Year: 2010

The Essential-Facilities-Doctrine in the USA, EU and Switzerland: with a special focus on FRAND

Rizvi, Salim

Originally published at:
Rizvi, Salim (2010). The Essential-Facilities-Doctrine in the USA, EU and Switzerland: with a special focus on FRAND. Jusletter:1-86.

Working Paper

The Essential-Facilities-Doctrine in the USA, EC and Switzerland

With a special focus on FRAND

Author:

lic. iur. Salim Rizvi,
Research Assistant at the University of Zurich

Zurich, 15 May 2010

"It [the Essential-Facilities-Doctrine] is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are."

Phillip Areeda
(in: Essential Facilities: An Epithet in Need of Limiting Principles, Antitrust Law Journal 58, 1989, p. 841)

Table of Contents

List of Abbreviations

All abbreviations and acronyms in German are translated into English where that seems appropriate and put in parentheses in order to simplify matters for the English speaking reader.

A.	Auflage (edition)
AAA	American Arbitration Association, New York
Art.	Article (section)
Bd.	Band (volume)
BGE	Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung (Official Report of the Decisions made by the Swiss Federal Supreme Court)
BGer	Schweizerisches Bundesgericht (Swiss Federal Supreme Court)
BSK	Basler Kommentar
ch.	chapter
CMLR	Common Market Law Reports
cons.	considerations
Diss.	dissertation/thesis
EC	European Community
ECJ	European Court of Justice
ECJ	European Competition Journal
ECLR	European Competition Law Review
ECPR	Efficient Component Pricing Rule
Ed(s).	Editor(s)
e.g.	for example
EGV	EC Treaty
Emory Int'l L. Rev.	Emory International Law Review
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (European Journal for economic law)
FMG	Fernmeldegesetz vom 30. April 1997, SR 784.10 (Federal Telecommunications Act of 30 April 1997)
Fordham Corp L Inst	Fordham Corporate Law Institute

Fordham Int'l LJ	Fordham International Law Journal
FRAND	Fair, Reasonable and Non Discriminatory
FTC	Federal Trade Commission
GCR	Global Competition Review
gem.	gemäss (in accordance with)
GmbH	Gesellschaft mit beschränkter Haftung (limited liability company)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GWB	Gesetz gegen Wettbewerbsbeschränkungen, in der Fassung der Bekanntmachung vom 15. Juli 2005 (law against competition restraints)
hersg.	herausgegeben (edited by)
Hrsg.	Herausgeber (Editor)
ICC	International Chamber of Commerce, Paris
incl.	including
IPLJ	Fordham Intellectual Property, Media & Entertainment Law Journal
IPR	Intellectual Property Right
IPRG	Bundesgesetz vom 18. Dezember 1987 (Stand 1. Juli 2009) über das Internationale Privatrecht (IPRG), SR 291
iss.	issue
JRE	Journal of Regulatory Economics
KG	Bundesgesetz vom 6. Oktober 1995 über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG), SR 251 (Swiss Federal Act on Cartels and other Restraints of Competition [Cartel Act, CartA] of 6 October 1995 [Status as of 1 January 2009])
LG	Landgericht (regional court)
lit.	litera (letter)
njtip	Northwestern Journal of Technology and Intellectual Property
No./no.	number
Nr./nr.	Nummer (number)
OLG	Oberlandgericht (regional court, second instance)
OJ	Official Journal of the European Union
p.(pp.)	page(s)
para.	paragraph

PTT	In der Schweiz die Post-, Telefon- und Telegrafenbetriebe, gegründet 1852, seit 1998 in zwei Betriebe aufgeteilt: Die Schweizerische Post und Swisscom
RAND	Reasonable and Non Discriminatory
REKO/WEF	Rekurskommission EVD und Rekurskommission für Wettbewerbsfragen (wurden per 31. Dezember 2006 abgelöst und sämtliche Geschäfte wurden per 1. Januar 2007 vom Bundesverwaltungsgericht übernommen).
RPW	Recht und Politik des Wettbewerbs, RPW : Schweizerische Wettbewerbsbehörden (Journal of the Swiss Competition Commission [WEKO])
Rz.	Note
sec(s).	section(s)
Sic!	Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht (Journal for Intellectual Property Rights, Information and Competition Law)
SR	Systematische Rechtssammlung des Bundesrechts, Schweiz (Systematic Collection of Federal Statutes and Regulations, Switzerland)
SSOs	Standards Setting Organizations
TEC	Treaty of the European Community
TFEU	Consolidated version of the Treaty on the Functioning of the European Union (Treaty of Lisbon)
US	United States (of America)
USA	United States of America
v./vs.	versus
vol.	volume
Vorbe.	Vorbemerkung (preliminary note/remark)
WEKO	Wettbewerbskommission (Swiss Competition Commission)
www.	World-Wide Wep
ZIK	Publikationen aus dem Zentrum für Informations- und Kommunikationsrecht der Universität Zürich
zit.	cited

Literature

In general, the following books and articles are cited (zit.) by indicating the name(s) of the author(s) as well as the relevant paragraph(s) and page(s). However, a different style of citation may be used where it seems appropriate. In order to differentiate several books or articles written by the same author(s), special quotations are indicated at the proper place in English even though it may be a book or article written in another language.

ABELL E. JAMES

Setting the Standard: A Fraud-based Approach to Antitrust Pleading in Standard Development Organisation Cases, University of Chicago Law Review, 75 U. Chi. L. Rev. 1601, Fall 2008

ALESE FEMI

Federal Antitrust and EC Competition Law Analysis, Ashgate Publishing Limited, Hampshire (England) and Burlington (USA), 2008

AMGWERD MATTHIAS

Netzzugang in der Telekommunikation, Diss., Schulthess Juristische Medien AG, Zürich/Basel/Genf, 2008

AMSTUTZ MARC/REINERT MANI

Anmerkung zum Bundesgerichtsurteil «Buchpreisbindung II» vom 14. August 2002 (BGE 129 II 18), sic! 2003

AOKI REIKO/SMALL JOHN

Compulsory Licensing of Technology and the Essential Facilities Doctrine, Information Economics and Policy, Vol. 16/2004

AREEDA PHILLIP

Essential Facilities: An Epithet in Need of Limiting Principles, Antitrust Law Journal 58, 1989

BAVASSO ANTONIO A.

Essential Facilities in EC Law: The Rise of an ‗Epithet' and the Consolidation of a Doctrine in the Communication Sector, Yearbook of the European Law, 2001-2002, Oxford University Press 2002

BECKMERHAGEN AXEL

Die essential facilities doctrine im US-amerikanischen und europäischen Kartellrecht, Diss., Nomos Verlagsgesellschft, Baden-Baden, 2002

BERGER BERNHARD/KELLERHALS FRANZ

Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Stämpfli Verlag AG, Bern 2006

BERNI MARKUS/CASANOVA CORINNE

The Swiss Market for Telecommunications, in: Telecommunication Laws in Europe, 5th Edition, Edited by Scherer Joachim/Baker & McKenzie LLP, Tottel Publishing, London 2005

BLESSING MARC

Arbitrating Antitrust and Merger Control Issues, in: Swiss Commercial Law Series, VOGT NEDIM PETER (Ed.), Vol. 14, Helbing & Lichtenhahn, Basel/Geneva/Munich 2003

BLUMENTHAL WILLIAM

Three vexing issues under the essential facilities doctrine: ATM Networks as illustration, 58 Antitrust Law Journal, Vol. 1989-1990

BISCHOF JUDITH

Rechtsfragen der Stromdurchleitung, Diss., Zürich 2002

BORK ROBERT H.

The Antitrust Paradox, A Policy at War with itself, Basic Books, Inc., Publishers, New York 1978

BREITENMOSER STEPHAN

Praxis des Europarechts, Schulthess Polygraphischer Verlag AG, Zürich 1996

BREITENMOSER STEPHAN/HUSHEER ANDRÉ

Europarecht, Band I, Institutionelle Grundlagen von EU und EG, Schulthess Juristische Medien AG, Zürich/Basel/Genf 2002

BUCCIROSSI PAOLO

Access to an Essential Facility: Efficient Component Pricing Rule or Unrestricted Private Property Rights?, JRE, Vol. 16, No. 3, 1999

BUCHER EUGEN

Obligationenrecht I, Art. 1-529, Basler Kommentar, HONSELL HEINRICH/VOGT NEDIM PETER/WIEGAND WOLFGANG (Hrsg.), Art. 1 OR, Helbing Lichtenhahn Verlag, Basel 2007 (zit. BSK BUCHER, Vorbe. Art. 1 OR)

BURGER-SCHEIDLIN MAXIMILIAN

Praxishandbuch Schiedsgerichtsbarkeit, TORGGLER HELLWIG (ed.), Verlag Österreich GmbH 2007

CARY GEORGE

Global Competition Review (GCR), Vol. 11 Iss. 4, April 2008

CARY GEORGE S./WORK-DEMBOWSKI LARRY C./HAYES PAUL S., Antitrust Implications of Abuse of Standard-Setting, in: George Mason Law Review, No. 15, August 2008

CHAPPATTE PHILIPPE

FRAND Commitments – The Case for Antitrust Intervention, ECJ, August 2009

- FRAND Commitments and EC Competition Law: A rejoinder, ECJ, April 2010 (zit. CHAPPATTE, Rejoinder)

CRAIG PAUL/GRÁINNE DE BÚRCA

EU Law, Text Cases and Materials, 4th ed., Oxford University Press, Oxford 2008

DESELAERS WOLFGANG

Die «Essential-Facilities»-Doctrine im Lichte des Magill-Urteils des EuGH, EuZW, 1995

ENCHELMAIER STEFAN

Europäisches Wirtschaftsrecht, Verlag W. Kohlhammer, Stuttgart 2005

FLINT DAVID

Magill, Case Comment, available at: <www.jurisdiction.com/flin0002.htm>

FURSE MARK

The Essential Facilities Doctrine in Community Law, ECLR 1995

GERADIN DAMIAN

Global Competition Review FRAND Roundtable, in: Global Competition Review (GCR), Vol. 11 Iss. 4, April 2008

GERADIN DAMIAN/RATO MIGUEL

Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royality Stacking and the Meaning of FRAND, in: European Competition Journal, Vol. 3 No. 1, 2007

- FRAND Commitments and EC Competition Law: A reply to Philippe Chappatte, ECJ, April 2010 (zit. (zit. GERADIN/RATO, FRAND)

GIRSBERGER DANIEL/SCHMID JÖRG

Rechtsfragen rund um die KMU, in: SCHMID JÖRG (Hrsg.), Luzerner Beiträge zur Rechtswissenschaft (LBR), Schuthess Juristische Medien AG, Zürich/Genf/Basel, 2003

HARZ, MERCER H.

Dominance and duty in the European Union: A look through Microsoft Windows at the Essential Facilities Doctrine, Emory Int'l L. Rev., 189 1997

HAY GEORGE A.

Trinko: Going all the way, in: The Antitrust Bulletin, Vol. 50, No. 4/Winter 2005

HEINEMANN ANDREAS

Schutzrechte und Wettbewerbsrecht: Perspektiven für die schweizerische Rechtsentwicklung, Sonderheft, sic! 2008

- Die Relevanz des „more economic approach―für das Recht des geistigen Eigentums, GRUR, Heft 11, 2008 (zit. HEINEMANN, more economic approach)

HEITZMANN PIERRE

The International Chamber of Commerce (ICC), in: International Arbitration, Tasks and Powers of different Arbitration Institutions, GOLA PASCALE/GÖTZ STAEHELIN CAUDIA/GRAF KARIN (Eds.), Schulthess Juristische Medien AG, Zürich/Basel/Genf 2009

HERDEGEN MATTHIAS

Europarecht, 10. Aufl., Verlag C.H. Beck, München 2008

HILTY RETO M.

Kartellgesetz, Basler Kommentar, AMSTUTZ MARC/REINERT MANI (Hrsg.), Art. 3 Abs. 2, Helbing Lichtenhahn Verlag, Basel 2010 (zit. BSK HILTY, Art. 3 Abs. 2 KG)

HOFFET FRANZ

Der Zugang des Athleten zum Stadion – wettbewerbsrechtliche Aspekte der Stellung von Sportverbänden, recht, 1997

HOHMANN HOLGER

Die essential facility doctrine im Recht der Wettbewerbsbeschränkungen, Eine Untersuchung der allgemeinen Zugangsregelung zu Netzen und anderen Infrastruktureinrichtungen gem. § 19 Abs. 4 Nr. 4 GWB unter Berücksichtigung US-amerikanischer, europäischer und sektorspezifischer Erfahrung, Diss., Nomos Verlagsgesellschaft, Baden-Baden, 2001

HOLMES WILLIAM C.

Antitrust Law Handbook, 1994 Edition, Clark Boardman Callaghan, 1994

HOLZMÜLLER TOBIAS

Einseitige Wettbewerbsbeschränkungen als Regelungsproblem des internationalen Kartellrechts, Diss., in: Münchner Schriften zum Europäischen und Internationalen Kartellrecht, Bd. 21, Stämpfli Verlag AG, Bern 2009

HÜBSCHER BARBARA/RIEDER PIERRE

Die Bedeutung der ―Essential-Facilities”-Doktrin für das schweizerische Wettbewerbsrecht, sic! 5/1997

HÜSCHELRATH KAI

Competition policy analysis: An integrated approach, Physica-Verlag, a Springer Company, Heidelberg 2009

JONES ALISON/SUFRIN BRENDA

EC Competition Law, Text, Cases and Materials, 2nd Edition, Oxford University Press, Oxford/New York, 2004

- EC Competition Law, Text, Cases and Materials, 3rd Edition, Oxford University Press, Oxford/New York, 2004 (zit. JONES/SUFRIN, 3rd Edition)

JOVANOVIC MILAN

Die kartellrechtlich unzulässige Lizenzverweigerung, Immaterialgüter als Essential-Facilities: Tatbestandsmerkmale und Rechtsfolgen, Diss., Schulthess Juristische Medien AG, Zürich 2007

KIRCHNER CHRISTIAN, Goals of Antitrust and Competition Law Revisited, in: SCHMIDTCHEN DIETER/ALBERT MAX/VOIGT STEFAN (eds.), The More Economic Approach to European Competition Law, vol. 24, Mohr Siebeck Verlag, Tübingen 2007

KLOUB JINDRICH

Commission issues guidance paper on application of Article 82 EC, 15. Colum. J. Eur. L. Online 19 (2009)

KROUSE CLEMENT G.

LRIC Pricing, Dynamically Competitive Markets and Incentives to Invest in Telecommunications, Antitrust Bull., Vol. 45, 2000

KÜNZLER ADRIAN

Effizienz oder Wettbewerbsfreiheit?, Zur Frage nach den Aufgaben des Rechts gegen private Wettbewerbsbeschränkungen, Diss., Mohr Siebeck Verlag, Tübingen 2008 (zit. KÜNZLER, Effizienz)

- Rechtlicher Regelungsrahmen und ökonomische Analysen im Kartellrecht, AJP 2008, (zit. KÜNZLER, Regelungsrahmen)

LARSON ALEXANDER C./LEHMAN DALE E.

Essentiality, Efficiency, and the Efficient Component-Pricing Rule, JRE, Vol. 12, No. 1, 1997

LAYNE-FARRAR ANNE/PADILLA JORGE A./SCHMALENSEE RICHARD

Pricing patents for licensing in standard setting organizations: Making sense of FRAND Commitments, CEMFI Working Paper No. 0702, January 2007 (www.cemfi.es)

- Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments, 74 Antitrust Law Journal 2007 (zit. LAYNE- FARRAR/PADILLA/SCHMALENSEE, A.J.)

LIPSKY JR. ABBOTT B./ SIDAK J. GREGORY

Essential Facilities, Stanford Law Review, Vol. 51, 1999

MESTMÄCKER ERNST JOACHIM/SCHWEITZER HEIKE

Europäisches Wettbewerbsrecht, 2. Aufl., Verlag C.H. Beck, München, 2004

MORGAN THOMAS D.

Modern Antitrust Law and its Origins, American Casebook Series, St. Paul Minn. West Publishing Co., 1977

MÖSCHEL WERNHARD

Art. 82 EGV, in IMMENGA ULRICH/MÄSTMÄCKER ERNST-JOACHIM, Wettbewerbsrecht, EG/Teil 1, Kommentar zum Europäischen Kartellrecht, 4. Auflage, Verlag C.H. Beck, München, 2007

MOSES MARGARET L.

The Principles and Practice of International Commercial Arbitration, Cambridge University Press, Cambridge 2008

NEALE A. D.

The Antitrust Laws of the U.S.A., A Study of Competition Enforced by Law, second edition, with a foreword by FORTAS ABE, Cambridge at the University Press 1970

NORALL Christopher

Judgement of European Court of Justice in IMS Health v. NDC Health, available at: <http://www.mofo.com/international/EU_en/news/ update1228.html>

OPI SERGIO BACHES

The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights still sacrosanct?, IPLJ 411, 2000-2001

PLEITNER HANS JOBST / FÜGLISTALLER URS/RUSCH CHRISTIAN

Schweizer Buchhandel - eine ökonomische Situationsanalyse, in: NZZ 9./10. Februar 2002

POULTON VICTORIA, Issues in the Third Circuit: All'S Fair In Love and ... STANDARD-SETTING?! The Third Circuit says No to deception and Yes to antitrust actions in Broadcom Corp. v. Qualcomm Inc., in: Villanova Law Review, No. 53, 2008

REINERT PETER

Kommentar zu Art. 7 KG, in: BAKER & MCKENZIE (Hrsg.), Kartellgesetz, Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen, Stämpflis Handkommentar, Stämpfli, Verlag AG, Bern 2007

RENTSCH RUDOLF

Deregulierung durch Wettbewerbsrecht, Diss., Basel 2000

RIDYARD DEREK

Essential Facilities and the Obligation to Supply Competitors under UK and EC Competition Law, ECLR, 1996

RITTER LENNART/BRAUN DAVIND W.

European Competition Law, A Practitioner‘s Guide, 3rd edition, Kluwer Law International, Netherlands 2004

RODGER BARRY J./MACCULLOCH ANGUS

Competition law and policy in the EC and UK, Routledge-Cavendish, London 2009

SCHAPIRO CARL/VERAIN HAL R.

Information Rules: A Stratigic Guide to the Network Economy, Bosten MA, Harvard Business School Press 1999

SCHLAURI SIMON/MICHAEL VLCEK

Netzneutralität, Eine Analyse mit Schwerpunkt auf dem geltenden Schweizer Kartell- und Telekommunikationsrecht, sic! 2010

SCHINDLER KATHARINA

Wettbewerb in Netzen als Problem der kartellrechtlichen Missbrauchsaufsicht, Die ―Essential-Facility”-Doktrin im amerikanischen, europäischen und schweizerischen Kartellrecht, Diss., Stämpfli Verlag AG, Bern 1998

SCHMIDTCHEN DIETER

Effizienz als Leitbild der Wettbewerbspolitik: Für einen more economic approach, in: OBERENDER, PETER (Hrsg.), Effizienz und Wettbewerb, Schriften des Vereins für Socialpolitik, Band 306, Duncker & Humblot Verlag, Berlin, 2005

SCHOMMER TIM

Die ―essential-facility”-Doktrin im Europäischen Wettbewerbsrecht, Diss., in: Münchner Juristische Beiträge, KÜFFNER THOMAS (Hrsg.), Herbert Utz Verlag GmbH, München 2003

SULLIVAN LAWRENCE ANTHONY

Handbook of the Law of Antitrust, American Casebook Series®, St. Paul Minn. West Publishing Co., 1977

SULLIVAN E. THOMAS/HOVENKAMP HERBERT

Antitrust Law, Policy and Procedure, Cases, Materials, Problems, 4th edition, Lexis Law Publishing, Virginia, 1994

SWANSON DANIEL G./BAUMOL WILLIAM J.

Reasonable and Nondiscriminatry (RAND) Royalties, Standards Selection, and Control of Market Power, Antitrust Law Journal, 73, 2005

TEMPLE LANG JOHN

Anti-competitive Non-pricing Abuses under European and National Antitrust Law, in: HAWK B. (ed.), Fordham Corp L Inst, 2003

- Defining Legitimate Competition: Companies' Duties To Supply Competitors, And Access To Essential Facilities, in: Fordham Int‘l LJ, 437 (1994), B. Hawk (ed.), 2003 (zit. TEMPLE LANG, Competition)

TEMPLE LANG JOHN/O‘DONOGHUE ROBERT

Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC, 2002, 26 Fordham Int‘l LJ

TOMLIN JONATHAN T.

Mars v. Coin Acceptors and the –Hypothetical Negotiation” Approach to Reasonable Royalty Calculations, available at SSRN: <http://ssrn.com/abstract=1205175>

TREACY PAT/LAWRANCE SOPHIE

FRANDly fire: Are industry standards doing more harm than good?, Journal of Intellectual Property Law & Practice, Oxford University Press, Vol. 3, 2008

TURNEY JAMES

Defining the limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation, njtip, 2005, vol. 3, no. 2

WEBER ROLF H.

Kartellrecht – Einleitung, in: VON BÜREN ROLAND/DAVID LUCAS (Hrsg.), Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Fünfter Band: Wettbewerbsrecht, Zweiter Teilband: Kartellrecht, Helbing & Lichtenhahn Verlag, Basel/Genf/München 2000 (zit. WEBER, SIWR V/2)

- E-Commerce, Rechtliche Rahmenbedingungen elektronischer Geschäftsformen, Schulthess Juristische Medien AG, Zürich 2001 (zit. WEBER, E-Commerce)

WEBER ROLF H./DÖRR BIANKA S.

Digitale Verbreitung von Rundfunkprogrammen und Meinungsvielfalt, Entwicklungen, Probleme, Lösungen, in: ZIK Publikationen aus dem Zentrum für Informations- und Kommunikationsrecht der Universität Züich, Band 15, Schulthess Juristische Medien AG, Zürich 2001

WEGMÜLLER MARK

Die Essential Facilities im Lichte des Missbrauchs einer marktbeherrschenden Stellung nach Art. 82 EGV, in: Baudenbacher Carl (Hrsg.), Aktuelle Entwicklungen des Europäischen und Internationalen Wirtschaftsrechts, Bd. 11, Helbing Lichtenhahn Verlag, Basel 2009

WHISH RICHARD

Competition Law, 6th edition, Oxford University Press, 2009

VAN BAEL IVO/BELLIS JEAN-FRANÇIOS

Competition Law of the European Community, 4th edition, Kluwer Law International, Netherlands, 2005

VAN DEN BERGH ROGER, The ‚more economic approach' and the Pluralist Tradition of European Competition Law, in: SCHMIDTCHEN DIETER/ALBERT MAX/VOIGT STEFAN (eds.), The More Economic Approach to European Competition Law, vol. 24, Mohr Siebeck Verlag, Tübingen 2007

ZÄCH ROGER

Schweizerisches Kartellrecht, 2. Auflage, Stämpfli Verlag AG, Bern, 2005 (zit. ZÄCH)

- Grundzüge des Europäischen Wirtschaftsrecht, 2. Aufl., Schulthess Juristische Medien AG, Zürich/Basel/Genf 2005 (zit. ZÄCH, Wirtschaftsrecht)

ZÄCH ROGER/KÜNZLER ADRIAN

Traditionelle europäische Wettbewerbspolitik versus „more economic approach", in: EPINEY ASTRID/ CIVITELLA TAMARA (Hrsg.), Schweizerisches Jahrbuch für Europarecht 2007/2008, Zürich/Basel/Genf/Bern 2008

Materials

- HEINONLINE: http://www.heinonline.org
- LEXISNEXIS: http://www.lexisnexis.de/e-solutions/KSH/de/index.html
- OFFICIAL JOURNAL OF THE EUROPEAN UNION: http://eur-lex.europa.eu/JOIndex.do
- OXERA: http://www.oxera.com
- SWISSLEX: https://www.swisslex.ch/cms_swisslex/slx/
- WESTLAW: http://web2.westlaw.com
- BOTSCHAFT zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG) vom 23. November 1994, BBl. 1995, 468 (zit. Botschaft 1994)

Links

USA:
- http://www.uscourts.gov
- http://www.supremecourtus.gov
- http://www.usdoj.gov/atr/

EU:
- http://www.curia.europa.eu/en/transitpage.htm
- http://www.europa.eu
- http://ec.europa.eu/competition/index_en.html

SWITZERLAND:
- http://www.admin.ch (Swiss Federal Administration)
- http://www.bger.ch/de/index.htm (Swiss Federal Supreme Court)
- http://www.weko.admin.ch (Swiss Competition Commission)

Part A. The Essential-Facilities-Doctrine

I. Introduction

1. The Essential-Facility-Doctrine – what's the issue?

a. An example

Imaging a public company A, which ownes and operates a port. The company also operates the only ferry service between the port and the port across the lake. Another ferry company B, intends to exploit the same sailing route as the company which ownes the port. It is however hindered by the port owner, a public corporation, by charging excessive payments for using the port and not allowing to build a new port next to theirs.[1] These facts make it impossible for the company B to compete with company A (Case of Port of Rødby)[2]. The Commission defined an essential facility as a facility or infrastructure without which the owner‘s competitors are unable to offer their services to customers.[3]

However, there are also situations which are not that clear:

Imagine the following Situation[4]: Company A operates skiing facilities at three of four skiing mountains in Aspen: Ajax Mountain, Buttermilk and Snowmass. Company B operates skiing facilities at the fourth mountain, Aspen Highlands.

For many years, the two parties, company A and B, individually offered a wide variety of ski-lift tickets. The ski-lift tickets of Company A were interchangeable among its three Aspen facilities. From the 1962-63 ski-season through the 1971-72 season, the two parties offered a joint multi-day ski-lift ticket which could be used at any of the four Aspen mountains. Revenues from the joint ticket were divided through coupons used to measure actual use at the four mountains. After a one-

1 See SCHOMMER, pp.124-126.

2 See Commission Decision 94/119/EC, 1994 O.J. (L 055) 52 (concerning a refusal to grant access to the facilities of the Port of Rødby [Denmark]).

3 See also Commission Decision 94/19/EC, 1994 O.J. (L 015) 8 (relating to a proceeding pursuant to Article 86 of the EC Treaty [IV/34.689- Sea Containers v. Stena Sealink-Interim Measures]).

4 Example based on the case of Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984); in this case the Supreme Court referred to the Essential-Facilities-Doctrine, but did not decide the case on that basis, see SULLIVAN/HOVENKAMP p. 703; see further MORGAN, p. 644-647; HOLMES, p. 407 and LIPSKY/SIDAK, p. 1207 and SCHOMMER, p. 19.

year discontinuance of the joint ticket during 1972-73, the joint ticket was reinstituted in 1973-74 through 1976-77. However, profits were divided on the basis of surveys of actual use. Company B received 17% of the net revenues from the sale of four-area tickets during 1973-74, 18% in 1974-75, 16% in 1975-76, and 13% in 1976-77. Company A offered to continue the joint ticket for 1977-78, if Company B would accept a 13% fixed percentage of the revenues. Company B objected to this percentage because it was based on the survey for 1976-77, which Company B contended was a ski-season market by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area. Company B wanted revenues to be divided on the basis of actual usage, it eventually accepted a «fixed 15% of revenues for 1977-78». Company A offered to continue the joint ticket for 1978-79, if the other Company would accept only 12 % of revenues. Company B again urged a return to a system of sharing revenues on the basis of actual usage. Based on these facts the parties were unable to agree and no joint tickets were offered thereafter. Company B sues against Company A alleging that Company A is violating Secs. 1 and 2 of the Sherman Act[5], by monopolizing, attempting to monopolize, and conspiring to monopolize the sale of downhill skiing services, and by conspiring to restrain trade (Case of Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 [10th Cir. 1984])[6].

b. Attempt of a possible definition

The Essential-Facilities-Doctrine[7] has been articulated as a subset of the so-called “refusal to deal” cases which place limitations on a monopolist‘s ability to exclude actual or potential rivals from competing with it.[8] The doctrine is a long-standing limitation on the general rule that a firm has no obligation to deal with its competitors.[9] “A monopolist has no general duty to share his essential facility, although there

---

5 See for the relevant articles Appendix A.

6 See literature in Fn. 4.

7 There is a lot of periodical literature about the the Essential-Facilities-Doctrine, see for example: BAVASSO, pp. 63-106; DEREK, pp. 438-452, CRAIG/DE BÚRCA, pp.1026-1028.

8 See further: WHISH, pp. 690-699; Van Bael /Bellis, pp. 954-955 and pp. 1229-1232, 1235-1237; ZÄCH, pp. 322-325; AMGWERD, pp. 226-230 and HOHMANN, pp. 23-25; RITTER/BRAUN, pp. 477-481; MÖSCHEL, pp. 579-581 and SCHOMMER, p. 1-3.

9 See BSK BUCHER, Vorbe. Art. 1 OR, Rz. 6.: “Niemand ist verpflichtet, einen bestimmten Vertrag zu schliessen; dieser selbstverständliche, in den Gesetzen kaum je ausdrücklich statuierte Grundsatz ist Ausfluss der Regelung, dass ein Vertrag allein durch (frei gebildeten) Vertragswillen der Parteien zustande kommt.”

are certain circumstances in which he must do so."[10] In other words and stated most generally we can say what follows: The Essential-Facilities-Doctrine imposes liability when one firm, which controls an essential facility (such as an airport, railway, gas, telecommunication or water pipeline), denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.[11] The doctrine arises, when a monopolist controls a facility or a resource, that serves a market, where the facility or resource is «essential» in the sense that competitors must have access to it if they are to be meaningfully able to compete with the monopolist in the downstream market in which the dominant firm holds monopoly power.[12]

c. USA

In the US the Supreme Court cases and numerous decisions by lower courts make clear that the Essential-Facilities-Doctrine renders a unilateral refusal to deal subject to potential liability as a monopolization violation of the Sherman Act (§ 1 and 2)[13]. Consequently, the Essential-Facilities-Doctrine is not an independent cause of action, but rather a type of monopolization claim.[14]

However, to define Essential-Facilities-Doctrine, with all its implications in terms of competition and related to regulatory policy,[15] is a pretty difficult task. As a matter of fact, a «simple» definition will hardly ever satisfy. Nevertheless the following definition should be a useful starting point: ―The expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means."[16]

---

10 Carribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1088 (D.C. Cir. 1998).

11 See Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991).

12 See HOLMES, p. 404.

13 See WEBER/DÖRR, p. 78 and SCHOMMER, pp. 14-28; see for the relevant articles Appendix A.

14 See Kramer v. Pollock-Krasner Found, 890 F. Supp. 250, 257 (S.D.N.Y 1995).

15 See also Part C. (FRAND).

16 Notice on the application of the competition rules to access agreements in the telecommunications sector, Official Journal of the European Communities, 98/C 265/02, para. 68 (Access Notice).

d. EC and Switzerland

Other than in the USA[17] there is a reason why the issue of the access for essential facilities in the EC became relevant. The Commission and many member states developed from the 1980s on policies, which favoured demonopolisation and liberalisation of sectors, which had been considered as natural monopolies or simply not appropriate for the market mechanism (gas, telecommunication, energy, water etc.).[18] In these circumstances competition is slow to emerge where the service provider can compete only if they would have access to the essential facilities such as for example gas-pipelines, which are owned by dominant undertakings. In cases of such important infrastructures it is often referred to the «bottleneck»[19] problem.[20] Competition is impossible where one firm, or a combination of firms, can prevent others from operating on the market by denying access to a facility which is essential and cannot be duplicated.[21] This problem was handled in many states by the establishment of specific regulatory regimes. In Switzerland there is for example a law related to telecommunication (FMG) that laid down by law reasonable and non-discriminatory terms for the access to the telephone sector (Article 11 FMG).[22]

e. Different Competition Policies

If we examine the Essential-Facilities-Doctrine in the US[23], EC[24] and Switzerland we will have to keep in mind that the competition policies[25] in these three regions differ.[26]

---

17 For Switzerland see AMGWERD p. 3-26; for the EC see WHISH, p. 692.

18 See WHISH, p. 691 and 692; AMGWERD p. 239-254.

19 See also WEBER/DÖRR, p. 68.

20 See also Part B.I.1./3. and literature in Fn. 215.

21 WHISH, p. 692.

22 See B.III.2. (Switzerland).

23 See also HOLZMÜLLER for the US, p. 230-231: „In einer Reihe von Entscheidungen die neue Linie [Effizienz-Standard] deutlich, nach der die Abschottung von Märkten und die Behinderung des Wettbewerbsprozesses nicht als Antitrust-Verstösse gewertet wurden, wenn nicht zugleich im Rahmen der *rule of reason* langfristige preissteigernde Effekte nachgewiesen werden. Nur wenn der einzige ökonomische Sinn in den wettbewerbsbeschränkenden und marktabschottenden Effekten besteht und sich preiserhöhende Effekte nachweisen lassen, verstösst ein einseitiges Verhalten gegen das Antitrust-Recht.—

24 See also HOLZMÜLLER for the EC, p. 249-250: „Dabei folgen die europäischen Gerichte und die Kommission – ungeachtet der Debatte um einen eher auswirkungsbezogenen Ansatz – einem dynamisch orientierten Wettbewerbskonzept, das ein Recht aller Marktteilnehmer auf freien Zugang zum Leistungswettbewerb auf allen Märkten beinhaltet und den Wettbewerb als Prozess schützt.÷See also Court of First Instance, Decision of 17. December 2007, T-201/04, Slg. 2007, II-3601, Tz.664 – Microsoft v. Commission: „ (…) last it must be borne in mind, that it is settled case law that Article 102 TFEU covers not only practices which

> *"Especially with focus on the misuse of market power which is the key element to examine regarding the Essential-Facilities-Doctrine, it shall not be overlooked that Article 2 of the Sherman Act and Article 102 (ex-Article 86) TFEU do not go together synchronic. The European Commission lays a certain weight on social-, political- and economic aspects, whereas the in the US single economic efficiency thoughts matter. The central role of «market integration»[27] as well as the thought of « fairness» plays in the US no or at least not a prior role. In the US social welfare[28] and efficiency[29] policies are related to Article 2 of the Sherman Act as the main issue."[30]*

This issue of the different competition policies[31] we would also come across especially by the so called «more economic approach»[32].

In Part B we will feel the pulse of the Essential-Facilities-Doctrine by examining the leading cases. We will see for example, that the doctrine is applied cautiously and usually in exceptional circumstances that meet the special requirements.

may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (…). In this case Microsoft impaired the competitive structure."

25 In German: «Wettbewerbspolitische Leitbilder»

26 See SCHINDER, p. 3 and WEBER/DÖRR, p. 77.

27 See ENCHELMAIER, p. 3-15; see also BREITENMOSER, ch. 4, 5 and 6; BREITEMOSER, p. 26-27; ZÄCH Wirtschaftsrecht, p. 55-56; HERDEGEN, p. 42-60.

28 See for consumer welfare BORK, p. 81-82.

29 See BORK, pp. 192-195 and 435-439.

30 WEBER/DÖRR, p. 77 (translated by the author).

31 See for further details HÜSCHELRATH, p. 11. and RODGER/MACCULLOCH, p. 20-21 (US), p. 22-23 (EC) and p. 24-34 (Development of UK Competition law).

32 See Part A.I.2.b.

2. The Essential-Facility-Doctrine and its issues to be resolved

In the following subsections there are some selected issues which create controversy (what exactly constitutes an essential facility? When does access has to be given and to whom?)[33]. I do not discuss these issues in a full manner. I just want to give some thoughts to think about.

a. Remove the incentive to invest in the establishment of an essential-facility

In the case of Oscar Bronner[34] Advocate General JACOBS pointed out in paragraph 56 "that allowing competitors do demand access to the essential facilities of dominant firms, which might seem to be pro-competitive by enabling claimants to enter the market in the short term, might ultimately be anti-competitive, if the consequence would be to discourage the necessary investment for the creation of the facility in the first place."[35] At paragraph 57 JACOBS said furthermore, that in the long term, it is generally pro-competitive to allow undertakings to retain its facilities for their own use, since granting access to a third party may remove the reasons to invest in the general establishment of the facilities.[36]

b. More economic approach versus the traditional system of competition law

The «more economic approach»[37] is especially in Switzerland[38] a highly and intensive discussed issue.[39] This new theory reflects current economic thinking about

33 See JONES/SUFRIN, p. 482-518.

34 Case C-7/97, Oscar Bronner GmbH v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH (1998); see also Opinion of Advocate General Jacobs, delivered on 28 May 1998, Case C-7/97 Oscar Bronner GmbH v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH.

35 WISH, p. 692.

36 See WISH, p. 692 and JONES/SUFRIN, p. 487-488.

37 See in general for the more economic approach in the EC: SCHMIDTCHEN, p. 9: „Seit etwa 1999 stösst man in wettbewerbspolitischen Stellungnahmen der EU-Kommission immer häufiger auf eine Formel, die man vorher nicht kannte: «a more econmic approach»."

38 See ZÄCH/KÜNZLER, p. 285-296 (ZÄCH/KÜNZLER legen im Kontext der Problemstellung des „more economic approach" [S. 285 ff.] dar, dass die Aufgabe des Wettbewerbsrechts nach dem neuen Theorienansatz nicht mehr darin bestehe, „im Sinne einer Rahmenordnung gewisse Spielregeln zu formulieren und dabei Verfahrensgerechtigkeit bzw. Gerechtigkeit des Spielverlaufs sicherzustellen", sondern dass auf die Ergebnisgerechtigkeit abgestellt wird (Wohlfahrtsauswirkung). Nach traditioneller Auffassung soll wirtschaftlicher Wohlstand jedoch nicht primäres und direktes Ziel sein, sondern indirekt über die Handlungsfreiheit der wirtschaftlichen Akteure angesteuert werden.); Künzler, Effizienz, p. 32-68; KÜNZLER, Regelungsrahmen, AJP, p. 1074-1084.

39 HEINEMANN, more economic approach, p. 949 ss.

competition, incentives and efficiency. It is argued, that it is time for antitrust policy to move beyond structural understandings of competition (preserving competition) and into the realm of explicit welfare analysis.[40]

The following two examples will show the differences between the two systems: (1) Beer X is in Zurich very famous; that is why every so called in-bar wants to provide Beer X to make big money. Now, corporation A which produces Beer X does not deliver one special bar B in Zurich. According to the traditional conception of competition law Bar B is protected, because the corporation A might for example have abused its dominant position. In the spotlight of the «more economic approach» bar B in Zurich would hardly be protected by competition law, because the consumers can get the beer X in every other bar in Zurich. (2) If there is simply no further capacity or space for a third party (which would generate competition), there might be a higher chance for a duty to increase capacity in order to create access under the traditional system. The traditional system protects every new competitor; where as the concept of a more economic approach is based on efficiency and on the primary goal of consumer welfare, which would hardy lead to an increase of capacity.

Behind this background one statement of Advocate General Jacobs in the case of Bronner is pretty interesting. In paragraph 58 Jacobs stressed the importance of the fact that the primary purpose of Article 102 TFEU is to prevent distortions of competition, and not to protect the position of particular competitors.[41] Recently the Commission published a guidance on the Commission‘s enforcement priorities in applying Article 102 TFEU related to abusive exclusionary conduct by dominant undertakings.[42] On behalf of price based exclusionary conduct the Commission now will apply the «as efficient competitor test»,[43] under which it will intervene except evidence obviously suggests that an «as efficient competitor» can *in concreto* compete with the dominant firm‘s pricing policy.[44] On the other hand, ~~t~~the guidance pa-

40 See Kirchner, p. 7-26 and Van den Bergh, p. 27-36.

41 See Whish, p. 693.

42 Guidance on the Commission‘s enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings, OJ C 45/7, 24.2.2009.

43 Kloub, C (Price based exclusionary conduct).

44 See Kloub, C (Price based exclusionary conduct); see also § 22 of the guidance paper on application of Article 82 EC (now Article 102 TFEU) (Fn. 31).

per also recognizes that from a dynamic efficiency point of view a foreclosure of even a less efficient competitor may in certain circumstances merit intervention”.[45]

c. Appropriate price for access to an essential facility

To achieve an access to an essential facility is obviously the first step to take. The next step is the question, how much does the new competitor has to pay for the access? What is the appropriate price for access?[46] It can not be the case that once an access for an essential facility is legally possible because of a court decision, but the plaintiff can not afford the high price for the access. Here the FRAND-Principle might matter (see Part C). Related to the Essential-Facilities-Doctrine and the obligation to supply competitors RIDYARD[47] stresses that access to a facility should not be required only where competition in the downstream market has seriously broken down. The concept of an essential facility should be very narrowly defined. There are however difficult problems of access pricing to be faced, so that competition authorities may as a result of the doctrine end up as price regulators.[48]

d. Refusal to license intellectual property rights and refusal to supply information needed for interoperability

A controversy legal question has been whether the law of refusal to supply can be applied to owners of intellectual property rights or to proprietary information which refuses to grant licence or to make the information available to a third party.[49] These issues were dealt in the case of IBM[50] in 1980 and in the famous case of Microsoft[51] in 2004.[52]

---

45 See KLOUB, C (Price based exclusionary conduct); see also § 23 of the guidance paper on application of Article 82 EC (now Article 102 TFEU), (Fn. 31).

46 See Part C.I.1. (FRAND).

47 See RIDYARD, p. 438, 447-8, 450 and 451.

48 JONES/SUFRIN p. 484.

49 See SCHOMMER, pp. 144-164.

50 See IBM (1984) OJ L118/24; (1984) 2 CMLR 342 … 644 and IBM Settlement (1991) OJ L122/42 … 769.

51 Case T-271/06, Microsoft Corporation v Commission of the European Communities; see also TURNEY, p. 179; see also T-201/04, 17. September 2007, Microsoft v. Commission; related to the mandatory access see LIPSKY/SIDAK, p. 1226-1247.

52 See for further information related intellectual property rights and competition law: HEINEMANN, p. 33-46 (HEINEMANN fokusiert in seinem Aufsatz die Schnittstellen von Immaterialgüter- und Kartellrecht. Obwohl beide Rechtsgebiete das gleiche Ziel der Innovationsförderung anstreben, kann es angesichts der Komplementarität der Rechtsgebiete zu Friktionen kommen [z.B. zu weit gefasste Ausschliesslichkeitsrechte, welche dann doch noch einer kartellrechtlichen Kontrolle unterliegen]. Solche Spannungen sollten nach HEINEMANN nur

e. Justified reasons for denying the access for an essential facility?

Under both cases Bronner[53] and IMS[54], denying access to an essential facility does not violate Article 102 TFEU, if there is an objective justification.[55] –Obvious justification would be that the undertaking seeking access is not creditworthy or that it is technically incapable of using the facility in a proper manner. A particular issue that arises in the case of essential facilities is that there may be capacity constraints which make it impossible for the access to be provided."[56] What the acceptable reasons are for a denial of access is controversial (an auction may be a solution).[57]

However, Temple Lang[58] says that there may be justifications for denying access to essential facilities. Though the basic principle is that if a reasonable owner of the facility who had no interest in any downstream operation would have a significant interest, acting logically, for refusing access, the vertically integrated company is entitled to do so. Consequently, according to Temple Lang, an owner of an essential facility may refuse access, if, e.g. giving access would reduce the efficiency of the downstream users of licences – including ultimate users. Furthermore we can take the following two observations with us:[59]

> **1.** In Community law there is a broad general principle that companies in dominant positions must not refuse to supply their goods or services if refusal to supply would have a significant effect on competition. This principle applies to both customers and competitors. Though neither the scope or the exceptions to this principle have yet been fully clarified, it initially made it unnecessary to develop a special category for essential facilities cases.
>
> **2.** Key questions in determining whether there is a duty to give access to facilities in single firm refusal cases therefore are:

---

durch gegenseitige Rücksichtsnahme minimiert und nicht durch Vorrangsregeln nach Art. 3 Abs. 2 KG eliminiert werden.); see also Which, p. 786-792.

53 See Part B.II.3.

54 See Part B.II.4.

55 See Whish, p. 697 and Mestmäcker/ Schweitzer, p. 453; Jones/Sufrin p. 510.

56 Whish, p. 697.

57 See Mestmäcker/ Schweitzer, p. 453.

58 Temple Lang, p. 235, 272-273; see also Temple Lang /O'Donoghue, p. 83, 159-162 and Jones/Sufrin p. 510-511.

59 See Temple Lang, p. 272-273.

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

Further to that in the Microsoft decision[60] the Commission rejected Microsoft‘s argument, that its refusal to supply interface information was justified by the need to protect innovation.[61]

---

60 See Microsoft, Commission Decision, 24 March 2004, COMP/C-3/37.792.
61 See Part B; JONES/SUFRIN, p. 511 and 513-514.

Part B. The leading cases in the USA, EC and Switzerland

I. USA

1. Introduction

The Essential-Facilities-Doctrine was developed in American Antitrust-Law.[62] The date of birth of the Essential-Facilities-Doctrine is considered to be in the year 1912 in which the case of United States v. Terminal Railroad Association of St. Louis[63] was decided. Even though, in this case the specific term «Essential-Facilities-Doctrine» was not used.[64] The first explicit reference to the Essential-Facilities-Doctrine was made by NEALE[65] in 1970 and later by SULLIVAN[66] in 1977.

NEALE coined the term «bottleneck-situation» by saying: “Sometimes it happens that one group alone has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants. These are so called «bottleneck» situations.”[67]

SULLIVAN summarizes as follows: We can generalize by saying that if a group of competitors, acting in concert, operate a common facility and if due to a natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility; the competitors operating the facility must give access to the excluded competitors on reasonable and non-discriminatory terms.[68] Further to that, Sullivan says that there must be a limiting case for this rationale.[69] To allow competitors to enter the facility after the success is achieved is to allow them to share in that success without having put up any stake (the competitors took for example no investment risk in this enterprise).[70] For SULLIVAN an answer to this problem might be, “to allow any firm to have access where the need for access to

---

62 See WHISH, p. 691; JONES/SUFRIN, p. 476 and 514-518 and SCHOMMER, pp. 14-29.
63 224 US 383 (1912).
64 See LIPSKY/SIDAK, p. 1195: “The phrase «essential facility» does not appear in any reported judicial decision until 1977. A few early cases, however, provide the foundation for the essential facilities doctrine and explain its evolution [e.g. the case of Termial Railraod].”.
65 NEALE, p. 66-70 («Bottleneck» agreements which deny scarce facilities to competitors: Associated Press).
66 SULLIVAN, p. 125-127 and 131-132.
67 NEALE, p. 61.
68 SULLIVAN, p. 131.; related to non-discriminatory terms see also Part C. (FRAND).
69 See SULLIVAN, p. 132.
70 See SULLIVAN, p. 132.

compete successfully is shown, but to allow the original investors an adequate return upon their earlier investment, predicated upon the risk elements which it involved."[71]

AREEDA states clearly and critically that the Essential-Facilities-Doctrine ―is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are." Further to that AREEDA says: ―As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of that response is then applied – often mechanically, sometimes cleverly – to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins."[72]

Essential facilities is now probably in the expansionary second phase, which needs to be brought back to antitrust policy.[73] With that in mind, I will review the cases usually relied upon, beginning with multifirm combinations.[74] We will see later on taking a look on the cases that Areedas' concern is even now an issue.[75]

In 1997 the Essential-Facilities-Doctrine was at the first time acknowledged by a court of appeal in the case of Hecht v. Pro-Football, Inc.[76],[77] based on the Sherman Act (§§ 1 and 2)[78].[79] However, the Essential-Facilities-Doctrine is one the Supreme Court has refused to accept or deny.[80] In AT&T Corp. v. Iowa[81] Justice BREYER acknowledged that the court had never adopted the Essential-Facilities-Doctrine concept as an antitrust doctrine and in Verizon Communications v. Law

71 See SULLIVAN, p. 132; related to the price for access see also Part A. I.2.c.
72 AREEDA, p. 841.
73 AREEDA, p. 841.
74 AREEDA, p. 841.
75 See Part B.II.5.
76 570 F2d982, 992 (D.C. Cir. 1977), see also: BECKMERHAGEN, p. 51 and SULLIVAN/HOVENKAMP, p. 704.
77 See Part B.I.3.; see also See LIPSKY/SIDAK, p. 1195: ―The term appears to be first defined in the published judicial opinions in Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S.956 (1978).
78 See Appendix A.
79 See HOHMANN, p. 25.
80 See FEMI, p. 308, HOHMANN, p. 25, BECKMERHAGEN, p. 40-51.
81 Util. Bd. 119 S.Ct 721 (1999).

Offices of Curits Trinko[82] Justice SCALIA noted that the court had never recognised such a doctrine and there is no need either to recognize it or repudiate it. In the lower courts there are disputes about the status in proceedings.[83] In Alaska Airlines, Inc. v. United Airlines, Inc.[84] the court regarded the case of Otter Tail[85] as the only decision of the court relating to essential facilities; in contrast to Twin Labs v. Weider Health & Fintness[86], both the Lorain Journal and the Aspen judgements were regarded as representing presence of the Essential-Facilities-Doctrine in the court‘s jurisprudence.[87]

2. United States versus Terminal Railroad Association (1912)

a. Facts of the case

Railroad companies had entered into an agreement between themselves for the purpose of acquiring railroad terminals and related facilities[88] with a view to operating them through a jointly owned corporation.[89] The geographic location of the city and its railway terminating points were crucial to the case: St Louis, Missouri sits on the western bank of the Mississippi River, at which point half of a set of 24 railways terminate, the other half terminating at East St Louis in Illinois, on the opposite eastern bank of the river.[90]

The corporation subsequently acquired control of the only three main railroad bridges used for crossing on both sides of the river, along with all terminal facilities linking the bridges on both sides of the cities. They than imposed premium charges, known as «arbitraries», especially on «non-member companies» of the Association travelling within or crossing from the St Louis side of the river, with exemptions

82 540 US 398, 411 (2004).
83 See FEMI, p. 308.
84 See 948 F.2d 536, 543 (9th Cir. 1991).
85 See United States v. Otter Tail Power Co. 331 F. Supp. 54, 61, (D. Minn. 1971), modified in 410 US 366 (1973).
86 900 F.2d 566, 569 (2nd Cir. 1990).
87 See SCHOMMER, pp. 16-19.
88 Like e.g. ferry alliances; see SCHOMMER, p.15.
89 See United States v. Terminal Railroad Association of St. Louis, 224 US 383 (1912); see Syllabus in the case of United States v. Terminal Railroad Association of St. Louis, 224 US 383 (1912).: Whether the unification of terminals in a railroad center is a permissible facility in aid of interstate commerce, or an illegal combination in restraint thereof, depends upon the intent to be inferred from the extent of the control secured over the instrumentalities which such commerce is compelled to use, the method by which such control has been obtained, and the manner in which it is exercised.
90 See United States v. Terminal Railroad Association of St. Louis, 224 US 383 (1912).

given to traffic originating within areas in which competitive conditions existed between St Louis and the toll railway bridge at Memphis, which was roughly 285 miles to the south.[91]

b. Legal aspects

The government‘s case was brought under both provisions §§ 1 and 2 Sherman Act[92] – the latter in the sense of the creation of a combination with the collective power to impose unfair prices and conditions on consumers using their facilities. Throughout this decision, the court took note of the nature and origin of the properties in question. In this regard, the court found it easier to recognize the topography of the areas and the efficiency brought about by the unification of the railroad facilities; and thus did not regard the combination as an affront to the law as it was almost impracticable for the companies concerned to each have built their own bridges. Further to that the court also applied considerable weight to the opinion of the defendant‘s expert witness: ―The witness, however, points out that such a terminal company should be the agent of every company, and furthermore that its service should not be for profit or gain."[93]

Subsequently, the court queried the legality of the premium charges imposed on non-members travelling from and within St Louis and the provisions in the contracts which stipulated that competing non-member companies might only be allowed access to the ―(…) joint use of the terminal system on unanimous consent, but not otherwise, of the Directors‘ of the Terminal Railroad Association of St Louis"[94] (…) and on the payment of such consideration as they determine.[95] The provision and/or its application were deemed as discriminatory, and a threat that would put

91 ALESE, p. 308-309; see also HOHMANN, p. 30 and AREEDA, p. 841 and SCHOMMER, pp. 14-15.

92 See for the relevant articles Appendix A.

93 See 224 U. S. 405-406.

94 See 224 U. S. 400.

95 See furthermore the following argument (Page 224 U. S. 400), Fn. 89: ―That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company."

non-members at a cost disadvantage.[96] The defendant's response that the provisions were not effective since they were not enforced and that non-members would be charged the same as members was not sufficiently persuasive for the court. It therefore ordered the clause to be stricken out and replaced by one providing access on equal terms.[97]

The court's analysis took in many factors that were subsequently taken for granted by some decisions in lower courts into substantial considerations. The perusal of how the economic power was unified, while giving rise to the applicability of the § 2 provisions, did not result in a per se condemnation – due, in particular, to the efficiency generated by the joint venture. While its assessment established a violation of the antitrust laws, the remedies crafted did not threaten the recognized efficiency (better coordination of transportation facilities and possible elimination of duplicitous costs incurred by separate management structures) by requiring that parties involved returned to their previous competitive positions. Furthermore, the facility was not only regarded as the market to be assessed, it also took on the overall impression, as reflected by the defendant's expert view, that it was an industry enhanced product, with access difficult to argue against wherever there is room for one more entity to enter the market at reasonable rates and access would not obstruct the working of those already using the facility.[98]

c. Note

In brief, the essential facilities notion is usually traced to the *Terminal Railroad* combination case. The Terminal Railroad Association controlled passages into and out of St. Louis, which was an important railroad junction. This monopoly facility was then acquired by a combination of some, but not all, of the railroads transiting St. Louis. This combination of railroads did not create anything; it merely acquired an existing facility. The combination was then in position to use the pre-existing monopoly to exclude or disadvantage competitors needing to pass through St. Louis. Recognizing that the combination had obtained a monopoly through joint purchase, the Supreme Court wisely concluded[99] that the most efficient remedy was to admit

96 See 224 U. S. 411.
97 ALESE, p. 309.
98 ALESE, p. 310.
99 Id. at 411-12.

non-member competitors to the consortium.[100] In addition, the Supreme Court obliged the Terminal Railroad Association to provide transfer to non discriminatory charges.[101]

3. Hecht versus Pro Football Inc. (1977)

a. Facts of the case

At the circuit court level the phrase «essential facility» makes its first appearance in Hecht v. Pro-Football, Inc[102].,[103] a case in which the promoter of a proposed new football team demanded access to RFK[104] stadium in Washington.[105] The case concerned the unsuccessful application of the plaintiff for an American Football League franchise for the Washington, DC area. The claimant took the position that the grant of exclusive use by the public authority to its rivals for the franchise, the Washington Redskins, had affected the success of its application. The district court reserved a jury verdict in favour of the defendants for lack of explanation to the jury of the constituents of the Essential-Facilities-Doctrine. Therefore, the district court provided the legal standard as requiring that ―(…) use of the RFK stadium was essential to the operation of a professional football team in Washington (…) that such stadium facilities could not practicably be duplicated by potential competitors (…) that another team could use RFK stadium in the Redskins' absence without interfering with the Redskins' use (…) and (…) that the [exclusive arrangement] prevented equitable sharing of the stadium by potential competitors"[106], before it could find liability under the restraint of trade provisions.[107]

---

100 AREEDA, p. 841.

101 See 224 U. S. 411: ―Such a plan of reorganisation must also provide definitely for the use of the terminal facilities by any other railroad […], upon just and reasonable terms and regulations as will, in respect of use, character and cost of service, place very such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."

102 570 F.2d 982, 992 (D.C. Cir. 1977).

103 570 F.2d 982 (D.C. Cir. 1977) cert. denied, 98 S. Ct. 3069 (1978); see also See LIPSKY/SIDAK, pp. 1202-1205.

104 Means the Robert F. Kennedy Stadium; see also LIPSKY/SIDAK, p. 1203.

105 See DAVID B. ALBECK at: <http://www.davidalbeck.com/writings/trinko.htm>.

106 570 F.2d at 993.

107 HECHT , 570 F.2d at 982.

–Leaving aside the fact that a lower court had explicitly inserted a doctrine into general antitrust law without the court deeming it fit to grant certiorari, the requirement in this case appears to rely chiefly on the criteria of examining the nature of a product (a stadium owned by a public authority) and the existence of capacity. The product was facilitated by the government – and as a result of this – where its efficiency could be shared without impinging on the access of those already using it, there would appear to be not much room for positions arguing otherwise. The matter itself could have been resolved by the public authority issuing guidelines or by-laws on the terms of access and use of the stadium. The notion of equitable sharing would appear to resist unreasonable demand for use by the plaintiffs. The perceived remedy in the court's instructions would appear to be self-enforcing and within the grasp of the public authority for implementation. The approach in Hecht could in many regards be considered as relating to instances of regulatory failure in rectifying defects in the operation of important public facilities."[108]

b. Legal aspects

The court used in this case the essential facility theory as a synonym for «bottleneck theory», citing a 1960 treatise for the latter phrase. The plaintiff in Hecht won a new trial because of the trial judges failure to give the following jury instruction:

> If the jury found
> (1) that use of RFK stadium was essential to the operation of a professional football team in Washington;
> (2) that such stadium facilities could not practicably be duplicated by potential competitors;
> (3) that another team could use RFK stadium in the Redskins' absence without interfering with the Redskins' use; and
> (4) that the restrictive covenant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute a contract in unreasonable restraint of trade, in violation of Sherman Act 1 and 3.[109]

[108] ALESE, p. 311-312.
[109] Hecht , 570 F.2d at 993.

c. Note

Five years after Hecht, in the case of MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.1982), the elements of an essential facilities claim were set out in what has become their canonical form, adopted verbatim by all but two circuits[110] over the next decade.[111]

4. MCI Communications versus American Tel. Co. (1983)

a. Facts of the case

Prior to 1969, the telecommunication industry was regulated as a lawful monopoly. Long distance service was provided by the Long Lines Department of AT& T.[112] In 1963 MCI requested permission from the Federal Communication Commission (FCC) to construct and operate a long distance telephone system between Chicago and St Louis. In 1969, after lengthy administrative proceedings in which AT&T and the other general service carriers opposed MCI‘s application, the FCC approved MCI‘s proposal. In September 1971, AT&T entered into interim contracts with MCI defining the kind of interconnections that AT&T would provide for MCI‘s initial Chicago-St Louis route and establishing the price for those interconnections. Through a series of informal complaints and conferences with FCC staff and, MCI charged that AT&T was treating it unfairly, on the question of interconnections, in at least three respects:

1. MCI claimed that AT&T was unlawfully denying it interconnections for point-to-point-service to customers located outside a local distribution area, including multi-point service;

---

110 The two exceptions are the 6th Circuit, where despite use of a four-element formulation by a few district courts, a simpler summary (quoted from discussion in Hecht) appears to be the rule, e.g., Directory Sales Mgt 833 F.2d 606 (6th Cir 1987): where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.; and the 8th Circuit, which has adopted a nominally three-part test that closely parallels the MCI four-part test: "(1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible". City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157, 160 (8th Cir. 1989) [David B. Albeck at: <http://www.davidalbeck.com/writings/trinko.htm>].

111 See the case below no. 4.

112 MCI Communications Corp. V. AT&T Co., 708 F. 2d 1081, 1132 (7th Cir.), cert. denied, 464 US. 891 (1983); see also for a summary, BECKMERHAGEN, p. 29-33.

2. MCI claimed that it was being charged excessive and discriminatory prices for the local prices for the local distribution facilities provided by AT&T; and

3. MCI claimed that it was being harassed by AT&T employees in the provision of local distribution facilities through delays, improper installation, improper maintenance and other similar practices. (…).[113]

b. Legal aspects

As articulated by the Seventh Circuit the Essential-Facilities-Doctrine requires proof of the following four elements[114]:

(1) Control by a monopolist of an essential facility or resource serving the monopolist‘s market;

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

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

(4) the feasibility of providing access to the facility.

Applying this standard, the court in the MCI case affirmed findings of monopolization in AT&T‘s refusal to grant a competing supplier of long-distance telephone services access to local telephone facilities controlled by AT&T affiliates, where access was essential for effective competition within the long-distance market monopolized by AT&T. Also other decisions have employed similar reasoning to find actual or attempted monopolization of markets dominated by firms have refused to make the facilities available to their competitors on reasonable, non-discriminatory terms.[115]

---

113 See BLUMENTHAL, pp. 856-860 (in relation with the market definition) and SULLIVAN/HOVENKAMP, p. 976-983.

114 See also WEBER/DÖRR, p. 78.

115 See e.g., United States v. Otter Tail Power Co. 331 F. Supp. 54, 61, (D. Minn. 1971), modified in 410 US 366 (1973) and United States v. Terminal Railroad Association of St. Louis, 224 US 383 (1912); See further the case of Advanced Health Care Serv. v. Radford Comm. Hosp., 910 F2d 139 (4th Cir. 1990), in Holmes, p. 405: A supplier of hospital outpatient equipment sated a cause of action under the Essential-Facilities-Doctrine, where it alleged that a hospital that controlled over 80% of patient services within the relevant service area 0had required outside nursing agencies that desired access to the hospital to agree to refer

c. Note

The case of MCI Communications v. AT&T is still a leading case for the telecommunication sector. Related to § 2 Sherman Act the court stated: ―A monopolist‘s refusal to deal under these circumstances is governed by the so called essential facility doctrine. Such a refusal may be unlawful because a monopolist‘s control of an essential facility (sometimes called a «bottleneck») can extend monopoly power from one stage of production to another, and from one market to another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms”.[116]

Important is the fact, that the court said, that there must be competition in the derived market for the Essential-Facilities-Doctrine.[117]

5. Verizon versus Communications Inc. v. Law Offices of Curtis Trinko (2004)

a. Facts of the case

Customers who received local telephone services from competing local exchange carriers (LEC), brought an action against the incumbent LEC alleging that it had breached its duty to share under the Telecommunication Act 1996 and that its failure to share violated section 2 of the Sherman Act.[118] The Supreme Court held that the duties under the 1996 Act could not be enforced through a section 2 claim, but the Act did not affect any liability which the LEC had under general antitrust law. The court held in paragraph 6 that even if the Essential-Facilities-Doctrine existed it served no purpose here as the question of access was taken care by the 1996 Act.[119]

their patients to an equipment supplier in which the hospital to agree to refer their patients to an equipment supplier in which the hospital was part owner.

116 MCI Communications Corp. V. AT&T Co., 708 F. 2d 1081, 1132 (7th Cir.), cert. denied, 464 US. 891 (1983); see also WEBER/DÖRR, p. 78..

117 See 708 F2d 1081, MCI Communications Corporation v. American Telephone and Telegraph Company, Fn. 100: ―Rather, the point made in those cases is that in the absence of competition between a potential seller and a putative buyer, there is no room to apply the essential facilities doctrine.”

118 540 US 398 (2004).

119 See JONES/SUFRIN, p. 515.

b. Legal aspects

In paragraph 6 Justice SCALIA points out that the Supreme Court has never recognized the Essential-Facilities-Doctrine, which has been ‚crafted by some lower courts‘. Given, that it could not apply here he states that there is ‚no need either to recognize or repudiate it here‘. However, the tenor of the judgement is not sympathetic towards it. Earlier he is careful to confine the Court‘s existing refusal to deal precedents such as the famous Aspen Skiing and Otter Tail cases to their own facts.[120] Even taking into account the ECJ‘s conservative approach in the case of Bronner[121], it appears that refusals to deal and essential facilities are an area of divergence between US and EC law.[122]

> **Justice SCALIA**: "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. […] We have never recognized such a doctrine, […], and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." […]. Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine

120 See JONES/SUFRIN, p. 515 and WHISH p. 691.
121 See Part B. II.3.
122 JONES/SUFRIN, p. 518.

> of forced access. To the extent respondent's "essential facilities" argument is distinct from its general §2 argument, we reject it."[123]

c. A new element by the Supreme Court

The U.S. Supreme Court's ruling in the case of Verizon v. Trinko (2004) in effect added a fifth element to the for set out in MCI Communications vs. American Tel. Co. (1983)[124]: Absence of regulatory oversight from an agency (the Federal Communications Commission) with power to compel access.[125]

These elements are difficult for potential plaintiffs to establish for several reasons. It is quite difficult for a plaintiff to demonstrate that a particular facility is «essential» to enter into and/or competition within the relevant market. The plaintiff has to demonstrate that the «facility» must be something so indispensable to entry or competition that it would be impossible for smaller firms to compete with the market leader. Likewise, the plaintiff must show that compelling the dominant firm to permit others to use the facility would not interfere with the ability of the dominant firm to serve its own customers.

There is no small degree of controversy about what exactly constitutes an «essential facility». While the doctrine has most frequently been applied to natural monopolies and owners of transportation facilities, it has also been applied in situations involving intellectual property.[126] For example, it is possible for a court to apply the doctrine in a case where one competitor refuses to sell materials protected by copyright or patent to potential competitors.[127] Contrary to that LIPSKY/SIDAK[128] put a warning blinking red light to that. According to them, the the Essential-Facilities-Doctrine cannot be applied to intellectual property. ―To do so would threaten the basic objective of the legal systems that create incentives for the production of information, and would thus threaten technical progress."[129]

123 Justice SCALIA, sec. III, in: 540 U.S. 398 (2004).
124 See above p. 20.
125 See also WHISH, p. 691.
126 See SCHOMMER, p. 166.
127 See also HAY, p. 527.
128 See LIPSKY/SIDAK, p. 1220.
129 LIPSKY/SIDAK, p. 1220.

6. Summary and Conclusion

a. The main issue

In U.S. antitrust law, some it is argued that the Essential-Facilities-Doctrine has been articulated as a subset of the «refusal to deal» cases. Consequently, the doctrine states that owners of an «essential facility» have a duty to share it with others, a refusal of which violates Section 2 of the Sherman Act. Although the U.S. Supreme Court does not expressly apply the doctrine, lower courts utilize the doctrine by interpreting Supreme Court decisions applying Section 2 of the Sherman Act.[130]

b. Elements of the Essential-Facilities-Doctrine

The basic elements of a legal claim under this doctrine under United States antitrust law, which a plaintiff is required to show to establish liability, are:

1. Control of the essential facility by a monopolist;
2. a competitor's inability to practically or reasonably duplicate the essential facility;
3. the denial of the use of the facility to a competitor;
4. the feasibility of providing the facility to competitors;
5. absence of regulatory oversight from a agency with power to compel access.[131]

d. Tendency by the courts?

Currently the courts in the US are willing to give green lights for an access to an essential facility, if the competition itself is improved.[132] According to SCHINDLER[133], the Essential-Facilities-Doctrine had its entrance especially on network structure related to joint enterprises; today the doctrine has been applied to a wide variety of business contexts, namely from railroads and football stadiums to the New York Stock Exchange[134]. However, courts have declined to extend the doctrine to a pretty

130 See WEBER/DÖRR, p. 80.
131 See Part B.I.5c.
132 See WEBER/DÖRR, p. 79; AREEDA, p. 842.; HOLMES, § 3.13.
133 See SCHINDLER, p. 5.
134 See 373 U.S. 341 (1963) and BLUMENTHAL p. 864-865.

wide variety of situations, but never provided a coherent rationale for the limitations of the doctrine.[135] Further to that, we have to keep in mind the question of the appropriate access price. In the case of MCI the court said, that related to the Essential-Facilities-Doctrine there must be competition in the derived market.[136] Interestingly, in cases before and after that, competition in the derived market was no further element for the application of this doctrine.[137] Also the FTC does not require this additional element.[138]

135 See LIPSKY/SIDAK, p. 1187.
136 See remarks in Fn. 117.
137 See Hecht/Pro-Football, Inc., 570 F.2d 982, 992 (D.C.Cir. 1977) and Fishman/Estate of Wirtz, 807 F.2d. 520, 539 (7th Cir. 1986).
138 See General Motors Corp., 99 F.T.C. 464, 580 f. (1982); see also SCHOMMER, p. 36.

II. EC

1. Introduction

The first[139] express reference to the Essential-Facilities-Doctrine in EC law was made in the three harbour cases[140], e.g. Sealink/B&I Holyhead[141]. Sealink Harbours was the owner and operator of the port at Hollyhead, in Wales, and as such was held by the Commission to be in a dominant position on the market on the British side for port facilities for ferry services on the «central corridor» route between Wales and Ireland (i.e. Holyhead to Dublin and Dun Laoghaire). It ran ferries on that route. B&I also ran ferries from the port. B&I used a particular berth, the Admiralty Pier, and the limitations of the harbour were such that whenever Sealink‘s ferries passed the berth, the drawing away of water and turbulences meant that B&I had to cease all loading and unloading activity. B&I complained that Sealink intended to introduce a new timetable which would cause greater disruption to B&I‘s schedules in this way. The Commission adopted a decision providing for interim measures, ordering Sealink to return to its previous timetable. However, the matter finally never went to a court‘s decision because the dispute was settled.[142]

In the first sentence of paragraph 41 the Commission laid down the basic principle that an owner of an essential facility may have to provide non-discriminatory access to it to a competitor:

> 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 that facility or grants access to competitors only on terms less favourable than those which it gives its own services,

---

139 It is also possible to see that the Essential-Facilities-Doctrine manifested itself in earlier cases. See e.g. TEMPLE LANG, Competition, p. 437 and See JONES/SUFRIN, p. 476 (however not «expresis verbis»); see also WEBER/DÖRR, p. 80.

140 The three harbour cases: Sealink/B&I Holyhead, Decision by the Commission on 11 June 1992, CMLR 1992, 255; Sea Containers/Stena Sealink, Decision by the Commission on 21 December 1993, Abl. 1994 L 15/8 ff.; Port of Rödby, Decision by the Commission on 21 December 1993, Abl. 1994 L 55/52 ff.; see for the development DESELAERS, p. 563 and FURSE, p. 469 and SCHOMMER, pp. 111-129.

141 See Sealink/B&I Holyhead: Interim Measures (1992) 5 CMLR 255.

142 See JONES/SUFRIN, p. 479.

> thereby placing the competitors at a competitive disadvantage, infringes Article 102 TFEU, if the other conditions of that article are met (…).[143]

In EC competition law, the Essential-Facilities-Doctrine is dealt with under Article 102 TFEU.[144] It is applied to exclusionary practices, such as refusals to deal, having the effect of abuse of a dominant position in the relevant market.

2. Magill, 1995

a. Facts of the case

Magill[145] concerned copyrights in tv programs (television programme schedules) [146]: Most homes in the Republic of Ireland and around two-fifths of Northern Irish homes are able to receive television programmes broadcast by the Irish State Broadcaster (RTE), ITV and the BBC. Now, under United Kingdom and Irish copyright law, the BBC, ITV (acting through a subsidiary, Independent Television Publications Limited ["ITP"]) and RTE own the copyright in their lists of television programmes. These three broadcasters provided their programme schedules free of charge to daily and periodical newspapers but until 1985 there was no comprehensive weekly listing guide. In 1985 the publisher Mr. Magill decided to create a new Irish guide to all channels and complained to the European Commission when the three broadcasters refused to license him to reproduce their weekly listings. The publisher complained to the Commission, which ordered the broadcasters to grant the necessary licenses (the Commission decided that there was a breach of Article 102 TFEU). The ECJ upheld both the Commission's and the Court of First Instance's view that the refusal by television companies to permit publication of their listings was a breach of Article

143 The Commission cited cases 6 and 7/73 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v. EC Commission (1974) ECR 223, (1974) 1 CMLR 309; see further JONES/SUFRIN, p. 479.

144 The case of B&I/Sealink (CMLR 1992/2, S. 255 and Fn. 140 und 141) shows the reception of the Essential-Facilities-Doctrine in the EC, because the owner of the port did nether refuse to have further nor starting making any business relations; see also SCHOMMER, p. 118.

145 C-241/91 P and C-242/91 P.

146 See JONES/SUFRIN, p. 495-497.

102 TFEU and prevented publication of comprehensive listings for which consumer demand existed.[147]

b. Legal aspects

The ECJ upheld the Commission's imposition of a compulsory license on copyright owners to remedy a violation of Article 102 TFEU. The violation consisted of the exercise by television broadcasters of their exclusive rights under national copyright laws to prevent potential publishers of weekly television guides from copying their copyrighted weekly television listings. This prevented potential competitors from entering the market for weekly television guides in a geographic area comprised of Ireland and Northern Ireland, a portion of the United Kingdom.[148]

In Magill the ECJ affirmed that mere ownership of an IPR cannot confer a dominant position, as referred in the introduction above.[149] However the ECJ ruled that in certain extreme cases a certain usage or non-usage of an IPR can be considered to be abuse of a dominant position. The abuse consisted of a monopoly on information necessary to produce weekly magazines, through the copyright associated to it. The proprietors of the monopoly abused their position according to Article 102 TFEU because (1) there where no actual or potential substitutes for a comprehensive weekly television guide, and there was a consumer demand for one; (2) there was no justification for such refusal either in the activity of television broadcasting or in publishing television magazines; (3) the broadcasters reserved themselves to the secondary market of weekly television guides by excluding all competition on the market. The ECJ decided that refusal to license an IPR to a party who intends to create a competitive product, can constitute an abuse according to Article 102 TFEU, thus also including IPRs in EC-competition law jurisprudence.[150]

However, the importance of Article 102 TFEU is clearly underlined by the Magill judgement and it is a matter of concern to holders of intellectual property

---

147 See Schommer, pp. 132-169 and FLINT, p. 1.
148 See capsule summary in C-241/91 P and C-242/91 P.
149 See for the impact of Magill on refusals to license, OPI, p. 453.
150 See Case 238/87 Volvo AB v Eric Veng, paragraph 9, and Magill, paragraph 50; see also: VIKTOR JOHANSSON, available at: <www.juridicum.su.se>.

rights that a refusal to license, even though there may be no classically abusive behaviour such as price fixing, may infringe Article 102 TFEU. Although the ECJ has confirmed that the principles in Magill will apply only in exceptional circumstances, it is likely that the judgement will lead to further challenges to holders of intellectual property rights who refuse to license third parties in particular in the field of computers and telecommunications.[151] Although the judgement appears to be confined to «exceptional circumstances» there is a problem with the judgement's lack of clarity and, in particular, its failure to explain in what «exceptional circumstances» it will apply.[152]

c. Note

Magill has given rise to controversy that the following question will show.[153] Are the conditions in the judgment the only ones which can constitute «exceptional circumstances» or is this concept open-ended? What is *in concreto* the meaning of the phrase «secondary market» and can Article 102 TFEU ever require a dominant company to license IPRs to enable another company to compete with it on the market where it is dominant? What is the measure of «indispensability» when determining whether refusal to license is abusive?[154]

Although the ECJ's judgment in IMS[155] is not perfectly clear, it seems to result in: (i) The setting in the Magill test is «sufficient» to find an infringement of Article 102 TFEU. This tends to confirm that other circumstances may also give rise to infringement; consequently the Magill test is not exhaustive.[156] (ii) The Magill test can be met even when the aspiring licensee intends to compete on the same market as the IPR holder. Nevertheless, the licensee must aim to introduce «new» products or services on that market, rather than merely «duplicating» the products or services already offered by the IPR holder. Or said it in different words, refusing a license to prevent price competition is not abusive, whereas refusing a license with the effect of

---

151 See Part B.I.5.c. and LIPSKY/SIDAK, p. 1220.

152 See SCHOMMER, p. 144 (IPR and the case of Magill); see FLINT, p. 1.

153 See FLINT, p. 1.

154 See also B.II.4 (case of IMS) and for the impact of refusals to license prior and after Magill, OPI, p. 452-463.

155 See for the case of IMS Part B.II.4.

156 See NORALL, p. 1; see for the Magill test Part B.II.4.b. (case of IMS Health).

preventing innovation is.[157] (iii) Magill test requires that a denial of the licence must make the introduction of new products impossible. Moreover, if the denial of licence leads to economical non-viability for the aspiring licensee to enter the market is also seen as abusive. Although the term «economically viable» appears to be a delusion of IPRs held by dominant companies. [158] In view of the lack of clarity in the language used, there is some doubt whether the ECJ (in this case consisting only of a three judge panel) intended the full implications of that language. Thus, it cannot be excluded that, when the European courts are given a further opportunity to consider the matter, they may seek to bring some clarification."[159]

3. Bronner

a. Facts of the case

An Austrian court referred to the ECJ under Article 234 EC (new Article 267 TFEU) the question whether the refusal by a newspaper group holding a substantial share of the market in daily newspapers to allow the publisher of a competing newspaper access to its home-delivery network, or to do so only if it purchased from the group certain additional services, constituted an abuse of a dominant position contrary to what was then article 86 of the Treaty (now Article 102 TFEU).[160]

Oscar Bronner was the publisher of a daily newspaper whose share of the Austrian daily newspaper market was 3.6 per cent of circulation and around 6 per cent of advertising revenues. Mediaprint was the publisher of two daily newspapers and carried on the marketing and advertising business of those newspapers through wholly-owned subsidiaries. The combined market share of the two newspapers was 46.8 per cent of total circulation and 42 per cent of total advertising revenues.

Oscar Bronner argued that under the doctrine of «essential facilities» Mediaprint was obliged to allow access to the home-delivery service by competing products and at market prices.[161]

---

157 See NORALL, p. 1.
158 See for the case of IMS Part B.II.4.
159 NORALL, p. 1.; see also SCHOMMER, p. 156 and 168.
160 Case C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG.
161 See JONES/SUFRIN, p. 487-492.

b. Legal aspects

The Court decided on 26 November 1998 that: The refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of Article 102 TFEU. The Court suggested that refusal would constitute an abuse only if the home-delivery service was indispensable to the carrying on of the business of the person requesting the service.[162]

The Advocate General in his opinion dated 28 May 1998 described the history of the Essential-Facilities-Doctrine in US law and decisions of the European Commission, and referred to ECJ cases raising similar issues as follows:[163]

> ―(56) First it is apparent 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 constitutional status. Incursions on those rights require careful justification. (57) Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest 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, purchasing or distribution facility 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. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it. (58) Thirdly, in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article 86[164] is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power. (61) It is on the other hand clear that refusal of access may in some cases entail elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term. That will be so where access to a facility is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability. (62) In assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to licence intellectual property rights. Where such exclusive rights are granted for a limited period, that in itself in-

---

162 See Case C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint (1998) ECR I-7791, (1999) 4 CMLR 112.

163 See further: WHISH, pp. 692-694, RITTER/BRAUN, pp. 410-411 and 471-472.

164 Now Article 102 TFEU.

volves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity. It is therefore with good reason that the Court has held that the refusal to license does not of itself, in the absence of other factors, constitute an abuse. (69) To accept Bronner‘s contention would be to lead the Community and national authorities and courts into detailed regulation of the Community markets, entailing the fixing of prices and conditions for supply in large sectors of the economy. Intervention on that scale would not only be unworkable but would also be anti-competitive in the longer term and indeed would scarcely be compatible with a free market economy."[165]

The ECJ does not use the term Essential-Facilities-Doctrine in the judgement.[166] The court just clarified as follows: "Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also 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."[167]

4. IMS Health

a. Facts of the case

IMS[168] is in the business of providing information to the pharmaceutical industry on sales of pharmaceutical products in Germany. For that purpose, IMS developed, in consultation with its customers and with doctors and pharmacies, a map of Germany segmented into «bricks» or geographical reporting units, and known as the «1860 Brick Structure», which, under German law, is covered by copyright. Seeking to compete with IMS, another firm named NDC attempted to develop its own brick structure, but discovered that customers and suppliers of data insisted on using the 1860 Brick Structure. They had participated in its elaboration, and would incur costs

165 Opinion of Advocate General Jacobs delivered on 28 May 1998. - Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG - Case C-7/97 (European Court reports 1998 Page I-07791).
166 See remarks in Fn. 160.
167 See remarks in Fn. 160, and in the decision Rz. 41.
168 See IMS Health v. NDC Health, Case C-418/01.

in using data prepared with another segmentation; as a result, NDC would have had to offer a product based on its own structure at a price so low as not to be viable.[169]

b. Legal aspects

NDC complained to the Commission. The Commission issued an interim decision ordering IMS to grant a license. IMS obtained an interlocutory order from the CFI suspending the Commission's decision, which the Commission then withdrew. In parallel, IMS sued before a German court, obtaining a preliminary injunction against NDC using the 1860 Brick Structure.[170] Before proceeding to the merits, the German court made a reference to the ECJ under Article 234 of the EC Treaty (now Article 267 TFEU), requesting guidance on the application of the *Magill*[171] doctrine.

In their pleadings before the ECJ, IMS asked the court to hold that the «exceptional circumstances» test could only be satisfied if denial of the license prevented the aspiring licensee from offering a new product on a market other than that on which the right holder operated; in other words, that Article 102 TFEU could never require a right holder to license the IPRs to compete with the right holder on the same market. By contrast, the European Commission and the complainant asked the ECJ to hold that there is no requirement of two separate markets; rather, it should be sufficient that the IPR is an indispensable input to permit competition with the right holder on the market on which it carries on business.

The ECJ's response was very finely nuanced. First, it seems to imply that the *Magill* tests are not exhaustive. This seems to follow from the reference to both *Volvo v. Veng*[172] and *Magill* as sources of the «exceptional circumstances» doctrine;[173] the possible circumstances in *Volvo v. Veng* are quite different from those in *Magill*[174]. This is further confirmed by the ECJ's statement that the *Magill* tests are

169 See also SCHOMMER, pp.186-188 and JONES/SUFRIN, p. 502-510.

170 See LG Frankfurt, AZ 2-03 O 283/00, 2-03 O 539/00, 2-03 O 628/00, 2-06 O 802/00, OLG Frankfurt, AZ 11 U 66/00.

171 See Part B.II.2.

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

173 See Paragraph 35, IMS Health v. NDC Health, Case C-418/01.

174 The notion that there could be circumstances in which refusal to license IPRs constituted an abuse of a dominant position was first stated by the ECJ in *Volvo v. Veng*, Case 238/87 [1988] ECR 6211. There the ECJ noted that refusal by a car manufacturer to license design rights to a body parts manufacturer was not 'in itself' an abuse, but there could be an abuse if it was coupled with refusal to supply spare parts to repairers, excessive pricing of spare parts, or ceasing production of spare parts for old models.

«sufficient» – leaving open the possibility that there are other circumstances which are also sufficient.

Second, following the lead of the Opinion of Advocate General Tizzano, the ECJ gave a new interpretation of the meaning of the conditions in the *Magill* test: There is an abuse only where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.[175] Although the way in which the word «secondary» is used may give rise to some confusion[176], the conclusion intended by the ECJ, as shown by the precise answer it gave to the German court's questions, seems to be the following:[177] if the right holder has a dominant position, there is an abuse if the refusal to license prevents the appearance of a new product, even on the same market as the one on which the right holder is operating. Apparently, where the *Magill* test is applied, refusal to license by a dominant company is abusive if it prevents innovation on the market on which the right holder operates, but not if it merely prevents price competition on that market.

The German court had also asked the ECJ two questions regarding the relevance of possible factual issues relating to the indispensability of access to the 1860

175 See paragraph 49, IMS Health v. NDC Health, Case C-418/01.

176 In paragraph 45, IMS Health v. NDC Health, Case C-418/01, the ECJ says that 'it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product. This suggests that it equated the «upstream/downstream» distinction with the «primary/secondary» distinction. In the IMS context, that approach has the effect of ignoring the market on which the IPR holder is operating, if that market is separate from the IPR.

177 Thus, in para 52 IMS Health v. NDC Health, Case C-418/01., the ECJ concludes: (…) the refusal by an undertaking which holds a dominant position and is the owner of an intellectual property right over a brick structure which is indispensable for the presentation of data on regional sales of pharmaceutical products in a Member State, to grant a license to use that structure to another undertaking which also wishes to supply such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC (now Article 102 TFEU) where the following conditions are fulfilled:

- the undertaking which requested the license intends to offer, on the market for the supply of the data in question, new products or services not offered by the copyright owner and for which there is a potential consumer demand;
- the refusal is not justified by objective considerations;
- the refusal is such as to reserve to the copyright owner the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

Brick structure to permit NDC to compete. NDC argued that participation by customers in elaborating the 1860 Brick Structure had made them dependent on it, and that users' switching costs to a new segmentation system would be so high as to render the use of that system by a competitor economically unviable. The ECJ confirmed that these were relevant issues. It cited *Bronner*[178] as supporting the proposition that it must be «impossible or at least unreasonably difficult» for the competitor to compete without access to the relevant IPR, and that operation without such access must be economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service[179].[180]

c. Note - Further legal aspects

The judgment is important because:

- It appears to provide a novel solution to some ambiguities in the case law under *Magill*: The *Magill* test is not exhaustive, and when it is applied, it renders abusive refusal to license a company wishing to compete on the same market as that of the IPR holder, provided that the competitor intends to introduce a «new» product and would be effectively prevented from doing so in absence of a license. This would appear to increase the exposure of right holders to attack from competitors seeking licenses to compete with them on their own markets, and from competition authorities acting in support of such competitors. The latter will now concentrate on alleging that they intend to introduce innovative products – a claim which can probably be made with some degree of plausibility in virtually all cases.[181] Moreover, the judgment confirms that the «exceptional circumstances» test is open-ended, and not limited to the conditions set forth in *Magill*.
- The judgment shifts the conceptual framework within which is conducted the appeal against the Commission's decision of 24 March 2004 in the *Microsoft* case, and any further enforcement action which the Commission may under-

[178] See Case C-7/97 [1998] ECR I-7791.
[179] Paragraph 28, IMS Health v. NDC Health, Case C-418/01.
[180] Arguments follow NORALL, p. 1.
[181] Query whether the right holder should be permitted to justify a refusal of a license on the ground that the right holder has the intention to introduce the same innovation as that intended by the aspiring licensee.

take against Microsoft. It gives increased importance to the question whether Microsoft's refusal to license interface specifications has a negative impact on innovation, and whether Microsoft is right in insisting that its competitors are merely seeking to duplicate its products.[182]

- The judgment provides an example of a divergence between the approaches of the EU and the U.S. in cases involving unilateral infringement. The U.S. Supreme Court's decision in *Verizon Communications Inc. v. Trinko* makes it clear that the courts should rarely impose upon a monopolist a duty to deal with its rivals.[183] In that case, the Court refused to find that Verizon had an antitrust duty to share with its competitors in the provision of local telephone service access to assets (*i.e.*, elements of Verizon's local telephone network) that it otherwise would not sell separately to consumers or competitors. The Court concluded that forced sharing of assets in these circumstances (**1**) may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities; (**2**) requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing; and (**3**) may facilitate the supreme evil of antitrust: Collusion. While the Court did not exclude the possibility that a monopolist's refusal to cooperate with rivals could violate the antitrust laws, it will be the rare case, indeed, in which these three concerns do not arise[184].[185]

---

182 See Commission of the European Communities, Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 Microsoft).

183 See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 538 U.S. 905, 123 S. Ct. 1480, 155 L. Ed. 224 and B.I.5.

184 The Court distinguished cases involving concerted refusals to deals by horizontal competitors, noting that these cases present greater anticompetitive concerns and are amenable to the simpler remedy of nondiscrimatory treatment. In addition, the Court noted that its holding in the leading case for antitrust liability based on a unilateral refusal to cooperate with a rival (*Aspen Skiing*) 'is at or near the outer boundary of § 2 liability. Moreover, «[t]he Court [in *Aspen Skiing*] found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*an thus presumably profitable*) course of dealing suggested a willingness to forsake short term profits to achieve an anti-competitive end».

185 Arguments follow NORALL, p. 1.

5. Conclusion

The recent decision on *Microsoft*[186] case *(or Intel)*[187], imposing remedies and indeed very high fines of EUR 497.2 million (*Microsoft)* on a computer giant, has done much to refocus attention on the Essential-Facilities-Doctrine.

Again and again the European Courts will be faced with a historic dispute. In particular, the courts must be mindful that the intellectual property right in question has only been developed through the investment of vast sums into the IT-project (e.g. by firms like Microsoft or Intel).[188] So, restrictive decisions in such high-profile cases will always shock the technology industry.[189] It is therefore vital that the court does not undermine the incentives to undertake such valuable projects. Although, e.g. Microsoft has a long history of exploiting its dominant position on the information technology, its products are traditionally of a high quality and are furthermore offered at competitive prices. Consequently, it may be doubtful that, through penalizing large IT-firms, there would be many tangible consumer benefits.

Throughout European businesses, there is as a matter of fact a widespread concern that a broad application of the essential facilities principle could have significant consequences. It appears that both the Commission and the ECJ are aware that the implications of a decision undermining the importance of intellectual property rights could be severe. However, the failure of the Court to establish more concrete principles in order to determine when a compulsory license should be granted continues to give cause for concern when investing in the development of new ideas.[190]

As we now can see AREEDA[191] critics from 1989 are still today right and up to date.

---

186 See remarks in Fn. 182.

187 Case C-252/07, Intel Corporation Inc. v. CPM United Kingdom Ltd.; see also, OPI, p. 490.

188 See for the issue of the Essential-Facilities-Doctrine and the Microsoft case, Harz, p. 189-191 and 200 (Microsoft's Market Dominance).

189 See e.g. Part B.I.5.c. and LIPSKY/SIDAK, p. 1220.

190 HARZ points out what follows, S. 189/190: ―Though constrained by similar doctrinal difficulties in both jurisdictions, the European Union may relay more heavily on the essential facilities doctrine than does the United States as a justification for controlling anticompetitive actions by a dominant firm or monopolist. The essential facilities doctrine is undoubtedly applicable to a broader range of conduct in the European Union than is currently the case in the United States."; see also HARZ p. 224/225 to the application of the doctrine in the US and EU; see also OPI, p. 414.

191 See page Part B.I.1.

> It [the Essential-Facilities-Doctrine] is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are. As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of that response is then applied – often mechanically, sometimes cleverly – to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins. Essential facilities is now in the expansionary second phase, which needs to be brought back to antitrust policy.[192]

WHISH[193] clarifies, that an owner of an essential facility is not committing an abuse where the owner has an objective justification for a denial of access. Examples would be that the undertaking seeking access is not creditworthy or that the new competitor is technically incapable of using the facility in a proper manner.[194]

III. Switzerland

1. Introduction

The Essential-Facilities-Doctrine as a right for access is in Swiss law not explicitly mentioned. However, the swiss legal doctrine subsumes the Essential-Facilities-Doctrine under Article 7 KG (Illegal behaviour by market dominating companies)[195].[196] In the foreground there is Article 7 Abs. 2 lit. a KG: An illegal behaviour is for example the denial of business relations (delivery blockade or denial of supply).[197] Although, Article 7 Abs. 2 lit. a KG has to be seen in connection with Article 7 Abs. 2 lit. b KG (discrimination of business partners related to prices or other business conditions) and Article 7 Abs. 2 lit. c KG (enforcement of inadequate prices or other inadequate conditions). In addition, the enumeration in Article 7 Abs. 2 KG is exemplary, that is way the merits of a case related to the Essential-Facilities-

---

192 See AREEDA, p. 841 and above page 14.

193 See WHISH, p. 697.

194 See also TURNEY, p. 201:—A Community-wide regime that establishes minimum criteria for the existence of intellectual property rights based on the economic and social value of the innovation could dispense with the need for an essential facilities doctrine altogether."

195 See for the relevant articles Appendix C.

196 See ZÄCH, p. 322-325, GRABER, p. 229, SCHINDLER, p. 171, HÜBSCHER/RIEDER, p. 444 and BSK HILTY, Art. 3 Abs. 2 KG N. 33.

197 See for the relevant articles Appendix C.

Doctrine is an issue of the «catch all clause» of Article 7 Abs. 1 KG. It says what follows: Market dominating companies are acting illegal, if they misuse their market power (monopoly) by preventing competition through other firms or discriminating the different firms.

For the application of Article 7 Abs. 1 KG there must be the following requirements[198]:

1. A market dominating company;
2. preventing competition by competitors or discriminating other competing firms;
3. through the abuse of its market dominance.

The abuse by preventing competition may be legal, if it is justified by ‗legitimate and objective reasons‘[199]. Admissible are so called ‗legitimate business reasons‘.[200] Admissible is a behaviour, if a market dominating company in a certain situation is not acting differently, as a company would do, without having a market dominance.[201] Further to that an illegal behaviour by a market dominating company which is preventing competition and was declared as illegal by the WEKO can still be declared as legal by the Swiss Federal Council (Bundesrat), if there are important public interests (see Article 31 Abs. 3 KG).[202]

However, the Essential-Facilities-Doctrine is expressly mentioned by the WEKO and the Courts, what the following selected cases will show.[203]

2. Telecom PTT (Blue Window)

a. Facts of the case

The Swiss telecommunications market has been open to competition since the Swiss Telecommunications Act (Fernmeldegesetz) entered into force on January 1, 1998.

---

198 See ZÄCH, p. 256-258.
199 See ZÄCH, p. 305-306
200 See ZÄCH, p. 305-306, SCHINDLER, p. 117 and HOHMANN, p 271.
201 See REINERT p. 98.
202 See BGE 129 II 18 (Börsenverein des Deutschen Buchhandels e.V. und Schweizerischer Buchhändler- und Verleger-Verband gegen Wettbewerbskommission und Rekurskommission für Wettbewerbsfragen [Verwaltungsgerichtsbeschwerde, 2A.298/2001 / 2A.299/2001 vom 14. August 2002]); see also PLEITNER/ FÜGLISTALLER/RUSCH, S. 27 and AMSTUTZ/REINERT, S. 56 ff.
203 See for an overview also JOVANOVIC, p. 44 and WEBER, E-Commerce, p. 432.

In the Swiss telecommunication market, even before the FMG was enforced, the WEKO had to examine in 1997 the behaviour of a market dominating company, namely the Telecom PTT (Blue Window) according to Article 7 KG. [204] PTT gave access to internet providers, but to less attractive prices and conditions than to its own internet provider Blue Window.[205]

b. Legal aspects

According to Article 4 Abs. 2 KG an enterprise is dominant in the market if the firm can act independently.[206] The WEKO said, that the PTT is market dominating because it had through the years a monopoly by the law for telephone services and furthermore it has also the network infrastructure. The WEKO pointed out that the services provided by Telecom PTT are an «essential infrastructure» for the technical access between internet user and internet provider.[207]

c. Note

RENTSCH sees in this final decision of the WEKO dated 5 Mai 1997 the first case of the Essential-Facilities-Doctrine in the revised KG,[208] even if the WEKO did not use the term «Essential-Facilities-Doctrine» expresis verbis.

3. BKW FMB Energie

a. Facts of the case

In July 1999 the WEKO started an examination against BKW FMB Energie[209], [210] which denied the access for a competitor, an electricity company, to its infrastructure

---

204 See RPW 1997/2 p. 161.

205 Translation by the author.

206 Art. 4 Abs. 2 KG: Als marktbeherrschende Unternehmen gelten einzelne oder mehrere Unternehmen, die auf einem Markt als Anbieter oder Nachfrager in der Lage sind, sich von andern Marktteilnehmern (Mitbewerbern, Anbietern oder Nachfragern) in wesentlichem Umfang unabhängig zu verhalten.

207 See RPW 1997/2 S. 161, Rz. 37 (Telecom PTT/Blue Window): ―Diese heute von der Telecom PTT erbrachten Grunddienste stellen die unerlässliche Infrastruktur für die technische Verbindung zwischen Internnet-Benutzer und Internet-Provider dar.―

208 See RENTSCH, p. 148.

209 BKW FMB Energy Ltd (BKW).

210 RPW 2000/1 S. 29.

of distribution.[211] The rival firm, the electricity company Laufenburg, wanted to deliver electricity to a third company, which was in the same region of BKW.[212]

b. Legal aspects

The WEKO analysed, if the denial of the transmission of electricity is a misuse according to Article 7 KG. Evan though there was a settlement, the WEKO left the possible application of the Essential-Facilities-Doctrine open, but pointed out what follows in the sense of the Essential-Facilities-Doctrine: "If a market dominating company denies access to a competitor for a reasonable price without objective reasons, there is an abuse in the sense of Article 7 KG, when the access is essential."[213] If the facts of the case have to be subsumed under Article 7 Abs. 2 lit. a KG or the catch all clause of Article 7 Abs. 1 KG was not answered by the WEKO. Further to that the WEKO pointed out that the denial of transmission of electricity in general can be subsumed as well as under Article 7 Abs. 2 lit. b KG (discrimination), if a market dominating company offers services to some companies, but not to all of the competitors without objective reasons of justification.[214]

c. Note

The key impulses for the Essential-Facilities-Doctrine in Swiss Competition Law were done by decisions related to the electricity sector.[215]

211 See Amgwerd, p. 235 and Bischof, p. 143.
212 Translation by the author.
213 Text translated by the author; In der Abschreibungsverfügung liess die WEKO die Anerkennung der Essential-Facilities-Doctrine explizit offen, hielt aber ganz im Sinne der Doktrin fest, es sei „von einem kartellrechtlich unzulässigem Missbrauch gemäss Art. 7 KG auszugehen, wenn ein marktbeherrschendes Unternehmen sich ohne objektive Rechtfertigungsgründe weigert, einem anderen Unternehmen gegen angemessenes Entgelt Zugang zu den eigenen Netzen oder anderen Infrastruktureinrichtungen zu gewähren, wenn es dem anderen Unternehmen aus rechtlichen oder tatsächlichen Gründen ohne die Mitbenutzung nicht möglich ist, auf dem nachgelagerten Markt als Wettbewerber tätig zu werden und auf diesem Markt kein wirksamer Wettbewerb herrscht“ (RPW 2000/1 S. 29, Rz. 25).
214 See RPW 2000/1 S. 29.
215 See Amgwerd, p. 236; see also WEBER/DÖRR, p. 81-82 and 212-213 and BERNI/CASANOVA, p. 833 ss.

4. Electriques Fribourgois

a. Facts of the case

Electriques Fribourgoises denied Watt Suisse the transmission of electricity. [216] In 2001 the WEKO said that this behaviour is a misuse in the sense of Article 7 KG.[217] This decision by the WEKO was upheld by the REKO/WEF and the BGer.[218] In this leading case, the BGer mentions explicitly the Essential-Facilities-Doctrine. This proves the acceptance of the doctrine by the Swiss Supreme Court (BGer).[219]

b. Legal aspects

The BGer summarizes the Essential-Facilities-Doctrine for the KG as follows:

> 6.5.1 (…) Suivant l'exemple de la théorie dite "Essential facility" élaborée aux Etats-Unis (BISCHOF, op. cit., p. 131 ss; SCHINDLER, op. cit., p. 3 ss) et discutée aussi dans l'Union européenne (SCHINDLER, op. cit., p. 35 ss), la doctrine suisse qualifie un comportement d'abusif lorsqu'une entreprise en position dominante dispose seule des équipements ou des installations indispensables à la fourniture d'une prestation et qu'elle refuse, sans raison objective, de les mettre à disposition aussi de ses concurrents. Encore faut-il que les concurrents n'aient aucune solution de remplacement, si bien que le refus incriminé est de nature à exclure toute concurrence (FF 1995 I 565 s.; BISCHOF, op. cit., p. 129 ss; BORER, op. cit., n. 12 ad art. 7 LCart; CLERC, op. cit., n. 124 ss ad art. 7 LCart; DALLAFIOR, op. cit., n. 105 ss ad art. 7 LCart; HÜBSCHER/RIEDER, op. cit., p. 440 ss; SCHINDLER, op. cit., p. 192 s., 195; RUFFNER, op. cit., p. 841; ZÄCH, 1998, op. cit., p. 139). D'après la doctrine, cette théorie s'applique en particulier aux réseaux électriques, qui se trouvent en situation de monopole de fait; il est en effet pratiquement impossible de construire un réseau parallèle et concurrent notamment pour des raisons financières, si bien que les concurrents sont obligés d'utiliser les réseaux existants. Car sinon aucune

[216] See RPW 2001/2 S. 255; see also BISCHOF, p. 144.
[217] Translation by the author.
[218] RPW 2002/4 S. 672 und BGE 129 II 497.
[219] Amgwerd, p. 236.

> concurrence ne serait possible (BISCHOF, op. cit., p. 141 s., 155 s., 165 s.; BORER, op. cit., n. 12 ad art. 7 LCart; VON BÜREN/MARBACH, op. cit., p. 280 s.; SCHINDLER, op. cit., p. 77, 88, 91 ss, 122; VOGEL, op. cit., p. 194; ZÄCH, 1999, op. cit., p. 223; le même, 2000, op. cit., p. 204 s.; le même, Netzstrukturen, op. cit., p. 951).[220]

And related to the legal reasons/justifications the Swiss Supreme Court (BGer) said:

> 6.5.3 La motivation des autorités inférieures, qui est conforme à l'avis de la doctrine, est convaincante. La recourante veut manifestement empêcher Watt d'accéder au marché en question. Watt ne peut pas livrer de courant électrique sans utiliser le réseau de la recourante parce que - ce qui n'est du reste pas contesté par celle-ci - pour des raisons juridiques et économiques, il n'est pratiquement pas possible pour Watt de construire elle-même un réseau de transport parallèle. La recourante utilise sa position de fait dominante, qu'elle tire de son réseau de transport, pour ne pas devoir s'ouvrir à la concurrence. Son comportement est donc directement dirigé contre une possible instauration de la concurrence et exclut, dans le résultat, toute concurrence entre les fournisseurs d'énergie. Ce comportement doit donc être qualifié d'abusif, dans la mesure où il ne peut pas être justifié par des motifs objectifs.[221]

In addition, the Swiss Supreme Court (BGer) did not see any objective reasons of justification for the denial of the transmission of electricity.[222]

---

220 BGE 129 II 497 S. 539.

221 BGE 129 II 497 S. 540.

222 See also Amgwerd, p. 237 and JOVANOVIC, p. 46 with further information; see also SCHLAURI/VLCEK, p. 146.

5. Swiss Football League

a. Facts of the case

In a civil competition procedure the commercial court of the canton Aargau (Switzerland) released a temporarily decision on 19th October 2004.[223] The court stated that a football player who was workless abroad also beyond transfer periods must be admitted to play actively.

David Sesa was born in 1973 and is a Swiss citizen. From 1998 he played for the Italian football club Lecce and from 2000 for football club Napoli. However, the football club Napoli did not get a new licence to play for the season 2004/2005 and as a result of this, David Sesa‘s contract (which would have endured till 2007) was cancelled. On 20/21 September 2004 David Sesa signed a contract to play for one period in Switzerland, but the Swiss Football League did not give its approval.[224]

b. Legal aspects

Football is on a national level (Switzerland) a relevant market in which on one side there are several football clubs and on the other side there are football players. Nevertheless, the Swiss Football League has a factual monopoly by licensing each football player; without a licence from the Swiss Football League no player is admitted to play football.[225]

The commercial court of the canton Aargau based its decision on Article 7 Abs. 1 lit. a KG and pointed out, that the licensing system of the football league is an «essential facility».[226] The court saw no objective reasons for the denial (legitimate

---

223 See RPW 2004/4 S. 1203.

224 Translation by the author.

225 See HOFFET, p. 184.

226 RPW 2004, S. 1208 (3.2.2): „Marktbeherrschende Unternehmen verhalten sich namentlich im Falle der Verweigerung von Geschäftsbeziehungen unzulässig oder missbräuchlich (Art. 7 Abs. 2 Bst. a KG). Mit der Verweigerung von Geschäftsbeziehungen hindert ein marktbeherrschendes Unternehmen andere Marktteilnehmer mittelbar oder unmittelbar daran, in den von ihm beherrschten Markt einzudringen oder in diesem Markt ihre Marktstellung zu verbessern. Eine solche Behinderung oder Benachteiligung liegt unter anderem immer dann vor, wenn das marktbeherrschende Unternehmen über "**essential facilities**" verfügt, die zur Erbringung bestimmter Dienstleistungen oder zur Herstellung bestimmter Produkte unerlässlich sind. Die Gesuchsgegnerin verfügt über die "**essential facilities**" bezüglich der Zulassung von Berufsfussballspielern zum nationalen Fussballmarkt. Indem sie dem Gesuchsteller 3 die Berufsausübung bis zum Beginn der zweiten Phase des Wettspielbetriebes der Super-League verunmöglicht, verweigert sie ihm den entsprechenden Marktzutritt. Der Missbrauchstatbestand von Artikel 7 Absatz 2 Buchstabe a KG ist dadurch grundsätzlich erfüllt.—

and objective reasons)[227]. Furthermore, the court declared the associations-stautes for not applicable.[228]

6. Pay-TV-Market

a. Facts of the case

Cablecom GmbH carries as her main business in Switzerland the distribution of TV- and Radioprograms through her cable network. In this sector, Cabelcom was also dominant. Since 2002 Cablecom is also providing an own Pay-TV-Platform. In this downstream market (market for Pay TV) it is not Cabelcom but Teleclub AG, which holds a dominant position.[229] Cablecom refused Teleclub to use its cable network; the network of Cablecom had in this matter the character of an essential facility.[230] The Weko, as the first instance, enacted a provisional decision against Cablecom.[231]

b. Legal aspects

Cablecom took the case to the next instance, the Reko.[232] Also the Reko decided in favour of Teleclub AG. Surprisingly, the Swiss Supreme Court (BGer) decided differently.[233] The Weko released a provisional decision for which the facts of the case and legal examination must not be very precise. The Swiss Supreme Court argued, the access right would be a too heavy interference, if the facts of the case are not seriously examined.[234] Evan though Cablecom would have been able to banish Teleclub AG from its network it did not do it, because both parties reached settlement.[235]

Further cases[236] in Switzerland which dealt with the Essential-Facilities-Doctrine:
(i) Platform to inform customers (hospital which informed burial firms/access to this platform).[237]

---

227 See ZÄCH, p. 305-306 and Part B.III.1.
228 See for a different opinion JOVANOVIC, p. 52-54, he points out that in this case there is no «self interest» and consequently there is no room for the Essential-Facilities-Doctrine.
229 See for the case RPW 2992/4, p. 567 ss., Weko, Teleclub AG vs. Cablecom GmbH.
230 However, the Weko did not use the term essential facility explicitly; see JOVANOVIC, p. 45.
231 See RPW 2992/4, p. 567 ss., Weko, Teleclub AG vs. Cablecom GmbH.
232 See RPW 2003/2, p. 406 ss., Reko, Cablecom GmbH.
233 See RPW 2003/4, p. 912 ss., Bundesgericht, Cablecom GmbH/Teleclub AG, Wettbewerbskommission, Rekurskommission für Wettbewerbsfragen.
234 See RPW 2003/4, p. 920 s., Bundesgericht, Cablecom GmbH/Teleclub AG, Wettbewerbskommission, Rekurskommission für Wettbewerbsfragen.
235 See JOVANOVIC, p. 45 with further information.
236 See for an overview JOVANOVIC, p. 44-54.

(ii) Access to parking spots (parking service near by the gate of the airport).[238]

To sum up, the variety of the cases show how many-sided this doctrine is.

7. Conclusion

The conclusion from the above mentioned cases is that Article 7 KG contains also the Essential-Facilities-Cases. Especially the electricity market cases show clearly that access to systems related to transmission of electricity can be reached by competition law. The element of misuse in Article 7 KG was substantiated by the doctrine and court decisions. This result was obviously done by comparative law; related to that the WEKO said: For the refusal to deal cases, the Swiss legal practice leans on the praxis abroad [the Essential-Facilities-Doctrine].[239] For that, the legal practice of the EC plays an important role (especially because the Swiss Competition Law is oriented by the EC competition law.[240]

As a matter of fact, to be market dominating is according to Article 7 KG not in general forbidden. But as explained above, the misuse of a market dominating situation is forbidden. The misuse is related to elements of the Essential-Facilities-Doctrine – the denial of access to an essential facility.[241] The element of essentiality results from the necessity to reach a downstream market. The necessity assumes that there is no alternative – as well there is no possibility to duplicate the system. Important to note is the fact that the Swiss Supreme Court (BGer) requires like the ECJ a qualified disability (exclusion of effective competition) on the downstream market.[242] The requirements in the general clause (catch all phrase) in Article 7 Abs. 1 KG and the essential facilities constellation derived from them can be put together as follows[243]:

---

237 See RPW 2003/2, p. 451 ss., Handelsgericht des Kantons Aargau, Allgemeines Bestattungs-institut.

238 See RPW 2004/1, 102 ss., Wettbewerbskommission, Flughafen Zürich AG (Unique) – Valet Parking.

239 See RPW 2007/ S. 353, Rz. 44.

240 See Botschaft 1994, p. 468 ff., especially p. 471 and 528 ss. (Der Gesetzesentwurf im internationalen, insbesondere europäischen Kontext); see also Schindler, p. 34. and Weber, SIWR V/2, S. 27 ff.

241 See SCHINDLER, p. 34.

242 BGE 129 II 49 E. 6.5.1.

243 See Amgwerd, p. 239.

Article 7 Abs. 1 KG (catch all phrase)	**Essential-Facilities-Doctrine**
A market dominating company	A market dominating company
Abuse of market dominance	Abuse in the sense of the denial of access to an essential facility
Disadvantage or discrimination	Qualified disability (exclusion of effective competition) in the downstream market
Objective, reasonable justification possible	Objective, reasonable justification possible
Exceptional allowance possible	Exceptional allowance possible

In contrast to the ECJ the Swiss Supreme Court (BGer) seems related to the Essential-Facilities-Doctrine to renounce the element of the «prevention of a from the consumers potentially wanted product».[244] With that, the scope of Article 7 KG is wider than the requirements by the ECJ.

244 See Amgwerd, p. 239.

Part C. FRAND

I. Introduction

1. Background and Definition

Computer or cellular phones, just to mention a few examples, must be able to communicate with each other. Consequently without standardisation a product or a market may not exist in modern life, because in high-technology sectors, uniform industry standards are crucial for ensuring product compatibility or interoperability.[245]

Standard setting organizations usually have rules that govern the ownership of patent rights covering the standards they adopt. Now, one of the most general rules is that a patent covering the standard must be adopted on «reasonable and non-discriminatory terms» (RAND) or «fair, reasonable and nondiscriminatory terms» (FRAND).[246] The two terms are generally interchangeable; FRAND seems to be preferred in Europe[247] and RAND in the U.S.[248]

The term FRAND refers in licensing to the obligation that is often required by Standards Setting Organizations[249] for members participating in the standard setting process. These industry groups set common standards for particular industry in order to ensure compatibility and interoperability of devices manufactured by different entities. Modern life depends on this interoperability of countless technical devices: Electric plugs must fit into electric sockets, light bulbs must fit into lamp sockets, webpage materials must be readable on different computer systems, and cellular telephones must be able to talk to each other.[250] Nevertheless, the rationale behind the FRAND Commitment itself can be described as follows:

---

245 See ABELL, p. 1601 and GERADIN/RATO, pp. 103: ―Industry standards ensure that products from multiple vendors are compatible and interoperable. A standard can be defined as a set of technical specifications which seeks to provide a common design for a product or process. The welfare benefits deriving from the existence of standards are obvious. By allowing complementary or component products from different manufactures to be to be combined or used together, they increase consumer choice and convenience, and reduce costs."; see for Switzerland, BSK HILTY, Art. 3 Abs. 2 KG N. 33.

246 See for the Question «Can Standard-Setting Lead to Exploitative Abuse?», GERADIN/RATO, pp. 101-161.

247 See below the case of Qualcomm in the EC, Part C III, where the term FRAND is used.

248 TREACY /LAWRANCE, pp. 22-29.

249 Also called «SSOs» for Standards Setting Organizations.

250 See CARY/WORK-DEMBOWSKI/HAYES, p. 1241.

(a) ensuring dissemination[251] of the essential IPR contained in a standard by allowing it to remain available for adoption by members of the industry and
(b) to make sure that the holders of those IPR are able to reap adequate rewards from their innovations.[252]

Standards Setting Organizations include this obligation in their bylaws as a means of enhancing the pro-competitive character of their industry. They are intended to prevent members from engaging in licensing abuse based on the monopolistic advantage generated as a result of having their intellectual property rights (IPR) included in the industry standards. Without such commitment, members could use monopoly power inherent in a standard to impose «unfair, unreasonable and discriminatory licensing terms» which would understandably damage competition and inflate their own relative position.[253]

2. The Terms

Under FRAND owners of intellectual property rights which are essential to the standard typically commit[254] to licence such patents on the following terms:[255]

Fairness and Reasonableness: In brief, the term fair relates primarily to the underlying licensing terms, where as the term reasonableness refers mainly to the licensing rates. Several economist suggest that a reasonable royalty is the royalty that the essential patent holder could have obtained before a standard was adopted – i.e. on an ex ante basis.[256] Further to that SWANSON/BAUMOL argue as follows: ―If the primary goal of obtaining RAND licensing commitments is to prevent IP holders from setting royalties that exercise market power created by standardisation, then the concept of a «reasonable» royalty for purposes of RAND licensing must be defined and implemented by reference to ex ante competition, e.g., competition in advance of standard

251 This could be for example a chip in a cellular phone to configure a connection the telephone network; See C.I.4. «Qualcomm» in this paper.
252 GERADIN/RATO, p. 110.
253 See POULTON, p. 717.
254 See for the difference between the traditional model of bilateral negotiations for the licensing of standard-essential IP between potential licensor and licensee and the FRAND commitments, GERADIN/RATO, pp. 108-112.
255 See also KLOUB, 19.
256 GERADIN/RATO, p. 113; See also Shapiro/Varian, p. 241: ―Reasonable should mean the royalties that the patent holder could obtain in open, upfront competition with other technologies, not the royalties that the patent holder can extract once participants are effectively locked in to use technology covered by the patent."

selection".[257] We have to keep in mind, hat this position is based on the promise that standardisation necessarily establishes market power beyond the power conferred by the patent itself.[258] Nevertheless, much sense makes though the approach by GERADIN/RATO[259]:

> "In our view, the question of what «reasonable terms» may consist of goes back to the second prerogative of the patent owner, ie its right to be rewarded for the innovative contribution made and to ask the price that the market is willing to pay for its IPR (ie how valuable the IPR is to others). As noted above, standardisation does not deprive a patent owner of this prerogative. The only material consequences of making a FRAND commitment is that the IPR owner waives its rights to refuse to engage in good faith negotiations to license and to grant an exclusive license. The specific terms of any such license, however, are left to be determined by the parties to the negotiation."

In other words, fair licensing terms would consist of those terms determined through fair, bilateral negotiations between individual intellectual property right owner and standard adopter in accordance with the market conditions prevailing at the time of such negotiations.[260] A reasonable licensing rate is though a rate charged on licenses which would not result in an unreasonable aggregate rate if all licensees charged a similar rate. Clearly aggregate rates that would significantly increase the cost to the industry and make the industry uncompetitive are unreasonable. It is worth noting that a licensor which has several different licensing packages might be tempted to have both reasonable and unreasonable packages. However having a reasonable «bundled» rate does not excuse having unreasonable licensing rates for smaller unbundled packages.[261]

---

257 SWANSON/BAUMOL, p. 5.
258 GERADIN/RATO, p. 113.
259 GERADIN/RATO, p. 114.
260 See GERADIN/RATO, p. 114.
261 If the standard setting organisation has influence to the licensing terms it should ensure their fairness. For example requiring licensees to buy licenses for products that they do not want

Non-Discriminatory: The term Non-Discriminatory relates to both, the terms and the rates included in the licensing agreements. As the name suggests this commitment requires that licensors treat each individual licensee in a similar manner.[262] This does not mean that the rates and payment terms can not change dependent on the volume and creditworthiness of the licensee. However, it does mean that the underlying licensing condition included in a licensing agreement must be the same regardless of the licensee. This obligation is included in order to maintain a level playing field with respect to existing competitors, and to ensure the potential new entrants are free to enter the market on the same basis.[263] The most controversial issue in FRAND licensing is whether the «reasonable» license price should include the value contributed by the standard-setting organization's decision to adopt the standard. Plausibly, a technology is often more valuable after it has been widely adopted than when it is one alternative among many; there is a good argument that a license price that captures that additional value is not «reasonable» because it does not reflect the intrinsic value of the technology being licensed.[264]

3. Legal Problems with the FRAND-Commitment

In general, the purpose of FRAND is clear. It is namely about creating a framework insofar as the standard, rather than resulting in an anti-competitive aggregation of market power, results in a competitive outcome. “The competitive outcome is that which would have prevailed prior to the adoption of the standard, and therefore an outcome that does not reflect the increased market power that results from the adoption of the standard, but rather the original competitive situation before that market power was created by locking into the standard.”[265]

in order to get a license for the products they do want (bundling/tying) would violate the FRAND commitment; See also JONES/SUFRIN, 3rd Edition, p. 65.

262 See GERADIN/RATO, p. 114: “Most authors consider that the «non-discriminatory» element of the (F)RAND promise is straightforward, requiring that IPR owners license similarly situated adopters on the same terms.”

263 See GERADIN/RATO, p. 114: “Discriminating between similarly situated competitors active in the markets for the product incorporating the standardised IPR would hinder the competitive process, as would allowing licensees to mix and match various provisions of individual licence agreements that reflect trade-offs between original parties.”

264 See LAYNE-FARRAR/PADILLA/SCHMALENSEE, p. 675-679.

265 CARY, p. 26.

While Standards Setting Organizations may require a FRAND basis, little interpretation of the concept «FRAND» is provided.[266] Drawing from a selected literature[267], two main alternatives for interpreting FRAND should be noted: The «Swanson-Baumol approach»[268] and the «Shapley value approach»[269].

The Swanson–Baumol approach[270] – the price that the IP holder would be able and willing to charge prior to the acceptance of the IP into the standard represents a fair price, as it reflects the value of the IP independently of the value of the standard.[271]

The Shapley value approach[272] – a price that awards each IP holder the value representing its contribution in a cooperative game situation.[273] According to Shapley the payoffs are driven by the number of alternatives for each element of the technology, rather than the innate value that a particular technology brings to the standard. For example, if just one operator develops the one aspect of the technology, while two together the other aspect, the payoffs would be 2/3 to the first and 1/3 would be divided between the last two.[274]

Honestly, what has to be pointed out is the interpretation/reflection for the term «reasonable» by SWANSON/BAUMOL[275]. They articulate that an SSO participant who competes downstream with other adopters in the market for the standardised product must treat its adopter-licensees no less favourable than it treats itself. Or said it more simply, the SSO participant should charge licensees what it ~~–i~~mplicitly charges itself for use of the intellectual property"[276]. Further to that SWANSON/BAUMOL[277] suggest

266 See for example the critics by GERADIN, p.27: ~~–Y~~ou may only realize later that your technology is actually more valuable than you originally thought."
267 GERADIN/RATO, pp. 101-161 and SWANSON/BAUMOL, pp. 1-58.
268 SWANSON/BAUMOL, pp. 1-58 (Selection of Compatibility Standards and Control of Market Power Related to Intellectual Property).
269 LAYNE-FARRAR/PADILLA/SCHMALENSEE, p. 671 ss.
270 See for a brief description LAYNE-FARRAR/PADILLA/SCHMALENSEE, p. 686 ss. (pp. 686-693).
271 SWANSON/BAUMOL, pp. 1-58 (Selection of Compatibility Standards and Control of Market Power Related to Intellectual Property).
272 See for a brief description LAYNE-FARRAR/PADILLA/SCHMALENSEE, p. 693 ss. (pp. 693-700).
273 LAYNE-FARRAR/PADILLA/SCHMALENSEE, p. 2-35.
274 See Oxera, February 2008.
275 SWANSON/BAUMOL, p. 11; see also GERADIN/RATO, p. 115.
276 SWANSON/BAUMOL, p. 11.
277 SWANSON/BAUMOL, p. 11; see also GERADIN/RATO, p. 115.

a principle for determining licence fees based on the «efficient component pricing rule» (ECPR), which they claim is:

> "both necessary and sufficient for a licence fee to be competitively neutral in downstream markets and, therefore, at least on that basis, a necessary condition for that fee to be non-discriminatory. That is to say, many licence fees that substantially departs from ECPR level can be deemed to violate the RAND requirement of non-discrimination."

It should, however, be noted that the terms «fair» and «reasonable» cannot be defined explicitly in all cases. This opens the door for different interpretations by different parties and my lead to legal disputes. For example in the case of Qualcomm.[278]

4. FRAND, Article 102 TFEU and the Case of Qualcomm

The European Commission has decided to open formal anti-trust proceedings against Qualcomm Incorporated, a US chipset manufacturer, concerning an alleged breach of EC Treaty rules on abuse of a dominant market position (now Article 102 TFEU).[279] Qualcomm is a holder of intellectual property rights in the CDMA and WCDMA[280] standards for mobile telephone. The WCDMA standard forms part of the 3G (third generation) standard for European mobile phone technology (also referred to as "UMTS"). This follows complaints lodged with the Commission by Ericsson, Nokia, Texas Instruments, Broadcom, NEC and Panasonic, all mobile phone and/or chipsets manufacturers. The complaints allege that Qualcomm's licensing terms and conditions are not Fair, Reasonable and Non-Discriminatory ("FRAND") and, therefore, may breach EC competition rules.[281]

---

278 See Part C.I.4.

279 See for this issue also Rambus Inc. v. FTC, 522 F.3d 464: In the Rambus case, the European Commission seems to leave its investigation related to the commitments offered by microchip designer Rambus with the consequence that there will be no case related to the issue of patent ambush (Antitrust: Commission market tests commitments proposed by Rambus concerning memory chips, MEMO /09/273, 12.6.2009).

280 Wideband Code Division Multiple Access (WCDMA); see Jesse Meyer v. Qualcomm Inc., United States District Court for the Southern District of California, Case No. 08cv655 WQH (LSP), Part C: "Qualcomm holds certain patents that are "essential" to Wideband Code Division Multiple Access ("WCDMA") technology."

281 See European Commission (2007), «Antitrust: Commission Initials Formal Proceedings Against Qualcomm», MEMO/07389, October 1st.

What was the decision of the Commission to initiate proceedings about? The alleged infringement concerns the terms under which Qualcomm licenses its patents essential to the WCDMA standard. The investigation focused on whether Qualcomm is dominant and whether the licensing terms and royalties imposed by Qualcomm are, as alleged by the complainants, not fair, reasonable and nondiscriminatory. In a context of standardization, a finding of exploitative practices by Qualcomm in the WCDMA licensing market contrary to Article 102 TFEU may depend on whether the licensing terms imposed by Qualcomm are in breach of its FRAND commitment.[282]

The complaints were based on their understanding that the economic principle underlying FRAND commitments is that essential patent holders should not be able to exploit the extra power they have gained as a result of having technology based on their patent incorporated in the standard. The complaints also alleged that charging non-FRAND royalties could lead to final consumers paying higher handset prices, a slower development of the 3G standard, and all the related negative consequences for economic efficiency associated with inhibited growth of the standard. In addition, the complainants alleged that this behaviour could negatively affect the standard setting process more generally as well as the adoption of the future 4G standard.[283]

On 24 November 2009 EU-Commission announced that it closes the investigation against Qualcomm.[284] All complainants have now withdrawn or indicated their intention to withdraw their complaints, the EU executive said in a statement. The EU's executive said furthermore it was still concerned about how technology was priced after it was adopted as an industry standard but could not commit the time or resources to such "complex" assessments.[285]

Nevertheless, CHAPPATTE asserts that antitrust intervention to enforce FRAND commitments is justified by «strong policies reasons», explicitly, the risk of

282 See also remarks in Fn. 279.

283 See literature in Fn. 254.

284 See European Commission (2009), « Antitrust: Commission closes formal proceedings against Qualcomm », MEMO/09/516, 24 November 2009: ―All complainants have now withdrawn or indicated their intention to withdraw their complaints, and the Commission has therefore to decide where best to focus its resources and priorities. In view of this, the Commission does not consider it appropriate to invest further resources in this case."

285 See <http://europa.eu/press_room/index_en.htm>.

consumer harm absent intervention, and the need for a clear legal precedent set by the commission in this field (see current developments of FRAND Appendix D).[286]

II. FRAND and the Essential-Facilities-Doctrine

1. Exclusionary Power

As we now know, a factor becomes an essential facility when there is no economically viable substitute for a competitor and consequently the owner is able to exercise market power. Intellectual property bestows on its title-holder the ability to exclude others from using the protected information. Accordingly, the owner of the intellectual property is able to exercise market power over a product requiring e.g. a patented technology. ―The intellectual property is very much like an essential facility in this sense."[287] Further to that the main issue can be described as follows: Both, the essential facility and the intellectual property right confer exclusionary power on their possessor by virtue of the absence of economically viable close substitutes.

Intellectual property is a system for promoting innovation.[288] By legally defining the boundary of the property, it allows the owner to appropriate rents by excluding others.[289] Here as well, there might be a possibility to make an invention of a close substitute (invent around) – this might be physically possible. However there are possible infringement litigation costs which must be taken into account in addition to the physical process of inventing the close substitute. These thoughts show, that the intellectual property covering the technology or software may be an essential facility.[290]

286 See CHAPPATTE, p. 331 ss.; for a different opinion see GERADIN/RATO, FRAND, p. 129 ss. and CHAPPATTE, Rejoinder, p. 175 ss.

287 AOKI/SMALL, p. 14.

288 See for the conflict between IPR and Competition Law OPI, p. 412: ―It has traditionally been stated that intellectual property rights (IPR's) and antitrust law conflict with each other. The conflict arises because intellectual property law creates and protects monopoly power, while antitrust law proscribes it."

289 See AOKI/SMALL, p. 16 and 17.

290 See also BSK HILTY, Art. 3 Abs. 2 KG N. 33 (for Switzerland) and B.II.2./4. (case of Magill and IMS)

2. Comparing the Essential-Facilities-Doctrine and compulsory licensing

a. The Essence of Access Price

In brief we have to be aware of the fact, that access to an essential facility or a compulsory licensing – e.g. on the basis of FRAND – results in the great question of the appropriate price for the relevant access. We have to focus on this issue, because once an access right has to be given by the court or a law, there must be an appropriate price which covers the inventers interests on one side and the interests of competitors on the other side. There is no sense if litigation will go on for years debating the appropriate access price for providing an access.

b. Access Price

Does the FRAND-Principle provide any help or guidance? The answer might be yes, the access price for an essential facility can be based on principles underlined by FRAND. Related to the enforceability, a FRAND commitment may be seen as imposing a duty on the owner of an essential IPR to engage in licensing in good faith.[291]

Where difficulties arise, what the appropriate price for an access could be, the court might throw a glance to court cases in which there had been disputes about breaking patents. In those cases, patent courts evaluate all relevant factors in particular circumstances. For example, American courts give nowadays great weight to fifteen factors which were employed to determine a reasonable royalty in the seminal *Georgia-Pacific* case, decided in 1970 in the Southern District of New York:[292]

> 1. The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.
> 2. The rates paid by the licensee for the use of other patents comparable to the patent in suit.
>
> […]

These factors included, inter alia, considering license fees for similar patents as benchmarks, measuring the nature and scope of the patent, considering the next alternative to the patent and any cost saving from using it as opposed to older modes or

---

291 See GERADIN/RATO, p. 120.

292 See the court case: Georga-Pacific Corp. v US Phywood Champion Papers Inc., 446 F2 295 (2nd Cir 1971).

devices, evaluating the opinion testimony of qualified experts, and considering the particular benefits to the licensee and the commercial relationship between IPR owner and the prospective licensees.[293] Similar thoughts should be taken into account for an access price. [294] In literature[295] there are some approaches for finding a reasonable charge for a licence:[296]

First, there is theory of the «Efficient Component Pricing Rule (ECPR)»[297]. A methodology that addresses access pricing taking into account the investments and the possible losses incurred due to the increased competition as a result of providing the access.[298]

Second, there is the theory of the «Forward Looking Long Run Average Incremental Costs (FL-LRAIC)»[299], which considers the future, average and long-term costs which a company can foresee by making available the essential facility (e.g. oil price increases, rent increases, and expansion and maintenance costs).

Third, there is the «Hypothetical bargaining-Theory»[300], which is based upon the hypothetical negotiations between the parties taking into account the hypothetical minimum charges which the licensor would accept and the hypothetical maximum fee a licensee would be willing to pay.

Forth, in some cases the best possible solution would be an auction in which the highest bidding party would get the license.[301]

---

293 GERADIN/RATO, p. 120.

294 LAYNE-FARRAR/PADILLA/SCHMALENSEE, A.J, p. 673 and 680-682; see also Jovanovich, p. 240-246 and WEGMÜLLER, p. 460-468.

295 See for a brief summary instead of a lot of authors JOVANOVICH, p. 241.

296 See also Appedix D related to a new tendency in the EC, Rz. 284.

297 See BUCCIROSSI, p. 287-296.

298 See LARSON/LEHMAN, p. 71-80.

299 See KROUSE, p. 921.

300 See TOMLIN, p. 1-5.

301 See Whish, p. 697: ―If there is only capacity for one additional user, it might be appropriate to hold an auction and to grant access to the highest bidder."

III. Arbitration

1. Introduction

Arbitration is a private system of adjudication.[302] Parties who go into arbitration have decided to resolve their disputes outside of a judicial system.[303] Consequently, in arbitration an independent third party considers both sides in a dispute, and makes a decision to resolve it.[304] The arbitrator is impartial; this means he or she does not take sides. In most cases the arbitrator's decision is legally binding on both sides, so it is not possible to go to court if one party is unhappy with the decision.[305] Examples of arbitration institutions are e.g. the ICC[306] or the AAA[307].

In comparison with a national state court, arbitration will provide some advantages: (i) Speed, (ii) Secrecy and (iii) the possibility for the parties to select the judges with special knowledge. [308] However, a big negative point is that arbitration is very expensive.[309]

Most types of arbitration have the following in common:[310] (i) Both parties must agree to use the process, (ii) it is private, (iii) the decision is made by a third party, not the people involved, (iv) the arbitrator often decides on the basis of written information, (v) if there is a hearing, it is likely to be less formal than court, (vi) the process is final and legally binding, (vii) there are limited grounds for challenging the decision.

---

302 See Berger/Kellerhals, pp. 399 ss. and 650 ss.; see also IPRG Article 176-194.

303 For example: The International Chamber of Commerce (ICC), see HEITZMANN, p. 119-139.

304 In the words of the U.S. Supreme Court, Scherk v. Alberto-Culver Co., 417 U.S. 506: " (…) an agreement to arbitrate before a specified tribunal [is], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."

305 See in general: Convention on the Recognition and Enforcement on Foreign Arbitral Award, New York, 1958 (New York Convention).

306 See: http:<//www.iccwbo.org/>.

307 See: <http://www.adr.org/index.asp>.

308 See also MOSES, p. 3: „The benefits of international arbitration are substantial. An empirical study of why parties choose international arbitration to resolve disputes found that the two most significant reasons were (1) the neutrality of the forum (that is, being able to stay out of the other party‘s court) and (2) the likelihood of obtaining enforcement, by virtue of the New York Convention, a treaty to which over 140 countries are parties.―

309 See for further elements MOSES, p. 4 and 5: „Another disadvantage is that arbitrators have no coercive powers – that is, they do not have the power to make someone do something by being able to penalize them if they do not.―

310 See for a brief overview: BURGER-SCHEIDLIN, p. 3-7.

2. Essential Facility Cases and Arbitration

In recent cases, arbitrational tribunals had to impose e.g. a forced license against a dominant party (similar to the IMS Health case) or had to force a dominant party to continue sales/supplies to a competitor on a non-discriminatory basis[311] or had to require the opening up of a network in the telecommunications' sector.[312]

With respect to the case[313] below I give an example of an arbitration case dealing with the Essential-Facilities-Doctrine:

BP and E.ON notified the Commission of a proposed concentration by which BP and E.ON acquire the joint control of Veba Oel AG. Consequently, the market leaders would have a privileged position in controlling the essential infrastructure and in particular the pipeline links. The proposed concentration results in a collective dominance by Shell/DEA and BP/E.ON on the market for the supply of ethylene on the ARG+pipeline network. Therefore, a substantial package of commitments had to be negotiated, with extensive structural and equally extensive behavioural commitments. The purpose of competing undertakings was to eliminate BP/Veba's strong foothold in the pipeline infrastructure. An open access to the pipeline at competitive costs should allow suppliers to actively compete. ~~"~~Moreover, BP/Veba's commitment to provide access to ARG suppliers for the ethylene customers will remove the remaining bottleneck infrastructure which is under control of BP/Veba. In this context […] reference was made to an independent arbitrator whose task would be to terminate the terms and conditions for the delivery of ethylene via the ARG pipeline."[314]

However, arbitration tribunals will analyse the refusal to deal cases under a number of leading cases discussed in the US and EC or Switzerland – including the leading cases like e.g. Terminal Rail Road, MCI or Magill.[315]

---

311 See BLESSING pp. 146-150 (Case of Shell/DEA, 2001).
312 See BLESSING p. 29.
313 Case of BP/E.ON (2001), see also See BLESSING pp. 150-152.
314 BLESSING p. 151/152.
315 See BLESSING p. 214/215.

Part D. Summary and Prospects

I. Essential-Facilities-Doctrine in US, EC and Switzerland

The leading U.S. essential facilities case is MCI Communications Corp. v. AT&T.[316] The Seventh Circuit said that there are four elements necessary to establish liability under the Essential-Facilities-Doctrine:

1) Control of the essential facility by a monopolist
2) A competitor's inability practically or reasonably to duplicate the essential facility
3) The denial of the use of the facility to a competitor
4) The feasibility of providing the facility[317]

The U.S. Supreme Court's ruling in Verizon v. Trinko, added a further fifth element: «Absence of regulatory oversight from an agency» with power to compel access.[318]

In the EC[319] a dominant company has, at least in some cases, a duty to supply, if a refusal will cause a significant effect on competition. When a customer is also a competitor of the dominant company in some market, usually downstream from the point at which the refusal to supply occurs, the effect on competition largely depends on the following three factors:

1) Whether the buyer can obtain the goods or service elsewhere
2) Whether there are other downstream competitors
3) How important the goods or services are to the buyer's business

In Switzerland competition law leans on the EC competiton law.[320] Consequently, the elements for an access do not in general differ from those in EC, but with one exception: In contrast to the ECJ the Swiss Supreme Court (BGer) seems related to the Essential-Facilities-Doctrine to renounce the element of the prevention of a

316 See 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983).
317 See 708 F.2d at 1132-33.
318 See U.S. Supreme Court's ruling in Verizon v. Trinko, 540 U.S. 398 (2004).
319 See literature in Fn. 190.
320 See remarks in Fn. 240.

product potentially wanted by the consumers.[321] Therefore, the scope of Article 7 KG is wider than the requirements by the ECJ.

II. Prospects

This brief note has illustrated the various approaches that have been taken to the issue of when a monopolist or dominant firm can be mandated to provide access to a facility (Essential-Facilities-Doctrine). In my eyes the great question is always to what price. Here one has to find a balance between the investor‘s- and competitor‘s interests.

However, there has not been reached an (even short-term) equilibrium yet, between the position of a dominant firm and a possible competitor. But by taking a distant look, a century of antitrust litigation has produced some guidelines. One of it is the FRAND commitment, which obliges the parties to negotiate in good faith.[322] Further to that, the Pacific case points out some relevant criteria to achieve a convincing access price for both parties. Moreover, there are some theories which provide guidelines:[323]

1) Efficient Component Pricing Rule (ECPR)
2) Forward Looking Long Run Average Incremental Costs (FL-LRAIC)
3) Hypothetical bargaining-Theory
4) Auction

By discussing the Essential-Facilities-Doctrine we always have to keep in mind that in general competition – not monopolization – leads to innovation, better products, efficiency and finally to consumer welfare. Beside this fact, multinational firms operating in different jurisdictions must be careful, because of the slightly different access-rights (Essential-Facilities-Doctrine) in different (legal) regions.[324]

321 See Amgwerd, p. 239.
322 See C.I.2.
323 See C.II.2.c. and especially Appendix D, Rz. 284.
324 See e.g. for US and the element of completion in the derived market, B.I.6.d.; B.II.5 (EC) and B.III.7 (Switzerland).

Appendix A (Sherman Antitrust Act)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Appendix B (TFEU)

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no conection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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

Appendix C (Swiss Antitrust Act)

Art. 7 Unlawful practices by dominant undertakings

1 Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

2 The following behaviour is in particular considered unlawful:

a. any refusal to deal (e.g. refusal to supply or to purchase goods);

b. any discrimination between trading partners in relation to prices or other conditions of trade;

c. any imposition of unfair prices or other unfair conditions of trade;

d. any under-cutting of prices or other conditions directed against a specific competitor;

e. any limitation of production, supply or technical development;

f. any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

(The Swiss Federal Act on Cartels and other Restraints of Competition [Cartel Act, CartA] of 6 October 1995 [Status as of 1 January 2009] is available at: <http://www.admin.ch/ch/e/rs/c251.html>)

Appendix D (FRAND – Current Developments in the EC)

Brussels, SEC(2010) 528/2

Draft

COMMUNICATION FROM THE COMMISSION

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

282. The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and nondiscriminatory terms ("FRAND commitment").

283. The aim of FRAND commitments in the context of standard-setting is to ensure that patented technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments are intended to prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard and/or charging discriminatory royalty fees.

284. An abuse of the market power gained by virtue of IPR being included in a standard constitutes an infringement of Article 102. In this context and in case of a dispute, the assessment of whether fees imposed for patents in the standard-setting context are unfair or unreasonable, will be based on whether the fees bear a reasonable relationship to the economic value of the patents.95 Various methods may be available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead , it may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner.

285. Another method of assessing the relationship of the IPR fees to the economic value of the patents could be to obtain an independent expert assessment of the relevant IPR portfolio's objective quality and centrality to the standard at issue. It may also be possible to rely on previous unilateral ex ante disclosures of most restrictive licensing terms. This also assumes that the comparison can be made in a consistent and reliable manner. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive.

286. To ensure the effectiveness of the FRAND commitment, there should also be a requirement on all IPR holders who provide such a commitment to take all necessary measures to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment.

(See for further information: <http://ec.europa.eu/competition/consultations/2010_horizontals/index.html>)