation, and constitutes a violation of the AMA.³⁸⁹ Careful watching is thus required to prevent such actions.

4.5 Appraisal of the Study Group's thoughts on NTT issues

In its 1989 and 1996 reports the Study Group dealt mainly with the overwhelming position of NTT in the Japanese telecommunications market. The measures proposed in the 1996 report are well thought off and include both radical structural-type measures such as the break up of NTT but also alternative less radical behavioural-type measures. The solution proposed, for the time being, is to implement the alternative measures and only if these prove insufficient to think about the implementation of the more radical measures to reform the market structure in order to introduce more competition.

The presentation of advantages and disadvantages that could be produced by each option is a sign of the seriousness with which the Study Group dealt with the issue of NTT's break-up. The Study Group takes a realistic approach throughout the study and for example concerning the division of NTT, it does not fail to point out that even if NTT is divided, the bottleneck monopoly in the local market will not be eliminated. The Study Group goes on to say that simply dividing up a local telecommunications company into multiple companies merely creates multiple companies each having its own bottleneck monopolies. This is a clear reference to the US experience where after the break-up of the incumbent in smaller local units, the Baby Bells still

³⁸⁹ See above the section of this Chapter on refusal to deal.

hold a monopolistic position in their local markets. In response to that the Study Group emphasised the importance of taking simultaneously deregulation and equalisation of conditions measures in order to encourage newcomers to enter the telecommunications industry, as well as to promote competition between NTT and other telecommunications companies.

4.6 Outcome of the Study Group's report

With the benefit of hindsight, it is important to note how significant the Study Group reports have been in helping shape the present Japanese telecommunications environment. The measures that the Study Group recommended back in 1989 and further elaborated in the 1996 report as to the break-up of NTT into regional entities have, nearly ten years later, become reality as part of the 1997 reform. Detailed interconnection rules were also adopted in the TBL as part of the same reform. Finally, the Study Group's recommendations to abolish the KDD law was followed in 1998 but its recommendation to reduce the burden of regulation of the TBL (such as the distinction between Type I and Type II operators) has not been followed.³⁹⁰

5. The 1997 reform

In the space of a little more than ten years Japan's telecommunications industry changed significantly. By 1997, 134 Type I telecommunications operator who own and operate their own facilities have been in open competition with the former monopolists. In a 1997 OECD survey, Japan figured in a table outlining the status of telecommunications facilities competition in the OECD as the only country which together with the US, UK, New Zealand, Finland and Mexico has introduced competition throughout the whole of the telecommunications industry.³⁹¹

However eloquent those figures can be, and despite the fact that new competitors are there in terms of numbers, the reality is that the 1985 reform has not been successful in introducing more competition. New entrants have managed to grab only a minuscule 2% of the local telephony market from NTT. Even in the long-distance market NTT has, in 1997, a 68.1% market share.³⁹² Introducing more competition, especially at the local level is the concern at the heart of the 1997 reform which, to a large extent follows the recommendations put forward by the Study Group on the promotion of competition in the Japanese telecommunications industry.

³⁹⁰ See the next section on the 1997 reform.

³⁹¹ OECD, *Regulatory Reforms in Telecommunications Services*, May 1997, p.14.

³⁹² *Ibid*, p.12.

The next sections outline the liberalisation measures of the 1997 reform³⁹³ and make critical comments on their effect.

5.1 The aim of the 1997 reform

As explained in the section above on the shortcomings of the 1985 reform, the 1985 reform did not bring the results expected. Although not stating this as bluntly, the Telecommunications Council ('TC') produced a report in 1996 on the status of NTT Corporation³⁹⁴ which takes into account the findings and recommendations of the Study Group's reports and in particular the 1996 report analysed above. In the TC's 1996 report two focal points were regarded by the TC as the basic drive behind the 1997 reform:

- the need to increase the benefits of telecommunications³⁹⁵ for the nations and users through the promotion of more competition in the market;
- the need to take into account technological changes that shape the telecommunications environment.

5.1.1 Promotion of competition

In its 1996 report, the TC strongly promoted more forceful competition in the telecommunications field. Competition was seen as a factor that would bring added advantages to the nation and telecommunications users by quickly returning the benefits of technological innovation to the consumers. In the same time competition was seen as having the benefit of reducing prices and bringing about diversification of services thereby helping to create a dynamic and competitive telecommunications sector.

Building on the achievements of the 1985 reform which introduced competition in the Japanese telecommunications sector, the TC considered necessary the implementation of structural as opposed to behavioural measures to promote competition. The 1985 reform had recourse solely to behavioural measures and not structural measures (although the latter were considered at

³⁹³ Referred to by the Japanese regulators as the "second info-communications reform".

³⁹⁴ Telecommunications Council, Report, Status of Nippon Telegraph and Telephone Corporation, Towards the creation of dynamism in the info-communications industry, February 29, 1996, <http://www.yusei.go.jp/policyreports/english/telecouncil/NTT/Council-NTTs.html>.

³⁹⁵ The TC actually refers to the term "info-communications" rather than telecommunications. This term covers telecommunications and other electronic communications industries such as the internet.

length by the Study Group³⁹⁶). However, issues such as interconnection require structural measures that would restructure the current market situation. Increased competition in the telecommunications field will come through the interplay of non-structural and structural measures.

As a final remark on the promotion of competition, the TC suggested that the promotion of competition should go hand in hand with the security of public interests. Universal service including welfare services and securing communications in emergencies such as natural disasters are such public interest goals that should not be neglected.³⁹⁷

5.1.2 Technological and other changes

The 1997 reform had to take into account the new technological environment. Technological innovations such as '*digitisation*'³⁹⁸, '*expansion of capacity*' and '*interactivity*' meant that the telecommunications environment was changing and that therefore regulation had to be adapted. Technological changes such as '*digitisation*' were some of the underlying elements behind the wider phenomenon of convergence³⁹⁹ (or coming together) between telecommunications and broadcasting services which was specifically pointed out by the TC as a factor that justified the revision of the present regulation of telecommunications.

Another change is the globalisation trend evident throughout the social and economic life around the world. The info-communications industry is also affected and global alliances between national telecommunications carriers are just one example of this trend. Globalisation meant that a certain level of harmonisation between developed nations was needed.

5.2 The measures implemented as a result of the 1997 reform

The 1997 reform builds on the three reports of the Study Group (analysed in the previous section) and on the TC's 1996 report in order to implement amendments to each of the three basic telecommunications laws, i.e. the TBL (so as to facilitate market entry), the NTT law (through amendments aimed at restructuring NTT) and the KDD law (which was abolished).

³⁹⁶ See the section of this chapter above on the shortcomings of the 1985 reform.

³⁹⁷ See in this regard the introductory section of Chapter 3 outlining the differences between the types of sector-specific regulation.

³⁹⁸ See the convergence section of Chapter 3 for an explanation of this notion.

³⁹⁹ Ibid.

5.2.1 Revision of the TBL

The aim of the revision was to further encourage market entry in the telecommunications market by new entrants and to stimulate fair and effective competition among the existing market players. The revision introduced a mandatory regime of interconnection under certain conditions (analysed in the section below on interconnection) and abolished some of the conditions that had to be met by Type I telecommunications business carriers, wishing to enter the market, such as the provisions aimed at preventing excess telecommunications investment.

The following provisions were withdrawn in order to facilitate market entry:

- telecommunications services shall be appropriate in the light of the demand (point 1 under article 10 of the TBL);
- telecommunications circuit facilities shall not result in significant excess (point 2 under article 10 of the TBL).

Further steps were taken by the MPHPT with regard to promoting competition by commissioning a report from the TC on the implementation of a competition policy for the promotion of the IT revolution aimed at, among other things, the creation of conditions ensuring fair competition in the telecommunications industry. Based on the report of the TC, the MPHPT submitted to the Diet a proposal for partial reform of the TBL which passed and which became effective in November 2001. The principal revisions made to the TBL are:

- The provision of asymmetrical regulations⁴⁰⁰;
- the development of a system for wholesale telecommunications services;
- the setting up of a telecommunications business dispute settlement commission;
- the development of a system for ensuring the offering of universal services; and
- the expansion of the scope of business of NTT East and NTT West management in order to allow more freedom.⁴⁰¹

⁴⁰⁰ Asymmetrical regulation introduces in addition to the existing regulations mainly focused on bottleneck facilities, minimal rules to ensure the continuous prevention and elimination of monopoly abuse of the market; MPHPT, White paper on information and communications in Japan, 2002, p. 59.

5.2.2 Revision of the NTT law

Perhaps the most dramatic effect of the 1997 reform was concerning NTT. During March 1997 a bill to revise the NTT law was submitted to the Diet. The purpose of the revision of the NTT law was to implement the restructuring of NTT and allow it to enter the business of international communications services aiming to promote fair and effective competition in Japan's telecommunications market and to actively respond to the globalisation of the information-communications business. NTT was restructured into a long-distance communications company and two regional communications carriers, under a purely holding company which is not involved in communications business operations.⁴⁰²

The holding company (NTT Corp.) is a special corporation whose object is to hold all the shares of the two regional carriers, and use its voting right as a shareholder to ensure the continuing provision of regional telecommunications services by the regional communications carriers. The holding company also promotes fundamental research and development (R&D).⁴⁰³ The regional communications carriers (NTT East and NTT West) are established as special corporations to provide regional communications services, and each is under an obligation to provide a universal service of telephony in its business area.⁴⁰⁴ The long-distance carrier is a private company and is able to enter the business of international communications. All the shares of the long-distance communications carrier are held by the holding company.⁴⁰⁵

The holding company and the regional communications carriers are basically regulated as special corporations like the old NTT, but will be less regulated regarding the following points:

- the regional communications carriers are not regulated concerning the appointment and discharging of their executives or concerning the distribution of their profits;
- the holding company and the regional communications carriers are not regulated concerning their incidental businesses (previously, NTT had to submit a notification in advance of starting such businesses).

⁴⁰¹ MPHPT, White paper on information and communications in Japan, 2002, p. 59.

⁴⁰² The establishment of a holding company was permitted following the recent revision of the AMA to allow such holdings.

⁴⁰³ Article 1 of the NTT law as amended by Law No. 98 of June 20, 1997.

⁴⁰⁴ Article 3 of the NTT law as amended by Law No. 98 of June 20, 1997.

⁴⁰⁵ MPHPT, Outline of the Telecommunications Business in Japan, April 2000, p.8.

5.2.3 The abolition of the KDD law

The KDD law was abolished by a law enacted on 30 July 1998. As a result of this, KDD lost its special legal status and became a normal private company openly competing in the telecommunications markets without restrictions as to its field of business.⁴⁰⁶ Therefore, as a result of the revision, KDD is allowed to provide on top of the existing international telecommunications business, domestic telecommunications activities for the first time since its creation.

Examples of additional services that KDD is able to provide are:

- domestic telecommunications activities making use of KDD-owned domestic communications transmission lines, etc.;
- provision of telecommunications services using communications satellites and which does not distinguish between domestic and international services.

5.2.4 Developments spurred by the 1997 reform

The main market development that occurred as a result of the 1997 reform was KDD's determination to reinforce its position by merging or otherwise. This move was the direct consequence of the announced restructuring of NTT allowing it to compete on the international telephony market (a market in which KDD had a monopoly until the 1985 reform). In August 1997, it was made public that KDD had the intention to tie up with second tier telephone companies DDI Corporation and Teleway Japan Corporation. The object of the tie up would be to create an integrated service for international and domestic calls.⁴⁰⁷ KDD would also sign a similar agreement with Tokyo Telecommunications Network Co. (TTNet) to meet expected competition from a new company to be created by the merger of Japan Telecom Co. and International Telecom Japan Inc.

However, KDD's original merger plan did not materialise until 2000 and even then only in a slightly revised form. In March 2000, the JFTC received a request for prior consultation from DDI Corporation, KDD Corporation, and IDO Corporation regarding the planned merger of these

⁴⁰⁶ Ibid, p.5.

⁴⁰⁷ The Nikkei Weekly, August 11, 1997, p.6.

three companies in October 2000 in order to create a new company, KDDI.⁴⁰⁸ The companies, which are Type I carriers, merged in October 2000 for the purpose of providing nation-wide services in international telecommunications, domestic telecommunications, and mobile telecommunications (cellular phones and PHS units). The merger was spurred by the changes in the telecommunications sectors such as deregulation and technological advances. The JFTC looked at three relevant markets in order to analyse the competitive effect of the proposed merger. The international telecommunications market, where strong competition is expected (both from international groups but also by NTT international), the long-distance market (where the new entity would have the second position with a market share of 20 per cent but again competition was expected in this market) and the mobile telecommunications market (where strong competition already existed). On the basis of its analysis of the relevant markets, the JFTC concluded that the proposed merger would not be likely to violate provisions of the AMA and authorised it.⁴⁰⁹

Other new entry into the Japanese telecommunications market include the start of telecommunications services by TEPCO (one of the leading energy companies in Japan), the investments by Vodafone in Japan Telecom and the purchase of IDC by Cable & Wireless.

It is also interesting to note that the MPHPT registered 1,486 new entrants into the telecommunications sector in Japan for 2000 as against 1,218 in 1999. The new entrants included cable television operators acting as Type I carriers, as well as Internet Service Providers acting as Type II carriers. Finally, the two NTT companies' share of subscribers diminished by 6.1 per cent as compared to 1999.⁴¹⁰

6. Shortcomings of the 1997 reform

6.1 Appraisal of the 1997 reform

The position of NTT in the local and long-distance telephone market was suffocating its competitors and action had to be taken long before 1997. However, even though the restructuring of NTT is to be welcomed, it inevitably brings to mind the break-up of ATT. It is clear that in the local market the Baby Bells are still the major players and one cannot think of a

⁴⁰⁸ MPHPT, Information and Communications in Japan 2001, Chapter 2, MPHPT website: www.soumu.go.jp/joho_tsusin/eng/index.html.

⁴⁰⁹ JFTC, Prior Consultation concerning the planned merger of DDI Corporation, KDD Corporation, and IDO Corporation, 16 March 2000.

⁴¹⁰ MPHPT, Information and Communications in Japan 2001, supra.

reason why the same will not happen to Japan. Although, the restructuring of NTT is a major achievement for the pro-competitive movement in Japan considering that discussions for the restructuring of NTT had been going on for nearly twenty years, further action is needed to promote competition (see the next section in this regard).

On the positive side, liberalisation of the old monopolies has not had the negative effects that its opponents predicted were sure to happen. The main concern of such detractors was that universal service would no longer be ensured. This has not been the case and in some cases the opposite happened with telecommunication operators entering previously considered unprofitable markets in an effort to differentiate their services vis-à-vis those of their competitors. Reduced profits for telecommunications operators have also not materialised as more competition brings more growth in the market. Market growth brings in turn job creation. In fact, it is a sort of vicious circle which operates here as there is clear evidence that competition by stimulating new entrants creates new jobs. Critics could say that the old monopolies have reduced their working forces significantly as a result of increased competition. In fact, as many new jobs have been created in the overall telecommunications sector as have been lost by NTT since 1980⁴¹¹. Moreover in some segments such as mobile communications, employment has increased thirteen-fold between 1990 and 1995. Liberalisation also brings a diversification of services and much of the new job creation is occurring in telecommunications-intensive activities. In Japan, employment in the *'info-communications'* industry grew from 3.3 million in 1985 to 4.0 million by 1994.⁴¹²

The 1997 reform reduced some of the barriers to entry in the Japanese telecommunications industry by simplifying legislation and even abolishing the KDD law as a way to promote further competition in the market. However, the restructuring of NTT, which many saw as the main achievement of the 1997 reform, did not dramatically change the Japanese telecommunications environment. On the positive side, the reform did not bring the negative results that some anticipated. The sections below analyse the criticisms and proposals for further reform voiced by the JFTC and the MPHPT. The JFTC, in particular, has been quite vocal in expressing its concerns with the 1997 reform. The MPHPT on the other hand seems less concerned and has already set itself further objectives.

6.2 The MPHPT's objectives following the 1997 reform

⁴¹¹ OECD, *Telecommunication Infrastructure: The benefits of Competition*, ICCP Series No 35, Paris.

⁴¹² MPHPT, *White Paper 1996, Communications in Japan*.

The MPHPT, in its annual outline of the telecommunications business in Japan, states that a third stage in the telecommunications regulation reform started in 1999 and consists in the promotion of the following policy goals:

- further pro-competitive policies;
- enhanced broader internet access;
- improvement in the environment of info-communications;
- advancement and enhancement of radio communications.

The first policy goal is of direct interest to market entry. The MPHPT believes that achieving further pro-competitive policies should be achieved by the promotion of further regulation in the regional communications market, the creation of an environment for international competition and the further implementation of the 1997 reform.⁴¹³ This latest stage of reform is still in its infancy and very little information is presently available as to how the MPHPT hopes to achieve the goals it set to itself above.

It is interesting to note that the way in which the MPHPT envisages that competition can be enhanced is by introducing further regulation at the regional level. This is in contradiction to what the JFTC has stated and is of direct relevance to the analysis conducted at Chapter 3 of the thesis.

6.3 The JFTC's remarks as to competition policy in the telecommunications sector following the 1997 reform

In a paper published in June 2000, the JFTC made a further statement as to its policy in the telecommunications sector. The JFTC held meetings with the Study Group on Government Regulations and Competition Policy since June 1999 in an effort to promote market entry and to ensure fair competition between newcomers and incumbent entities in the telecommunications industry (among other industries).⁴¹⁴

6.3.1 The establishing of flexible networks

⁴¹³ MPHPT, Outline of the Telecommunications Business in Japan, April 2000, p.9.

⁴¹⁴ JFTC, Competition Policy in the Telecommunications Sector, 12 June 2000, <http://www.jftc.go.jp/e-page/report/survey/2000/tuusin.html>.

The JFTC, in light of the fact that the telecommunications sector is changing very rapidly, would like to see the present system reformed in order to ensure that carriers can use their originality and creativity to the maximum extent. In that regard, the JFTC considers that the classification between Type I and II carriers is no longer necessary. This is because it is desirable to create a system under which the carriers can build up a telecommunications network that they believe is the most efficient without the hindrance of carrier classification. This will allow, for example, a carrier to have a network combining telecommunications facilities established by itself and others procured from other companies.

As to interconnection, the JFTC advocates that transparency in interconnection between NTT and other carriers should be ensured and more desirable ways of determining interconnection rates should be considered.⁴¹⁵ As to the transparency point, the JFTC recommends that in order for the interconnection regime to function properly it is necessary for carriers that have to provide interconnection to disclose information on their accounts concerning interconnection services. Further, interconnection rates should be as low as possible because they affect new entry in the telecommunications market and the promotion of competition as its result. The current framework whereby the level of interconnection rates charged by private carriers is determined by the government is undesirable. The origin of this rules comes from the fact that the NTT regional companies almost monopolise the so-called '*last mile*' (i.e. the network of users' circuits from their terminal switching devices to users' terminal units). NTT has a 96 per cent share of the last mile market. As long as this situation remains, the current regulatory framework is justified but it is important to establish the foundation for other networks that could replace the NTT network of users' circuits in the last mile. This will promote competition which in turn will trigger a decline in interconnection tariffs.

The JFTC adds that in order to promote competition in networks of users' circuits, new technologies and methods are necessary. New technologies have already been used by some carriers to build their own networks, such as cable TV (CATV) circuits and DSL services. In time these services could replace the networks of users' circuits owned by the NTT regional companies. In that regard, the regulation by the Cable Television Broadcasting Law should be simplified by separating the broadcasting business and facilities-establishment business. Also, it is necessary to allow DSL service providers to enter the NTT regional companies' switching facilities and install modems there as well as to clarify the details of this operation.

⁴¹⁵ See the next section of this chapter on interconnection.

As to promoting competition in the mobile sector, the JFTC proposes the introduction of auctions for the assignment of radio frequencies.

6.3.2 Measures concerning NTT

The JFTC pointed out that the recent restructuring of NTT has not been successful in introducing more competition. The restructuring has merely transformed the competition between NTT and its competitors into the competition between companies controlled by the NTT Holding Co. and their competitors. As a result, the structure of competition in the telecommunications market remains substantially the same after the restructuring.

Additionally, it has been pointed out that the measures to ensure fair competition, which are incorporated in the NTT restructuring plan, are insufficient but also have not been properly implemented. The JFTC suggests that the proper authorities (i.e. the MPHPT) examines whether NTT has implemented the measures to ensure fair competition and takes action to rectify the situation if necessary. The JFTC will also monitor NTT as to its strict enforcement of the AMA and make necessary proposals from the viewpoint of promoting fair competition in the telecommunications market.

Also, it was proposed that NTT Holding Co. should lower its stake in the dominant mobile carrier, NTT DoCoMo. The JFTC believes that the present situation enables the holding company to prevent competition between NTT DoCoMo and NTT regional companies with the aim of increasing the profits of the entire NTT Group to the maximum extent. NTT Holding Co. should lower its stake in NTT DoCoMo to the point where it can act as an independent competitive unit and compete with the fixed carriers, including the NTT regional carriers. This would also allow to introduce competition in the last mile thereby lowering interconnection rates.

Recent events seem to confirm the JFTC's view that the recent restructuring of NTT has not been successful in introducing more competition. As mentioned above in the private monopolisation section, it was recently reported that the MPHPT is pressing NTT to discontinue the practice of letting one unit offer discount phone services by using the networks of its two regional carriers under preferential terms.⁴¹⁶ The press release added that NTT Communications Corp. will be asked to terminate five types of discount services within two to three years. In one such service, NTT East and NTT West enable NTT Communications to provide out-of-city phone services at discounts of 10 to 30 per cent., thereby sharply undercutting rates charged by other competitors. The MPHPT will also urge NTT

⁴¹⁶ The Nikkei Weekly, February 18, 2002, p.8.

Communications, which shares a customer data management system with NTT East and NTT West, to set up its own system by the end of fiscal 2002. The MPHPT took action following a complaint by competitors that the sharing of the customer data enables the NTT units to pool resources to market their services. The customer data management system enables NTT regional carriers and NTT Communications to share such information as the kinds of services customers are receiving and the carriers they have used so far.⁴¹⁷

Another recent report publicised the fact that the MPHPT is to take action against NTT in order to ensure that it will let new entrants use its customer information and fee-collection systems in order to promote competition in high speed internet access (DSL). Smaller DSL providers need to use NTT's system to collect fees as they are unable to do so directly on their own.⁴¹⁸

6.3.3 Measures concerning telecommunications legislation

The JFTC pointed out that regulations provided for in the telecommunications legislation should be relaxed as much as possible, except for those aimed at ensuring the smooth formation of networks and freedom of the fair use of the networks. This is a clear statement by the JFTC that it is in favour of less *ex ante* regulation in favour of more *ex post* regulation through a strict enforcement of the competition rules.⁴¹⁹

The convergence of technologies experienced in the broadcasting and telecommunications sector also means that the current legal framework which regulates separately the two industries should be reviewed with the aim of possibly regulating both sectors together.⁴²⁰ With regard to convergence between the internet and telephony, it was recently reported in the press that convergence is increasingly becoming a reality and that internet telephony was starting to provide real competition to traditional telephony in the Japanese telecommunications industry. This is mainly due to higher quality of internet voice calls offered by new technology as well as to the cheap prices offered by operators such as Yahoo Japan Corp.⁴²¹ In addition, an alliance between ten power utilities, including Tokyo Electric Power, and a broadband services company,

⁴¹⁷ See also Chapter 3 of this thesis explaining the interrelation between sector-specific and general competition rules as well as the respective roles of the JFTC and MPHPT in regulating access to the telecommunications industry.

⁴¹⁸ Nikkei Weekly, 6 May 2002, High speed access services in line for more deregulation.

⁴¹⁹ See Chapter 3 generally for an analysis of the interrelation between general competition rules and sector-specific rules in Japan.

⁴²⁰ See in this regard Chapter 3 of the thesis and in particular the section which analyses the future interrelation between general competition rules and sector-specific rules in the EU and Japan.

⁴²¹ Nikkei Weekly, 13 May 2002, IP telephony attracts fans with promise of cheap calls.

Internet Initiative Japan Inc. has been announced. This alliance would bring together the very extensive fibre optic network owned by the power utilities⁴²² and the broadband technology of Internet Initiative Japan Inc. to create a real competitive threat to NTT. The convergence of voice telephony and the internet is behind this move which could at last bring some competition into the broader telecommunications market in Japan.⁴²³

6.3.4 The establishing of rules aimed at promoting competition

Finally, the JFTC believes that in order to better promote competition in the telecommunications market, it could co-operate with relevant Ministries and agencies to compile such rules so that they will be more proper and effective.⁴²⁴ An example of this co-operation is the joint JFTC/MPHPT GPCT Guidelines.⁴²⁵

6.4 The European Business Community's remarks as to access to the Japanese telecommunications market

A non-Japanese view on the competitive situation in the Japanese telecommunications market comes from the European Business Community ('EBC'), a lobbying group representing the interests of European industry. The EBC notes that the Japanese telecommunications market is undergoing a period of fundamental change. However, it feels that despite NTT's recent restructuring, NTT-affiliated companies still dominate the Japanese telecommunications market. The Japanese government should take measures to prevent possible anti-competitive practices such as predatory pricing, cross-subsidies from monopolies to market-based activities, and misuse of customer information by establishing an independent regulatory authority to police such market abuse. NTT-affiliated companies should be made to deal with each other in a transparent manner and not discriminate against outside firms. Reinforcing competition in the telecommunications sector is necessary to ensure that the benefits of liberalisation are passed on to the Japanese consumer. The EBC recommends that regulation should focus on companies with dominance and not on distinctions such as between Type I or Type II

⁴²² Estimated to extend to more than 200,000 km as compared to the NTT regional carriers' network of 260,000 km

⁴²³ Nikkei Weekly, Telecom sector faces shift as new player enters arena, 22 July 2002.

⁴²⁴ JFTC, Competition Policy in the Telecommunications Sector, supra note 414, p.5.

⁴²⁵ Supra, see also Chapter 3 of the thesis for an analysis of the GPCT Guidelines.

operators.⁴²⁶ Filing requirements for non-dominant carriers should be reduced and full accounting transparency introduced in order to counter possible market abuses.

The EBC also recommends local loop unbundling, as it notes that there is virtually no competition in the local loop (i.e. the circuits that link individual subscribers with the first network switch). Regulation should focus on those organisations with dominant positions, and on bottleneck situations such as bridges and tunnels, and other scarce resources. In addition, telecommunications carriers should have the right to access multi-tenant buildings in order to provide services to customers.⁴²⁷

7. Interconnection in Japan

As mentioned at the beginning of Section B of this chapter, Japan's telecommunications industry is in a different phase than the European telecommunications industry taken as a whole. Liberalisation started in 1985 with the introduction of competition in the telecommunications industry and the privatisation of NTT, whereas in the EU (as a whole) full liberalisation only occurred in 1998. Having analysed the development of market entry in Japan from the old days of the State monopolies to the present days of intensifying competition this section will analyse Japan's interconnection regime. This will help in the analysis, conducted in Chapter 3 of the thesis, of the interrelation between general competition rules and sector-specific rules in the EU and Japan with regard to the question of access to telecommunications infrastructure and network facilities.

7.1 The Japanese interconnection regulatory framework

In Japan the basic regulatory framework of interconnection is built around two laws, the TBL⁴²⁸ and the NTT law.⁴²⁹ The TBL contains the regulatory provisions that establish the interconnection regime.⁴³⁰

⁴²⁶ See the previous sections explaining the Japanese telecommunications framework.

⁴²⁷ European Business Community in Japan, Issues for the New Millennium, The EBC Report on the Japanese Business Environment, 2000, p. 77.

⁴²⁸ Law No.86 of 25 December 1984.

⁴²⁹ Law No.85 of 25 December 1984. The KDD Law No. 301 of 7 August 1952 has now been abolished.

⁴³⁰ For more details on the general evolution of the telecommunications industry in Japan with an emphasis on the relations with the US see; Douglas W. Colber, Reform of the Japanese Telecommunications Law: Panacea or Placebo?, *Northwestern Journal of International Law & Business*, 1987, p.145 to 180.

7.2 Present structure of the industry

NCCs are competing on all telecommunications markets including local services, even though NTT still holds a virtual monopoly on that market. Thus, NTT's local networks are still a bottleneck for most of the NCCs activities because they are mainly operating in the long-distance and mobile markets. The most aggressive competition takes place in international and domestic long-distance, mobile and paging markets. Local services are not so competitive and most NCCs' activities depend on NTT's local networks. The major competition problem between the NCCs and NTT still lies in the issue of interconnection, the study of which is the object of this section.⁴³¹

7.3 The problems with the old interconnection rules - thinking behind the current interconnection rules

The first interconnection rules were introduced in 1984, when the TBL was enacted. However, very little guidance existed as to how these would apply and the NCCs had to negotiate directly with NTT with no supervision of any independent body. In addition, there was no obligation to interconnect and as a result interconnection negotiations did not always proceed smoothly. In view of the persistent competition problems related to interconnection and of the recommendations⁴³² of the Study Group, the TC produced a report in December 1996 on the "*Basic Rules for Interconnection*" which had to be regarded as the general terms for interconnection. This report also forms the basis of the current interconnection regime.⁴³³

7.3.1 The necessity to revise the rules

The TC recognised that the 1984 version of the interconnection rules did not necessarily function effectively for one or more of the following reasons:

- A prolonged interconnection negotiation period;
- issues concerning the scope of cost for calculating interconnecting charges;

⁴³¹ S.Naoe, Japan's Telecommunications Industry, competition and regulatory reform, *Telecommunications Policy*, 1994, 18 (8), p.654.

⁴³² The Study Group on Competition Policy Relating to Information and Communications Industries, Issues relating to competition policy in the telecommunications industry, November 1995, p.88 to 91.

⁴³³ Telecommunications Council, Basic rules for interconnection, 16 December 1996, http://www.soumu.go.jp/joho_tsusin/eng/index.html.

- issues concerning period and cost of network modification for interconnection; and
- issues concerning interconnection between Type II telecommunications carriers and NTT, etc.

Moreover, the TC made an international comparison of interconnection costs (which can be considered representative of the state of competition in a market) which showed that Japan's interconnection charges are expensive compared with those of the USA or the UK.⁴³⁴

7.3.2 Policy for establishment of Basic Rules for Interconnection

The TC recognises two principles underpinning the basic rules.

The first principle is that rules must act to improve benefits for users, by:

- lowering charges;
- securing end-to-end seamless service;
- making it possible to provide new services in response to the demands of a multimedia society.

The second principle is that rules must promote fair and effective competition, by:

- providing transparent, fair, prompt, and reasonable interconnection;
- preventing any anti-competitive conduct that would hinder smooth interconnection.

7.3.3 General interconnection rules for Type I telecommunications carriers

The TC has recommended four rules for Type I operators:

(a) The obligation for interconnection

To improve benefits to users and to promote fair and effective competition with regard to Type I telecommunications carriers' networks that carry the recognised privileges of public utilities,

⁴³⁴ The Telecommunications Council found that the cost of interconnection in Japan is 3.66 yen/3 minutes (Fiscal year 1995), in the USA 0.2 to 0.4 yen/minute and in the UK 0.76 yen/minute, Basic rules for interconnection, MPHPT web site.

such carriers shall be obliged to conclude interconnection agreements with other carriers, unless there is an appropriate reason not to do so.

This is the most revolutionary measure recommended by the TC, from the previous regime of agreement between operators sanctioned by the MPHPT, Type I operators shall be obliged to interconnect. All Type I carriers, including NTT are considered as carrying the recognised privileges of public utilities such as the power to dig-up the roads in order to lay new telecommunications lines and as such will fall within the obligation to interconnect.

(b) Disclosure of interconnection agreements

In order to prevent unfair discriminatory treatment and for other reasons, the TC recommends that authorised interconnection agreements should be made available for public perusal. This goes back to what was said in the previous section and by the Study Group.

(c) Easier use of arbitration procedures

In order to promote prompt solutions of disputes between carriers, the TC recommends that it is appropriate to establish a system that allows immediate application for arbitration once negotiations between carriers regarding interconnection conditions reach an impasse. This measure is to be welcomed as the two basic objectives of the rules - improved benefits to users and promotion of fair and effective competition - will both be better served by quicker and more effective solutions to difficult situations.

(d) Treatment of Type II telecommunications carriers

Type II telecommunications carriers should be able to request interconnection with Type I telecommunications carriers' networks. It is preferable that Type I telecommunications carriers establish so-called wholesale rates in their user tariffs because in many cases, Type II and Type I telecommunications carriers are interconnected according to such tariffs.

7.3.4 Special interconnection rules for designated carriers

(a) Designated carriers

The user of telecommunications services is connected with a network of a telecommunications carrier via the subscriber line (the so-called 'local loop'). If a user wants to communicate with another user, it cannot be connected without going through the subscriber lines via whatever networks they were routed. This means that connection to networks owned by carriers with a significant number of subscriber lines is essential for the business development of other carriers. It is also essential to secure use of such networks in order to improve benefits for users.

Interconnection conditions to networks owned by large carriers are therefore extremely important from the viewpoint of promoting competition and improving benefits to users.

Because carriers with a significant number of subscriber lines may gain an overwhelmingly superior position in negotiations over interconnection conditions, there are structural difficulties which hinder the agreement of reasonable conditions for interconnection through negotiations between carriers. Consequently, it is necessary, in addition to the general interconnection rules, to determine special interconnection rules and apply these to carriers with a significant number of subscriber lines.

The TC recommends that it is appropriate for special interconnection rules to apply to telecommunications carriers which own subscriber lines in excess of 50% of the total number of subscriber lines in a specific market (hereafter referred to as 'designated carriers').⁴³⁵ In order to determine if a specific carrier falls over the market share threshold the TC considers that a prefecture should be taken as the unit of a specific market. For the time being, the application of special interconnection rules is limited to fixed (and not for example mobile) communications carriers.

The facilities owned by designated telecommunications carriers to which special interconnection rules shall apply (referred to as 'essential facilities')⁴³⁶ should be the facilities which comprise subscriber lines and other facilities linked to them, and which cover prefectural regions.

The TC's report also provided that the following rules should apply to designated carriers:⁴³⁷

(b) Interconnection accounting system for designated carriers

The TC recognised that the lack of a well organised interconnection accounting system is one of the reasons which make interconnection negotiations difficult and prolonged. Therefore, the TC proposes that:

- Interconnection accounting standards should be defined by the government and designated carriers be obliged to implement interconnection accounting;

⁴³⁵ The Telecommunications Council recommends that the definition of "*Designated Carriers*" is reviewed taking into consideration the actual market situation at the time of the review.

⁴³⁶ See the section of this chapter on the application of the doctrine of essential facilities in Japan.

⁴³⁷ Rules on interconnection tariff, interconnection charges and the defrayment of interconnection costs are not studied here (nor were they studied Chapter 1) as they are not directly relevant to the object of this thesis.

- Designated carriers' accounting reports should be separated into two parts, covering firstly the department which manages and operates essential facilities, and secondly the department which provides services to users by using essential facilities. The essential facility management department shall adopt the method of providing essential facilities to other carriers on conditions (and at charges) equal to those imposed on its own sales department.

In addition, the TC recommended that designated carriers are obliged to submit a report on their interconnection accounting to the MPHPT and disclose it.

(c) Technological requirements for designated carriers

The TC's report also provided that designated carriers are obliged to stipulate technological requirements in their tariffs, in order to secure transparency of interconnection conditions and to promote interconnection. This is of particular significance for interconnection of advanced services as consent on each technical detail of a new service has to be obtained through a cumbersome consultation between new entrants and designated carriers, i.e. in the majority of cases with NTT. With this in mind, the TC recommended that certain necessary requirements for interconnection be disclosed.⁴³⁸

(d) Division of network elements and functions (Unbundling)

⁴³⁸ These requirements that need to be disclosed for interconnection to be granted are:

- Interconnection configuration;
- Interconnection target point;
- Numbering systems;
- Network composition;
- Signal method;
- Interconnection sequence;
- Charge method;
- Testing method;
- Physical and electrical condition;
- Other items required for interconnection.

Unbundling of network elements and functions allows competitors of NTT to be able to request interconnection with only a specific part of the network thereby making their operation more efficient and cheaper. Whenever it is technically feasible to do so, designated carriers are obliged to provide unbundled network elements and functions when requested to do so by other carriers. If designated carriers do not report any technological difficulty in meeting requests for unbundled network elements and function within a certain period, it will be assumed that providing such unbundled elements and functions is feasible.

(e) Number portability

For the purpose of promoting competition and improving benefits for users, when subscribers of designated carriers switch to other carriers, number portability should be guaranteed. This follows the recommendations of the Study Group which recognised the importance to customers of number portability and the unfair disadvantage a carrier would be in if it could not offer this service vis-à-vis NTT which was the original carrier which attributed numbers to customers and to which they are now accustomed.

The following services should be covered by number portability:

- Subscriber telephone numbers;
- ISDN numbers;
- Freephone service numbers.⁴³⁹

(f) A scheme for providing network functions

To secure the conditions for fair and effective competition between designated and other carriers in relation to service development and to promote smooth connection, the TC provided that it is appropriate to make it obligatory for designated carriers to disclose schemes for providing network functions that include information pertaining to additions and changes to network functions of essential facilities:

- Items to be included in schemes for providing network functions and timing of disclosure;⁴⁴⁰

⁴³⁹ With regard to ISDN numbers and free-phone service numbers the Telecommunications Council recommends that number portability should only be guaranteed when switching between carriers at the same location.

- handling of incurred costs;⁴⁴¹
- handling of network functions for own-use;⁴⁴²
- handling of network functions developed at other carriers' requests.⁴⁴³

7.3.5 Prevention of anti-competitive conduct

Under the old article 36 of the TBL it was possible for the Minister of the MPHPT to issue an order to improve business activities, "*When it is acknowledged that the public interest is likely to be significantly impaired because a Type I telecommunications carrier unreasonably discriminates against a specific telecommunications carrier concerning interconnection*". However, it was difficult to properly respond to acts that hinder smooth interconnection, such as:

- deliberately delaying interconnection; or
- demanding the submission of documents which are not essential for interconnection.

Given the inability of the system to deal with such issues, a drastic review needed to take place, making it possible to properly respond to anti-competitive acts that hinder smooth interconnection.⁴⁴⁴

7.4 The interconnection rules of the new TBL

⁴⁴⁰ It is necessary for designated carriers to include in schemes for providing network functions information which is detailed enough to allow carriers to examine the possibility of interconnection. This disclosure should take place at least six months before work begins on modifying the network.

⁴⁴¹ With regard to the cost to be incurred by other carriers, designated carriers should endeavour to disclose estimated expenses in as much detail as possible, in addition to disclosing the calculation method and the expense items.

⁴⁴² It is appropriate for designated carriers to disclose an outline of own-use network functions etc. With respect to essential facilities in schemes for providing network functions etc. In addition, it is appropriate for designated carriers to present detailed information on own-use network functions in response to extra requests from other carriers during the procedures of reflecting the opinions of other carriers.

⁴⁴³ Disclosure of network functions which are developed at the request of other carriers and defrayment of their costs should be allowed with the permission of those other carriers. Unbundling should also occur for at least those basic functions related to transmission and switching. In addition, unbundling should be promoted as much as possible in the process of taking into consideration the opinions of other carriers. The TC proposes a procedure for the establishment of a scheme for providing network functions which consists in designated carriers being obliged to hold explanatory meetings to introduce their schemes and by involving the Minister of the MPHPT if negotiations fail. Moreover, a summary of a designated carrier's scheme for providing network functions shall be published in an official gazette.

⁴⁴⁴ Telecommunications Council, Basic rules for interconnection, 16 December 1996, http://www.soumu.go.jp/joho_tsusin/eng/index.html.

In June 1997 articles 38 and 39 of the TBL - which contain the basic interconnection rules - were amended. The amendments broadly follow the informal but binding regime imposed by the TC's Basic Rules for Interconnection analysed above.

7.4.1 The objective of the new rules

In the GPCT Guidelines, the JFTC and MPHPT provide that: *"the object of the system for interconnection of telecommunications facilities is to ensure smooth interconnection between telecommunications carriers to avoid impairing fair competition or benefits of users that might result from conclusion of agreements where parties that are superior in bargaining power conclude agreements that are extremely unfavourable to the other parties in light of differences in bargaining power between telecommunications carriers, and similar practices that might effectively negate interconnection."*⁴⁴⁵

7.4.2 Article 38 of the TBL

(a) Interconnection of Type I carriers

Article 38.1 imposes the obligation to interconnect telecommunications facilities for Type I telecommunications carriers except in the following cases of objective justification:

- when there is a concern regarding the smooth delivery of telecommunications services;
- when there is a concern that the said interconnection may materially impair the interest of the Type I telecommunication carrier providing interconnection;
- when there are legitimate reasons provided by applicable ordinances of the MPHPT in addition to the cases specified in the preceding two paragraphs.

The legitimate reasons mentioned above have been defined in the Regulations for Enforcement of the TBL.⁴⁴⁶ These provide that two situations qualify as legitimate reasons of refusal to interconnect by Type I carriers. These occur where:

⁴⁴⁵ GPCT guidelines, supra note 12, p.9.

⁴⁴⁶ Regulations for Enforcement of the Telecommunications Business Law, Ministerial Ordinance of the Ministry of Posts and Telecommunications No. 25 of 1 April 1985 (as amended by the Ministerial Ordinance of the Ministry of Public Management Home Affairs, Posts and Telecommunications No.163 of 11 December 2001. See also MPHPT, Manual for the Construction of Networks by Telecommunications Carriers-Framework for Constructing Networks with Examples, December 1999.

- The telecommunications carrier that has made a request for interconnection with the Type I carrier's telecommunications circuit facilities has failed, or is likely to fail, to pay the investment to cover the costs that the requested carrier must bear for the interconnection; and/or
- It is materially difficult in technological or economic terms for the Type I carrier to establish or remodel its telecommunications circuit facilities to accommodate interconnection.⁴⁴⁷

It is of crucial importance that the MPHPT strictly enforces the exceptions to the obligation to interconnect by Type I carriers so as to limit the cases of abuse of the rules. An abuse of the above rules could lead to effectively justifying what would otherwise be a refusal to deal under general competition rules as well as a breach of the sector-specific obligation to interconnect.⁴⁴⁸

Type I telecommunications carriers must notify the Minister of the MPHPT when they intend to formulate or amend an interconnection agreement regarding rates and conditions on interconnection to their own telecommunications facilities (except Type I and Type II designated telecommunications facilities below) with other telecommunications carriers.⁴⁴⁹

(b) Interconnection of designated facilities

The designated Type I telecommunications facilities are, at present, the local networks of NTT East and NTT West. The designated Type II telecommunications facilities are at present the telecommunications facilities of NTT DoCoMo and Okinawa Cellular Phone.⁴⁵⁰

Article 38.2 of the TBL provides that the Minister of the MPHPT may, in accordance with the procedures stipulated in the applicable ordinance of the MPHPT, decide which carriers are going to be considered as designate carriers in each prefecture of Japan. Three main criteria have to be fulfilled for such a designation. First, a certain ratio of telecommunications lines of the transmission facilities as compared to the telecommunications facilities of the same kind installed in the relevant prefecture must be exceeded. At present, that ratio has been fixed at

⁴⁴⁷ Regulations for Enforcement of the Telecommunications Business Law, *supra*, Supplemental provisions, p.64. See also MPHPT, Manual for the Construction of Networks by Telecommunications Carriers-Framework for Constructing Networks with Examples, December 1999, p.22.

⁴⁴⁸ See Chapter 3 of the thesis for an analysis of the interrelation between general competition rules and sector-specific rules and more specifically for an analysis of the GPCT Guidelines where specific practices are analysed both under general competition rules and sector-specific rules.

⁴⁴⁹ Article 38.4(2) of the TBL.

⁴⁵⁰ MPHPT, Manual for the Construction of Networks by Telecommunications Carriers, April 2002, p.22.

50 % of the subscriber lines in a given area.⁴⁵¹ Second, the facilities in question must be facilities with which interconnection of other telecommunications carriers is essential for the enhancement of user benefits and the general and rational development of telecommunications. To these two criteria for deciding which carriers are designated, the GPCT Guidelines add a third - that the telecommunications facilities are monopolistic. The rationale for designating telecommunications facilities and the consequences of such a designation are further explained in the GPCT Guidelines: *“For that reason, in terms of fairness and openness and to ensure smooth and speedy interconnection, Type I telecommunications carriers that install such facilities are obligated to submit articles of interconnection agreements to the Minister of the MPHPT, to obtain authorisation from the said Minister and to publish them, and to provide interconnection unbundled from other network functions, to keep and publish interconnection accounting, and to calculate interconnection rates using the LRIC (long-run incremental costs) methodology for certain network functions”*.⁴⁵²

In relation to Type II designated facilities the GPCT Guidelines provide that: *“Secondly, Category II designated facilities shall be mobile telecommunications facilities that accommodate a relatively large number of subscribers. The mobile telecommunications market tends to be an oligopolistic market where new entry is restricted because bandwidth of radio frequency is limited. Therefore, Type I telecommunications carriers that install them are obligated to formulate and publish articles of an interconnection agreement, and notify them to the Minister of the MPHPT.”*⁴⁵³

If a legal entity is under special circumstances that do not allow it to use the authorised tariff for interconnection with designated telecommunications facilities, the entity may conclude a special interconnection agreement which will be subject to the authorisation of the Minister of the MPHPT.⁴⁵⁴ Certain requirements, which follow closely the TC’s recommendations detailed above, are provided for in order for the Minister of the MPHPT to grant authorisation.⁴⁵⁵

(c) Interconnection agreement

⁴⁵¹ Ibid, p.21.

⁴⁵² GPCT Guidelines, supra note 12, p.10.

⁴⁵³ Ibid.

⁴⁵⁴ Article 38.2 (6) of the TBL.

⁴⁵⁵ See Article 38.2 (3) to (14) of the TBL.

Before entering into an agreement for the interconnection of telecommunications facilities, other than for designated facilities, by telecommunications carriers, authorisation from the Minister of the MPHPT has to be requested. The purpose of the authorisation procedure is to ensure that unjust conditions have not been imposed on one party or that an agreement does not include any provision that unfairly discriminates against one party.

If a Type I telecommunications carrier establishes a tariff for interconnection with other carriers, an authorisation from the Minister of the MPHPT will be necessary for the tariff or the changes in it. However, if an agreement for interconnection is made according to such a tariff, the Type I telecommunications carrier only has to submit a notification to the Minister.⁴⁵⁶ Certain conditions have to be satisfied for an interconnection agreement to be authorised by the Minister of the MPHPT.⁴⁵⁷

7.4.3 Article 39 of the TBL

Article 39 provides for the order of interconnection by the Minister of the MPHPT where agreement cannot be reached between carriers or one refuses to enter into negotiations. A Type I carrier is required to accept another carrier's request for interconnection with its telecommunications facilities unless the former has a legitimate justification for refusing it. Particular cases, however, may not necessarily demonstrate clearly that the refusing carrier is justified in his refusal. This is why the Minister of the MPHPT has the following powers. As a first step, where negotiations have not taken place or they fail to come to an agreement, the Minister can order the carriers to start or reopen negotiations. If as a result of the Minister's order the parties fail to reach an agreement with respect to the interconnection charge or other conditions of interconnection, either party can apply to the Minister for arbitration. Under the arbitration procedure, the negotiations between the parties concerned shall be deemed to have come to an agreement, as prescribed by the arbitration. Any party which is dissatisfied with respect to the amount of money to be paid or received by the party (or parties) concerned, may demand an increase or decrease in the amount by filing a lawsuit within three months of the notification of the arbitration decision.

Further, a Type I carrier which plans to change or add to the existing functions of designated facilities may be instructed by the Minister to change its plan if, as a result of the implementation

⁴⁵⁶ See Article 38.3 (2) of the TBL.

⁴⁵⁷ MPHPT, Manual for the Construction of Networks by Telecommunications Carriers-Framework for Constructing Networks with Examples, December 1999, p.25.

of the plan, it is likely that there is a hindrance in the smooth interconnection between the designated facility and the facilities of other carriers.

Finally, an agreement between carriers to share facilities has to be concluded through negotiation between the parties and then authorised by the Minister of the MPHPT and an arbitration procedure is also available where a carrier does not accept to enter into negotiations with another or the negotiations to share facilities have not been conclusive.⁴⁵⁸

7.5 Applications of the new measures

On 30 January 1998, NTT submitted to the MPHPT a demand for authorisation of establishment of its tariff for interconnection relating to designated telecommunications facilities.⁴⁵⁹ This shows the willingness of NTT to comply with the new rules as well as being ready to compete under the new interconnection rules. The type of authorisation asked by NTT is an authorisation to establish tariff for interconnection when a Type I carrier which owns designated telecommunications facilities (i.e. NTT) interconnects its facilities to those of other telecommunications carriers. NTT's application follows the new rules described in the previous sections. NTT believes that the new tariffs will greatly simplify procedures for interconnection, requiring only the signing of an agreement based on its tariffs, and a submittal of a notification to the Minister of the MPHPT.

As explained above, the new provisions provide that interconnection tariffs will be unbundled by function. In NTT's notification this is translated by producing a list of different functional categories together with a list of charges for each category. For example, the functional category of local switching function will be charged at 0.99 yen per communication whilst the directory assistance service interconnection function will be charged at 217 yen per service. Previously, all charges were based on profit calculations for each business sector, but under the new rules charges will be calculated based on interconnection accounting after unbundling by function so as to better reflect facility costs. The new measures seem to fulfil their objective as compared to NTT's current charges, most interconnection functions will be cheaper for carriers which use designated carriers facilities.

NTT has also stated that its new tariff will include all technical requirements necessary for interconnection so as to avoid any possible restriction on competition towards operators wanting

⁴⁵⁸ See Article 39-3 and 4 of the TBL, as well as GPCT Guidelines p. 11.

⁴⁵⁹ MPHPT, Outline of the Telecommunications Business in Japan, April 2000, p.7.

to interconnect with NTT's network but not knowing what technical requirements they have to fulfil.⁴⁶⁰ Subsequently, on 22 January 1999, the MPHPT authorised revisions to the NTT interconnection tariffs for reducing interconnection charges.

Finally, following the break-up of NTT into three distinct entities, on 1 July 1999 NTT East and NTT West filed applications for interconnection tariffs that were authorised by the MPHPT on the same day.⁴⁶¹

7.6 Appraisal of interconnection and competition law in Japan

Generally speaking, the whole of the interconnection regime in Japan is focused on how best to harness the huge power of NTT and ensure that some real competition can emerge out of the new measures. The stringent rules to be imposed on the designated carriers are an effort to solve the problems identified after nearly twenty years in a liberalised environment and there is little doubt that further measures will be necessary in order to see effective competition arising against NTT.

Ultimately, the decision of the government to restructure NTT into three separate entities, one of which (NTT Communications Corp.) is able to compete in the international arena is nothing but a radical solution to the problem of the dominant position still occupied by NTT. Indirectly the problems identified as to competition in relation to interconnection could be solved as NTT will no longer be one huge company, but on the other hand the problems will remain if nothing else is done. The two regional NTTs and the international arm of NTT could each be just a third of the old NTT monopoly and similar problems as the ones encountered prior to 1999 could remain. The new interconnection regime take much of the interconnection-related burden off the smaller operators and put it onto the bigger ones. The clearest example of this shift being the switch from the negotiation/authorisation procedure to the new obligation to interconnect for designated carriers so as to limit the cases of unjust refusal to provide interconnection.

However, it has to be noted that the heavier burden imposed on the designated carriers will be limited for the time being to fixed telecommunications carriers. This could be partly justified by the higher level of competitors enjoyed in the cellular phone market⁴⁶² but certainly not when

⁴⁶⁰ NTT, News Release, January 30, 1998.

⁴⁶¹ MPHPT, Outline of the Telecommunications Business in Japan, April 2000, p.8.

⁴⁶² The MPHPT reports that in January 1996 there were 21 competitors in the cellular phone market as opposed to 3 in the long-distance market, 14 in the regional market and 2 in the international telephony market; MPHPT, Outline of the Telecommunications Business in Japan, March 1996, p.3.

looking at the measure of effective competition in the cellular market which reveals that NTT DoCoMo still is the dominant player in the mobile telephony market.⁴⁶³ Interconnection between mobile and fixed carriers is just as important as between fixed carriers and the prospective growth of the cellular market being much greater than the fixed market more stringent interconnection obligations should be imposed on dominant cellular carriers.

A recurrent criticism of the Japanese interconnection regime is the very high interconnection rates that are charged by NTT. In its 2000 review the EBC's representation in Japan, noted that interconnection rates in Japan are amongst the highest in the world. Interconnection charges represent the largest cost to telecommunications firms in Japan. Up to 30 to 40 per cent of all revenues generated by competing carriers go to NTT to connect to their mobile and fixed networks. As a result of the present situation the EBC believes that competition is stifled and new entries made difficult.⁴⁶⁴

There are also signs that the MPHPT is trying to open up the markets by other means such as allowing the local NTT carriers to enter new markets, such as the provision of internet services through telephone lines, and the condition that they open up their local phone and fibre optic networks to rivals. Although these have only been reported by the press at this stage it is quite likely that regulatory changes in that direction will be introduced in the coming months.⁴⁶⁵

⁴⁶³ MPHPT, Outline of the Telecommunications Business in Japan, March 1996, p.5.

⁴⁶⁴ European Business Community in Japan, *supra* note 427, p. 77.

⁴⁶⁵ The Nikkei Weekly, 12 March 2001, p.8.

CHAPTER 3: ACCESS TO TELECOMMUNICATIONS MARKETS - THE INTERRELATION BETWEEN GENERAL COMPETITION RULES AND SECTOR-SPECIFIC RULES IN THE EU AND JAPAN

The interrelation between sector-specific rules and general competition rules is rapidly becoming one of the most important policy issues in relation to access to telecommunications markets (i.e. infrastructure and network facilities).⁴⁶⁶ This is because the policy choices made by the EU and Japan as to the relationship between sector-specific rules and competition rules will determine the future success of the telecommunications liberalisation effort. Successful liberalisation should result in unencumbered access to telecommunications networks resulting in the free interplay of market forces.

This chapter will analyse the EU and Japanese approach to access to telecommunications infrastructure and network facilities from the point of view of the weight given to each of general competition and sector-specific rules in the regulation of this issue as well as from the point of view of the interrelation between these rules. In addition, some principles will be set down which should prove useful in approaching the question of the future interrelation between sector-specific rules and general competition rules with regard to access to telecommunications infrastructure and network facilities. Although Japan has a preference for sector-specific regulation and the EU is moving towards more regulation by competition rules, there are indications that the policies are converging and that therefore a similar set of principles can be used in both instances.⁴⁶⁷

1. Preliminary issues

1.1 The two basic approaches to regulation of market power - *ex ante* v. *ex post*

1.1.1 *Ex ante* v. *ex post* regulation

It was said in the introduction to this thesis that the notions of *ex ante* and *ex post* are used to describe the two basic approaches to regulation of market power. General competition rules apply *ex post* and within the context of this thesis cover the analysis of Article 82 EC in the EU and of refusal to deal in Japan. Sector-specific rules apply *ex ante* and can be sub-divided

⁴⁶⁶ The importance of this interrelation was recognised in the 1998 Access Notice, *supra* note 1. Part I of that Notice focuses exclusively on the interrelation between competition rules and sector-specific rules.

⁴⁶⁷ See in particular the last section of this chapter which analyses the future relationship between general competition rules and sector-specific rules.

between '*public interest*' type rules (which are not specifically studied in this thesis) and '*preparatory*' rules which are analysed in this thesis.⁴⁶⁸ Within the context of this thesis the significance of the distinction between *ex ante* and *ex post* regulation is closely linked to the legal analysis conducted in this chapter which shows why there is a policy trend in the EU to move towards less *ex ante* regulation in favour of more *ex post* regulation. This trend is itself closely linked to the convergence phenomenon (analysed below) that makes regulation by inflexible predetermined rules inappropriate in the rapidly changing technological environment.

1.2 Convergence of electronic communications and access to telecommunications networks

1.2.1 The concept of convergence

The end of the 1990s has seen the emergence of new technologies and new services at accelerating speeds and on a global scale. Convergence is initially a purely technologically driven phenomenon which will eventually lead to convergence of markets and therefore directly affect the competition analysis of market power in this sector.

(a) Convergence of technology

Convergence initially takes place at the technological level. It can be defined as the coming together of the telecommunications, audio-visual and information technology sectors.⁴⁶⁹ The key feature driving this development is the digitalisation of virtually all networks and services. Digital technology unifies the previously distinct technologies by converting any type of information (audio or visual) into a sequence of binary digits (0 or 1). This means that any form of content be it still or moving picture, sound, text or data can be stored and made available by common transmission mechanisms.⁴⁷⁰

(b) Convergence of networks

Technological convergence is leading to a convergence of networks. Networks that were previously dedicated to the transmission of a specific type of data can now transmit any type of information. For example, telecommunications networks now have the ability to transport broadcast services while cable networks can be used to provide telecommunications services,

⁴⁶⁸ See Section B of Chapter 1 and Chapter 2.

⁴⁶⁹ I.Walden and J.Angel, *supra* note 6, Chapter 12, p.408.

⁴⁷⁰ *Ibid.*

including voice telephony, in addition to their traditional business of television programming distribution. Network convergence also means that electricity and gas providers can install fibre optic lines within their controlled public-rights-of-way, and then use or lease these services fibre lines to provide competitive long-distance, high speed data, and video services.⁴⁷¹

(c) Convergence of services

Technological and network convergence is itself leading to convergence of services, with the creation of “hybrid services” as a result of the cross-fertilisation between telecommunications, broadcasting and information technology and the development of entirely new services.

Three major trends (analysed below) have been identified:⁴⁷²

- internet-based services will eventually encompass text and image based services (e.g. e-mail, file-transfer, etc.), ‘*traditional*’ telecom services (e.g. voice telephony and faxes), and audio-visual services (e.g. video-on-demand and live broadcasting);
- mobile (and satellite) communications will converge with fixed communications;
- the digital television platform will also be used for interactive multimedia services, such as tele-shopping, tele-banking and video on demand.

(d) Convergence of markets

Convergence is also progressively changing market structures. This is best exemplified by the fact that companies that were previously active in separate markets are now seeking to enter these new and converging markets as a result of technological convergence.⁴⁷³ The trend towards vertical integration, for instance of content and infrastructure providers, is particularly

⁴⁷¹ Lipschitz, Regulatory treatment of network convergence, in *Media Law & Policy*, volume VII, number 1, p.14 to 26.

⁴⁷² Robert Verrue, Director General DGXIII, Telecoms Liberalisation “Future Key Issues from the European Point of View”, Verband Alternativer Telekom-Netzbetreiber (VAT), Third Forum, Vienna, January 27, 1999, p.7, http://europa.eu.int/comm/information_society/speeches/verrue/telecomlib_en.htm.

⁴⁷³ L.Garzaniti, *supra* note 4, p. 102 to 103.

indicative of the convergence environment, where mergers are necessary in order to acquire the skills or resources necessary to compete in the converged environment.⁴⁷⁴

(e) Convergence of principles

Despite what was said above, it is quite likely that convergence of markets will take some time. At EU level, the Commission believes that markets remain substantially different at present and that a competition analysis of the current market situation would show a wide array of separate markets in both the media and telecommunications field.⁴⁷⁵ As a consequence, the Commission believes that at present we are faced with a convergence of principles (i.e. an increased application of competition law principles, exemplified in the EU by the use of the concept of dominance as the definition of the new SMP test)⁴⁷⁶ that prepares an ultimate convergence of markets in the years to come.⁴⁷⁷

1.2.2 The internet as a driver for convergence

The internet is undoubtedly the most significant and the most unanticipated market development in the telecommunications services sector of the last ten years. Its strong and continuing growth presents a number of challenges to regulators as market players move rapidly into this new business:

- the internet has become an important driver of demand for faster access. New entrants now require much easier access to the local loop (i.e. unbundling of the local loop). Their objective is to introduce technologies (known as xDSL) which multiply by one hundred the capacity of technology traditionally used in the local loop;
- the demand for fast access is also a major driver of backbone investments, potentially stimulating the wide-scale deployment of Asynchronous Transfer Mode ('ATM') switching.

⁴⁷⁴ See for example the merger of AOL/Time Warner where the combination of Time Warner and AOL brought together a unique range of content (films, TV programming, news, magazines and music) with the world's leading Internet Service Provider, European Commission, Case No COMP/M.1845, 11.10, 2000.

⁴⁷⁵ The European Commission recently stated the test it applies in order to define the relevant product/service market for electronic communications networks and services in its Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 8 July 2002, COM(2002), paragraphs 44 to 54.

⁴⁷⁶ See in the section of this chapter below on the interrelation between the new SMP test and dominance.

⁴⁷⁷ H.Ungerer, Convergence in regulatory and competition law paradigms, 17 September 2001, p.4 and 5, http://europa.eu.int/comm/competition/speeches/text/sp2001_021_en.pdf.

Over time, the percentage of data traffic on networks is likely to substantially overtake the volume of voice traffic;

- The internet has the potential to become the competitive platform for many traditional services, be they public voice telephony or broadcasting. The main reason is that the use of the Internet Protocol ('IP') allows the integration of different services on the same network, which is much cheaper than running in parallel several networks (for example, voice telephony and cable TV network) and brings clear marketing advantages (i.e. package of services, one-stop-shopping etc.). In response to new entrants strategies, many European telecommunications operators are now offering internet-based voice telephony services, in competition with their own telephony business. Similarly, an increasing number of telecommunications operators are also investing in digital TV platforms. In Japan, already back in 1996 the TC had noted the convergence of telecommunications and broadcasting.⁴⁷⁸ Subsequent to this, a new Act - the Broadcasting Using Telecommunications Act 2001⁴⁷⁹ - has been enacted to take into account of the possibility to offer broadcasting services by using in part or in whole telecommunications services. The main targets of the new Act are satellite and cable operators that provide broadcasting via (broadband) telecommunications equipment. In addition, ISPs⁴⁸⁰ and websites that offer broadcasting type services are also covered by the new legislation. Under the new Act one licence will be required rather than the two licences required under the present regime (one for telecommunications and one for broadcasting).⁴⁸¹ Still in Japan it was reported that the seven largest Japanese ISPs are considering joining forces to offer improved IP telephony services. This would allow about 2 million subscribers of broadband communications services to call each other free of charge via the IP phone network.

1.2.3 Convergence of mobile (and satellite) communications with fixed communications

The continued growth of mobile communications in Europe, with a total of approximately 199 million cellular subscribers and an average penetration rate of 73% in the 15 EU Member States

⁴⁷⁸ Telecommunications Council, Report, Status of Nippon Telegraph and Telephone Corporation, Towards the creation of dynamism in the info-communications industry, February 29, 1996, <http://www.yusei.go.jp/policyreports/english/telecouncil/NTT/Council-NTTs.html>.

⁴⁷⁹ Law No. 85 of 29 June 2001.

⁴⁸⁰ It was reported that the seven largest Japanese ISPs are considering joining forces to offer improved IP telephony services. This would allow about 2 million subscribers of broadband communications services to call each other free of charge via the IP phone network; Nikkei Weekly, Access providers courting IP callers, 18 November 2002.

⁴⁸¹ Nishimura & Partners, The 2002 Guide to telecommunications in Asia, Asia Law and Practice, 2002, p.83.

in 2001, reflects a huge business and policy success in the EU.⁴⁸² In Japan, mobile telephony has been a great success with over 77 million cellular subscribers as of September 2002.⁴⁸³

The emerging third-generation mobile-system, the universal mobile telecommunications system (UMTS), will further accelerate the penetration of mobile communications for business and residential use. Mobile communications is beginning to challenge fixed telephony in some areas, notably as wireless local loop can offer a cost-efficient alternative to existing copper wire, and will in the future offer broadband access. The fixed-mobile network convergence should allow users to access a consistent set of services from any fixed or mobile terminal via any compatible access point. As a consequence, it will become increasingly difficult in the future to justify the different treatment of fixed and mobile communications. In addition to mobile communications based on cellular technology, personal satellite communications services will be offering increased global mobility.

1.2.4 Using Digital TV as a platform for Interactive Multimedia Services

Convergence, in parallel with the increasing bandwidth of networks, allows the distribution of many more channels over the same infrastructure (cable TV, satellite transponders, terrestrial spectrum) by using digital compression rather than existing analogue transmission. As a result, new digital television services are appearing on the market which consist mainly of thematic channels, near video on demand (NVOD) and pay-per view. In the same time the digital television platform is increasingly being used for interactive multimedia services such as tele-shopping and tele-banking.

1.2.5 Impact of convergence of electronic communications on the analysis of access to telecommunications infrastructure and network facilities

(a) Effect of convergence of electronic communications on the competition analysis

From the competition law point of view, the convergence of electronic communications has significant implications for the traditional competition analysis as applied to the telecommunications industry.⁴⁸⁴ As the convergence of markets increasingly becomes a reality,

⁴⁸² European Commission, Seventh report on the implementation of the telecommunications regulatory package, COM (2001) 706, p.2.

⁴⁸³ MPHPT, Prompt report on the number of subscribers of cellular telephone and PHS (Personal Handy-phone System) at the last day of September 2002 in Japan.

⁴⁸⁴ European Commission, Status Report on European Union Electronic Communications Policy, COM(2001) 706, p.20.

the traditional analysis of market power in the telecommunications industry as well as the doctrine of essential facilities in the EU will have to be revisited to take into account that there is in parallel to the existing standard telecommunications infrastructure, the cable network and mobile telephony network which perform the same plus other additional services such as sending image with speech (e.g. video-conferencing) or broadband internet coupled to telephony.

In the EU the traditional analysis of dominance provides that supply and demand substitution must be at low levels for a dominant position to be found. Continuing on the example of convergence between traditional telephony and internet telephony, the possibilities for voice telephony offered by the internet will mean that demand substitution could be altered in a very significant way. The SSNIP test⁴⁸⁵ used by the Commission of a hypothetical small (in the range of 5% to 10%), lasting change in relative prices in order to evaluate the likely reactions of customers to that increase could prove that consumers will readily switch to internet telephony if traditional telephony prices were to increase. In addition, the analysis of the dominant position could further be altered by a change in the supply substitution analysis. The test here is similar to the one for demand substitutability, only it is the ability of the supplier to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices that is the main factor. It is quite likely that because some traditional telephony companies have already started providing internet telephony they do not need to incur significant additional costs or risks to provide the new services (this is an example that is specifically mentioned by the European Commission in its guidelines on market analysis and the assessment of significant market power).⁴⁸⁶ As a result, it is becoming increasingly difficult to argue that traditional telephony, mobile telephony, the internet as well as digital television are not all providing communications activities which are substitutable both from the demand and the supply side. The phenomenon of convergence therefore means that the assessment of market power in the telecommunications industry will increasingly need to take into account that there is, in parallel to the existing standard fixed telecommunications services, other electronic communications services which perform the same plus other additional services by using alternative networks to

⁴⁸⁵ The Small but Significant Non-transitory Increase in Price test was developed in the USA and introduced in EC competition law through merger control cases: see B.Bishop, *The Modernisation of DGIV*, ECLR, 1997, p. 481. It has been pointed out that there is much misunderstanding about the SSNIP test. It is not really a method for market definition. It asks a different question, which is the question of knowing if there is market power; Mark Williams, *Speaking Notes for the second Oxford Antitrust Law & Economics Conference*, Hertford College, Oxford, 17 March 1999, p. 7.

⁴⁸⁶ European Commission, *Guidelines on market analysis and the assessment of market power under the Community regulatory framework for electronic communications networks and services*, supra note 475, paragraph 47.

the traditional telecommunications networks and facilities. The practical effect of this change in demand and supply substitution would be the enlargement of the relevant market for telephony to a wider market that includes all electronic communications thereby reducing the dominant position of the big telecommunications operators which do not offer internet telephony or have a very small market share in that new service.

In Japan, the traditional analysis of whether or not a refusal to deal constitutes a prohibited practice is also directly affected by the convergence phenomenon. In the JFTC's guidance on the criteria it will consider when analysing whether or not a refusal to give access to a facility substantially restrains competition in the market, it was clearly provided that one of the elements that is taken into consideration is the market structure as well as the characteristics of the facility.⁴⁸⁷ The same principles as in the EU therefore apply to Japan and the increasing substitutability (both from the point of view of supply and demand) between all electronic communications will have to be taken into account by regulators. In a paper published in June 2000, the JFTC recognised the impact of the convergence phenomenon and as a result is actively promoting the goal of network competition as a way to bring more competition to the market. In time, the JFTC believes that new networks (such as cable TV circuits and DSL services) could replace the networks of users' circuits owned by the NTT regional companies.⁴⁸⁸

As to the relation between the effects of convergence and the EU doctrine of essential facilities, the whole idea of the doctrine has to be re-visited if a new entrant can provide telephony services through the internet at a similar or even lower cost than leasing lines from the incumbent operator. The telephony network will not be considered as essential anymore if other means for providing the same service exist. As a result of recent jurisprudence from the European Courts,⁴⁸⁹ the application of the doctrine has been restricted to cases where the following three conditions are met:

- the refusal of the service comprised is likely to eliminate all competition in the relevant market on the part of the person requesting the service; and
- such refusal be incapable of being objectively justified; and

⁴⁸⁷ OECD, roundtable on the essential facilities concept, supra note 320.

⁴⁸⁸ JFTC, Competition Policy in the Telecommunications Sector, supra note 414.

⁴⁸⁹ *European Night Services* and *Oscar Bronner*, supra notes 153 and 156 respectively.

- the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that service.

It is clear from the above test that, in the light of the technological revolution brought about by the internet, the third condition especially is very unlikely to be satisfied. Following the *Oscar Bronner*⁴⁹⁰ case this is even if the alternative way to provide the service (here through the internet) is not as economically beneficial as if there was no refusal to access the telephony network. Therefore, the doctrine of essential facilities already restricted by the ECJ in its application loses even more relevance for the telecommunications industry in the light of the technological revolution created by the internet.

- (b) The impact of convergence on the interrelation between general competition rules and sector-specific rules

Convergence is first of all a technological and market driven phenomenon. However, the increasing convergence of markets that it leads to makes it necessary to adjust the existing sector-specific regime of access to telecommunications infrastructure and network facilities to the new market environment failing which the sector-specific regime will be inefficient and act as a burden rather than as an aid to competition. Convergence was recognised by the Commission as being the main driver behind the adoption of the new European sector-specific regulatory framework and is an issue that is starting to be considered in Japan as well.⁴⁹¹ Therefore, the most important effect of convergence within the context of this thesis is its impact on the general trend to reduce *ex ante* sector-specific regulation in favour of more regulation by *ex post* general competition rules as already experienced in the EU and as is being considered in Japan. This key issue is addressed in the sections below.

2. Access to telecommunications markets - the interrelation between general competition rules and sector-specific rules in the EU

2.1 The 'dual regime' in the EU

The development of the telecommunications policy framework was, from the start, i.e. since the 1987 telecommunications green paper on the development of a common market for

⁴⁹⁰ Ibid.

⁴⁹¹ See the new Framework Directive, *supra* note 223, recital 5.

telecommunications services and equipment⁴⁹² and the subsequent ONP Directives setting down the basic principles for the liberalisation of the telecommunications industry, based on an *ex ante* sector-specific regulatory approach (ONP is analysed in more detail in the next subsection).⁴⁹³

Ex post competition rules apply concurrently with the *ex ante* sector-specific regulation rules to the question of access to the incumbents' telecommunications networks. It is because of this concurrent application of sector-specific regulation and competition regulation that this section is entitled the 'dual regime'. In the course of implementing the telecommunications policy concept under the ONP framework, the application of EU competition law was of primary importance since the very beginning. It is important to note that although the two sets of rules - *ex ante* sector-specific rules and *ex post* general competition rules - are fundamentally different in nature and scope, they are actually very much dependent one on the other.⁴⁹⁴

2.1.1 General competition rules

The term 'general *competition rules*' within the context of access to the EU telecommunications markets should be understood as covering the basic EC competition rules, i.e. Article 81 (previously Article 85 EC) and 82 EC (previously Article 86 EC) as well as the EC Merger Regulation.⁴⁹⁵ Within the context of this thesis it is the Article 82 EC prohibition that forms the basic general competition rule analysed in relation to access to EU telecommunications markets.⁴⁹⁶ General competition rules were first applied to the telecommunications sector in Decisions holding that agreements and other forms of co-operation between companies were in breach of Article 81 EC. The 1992 *Infonet* case⁴⁹⁷ stands as an early case, right at the start of the EU telecommunications liberalisation process that exemplifies the Commission's thinking on the subject. In *Infonet*, twelve national telephone operators, the majority based in the EU, were members of a joint venture to provide value-added services as well as voice and data

⁴⁹² EC telecommunications policy can be traced back to the 1987 Green Paper - Towards a dynamic European economy - Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290 final (30 June 1987).

⁴⁹³ See Chapter 1 of the thesis and in particular the section on the development of EC telecommunications law which describes in more detail the Green Paper.

⁴⁹⁴ See the conclusions of this thesis below.

⁴⁹⁵ Regulation 4064/89 on the control of concentrations between undertakings, as amended.

⁴⁹⁶ See Section A of Chapter 1 of the thesis above.

⁴⁹⁷ *Infonet*, OJ [1992] 7/3.

transmission systems for the corporate sector based on the packet switch. As a condition of exemption, the Commission required each member in Infonet based in the EU not to offer network services to their joint venture at prices which were less than the prices for the same network services offered to third parties, and not to cross-subsidise their own value added service offerings.⁴⁹⁸ *Infonet* was the first of what was to become a series of cases of similar nature.⁴⁹⁹ The issue of access and interconnection acquired a key role in the big alliance cases which started to dominate attention in the application of EU competition law since the middle of the 1990s', as a prelude to liberalisation and the Full Competition Directive of 1998.⁵⁰⁰

2.1.2 Sector-specific rules

As mentioned in the general introduction of the thesis, this study focuses only on one type of *ex ante* regulation, i.e. '*preparatory*' sector-specific rules⁵⁰¹ such as the interconnection Directive. '*Preparatory*' sector-specific rules complement competition rules and as such are relevant to the study of the interrelation between competition rules and sector-specific rules from the point of view of access to telecommunications infrastructure and facilities.⁵⁰² Among sector-specific rules on access to telecommunications markets, interconnection is the single most important issue for liberalisation to succeed and it is an issue that carries many competition concerns.⁵⁰³ Article 3 of the Interconnection Directive makes clear reference to competition rules (within the wide meaning of the word) as rules subject to which any agreement between operators should take place. Further, Article 4 which provides for the rights and obligations for interconnection establishes which telecommunications operators are under an obligation to negotiate interconnection with other carriers. The same article uses the concept of Significant Market Power ('SMP')⁵⁰⁴ as a basis for determining whether an operator has to interconnect with another operator which is requesting access. The relationship between the notions of SMP and of dominance under Article 82 EC is of great policy importance as it is at the very centre of the

⁴⁹⁸ E. Pitt, Telecommunications regulation: is it realistic to rely on competition law?, ECLR, 1999, p.246.

⁴⁹⁹ Such as for example the Atlas decision 96/456 [1996] OJ L 239/23.

⁵⁰⁰ H.Ungerer, supra note 8, p. 7.

⁵⁰¹ '*Preparatory*' sector-specific rules (and '*public interest*' sector-specific rules) is an established term used in legal writings; see, for example, K.Grewlich, supra note 10, p.951 as well as L.Garzaniti, supra note 4, p. 227 to 278. For the purposes of this thesis '*sector-specific rules*' in the EU should be understood to mean '*preparatory*' sector-specific rules, as explained in the general introduction of the thesis.

⁵⁰² See in Chapter 1 of the thesis the section on interconnection in the EU.

⁵⁰³ Ibid.

⁵⁰⁴ See Chapter 1 of the thesis for an explanation of the concept of SMP.

'*dual regime*' and as such is analysed below.⁵⁰⁵ Other relevant issues are the relationship between the authorities implementing each set of rules and the relationship between sector-specific rules and the doctrine of essential facilities. Each of these issues will be analysed below. However, before doing that it is important to analyse the relationship between sector-specific rules and general competition rules in more detail.

2.2 Relationship between (sector-specific) ONP rules and general competition rules in the EU

The Commission issued Guidelines on the application of the competition rules to the telecommunications sector in 1991.⁵⁰⁶ These Guidelines describe the relationship between the competition rules and the Open Network Provision framework (ONP) rules in the following terms: "*ONP rules cannot be considered as competition rules which apply to States and/or to undertakings behaviour. ONP and competition rules therefore constitute two different but coherent set of rules. Hence, the competition rules are of full application, even when all ONP rules have been adopted.*"⁵⁰⁷ This statement establishes the principle of the concurrent application of *ex post* competition rules and *ex ante* sector-specific rules and is the underlying principle of the analysis that will follow in this section.

Taking the example of the Interconnection Directive it is not possible for ONP to cover all facets of the interconnection relationship, particularly those not involving public telecommunications networks as they are outside the ambit of such rules. Moreover, any instruments adopted pursuant to the framework of ONP, as set in Council Directive 90/387/EEC (the 'ONP Framework Directive')⁵⁰⁸, must necessarily be limited to conditions affecting open and efficient access and, more particularly, usage conditions and tariff principles. These limitations, inherent to the nature of *ex ante* ONP rules, justify the necessity of the application of general competition rules in parallel to the ONP rules.

2.2.1 The regulatory framework of ONP

⁵⁰⁵ See also the section of this chapter on the future relation between dominance and SMP.

⁵⁰⁶ European Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, *supra* note 75.

⁵⁰⁷ *Ibid*, paragraphs 15 to 18.

⁵⁰⁸ Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ 1990 L 192/1. See also the next section of this chapter.

ONP is defined as "*the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services*".⁵⁰⁹ The interconnection Directive is taken in application of the ONP framework. ONP rules are an example of internal market legislation adopted on the basis of Article 95 EC (previously Article 100a EC) which provides for harmonisation of Community-wide regulations. In addition, liberalisation legislation (which is not studied in this thesis) was adopted under Article 86(3) (previously Article 90(3)).⁵¹⁰ ONP rules and their transposition into national legislation, are the rules that lay down the regulatory framework for access to the EU's telecommunications industry.

At first, the objective pursued by the ONP provisions was to secure access to the telecommunications network and hardware for the provision of which the Member States had previously granted exclusive rights. Prior to the full liberalisation of the sector in 1998, ONP served as the regulatory framework that ensured that the operation of the part of the sector under monopoly did not negatively affect the competitive part. The ONP Framework Directive⁵¹¹ defines and sets out the general principles of ONP. Three types of principles and application criteria define the ONP regulatory framework, namely: harmonised conditions, basic principles and essential requirements.

ONP conditions include, in particular, harmonised conditions with regard to:

- technical interfaces, including the definition and implementation of network termination points;
- usage conditions, including access to frequencies;
- tariff principles.

Article 3 of the framework Directive provides that ONP conditions, i.e. all harmonised conditions of ONP, must comply with a number of basic principles, namely that:

- they must be based on objective criteria;

⁵⁰⁹ Ibid.

⁵¹⁰ See P.Larouche, supra note 3, p.61.

⁵¹¹ ONP Framework Directive, supra note 508.

- they must be transparent and published in an appropriate manner;
- they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.

Furthermore, ONP conditions must not restrict access to public telecommunications networks or public telecommunications services, except for reasons based on essential requirements, within the framework of Community law, namely:

- security of network operations;
- maintenance of network integrity;
- interoperability of services, in justified cases;
- protection of data, as appropriate.⁵¹²

The Framework Directive as part of its function to set out the basic functioning of ONP rules, explicitly identifies a number of networks/services for which ONP conditions may be drawn up in accordance with the rules set out in the Directive. These are:

- Leased lines;
- Packed and circuit switched data services;
- Integrated Services Digital Network (ISDN);
- Voice telephony service;
- Telex service;
- Mobile services;
- New types of access to the network, such as access, under certain conditions, to the circuits connecting subscriber premises to the public network exchange ("data over voice") and

⁵¹² These conditions can be found in Article 3 of the ONP Framework Directive, supra note 508 but also Article 10 of the ONP Interconnection Directive which is analysed in detail in Chapter 1 of the thesis.

access to the network's new intelligent functions, according to progress on definition and technological development;

- Access to the broadband network, according to progress on definition and technological development.⁵¹³

The complete liberalisation of the EU telecommunications industry in January 1998 could have removed the rationale of the ONP framework if the Commission had not intervened to redefine the ONP principles to match the new environment following the implementation of a fully liberalised market from 1 January 1998.⁵¹⁴ Post-1998, the main area in which the revised ONP principles became instrumental is that of interconnection.⁵¹⁵ Under the new rules set out in the interconnection Directive, the central ONP concept is the concept of SMP which is the basic tool used to assess which operator falls under the stricter obligations forcing it to behave in a certain manner. The SMP standard is not, at present, the same concept as the one used under traditional competition rules to assess market power (i.e. the concept of dominance), rather it focuses on organisations with a market share above 25% of the relevant market. This is an issue that will be addressed in the future under new rules that will have to be implemented by Member States by July 2003.⁵¹⁶ The new sector-specific regime which has been adopted but is not yet in force⁵¹⁷ will have the effect of progressively phasing-out the existing ONP regulatory framework in favour of a much reduced *ex ante* regulatory framework coupled with a stronger application of *ex post* competition rules.

2.2.2 Differences between ONP rules and competition rules

(a) *Ex ante v ex post* regulation

ONP rules are *ex ante* sector-specific regulation aimed at setting the regulatory background on the basis of detailed, prescriptive control of business conduct. The duality between *ex ante* and

⁵¹³ See Annex 1 of the ONP Framework Directive, *supra* note 508.

⁵¹⁴ Communication from the Commission to the Council and the European Parliament, Present Status and Future Approach for Open Access to Telecommunications Networks and Services (Open Network Provision), COM 994 513 final of 29 November 1994.

⁵¹⁵ See Chapter 1 of the thesis and in particular the section on interconnection.

⁵¹⁶ See below the analysis of the concept of SMP contained in Article 4 of the interconnection Directive as well as the proposed changes to the notion of SMP under the new regulatory framework which will align this concept with the competition law notion of dominance; see also L.Garzaniti and A.von Bonin, The impact of the new SMP concept on telecoms operators in Europe: some advice for market participants, Global Competition Review, June 2002.

⁵¹⁷ See below the section of this chapter on the future telecommunications regulatory framework.

ex post regulation was put in the following terms by the Commission in relation to the interconnection Directive: “*In a perfectly competitive environment, the need for regulation would be limited to ensuring fair play, most probably by ex post application of the Treaty competition rules, and essential requirements. Until the market becomes fully contestable however, an appropriate ex ante regulatory regime will be required to reduce the risks that exist: that players might use their strength to discourage new potential operators and service providers entering the market*”.⁵¹⁸

Therefore, ONP rules come as ‘*preparatory*’ rules that set the ground for competition to play freely in the newly liberalised market. By their nature ONP rules are quite different in their function to the pan-sectoral competition rules. Hence, the first difference between ONP sector-specific regulation and traditional competition rules is that the former are *ex ante* regulation whereas the latter are *ex post* regulation.⁵¹⁹

(b) Different starting points

Sector-specific regulation such as ONP allows much greater regulation of the question of access to telecommunications markets. The reason for this is linked to the *ex ante* nature of ONP. *Ex ante* regulation is a preventative, regulatory approach which relies on detailed, prescriptive control of business conduct. ONP Directives impose certain obligations of access, transparency, non-discrimination, pricing, etc. on telecommunications operators that go beyond those which would normally apply under general competition rules such as Article 82 EC.⁵²⁰ Access can only be refused for reasons based on essential requirements, as described above. This *ex ante* regime can therefore impose stricter rules on telecommunications operators than the *ex post* Article 82 EC rules. Under Article 82 EC, specific non-discrimination rules can be imposed but only after a finding that the operator in question is dominant and has abused its dominant position. Even if that were considered to be the case, traditional *ex post* rules would not go as far as imposing access unless certain essential requirements were found to exist. Under Article 82 EC, access would only be imposed if it were considered that refusing access was discriminatory or was leading to an abuse of a dominant position. Under the ONP rules there is no need to show dominance and its abuse in order to force access. It is only necessary

⁵¹⁸ Proposal for a European Parliament and Council Directive on Interconnection Services to Public Telecommunications Services in the context of Open Network Provision, OJ 1995 C 313/7, cited in The Institutional Framework for the Regulation of Telecommunications and the Application of EC Competition Rules, Final Report to the European Commission, Forrester Norral & Sutton, 1996, p.42.

⁵¹⁹ Although, as mentioned before, merger control and national sectoral investigations technically apply *ex ante*, they are considered to be part of the *ex post* rules for the purposes of the analysis undertaken in this thesis.

⁵²⁰ K.W.Grewlich, *supra* note 10, p. 951.

to show that the specific exemptions from giving access are not met in the case at hand so that access has to be granted. Therefore, the ONP regime by imposing access as the rule takes a more interventionist approach to the Article 82 EC approach which imposes access (under, for example, the essential facilities doctrine⁵²¹) only after an abuse can be shown. This means that the ONP rules apply independently of any behavioural consideration in order to allow access to facilities or network infrastructure considered difficult to enter otherwise.⁵²²

(c) Immunity from fines

When agreements have been notified to the Commission pursuant to Article 81(3) EC,⁵²³ no fine may be imposed upon the businesses concerned. In principle, notification of an agreement to an NRA does not ensure immunity from fines for a violation of competition rules. However, in cases of concurrent application of ONP and competition rules⁵²⁴ the Commission has indicated that it does not intend to impose fines in relation to agreements that would prove ultimately to be anti-competitive, when the agreement has been notified to an NRA but not to the Commission.⁵²⁵ The Commission, however, may impose fines when a practice or agreement amounts to an abuse of a dominant position (under Article 82 EC) or to a serious breach of Article 81 EC (e.g. resale price maintenance or a cartel agreement).

(d) Complaints

Another difference between sector-specific rules and competition rules concerns complaints. Competition rules give rise to complaint rights and the possibility of offensive and defensive action by enterprises and individuals before the national courts. As is acknowledged by existing and future ONP legislation⁵²⁶, such rights are not prejudiced by the specific dispute resolution mechanisms contained in ONP rules. However, the Commission has set down rules as to its

⁵²¹ See the section at Chapter 1 on the essential facility doctrine.

⁵²² See also below the section of this chapter on the differences between *ex ante* and *ex post* rules.

⁵²³ This is the provision of the EC Treaty that provides for the possibility of notifications to be made to the European Commission for individual exemption when there is doubt as to the compatibility of an agreement with EC competition rules (under new rules drawn up by the Commission national courts and NCAs will be able to grant individual exemption as well in the future; see White Paper on the Modernisation of the Rules Implementing Articles 81 and 82, OJ [1999] C 132/1).

⁵²⁴ See below the section of this chapter on the question of competence.

⁵²⁵ Access Notice, *supra* note 1, paragraph 37.

⁵²⁶ See below the section of this chapter on the future EU regulatory framework.

conduct concerning complaints when a matter is already pending before a NRA in order to avoid double jeopardy.⁵²⁷

(e) Scope of application

Competition rules have a much wider scope of application than sector-specific regulation. *Ex post* competition rules are not limited to a particular type of undertaking or network holder as is sector-specific regulation (sector-specific rules in the telecommunications sector are often addressed at specific undertakings, usually the incumbent). Nor is the application of *ex post* competition rules restricted to a limited number of issues or industries as is the case for sector-specific rules (e.g. interconnection in the telecommunications sector). Finally, competition rules may evolve and be adjusted easily to changed market circumstances (e.g. the convergence between telecommunications and internet).⁵²⁸ In that sense, the application of competition rules is much more flexible than sector-specific rules which require the use of the cumbersome legislative process in order to introduce amendments. However, the scope of application of competition and ONP rules may be becoming more similar due to the Commission's recent practice of increasingly making use of soft-law (such as the Communication on unbundled access to the local loop⁵²⁹ or the Access Notice⁵³⁰) in order to accelerate the introduction of amendments to ONP rules. This is even though in certain instances the Commission has subsequently felt that in order to ensure availability of unbundled access to the local loop within the specified deadline, stronger measures might be necessary (see for example, the Regulation on unbundled access to the local loop that followed the Commission Communication on the same subject).⁵³¹

2.3 National Regulatory Authorities, National Competition Authorities, National Courts and the European Commission

⁵²⁷ See below the section of this chapter on the competence of the Commission, NRAs, national competition authorities and national courts and in particular the part on the existing framework to solve conflicts of competence.

⁵²⁸ This is already happening in Japan, see Nikkei Weekly, 13 May 2002, IP telephony attracts fans with promise of cheap calls.

⁵²⁹ Commission Communication, Unbundled Access to the Local Loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet, COM (2000) 237 final.

⁵³⁰ *Supra*, see Chapter 1 for the analysis of the Access Notice, *supra* note 1.

⁵³¹ Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ L 366, 30.12.2000, pp. 4 to 8. The terms of the Regulation became mandatory within the Member States as of 1 January 2001.

The '*dual regime*' implies two different sets of rules but also various authorities in charge of implementing these rules. This section analyses which authority has competence over which issue and how conflicts of competence can be resolved.

2.3.1 The question of competence

In general, European competition law is implemented by the Commission, national competition authorities and national courts, in accordance with the principles developed by the Community legislature and by the ECJ and the CFI. In the telecommunications field it is NRAs⁵³² that will often have the task of implementing European telecommunications law and policy into their respective Member States.

A fundamental principle of Community law that applies to the division of competencies between national and EU level is the principle of subsidiarity.⁵³³ This principle aims at achieving a sensible distribution of powers or functions as regards the individual, the Member State and the Union's institutions. The Commission explains the notion of subsidiarity in the following terms: "*In the Community context subsidiarity means that the functions handed over to the Community are those which the Member States, at the various levels of decision-making can no longer discharge satisfactorily*".⁵³⁴ This means that Community-level activities are to be restricted to those functions which involve a Community interest. With regard to the introduction and maintenance of competition in the telecommunications sector, the Community interest is in promoting the common market and establishing clear rules for the emerging competitive environment.⁵³⁵

Having this fundamental principle in mind, the following can be said as to the relation between national courts and the European Commission. It is the task of national courts to safeguard the rights of private persons with one another. With regard to *ex post* competition rules, those rights derive from the fact that the prohibitions in Articles 81(1) EC and 82 EC and the exemptions

⁵³² I.e. National Regulatory Authorities as defined in Chapter 1.

⁵³³ See Article 5 EC which provides that: "*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence the Community shall take action, in accordance with the principle of subsidiarity, only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*".

⁵³⁴ The principle of subsidiarity: Communication of the Commission to the Council and the European Parliament, SEC(92) 1990 final, paragraph 2.

⁵³⁵ P.A.Buigues, O.Guersent and J.F. Pons, Network Utilities-The EU Institutions and the Member States, 1 November 2001, http://europa.eu.int/comm/competition/speeches/text/sp2001_019_en.pdf, p.5.

granted by Regulation have direct effect (because they give rise to rights and obligations on the part of individuals which national courts have a duty to safeguard) and have been recognized by the Court of Justice as being directly applicable.⁵³⁶ The same applies for EC Regulations and Directives transposed into national legislation.⁵³⁷

The relationship between national Competition authorities ('NCAs') and the Commission is the subject of a Commission Notice which describes the practical co-operation which is desirable between the Commission and the national authorities.⁵³⁸ The Notice defines the role of Member States and of the Community, gives guidelines on case allocation and deals with co-operation in cases where the Commission deals with a case first but also where a national authority deals with a case first.

The Commission foresaw that potential conflicts of competence might arise between NRAs, NCAs and the European Commission. It dealt with that point in the Access Notice.⁵³⁹ The potential conflict of competence referred to in the Access Notice is one between various bodies which can all be competent at the same time as well as between national and Community law. The Notice recognises that "*access problems in the broadest sense of the word can be dealt with at different levels and on the basis of a range of legislative provisions, of both national and Community origin*".⁵⁴⁰

Two routes are recognised in the Access Notice: "*At a national level, the applicant has two main choices, namely (1) specific national regulatory procedures now established in accordance with Community law and harmonised under Open Network Provision and (2) an action under national and/or Community law before a national court or national competition authority*".⁵⁴¹ At the European level, under Regulation 17⁵⁴², the Commission could be seized of an issue relating to access agreements. This would happen in the context of a notification of an access

⁵³⁶ Case 127/73 BRT v SABAM [1974] ECR 51.

⁵³⁷ For more details see Commission Notice on co-operation between national courts and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty, 1993, OJ [1993] C 39/6.

⁵³⁸ Commission Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ [1997] C 313/3.

⁵³⁹ Access Notice, supra note 1; see Chapter 1 of the thesis for more details on the Access Notice.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Council Regulation No.17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty (OJ 13, 21.2.1962,p.204).

agreement by one or more of the parties involved, by way of a complaint against a restrictive access agreement or against the behaviour of a dominant company in granting or refusing access, by way of a Commission own-initiative procedure into such a grant or refusal, or by way of a sector enquiry. At national level a NCA could have competence provided that the access agreement does not have a Community dimension.

The multiplicity of rules (and authorities that enforce them) that potentially apply to a given situation within this context means that compliance with EC competition rules does not absolve operators of their duty to abide by obligations imposed by sector-specific rules, and vice versa. Within the context of this thesis the principle relationship between enforcement authorities that is of relevance is the one between the Commission and NRAs. This is because in the telecommunications field, NRAs acting within the ONP framework have jurisdiction over certain sector-specific access agreements and hence are the authority most likely to have a conflict of competence with the Commission. The next sections focus mainly on the relationship between NRAs and the Commission.

2.3.2 The characteristics of NRAs

The first element of the NRAs uniqueness vis-à-vis the Commission is that they operate at a different level. The NRAs are by definition national organs in charge of the application of national sector-specific legislation whereas the Commission is a supra-national institution with a very broad spectrum of competence.⁵⁴³ This however has to be qualified by the fact that the NRAs legitimacy and their field of operation is delineated by European legislation.

The second and most important difference is that NRAs may follow different objectives from the Commission. In the case of telecommunications, the NRAs may have as primary objective purely national objectives, such as universal coverage within their respective Member States, whereas the Commission may have at the top of its list of priorities the maintenance of an effectively competitive environment (DG COMP) or the establishment of a common telecommunications market throughout the EU (DG INFOSOC) in the liberalised telecommunications sector. In the event of a conflict between the Commission and an NRA it is not clear which authority should prevail (see the next section). In theory, as long as the NRA is acting in conformity with the EC law on which national sector-specific regulation is based, it can legitimately claim to be applying EC law (albeit indirectly) just as the Commission would do. It is therefore arguable that the Commission does not have supremacy over NRAs' decisions but

⁵⁴³ For a general description of the legal status of the European Commission see; N.Moussis, *Access to European Union*, Ed. Edit-Eur, 2001.

rather than the relationship between these two authorities should be seen as a matter of hierarchy of norm within EC law itself. What is clear is that legislation under which NRAs operate is implementing secondary legislation adopted pursuant to Article 95 EC (formerly Article 100a EC) which has to be co-ordinated with the primary norms of Articles 81 and 82 EC.⁵⁴⁴ This co-ordination of actions between the NRAs and the Commission is the subject of specific rules studied below.

2.3.3 The existing framework to solve conflicts arising from the dual regime

The following is an analysis of existing and potential conflicts that can arise between authorities creating and enforcing general competition rules and authorities creating and enforcing sector-specific rules.

(a) Commission internal conflicts

The dual regime described above means that within the European Commission two Directorate Generals have authority over access to telecommunications networks issues. The Directorate General for the Information Society ('DG INFOSOC') oversees the *ex ante* sector-specific side of the regulation whereas the Directorate General for Competition ('DG COMP') oversees the *ex post* general competition rules side of the regulatory framework. The dual regime led to a uniquely close co-operation between the two Directorates, symbolised since 1997 by the Joint Team ('JT') between the two DGs and the joint implementation reports issued at regular intervals.⁵⁴⁵ The JT is therefore the structure put together to ensure that conflicts between the DGs are kept to a minimum but also to ensure that the Commission speaks with one voice to the external world. However, there is no formal framework or procedure to solve conflicts between the two DGs other than through the normal negotiations between the relevant officials of the two DGs.

(b) Conflicts between the Commission, NRAs and NCAs

Right from the start of the telecommunications liberalisation process the Commission gave a high priority to the aim of developing a decentralised sectoral regulatory enforcement structure, with the creation of the sector-specific NRAs, supported in many instances by the NCAs. This

⁵⁴⁴ P.Larouche, *supra* note 3, p.294.

⁵⁴⁵ European Commission, DG COMP and DG INFOSOC, H.Ungerer, *Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector, Assessment of Past Experience and Conclusions for Use in other Utility Sectors*, Brussels 6 May 2001, p.18; http://europa.eu.int/comm/competition/speeches/text/sp2001_009_en.pdf.

resulted in a complicated regulatory picture potentially leading to conflicts between the various competent authorities. NRAs derive their authority and competence from the ONP Directives (such as the interconnection Directive).⁵⁴⁶

The Access Notice proposes the following solution to the possible conflicts of competence and legal uncertainty resulting for operators. It is recognised that given the Commission's responsibility for the Community's competition policy, the Commission must serve the Community's general interest. However, the limited administrative resources of the Commission mean that it cannot deal with all the cases and that it has to establish priorities. The Commission intends to concentrate on notifications, complaints and own-initiative proceedings "*having particular political, economic or legal significance for the Community*". In this regard, it is interesting to look at the approach taken in the Notice on co-operation between national courts and the Commission in applying Articles 81 and 82 EC as a reference to how co-operation between the Commission and the NRAs could happen.⁵⁴⁷

Some clarification as to the meaning of those words is given in the Access Notice: "*In evaluating the Community interests, the Commission examines...the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 81 and 82 are complied with...*".⁵⁴⁸ In deciding whether to intervene the Commission will also look at the ability of the national judge to deal with the infringement in question. Extra-territorial elements will usually signify that the Commission considers itself more competent than a national judge to investigate a complaint.

If a NRA is seized of the issue in question, the interconnection Directive provides that such an authority has power to intervene and order changes in relation to both the existence and content of access agreements. The legal basis for such an action would be the national legislation

⁵⁴⁶ Directives instruct Member States to develop and implement national legislation in order to implement policy decisions of the Community. As a Community legislative instrument, Directives require transposition into national law in order to be effective. As to the effect of Directives, being commands addressed to Member States, Directives have a direct effect upon their addressees. It is the duty of the latter to give effect to their obligation in this respect. In principle, a Directive takes effect through the domestic measures implementing it; and, once implemented, the Directive remains a guide to the interpretation of the domestic measures but not as a distinct source of rights. This was established in the *Marleasing* case where the ECJ held that: "*in applying national law...national courts are required to interpret the provisions of the Code so as to preclude a declaration of nullity of a company based on a ground which is not listed in the First Company Directive*", Case C-106/89: *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

⁵⁴⁷ OJ C 39, 13.2.1993, p.6 at paragraph 14.

⁵⁴⁸ Access Notice, *supra* note 1, paragraph.26.

implementing the Interconnection Directive. National courts, because of the principle of direct effectiveness of the competition rules, must enforce Community competition law.

The Commission recognises that the multiplicity of proceedings opened to a plaintiff may lead to unnecessary duplication of investigative efforts by the Commission and the national authorities. To eliminate such duplications, the Commission proposed that: "*Where complaints are lodged with the Commission under Article 3 of Regulation No 17 while there are related actions before a relevant national or European Authority or court, the Directorate-General for Competition will generally not initially pursue any investigation as to the existence of an infringement under Article 81 or 82 of the Treaty*". In practice this will mean that where a complaint is lodged with the Commission the object of which is clearly national and there are related actions before a NRA which has the power to remedy the competition problems at issue, the Commission will not initially pursue any investigation as to the existence of an infringement of EU competition law. The Commission will suspend its own investigation pending the conclusion of the national proceedings. The Commission will then decide to close its own case, if the competition law problems have been solved in line with the case law of the Court of Justice.⁵⁴⁹

However, in two cases the Commission reserves the right to investigate itself an alleged infringement. First, in order to safeguard the complainant's rights, the Commission will intervene if national proceedings were allowed to lead to an excessive delay of the Commission's action, without a satisfactory resolution of the matter at a national level. The Commission rightly points out that in sectors such as telecommunications, innovation cycles are very important and any substantial delay in resolving an access dispute might in practice be equivalent to a refusal of access. The Commission thinks that an access dispute should be resolved within a time not normally exceeding six months. If the dispute has not been effectively resolved within this period, the Commission acknowledges that there is a *prima facie* case that the rights of the parties are not being effectively protected.⁵⁵⁰ The Commission (as well as the EFTA Surveillance Authority⁵⁵¹) could decide to initiate their own investigation on the matter under the competition

⁵⁴⁹ J.-F. Pons, Deputy Director General DG COMP, Speech, Rome, 12 April 1999, The Liberalisation of telecommunications in Europe and the role of the regulators, http://europa.eu.int/comm/competition/speeches/text/sp1999_010_en.html. The guidelines on market analysis and the assessment of significant market power also point out that to ensure consistency of approaches the guidelines are based, amongst others, on the jurisprudence of the European Courts and will be amended whenever appropriate in the light of new jurisprudence from the ECJ or CFI, *supra* note 475, paragraphs 11 and 13.

⁵⁵⁰ Access Notice, *supra* note 1, paragraphs 14, 21 and 31.

⁵⁵¹ As to the applicability of the principles outlined in the Access Notice to the EFTA Surveillance Authority, although the Access Notice has not been adopted as such by the Authority, it has been followed as a sound general principle of EEA/Community law. The authority's 2000 Annual Report states that: "*the preparation by the Authority of non-binding acts corresponding to theses adopted by the European Commission is subject to internal resource allocation. Pending*

rules. Once again there must be a substantial Community interest affecting, or likely to affect, competition in a number of Member States for the Commission to investigate itself in cases of undue delay. Second, the Commission will investigate itself where national proceedings cannot answer adequately a request for interim measures. To decide whether to intervene or not the Commission will look at the availability of, and criteria for, interim relief. In the absence of these features, notifications will not normally be dealt by means of a formal decision, but rather a comfort letter (subject to the consent of the parties) and complaints should, as a rule, be handled by national courts or other relevant authorities.

Generally, the Commission has stated that according to the principle of subsidiarity⁵⁵² and of role specialisation, the NRAs must have a leading role for national cases related to the application of sector-specific rules (and the NCAs when the case is not linked to sector-specific rules, but to competition ones), the Commission being in charge of ensuring a correct transposition of Directives and of competition cases of Community interest. Close co-operation between the authorities is crucial to ensure the satisfactory exchange of information and consistent analysis.⁵⁵³ Therefore, in the vast majority of cases, the Commission would concentrate only on major cases and leave the NRAs to conduct the bulk of the work. This was the case in the Mobile Interconnect proceeding⁵⁵⁴ and the Accounting rate proceeding.⁵⁵⁵ This approach has proved successful in establishing pro-competitive access in the EU's liberalised

the adoption of its own notices, the Authority intends to apply the principles set out in the Commission notices whenever relevant’.

⁵⁵² See above for an explanation of the principle, see also; The principle of subsidiarity: Communication of the Commission to the Council and the European Parliament, SEC(92) 1990 final, paragraph 2.

⁵⁵³ J.-F. Pons, Deputy Director General DG COMP, *supra* note 549, p. 5.

⁵⁵⁴ Mobile Interconnect proceeding, Press Release IP/98/707, 27 July 1998. In January 1998, the Commission launched an inquiry into interconnection charges between fixed and mobile operators opening 15 cases, i.e. one for each Member State due to growing concern about persistently high prices for mobile communications particularly for fixed to mobile calls. In the press release, the Commission suspended for 6 months an in-depth investigation of preliminary indications of possibly excessive or discriminatory prices by Deutsche Telekom, Telefonica, KPN Telekom and Telecom Italia in favour of action by national regulators.

⁵⁵⁵ Accounting rate proceeding, Press Release IP/98/763, 13 August 1998. The Commission opened procedures in the Autumn of 1997 concerning European operators with a potentially dominant position, regarding the accounting rates (transfer prices) charged to terminate international calls. Following a preliminary assessment, the Commission announced in the press release that it appeared that *“the international accounting rates charged within the EU by 7 operators may result in excessive margins”*. The Commission concluded that it would further investigate on the prices for international phone calls paid to these operators. On the occasion, the Commission stated that the issue may also be tackled under the ONP rules. In line with its “Notice on the application of competition rules to access agreements in the telecommunications sector” the Commission informed the NRAs of the findings of its first phase of investigation. In those cases where the relevant authority decided to pursue the issues under its own jurisdiction, the Commission stayed its own proceedings, and assessed within six months from that date whether it should continue its own proceedings.

telecommunications market and was fundamental to the success of the overall liberalisation exercise.⁵⁵⁶

In terms of distinguishing the competence of the NRAs with that of the NCAs (and hence minimising the risks of conflict between them) it can be seen from the above description of the existing allocation of competencies that NRAs are meant to be front-line regulatory authorities for telecommunications, applying national sector-specific regulation and indirectly ensuring - under the supervision of the Commission - the enforcement of EC competition law as well. There are obvious advantages to using the NRA in this role, given that it has a better knowledge of the telecommunications sector and hence greater expertise in the complex issues arising in disputes. Additionally, the NRA will usually have more resources to devote to a given case than any competition authority. The down side to this situation is the risk the NRAs will not be able to assume this role at the front-line for lack of jurisdiction. The convergence phenomenon has in many cases left existing legislation out of line with the real market conditions so that often national sector-specific legislation (taken in application of EU sector-specific Directives, such as the interconnection Directive) does not entrust the NRAs with as broad a jurisdiction as the NCAs, whose mandate will extend to the whole economy rather than only to telecommunications.⁵⁵⁷

Conflicts under the new Regulation 17

It is also worth mentioning here the Commission's new Regulation 17 (the Regulation implementing Articles 81 EC and 82 EC). The Commission published a proposal for a new Council Regulation which has now been approved by the Council⁵⁵⁸ which offers the opportunity to substantially strengthen the use of competition law in the Member States on telecommunications cases. However, for this '*decentralisation*' to be effective a build-up of the network of NCAs would be necessary together with a review of the ways of operation, particularly in own initiative cases, which have been a major instrument in the liberalisation process.⁵⁵⁹ This strengthening of the NCAs role under the new proposed implementing

⁵⁵⁶ See for example the findings of the European Commission's Communications Review 1999, COM (1999) 539, 10 November 1999.

⁵⁵⁷ P.Larouche, supra note 3, p.302.

⁵⁵⁸ COM (2000) 582 final, 2000/0243 (CNS), Brussels, 27.09.2000. This proposal was approved by the Council on 26 November 2002. The new Regulation will come into force in May 2004.

⁵⁵⁹ European Commission, DG COMP and DG INFOSOC, H.Ungerer, Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector, Assessment of Past Experience and Conclusions for Use in other Utility Sectors, supra note 545, p. 19.

regulation would tie-in with the strengthening of the NRAs' role and the new telecommunications sector-specific regime to give a bigger say to national authorities in the regulation and enforcement of access to telecommunications facilities and therefore reduce the opportunities of conflict between the national authorities and the Commission.

2.4 The concept of Significant Market Power compared to the concept of dominance

In the telecommunications sector, the ONP Directives aim at establishing a regulatory regime for access agreements. This means that often, through national implementing legislation, they will impose conditions on undertakings that go beyond what could have been imposed by Article 82 EC. The interconnection Directive provides a very good example of this in the form of the presumptions it establishes and the obligations it imposes if a telecommunications operator falls within the presumption.⁵⁶⁰ Article 4 of the interconnection Directive imposes an obligation to meet all reasonable requests for interconnection for operators with SMP.⁵⁶¹ The concept of SMP applies to operators with a market share of more than 25 per cent of the relevant market. The SMP concept applies throughout the ONP framework as the test which serves to define the ultimate addressees of the ONP obligations.⁵⁶² However, none of the ONP Directives gives any further details on what the relevant market could be or even how it could be defined for the purpose of the ONP framework.⁵⁶³

The concept of SMP within the meaning of the ONP Directives is not currently⁵⁶⁴ synonymous with the concept of dominant position under Article 82 EC.⁵⁶⁵ The threshold of a market share

⁵⁶⁰ The interconnection Directive is analysed in detail in Chapter 1 of the thesis.

⁵⁶¹ See also Chapter 1, section B and in particular the section analysing of the presumption of SMP.

⁵⁶² The Commission has produced a document entitled "Determination of organisations with significant market power (SMP), as defined in the ONP Directives", 1 March 1999, (available at <http://www.ispo.cec.be>) which gives some indications on how to recognise organisations with SMP.

⁵⁶³ However, as noted in the interconnection section of Chapter 1, NRAs are free to stray from the 25 per cent criterion and make a determination based on an "*organisation's ability to influence market conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.*", Directive 92/44, Article 2(3). It should also be said that the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services address this very issue and are analysed below in the main body of the text, supra note 475.

⁵⁶⁴ See below the proposals of the Commission to align the concept of SMP with the one of dominance under Article 82 EC under the new sector-specific regime which will enter into force in July 2003.

⁵⁶⁵ However, Germany has implemented the ONP framework in the Telekommunikationsgesetz the Gesetz gegen Wettbewerbsbeschränkungen (GWB, Competition Act) in the version of 26 August 1998, BGB1.1.2546. It has therefore interpreted the concept of SMP as being the same as dominant position under general competition law. This is a general weakness of the European regulatory system whereby Directives have to be implemented by Member States thereby leaving the door open to discrepancies between national regimes of Member States.

exceeding 25 per cent will generally not be considered sufficient to give market dominance within the meaning of Article 82 EC.⁵⁶⁶ Moreover, SMP involves a broadly predetermined legal definition of the market, whereas the definition of relevant market under the competition rules follows the economics of competition law.⁵⁶⁷ Therefore, the notion of SMP contained in the ONP interconnection Directive describes a position of economic power on a particular market which is lower than that of dominance. As a result of this difference, a market player (such as an incumbent or even a new entrant which has managed to establish itself in the market) with a dominant position will normally be considered to have market power within the meaning of the ONP Directives but not necessarily vice-versa.⁵⁶⁸ However, under the Commission's new regulatory framework (which is based on a series of legal instruments which have been adopted⁵⁶⁹ by the European Council and European Parliament but which will not enter into force before July 2003) the concept of SMP under the interconnection Directive would be calculated in a manner consistent with EC competition law.⁵⁷⁰ The Commission notes that the application of the concept of dominance within the context of the assessment of SMP will be an *ex ante* assessment. This calls for certain methodological adjustments to be made regarding the way market power is assessed. NRAs will be relying on a different set of assumptions and expectations than those relied upon by a competition authority applying Article 82 EC *ex post*. Often the assessment of SMP will have to be a prospective assessment and this the accuracy of the NRAs market analysis will be conditioned by the information and data existing at the time of the adoption of the relevant decision. This is why the Commission recommends that in applying *ex ante* the concept of dominance, NRAs must be accorded some discretionary powers correlative to the complex character of the economic, factual and legal situations that will need to be assessed.⁵⁷¹

In practical terms for telecommunications operators this situation will mean that if for example they fall within the presumption set out in the interconnection Directive, the stricter ONP regime will apply and they will have to provide access following a reasonable request by their

⁵⁶⁶ See Chapter 1 of the thesis for the analysis of what is a dominant position in the EU telecommunications sector.

⁵⁶⁷ See the Access Notice, *supra* note 1, and the Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ [1997] C 372/03.

⁵⁶⁸ L.Garzaniti, *supra* note 4, p. 279.

⁵⁶⁹ Apart from the Data Protection Directive which will be adopted later.

⁵⁷⁰ See below the section of this chapter analysing the Commission's proposals for a new regulatory framework for telecommunications.

⁵⁷¹ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraphs 70 and 71.

competitors. The dual character of the access regime becomes evident when one realises that compliance with one set of rules does not exempt an operator from the other set of rules. Thus, an operator which is considered as having SMP and therefore has to comply with various ONP obligations can still infringe traditional competition rules by its conduct. In this regard, the Commission said in its 1991 Guidelines on the application of the competition rules to the telecommunications sector⁵⁷² and in the Access Notice⁵⁷³ that where ONP rules apply, the Commission could still intervene and impose fines and nullify existing agreements. This situation should however remain exceptional and the mechanisms to resolve such conflicts were created with this situation in mind.⁵⁷⁴ The '*dual regime*' therefore imposes a very high burden on dominant operators in the telecommunications industry. In this regard, it is interesting to note that the whole liberalisation effort viewed from a competition law perspective consists in altering the rules of competition to the benefit of small competitors such as new entrants. Under the ONP rules the concept of SMP is such an example of an alteration of the competition rules. Without such a measure it is almost certain that the liberalisation process would have taken place much more slowly than it actually did. Considering that the telecommunications industry was characterised by a State run operation protected from competition, the stricter regime imposed by the ONP rules greatly enhances the chances of third parties successfully entering the telecommunications market.

For ex-monopolists the last decade has been a tragic reversal of fortunes. Most of the European incumbents started the nineteen-nineties in a situation of legal monopoly. They are now, under the dual regime of sector-specific and general competition rules, forced to help their competitors by providing them access to their networks. The reality is that once a market matures there is no longer any justification for competition to be restrained. Moreover, because network industries are characterised by a very high level of sunk costs, the ex-monopolists have over the years built their networks which are in most cases economically impossible to duplicate. This means that the only way for competition to grow is to force access to the existing networks, which necessarily means altering the normal rules of competition. Ex-monopolists will have to be very careful not to breach the multitude of competition rules that are now imposed upon them. For the time being, in most cases SMP operators will also hold a dominant position within the meaning of Article 82 EC so that there is a significant risk of overlap between the target group of

⁵⁷² 1991 Guidelines, supra note 75.

⁵⁷³ Access Notice, supra note 1.

⁵⁷⁴ There are limited circumstances where such a conflict could arise, see above the section on the competence of the Commission, NRAs and national authorities and in particular the part on the existing framework to resolve conflicts.

the regulatory and competition authorities.⁵⁷⁵ Complying with the very tough measures of the ONP regime and in particular the interconnection Directive will not mean that telecommunications operators will not have to worry anymore about the competition rules. On the contrary, the success of the liberalisation process depends very much on the application of the competition rules and the competition authorities will be watching as closely as ever the ex-monopolists actions.

2.5 The potential overlap between sector-specific regulation and the essential facilities doctrine

A corollary of the potential conflict of competence between NRAs and NCAs is that there are significant risks of overlap between the application of the substantive principles these authorities apply. For example, the interconnection rules that force access to infrastructure are sector-specific rules that clearly overlap with the essential facilities doctrine in its function of allowing new entrants to get access to the incumbents' telecommunications infrastructure. The main difference between these rules is the moment in time at which they apply. Sector-specific regulation such as the interconnection Directive applies *ex ante* whereas general competition rules such as the essential facilities doctrine apply *ex post*. However, this does not mean that there cannot be a conflict between these rules. It is quite possible that although NRAs have the primary responsibility to deal with network access issues within the framework of the ONP rules, a concurrent procedure in front of a NCA might involve the application of the essential facilities doctrine in the exact same situation leading to potentially different outcomes.

In terms of avoiding conflicts between the authorities themselves the analysis above showed that the principle of subsidiarity⁵⁷⁶ and of role specialisation provide that NRAs must have a leading role for national cases on the application of sector-specific rules whilst NCAs should take the lead when the case is not linked to sector-specific rules, but to competition ones. This division of responsibilities minimises the risks of overlap. In addition to this division of responsibility certain precautions can be taken by NRAs when deciding whether or not to grant a new entrant access to an incumbent's infrastructure. First, as indicated above, NRAs are required to apply competition rules and implementation of access regulation must be consistent with the principles established by the Commission or the European Courts in relation to access to essential facilities under Article 82 EC. This also means that the NRAs will have to be aware

⁵⁷⁵ P.Larouche, supra note 3, p.332.

⁵⁷⁶ See above for an explanation of the principle, see also; The principle of subsidiarity: Communication of the Commission to the Council and the European Parliament, SEC(92) 1990 final, paragraph 2.

of and follow the line of essential facilities cases of the Commission and European Courts, notably the *Oscar Bronner* judgment, when taking decisions for example on interconnection.⁵⁷⁷ Furthermore, NRAs will have to keep abreast of new Commission decisions and European Courts' judgments on essential facilities. Second, as mentioned above, the scope of application of competition rules is broader than that of ONP rules. For instance, the interconnection Directive only deals with issues of access to public telecommunications networks and arguably does not apply to facilities such as the local loop⁵⁷⁸ or set top boxes and whatever other device or network which is not public. For access to such non-public facilities, new entrants will have to rely on their right to complain under the general competition rules and more specifically the essential facilities doctrine. Third, in so far as competition rules apply in parallel with sector-specific regulation, new entrants and other companies have the possibility of relying on the essential facilities doctrine in case of deficient or unsatisfactory implementation of ONP rules by one of the NRAs. However, there are also limits to the use of *ex post* competition rules to regulate the issue of access to telecommunication networks and these are analysed in more detail below.

2.6 Appraisal of the 'dual regime' in the EU

First, some conclusions can be drawn on the success to date of the 'dual regime' that characterises access to the EU's telecommunication sector. *Ex ante* sector-specific regulation allows much greater regulation of access to telecommunications networks than pure *ex post* competition rules. The intervention by the national regulators has had mixed results. It has been generally successful in securing access to the incumbent's bottleneck network, particularly as concerns pricing of interconnection and access.⁵⁷⁹ However, opening up access to infrastructure and network facilities has not been a complete success with the particularly important issue of unbundling of the local loop being a noticeable failure.⁵⁸⁰ *Ex post* action in this context concentrates on abuses of dominant position⁵⁸¹ such as excessive pricing and predatory pricing

⁵⁷⁷ See Chapter 1 of the thesis for an analysis of the essential facilities doctrine and interconnection.

⁵⁷⁸ See the section of Chapter 1 of the thesis on access to the local loop and the Commission's action in the area.

⁵⁷⁹ H.Ungerer, Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union, *supra* note 8, p.18, see also generally the interconnection section of Chapter 1.

⁵⁸⁰ P.A. Buigues, DG COMP, Benefits for consumers from competition in the "New Economy", the case of access to the internet and the local loop, Madrid, 26 February 2002, http://europa.eu.int/comm/competition/speeches/text/sp2002_004_en.pdf.11.

⁵⁸¹ See Chapter 1 of the thesis for an analysis of abuse of dominant position.

using the normal competition law provisions.⁵⁸² In many cases the case law to which reference can be made is limited although the principles set down by the Access Notice are helpful in this regard.⁵⁸³

There are five main weaknesses to the present system. The European Commission itself has identified the first three weaknesses.⁵⁸⁴ The fourth and fifth weaknesses are findings of this study. Firstly, sector-specific regulation, particularly as regards price regulation, is a deep intervention in market mechanisms, with a high risk and consequent responsibility for the regulator. An excessive use of such regulation can reduce investment incentives in facilities (such as infrastructure or network facilities), both for the bottleneck holder, as well as for the party seeking access.⁵⁸⁵

Secondly, the ONP regime and the derived national sector-specific regimes have become highly dependent on definitions, which imply a high degree of technicality, and therefore a high potential of legal conflict. The ONP regime as established is depending on two concepts: the category within which the party seeking access and the bottleneck holder falls (i.e. whether they are public network operators or not) and the SMP determination. These qualifications are of great importance as public network operators have to provide low interconnect rates and operators holding SMP become subject to substantial regulatory obligations (including the obligation not to refuse interconnection if asked upon reasonable request)⁵⁸⁶ and to regulatory rate approval. In a number of Member States conflicts threaten concerning the interpretation of these concepts.⁵⁸⁷

Thirdly, the heavy regulatory regime imposed by the ONP regulation, especially as to the obligation to negotiate and accept interconnection in certain cases as well as the approval of

⁵⁸² Under implementing Regulation 17, OJ L13, 21.2.62, p.604.

⁵⁸³ Access Notice, *supra* note 1.

⁵⁸⁴ H.Ungerer, Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union, *supra* note 8, p.20.

⁵⁸⁵ The different regulatory approaches are quite visible when comparing the number and size of the regulation which applies to fixed/mobile telecommunications and compare it with the scarce regulation of the internet. This disparity coupled with the phenomenon of convergence (see above Chapter 1 of the thesis and in particular the section on convergence) explains why the Commission's new regulatory proposals for electronic communications cut down significantly *ex ante* regulation in favour of *ex-post* control of the proper functioning of market forces (see below the section on the Commission's proposal for a new regulatory framework of all electronic communications).

⁵⁸⁶ For more details see Chapter 1 of the thesis and in particular in the section on interconnection the analysis of Article 4 of the interconnection Directive.

⁵⁸⁷ H.Ungerer, Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union, *supra* note 8, p.20.

interconnection rates, inevitably lead to a substantial intervention by the regulator in the day-to-day business practices and strategies of the bottleneck holder. The danger here is that regulation might be too heavy-handed and might unnecessarily impair the functioning of businesses. This might lead to legal conflicts between operators but also between the incumbent and the relevant NRA.

Fourthly, in relation to the Commission's stated policy to stay its (competition) procedures where sector-specific proceedings under the ONP or derived national regulations are likely to resolve the issue, there is no clear certainty as to when the Commission will intervene when an NRA is also seized of a notification. The criteria proposed by the Commission to indicate when it intends to intervene are at best, vague. The Commission said that it will concentrate on notifications, complaints and own initiative proceedings having '*particular political, economic or legal significance for the Community*'. There is uncertainty as to the meaning of the words used and as to who will decide their interpretation. The point being here that the wording of the Access Notice is not entirely clear and that the Commission and NRAs might understand it differently in cases of dual competence. For example, '*particular political significance for the Community*' could be interpreted very differently by various NRAs but also differently by the Commission. What is relatively certain is that the Commission will investigate itself a complaint if there is a risk that the complainant's rights could be harmed by an excessively long investigation and where interim measures are not adequate in particular national proceedings. It remains that the essential criteria which will be used by the Commission to decide if it will seize itself of a complaint turn around the words '*Community interest*', which is a concept difficult to define. Nor is the statement by a senior official of DG COMP⁵⁸⁸, that the principle of subsidiarity should apply so that NRAs should have a leading role for national cases, particularly helpful as it does not give a concrete delimitation of competencies and does not explain how cases of substantial Community interest interrelate with the principle of subsidiarity.⁵⁸⁹ The consequences of this uncertainty are that valuable investigative resources could be wasted and more importantly, that market players could lose confidence in the investigative authorities and not notify or not even complain to any of them.

Finally, the last criticism to the dual regulatory regime is that the role of the NRAs at the forefront of the regulatory task in the telecommunications area is impeded by the fact that national sector-specific legislation varies among Member States. This means that not all NRAs will have the same powers because the national implementing laws they are relying on might be different

⁵⁸⁸ J.-F. Pons, *supra* note 549.

⁵⁸⁹ See above the paragraph defining the concept of subsidiarity.

(ONP Directives, as all EC Directives, leave some room for manoeuvre to national legislators in the way in which they implement the Directives) but perhaps more importantly the interpretation of common provisions might also vary quite significantly between Member States. In particular, NRAs may be restricted to telecommunications whereas the convergence phenomenon clearly makes it necessary to give wider jurisdiction to NRAs. This is a point that will have to be addressed by the Commission, possibly through legislation, especially in view of the increased role that NRAs will be asked to play under the new regulatory regime (see below).

Therefore, the conclusion on the assessment of the effectiveness of the dual regulatory approach is that while sector-specific regulation can assure in many cases efficient intervention for providing access through, for example, interconnection to the incumbent's network, there are important weaknesses to the present regime. It is partly in order to alleviate some of these concerns and to respond to technological changes but also in order to adapt the regulation to the fully liberalised telecommunications industry, that the Commission has put forward concrete proposals for a new regulatory framework.

2.7 The future regulatory framework

The Council and the European Parliament adopted in March 2002⁵⁹⁰ four Directives and one Decision that will replace in 2003 the existing framework consisting of 26 legislative texts that comprise the sector-specific regulatory basis of the EC telecommunications, media and information technology sector.⁵⁹¹ The convergence of these sectors is the reason why the Commission believes that a single regulatory framework is now necessary for all electronic communications. The four Directives and one Decision (that will come into force in July 2003) comprise a framework directive, the access and interconnection Directive, the authorisation Directive, the universal service Directive and the radio spectrum Decision. A data protection Directive should be adopted separately later.⁵⁹² In addition, a Regulation on unbundled access to the local loop entered into force in January 2001.⁵⁹³ These measures will, as of July 2003, constitute the EC *ex ante* sector-specific regime in the telecommunications field. Non-binding

⁵⁹⁰ Supra note 223.

⁵⁹¹ See above the section of Chapter 1 dealing with the new telecommunications regulatory framework.

⁵⁹² Due to ongoing disputes between the Commission and the Parliament, this Directive has been separated from the rest of the new regulatory framework and will be adopted later.

⁵⁹³ Regulation 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ L 366, 30.12.2000, pp. 4 to 8. The terms of the Regulation became mandatory within the Member States as of 1 January 2001.

sector-specific measures and *ex post* competition law regulation will apply in parallel with these measures.

2.7.1 The relation between sector-specific and competition rules under the Commission's future regulatory framework

The drastic reduction in the number of sector-specific regulation is closely linked to the strong belief of EC policy-makers that competition rules will progressively play a primary role in the future regulation of telecommunications. This is reflected in the first regulatory principle which holds that regulation should be kept to the minimum necessary to meet the Commission's policy objectives. An unduly restrictive regulatory system risks acting as a brake on investment or may fail to stimulate sustainable investment. Much of the current regulatory framework was put in place in order to create a competitive market from a situation of state monopolies. As such, it was focused on the creation of a competitive market and the rights of new entrants. However, once a competitive market is effectively established, many of these provisions should no longer be necessary and it would therefore be sufficient to rely mainly on the application of competition rules. It is proposed that the new framework should therefore build-in mechanisms such as '*sunset clauses*' whereby certain basic rules are reviewed periodically to assess whether they are still necessary. In this regard, the Commission published in February 2003 a Recommendation identifying 18 markets in the electronic communications sector that NRAs will have to investigate in order to decide whether these markets continue to justify sector-specific regulation. Whilst the aim of the Recommendation is to get NRAs to examine the necessity of sector-specific regulation in these markets and subsequently to roll back regulation where it is no longer required, the Commission aims at doing this by also ensuring harmonisation (because all NRAs will consider the same markets) and legal certainty (because market players know in advance which markets are to be analysed by NRAs).⁵⁹⁴

This means that the Commission foresees a shift from *ex ante* sector-specific rules to *ex post* competition rules as the markets become more competitive. However, some *ex ante* sector-specific rules will continue to be appropriate during the transitional phase, in particular where former monopoly operators continue to benefit from inherited market power, such as in local access networks, or where firms are vertically integrated. In that case a regulatory response is appropriate but, keeping in line with the general thinking behind the new regulatory framework, it

⁵⁹⁴ European Commission Recommendation of 11 February 2003 on relevant products and services markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services, 11 February 2003, C2003/497. See also generally the section of Chapter 1 of the thesis on the 1999 Review and the proposed new regulatory framework.

should be specific to the problem, proportionate and maintained only for as long as necessary. For this new framework to succeed, transparent decision-making processes have to be established, with NRAs having to justify all decisions against the objectives of Community policy, and using *ex ante* rules only where they are more effective than competition law remedies to address the market problems identified.

The Commission's aim of progressively phasing-out *ex ante* rules may have to be applied at variable speeds depending on the Member State concerned but also depending on the market segment. This is specifically recognised by the new interconnection Directive which empowers the NRAs with the task of deciding the degree and scope of the phasing-out of the *ex ante* rules within each Member State. However, in order to ensure equal treatment of operators, the Commission keeps to itself the task of ensuring the harmonised application of the provisions of the new interconnection Directive. Further, the new Directive specifically mentions NCAs as authorities that must co-operate with NRAs in order to ensure that the most appropriate remedy is applied in each case.⁵⁹⁵

2.7.2 Conflicts under the new sector-specific regime

The Commission has published guidelines⁵⁹⁶ on matters such as market analysis and the calculation of SMP for use under the future regime. The guidelines are for NRAs to use when determining whether an undertaking or undertakings enjoy SMP as defined under the new proposed regime. The guidelines introduce a new policy as to the meaning of SMP⁵⁹⁷ and also ensure a consistent approach among NRAs themselves and also NRAs as a whole and the Commission. This approach of issuing non-binding rules (i.e. soft-law) will undoubtedly help not only in ensuring better consistency of approaches (as will be seen below) but also in pre-empting potential conflicts between the Commission and NRAs.

In addition to this policy trend towards less *ex ante* regulation (which inherently reduces the future risks of conflict), specific co-operation procedures are provided for in the new regulatory regime. As between NRAs and NCAs, given that NRAs conduct their market analyses in accordance with the methodologies of competition law, the guidelines recognise that NRAs should liaise closely with NCAs. The idea is that NRAs should normally have access to all the

⁵⁹⁵ Directive 2002/19/EC on access to, and interconnection of electronic communications networks and associated facilities, *supra* note 223, Recital 13.

⁵⁹⁶ COM (2001) 175, 28/03/2001.

⁵⁹⁷ The changes brought about by the new proposals are analysed below.

information held by the NCAs, obtained using the investigatory and enforcement powers of the NCAs including confidential information as NRAs are also subject to Community and national rules on professional secrecy.⁵⁹⁸ As between the Commission and NRAs, it is provided that NRAs must supply the Commission with information necessary for it to carry out its tasks. This information supply, especially the one relating to the regulatory framework, will allow the Commission to control the compatibility of the NRAs action with EC legislation. As the Commission will be collecting information from the various NRAs, it is also the intention of the new legislation that it will act as the mechanism for exchange of information between NRAs provided that it is appropriate for it to do so.⁵⁹⁹ Perhaps the most important co-operation that needs to be ensured is between NRAs themselves. The guidelines emphasise that it is of the utmost importance that NRAs develop a common regulatory approach across Member States that will contribute to the development of a true single market for electronic communications. A specific forum for such co-operation has been provided for under the new regime.⁶⁰⁰ The corollary to this risk of overlap between authorities is the risk of overlap between the essential facilities doctrine and the new sector-specific access provisions. This is analysed in the sections below.

2.7.3 The interrelation between the new SMP test and dominance

As a reminder, under the current sector-specific regime the concept of SMP is different to the one of dominance within the meaning of Article 82 EC.⁶⁰¹ SMP describes a position of economic power on a particular market which is lower than that of dominance and these different standards are considered as a weakness of the present system because they result in discrepancies. In addition, although NRAs have in theory been able to exercise discretion regarding the 25 per cent. market share test, they have in fact adhered to the fixed threshold in a strict and inflexible manner.⁶⁰²

⁵⁹⁸ See article 3.5 of the Framework Directive, *supra* See also the Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraph 135.

⁵⁹⁹ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraph 141.

⁶⁰⁰ The European Regulators Group is expected to provide a forum for co-operation between NRAs but also between the Commission and NRAs; Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraphs 138 and 143.

⁶⁰¹ See above in this chapter the section comparing dominance with SMP.

⁶⁰² L.Garzaniti and A. von Bonin, *supra* note 516, p.54.

The key premise of the Commission's new interconnection Directive⁶⁰³ is that competition rules will be the prime vehicle for regulating the electronic communications market once the market becomes effectively competitive. A very significant change concerns the cornerstone of the current framework, the concept of SMP, and consists in modifying it and using it as the underlying concept for imposing *ex ante* obligations relating to access and interconnection. In particular, the market share threshold of 25 per cent. will no longer be part of the definition.⁶⁰⁴ Instead, the definition will be based on the general competition law concept of dominant position in particular markets, assessed in a manner consistent with EC competition law practice, as a trigger for the heavier *ex ante* obligations. Interestingly, the competition law test of dominance would be applied *ex ante* while traditionally the finding of dominance under Article 82 EC has been undertaken based on an analysis of behaviour in the past i.e. *ex post*. This will necessarily involve a projective analysis (as under the EC Merger Regulation) regarding future developments. This makes the task of the NRAs all the more important.

The new definition of SMP will also cover all aspects of dominance including joint dominance and leverage of market power into associated markets.⁶⁰⁵ The justification given by the Commission as to the new definition of the notion of SMP is that it is adapted to suit more complex and dynamic markets.⁶⁰⁶ In that sense the reform would help in measuring actual market power held by a telecommunications operator. Under the present sector-specific regime, the notion of SMP is itself the measure of market power (and carries obligations such as to provide access to a telecommunications infrastructure or network facility). The switch from the notion of SMP to the one of dominance under traditional competition rules should also alleviate the concern that SMP is based on a broadly predetermined market definition with all the drawbacks that entails in an industry that is characterised by such high technological change. Dominance analysed in the traditional way should help in measuring actual market power and should therefore prove more adapted to complex dynamic markets such as the converging electronic communications markets.

The introduction of the principle that only operators dominant either singly or jointly, be subject to the full weight of regulation should introduce automatic '*sun setting*' of the more heavy parts

⁶⁰³ Directive on access to, and interconnection of electronic communications networks and associated facilities, supra note 589, p. 2.

⁶⁰⁴ See above the section of the thesis on interconnection and more specifically the analysis of section 4 of the interconnection Directive.

⁶⁰⁵ For an explanation of joint dominance and leverage of market power into associated markets see the analysis in Chapter 1 of the concept of dominance.

⁶⁰⁶ New Framework Directive, supra note 223, recitals 5 and 25.

of regulation. This is because once dominance disappears regulatory checks will be replaced by the constraints on market behaviour set by competitors. The Commission hopes that this will result on regulation more focused on the actual market situation.⁶⁰⁷

NRAs will have an increased role under the new regime. In particular, NRA's will be able to designate undertakings on which they could impose *ex ante* obligations where:

- the undertaking has financed infrastructure partly or wholly on the basis of special or exclusive rights which have been abolished, and there are major legal, technical or economic barriers to market entry, in particular for construction of network infrastructure; and/or
- the undertaking concerned is an integrated entity and its competitors necessarily require access to some of its facilities to compete with it in on a downstream market; and
- where both national and EU competition law remedies do not suffice to ensure effective competition and choice in the market concerned.

In addition, NRAs will be able to apply the new rules not only to the telecommunications industry but rather to all '*electronic communications*'. This would solve the problem that NRAs face in that their mandate is limited to telecommunications when in fact, because of the convergence phenomenon⁶⁰⁸, the issues they need to address apply across more than one industry. The types of obligations that could be imposed on an undertaking will cover: non-discrimination and transparency, including cost orientation, access to, and use of, unbundled network elements and/or associated facilities.⁶⁰⁹

NRAs will draw up the list of organisations for the purposes of implementing the *ex ante* obligations and notify such a list to the Commission, together with the precise obligations imposed. Thereafter, determinations of the relevant markets and of the positions of market players on those markets, would be carried out by NRAs on a regular basis, in order to adapt regulatory obligations. The new Interconnection Directive (which will come into force in July 2003) gives an insight into the new approach taken by the EU with regard to regulation of

⁶⁰⁷ H.Ungerer, DG COMP conference paper on Legislation and regulation in the transatlantic framework - telecoms and media, executive forum on the telecommunications industry, Atlanta, 17 June 2002, p. 11; http://europa.eu.int/comm/competition/speeches/text/sp2002_026_en.pdf.

⁶⁰⁸ See below the preliminary issues section of this chapter below.

⁶⁰⁹ P.A.Buigues, O.Guersent and J.-F. Pons, Network Utilities -The EU Institutions and the Member States, http://europa.eu.int/comm/competition/speeches/text/sp2001_019_en.pdf, p.6.

undertakings with SMP. The obligations to be imposed on such undertakings, such as transparency, non-discrimination or accounting separation, should be maintained but, in addition, they should be established as a set of maximum obligations that can be applied to undertakings.⁶¹⁰ The intention here is to avoid over-regulation by imposing too much *ex ante* sector-specific regulation.⁶¹¹ This trend of reducing regulation can be also seen in the core provisions of the new Interconnection Directive which often uses terminology such as “*to the extent that it is necessary*” when providing for the powers of NRAs to impose obligations on telecommunications operators.⁶¹² When assessing to which operators the stricter obligations will be applied, NRAs should do this in close co-ordination with the relevant NCAs. In order to facilitate the correct application of the competition law principles, and to avoid having different market definitions in different Member States, the Commission has published guidelines on market analysis and the assessment of significant market power under the new proposed sector-specific regime.⁶¹³ The guidelines describe how the Commission envisages that the assessment of SMP should be done under the proposed future sector-specific regime and are aimed primarily at NRAs that will be called upon to determine which undertakings have SMP.⁶¹⁴

A distinction is made by the Commission in the guidelines on market analysis and the assessment of significant market power between an *ex ante* and *ex post* analysis of market power.⁶¹⁵ In an *ex post* scenario a competition authority may be faced with a number of different examples of market behaviour each indicative of market power within the meaning of Article 82 EC. However, in an *ex ante* environment, market power is essentially measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues. The constraining effect exercised by potential competitors on the market power of an undertaking is also considered as a criterion for assessing SMP.⁶¹⁶

⁶¹⁰ See generally the section of Chapter 1 entitled “Towards less *ex ante* regulation?”.

⁶¹¹ New Interconnection Directive, Recital 14, *supra* note 230.

⁶¹² See for example, Article 5.1 (a) and (b) of the new Interconnection Directive, *supra* note 230 as well as recital 27 of the new Framework Directive, *supra* note 223.

⁶¹³ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475.

⁶¹⁴ See section 1.1.1 of the Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, p.6.

⁶¹⁵ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraph 70.

⁶¹⁶ In a scenario where there would be no substitutable service or product to an undertaking product, the Commission is likely to conclude that a dominant position exists. This was the Commission’s finding in the Magill case analysed in the essential facilities section of Chapter 1, *supra* note 148.

Another criterion mentioned in the guidelines that could be used to measure market power is market shares. The Commission's and European Courts' traditional jurisprudence on the use of market shares to measure market power is of relevance here.⁶¹⁷ The actual criteria to be used to measure the market share of the undertaking(s) concerned will depend on the characteristics of the relevant market. It is left open to NRAs to decide for each specific case the criteria which are most appropriate for measuring market presence. The guidelines also list the other traditional ways under Article 82 EC to calculate market power as being relevant to calculate SMP under the future regulatory framework as well as point out the significance of barriers to entry. In addition, the guidelines describe leverage of market power, collective dominance as well as the jurisprudence of the CFI/ECJ and the Commission's decision-making practice on dominance.⁶¹⁸

Clearly, the guidelines when describing the criteria for assessing SMP, do not do much more than providing a summary of the existing law on dominance under Article 82 EC. This is within the overall policy aim of abandoning the present definition of SMP and using the traditional notion of dominance as a basis for the definition instead, so as to measure actual market power in an environment where technology changes rapidly. The principal aim of the guidelines is to educate NRAs and thereby help them get to grips with the new concept of SMP which they will need to apply from July 2003. The objective of this approach is to ensure that NRAs will apply consistently the provisions of the new regulatory framework. The consistent application of the new rules will have the greatest relevance in relation to the designation by NRAs of undertakings with SMP. This designation will trigger the heavier behavioural obligations under the sector-specific regime and hence will need to be done fairly and consistently throughout the EU so as to ensure a level playing field among telecommunications operators providing their services within the EU.⁶¹⁹ Perhaps the most important consequence of the new SMP test is that from July 2003, the basis of sector-specific regulatory intervention will be application of the general competition law principle of dominance, at least as far as market definitions and the determination of market power are concerned.⁶²⁰

⁶¹⁷ See Chapter 1 of the thesis and in particular the analysis of dominance in the EU.

⁶¹⁸ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraphs 78 to 106.

⁶¹⁹ *Ibid*, paragraph 11.

⁶²⁰ H.Ungerer, *Access Issues under EU Regulation and the Anti-Trust Law - The Case of Telecommunications and Internet Markets*, *Competition Policy in the Global Trading System; Perspectives from Japan, the United States and the European Union*, p. 19.

2.7.4 The interrelation between the new access provisions and the essential facilities doctrine

(a) The new definition of access

Article 2 of the new Interconnection Directive defines the term ‘access’ as meaning: “*The making available of facilities and/or services to another undertaking under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communication services. It covers inter alia access to network elements and associated facilities and services, which may involve the connection of equipment, by wire or wireless means; access to physical infrastructure, including buildings, ducts and masts; access to software systems including operational support systems; access to number translation or systems offering equivalent functionality; access to mobile networks, in particular for roaming; access to conditional access systems for digital television services*”. Under the new definition the scope of access is broadened so that an operator with SMP can be obliged to grant access not only to infrastructure and (unbundled) network facilities, as is the case under the current regulation, but also to key technology (such as operational support systems, software, interfaces and protocols) and services (through the imposition of a resale obligation).

(b) The criteria of access under the new regime compared to the essential facilities doctrine

The new interconnection Directive⁶²¹, due to come into force in July 2003 provides the power for NRAs to force access to facilities. This *ex ante* sector-specific legislation gives a very good indication of the regulators thinking on the conditions that must be fulfilled for access to be granted. These conditions for access are compared below with the essential facilities concept as it has been developed by the Commission and European Courts. Access can be forced by a NRA “*in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would not be in the end-user’s interest.*”⁶²²

The new interconnection Directive provides for certain factors that must be taken into consideration by NRAs when considering whether they will impose access obligations and

⁶²¹ This Directive was adopted by the Council and the Parliament under the co-decision procedure on 3 March 2002. *supra* note 230.

⁶²² New Interconnection Directive, Article 12, *supra* note 230.

whether these are proportionate to the policy objectives and regulatory principles set out in the Framework Directive.⁶²³ The following factors to be taken into account by NRAs are listed:

- *the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved*

This factor appears quite difficult to apply in practice. An assessment of the rate of market development as suggested above will not be very straightforward and will be open to different interpretations between the various Member States. On the positive side this factor is in line with the ECJ's *Oscar Bronner* judgment where the economic viability of installing competing facilities was the overriding criterion in the Court's mind for forcing access through the use of the essential facilities doctrine. Concretely, the undertaking requesting access must establish that the market could not sustain a competing system at all and not just that that it would not be economic to establish a competing system. In this regard, the above criterion should be understood in light of the ECJ's judgment in *Oscar Bronner*.

- *the feasibility of providing the access proposed, in relation to the capacity available*

This criterion opens the possibility for NRAs to refuse access on the basis of an objective justification of lack of capacity. This idea is also in line with the Commission and European Courts thinking as described above not only in relation to essential facilities but also more generally as a valid justification for an abuse of a dominant position.

- *the initial investment by the facility owner, bearing in mind the risks involved in making the investment*

NRAs, when deciding whether it is reasonable or not to grant access, can weigh in their decision the size and significance of the initial investment as well as the risks involved in making the investment by the facility owner. This idea is also in line with *Oscar Bronner* and the general idea that access should only be granted in a limited number of circumstances which involve 'genuine strangleholds'.⁶²⁴ This criterion will also address the concern voiced by the opponents to the essential facility doctrine that the application of the doctrine will hamper innovation by putting off investors from spending very large sums of money in a

⁶²³ See below as well as Chapter 3 of this thesis for an explanation of the Framework Directive.

⁶²⁴ See above in Chapter 1 the sub-section of the essential facilities section on the meaning of "true barrier to entry" after *Oscar Bronner*, supra note 156 and the Access Notice, supra note 1.

project (such as a telecommunications network) which will be later open to the use of new entrants.

- *the need to safeguard competition in the long term*

This is a general criterion which is related to the ones above. NRAs must consider that an inappropriate use of their powers under the new interconnection Directive will potentially harm competition in the long term by, for example, impeding innovation or new investment if they allow new entrants access to facilities too easily.

- *where appropriate, any relevant intellectual property rights*⁶²⁵
- *the provision of pan-European services*

This criterion is specific to the EU and is aimed at achieving a telecommunications internal market in line with the general aims of the EU. The Framework Directive sets out general principles describing how NRAs should contribute to the development of the internal market.⁶²⁶ The goal of provision of pan-European services should be understood in light of the general principles set out in the Framework Directive. A NRA could use this criterion to allow access to non-national new entrants into the network of the national incumbent on the consideration that such access would promote pan-European competition and ultimately benefit consumers. This would be in line with the principle of encouraging the establishment and development of trans-European networks and the interoperability of pan-European services advocated by the Framework Directive.⁶²⁷ However, NRAs should be cautious that there is no discrimination in the treatment of operators when applying these criteria.⁶²⁸

- (c) The new interrelation between the sector-specific access provisions and the essential facilities doctrine

Even though the new regime is shifting the emphasis of access regulation to more regulation by general competition rules there are still risks of overlap between the application of the essential

⁶²⁵ See above Chapter 1 and in particular the analysis of the Magill case, supra note 148, on how intellectual property rights can constitute 'essential facilities'.

⁶²⁶ Framework Directive, supra note 223, Article 8.3.

⁶²⁷ Ibid, Article 8.3 (b).

⁶²⁸ Ibid, Article 8.3 (c).

facilities doctrine and the work of the NRAs under sector-specific legislation such as the provision (analysed above) forcing access to infrastructure, facilities and even key technology and services. The risk, just as in the current regime, is that a given factual situation might have a different outcome depending on if it is treated under the essential facilities doctrine or the interconnection Directive. With regard to the interrelation between the new SMP test and the essential facilities doctrine the Commission states in the guidelines on market analysis and the assessment of market power that the doctrine of essential facilities is less relevant for the purposes of applying *ex ante* sector-specific regulation (such as the new interconnection Directive).⁶²⁹ The reasoning behind this statement is that under sector-specific legislation it is sufficient to show that a given facility affords its owner SMP in the market without being further necessary to establish whether the said facility is '*essential*'. This statement however, does not address the risk that there might be situations where a NRA might decide that on a given factual situation access should not be granted on the basis of sector-specific legislation whereas on the same facts a NCA or the Commission would grant access on the basis of *ex post* competition rules such as the essential facilities doctrine.

Therefore, the interrelation between the sector-specific access provisions and the essential facilities doctrine is similar to the current regime, i.e. there is a risk of overlap leading to inconsistent practice in forcing access to infrastructure or facilities. However, this risk and the legal uncertainty that would result from it will be minimised by the following elements. First, under the guidelines on market analysis and the assessment of significant market power, the starting point of the analysis, i.e. assessing whether or not there is a market situation justifying regulatory intervention, will be made (in the future) under the competition law test of dominance.⁶³⁰ The fact that the same concept of '*dominance*' will be used in the future both under competition rules and sector-specific rules to assess whether or not access should be granted is likely to ensure a more consistent application of access by the different regulators. In addition, the alignment of the SMP test with the concept of dominance will facilitate the task of the NRAs in that it will be easier for them to take guidance from the Commission's and European Court's jurisprudence on essential facilities cases as they will have been decided under the same '*dominance*' test. Second, the broader scope of the new definition of access will mean that there will be fewer cases where complainants will need to resort to an essential facilities-based complaint for lack of satisfactory redress under sector-specific regulation.

⁶²⁹ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475, paragraph 82.

⁶³⁰ *Ibid*, paragraph 70.

A final remark on this issue is that the ‘*safety*’ function of the essential facilities doctrine, i.e. the ability for complainants to use it where sector-specific regulation does not provide a satisfactory solution will remain. Such a situation might still arise under the future sector-specific regime either because it would be *ultra vires* for it to apply to certain situations (e.g. access to private infrastructure of hardware) or in general in case of unsatisfactory or deficient application of those rules.

2.7.5 Appraisal of the Commission’s new regulatory framework

There are a variety of reasons that explain the Commission’s policy move to reduce *ex ante* regulation in favour of more *ex post* regulation. The need to avoid an overly heavy regulatory environment and the Commission’s policy aim to create an environment where market forces regulate themselves are two of these reasons. However, the overriding reason given by the Commission for the move towards less *ex ante* regulation in the telecommunications sector is technological and market developments and in particular the phenomenon of convergence⁶³¹ of electronic communications services such as telecommunications, media and the internet.⁶³² The notion of convergence refers to the progressive disappearance of the boundaries between technologies, services and markets traditionally regarded as distinct.⁶³³ The speed with which different technologies, previously considered distinct, have converged made the Commission realise that an *ex ante* approach based on an industry-specific framework within which market forces can develop is no longer suitable. This is why the new regime covers all “*electronic communications*”. The Commission has also come to the realisation that the dual regime as we know it might have reached its limits in an environment which is now liberalised and where crucial issues such as unbundling of the local loop have not yet been satisfactorily answered.⁶³⁴ The ultimate aim of these reforms is to achieve a regulatory regime that is more focused and adapted to actual market conditions.⁶³⁵

⁶³¹ See the first part of this chapter for an explanation of what convergence is.

⁶³² See the Framework Directive, *supra* note 223, recital 5.

⁶³³ Ch.Humpe, Convergence in the European Communications Sector – An Analysis, *Journal of Network Industries*, 1, 2000, p.186.

⁶³⁴ See Chapter 1 of the thesis and in particular the section on unbundling the local loop; see also P.A. Buigues, DG COMP, Benefits for consumers from competition in the “New Economy”, the case of access to the internet and the local loop, *supra* note 580.

⁶³⁵ H.Ungerer, DG COMP conference paper on Legislation and regulation in the transatlantic framework - telecoms and media, executive forum on the telecommunications industry, *supra* note 607, p. 11.

Sector-specific regulation due to its intrinsic *ex ante* nature is more interventionist and is dependent on a forward looking assessment of the likely market developments. This forward-looking assessment is prone to error or miscalculation. In an environment, such as the telecommunications industry, characterised by high technological change, regulation by *ex post* general competition rules has the clear advantage of not having to predict future market environments but rather regulate once a certain issue arises. So, for example, competition regulators will be able to take into account the fact that convergence between internet and telecommunications has created a real substitute in the eyes of the consumers for traditional voice telephony in the form of internet telephony. This new market reality will be taken into account by the Commission in its market analysis and might help it reach the conclusion that a certain telephony operator should not be considered dominant for voice telephony in a particular geographic market because internet telephony services offer substitutable services thereby diluting the market share of traditional telecommunications operators. As there is a real substitute in the form of internet telephony, the product market is wider than pure traditional telephony thereby diluting the market share of the telephony operator (assuming that that operator has no or negligible operations in the area of internet telephony).

The Commission's proposals for a new regulatory framework are therefore to be welcomed. In particular, the shift of emphasis from sector-specific to established general competition rules in the interconnection regulation through a re-definition of the concept of SMP will help ironing-out some of the five weaknesses of the present dual regime identified above. The alignment of sector-specific regulation with general competition law concepts through the use of the concept of dominant position to calculate SMP will eliminate a major source of potential conflict between the application of the sector-specific regime and the application of the general competition law regime to issues of access to telecommunications infrastructure and network facilities. Also, there is some hope within the Commission that this more flexible approach, based on the analysis of actual market power could pave the way towards a potentially more generalised application of access obligations, and their application to higher levels of access (such as broadband services allowing high speed internet services but also key technology and services⁶³⁶), beyond the basic telecommunications infrastructure.⁶³⁷

Looking at each of the criticisms voiced above as to the weaknesses of the dual regime in its present form, the following remarks can be made as to the ability of the new rules to answer

⁶³⁶ See above the definition of 'access' under the new Interconnection Directive.

⁶³⁷ H.Ungerer, Access Issues under EU Regulation and the Anti-Trust Law - The Case of Telecommunications and Internet Markets, Competition Policy in the Global Trading System; Perspectives from Japan, the United States and the European Union, *supra* note 9, p. 27 and 28.

those criticisms (5 weaknesses of the present dual regime were identified above, the first three were identified by the Commission,⁶³⁸ whilst the other two are findings of this study). First, the criticism that sector-specific regulation represents a deep intervention in market mechanisms is addressed to the extent that under the new regime there will be a drastic reduction in the volume of sector-specific telecommunications regulation in favour of more *ex post* regulation, when those rules come into force in July 2003. Second, the dependence on definitions, which imply a high degree of technicality, and therefore a high probability of legal conflict is also partly addressed in that the concept of SMP is aligned with the concept of dominance under Article 82 EC, the application of which is well known by market operators and their legal counsel. The Commission's guidelines on market analysis and assessment of SMP⁶³⁹ are a further step which is aimed at ensuring the consistent application of the new regime by NRAs throughout the EU and hence promote market stability and minimise the risks of legal conflicts. The third criticism, that the heavy regulatory regime imposed by the ONP regulation, (especially as to the obligation to negotiate and accept interconnection in certain cases as well as the approval of interconnection rates) inevitably lead to a substantial intervention by the regulator in the day-to-day business practices and strategies of the bottleneck holder remains unchanged by the proposals.⁶⁴⁰ The criticism to the 'dual' regulatory regime that there is no clear certainty as to when the Commission will intervene when an NRA is also seized of a notification is also unanswered by the Commission's proposals.⁶⁴¹ Finally, the Commission tries to address the potential issue of inconsistent application among the NRAs (because of the inevitable variations in the national rules implementing EU Directives) through the use of guidelines (such as the guidelines on market analysis and the assessment of SMP⁶⁴² and the increasing use of soft-law measures, such as the Communication on unbundled access to the local loop⁶⁴³). These measures present the advantage of not needing a lengthy legislative process (unlike Regulations and Directives) before being adopted thereby ensuring quick results. Whether or

⁶³⁸ H.Ungerer, Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union, *supra* note 8, p.20.

⁶³⁹ Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475.

⁶⁴⁰ See Article 12 of the new Interconnection Directive.

⁶⁴¹ See also below the section of this chapter on the future interrelation between sector-specific and general competition rules in the EU and Japan.

⁶⁴² Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *supra* note 475.

⁶⁴³ Commission Communication, Unbundled Access to the Local Loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet, COM (2000) 237 final. See also Chapter 1 and in particular the section on abuses related to the local loop.

not this will be sufficient will depend to a large extent from the Commission itself as one of its tasks is to ensure the consistent application of access to telecommunications facilities throughout the Member States.⁶⁴⁴

3. Access to telecommunications markets - the interrelation between competition rules and sector-specific rules in Japan

3.1 The 'dual regime' in Japan

Despite the early liberalisation of the telecommunications industry in Japan⁶⁴⁵ the GPCT Guidelines⁶⁴⁶ take the view that:

- a competitive situation is hard to achieve because there are telecommunications carriers that are assumed to have market power, due to the fact that the dominant carriers control the local loop (which are essential bottleneck facilities) on which other telecommunications carriers need to rely, or due to the big market shares they hold on the relevant markets;
- reliance on other telecommunications carriers is inevitable in so-called '*network industries*' (i.e. industries characterised by infrastructure to which access is necessary in order to compete on the market), where interconnection with competitors greatly increases the benefit of users and where provision of services is very difficult without it; and
- the telecommunications industry is still characterised by the rapid technological change and the effects this has on the market structure.⁶⁴⁷

In the light of the above characteristics of the Japanese telecommunications industry and in order to promote fair competition in telecommunications markets, the JFTC and MPHPT decided that it is necessary to maintain a regulatory system that combines *ex ante* sector-specific rules (i.e. basically the TBL and NTT law⁶⁴⁸) together with *ex post* rules (i.e. the AMA⁶⁴⁹).

⁶⁴⁴ For example, Article 14 of the Framework Directive gives to the Commission the task of deciding which is the relevant market in consultation with NRAs. Through this task the Commission will be able to ensure the consistent application of market definition among NRAs.

⁶⁴⁵ Liberalisation formally started in Japan in 1985, much earlier than in the EU Member States on average. See Chapter 2 of the thesis and in particular the analysis of the development of market access in Japan.

⁶⁴⁶ JFTC and MPHPT, Guidelines for the promotion of Competition in the Telecommunications Business Field, *supra* note 12.

⁶⁴⁷ See Chapter 1 of the thesis and in particular the section analysing the notion of convergence.

⁶⁴⁸ See Chapter 2 of the thesis and in particular the section analysing the sector-specific regulatory framework in Japan.

This choice was clearly expressed in an OECD submission where it was stated that: “*In other words, in addition to removing the problem ex post, it is necessary to make explicitly clear rules, such as interconnection rules, and actively establish a competition environment, so that telecommunications carriers’ are able to predict the outcome ex ante*”.⁶⁵⁰

Therefore, a dual regime combining *ex ante* sector-specific rules and *ex post* general competition rules applies to the question of access to telecommunications markets. However, the concurrent application of these rules is at present, balanced differently than in the EU as the next sections will show.

3.1.1 General Competition rules

The term ‘*general competition rules*’ within the context of access to the Japanese telecommunications market should be understood as covering the prohibition of refusal to deal. The JFTC will assess whether or not a refusal to deal violates the AMA by looking at whether the refusal substantially restrains or tends to impede fair competition. At the same time the JFTC will also consider the influence of the refusal to deal on the fair competitive order. The actual AMA prohibition that will be used to prohibit the refusal to deal depends on the type of refusal to deal. For a single refusal to deal the JFTC usually relies on the prohibition of unfair trade practices although increasingly it will try to use the prohibition of private monopolisation as it carries heavier sanctions for the offenders.⁶⁵¹ However, there hasn’t been any decided case on refusal to deal in the telecommunications sector. Generally, the analysis of the competition rules applying to access to the telecommunications industry showed a lesser reliance on *ex post* general competition rules in Japan when compared to the EU.⁶⁵² Competition rules do apply normally to access problems in the telecommunications industry but in Japan it is *ex ante* regulation that has the primary role in regulating access issues in that industry.

3.1.2 Sector-specific rules

The TBL’s rules on interconnection as well as the NTT law form part of the core sector-specific regulation of access to telecommunications infrastructure and facilities in Japan. There are

⁶⁴⁹ See Chapter 2 of the thesis and in particular the section analysing the functioning of the AMA.

⁶⁵⁰ OECD, Competition and regulation issues in telecommunications, 1 February 2002, DAFFE/COMP(2002)6, p.217.

⁶⁵¹ See the section of Chapter 2 on single refusal to deal and the explanation which is given there on why the prohibition of private monopolisation is favoured by the JFTC over the prohibition of unfair trade practices to prohibit unfair refusals to deal.

⁶⁵² See Chapter 2 of the thesis.

clearly competition rules embodied within the sector-specific rules. For example, under Article 38 of the TBL, once a carrier has been categorised as a '*designate carrier*'⁶⁵³ it will have to establish articles of interconnection which set forth the interconnection tariff as well as the terms and conditions of interconnection. Those articles will have to be authorised by the Minister of the MPHPT upon their establishment and upon their amendment.⁶⁵⁴ Once authorised, the articles of interconnection are published. If a legal entity interconnects with designated telecommunications facilities in accordance with the authorised articles, the designated carrier has to submit a notification of an agreement for interconnection of designated telecommunications facilities with other telecommunications carriers.

This regime is similar to the interconnection regime of the EU where an obligation to deal is imposed on carriers with a certain market power. The remarks made above as to the EU also apply here, i.e. under traditional competition rules access would only be imposed if it was considered that refusing access was an illegal refusal to deal resulting in a private monopolisation, unfair trade practice or even unreasonable restraint of trade.⁶⁵⁵ Under the interconnection rules there is no need to show any of these anti-competitive conducts in order to force access, it is only necessary to show that a specific carrier fulfils the criteria to be categorised as a '*designate carrier*'. As in the EU, this means that the interconnection regime applies independently of any behavioural considerations so as to give new entrants easy access to markets considered difficult to enter otherwise.

3.2 Relationship between sector-specific rules and general competition rules in Japan

The question of the relationship between sector-specific and general competition rules has not, to our knowledge, been the object of any specific policy or other study in Japan. However, it is possible to study this relationship by a close analysis of the GPCT Guidelines published jointly by the JFTC and the MPHPT in November 2001.⁶⁵⁶ The GPCT Guidelines, adopted following a recommendation by the Competition Study Group (analysed below), represent a joint effort by the regulator in charge of sector-specific telecommunications rules, the MPHPT, and the regulator in charge of general competition rules, the JFTC, to work together in producing the

⁶⁵³ See Chapter 2 of the thesis and in particular the section on interconnection.

⁶⁵⁴ Article 38.2 (2) of the TBL.

⁶⁵⁵ See Chapter 2 of the thesis and in particular the analysis of the various prohibitions of the AMA that can apply to refusal to deal.

⁶⁵⁶ JFTC and MPHPT, Guidelines for the promotion of Competition in the Telecommunications Business Field, *supra* note 12. For more details on these guidelines see Chapter 2 of this thesis.

most effective regulation of access to telecommunications markets rather than have two separate and perhaps diverging sets of rules. It is because these Guidelines represent a joint effort to optimise the application of sector-specific and general competition rules to the wider question of access to telecommunications markets that they are the best example of the interrelation between these rules.

3.2.1 The regulatory challenge presented by the dual regime

Since Japanese regulators have decided to maintain in place a dual regulatory regime combining *ex ante* sector-specific regulation with *ex post* general competition rules the obvious challenge that arises for them, as for their European counterparts, is to devise a successful working scheme under which the two sets of rules can exist side by side whilst limiting as much as possible the regulatory burden on businesses. The only clear policy statement made with regard to this question is by the JFTC which has stated that *ex ante* sector-specific regulation should be kept to a minimum and that there should be greater reliance on *ex post* competition regulation because it is more adapted to deal with industries characterised by high technological change such as the telecommunications industry.⁶⁵⁷

A good indication of how the two sets of rules are meant to interrelate in the future can be found by analysing the structure of the GPCT Guidelines in terms of how they go about analysing the dual regulatory regime. The backbone of the guidelines is a list of practices that can constitute problems under the AMA or the TBL. Each section deals with a specific practice, for example interconnection, and starts off by giving an interpretation of the AMA (i.e. of the offences that could be applied to each specific situation), then an overview of the regulatory system (for example the functioning of the interconnection sector-specific regulations) and then an analysis of each practice from the point of view of "*Practices constituting problems under the AMA*" and then separately of "*Practices constituting problems under the TBL*".

As a rule, most practices found to be problematic under the AMA rules are also considered problematic under the (sector-specific) TBL rules. So, for example, the section on interconnection and sharing of telecommunications facilities starts off with an introductory part explaining the interpretation of the AMA in relation to these practices and an overview of the system for interconnection in the TBL. These introductory paragraphs are then followed by an analysis of practices that constitute problems under the AMA and separately of practices constituting problems under the TBL. One of the specific practices that would infringe the rules

⁶⁵⁷ JFTC, Competition policy in the telecommunications sector, supra note 414. This idea is further developed in the general conclusions of the thesis below.

of the AMA is for a telecommunications carrier, without legitimate reasons, to reject interconnection or give unfavourable terms to competitors compared with those to its own departments or affiliates, by offering discriminatory fees for interconnection and other discriminatory practices. All of these practices are found to fall under the category of private monopolisation and unfair trade practices (discriminatory treatment), both of which are prohibited under the AMA.⁶⁵⁸ The analysis of the same practices under the TBL is that should these impair significantly the public interest, the MPHPT will issue an order to improve business activities under Article 36, paragraph 4 of the TBL.

Therefore, illegal practices in relation to interconnection can be caught both under the general competition rules (under the prohibition of private monopolisation or unfair trade practices and even, in some cases, under the prohibition of unreasonable restraint of trade) or under the sector-specific rules (under the prohibition of impairing the public interest). This situation of practices being caught by both sets of rules is not generalised throughout the GPCT guidelines. In the case of so-called '*asymmetric regulations*' imposed on dominant carriers under the TBL⁶⁵⁹ it is only sector-specific rules that apply. These '*asymmetric regulations*', which are of an *ex ante* nature, were specifically adopted in order to promote fair competition and have therefore no equivalent in the traditional *ex post* rules.⁶⁶⁰

3.3 The question of competence between the JFTC and the MPHPT

The JFTC has exclusive competence to enforce the AMA but it will not implement economic and technical regulations. In this regard there is a clear division of functions between the JFTC and regulatory agencies such as the MPHPT.⁶⁶¹ However, the MPHPT can determine and enforce any policy, including competition policy, relating to the telecommunications sector pursuant to the telecommunications legislation. The JFTC can decide and enforce any competition policy generally, including any policy applicable to the telecommunications sector pursuant to the AMA. Therefore, the JFTC and the MPHPT formally share jurisdiction on competition issues raised in the telecommunications industry. For example, concerning mergers, the MPHPT has statutory

⁶⁵⁸ See the section of Chapter 2 analysing private monopolisation and also the section on refusal to deal and in particular the sub-section dealing with the willingness of the JFTC to use the private monopolisation prohibition wherever possible in cases of unjust refusal to deal.

⁶⁵⁹ See Chapter 2 and in particular in Section B (sector-specific rules) the analysis of the rules imposed on carriers considered dominant under the TBL.

⁶⁶⁰ JFTC and MPHPT, Guidelines for the promotion of Competition in the Telecommunications Business Field, *supra* note 12, p.44 to 47.

⁶⁶¹ JFTC, The relationship between regulatory and competition authorities, Contribution paper of JFTC, Mini-Roundtable, OECD/Committee on competition law and policy, 11-12 June 1998, Paris France.

power to deny authorisation to acquisitions of major telecommunications businesses (i.e. those that fall within the Type I category)⁶⁶² and the JFTC has to decide from its own viewpoint whether the merger or transfer of business will create any monopoly or other anti-competitive effects. The MPHPT thus has substantial influence concerning competition issues in the telecommunications sector, although the JFTC retains enforcement authority. Thus, there is a possibility of an overlapping exercise of jurisdiction by the MPHPT and the JFTC. In practice however, the MPHPT and the JFTC normally consult with each other in order to define and enforce competition policy applicable to the telecommunications sector, and thus it is unlikely that they will publicly take different positions on a specific matter.⁶⁶³

Moreover, it has been argued that even though the JFTC has the tools to deal with competition issues in deregulating monopolies it has not done so.⁶⁶⁴ Rather, it is the sector-specific regulators who usually deal with anti-competitive behaviour such as refusal of access in the telecommunications sector. The fact that all the legislation on access to telecommunications infrastructure and network facilities is sector-specific (rather than a mix of competition legislation and sector-specific legislation, as is the case in the EU), reinforces the MPHPT's role as the main regulator of access issues in the telecommunications industry.

3.4 Possible explanations for the reduced role of general competition rules on access to the telecommunications sector when compared to the EU situation

In a recent speech, Shogo Itoda, Commissioner of the JFTC explained the role of the JFTC in the deregulation process and outlined its future policies.⁶⁶⁵ The Commissioner started by quoting an article on the JFTC stating that: *"The law itself has teeth in plenty; the problem is that its designated watchdog has been trained not to bite"*.⁶⁶⁶ This statement is indicative of a widely held perception that the strict enforcement of competition rules in Japan has not historically been a priority in the regulation of access to telecommunications markets.

⁶⁶² See below Chapter 2 and in particular the section on the development of market entry in Japanese telecommunications in Section B of that chapter where the Japanese telecommunications sector-specific regime is explained.

⁶⁶³ M.Kamiya, *supra* note 348, p. 93.

⁶⁶⁴ M.Wise, Review of competition law and policy in Japan, OECD Journal of Competition Law and Policy, p.97.

⁶⁶⁵ Speech given at the Royal Institute of International Affairs by Commissioner Shogo Itoda, 22 February 2000, p.7.

⁶⁶⁶ The Economist, September 16, 1989.

Although telecommunications liberalisation dates back to 1985 there is a scarcity of JFTC decisions on anti-competitive practices regarding access to the telecommunications market as well as a general lack of policy papers or guidelines in this area (until the recent GPCT Guidelines). There are two main reasons for this. First, the special 'public interest' function of telecommunications and secondly the history of the introduction of competition rules in Japan as well as by the quasi-ministerial status of the JFTC.

3.4.1 The pursuance of national goals

The idea has been put forward that one of the possible reasons why enforcement of competition rules has been casual on firms which obvious market power in Japan - such as NTT - is the acceptance in government and in the public opinion that the pursuit of other desirable national goals such as international competitiveness is an acceptable trade-off for a reduction of competition in domestic competition.⁶⁶⁷

3.4.2 The history of the introduction of competition rules in Japan

(a) The enactment of the AMA and the weakening of the antimonopoly rules

In 1947 the AMA had largely been imposed, rather than voluntarily adopted, upon the Japanese government and business circles. The initial reaction to the AMA was that the prohibitions imposed were unrealistic and too severe. The way of doing business in Japan was suddenly submitted to a new, extraneous parameter with no clear rationale. The above factors grouped together justify the initial negative reaction to the AMA. The years that followed the progressive recovery of governmental independence showed a voluntary fading down of the antitrust rules.

Business circles were the main economic power that lobbied for the relaxation of the antimonopoly rules. The opposition of the business circles to the AMA was based on two grounds:

- first, as a reaction to the state of devastation of the Japanese economy at the outset of the war; and

⁶⁶⁷ D.Melamed, International antitrust in an age of international deregulation, speech before G.Mason Law Review Symposium, Washington D.C., 10 December 1997, <http://www.usdoj.gov/atr/public/speeches>.

- secondly, and more importantly, because of the drastic measures taken in order to weaken the large businesses during the occupation.⁶⁶⁸

The AMA was weakened by a series of amendments of which the 1953 amendment was the most potent one. Commenting on the initial reaction to the law a publication said: “*But industrial circles strongly opposed the law and cartels were allowed to resurface under a revision of the law in 1953. Numerous exceptions to the law followed*”.⁶⁶⁹

In a similar fashion to the pre-Second World War situation the laws had provisions allowing the formation of cartels and allowed the issuance of ministerial orders to non-members of the cartel agreement to make them observe the restrictions of the cartel agreement.⁶⁷⁰ In addition to amendments, the importance of the antimonopoly rules was further reduced by the enactment of 10 laws allowing for exemption from the AMA of various industrial sectors⁶⁷¹ of the economy.⁶⁷² The Ministry of trade and Industry (‘MITI’)⁶⁷³ organised and supervised the application of the exemption laws. The rationalisation and depression cartels, first introduced by the 1953 amendment to the AMA, were used but under conditions which, compared with the ones that applied to the AMA, had been watered down. The MITI’s practice was halted in 1956.⁶⁷⁴

(b) Internationalisation and the new role of the antimonopoly rules

The 1980’s inaugurated a new role for the antimonopoly rules of Japan. More than 35 years after they imposed the AMA to Japan, the government of the United States came back with increased demands for stricter competition rules and enforcement in Japan. The motivation of these demands was the American belief that the trade frictions that existed with Japan, namely the trade imbalance between the two countries, could be solved through a stricter enforcement of antimonopoly measures.

⁶⁶⁸ M.Matsushita, supra note 248, p.79.

⁶⁶⁹ The Nikkei Weekly, July 7, 1997, p.2.

⁶⁷⁰ Specific Small and Medium Enterprise Stabilisation Temporary Measures Act, (Act No. 294 of 1952).

⁶⁷¹ See for example; Electronics Industry Promotion Temporary Measures Act (Act No. 171 of 1957).

⁶⁷² Machinery Industry Promotion Temporary Measures Act (Act No. 156 of 1956).

⁶⁷³ Now called Ministry of Economy Trade and Industry (‘METI’).

⁶⁷⁴ H.Iyori and A.Uesugi, The Antimonopoly Laws and Policies of Japan, supra note 11, p.38.

In 1985 the Market-Oriented Sector Selective talks put the telecommunications, electronics, forest products, medical equipment and pharmaceutical markets under close scrutiny in order to eliminate all barriers to imports. The 1989 Structural Impediments Initiative ('SII') is a bilateral trade agreement between Japan and the United States whereby both parties agree to reduce trade barriers. As a result of the SII Talks, the Japanese government committed itself to adopt and implement measures that will ensure a stricter enforcement of the competition rules in Japan including publishing guidelines (the DSPB Guidelines⁶⁷⁵) concerning distribution and trade practices.⁶⁷⁶

(c) The impact of the Structural Impediment Initiative Talks

Hiroshi Iyori, who at that time was a Commissioner of the JFTC, said: "*We judged the operation should be beefed up, since the interpretation of the law was ambiguous despite the fact that the law was the same as that of the US*".⁶⁷⁷ Under American pressure the government recognised the importance of those measures and adopted them. More significantly the business community reassured by the economic success of Japan accepted the idea of the necessity of competition policy. Compliance with the rules was accepted as a *de facto* reality. The measures taken in application of the SII talks gave a new impetus to the JFTC which has significantly improved its enforcement record. Surcharge orders became more frequent and more costly for the penalised companies, recommendations multiplied, warning cases were released in the press and the JFTC started using its criminal accusation powers.⁶⁷⁸ In addition, in April 1999 the US and Japanese governments agreed a co-operation agreement between the DoJ and the JFTC on exchange of information on antitrust enforcement and merger activities between the two countries⁶⁷⁹, which should help in ensuring further stiffening the content and enforcement of Japanese competition rules.⁶⁸⁰ A similar agreement is being negotiated between the EU and Japan.

⁶⁷⁵ See Chapter 2 of the thesis and in particular the section analysing the DSPB Guidelines, *supra* note 288.

⁶⁷⁶ For details see, Final Report on Japan-US Structural Impediments Initiative Talks, (1990) as well as the First Follow-up Report (1991) and the Second follow-up Report (1992) of the SII.

⁶⁷⁷ The Nikkei Weekly, July 7, 1997, p.2.

⁶⁷⁸ A.Yamada, Competition Law and Policy in Japan, Address delivered at the Global Economic Development and Competition Policy Conference, 17 March 1997, New Delhi, India, p.4.

⁶⁷⁹ Agreement between the government of the United States of America and the government of Japan concerning co-operation on anti-competitive activities, October 1999, <http://www.usdoj.gov/atr/public/international/docs/3740.htm>.

⁶⁸⁰ I.Walden and J.Angel, *supra* note 6, p.465.

3.4.3 Conclusion as to the reasons behind the lack of strong ex post competition rules applying to access to telecommunications industries in Japan

The analysis made above shows that competition rules were not immediately accepted in Japan and that many years passed before their usefulness and authority was recognised. As a result of this situation the JFTC had to struggle to establish its authority and often had to dispute its remit over a certain case with Ministries such as the MITI (now called METI) or the Ministry of Posts and Telecommunications (now called MPHPT).

The fact that the JFTC is now (following the re-organisation of the government Ministries in 2000) attached to the MPHPT rather than the Cabinet Office has not helped it in its quest for more independence and power. Many academics⁶⁸¹ but also foreign regulators⁶⁸² have expressed concern over the present state of affairs and have said that the new relationship raises questions about the autonomy of the JFTC.

In the present days the JFTC is recognised as the competition watchdog of Japan and competition rules are well known by the Japanese business community. However, the background to the development of competition rules including the pursuance of national goals such as the creation of national champions combined to the structural attachment of the JFTC to the MPHPT might be the reason why, when compared to the EU's DG COMP, the JFTC has appeared less active in deciding telecommunications cases and in producing policy proposals on access to the telecommunications sector even though liberalisation occurred in 1985 as compared to 1998 in the EU as a whole.⁶⁸³ The specific example recently cited in the press of the JFTC having to delay the publication of the GPCT Guidelines⁶⁸⁴ because it was waiting for the MPHPT's view on them, is an excellent illustration of the difficult position of the JFTC vis-à-vis the MPHPT.⁶⁸⁵ This might also explain why Japan relies much more than the EU on sector-specific *ex ante* rules (promulgated by the MPHPT) including structural measures (also decided

⁶⁸¹ Nikkei Weekly, Opposition derails efforts to give JFTC more muscle, 28 January 2002.

⁶⁸² W. Kolasky, U.S. DoJ, The role of competition in promoting dynamic markets and economic growth, 12 November 2002, Tokyo, <http://www.usdoj.gov/atr/public/speeches/200484.htm>.

⁶⁸³ See also a report published by the Committee Considering Competition Policy for the 21st Century, Recommendation concerning competition policy appropriate for the 21st Century, November 2001, JFTC website. In that report it is suggested that the JFTC should issue policy recommendations more aggressively in order to continuously monitor the efficiency of regulatory reform and measure the thoroughness of such reform. It was recommended by the Committee that legislative changes should be introduced that make it clear that it is the JFTC's role to conduct surveys and make recommendations with regard to regulatory reform.

⁶⁸⁴ JFTC and MPHPT, *supra* note 12, p. 8; see also below for more details on the GPCT Guidelines.

⁶⁸⁵ Nikkei Weekly, Opposition derails efforts to give JFTC more muscle, 28 January 2002.

by the MPHPT but with the co-operation of the JFTC) to regulate access to the telecommunications sector.

However, the JFTC's new proposals on deregulation and competition policy⁶⁸⁶ indicate that at the level of the JFTC at least, there is a willingness to see the balance of *ex ante* to *ex post* rules change in favour of more regulation by *ex post* general competition rules.⁶⁸⁷ In addition, within *ex post* competition rules the JFTC has recently indicated that it intends to apply the private monopolisation prohibition (which carries tougher sanctions than the unfair trade practices prohibition which is also used in refusal to deal cases) as the preferred prohibition in cases of refusal to deal. In the last four years alone the JFTC reported four cases of private monopolisation aimed at excluding competitors.⁶⁸⁸ In December 2000, the JFTC issued a warning (based upon a potential violation of the private monopolisation prohibition) to NTT East (the NTT operator for the East region of Japan which came into existence following the break-up of NTT into three units) against blocking entry into a high-speed telecommunications service (ADSL).⁶⁸⁹ Finally, the JFTC in conjunction with the MPHPT was reported to have been pressing NTT to discontinue the practice of letting one unit offer discount phone services by using the networks of its two regional carriers under preferential terms on the grounds that this practice would constitute private monopolisation.⁶⁹⁰ These are clear examples of the JFTC's tougher stance against illegal refusals to deal.

Aside from the increasing use by the JFTC of the tougher private monopolisation prohibition wherever possible, it has also shown a renewed willingness to assert itself and stand up against other Ministries if necessary. The recent proposed merger between Japan Airlines Co. ('JAL') and Japan Air Systems Co. ('JAS'), which was reviewed and cleared by the JFTC under merger control rules, is a good example of this renewed willingness. The JFTC asked the parties to divest nine slots (i.e. turnaround flights) at Tokyo's Haneda airport in order to alleviate concerns of creation of a dominant position that the new entity would have at the main domestic airport in Japan. The JFTC's review and ensuing recommendation went against the Land, Infrastructure

⁶⁸⁶ See below the section of this chapter on the new proposal on deregulation and competition policy as well as the Conclusion below.

⁶⁸⁷ JFTC, Deregulation and Competition Policy in Public utilities Sector - Report of Study group on Government Regulations and Competition Policy, January 10, 2001, p.1.

⁶⁸⁸ See above the section on private monopolisation aimed at excluding business activities of other entrepreneurs.

⁶⁸⁹ JFTC, Promotion of regulatory reform and the JFTC's position on competition policy at the time of the three years program for the promotion of regulatory reform, 30 March 2001.

⁶⁹⁰ The Nikkei Weekly, February 18, 2002, p.8.

and Transport Ministry's view which had given its approval to the initial integration plan. It was reported in the press that the JFTC used this case to make its presence felt in admittedly the largest integration in Japan since 1970.⁶⁹¹ This recent activity has to be coupled with a policy paper published by the JFTC in 2001 proposing the acceleration of competition in Japan through the active creation of conditions for competition, law enforcement corresponding to structural reform and the creation of an orderly environment for competition.⁶⁹² Finally, closer international co-operation with other competition authorities (as agreed between the DoJ and the JFTC and as is being negotiated between the JFTC and the European Commission) as well as international harmonisation within the WTO forum⁶⁹³ should ensure a strong enforcement of competition rules in Japan.

3.5 The role of structural measures in regulating access to the Japanese telecommunications industry

Unlike in the EU, in Japan structural measures have played a significant role in allowing access to the telecommunications facilities of the incumbents. Structural measures are a type of '*preparatory*' sector-specific measure decided by the relevant Ministry such as the MPHPT for the telecommunications industry in co-ordination with the JFTC. This is because they are a form of government intervention taken in order to force competition into the markets by placing restrictions on firms (e.g. the structural separation of an incumbent into various operational entities) that are intended to prevent anticipated adverse effects such as abuse of market power. The 1999 restructuring of NTT into three separate entities is a very good example of a structural measure in the Japanese telecommunications industry. This restructuring necessitated amendments to the NTT law which were drafted by the MPHPT in co-ordination with the JFTC before becoming law in 1999.⁶⁹⁴ This measure can be considered as a first step towards allowing more competition in the Japanese telecommunications sector.

⁶⁹¹ Nikkei Weekly, 29 April 2002, JAL/JAS integration plan approved.

⁶⁹² See Chapter 3 of the thesis and in particular the section analysing the reasons of the past weakness of the JFTC and the likely future developments. JFTC, The Japan Fair Trade Commission will accelerate competition in Japan, Grand-design for competition policy in the 21st century, 29 August 2001.

⁶⁹³ For example see the WTO Agreement on Basic Telecommunications Services, Fourth protocol of the General Agreement on Trade and Services. This agreement took effect on February 5, 1998, although several countries are allowed to delay implementing the terms of the agreement until 2000 or later. By becoming party to the agreement, countries commit to a set of regulatory principles. In addition, countries make specific commitments to open up their telecommunications services markets. Market opening measures include access to the public telecommunications transport networks of incumbent suppliers under non-discriminatory terms and at cost-oriented rates. These non-discriminatory terms include a competitive provider's technical ability to interconnect to the public network using standardised, open interfaces.

⁶⁹⁴ See Chapter 2 of the thesis and in particular the part on the 1997 reform.

However, the effectiveness of the 1999 NTT restructuring has been put into question. One of the criticisms to the present situation is that although the NTT companies are separate entities, they are all under the same group company so that they do not really compete with each other. An example of this is the fact that the long distance and international carrier - NTT Communications Co. - paid in 2000 a full one third of all interconnection fees received by the two regional NTT carriers.⁶⁹⁵ This means that instead of competing with each other by trying to create new infrastructure, the NTT companies are operating together as the old NTT but under different corporate entities.⁶⁹⁶ Also, the fact that NTT Holding Co. holds a significant equity stake in the dominant mobile carrier, NTT DoCoMo, is a point of concern, as competition between fixed and mobile telecommunications is not thought to have really taken off.

Therefore, more structural measures could be expected in the coming years. The MPHPT could decide to order the complete separation of the NTT regional companies from their common holding company and allow each to compete in the others territory. There are indications that the Japanese government is considering very seriously this possibility which could prove more effective in bringing competition to the market than the restructuring implemented in 1999.

3.6 The new proposals on deregulation and competition policy

New proposals have been put forward which may affect the interrelation between general competition rules and sector-specific rules in the future. The JFTC held meetings with the Study Group on Government Regulations and Competition Policy (the 'Competition Study Group') in January 2001 followed up by further meetings in September 2002. The results of the first meeting were summarised in a report⁶⁹⁷ which proposes measures aimed at promoting market entry and ensuring fair competition between new entrants and incumbent firms in, among others, the telecommunications sector. This report was followed in November 2002 by a second report by the Competition Study Group on the same subject which focused purely on telecommunications.⁶⁹⁸ These reports give the best indication as to the latest thinking in Japan

⁶⁹⁵ The Nikkei Weekly, NTT Units join price-cutting fray, 4 September 2000.

⁶⁹⁶ However, this situation could change as to high-speed internet services where NTT Communications Co., will compete with the two NTT regional carriers. It was reported that NTT Communications Co plans to begin offering digital internet subscriber line (DSL) internet access and challenge the two regional NTT carriers on the high speed internet market, The Nikkei Weekly, NTT Units join price-cutting fray, 4 September 2000.

⁶⁹⁷ JFTC, Deregulation and Competition Policy in Public utilities Sector - Report of Study group on Government Regulations and Competition Policy, supra note 687, p.1.

⁶⁹⁸ JFTC, Regulatory reform and competition policy in the telecommunications business field - Report of Study group on Government Regulations and Competition Policy, 15 November 2002, <http://www.jftc.go.jp/e-page/press/2002/november/telec1115.html>.

on the interrelation between general competition rules and sector-specific rules with regard to access to telecommunications infrastructure and network facilities. However, it should be specified that this is the position of the JFTC on this question and not the one of the MPHPT. The MPHPT has not made any recent statements as to this issue. In addition, it should be noted here that these reports apply equally to other ‘*network industries*’⁶⁹⁹ that face similar access problems to the telecommunications industry and are all undergoing deregulation (i.e. electricity, gas and transport).

3.6.1 The problems identified

The main problem identified by the Competition Study Group is the dominant market position enjoyed by the incumbents as characterised by their exclusive holding of infrastructure and network facilities that are crucial for market entry. Deregulation does not make it easier for new players to enter the market and the Competition Study Group went as far as to note that: “*there are remarkable gaps in the competitive conditions between incumbents and newcomers*”.⁷⁰⁰ In addition, similar concerns were expressed by the JFTC in an OECD submission where it stated that: “*In the telecommunications sector, major service providers that have been present in the market for many years and were previously allowed to monopolise the market still exist as dominant forces. If these companies refuse or restrain new service providers’ connections with their networks - which is a prerequisite for market entry - without proper reasons, it constitutes a violation of the AMA. And we believe that there is a high possibility that the dominant providers will engage in such practices. Therefore, it is important to take action in accordance with the AMA to prevent such practices in order to promote free and fair competition in the telecommunications sector.*”⁷⁰¹

On the basis of the above concerns, the Competition Study Group proposed a package of measures suited to each of the liberalised industries.

3.6.2 Basic position for solving the problems

⁶⁹⁹ Network industries are industries where access to infrastructure is necessary in order to compete on the market. Because of the very high costs involved in putting such networks together and the fact that they cannot be shifted to another use easily they involve very high ‘*sunk costs*’ i.e. investments that have no use save for a single purpose.

⁷⁰⁰ JFTC, Deregulation and Competition Policy in Public utilities Sector - Report of Study group on Government Regulations and Competition Policy, supra note 687, p.1.

⁷⁰¹ OECD, Competition and regulation in regulation in telecommunications, supra note 650, p.219.

In order to promote effective competition, the Competition Study Group proposes a set of initial measures. Should these not prove effective, the Competition Study Group recommends taking alternative measures that consist in reviewing the structure of the dominant incumbent operators and considering the use of measures such as the structural separation of these operators. The proposed measures are reviewed below.

Initial measures

- establish a framework to ensure market entry, including making networks held by incumbents open to newcomers

Networks held by incumbent operators should be opened to newcomers under the principles of non-discrimination, fairness and transparency, and infrastructure-based competition should be encouraged. The opening of local residential telephony (i.e. unbundling the local loop or the last mile) is essential for operating businesses. The Competition Study Group found that in most cases newcomers find it extremely difficult to build such networks on their own. Rules must be enacted to allow access to such networks as well as for dispute settlement. Infrastructure-based competition can be promoted by the creation of alternative networks. To this end, it is necessary to review regulations that hamper the construction of alternative networks and to establish rules to facilitate open access to existing utility poles, pipes and other facilities. Rare resources, such as frequencies for mobile telecommunications should not become vested rights. In conjunction with measures necessary to prevent that from happening, the allocation of such frequencies should be transparent and done under a system, like competitive bidding, where the result can reflect operators' efficiency as much as possible. In this regard, the MPHPT published in April 2002 a Manual for the Construction of Networks by Telecommunications Carriers that provides an explanation about the systems and examples on construction of networks, and is considering measures to enhance flexibility in constructing networks in response to requests for such a manual by telecommunications carriers.⁷⁰² The Competition Study Group's November 2002 report repeated the need to promote infrastructure-based competition and in that regard added that any anti-competitive conduct that would prevent a new entrant, such as an electricity company, to enter the telecommunications market should be sanctioned quickly and severely by the JFTC. The November 2002 report recommends the publication of guidelines in this area so as to ensure greater predictability and security of operations for new entrants.⁷⁰³

⁷⁰² MPHPT, Manual for the Construction of Networks by Telecommunications Carriers, April 2002.

⁷⁰³ JFTC, Regulatory reform and competition policy in the telecommunications business field - Report of Study group on Government Regulations and Competition Policy, *supra* note 698.

- ensure fair competitive conditions between incumbents and newcomers

Ensuring fair cost for network access can be helped by separating the accounting of the department running the networks from the accounting of other business operations. In addition, a third party should check the accounting as well as monitor the management in a transparent way and take corrective measures when needed.

- enforce the AMA strictly against anti-competitive activities

The Competition Study Group recommends moving from the system of '*prior restrictions*' (i.e. *ex ante* sector-specific regulation) by sectoral laws to '*ex post facto checking*' by the AMA. The example given in the report is the one of a telecommunications carrier refusing or restricting the interconnection to its networks without a reasonable ground. Such a practice should be strictly eliminated through the use of the AMA. The move towards more regulation by *ex post* rules is also clearly recommended by the November 2002 report. That report makes the point that especially in a sector like telecommunications which is characterised by significant and rapid changes in technology, regulation by sector-specific rules should be reduced to the minimum necessary. In addition, the Competition Study group recommended that industry-by-industry guidelines covering the conducts that might violate the AMA should be adopted in order to prevent illegal practices and further promote fair and free competition.

As to the role of the JFTC in this area, the Competition Study Group's November 2002 report takes an aggressive approach on this question. The report says that the JFTC's present response to the issues arising in this sector is not sufficient. Faster and better investigations (including by improving the technical ability of investigators) as well as more efficient decision-making is recommended. Further, the AMA's rules should be made clearer in this area (see Chapter 2, Section A of the thesis where it is said that there is a general lack of specific competition rules in this area) and a quick response should be provided to enquiries made by operators so as to ensure that an end is put to the anti-competitive conduct as soon as possible.⁷⁰⁴

Alternative solution

Should the above measures not succeed in bringing about a more competitive environment, the Competition Study Group proposes the review of the structure of dominant incumbent operators

⁷⁰⁴ JFTC, Regulatory reform and competition policy in the telecommunications business field - Report of Study group on Government Regulations and Competition Policy, 15 November 2002, *supra* note 698.

as an alternative solution. The review of the dominant operators' structure should include a review of the nature of its vertical integration and relations with affiliates while giving due consideration to the efficiency of the integration and the shareholders' interests. In this regard, structural separation is a way to ensure the neutrality of the network operation. The separation of NTT into three divisions (NNT East, NTT West and NTT DoCoMo), which is a result of the 1997 reform, is not a full structural separation as such because all three entities are ultimately functioning under the same parent company, NTT Group. It is therefore possible to envisage that in the future regulators might envisage a full-blown structural separation of the three NTT operational entities by ordering their divestment out of the NTT group.

3.6.3 Organisation of the incumbent dominant operator

Should the above measures not succeed in bringing about a more competitive environment, the Competition Study Group proposes the review of the structure of dominant incumbent operators as an alternative solution. The review of the dominant operators' structure should include a review of the nature of its vertical integration and relations with affiliates while giving due consideration to the efficiency of the integration and the shareholders' interests. In this regard, structural separation is a way to ensure the neutrality of the network operation. The separation of NTT into three divisions (NNT East, NTT West and NTT DoCoMo), which is a result of the 1997 reform, is not a full structural separation as such because all three entities are ultimately functioning under the same parent company, NTT Group. It is therefore possible to envisage that in the future regulators might envisage a full-blown structural separation of the three NTT operational entities by ordering their divestment out of the NTT group.

3.6.4 The Competition Study Group's views on the role of the JFTC in regulatory reforms in the public utilities sector

In the context of the study of access to telecommunications markets from the point of view of the interrelation between competition rules and sector-specific rules, the crucial policy point made by the report is the idea of strengthening *ex post* competition regulation over *ex ante* sector-specific regulation. This is a trend started first in the EU by the 1999 Review.⁷⁰⁵ In order to achieve this goal, the Competition Study Group recommends that further studies should be carried out to see if additional regulation by sectoral laws is needed on top of regulation by the AMA. More specifically, in relation to the use of '*asymmetrical regulation*' against dominant operators the Competition Study Group recommends that such sector-specific rules should be

⁷⁰⁵ See Chapter 1 of the thesis and in particular the section on the 1999 Review.

minimised in the future. The report says that it is highly probable that incumbents will resort to anti-competitive activities if they are not regulated. However, the use of ‘*asymmetrical regulation*’, which imposes special obligations on operators deemed to be dominant, also carries risks in that if carried arbitrarily, it can distort fair competitive conditions. To solve this situation, it is recommended for sector-specific regulators to review the structure of dominant firms in order to bring about the situation where no regulation of dominant operators is needed. The underlying idea being here that *ex post* competition rules should alleviate the need to have ‘*asymmetrical regulation*’. Finally, where it is decided that sector-specific regulation is still needed, it is important to ensure that the sector-specific regulations are consistent with the AMA. This should be ensured through close co-operation between the JFTC and the sector-specific regulators both at the stage of preparation of new rules but also in the enforcement of the competition rules.⁷⁰⁶

3.6.5 First results of the Competition Study Group’s recommendation

In response to the Competition Study Group’s recommendations, the JFTC established the “*Task Force of IT Business and Public Utility Business*” within its investigations Bureau on 11 April 2001. The purpose of the task force is to ensure fair and free competition in the IT-related sectors and public utility sectors.⁷⁰⁷

In addition, in November 2001, the JFTC published jointly with the MPHPT the GPCT Guidelines, analysed above.⁷⁰⁸ These guidelines follow the course of action recommended by the Competition Study Group whereby in order to prevent illegal practices and further promote fair and free competition, industry-by-industry guidelines covering the conducts that might violate the AMA, the JFTC should co-operate with the appropriate sector-specific regulator (here the MPHPT) in order to draft guidelines on the promotion of competition. Joint guidelines (between the JFTC and the relevant Ministry) have now been accepted as the best way forward in order to achieve the most efficient regulation of industries characterised by infrastructures to which access is necessary in order to compete on the market.⁷⁰⁹

⁷⁰⁶ JFTC, *Deregulation and Competition Policy in Public utilities Sector - Report of Study group on Government Regulations and Competition Policy*, supra note 687, p. 7 to 8.

⁷⁰⁷ OECD, *Competition and regulation issues in telecommunications*, supra note 650, p.220.

⁷⁰⁸ JFTC and MPHPT, *Guidelines for the promotion of Competition in the Telecommunications Business Field*, supra; for more details on these guidelines see Chapter 2 of this thesis.

⁷⁰⁹ Before to the GPCT Guidelines, the JFTC had adopted *Guidelines on fair electricity trade* in collaboration with the MITI (December 1999) and *Guidelines on fair gas trade* in collaboration with the MITI (in March 2000); see JFTC,

3.7 Appraisal of the Japanese regulatory framework and thoughts on possible future developments

Japan has a dual regulatory regime of access to telecommunications markets, which, just like the EU, is composed of general competition rules on the one hand, and sector-specific rules on the other. However, Japan has so far favoured a regime where sector-specific rules have a greater role in regulating access to telecommunications markets than in the EU. The fact that the essential facilities doctrine has not been applied in Japan in the way it has in the EU is also indicative of the different balance between general competition rules and sector-specific rules. The essential facilities doctrine provides that a refusal to grant access to an essential facility is a practice which on its own is a breach of the EC competition rules but not of Japanese competition rules (an additional behavioural element would be needed in Japan). This means that there is less protection in case of deficient or inappropriate application of the sector-specific rules as competition rules will not be able to step in a situation of simple refusal to grant access to an essential facility. Another disadvantage resulting from this situation is that greater reliance is put on sector-specific rules which are not, by their nature, as flexible and adaptable to new market circumstances (see the next section in this regard). However, by and large the end result is very similar between the EU and Japan. An anti-competitive conduct in relation to access to telecommunications infrastructure or network facilities in Japan will be caught either by traditional competition rules such as refusal to deal or by sector-specific regulation.⁷¹⁰

However, despite the historic preference in Japan for strong regulation by *ex ante* sector-specific rules, Japan appears to be moving in the same direction as the EU with regard to the future weight to be given to *ex ante* sector-specific regulation as compared to *ex post* competition rules. There have been clear policy statements, mainly by the JFTC, indicating that the convergence phenomenon makes it necessary to relax as much as possible *ex ante* sector-specific regulation and rely more heavily on the flexible cross-sectoral regulation provided by *ex post* competition rules.⁷¹¹ The Japanese business community has also been advocating a relaxation of telecommunications sector-specific regulation.⁷¹² In addition, the market environment itself has been changing as recent alliances between power utilities (that own vast

Promotion of regulatory reform and the FTC's position on competition policy - at the time of the three year program for the promotion of regulatory reform, 30 march 2001, <http://www.jftc.go.jp/e-page/report/survey/2001/20010330RR.pdf>.

⁷¹⁰ This idea will be developed further in the section on critical conclusions and recommendations below.

⁷¹¹ JFTC, Competition policy in the telecommunications sector, *supra* note 414. This idea is further developed in the section on critical conclusions and recommendations below.

⁷¹² Keidanren, Deregulation in the field of telecommunications, 18 September 1997.

fibre optic networks) and internet companies (that have the technology to offer broadband services) aimed at breaking NTT's monopoly in the newly developing broadband services market sector, indicate that the convergence phenomenon is gathering speed in Japan.⁷¹³

Finally, just as in the EU, the system of dual regulators of access to telecommunications infrastructure and network facilities means that there will inevitably be conflicts between the sector-specific regulator, the MPHPT, and the competition regulator, the JFTC.⁷¹⁴ When compared to the EU situation, this potential conflict is accentuated in Japan by the fact that the JFTC is not a Ministry but rather an extra-ministerial agency attached directly to the MPHPT. Although officially the JFTC's independence is guaranteed⁷¹⁵, there has been strong support for the JFTC to be attached directly to the Cabinet Office in order to increase its independence and neutrality.⁷¹⁶ Recent press articles have reflected this view and added that although the ruling political party would like to see a stronger JFTC, the MPHPT officials are reluctant to release it from their control, thereby stalling change.⁷¹⁷ This situation, combined with the historic difficulties that the general competition rules had in being accepted by the business community, could be damaging to the healthy development of competition in the telecommunications sector as the regulators pursue their own policy objectives. It is necessary that the JFTC be independent and free from government political pressure which is not the case at present as it is attached to a government Ministry - the MPHPT.⁷¹⁸ The MPHPT's primary aim in relation to telecommunications is to protect and foster that industry and issue permissions and licences. It will therefore be less concerned about the strict enforcement of competition rules and more interested about long term sector-specific policy aims such as universal service or other general public policy objectives. The JFTC is the designated administrative body for competition policy-making and enforcement. As such, it can take greater responsibility than a Ministry for

⁷¹³ Nikkei Weekly, Telecom sector faces shift as new player enters arena, 22 July 2002.

⁷¹⁴ See the section on the JFTC's remarks as to competition policy in the telecommunications sector in Section B of Chapter 2. There the JFTC states that the measures to ensure fair competition, which were incorporated in the NTT restructuring plan, are insufficient but also have not been properly implemented. As a result, the JFTC recommends that the MPHPT examines whether NTT has implemented the measures to ensure fair competition and takes action to rectify the situation if necessary. This is a good example of an area where future conflicts between the JFTC and MPHPT might arise.

⁷¹⁵ This is stated at section 28 of the AMA.

⁷¹⁶ S.Itoda, Commissioner of the JFTC, Competition in Japan's Telecommunications Sector: Challenges for the Japan Fair Trade Commission, 11 October 2001, p.7; see also Committee Considering Competition Policy for the 21st Century, Recommendation concerning competition policy appropriate for the 21st Century, November 2001, JFTC website. See also W.Kolasky, supra note 682.

⁷¹⁷ Nikkei Weekly, Opposition derails efforts to give JFTC more muscle, 28 January 2002.

⁷¹⁸ N.P.Miller, Regulation: reconciling policy objectives in implementing reforms in the telecommunications sectors - lessons from experience, Avebury, 1996, p.488.

competition law policy and enforcement. Guaranteeing its independence by attaching it directly to the Cabinet Office is, therefore, highly advisable in order to promote the application of the competition rules in the telecommunications sector.

CONCLUSION

This thesis analysed the interrelation between general competition rules and sector-specific rules as they apply to access to EU and Japanese telecommunications markets. The central contention is that the further promotion of competition in the EU and Japanese telecommunications markets needs the maintenance of a dual regulatory regime of access to these markets. However, in the liberalised EU and Japanese telecommunications environment the balance between the two types of regulation should be one where sector-specific rules will increasingly serve limited functions (such as core *'preparatory'* and *'public interest'* functions) and where general competition rules will progressively take precedence over the regulation of third party access to telecommunications markets.

The starting point of the analysis carried out in this thesis is that greater competition in telecommunications markets, through better access to these markets, can be achieved through a combination of sector-specific regulation (including structural measures) and general competition rules. Chapters 1 and 2 showed that the EU and Japan are presently using a dual regulatory regime that combines these rules but with differences as to the weight given to each rule. Chapter 1 showed that the EU favours, at present, a dual system based on the interplay of *ex ante* sector-specific regulation of access and *ex post* use of competition rules. However, the EU is moving towards a reduction in the number of *ex ante* legislation in favour of stronger *ex post* enforcement through general competition rules mainly in order to respond to the rapid pace with which the market environment changes. Chapter 2 showed that Japan has also favoured a dual regulatory system but one where sector-specific rules are comparatively more important than in the EU and where general competition rules have had less weight than in the EU. Section 3.4 of Chapter 3 gave possible explanations for this difference of balance between the two regimes and concluded that there are historical reasons that justify the lesser importance of competition rules in Japan although there are indications that this situation might be changing. At the same time, and unlike in the EU, structural measures have been applied in Japan in order to curb the excessive power of the incumbent and bring more competition to the markets.

The next paragraphs will first appraise the policy choices made by the EU and Japan. The analysis below builds upon the work undertaken at Chapter 3 on the appraisal of the EU regime (at sections 2.6 and 2.7.5 of Chapter 3 respectively) and on the appraisal of the Japanese regime (at section 3.7 of Chapter 3). Second, an assessment is made of the likely future interrelation between sector-specific and general competition rules for both the EU and Japan. The analysis is undertaken on the basis of the new EU regulatory regime analysed at Chapters 1 and 3, emerging policy documents such as the GPCT Guidelines in Japan analysed at Chapters 2 and 3, legal writings and wider market developments.

As to the EU, a preliminary remark that has to be made is that it is different to Japan in terms of its nature and structure. The EU is a supra-national institution that sits on top of the Member States' national administrations. As a result of this, there is a multiplicity of authorities in charge of competition policy and enforcement as well as sector-specific policy and enforcement. Apart from the EU's DG COMP and DG INFOSOC, businesses are faced with NCAs (that enforce EC and national competition law at national level), NRAs (that enforce EC and national sector-specific rules at national level) and national courts (that also enforce EC and national competition law at national level). Increasingly, telecommunications operators are providing services in more than one Member State, which means that the above complexity is multiplied proportionally to the number of Member States where they have operations, thereby further complicating the situation.

Before the completion of telecommunications liberalisation the peculiar structure of the markets in Europe, i.e. an incumbent dominant operator and very high costs of entry, required the adoption of sector-specific regulation (in addition to general competition rules) to foster competition by forcing access to networks or other facilities, which would otherwise constitute bottlenecks for market entry. Now that the EU telecommunications liberalisation process is completed, the Commission has proposed a policy shift towards more regulation by *ex post* competition rules. Chapters 1 and 3 of this thesis showed that one fundamental reason of the policy change towards a stronger *ex post* regulatory framework is the progressive convergence of the telecommunications sector with neighbouring sectors. The bottleneck situations of the future are likely to have a cross-sector nature affecting a multiplicity of markets. The future technological and market environment cannot be covered by any single sector-specific regime due to the industry-specific nature of such regulation but also its static nature in the sense that it takes into account market and technological developments up to a point but does not evolve beyond that. The progressive convergence of electronic markets makes it necessary to converge the regulation of telecommunications, media and the internet. This has led regulators to move away from the current telecommunications sector-specific regime, which limits itself to regulating one sector at a time and is mainly focused on voice telephony, towards a more flexible regulatory regime based on more regulation by *ex post* general competition rules and a progressive reduction of *ex ante* sector-specific regulation. The ultimate objective of the reforms is to achieve regulation which is more focused on actual market conditions so that constraints on market behaviour are set in the first place by competitors under the normal rules of competition.

Although the EU move towards more *ex post* competition is commendable, some cautionary remarks have to be made. First, although the new regulatory regime intends to significantly reduce *ex ante* sector-specific regulation, it is also clear from the new interconnection Directive that the interconnection and access obligations imposed under the present interconnection Directive will remain in force for as long as the NRAs consider that they remain necessary to

foster competition. This means that a very large part of the existing interconnection regime is to remain in place subject to review by the NRAs. The role of the NRAs and the difficulty of their task under the new regime should not be underestimated. NRAs face the challenge of having to get to grips with EC competition law concepts such as the concept of dominance (which as explained at section 2.4 of Chapter 3, is the measure of the SMP test under the future regime) and ensure that their implementation of sector-specific regulation is not in contradiction with the implementation by other NRAs. The task of ensuring consistent implementation throughout the EU is left to the Commission which will have to take delicate judgment calls in situations where two NRAs have implemented differently the same sector-specific provision and it will have to decide which is the correct one. A successful co-operation between NRAs and the Commission will be crucial to reassure market players that there will be a level playing field in the application and enforcement of access rules across the Member States.

Second, even in the light of the current trend to reduce the amount of *ex ante* sector-specific regulation there is some scope left for regulation by such rules. Looking at the Japanese approach to the regulation of access to telecommunications infrastructure and network facilities and in particular the experience acquired there in the use of structural measures it can be argued that some thought should be given by EU regulators to the possible use of such measures to achieve more competition in the market. EU sector-specific regulators are not presently empowered to impose structural measures, however, in the light of the difficulty faced by new entrants in breaking the bottleneck created at local level, the possibility to use structural measures in the future could be considered.

Third, caution is warranted by statements made by the Commission as to the way in which *ex post* competition rules may develop in the future. The essential facilities doctrine presents the advantage of being able to adjust to changes in the market environment (such as the phenomenon of convergence) by adapting the market definitions used and without changing either the sector-specific regulatory framework or its basic principles. Therefore, it is quite likely that the further development of the essential facilities doctrine will be a natural consequence and one response to the challenge of convergence (see in this regard section 2.1.10 of Chapter 1). However, the study in Chapter 1 of the essential facilities doctrine has showed that the Commission's analysis of the essential facilities doctrine in the Access Notice is not entirely in line with the ECJ's *Oscar Bronner* judgment. In the Access Notice, the Commission enumerated the necessary conditions that need to be satisfied for the essential facilities doctrine to apply. These conditions are in line with the *Oscar Bronner* judgment and give the impression that the Commission favours a strict interpretation of the essential facilities doctrine. However, the Commission adds in the Access Notice that it believes that access to the incumbent's infrastructure will be necessary until alternative infrastructures develop further. This statement leaves the door open for a wider application of the essential facilities doctrine in the EU telecommunications sector.

Therefore, the Commission's position is to favour service competition through forcing access to infrastructure not only through *ex ante* sector-specific measures but also through the use of the essential facilities doctrine if the right conditions are met. The thrust of the service-based competition argument is that opening access to infrastructure, in particular the local loop, is essential for the development of a large variety of information society content services which will need to reach the largest possible potential users if they are to be successful. However, the down side of the Commission's pro-access attitude to telecommunications infrastructure is that it will even further discourage new entrants from investing in infrastructure to the extent that they can get cheap and immediate access to existing infrastructure. This in turn may reduce consumer choice in terms of network offerings (see in this regard section 2.1.1 of Chapter 1). Moreover, control of access pricing and conditions requires continuous regulatory monitoring with inevitable shortcomings. It could therefore be argued that competition and consumer interests would be better served in the long term by a policy promoting at least some infrastructure competition. This should result in competitors being less dependent on the incumbent's network which in turn should act as a guarantee for the development of strong competition, both in terms of price and availability of new services.

Japan has also a 'dual regime' in place but one where sector-specific rules have been favoured for the regulation of access to telecommunications infrastructure and network facilities whilst competition rules have played a much-reduced role when compared to the EU position. Another significant difference with the EU is that Japanese sector-specific regulators have not hesitated to use structural measures (e.g. the 1999 restructuring of NTT) in order to try to improve competitive conditions through better access to telecommunications infrastructure and facilities. A drawback of this strong reliance on sector-specific rules is that such rules are not adapted to the rapidly changing market conditions that presently characterise the telecommunications sector. Because of the time it takes between the inception of a new policy is thought-of and the actual moment when it becomes a binding rule, it will be increasingly difficult for regulators to put in place a regulatory regime that is in line with market changes. The fundamental change that has occurred in the telecommunications market over the last years is the convergence of electronic communications. As was explained at section 1.2 of Chapter 3, convergence starts as a purely technological phenomenon but will likely lead to convergence of markets. This means that the traditional competition analysis of market power in the telecommunications industry will have to be revisited to take account of the increasing substitutability of, among others, the cable network and mobile telephony network with the traditional fixed telephony network but also that the sector-specific regime will need to be adapted failing which it will not be efficient.

Structural measures can appear as the last resort in order to bring more competition in markets dominated by incumbent operators. Especially when it comes to breaking up the local monopoly enjoyed by NTT, the structural measures taken so far in Japan have not proved very effective, partly because they did not go as far as breaking-up NTT but rather only restructured it. Further

structural measures are now being considered - although only as a last resort measure - should the stricter enforcement of competition and sector-specific rules not bring more competition into the market. Although, for the reasons explained above structural measures have, to date, only had limited effects, they should not be completely discounted given that they have the potential to bring real and quick changes to the market structure.

A more important role could be envisaged in Japan for competition rules. It is highly likely that the same market developments that presently exist in the EU, characterised by the phenomenon of convergence, affect equally the Japanese markets. The recent Telecommunications and Broadcasting Act 2001, is an example of the recognition of this trend in that the basic drive behind its enactment is the convergence of broadcasting and telecommunications. Therefore, the remarks made above as to the inadequacy of sector-specific rules to deal efficiently with cross-sector bottlenecks apply to Japan as well. The key issue is here that the advantage of applying *ex post* competition rules and not having to preempt technological trends through *ex ante* regulation will undoubtedly prove as useful in Japan as it is expected to be in the EU in ensuring that regulation is adapted to the actual market situation. The JFTC has already made statements favouring less *ex ante* regulation in favour of a stronger *ex post* regime. In addition, the JFTC is showing a willingness to apply more strictly competition rules (see section 2.3 of Chapter 2). This is a necessary pre-condition to a regime relying more heavily on *ex post* regulation. In this regard, the JFTC has been pursuing the application of stricter sanctions for illegal refusal to deal through the use of the private monopolisation prohibition (which carries heavier sanctions than previously used prohibitions) for such practices, whenever possible.

The inescapable conclusion that derives from the convergence phenomenon is that there is a high likelihood that unless competition and sector-specific regulators act fast, Japanese sector-specific telecommunications regulation will no longer be adapted to the market situation and will hence create more damage than good to market players. Therefore, following the lead taken by the EU, and as suggested by the JFTC in its paper on deregulation and competition policy (see section 3.6 of Chapter 3) it is appropriate for the Japanese competition and sector-specific regulators to actively pursue the goal of stronger *ex post* regulation through general competition rules and limit *ex ante* sector-specific telecommunications regulation to the minimum necessary. This will ultimately achieve a market situation where regulation is market-focused and where constraints on market behaviour are set by the normal rules of competition rather than being artificially forced upon market players through *ex ante* sector-specific regulation.

As to the future interrelation between *ex ante* sector-specific rules and *ex post* general competition rules with regard to access to EU and Japanese telecommunications markets, it was mentioned above in the EU Chapter that although the '*dual regime*' and the balance it strikes between general competition rules and sector-specific rules has so far been generally

successful, the Commission is moving towards a new regime where *ex post* general competition rules will play a more significant role when compared to their present role. There are signs that the same policy trend is starting to develop in Japan. Faced with this strengthening of *ex post* general competition rules the question of the future relationship between *ex ante* and *ex post* rules arises. One can legitimately question whether sector-specific rules are still necessary now that both Japan and the EU have fully liberalised their telecommunications markets. Based on the analysis and research carried out in this thesis, the following paragraphs will set down some principles that may prove useful in defining the future interrelation between general competition rules and sector-specific rules when applied to access to EU and Japanese telecommunications markets.

Ex post competition rules have certain limits. Although the rationale behind the European and the nascent Japanese move towards more *ex post* regulation is understandable, there is a risk that competition rules are given a role that they cannot really fulfil. There are six basic limitations to the regulation of access to telecommunications infrastructure and network facilities solely by *ex post* general competition rules. These limitations are findings of this study as well as of EU legal writings, referred to below, which can be adapted to apply to Japan as well.

Firstly, investment can only be encouraged by a regulatory framework which is characterised by stability and legal certainty. The competition authorities and courts' case law is not yet sufficiently developed so as to have established recognised principles and practices regarding access issues, especially in Japan. Competition law, if it were the main regulatory driver of telecommunications policy, would have to expand so as to accommodate solutions to new situations. The introduction of the doctrine of essential facilities into EC competition law by the European Commission is an example of expansion of the boundaries of competition law to respond to new market situations. However, as noted in the assessment and criticisms to the essential facilities doctrine at section 2.1.11 of Chapter 1, that process of expansion brings legal uncertainty and the related disadvantages that this has on the functioning of the market.

Secondly, given the inherent cross-sector nature of competition rules, it is quite likely that the essential facilities doctrine will be further developed in the EU and become one of the answers to the challenge posed by the phenomenon of convergence. However, as noted above and at section 2.1.11 of Chapter 1, expanding the application of the doctrine will mean that competitors will have to rely even more on the incumbents' infrastructure. This may discourage market players from investing in telecommunications infrastructure thereby resulting in less consumer choice in terms of network infrastructure.

Thirdly, competition law by itself does not and cannot address all possible issues that arise in telecommunications policy. General competition law, within the context of access to telecommunications markets, usually applies in situations of market dominance. As noted by

H.Ungerer in his paper on Convergence in Regulatory and Competition Law Paradigms, this in itself would limit telecommunications policy-making to the few situations where such dominance can be shown to exist. It results from this that general competition rules are not the most appropriate regulatory forum to make strategic policy decisions. Moreover, the safeguard of public policy objectives, such as universal service, cannot be assured through the sole use of competition law.

Fourthly, at EU level there might be a concern that should EC competition law become the sole telecommunications regulatory driver throughout the EU, it will not suit the inevitable necessity to allow for minor variations of implementation between Member States. In other words, the uniformity of EC competition law will probably not ensure the best implementation throughout the EU. Although NCAs will be implementing EC and national competition law at national level there is a concern that it will not be possible to cater for national specificity without sector-specific legislation implemented at national level by NRAs. The result of this might be an overly inflexible application of telecommunications rules within the Member States.

Fifthly, as noted by P.Larouche's study on Competition Law and Regulation in European Telecommunications, the nature of the remedies imposed by the Commission, or the JFTC, in order to solve anti-competitive situations is not easily changeable so that if market developments occur which make the use of a remedy no longer appropriate, competition authorities will have no other avenue than to make a new assessment of the situation on the merits.

Finally, as also noted by P.Larouche's study referred to above, competition law procedure is not very transparent. The European Commission's and the JFTC's decision making process is not open to the public at large and in general the whole procedural aspect gives a feeling of opaqueness when compared to the legislative process which is necessary for sector-specific legislation to be adopted.

In addition, there are specific arguments justifying why sector-specific regulation is still necessary in a liberalised telecommunications environment. First, it is arguable that principles such as the essential facilities doctrine in the EU can be better addressed by sector-specific regulation. The issues that the doctrine of essential facilities is aimed at can be better dealt with as an issue of supplier access under sector-specific legislation. This is the approach taken in Japan where the doctrine of essential facilities is not recognised but *ex ante* sector-specific legislation achieves similar results by forcing access to the incumbents' facilities and networks through interconnection. Second, by imposing a preliminary permission regime, *ex ante* 'preparatory' regulation can provide legal certainty for investors and the timely solution of situations arising from anti-competitive practices. Arguably, the pure application of *ex post* competition rules leads to the entrenchment of anti-competitive practices, with all the negative

market effects that this entails, before any *ex post* application of competition rules can be effective. Third, *ex ante* sector-specific regulation can be the tool that will achieve international harmonisation of telecommunications regulation. Given the globalisation trend, especially strong in cross-border industries such as telecommunications, the importance of ensuring the widest possible application of liberalisation rules such as access to telecommunications infrastructure and network facilities becomes all the more important. The WTO's Basic Telecommunications agreement is such an example of *ex ante* sector-specific legislation aimed at opening up telecommunications markets agreed at the international level, including by the EU and Japan. Finally, the future regulatory regime will also need sector-specific regulation for the '*public interest*' function of sector-specific regulation - such as universal service or affordable pricing - since it can deal with the issues arising in connection therewith more consistently and with greater legitimacy than competition law.

Based upon the example set by the new EU regulatory regime, policy statements such as the Access Notice in the EU and the GPCT Guidelines in Japan, it is therefore argued that a regulatory regime consisting solely of *ex post* general competition rules to deal with the issue of access to the EU and Japanese telecommunications infrastructure and network facilities is not viable. *Ex ante* sector-specific rules will remain necessary for the regulation of access to telecommunications markets. However, it should increasingly be the case that '*preparatory*' sector-specific regulatory intervention will occur based on the application of general competition law principles so as to minimise the risks of conflict between the two sets of regulation. This is a trend that has already started in the EU with the adoption of a new (SMP) test that triggers the heavier sector-specific obligations based on the general competition law test of dominance.

Having established that the likely future regulation of access to telecommunications infrastructure and network facilities needs to combine general competition rules and sector-specific rules, the crucial question that remains is the one of the correct balance that needs to be achieved between *ex ante* sector-specific regulation and *ex post* general competition rules. Based upon the example set by the new EU regulatory regime as analysed at Chapters 1 and 3, it is suggested that the correct balance between the two types of regulation should be one where regulation by '*preparatory*' *ex ante* sector-specific rules is progressively reduced in favour of more enforcement by *ex post* general competition rules. The latter are by their nature better adapted to regulating the rapidly evolving telecommunications industry and are more 'market friendly' in the sense that they do not forbid certain types of conduct automatically but rather assess the practical economic effects of certain behaviour on the market before intervening.

It was mentioned at the beginning of Chapter 3 that the past and to a large extent still present, function of *ex ante* sector-specific regulation is as '*preparatory*' regulation which works as a support to *ex post* competition rules in the transitional phase from monopoly to a competitive market. A large number of provisions in the EU's ONP rules and the Japanese TBL and NTT law

have as their principal aim to police the dominant position of the incumbent. As that dominant position weakens so will the need to have *ex ante* sector-specific regulation of that type whilst at the same time there will be fewer cases of *ex post* intervention due to the development of truly competitive access markets. In that regard, the policy trend in the EU to move towards a regime where *ex post* general competition rules would be the principal regulatory instrument to regulate telecommunications markets is justified. However, looking at the Japanese model, a role could be envisaged for structural measures which have not, so far, been favoured by regulators in the EU. Japan has some experience in using structural measures through the restructuring of NTT in 1999, as analysed at section B of Chapter 2. A more important role for structural measures could be envisaged both in Japan, where the idea has been proposed by the Competition Study Group in its report on deregulation and competition policy in the public utilities sector, and in the EU where this idea has not been considered by regulators. This is especially true in the converging electronic communications environment where there will be a need to keep the various units of operators separate in order to avoid, for example, foreclosure concerns arising from integrated packages offered by fixed incumbents and their mobile operations.

Ultimately, it is hoped that this study has shown that the correct balance between general competition rules and sector-specific rules in the future EU and Japanese telecommunications environment should be one which combines the existence of limited '*preparatory*' sector-specific regulation coupled with a strong and uniform enforcement of general competition rules. In addition, it will also be necessary to maintain a background of necessary '*public interest*' sector-specific rules. The '*preparatory*' sector-specific rules should progressively be limited to core rules only which should be based on competition law principles. At the same time, the possibility to use structural measures in the future should not be ruled out. This model should not be subject to future changes in the market environment because it increasingly relies on general competition rules which apply across all sectors of the economy and are inherently adaptable to the rapidly changing market conditions. The greater reliance on general competition rules will guarantee that the regulation of access to telecommunications markets, as described above, will be closer to actual market conditions and hence not overly intrusive or burdensome on market players.

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