

Carsten Peters

Access to Essential Facilities in
New Zealand, Australia, Europe and Germany

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Christen Peters

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The essential facilities doctrine is a tool of competition authorities to decide on the access of a would-be competitor to the facility of another competitor.

It will be argued that there is no such thing as one essential facilities doctrine. The different jurisdictions have developed different requirements according to their needs. The combination of these national requirements can be seen as one essential facility. This gives rise to a difficulty in defining the essential facilities doctrine in more than a general way. Instead of giving a complex definition and a criteria against which cases can be assessed a set of certain requirements can be identified as common in the different jurisdictions. Nevertheless, these criteria might be interpreted in different ways. Therefore, the definition may be broad. Further, the availability of having a doctrine and access rights at all will be limited to exceptional circumstances only.

Advantages and disadvantages of "light-handed regulation" as well as industry specific regulators will be assessed. Further, the approach of the different jurisdictions under evaluation in the telecommunication sector will be illustrated.

The text of this paper (excluding contents page, footnotes and bibliography) comprises 14,292 words.

Abstract

The essential facilities doctrine is a tool of competition authorities to decide on the access of a would-be competitor to the facility of another competitor.

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A United States of America

The legal term of "essential facilities"¹ originates from the antitrust jurisprudence in the United States of America.²

¹ Also referred to as "essential facilities doctrine" *Eastman Kodak Company v. Eastman Kodak Company* (1975) 378 U.S. 838, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

I INTRODUCTION

This paper illustrates the attitude and the approach adopted concerning the essential facilities doctrine in Australia, New Zealand, Germany and Europe. The early developments in the United States of America will be discussed in order to provide a better understanding of the essential facilities doctrine and its background.

The second part of this paper gives an overview of the European, German, Australian and New Zealand response to the US involvement in the creation of the doctrine. This part will also analyse the implementation of the essential facilities doctrine in these countries.

The following section tries to present a definition of the essential facilities doctrine, while the fourth part is dedicated to the evaluation of the desirability of granting access rights in the light of balancing short-term promotion of competition against long-term harm to investments.

The next part focuses on the different regulatory approaches the jurisdictions in question have taken to deal with the issue of access rights to certain essential facilities.

The subsequent section of this paper analyses some of the requirements that are comparable in the different countries in question. This is followed by an introduction into the area of telecommunications. The access to these networks and services is outlined.

II HISTORICAL BACKGROUND

A United States of America

The legal term of "essential facilities"¹ originates from the antitrust jurisprudence in the United States of America.²

¹ Also referred to as „bottleneck doctrine“. *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, 679 (HC); *Hecht v Pro-Football Inc* (1977) 570 F 2d 982, 992; Valentine Korah "Access to Essential Facilities under the Commerce Act in the Light of Experience in Australia, the European Union and the United States" (2000) 31 VUWLR 231, 246; Brenda Marshall/ Rachael Mulheron

The development of a common law doctrine in general and the essential facilities doctrine in particular can be described in three stages:³

- (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.

The case of *US v Terminal Railroad Association of St Louis*⁴ decided in 1912 can be seen as the first stage in the development of the doctrine.⁵ In this case the Supreme Court established an access right to the undertaking that was in control of the tracks. A case that followed was *Associated Press v United States*.⁶ The Court held that the Associated Press had to change its admission policy for public policy reasons, namely the need for free access to publicly available information.

“Access to ‘Essential Facilities’ under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime” (1998) BOND LR 99, 100 note 12; Daniel Clough “Economic Duplication and Access to Essential Facilities in Australia” 28 ABLR 325.

² Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 201; Meinrad Dreher, “Die Verweigerung des Zugangs zu einer wesentlichen Einrichtung als Missbrauch der Marktbeherrschung” DB, 1999, 833.

³ Phillip Areeda “Essential Facilities: An Epithet in Need of Limiting Principles” (1990) 58 ALJ 841.

⁴ *US v Terminal Railroad Association of St Louis* (1912) 224 US 390.

⁵ The Terminal Railroad Association controlled passages into and out of St Louis, which was an important railroad junction of that time. This monopoly facility acquired by a combination of some, but not all, of the railroads transited St Louis. The association of railroads was in a position to use the monopoly to disadvantage other competitors by excluding them from the necessary passage.

⁶ *Associated Press v United States* (1945) 326 US 1; The Associated Press consisted of about 1200 newspapers. The Members had access to all the collected and generated information world-wide. The Associated Press welcomed new members, unless the applicant competed with an incumbent. This policy blocked competitors. Although it was held that Associated Press had not to admit everyone. Nevertheless, for public reasons and the free press a maximum flow of information had to be secured.

However, the case of *Hecht v Pro-Football Inc*⁷ established the doctrine under its present name in 1977.⁸ The essential facilities doctrine was encapsulated for the first time in the following way:⁹

Where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.

To be "essential", a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited; the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

The second and the third stage mentioned earlier in the development of the essential facilities doctrine in the common law of the United States cannot be distinguished exactly. The need for restrictive requirements for the new doctrine was already recognised in *MCI Communications v American Telephone & Telegraph Co.*¹⁰ Subsequently the courts had to take four elements into account that could create an access right:¹¹

- (1) control of the essential facility by a monopolist;
- (2) a competitor's inability practically or reasonably to duplicate the essential facility;

⁷ *Hecht v Pro-Football Inc* (1977) 570 F 2d 982.

⁸ This case was a private antitrust action brought by a group of promoters who had sought to obtain a professional football league franchise, against the owners of the Washington Redskins to access their stadium for training sessions and games. The denial of this prevented them from submitting an acceptable franchise application.

⁹ *Hecht v Pro-Football Inc* (1977) 570 F 2d 982, 992.

¹⁰ *MCI Communications Corp v American Telephone & Telegraph Co* (1983) 708 F 2d 1081; This 1983 case involved the interconnection in telecommunications decided before the breakup of AT&T. Among other claims against AT&T, MCI alleged that AT&T had refused to grant it interconnection with its local network or imposed unreasonable conditions on interconnection, thereby preventing MCI from offering any service other than long-distance leased lines.

¹¹ Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, (AGPS, Canberra, 1993) (later referred to as Hilmer Report), chapter 11, 239, 244; Brenda Marshall/Rachael Mulheron "Access to 'Essential Facilities' under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime" (1998) BOND LR 99, 101.

- (3) the denial of the use of the facility to a competitor; and
- (4) the feasibility of providing the facility.

It is important to remember the origin and the legal background of the doctrine at all times. An assessment of the desirability of applying the essential facilities doctrine in the countries or jurisdictions the subject of this paper can be successful only then. This is also important in making an informed and reasonable decision about certain requirements being mandatory, necessary or just sufficient to grant an access right.

In the United States the crucial rules are found within sections 1¹² and 2¹³ of the Sherman Act 1890. Abusive behaviour under the essential facilities doctrine can be seen there as a special case of refusal to deal. It can be seen as “monopolisation” and therefore a violation of section 2 of the Sherman Act 1890 if a single firm owns the facility in question. The collaborative conduct of several firms, which own a facility, can be seen as “conspiracy in restraint of trade”. This amounts to a violation of section 1 of the same Act.¹⁴

¹² Section 1 of the Sherman Act 1890: 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 \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹³ Section 2 of the Sherman Act 1890: 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 \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹⁴ Mats A. Bergmann “*The role of the essential facilities doctrine*” (Summer 2001) *The Antitrust Bulletin* 403, 405.

B European Regulation

The European competition law is similar to the Sherman Act 1890 of the United States. The two articles that deal with issues that are related to the essential facilities doctrine are articles 81¹⁵ and 82¹⁶ of the EC Treaty.¹⁷ Refusal to deal is a special case of the abuse of dominance under article 82 (b) of the EC Treaty.

¹⁵ Article 81 EC Treaty:

- (1) The following shall be prohibited as incompatible with the common 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 common 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 competitive disadvantage
 - (e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection 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.

¹⁶ Article 82 EC Treaty:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar 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 customers
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

Within the European competition law system, the Commission of the European Communities (EC) is "the guardian of the treaties".¹⁸ It is in charge of the application and enforcement of articles 81 and 82 of the EC Treaty where the cases have an impact on the Common Market.¹⁹ As a result, the Commission has to monitor the behaviour of competitors.

The second possibility for the Commission to become active is a complaint of a competitor about the unlawful behaviour of another. The Commission can take actions against the offender if it is of the opinion that a certain conduct breaches the provisions of the EC Treaty.

As a consequence, the first recognition was given to the essential facilities doctrine in Europe in decisions of the European Commission in 1992 and 1993. These decisions are commonly referred to as "sea-harbour"-cases.²⁰ An example is the *Sea*

(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.

¹⁷ The enumeration was changed after the Treaty of Amsterdam. The Treaty of Amsterdam was signed on 2 October 1997. It entered into force on 1 August 1999. Articles 81 and 82 were formerly articles 85 and 86. European Integration http://europa.eu.int/abc/treaties_en.htm (Last accessed 21 July 2002).

¹⁸ *Butterworths guide to the European Communities* (Butterworths, London, Dublin, Edinburgh, Munich, 1989) 21.

¹⁹ Articles 81 (I) and 82 (I) of the EC Treaty require for the application of competition law that the limiting action in question can possibly impair the trade between Member States. The applicability of the European and the national competition law shall be marked off through this clause. Nowadays, the practical significance of the *Zwischenstaatlichkeitsklausel* (inter state clause) is in most of the cases very low. The requirements of that clause are already met if the circumstances are capable of impairing the trade between Member States directly or indirectly in a manner that thwarts the goal of a common market. This is the case with barriers to trade and the creation of obstacles for the mutual penetration of the markets. See Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 374.

²⁰ *B & I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd* (Case IV 34.174) [1992] 5 CMLR 255; Commission Decision of 21 December 1993 (Case IV 34.689) *Sea Containers v Stena Sealink – interim measures*; Meinrad Dreher, "Die Verweigerung des Zugangs zu einer wesentlichen Einrichtung als Missbrauch der Marktbeherrschung" (1999) 16 DB 833; Thomas Lampert "Der EuGH und die essential facilities-Lehre" (1999) 31 NJW 2235.

*Containers v Stena Sealink*²¹ case. The basis for a decision in favour of Sea Containers ceased to exist in the end. However, the Commission indicated its readiness to grant Sea Containers an access right on the basis of the essential facilities doctrine.²²

The second authority that shapes the competition law in Europe is the European Court of Justice (ECJ). The national competition authorities are in charge of the national competition law. Further, the national competition authorities have the power to act if the behaviour of the competitor of a certain Member State has an effect on the markets and competitors of other Member States and the main effect is in the one Member State.²³ However, they have to apply articles 81 and 82 of the EC Treaty. The legal systems of the Member States have to provide judicial review against the decision of the national competition authority. The national courts have to ensure that they take the relevant European legislation and principles into account. In the case of judicial review article 234 of the EC Treaty provides an optional possibility for the national court to seek the opinion of the ECJ if a court has doubts about the European implications. The procedure is mandatory for a court of a Member State against whose decisions there is no judicial remedy under national law, according to article 234 (III) of the EC Treaty.

²¹ Commission Decision of 21 December 1993 (Case IV 34.689) *Sea Containers v Stena Sealink – interim measures*; Sea Containers wanted to compete with the harbour-owning Stena Sealink on the ferry route between Holyhead in the UK and Laoghaire near Dublin in Ireland. Negotiations took place over almost 2 years without a result. A complaint of Sea Containers about the delaying tactics of Stena Sealink was not successful for the sole reason that both parties reached an agreement in the end.

²² Sea Containers could have asked for damages for the lost 1993 season like Clear Communications did in his litigation against Telecom. (This case will be discussed later in this paper.) However, the difference between the two cases is that Stena Sealink and Sea Containers reached an agreement in the end. In addition to that, to actually prove the delaying tactics of Stena Sealink would not have been easy.

²³ The extensive manner of the interpretation of the *Zwischenstaatlichkeitsklausel* (inter state clause) leads to a parallel applicability of national and European competition law. However, in the case of colliding regulations the European law prevails. *Maria Salonia v Giorgio Poidomani and France Baglieri, nee Giglio* (Case 126/80) [1981] European Court Reports 1563, 1578; *SPRL Louis Erauw – Jacquery v La Hesbignonne SC* (Case 27/87) [1988] European Court Reports 1919, 1939; *SC Belasco and Others v Commission of the European Communities* (Case 246/86) [1989] European Court Reports 2117, 2189; *Carlo Bagnasco and Others v Banca Popolare di Novara soc. Coop. Arl. (BNP)* (Case 215/96) [1999] European Court Reports I-135; See also Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 376.

A case in which the ECJ had to decide about competition law in general and the essential facilities doctrine in particular is the Austrian case of *Oscar Bronner*.²⁴ This case will be discussed later in this paper in more depth.

C Germany

German competition law is influenced to a large extent by European developments. This is due to the hierarchy of the European acts of law in relation to the national law of the Member States. Primary European law is always superior to German national laws if there is a conflict for example between the European and the German legal system. In the area of competition law, the Member States have jurisdiction in cases that affect their territory only. The competition authority of a certain Member State has a shared competence with the Commission if the main effect of a cross border cases is in that Member State.²⁵ However, the courts have to take the European repercussions into account if the Common Market is also affected.

In Germany it is the purpose of the Gesetz gegen Wettbewerbsbeschränkungen (*Act against Restraints of Competition* – later referred to as GWB) to enable competition in the first place.²⁶ Similar to the European system, the national competition authorities are in charge of safeguarding competition on the national level. The courts only have a chance to shape competition law in cases of the judicial review of certain decisions.

Due to the influence of the “sea-harbour”-cases mentioned above on the European level and the subsequent Commission decisions, the German legislator changed the GWB

²⁴ *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-7791. In this case the publisher of the small national Austrian newspaper “Der Standard” demanded access to the home delivery scheme of another publisher who was in a dominant position. Bronner argued that it would be uneconomical to set up another delivery system. Nevertheless, the court held that Bronner could use another scheme like the postal service as an alternative.

²⁵ Articles 81 (I) and 82 (I) of the EC Treaty require for the application of competition law that the limiting action in question can possibly impair the trade between Member States. The *Zwischenstaatlichkeitsklausel* (inter state clause) is the decisive test for the jurisdiction. See note 19.

in order to embody the European development in the German statutes and to anticipate the future developments in that area. The German Parliament adopted the Sixth Amendment of the GWB in May 1998. These changes came into force on 1 January 1999. This led to a moderate harmonisation of the German and the European competition law.²⁷ At the same time, this improved the level of protection provided by the statute as a whole.²⁸

The relevant change in relation to essential facilities was the introduction of § 19 IV Nr. 4 GWB. This new subsection was embodied into § 19 GWB dealing with "the abuse of a dominant market position", which illustrates the context of the essential facilities doctrine in German competition law.

D Australia

In Australia the Hilmer Report²⁹ was highly influential on the development of the competition law in the area of the misuse of market power and the establishment of an essential facilities doctrine. The Hilmer Report was published in 1993. It stated:

In some markets the introduction of effective competition requires competitors to have access to facilities, which exhibit natural monopoly characteristics and hence cannot be duplicated economically.³⁰

As a result of the suggestions made by the Hilmer Report, all Australian state governments signed the Competition Principles Agreement (CPA) on 11 April 1995.³¹

²⁶ On a second level the Gesetz gegen den unlauteren Wettbewerb (*Act against Unfair Competition*) secures that competition is taking place in a fair manner.

²⁷ Rainer Bechthold "Das neue Kartellgesetz" (1998) 38 NJW 2769-2770; Bundesministerium für Wirtschaft, Nationales Kartell- und Wettbewerbsrecht <http://www.bmwi.de/Homepage/Politikfelder/wirtschaftspolitik/wettbewerbspolitik/wettbewerbspolitik/Kartellrecht-national.jsp>.

²⁸ Bundesministerium für Wirtschaft, Wettbewerbspolitik <http://www.bmwi.de/Homepage/Politikfelder/wirtschaftspolitik/wettbewerbspolitik.scr?url=Homepage/Politikfelder/wirtschaftspolitik/wettbewerbspolitik/wettbewerbspolitik.jsp&SB=GWB&host=wwwbmwi.de>.

²⁹ Hilmer Report, ch 11, 239.

³⁰ Hilmer Report, ch 11, 239.

Further, as a result of the recommendations made by the Hilmer Committee in 1995 Part IIIA of the Trade Practices Act 1974, dealing with the access to essential facilities, was enacted. This was a significant step for the Australian government to take, as this part of the Trade Practices Act was one of the earliest statutory regulations of the essential facilities doctrine. Only Denmark in 1997³² and Germany in 1999³³ have taken this step so far. Other jurisdictions left the issue for the courts to deal with under some general competition law rules.³⁴ Part IIIA was designed to achieve through regulatory means what the courts had been reluctant to achieve in applying the misuse of market power provisions in section 46 of the Trade Practices Act.³⁵

A prominent case, indicating the opposite in terms of the willingness of the courts to recognise the essential facilities doctrine, is *Queensland Wire*³⁶. Although the High Court remitted the case for further hearing to the Federal Court, it also indicated that it was in favour of a duty of BHP supplying Queensland Wire under section 46 of the Trade

³¹ The Commonwealth and all State and Territory governments have agreed to a national competition policy to generate broad based community benefits and improve Australia's competitiveness in international markets. The Prime Minister of the Commonwealth of Australia, the Premiers of the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania and the Chief Ministers of the Australian Capital Territory and the Northern Territory of Australia signed the *Conduct Code Agreement, Competition Principles Agreement and Agreement to Implement the National Competition Policy and Related Reforms*. See Tony Buti, E Law - Murdoch University Electronic Journal of Law, Vol 4, No 4 (December 1997) <http://www.competition.act.gov.au/comp/chp1.html> (Last accessed 17 September 2002) and ACT Government, National Competition Policy - An Overview <http://www.murdoch.edu.au/elaw/issues/v4n4/buti44.html> (Last accessed 17 September).

³² Law No 384 of 10 June 1997.

³³ § 19 IV Nr. 4 GWB.

³⁴ Like ss 1 and 2 of the Sherman Act 1890 in the US, arts 81 and 82 of the EC Treaty and s 36 of the Commerce Act 1986 in New Zealand.

³⁵ The regulatory system of Part IIIA, Part XIC and s 46 of the Trade Practices Act 1974 in Australia will be analysed later in this paper.

³⁶ *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177 (HCA); In this case, The Broken Hill Proprietary (BHP) was responsible for about 97 per cent of Australia's steel output and products. It refused to supply Queensland Wire with a product called Y-bar, which is necessary to produce "star picket posts", the most popular rural fences.

Practices Act 1974. Therefore, it is questionable that the courts were really reluctant to grant access rights under section 46 and that a statutory action was necessary.

E New Zealand

As a result of the implementation of the Commerce Act 1986 in New Zealand courts adopt the essential facilities doctrine as a special case of the abuse of a dominant position under section 36 of that Act.³⁷ The willingness of the application of the essential facilities doctrine was not only an outcome of the intended harmonisation of the New Zealand competition law with the one of the Australian Trade Practices Act 1974, but also due to the influence of the European Community. The section 3 (8)³⁸ of the Commerce Act 1986 was based on article 86 of the EC Treaty³⁹.

³⁷ Section 36 of the Commerce Act 1986 "Taking advantage of market power -:

- (1) Nothing in this section applies to any practice or conduct to which this Part applies that that has been authorised under Part V.
- (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of-
 - (a) restricting the entry of a person from engaging in competitive conduct in that or any other market; or
 - (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - (c) eliminating a person from that or any other market.
- (3) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45 (2), in New Zealand.
- (4) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

Previously section 36 of the Commerce Act applied the use of a dominant position in a market as a threshold.

³⁸ Subsection (8) was repealed, as from 26 May 2001, by s 9 (3) Commerce Amendment Act 2001 (2001 No 32).

³⁹ This article is now article 82 EC Treaty.

An early indication of the readiness of the courts to apply the essential facilities doctrine in New Zealand was the case of *ARA v Mutual Rental Cars*⁴⁰. After consideration of the essential facilities doctrine, Barker J held:⁴¹

[It] is correct to submit that a gateway facility is likely to beget a separate and identifiable geographic market and that exclusion from that market by means of the gateway, prima facie indicates anti-competitive intention unless the exclusion can be explained by reference to reasonable constraints in the circumstances: an agreement to exclude others arbitrarily must be taken as having the purpose to monopolise. Although ARA's motive may have been to maximise rent, by accepting only two rental car operators, its means of achieving this object was the use of its dominant position to exclude competitors of the successful concessionaires. The collateral contracts therefore had the purpose of excluding other potential concessionaires.

I emphasise that ARA does not necessarily have to accept any applicant for a rental car concession, including Budget. The availability of space, level of service proposed for the public and other considerations will operate as reasonable constraints.

However, McGechan J and RG Blunt in *Union Shipping v Port Nelson Ltd*⁴² hesitated "to incorporate the entire doctrine "as is" into New Zealand competition law at [that] point".⁴³ They emphasised that their decision did not rest upon an essential facilities doctrine.⁴⁴ Their main points of concern were the distinctively American social, commercial and constitutional setting, the background of sections 1 and 2 of the Sherman Act 1890 and the fact that the doctrine was yet to be tested before the United States

⁴⁰ *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC); The Auckland Regional Authority (ARA) is the body responsible for, and in charge of, administration and the operation of Auckland International Airport. Avis and Hertz are holders of licences granted to them by the ARA to provide and operate rental vehicle services at the airport. The ARA granted the licences to both companies as successful tenderers. The ARA granted the licences on a "two only" basis to obtain the maximum income for the airport. Budget, a competitor not recognised, was challenging that decision.

⁴¹ *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, 680 (HC) Barker J.

⁴² *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC); Prior to 1 October 1988 the Nelson Harbour Board had a monopoly of mobile equipment and drivers on the wharves at the Port of Nelson. After the privatisation Port Nelson Ltd granted licenses to use the port which included clauses that required users to use the equipment of Port Nelson Ltd or pay higher levies.

⁴³ *Union Shipping NZ Ltd v Port Nelson Ltd*, above, 705 (HC), McGechan J and RG Blunt.

⁴⁴ *Union Shipping NZ Ltd v Port Nelson Ltd*, above, 711 (HC), McGechan J and RG Blunt.

Supreme Court. The Courts should interpret and apply the New Zealand Commerce Act 1986 rather than import a common law doctrine. Therefore, the starting point has to be section 36 of the Commerce Act 1986.⁴⁵ Nevertheless, the court held that “[t]he American experience may give valuable insight, and assists assessment of potential section 36 solutions”.⁴⁶ Since then the courts have maintained that cautious attitude towards the essential facilities doctrine.

F Interrelation

The interrelation of the different jurisdiction can be seen in the chart on the next page. The United States has an influence on the other jurisdiction in so far as the doctrine was invented there. While Australia normally has a significant influence on New Zealand, this is different in the area of the essential facilities doctrine. Australia has no more influence than Europe in terms of a general tendency to harmonisation and the recognition of certain principles. However, Europe has a huge influence on Germany.⁴⁷

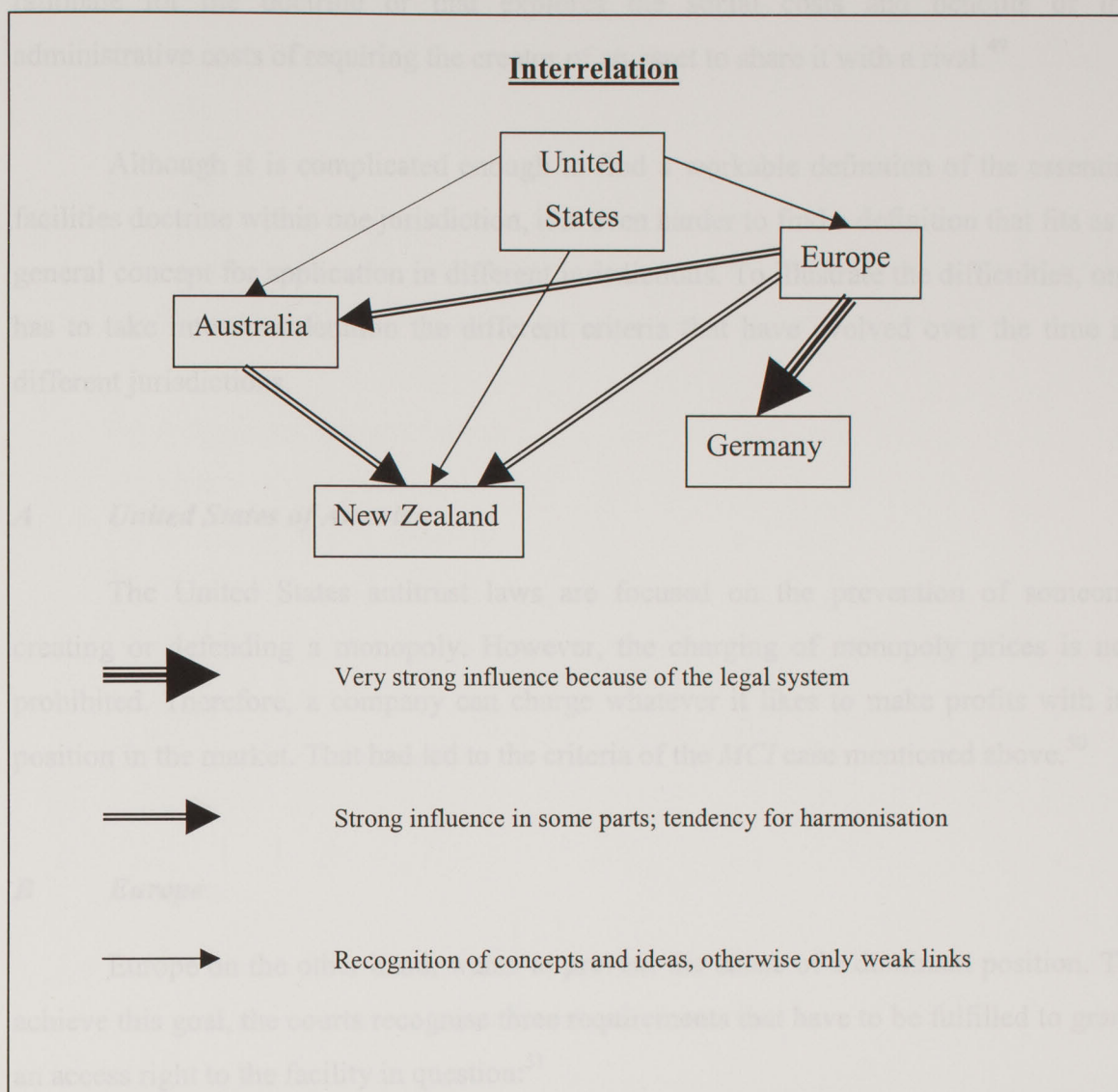
III. DEFINITION

Intervence of the process of competition in the marketplace should be restricted to the absolute minimum necessary to restrict failures of the market to allocate resources effectively. The rules for interventions should be clear and consistent so market conduct is not influenced by uncertainty.⁴⁸ These are the expectations the doctrine has to fulfil. Therefore, to apply the essential facilities doctrine properly and assess its value the courts

⁴⁵ *Union Shipping NZ Ltd v Port Nelson Ltd*, above, 705 (HC), McGechan J and RG Blunt.

⁴⁶ *Union Shipping NZ Ltd v Port Nelson Ltd*, above, 705 (HC), McGechan J and RG Blunt.

⁴⁷ These relationships between the different countries are mostly one-sided. There is hardly any influence on the USA. Europe is not influenced by Australia and New Zealand. Germany has an influence on the European development to the extent only that it can influence the decision making process.



III DEFINITION

Interference of the process of competition in the marketplace should be restricted to the absolute minimum necessary to restrict failures of the market to allocate resources effectively. The rules for interventions should be clear and consistent so market conduct is not influenced by uncertainty.⁴⁸ These are the expectations the doctrine has to fulfil. Therefore, to apply the essential facilities doctrine properly and assess its value the courts or competition authorities need a proper definition of it. Nevertheless, to give such a definition is a very hard task. One will not find any case that provides a consistent

⁴⁸ Daniel Clough "Economic Duplication and Access to Essential Facilities in Australia" 28 ABLR 325, 327.

rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival.⁴⁹

Although it is complicated enough to find a workable definition of the essential facilities doctrine within one jurisdiction, it is even harder to find a definition that fits as a general concept for application in different jurisdictions. To illustrate the difficulties, one has to take into consideration the different criteria that have evolved over the time in different jurisdictions.

A United States of America

The United States antitrust laws are focused on the prevention of someone creating or defending a monopoly. However, the charging of monopoly prices is not prohibited. Therefore, a company can charge whatever it likes to make profits with its position in the market. That had led to the criteria of the *MCI* case mentioned above.⁵⁰

B Europe

Europe on the other hand, wants to prevent the abuse of a dominant position. To achieve this goal, the courts recognise three requirements that have to be fulfilled to grant an access right to the facility in question:⁵¹

- (1) The facility, an infrastructure or infrastructure in combination with services, must be complementary to an economic activity in a related but separate market. Goods and immaterial property may only in exceptional cases be considered essential facilities.

⁴⁹ Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1990) 58 ALJ 841.

⁵⁰ The criteria of the *MCI* case are:

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

⁵¹ Mats A. Bergmann "The role of the essential facilities doctrine" (Summer 2001) *The Antitrust Bulletin* 403, 409.

- (2) Competing firms lack a realistic ability to duplicate the facility.
- (3) Access to the facility is necessary in order to compete in the related market.

C Germany

Germany's criteria for the access to an essential facility are now regulated by statute in § 19 IV Nr. 4 GWB. According to this section, the requirements are:

- (1) A dominant market position;
- (2) Misuse of that position;
- (3) A network or infrastructure;
- (4) Denial of access at all or under reasonable terms;
- (5) Impossibility to compete in an up- or downstream market without the access to the facility; and
- (6) No proof of unfeasibility.

D Australia

Australia has a special access regime in Part XIC of the Trade Practices Act 1974 that regulates the access to telecommunications networks.⁵²

Part IIIA of the Trade Practices Act now deals with the access to bottleneck facilities. Similar to the German system, these statutory provisions set the requirements for the access. The relevant section is section 44 G (2) of the Trade Practices Act. Its criteria have to be fulfilled before the National Competition Council (NCC) can make a suggestion to the designated Minister to declare the service.

- (1) Access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service; and

⁵² The *Telecommunications Act* 1991 provided industry-specific regulation for the access to telecommunications networks already. The access to telecommunications networks will be dealt with later in Part VII of this paper. Hilmer Report, ch 11, 245.

- (2) it would be uneconomical for anyone to develop another facility; and
- (3) the facility is of national significance,⁵³ having regard to
 - (a) the size of the facility; or
 - (b) the importance of the facility to constitutional trade or commerce; or
 - (c) the importance of the facility to the national economy.
- (4) access to the service can be provided without undue risk to human health or safety; and
- (5) access to the service is not already subject of an effective access regime; and
- (6) access (or increased access) to the service would not be contrary to the public interest.⁵⁴

However, if a service is not declared under Part IIIA consideration may still need to be given to the possible application of section 46 of the Trade Practices Act.

E Other Requirements

The literature and commentators also tried to develop requirements that on the one hand promote competition but on the other hand limit the extensive use of the essential facilities doctrine.

These additional requirements are to a certain extent interrelated. As the access right should be exceptional only this right should be granted only if the access for competing firms is expected to increase competition substantially.⁵⁵ Another concern expressed through an additional criterion is the effect an access right can have on future investments. The doctrine should typically not be applied if this were to reduce the incentives to engage in desirable activities.⁵⁶

⁵³ This excludes local phenomena from being declared.

⁵⁴ The public interest could be the efficiency of competition and consumer benefits.

⁵⁵ Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1990) 58 ALJ 841; Mats A. Bergmann "The role of the essential facilities doctrine" (Summer 2001) *The Antitrust Bulletin* 403, 410; Valentine Korah "Access to Essential Facilities under the Commerce Act in the Light of Experience in Australia, the European Union and the United States" (2000) 31 *VUWLR* 231.

⁵⁶ Phillip Areeda, above, 841; Mats A. Bergmann, above, 410; Valentine Korah, above, 231.

F Conclusion

As a result, the essential facilities doctrine is not easily applied or defined, since even the creation of an extended list of criteria does not appear to capture all elements of the courts' considerations and the requirements remain very ambiguous.⁵⁷

One possible definition could be that

[an] "essential facility" is [...] a monopoly permitting the owner to reduce output and or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets.⁵⁸

The European Commission defined an essential facility as "a facility or infrastructure, without access to which competitors cannot provide services to their customers".⁵⁹

Some facilities are understood to be essential in all the jurisdictions. These can be regarded as having natural monopoly characteristics.⁶⁰ Those facilities can be seen as classic examples such as telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves.

In more contentious cases a lot more effort is necessary to justify the access to a certain facility. Such cases include a rock impresario seeking admission to the local auditorium⁶¹; a teletype machine marketer complaining that its competitor will not sell machines for it⁶²; a ski resort complaining that a rival resort will not engage in joint

⁵⁷ Mats A. Bergmann, above, 413.

⁵⁸ Hilmer Report, ch 11, 239.

⁵⁹ *B & I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd* (Case IV 34.174) [1992] 5 CMLR 255.

⁶⁰ It will be analysed in Part VI D 1 of this paper if this is a necessary or sufficient requirement.

⁶¹ *Flip Side Prods., Inc v Jam Prods., Ltd*, 843 F 2d 1024 (7th Cir), cert. denied, 109 S. Ct. 261 (1988).

⁶² *Olympia Equip. Leasing Co v Western Union Tel Co*, 797 F 2d 370 (7th Cir 1986), cert. denied, 107 S.Ct. 1574 (1987).

marketing with it⁶³; a maker of "muscle building" food supplements demanding that a muscle building magazine accepts its ads⁶⁴, a would-be oil seller, who has no storage tanks of his or her own demanding to use those of an incumbent seller⁶⁵ or Berkey, who wants to know the results of Kodak's research before Kodak markets its own innovations⁶⁶.

This illustrates that the term of essential facilities can be misleading. The term is not used, or at least not only, for the provision of elementary requirements such as fresh water, health care and education. Instead, the term essential is rather used in the way of being indispensable to enable competition.

IV *DESIRABILITY*

The key question to answer, before the different criteria of the essential facilities doctrine are examined, is, if it is really desirable to grant a competitor an access right to a facility another competitor owns to enable competition in a downstream market.

It is very understandable, from the point of view of a small company that an access right seems like the best solution to enable competition in a certain market with a "big player" that might even be a monopolist. For example, if a small telecommunications company wants to compete with a nation-wide operating telecommunications company that has all the telecommunications lines and facilities available to provide millions of people with telecommunications services, the small company can only do so if it can use the existing lines. If the small business wants to compete in a niche of the market like international or long distance calls it is impossible to build a network of its own and still be able to make profits.

On the other hand, the big company might have taken risks and large investments to build a network of its own. Therefore, a balance between the different needs has to be

⁶³ *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985).

⁶⁴ *Twin Laboratories, Inc v Weider Health & Fitness Corp*, 720 F Supp 31 (S.D.N.Y. 1989).

⁶⁵ *Florida Fuels, Inc v Belcher Oil Co*, 717 F Supp 1528 (S.D. Fla. 1989).

⁶⁶ *Berkey Photo v Eastman Kodak Co*. 603 F 2d 263 (2d Cir 1979), cert. denied, 444 US 1063 (1980).

struck. The need to access a certain existing facility instead of building a new one to enable competition is one demand. The recognition of fundamental rights and freedoms as well as the incentives to invest are the opposing needs.

One has to realise and bear in mind that it is a general rule that the law does not impose a duty on one person to deal with another. Instead, owners of property and/ or suppliers of services are free to transact with others when, and in a manner, they choose. However, when a monopoly is involved, freedom to contract must be balanced against the possible misuse of market power.⁶⁷

Striking that balance, one has to consider that at least in Germany the freedom of contract and the right to decide about ones property, which also includes businesses, have constitutional rank. Article 2 of the German Basic Law establishes the freedom of contract. Article 14 of the German Basic Law grants the freedom of property. As a result, these rights are not to be easily set aside. To rule against these fundamental freedoms the court must have sufficient justification.

The German legislator defined the relationship between the purpose of competition law and the basic freedoms. With the enactment of § 19 IV Nr.4 GWB the German legislator defined the content of the rights in question. As the legislator gave a general definition and was not only regulating a single case this is consistent with German constitutional law.⁶⁸

Nevertheless, the courts, not only in jurisdictions without a general access rule to essential facilities but also in jurisdictions like Germany and Australia that enacted special provisions, have to take the objectives of competition law into account. This is advisable because of the real infringement an access right may have. The possible harm caused has to be as moderate as possible. It has to be outweighed by the possible effects on competition.

⁶⁷ Hilmer Report, ch 11, 242; Brenda Marshall/ Rachael Mulheron "Access to 'Essential Facilities' under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime" (1998) BOND LR 99, 102.

⁶⁸ Inhalts- und Schrankenbestimmung eines Grundrechts (definition of the content and the boundaries of a basic right).

A *Objectives of Competition Law*

The objectives of competition law in general and the provisions about access rights to essential facilities in particular are the promotion of competition, economic growth and efficiency.⁶⁹ The main goal of granting access rights to essential facilities is to secure competition in up- or downstream markets.⁷⁰

The objectives of competition law are stated, for example, in section 1 (A) of the Commerce Act 1986 that defines the purpose of the Act as to promote competition in the markets for the long-term benefit of consumers in New Zealand.

Further, § 1 GWB prohibits any agreement between competing undertakings, decisions by associations of undertakings and concerned practices, which have as their object or effect the prevention, restriction or distortion of competition.

The object of the Australian regulation of the Trade Practices Act 1974, as stated in section 2, is to enhance the welfare of the Australians through the promotion of competition and fair trading and provision of consumer protection. Part IIIA in particular is also concerned with how best to promote competition⁷¹ and is based on the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of 'monopoly' facilities to determine the terms and conditions on which they will supply their services.⁷²

Article 3 (I) (g) of the EC Treaty seeks to provide a system ensuring that competition in the internal market is not distorted. Article 82 (II) (b) of the EC Treaty prohibits the limitation of production, market or technical development to the prejudice of consumers. This illustrates that consumer protection and benefits are essential goals for competition law to achieve and promote.

⁶⁹ Commentary by the Commerce Select Committee, "Penalties, Remedies and Court Processed Under the Commerce Act 1986", 7 February 2001, 5.

⁷⁰ Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 202; Justification of § 19 IV Nr.4 GWB by the German Government, BT-Drs. 13/9720, 73.

⁷¹ Frank Zumbo "Access to Essential Facilities in Australia" (Feb. 2000) NZLR 13.

⁷² *Re Australian Union of Students* [1997] ATPR 41,473 at 43,956 – 43,957.

B Implications of an Access Right

However, one always has to bear in mind that the essential facilities doctrine is “not an independent tool of analysis but only a label – a label that beguiles some commentators and courts into pronouncing a duty to deal without analysing the implications”.⁷³ The justification in terms of competition policy for interfering with a dominant undertaking’s freedom of contract often requires a careful balancing of conflicting considerations.⁷⁴

The implications that one has to take into account when deciding on granting an access right are the repercussions for investment. A regulator or court also has to decide whether the goal is short-term promotion of competition or the long-term benefit of consumers through competition.

The goal of short-term competition can obviously be achieved through an access right for an applicant to an existing facility of another competitor. However, a considerate and thoughtful analyst will not stop at that point of the analysis. The further questions to ask are:

- (1) What are the signals that are sent to the competitor that owns the facility that another competitor is now able to access?
- (2) What are the considerations of other companies that think about an investment in a certain facility?
- (3) What is the outcome for long-term innovation?

⁷³ Phillip E. Areeda and Herbert Hovenkamp, 1987 supplement to Areeda and Turner on Antitrust Law (1978) 655, 656; *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662, 704 (HC), McGechan J and RG Blunt.

⁷⁴ Opinion of Advocate General Jacobs delivered on 28 May 1998 ([1998] ECR I-7791) para 57.

1 *What are the signals that are sent to the competitor that owns the facility that another competitor is now able to access?*

Concerning question one, the owner of that facility will not be very pleased to grant the other competitor an access right. The owner took all the risks of a sometimes huge investment to build a network or facility. This happened because of a calculation of the risks and the possible profits to gain if the investment is successful. Introducing a new variable of another competitor that is able to access the established facility without the risks spoils this calculation. Chances are that profits are lower under these new circumstances.⁷⁵

2 *What are the considerations of other companies that think about an investment in a certain facility?*

This leads straight to question two. It could be argued that the competitor knew before that this might happen. Therefore, other companies or the owner of the company who has to grant an access right from an ex ante perspective must think about the possible implications of their successful investment. If the company takes a risk and is successful it could well be that someone else is going to free-ride. If a company is considering an investment in a laboratory, plant or other facility it might choose the option of taking less risk and investment. If the facility is too big and has spare capacities for future developments a competitor might demand access to that facility. As a result, an investor will only opt for facilities with spare capacities if the compensation for a possible access right is carefully balanced. The need for enhanced competition on one hand has to be balanced against the needs of the owner of a facility to generate profits from its business.

⁷⁵ A market analysis before the start of a business has difficulties to assess that risk. Such an analysis can try to predict the demand and therefore the time until the business generates profits. Credit lines are calculated on that basis. These credits are likely to be more expensive if they run over a longer period of time to cover lower profits in the case of an access right.

3 *What is the outcome for long-term innovation?*

This is interrelated with question three. If a company opts for the smaller facility it might not be able to do research and come up with innovations. The argument against such an assumption could be that a company has no choice but to produce innovations. A company that is not producing innovations and is not able to present new products to the customer will not perform very well in the future. However, this is only true if competitors of that company are able to take over market shares, which is prevented if they cannot access the facility.⁷⁶ As a result, the incentives to do research are minimised if there is no risk of competitors taking away customers. This would definitely harm consumer benefits in the long-run.

4 *Conclusion*

Thus, if access to a producing, 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 competitor were, upon request, able to share the benefits. A company might still be able to make profits without improvement to its products. However, this would not be in the best interest of the customers. Therefore, 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. As a consequence, 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.

All this has to be taken into account when it comes to the assessment of the different criteria of the essential facilities doctrine. This doctrine can be a viable tool to determine the facility that need to be accessed if these concerns and repercussions for the economy as a whole are borne in mind.

⁷⁶ It will be analysed later if a competitor can exclude another when there are no spare capacities or if the owner of the essential facility has to promote the business of the other competitor through investments, changes in the facility and the extension of the facility.

V *DIFFERENT REGULATORY APPROACHES*

The different jurisdictions approach the issue of access rights to essential facilities in a different way. Germany and Australia have special provisions for certain network facilities, a special rule for essential facilities in general and a general rule to fall back on that regulates the misuse of market power.

Europe has special provisions for access to essential facilities to a certain extend only.

New Zealand on the other hand, tackles the problem through the general rule of the misuse of market power alone.⁷⁷

A *Australia*

The Australian regulatory approach concerning different essential facilities is very diverse. Australia has a three-stage system.

In the first stage, Australia enacted special regulatory regimes that regulate comprehensively thorough access to certain facilities. Such regimes exist in the form of, for example, the National Electricity Market Access Code and the Natural Gas Access Code. Access to telecommunications networks can be seen as being on the same level with these regimes. Instead of a special access regime, the access to these networks is regulated and incorporated in the Trade Practices Act as Part XIC.⁷⁸

The second stage of access regulation forms Part IIIA of the Trade Practices Act. This part provides general provisions for the granting of an access right. An access right may be granted for a declared service. The NCC and the designated minister have to be convinced that the relevant requirements are met before they can take the necessary steps to declare a service. These requirements are:

⁷⁷ An exception is the Telecommunications Commissioner under the Telecommunications Act 2001 that I will refer to later in this paper.

⁷⁸ As mentioned earlier (note 48), the access to telecommunication networks used to be regulated in the *Telecommunications Act 1991*.

- (1) First, the relevant service has to be identified. The service has to meet the definition of section 44 B of the Trade Practices Act.⁷⁹
- (2) Secondly, the requirements of section 44 G (2)⁸⁰ have to be fulfilled before the National Competition Council (NCC) can make a suggestion to the designated Minister to declare the service.
- (3) Thirdly, the Minister declares the service.
- (4) Fourthly, the parties can either negotiate the terms of access themselves and register their agreement with the Australian Competition and Consumer Commission (ACCC) or the ACCC is empowered to arbitrate the dispute.

The third stage within the Australian system of access rights to essential facilities is the general rule of section 46 of the Trade Practices Act. This section covers the taking advantage of a substantial degree of market power.

⁷⁹ "service" means a service provided by means of a facility and includes:

- (a) the use of an Infrastructure facility such as a road or railway line;
- (b) handling or transporting things such as goods or people;
- (c) a communications service or similar service;

but does not include:

- (d) the supply of goods; or
- (e) the use of intellectual property; or
- (f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service.

⁸⁰ Section 44 G (2) of the Trade Practices Act 1974 holds:

- (a) Access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service; and
- (b) it would be uneconomical for anyone to develop another facility; and
- (c) the facility is of national significance, having regard to
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy.
- (d) access to the service can be provided without undue risk to human health or safety; and
- (e) access to the service is not already subject of an effective access regime; and
- (f) access (or increased access) to the service would not be contrary to the public interest.

B Germany

The German legislator has established a similar system to the Australian one. However, there are only two different stages that can be distinguished in Germany.

On the first level, special regimes, comparable to the Australian special access regimes, exist to regulate the access to certain facilities in a comprehensive manner. These statutes are the Telekommunikationsgesetz (*Telecommunications Act* - later referred to as TKG) of 1996, the Postgesetz (*Postal Services Act* - later referred to as PostG) of 1997, the Allgemeines Eisenbahngesetz (*General Railroad Act* - later referred to as AEG) of 1993 and the Energiewirtschaftsgesetz (*Energy Act* - later referred to as EnWG) of 1998.

Enforcement of the different Acts varies. Special industry specific regulators enforce the TKG, the PostG and the AEG. The statutory body responsible for the access of competitors to networks in the area of the TKG and the PostG is the *Regulierungsbehörde für Telekommunikation und Post* in Bonn.⁸¹ The reform of the railroad legislation with the AEG of 27 December 1993 the *Eisenbahnbundesamt* was established as an industry specific regulator that enforces the Act in the area of railroad services.⁸²

The situation within the energy sector is exceptional in terms of enforcement of the EnWG. Enforcement of the Act is not the responsibility of a specific statutory body but rather is placed in the hands of the industry itself.⁸³ Following the German tradition in this area the necessary decisions are implemented in special association agreements.⁸⁴

⁸¹ REGTP „Die Regulierungsbehörde“ http://www.regtp.de/behoerde/start/in_01-00-00-00-00_m/index.html (Last accessed 2 August 2002)

⁸² Rudolf Eiermann “Die Benutzung der Eisenbahninfrastrukturen durch Eisenbahnverkehrsunternehmen” (1998) 25 Neue Juristische Wochenschrift 1846.

⁸³ Hanna Schroeder “Selbstregulierende Netzzugangsorganisation als Marktzutrittsschranke im deutschen Energiewirtschaftsrecht” <http://www.jura.uos.de/prof/schneider/Downloads/Vortraege/SeminarGreifswaldNetzzugang.pdf> (Last accessed 2 August 2002).

⁸⁴ Verbändevereinbarung Gas (*Association Agreement Gas*), Verbändevereinbarung II (*Association Agreement II*), Nachtrag (Amendment) and Verbändevereinbarung II plus (*Association Agreement II plus*).

The competition authority (*Bundeskartellamt*) and the Ministry of Commerce supervise these agreements. If they are not satisfied with the way the industry is regulating itself they can put pressure on the industry to enact better regulations.

In the second stage § 19 GWB regulates the misuse of a dominant position. The access to networks and infrastructures is regulated in § 19 IV Nr.4 GWB as a special case of that misuse. However, it is still possible to assess the circumstances under § 19 I GWB, which is the general rule that deals with misuse of a dominant position if the special case is not applicable because the requirements set out are not met.

C *Europe*

Europe has not established a special regulatory system like Germany and Australia as telecommunications and railroads are administered by the Member States.⁸⁵ The articles 81 and 82 of the EC Treaty are the only provisions that deal with the issue of access rights. These provisions tend to be construed in a restrictive manner.⁸⁶

D *New Zealand*

New Zealand has chosen a different system from Germany and Australia but can be compared with the European approach. New Zealand uses so-called "light-handed regulation". This must not be mistaken as little or even absence of regulation at all.⁸⁷ The term means that New Zealand did not establish an industry specific regulator but relies on competition and the threat of regulation. The only exception so far is the Telecommunications Commissioner established by the Telecommunications Act 2001. In general, section 36, Commerce Act 1986, that deals with the abuse of power, has to

This is regarded as the best solution to process the requests for access of about 800 network operators in Germany in relative proximity of the applications. Boris Scholtka "*Die Entwicklung des Energierechts in den Jahren 2000 und 2001*" (2002) 7 *Neue Juristische Wochenschrift* 483.

⁸⁵ However, the European legislator set the regulatory framework for the Member States to act in. This will be illustrated for the telecommunication industry in Part VII of this paper.

⁸⁶ Opinion of Advocate General Jacobs delivered on 28 May 1998 ([1998] ECR I-7791) para 68; see also *Bronner* ECJ, ([1998] ECR I-7791) para 46.

⁸⁷ New Zealand Law Society Seminar August 2001 *Competition Law Update* 3.

ensure that economic efficiency prevails. The courts have the potential to create an access right in circumstances where the regulatory function of the markets has failed.

E Assessment

Both systems, the light-handed approach of New Zealand and the establishment of industry specific regulators in Germany and Australia, work according to the specific needs within the different jurisdictions. Therefore, the assessment of the advantages and disadvantages is only possible in relation to the different circumstances within the different countries.

The establishment of an industry specific regulator can have various incentives.

One of the reasons for a legislator to establish a special regulator is the need to have an expert authority to deal with a very complex issue. Especially in telecommunications issues a lot of technical knowledge is necessary to administer the system in a way that allows lively competition and still does not disadvantage anyone. One only has to think about the frequencies that are involved for TV broadcastings, radiocommunications, and landbased telephone line or satellite connections. All this has to be regulated for many different providers. In big markets with many participants like in Australia and Germany the courts would not be capable of dealing with the granting of licences and frequencies by themselves. The courts could manage this task only if they had the necessary resources.⁸⁸ However, to call several experts to testify each time would generate immense costs and would make lawsuits even more expensive.⁸⁹ As a result, the complexity and size of certain industries in different jurisdictions make an industry specific regulator almost indispensable.

Predictability is another advantage of taking that task away from the courts and regulating this issue by statute in order to concentrate the responsibility in the hands of

⁸⁸ However, one has to take into account that the industry specific regulator for the German telecommunications and postal services area alone employs several hundred full-time staff members. To leave this regulation for the courts to sort out is hardly imaginable.

the regulator. All regulatory regimes have in common that competitors are encouraged to solve problems on their own. To accomplish this and to solve the question of access rights to certain facilities it is easier for all parties involved if there are guidelines to follow. The regulator takes actions to decide on that issue only if there is no solution for a problem.

On the other hand, in jurisdictions like New Zealand with only relatively small markets the costs of the establishment of an industry specific regulator have to be balanced against the costs of experts testifying in a case before a judge.⁹⁰ In New Zealand with only a few companies in positions of interest in relation to access rights it would be "overkill" to have a regulatory body that is responsible for the supervision of competition. The newly established Telecommunications Commissioner under the Telecommunications Act 2001 is a slight exception to that. However, this new authority deals mainly with technical issues though the Commissioner is also acting as intermediary where an agreement cannot be found between parties. For the few cases that might arise the costs of an expert testifying are justifiable in comparison to the costs that might be involved in the establishment of a regulator. It "costs the country less in terms of both compliance costs to business and cost to the taxpayer of funding the regime".⁹¹

Another valid concern that influences the establishment of an industry specific regulator is the possible familiarity of an industry specific regulator with the sector of the economy that has to be regulated. While a rotation of personnel within competition authorities is common practice to secure independence of the authority generally no rotation takes place in a special regulatory body. Within the sector that has to be monitored the persons involved get to know each other very well. This could give rise to bias concerns. To counter these concerns safeguards have to be established.

⁸⁹ The affected companies would try to calculate the risk of an expensive law suit in advance to recover the possible losses through higher prices. This would be to the detriment of consumers.

⁹⁰ Although these experts can be very costly. As an example the case of *Telecom v Clear* involved two economists and one accountant on the side of Clear and three professors and one accountant on the side of Telecom in the High Court. *Telecom Corporation of New Zealand v Clear Communications Ltd* [1995] 1 NZLR 385, 397 (PC), Lord Browne-Wilkinson.

⁹¹ Commerce Commission Media Release: 1998-58, http://www.comcom.govt.nz/publications/display_mr.cfm?mr_id=417 (Last accessed 20 May 2002).

Another circumstance that can influence the decision of a legislator in terms of light-handed regulation or an industry specific regulator is the political attitude towards legislation. Germany lives up to the stereotype of being overly correct and keen to regulate everything as thoroughly as possible. Trust in the markets is not very strong. New Zealand on the other hand, has a strong belief in market forces and chooses a liberal "laissez-faire"-approach.

As a consequence, the light-handed approach as well as the regulatory approach is justifiable under different market circumstances. However, in jurisdictions that are very sceptical about the application of the essential facilities doctrine like New Zealand, as well as in jurisdictions that enacted statutory provisions dealing with the access issue, the doctrine is only a tool the courts or legislators use.

VI CRITERIA OF ANALYSIS ACCORDING TO THE ESSENTIAL FACILITIES DOCTRINE

As mentioned above, the essential facilities doctrine and the criteria set up to analyse a case according to the doctrine differ to a considerable extent. The emphasis in the US antitrust system is on the prevention of monopolies or their defence once a monopoly is established. Other jurisdictions like Europe, Germany, New Zealand and Australia focus on the use or misuse or a dominant market position. Nevertheless, some common ground and certain common features to start from can be identified. They form a set of criteria to describe a behaviour that is deemed anti-competitive. Criteria that appear one way or another throughout all jurisdictions are:

- 1.) The facility has to be a network, infrastructure or relevant service.
- 2.) The facility has to be in a dominant position or a monopolist (or have substantial market power).
- 3.) The facility has to be impossible to duplicate within reasonable limits.
- 4.) The owner of the facility has to deny the access at all or under reasonable terms.
- 5.) The facility has to be necessary to enable up- or downstream competition.
- 6.) Sharing the facility has to be feasible in terms of security and competence of the applicant. Further, the business of the owner must not be put at risk.

A *Network, Infrastructure or Relevant Service*

That the facility has to be a network or infrastructure is an explicit requirement of § 19 IV Nr.4 GWB. Section 44 B of the Trade Practices Act 1974 on the other hand mentions a relevant service. Europe and New Zealand in their general rules do not mention a specific description the facility has to fulfil. However, the difference between the requirements in the different states is not very big. The concepts of networks and infrastructures are wide enough to cover almost everything. Examples that are covered are airport terminals, electronic reservation systems, railroad tracks and terminals, databases and even camera spots at the funeral of a British princess.⁹²

Within section 44 B of the Trade Practices Act 1974 infrastructure facilities such as a road or railway line, the handling or transporting of things such as goods or people and communications services are covered.

Excluded from the relevant services are the supply of goods, the use of intellectual property and the use of a production process. Clearly, since the focus of Part IIIA is on the provision of a service, any of the above-mentioned is only relevant to the extent that it is necessary for gaining access to the primary service. Importantly, while Part IIIA does not cover a service that does not fall within the definition of service, consideration may still need to be given to the possible application of section 46 of the Trade Practices Act.⁹³

The same is true for the German application of the essential facilities doctrine. § 19 IV Nr.4 s.2 GWB explicitly excludes intellectual property rights. The reason for the exclusion of these rights is the balance the legislator has to find between promotion of research and innovations on one hand and the promotion of competition through granting access rights on the other hand. The protection of an invention through a patent enables the inventor to recover the costs of his/ her research to produce that invention. Therefore, other companies or individuals are encouraged to research as well. This is for the benefit

⁹² Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 201; Meinrad Dreher, "Die Verweigerung des Zugangs zu einer wesentlichen Einrichtung als Missbrauch der Marktbeherrschung" (1999) 16 DB 833, 834.

⁹³ Frank Zumbo "Access to Essential Facilities in Australia" (Feb. 2000) NZLR 13, 14.

of society and the consumer as well. Additional benefits for consumers can be gained after the period of 20 years of protection. New innovations are often based on older patents. Therefore, the access to intellectual property rights has to be restricted for a certain period of time as benefits for consumers would be realisable only in the short-run while in the long-run disadvantages would nullify the gained benefits.

The European approach to intellectual property rights is slightly different. This is illustrated by the decision of "*Magill*".⁹⁴

This behaviour of the big TV broadcasters in the UK and Ireland was regarded as misuse of their intellectual property rights, which meant their copyrights. These rights were so short-lived that after the protection period there was no use for them anymore. The circumstance that consumers in the UK and Ireland had to buy one TV guide for each channel was regarded as intolerable.

As a result, intellectual property rights are covered by the European approach to the application of the essential facilities doctrine under very exceptional circumstances only.

B Dominant Position or Monopolist

The next question to be answered is the amount of market power that an owner of a facility in question has to have to regard his or her behaviour as intolerable when refusing to deal or provide access under reasonable conditions for a competitor.

The United States' requirement is that the owner has to be a monopolist. Europe and Germany have the criteria of the dominant position in their provisions of § 19 GWB and article 82 of the EC Treaty. Australia does not refer to this problem in Part IIIA but in

⁹⁴ ECJ, Judgement of 6 April 1995, Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) v Commission* [1995] ECR I-743; In that case, the three main broadcasters in Ireland, Radio Telefis Eireann (RTE), Independent Television Publications (ITP) and the British Broadcasting Corporation (BBC), refused to release their programme listings to Magill TV Guide, so that it could publish a weekly TV guide comprising all listings. Under Irish and UK law, the programme listings were copyrighted. Each one of these broadcasters was publishing its own guide with its respective listings only.

the general rule that is applicable if the access right cannot be achieved through Part IIIA it also has the substantial degree of market power requirement. In New Zealand, the criteria was dominance, but is now a substantial degree of market power.

1 *Market Definition*

No matter what the requirement for the application of the essential facilities doctrine is, the definition of the market is crucial. For competition law purposes, the market is the theoretical construct where firms interact. Put broadly, it encompasses the smallest geographical area where products are close substitutes.⁹⁵

Mason CJ and Wilson J emphasised the importance of the definition of the relevant market in *Queensland Wire* in the following way:⁹⁶

After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes: too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is.

The European approach as common ground for the jurisdictions under scrutiny is helpful in this context. The ECJ held in *Hoffmann-LaRoche*⁹⁷ that:

[t]he concept of the relevant market [...] implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.

⁹⁵ New Zealand Law Society Seminar August 2001 *Competition Law Update* 16.

⁹⁶ *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177, 187 (HCA), Mason CJ and Wilson J.

⁹⁷ *Hoffmann-La Roche AG v The Commission of the European Communities* [1979] 1 ECR, 461. Hoffmann-La Roche concluded agreements with its customers who purchased vitamins which contained an obligation upon them, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche.

This culminates in the question of substitutability. The New Zealand Law Society phrases it in the following way:⁹⁸

It is a simple enough proposition to state, but somewhat more difficult to control in practice. At a superficial level it can be illustrated as follows. A consumer goes to the shop to buy an apple and discovers the price has increased. Is an orange purchased in substitution? If the answer to that is yes, it may indicate there is a broader market for fruit. But, if a banana is wanted in order to bake a banana cake, an orange will not be an adequate substitute.

From the approach of an economist the test of substitutability is about cross-elasticity of supply and demand. This measures the extent to which supply or demand conditions alter if the price of a substitute product alters.

Dawson J in *Queensland Wire*⁹⁹ put it like this:

The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product responds to a change in the price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market.

If demand is described as inelastic it means that demand is unresponsive to an increase in price. It simply remains the same.

2 *Monopolist*

The question to be decided once the relevant market is defined is whether the competitor in the market needs to be a monopolist for there to be an obligation to grant someone an access right.

⁹⁸ New Zealand Law Society Seminar August 2001 *Competition Law Update* 17.

⁹⁹ *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177, 199 (HCA) Dawson J.

a Necessary Condition

In the United States the *MCI* case that established the four criteria for the essential facilities doctrine in the United States required the owner of the facility in question to be a monopolist. As mentioned above, the legal and historical background has to be taken into account when it comes to the interpretation and analysis of the doctrine in different jurisdictions. The US American antitrust law is concerned with the prohibition of the establishment and maintenance of monopolies. This stems from their historical experience with omnipotent trusts that thwarted competition to the detriment of consumers.

The regulations in force in the four other jurisdictions that deal with the essential facilities doctrine explicitly or through their general rules do not require the facility to be a monopolistic one. The focus is based on market power that has to be substantial¹⁰⁰ or establishes a dominant position¹⁰¹.

As a result, it is not necessary that a monopolist owns the facility that is regarded as being essential.

b Sufficient Condition

To say that the facility does not necessarily have to be owned by a monopolist for the essential facilities doctrine to be applicable does not rule out that the monopoly position still could be sufficient condition for the essential facilities doctrine to be applied.

To consider a monopoly position as sufficient for the application of the essential facilities doctrine would imply that this market position on its own is blameworthy. However, a monopoly position in a market is not enough on its own to force a competitor to open his or her facility for another competitor. This would leave the forces of the market out of consideration. The law does not condemn every monopolist simply because

¹⁰⁰ Section 46 of the Trade Practices Act 1974 in Australia; Section 36 of the Commerce Act 1986 in New Zealand.

¹⁰¹ § 19 IV Nr.4 GWB in Germany; Article 82 of the EC Treaty.

he is a monopolist in order to "reshuffle" the market.¹⁰² Not even in the United States where the wilful acquisition under sec 2 of the Sherman Act is the position of a monopolist enough to take actions against him or her. A competitor that uses innovation, service and other forces of competition in a market to deny other competitors market shares cannot be subject to an action against him or her. This is because this kind of behaviour is intended by competition law.¹⁰³

If this is true in the United States it is also true in the other jurisdictions in question because the threshold of market power is lower than in the United States.

As a result, a monopoly position of a competitor might be an indication that further investigations concerning his or her business practices in relation to the access to certain facilities could be advisable. Nevertheless, this position itself is not enough to trigger any kind of access right.

C Involvement of the State

As some of the networks in question like telecommunications networks, electricity grids or railroad terminals and tracks were formerly state owned, the question is if this circumstance could be a sufficient or even necessary condition to apply the essential facilities doctrine.

The problem with state involvement in the competition process is that competitors are not treated equally. This is a valid concern. However, the commentators critical of regulation of network industries relate more to an evolving industry when everyone is out of the blocks at the same time rather than a market with a dominant incumbent as a result of privatisation of a state-owned monopoly.¹⁰⁴

¹⁰² Phillip Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" (1990) 58 ALJ 841, 845.

¹⁰³ "A monopolist is entitled, like everyone else, to compete with its competitors: if it is not permitted to do so it would be holding an umbrella over inefficient competitors." *Telecom v Clear Communications* [1995] 1 NZLR 385, 402 (PC) Lord Browne-Wilkinson; *Olympia Equip. Leasing Co v Western Union Tel Co*, 797 F 2d 370 (7th Cir 1986) Posner J.

¹⁰⁴ Ministerial Inquiry into Telecommunications *Final Report* (2000) 14, note 4.

An argument for the application of the essential facilities doctrine to grant a competitor an access right where a formerly state-owned now privatised monopolist is involved is that this player in the market was equipped with a network that was paid for by taxpayers. The risk of failure was placed on the state. Securing the monopoly by statutory regulation the competitor had the possibility to bind customers to his or her services. As these industries were established in areas that provided services for the essential requirements of the people these services are more than likely to cover all consumers. It is very difficult for a new entrant in the market to acquire market shares because of that.

On the other hand, one could argue that this advantage was equalised when the monopolist was privatised. The shares were sold at a price that the government saw fit to cover the value of the company. Therefore, one could say that the formerly state-owned enterprise is not different from any other business just started. Therefore, the result could be that the former state involvement should not be considered as the important factor in the decision of granting an access right or not.

It is true that a government in the privatisation process tries to accomplish a price per share that reflects the true value of the company. Nevertheless, one has to take into consideration that some positions are not covered, like the possible losses from the beginning of the undertaking, the costs of innovation and the invaluable fact that because of the statutory monopoly position many customers were forced to use the services of that company. Although there might be competition now these customers might now be reluctant to change the service provider they know for a certain time. This could be because of the concern that the new provider is not as good as the old one, that changes might be involved or just because of laziness. As a conclusion, the former state involvement makes it more likely that an access right to certain essential facilities is justified.

To assess the validity of this argument a comparison with the situation with a private competitor involved in the first place might provide valuable information.

Two cases that might help answer the question of the indicative effect of former state involvement in comparison to private achievements are the Australian cases of

Queensland Wire and *Melway*. The facts of *Queensland Wire* were already mentioned above. In the case of *Melway* the Melway Street Directory held in excess of 80-90 per cent of the retail market share for Melbourne street directories. It could have arranged for the distribution of its street directories in a number of different ways. It decided to appoint independent wholesalers who were given exclusive responsibility for a particular segment of the market. Thus, newsagents and bookshops constituted one segment service stations and retail outlets for automotive parts constituted another segment. Selected wholesaler distributors were appointed exclusively for each defined market. While there was strong competition between retailers within a segment or across segments especially in relation to price, there was very little competition at the wholesale level. Melway cancelled one of the contracts with its distributors.

Both cases involved a private company that took all the risk in the first place to establish a very costly facility in the hope of making profits one day. In the course of the events the facility proved profitable because other competitors did not take the risk to establish a competing facility themselves or if they did the products were not as successful. Therefore, the markets decided who is able to compete and who is not. In such a situation one has to be careful to establish an access right too readily. Therefore, less often has the doctrine been used when the monopoly position is the result of "skill, foresight and industry" – and nor should it be.¹⁰⁵

On the other hand, the situation is different in the case of the purchase of shares of a former state-owned monopolist. The buyer gets an already established company with less risks involved. Though the price might be high it is unlikely that it reflects all the risks taken properly.

As a result, while successful private competitors should be treated with careful consideration if not left alone altogether, the involvement of a former state-owned

¹⁰⁵ Mats A. Bergmann "The role of the essential facilities doctrine" (Summer 2001) *The Antitrust Bulletin* 403, 405. The *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177 (HCA) case is an example for successful establishment of a product. However, the essential facilities doctrine is not applicable because the Y-Bar is a product or good and no facility, network or infrastructure.

competitor has the same indicative consequences as monopolist status. While it is not enough on its own the state involvement triggers further investigation in the business practices of that company.

D Impossibility of Duplication of the Facility

Another condition that has to be fulfilled by the facility is that it has to be impossible to duplicate within reasonable terms. Uncertainties arise in relation to the term of natural monopolies and the point of view an authority or regulator or a court has to take when it decides about the impossibility to duplicate a facility.

1 Natural Monopoly

In the context of the impossibility of duplicating a certain facility, the term of natural monopolies, or facilities having natural monopoly characteristics, is often used.

First of all, it is necessary to define what the term means and to decide if it provides a helpful tool in the application of the essential facilities doctrine.

The National Competition Council (NCC) of Australia defines a natural monopoly as occurring where one facility can supply the entire market demand more cheaply than two or more smaller facilities.¹⁰⁶

In *Sydney International Airport* the Tribunal considered that:¹⁰⁷

The "power and salience" of a natural monopoly comes from, first, economies of scale; second, economies of scope, that is producing a number of different but complementary products at a comparatively low unit cost; and, third, the specialised nature of the assets, having no alternative economic value in use and therefore entailing costs on new entrants which are unrecoverable, or "sunk" in the event of subsequent exit.

¹⁰⁶ National Competition Council "The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act" (NCC, Melbourne, 1996) 22.

¹⁰⁷ *Sydney International Airport* [2000] ACompT 1, 82.

In essence, a natural monopoly occurs in markets characterised by diminishing marginal costs and average costs over a relevant range of output, due to the existence of fixed costs for the delivery of the service.¹⁰⁸

In circumstances like this, where high barriers to entry safeguard the present monopolist against competition, consumer benefits demand the legislator or courts to take actions. The success of breaking up such natural monopolies is displayed in the German telecommunications sector. The prices for national and international calls are considerably lower now than they have been before the privatisation and the access of smaller competitors to the networks owned by the Telekom AG.¹⁰⁹

2 *Impossibility*

There are several options as to how to construe the requirement that it be impossible for a competitor to duplicate the facility. First of all, "impossibility" has to be defined. Further, the criteria can be assessed from an objective point of view as well as from a subjective one. Thirdly, a decision has to be made if impossibility of duplication has to be absolute or just relative.

a *Definition of Impossibility*

Impossibility of duplicating a facility can be defined as the mere inconvenience of raising enough money, to fulfil the legal requirements to get the necessary permits and to overcome any physical obstacles. On the other hand, it can have the meaning of an insurmountable barrier as well.

¹⁰⁸ Daniel Clough "Economic Duplication and Access to Essential Facilities in Australia" 28 ABLR 325, 328.

¹⁰⁹ The introduction of the call-by-call option for long distance and international calls in the beginning of 1998 led to a decrease of fees by 90%. Handelsblatt *Mehr Wettbewerb im Telefon-Ortsnetz beschlossen* 11 September 2002

<http://www.handelsblatt.com/hbiwwangebot?fn=relhbi&sfn=buildhbi&cn=GoArt!200104,201197,56448>

2 (Last accessed 12 September 2002).

As mentioned above, became the essential facilities doctrine a very powerful tool in the hands of the competition authorities. It has to be applied with care. Therefore the Hilmer Committee considered that "clearly, the access to the facility should be essential, rather than merely inconvenient".¹¹⁰ In other words,¹¹¹

the dominant undertaking has [to have] a genuine stranglehold on the related market. That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographic or legal constraints or is highly undesirable for reasons of public policy.

This is in line with only exceptional circumstances justifying the application of the essential facilities doctrine.

b Objective or Subjective Approach

The next question to answer is, whether an objective or subjective approach should be applied to evaluate the potential of a competitor to duplicate a facility. To answer this question it is necessary to identify the objective of competition law in this context.

Some argue that cases like *Commercial Solvents*¹¹² have involved situations where a small or medium-sized business, which was dependent on a particular supplier, saw its livelihood threatened. As a result, the objective of competition law could be seen as protection of a single competitor.

The argument against this is the fact that in the *Commercial Solvents* case "it was the elimination of downstream competition with itself that made the refusal of supply [by

¹¹⁰ Hilmer Report, ch. 11, p.251.

¹¹¹ Opinion of Advocate General Jacobs delivered on 28 May 1998 ([1998] ECR I-7791) para 65.

¹¹² *Commercial Solvents Corp v The Commission of the European Communities* [1974] 1 CMLR 309; Commercial Solvents as the dominant manufacturer of certain chemical products, used in the production of drugs to combat tuberculosis, decided that it would no longer supply the products to other drug producers because it intended to produce the finished drugs itself.

Commercial Solvents] an abuse".¹¹³ In Australia section 46 of the Trade Practices Act is concerned with free not fair competition¹¹⁴. This section "aims to promote competition, not the private interests of particular persons or corporations".¹¹⁵ The approach is not different in the other jurisdictions.¹¹⁶ Indeed, competition in general is often ruthless, stressful and unpredictable.¹¹⁷

Merely to focus on the inability of some entrants to raise sufficient capital in potentially imperfect financial markets is to focus subjectively on the competitor rather than objectively on the process of competition.¹¹⁸

As a consequence, it cannot be the aim of competition law in general and the essential facilities doctrine in particular to promote a competitor that made up his or her mind to compete with an existing market player when this new would-be entrant lacks all the necessary requirements. For the sake of recognising the fundamental freedoms of contract and property subjective difficulties of the competitor have to be set aside. Taking this into consideration the test has to be objective.

c Absolute or Relative

The last decision to be made in the context of the impossibility to duplicate a facility requirement is whether to take an absolute or relative perspective.

¹¹³ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (t/as Auto Fashions Australia)* [2001] 50 Intellectual Property Reports 257, 274 (HCA) Gleeson CJ, Gummow, Hayne and Callinan JJ para 70.

¹¹⁴ Stephen Corones „Section 46 of the Trade Practices Act: Rules of Battle revisited“ (2001) 29 ABLR 252, 256.

¹¹⁵ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (t/as Auto Fashions Australia)* [2001] 50 Intellectual Property Reports 257, 274 (HCA) Gleeson CJ, Gummow, Hayne and Callinan JJ para 17; *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177, 191 (HCA) Mason CJ and Wilson J.

¹¹⁶ See art 3 (1) (g) of the EC Treaty, s 1 of the Act Against Restraint of Competition and s 1A of the Commerce Act 1986.

¹¹⁷ New Zealand Law Society Seminar August 2001 *Competition Law Update 5*; *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* [1988-1989] 167 CLR 177, 191 (HCA) Mason CJ and Wilson J.

¹¹⁸ Daniel Clough "Economic Duplication and Access to Essential Facilities in Australia" 28 Australian Business Law Review 325, 338.

The absolute perspective would take all the competitors or potential competitors into account. The entry has to be forced by an access right granted by competition authorities or courts if none of these competitors would be able to enter the market without such an intervention. The relative approach would use objective criteria but only in relation to the particular competitor that demands access to the market.

As mentioned above, competition law focuses on competition as a whole and not the competitiveness of a single competitor. Therefore, in Australia the question is answered in favour of the absolute view. It has to be evaluated, "whether it would be economical for *anyone* to develop another facility to provide the service [emphasis added]".¹¹⁹

The European legislation and court decisions are in line with this Australian approach. The ECJ held in the case of *Bronner* that¹²⁰

it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers distributed by the existing scheme.

As a result, the perspective is absolute and not in relation between the owner of the facility and the would-be entrant.

As section 1A of the Commerce Act 1986 states the objective of the Act as promotion of competition for the benefit of consumers, New Zealand focuses on competition rather than on the competitor. The approach taken under section 36 of the Commerce Act 1986 should be absolute, too.

¹¹⁹ Daniel Clough "Economic Duplication and Access to Essential Facilities in Australia" 28 ABLR 325, 335.

¹²⁰ *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* ([1998] ECR I-7791) para 46.

The question is, whether this is also true for Germany. The situation there seems to be different. This illustrates the comparison with the Australian provisions. Sections 44 G (2) (a) and (b) focus on the promotion of competition in a market and the impossibility for anyone to develop another facility to decide whether the service should be declared.

In Germany the focus is on the single competitor as applicant. § 19 IV Nr. 4 GWB regards the denial of access for another undertaking as misuse of a dominant position. Therefore, the wording of the subsection indicates the focus on the particular applicant though from the point of view of competition it would be sufficient, if another undertaking would be capable of the duplication. This would also create potential competition.

However, the justification of the German government of the new subsection emphasises that a facility is only essential if competitors are unable to establish an equal facility.¹²¹ Though the government refers to more than one competitor, this is not enlightening. This can also have the meaning of just multiple applicants rather than an absolute perspective. Though the later interpretation would be in line with the other jurisdictions under scrutiny it is up to the German courts to use the tool of *teleological reduction*¹²² to limit the scope of § 19 GWB to an absolute perspective. The phrasing of the subsection could be regarded as generalisation and therefore used only in a restrictive manner. Until the courts decide on that issue one has to take the statutory provision as one finds it. That indicates a relative approach in Germany while other jurisdictions have chosen an absolute approach.

E Denial of Access at all or under reasonable Conditions

One other requirement that can be identified in all jurisdictions in question is that the undertaking in a dominant position or with a substantial degree of market power has to deny the would-be entrant access to the market. Only in some rare and special occasion

¹²¹ Justification of § 19 IV Nr.4 GWB by the German Government, BT-Drs. 13/9720, 73.

¹²² This is a tool of German statute interpretation that cuts back the extensive application of a statute to a level that was originally intended by the legislator.

access will be denied at all.¹²³ The owners of facilities to which other competitors want access generally such blatant behaviour. Therefore, the most common offence against competition law is not the refusal to deal at all but to deal only under conditions that are less favourable than the conditions the owner would charge subsidiaries or related companies. The conditions or the prices are just disadvantageous.¹²⁴

Under the first circumstances, the courts only have to decide whether an access right should be granted. This decision can be made fairly easy using the essential facilities doctrine or the general misuse rule. The hard task for competition authorities or the courts to solve is to deal with the terms of the access. If the parties cannot reach an agreement on the terms and prices of the access it is up to the authorities to come up with a solution. This task is almost impossible to accomplish. In the case of the first access to a facility the judge would have to draft a contract without any guidelines and in further violation of the freedom of contract. The landmark case of *Telecom v Clear* illustrates the problem.¹²⁵ This example demonstrates the difficulty competition authorities and courts can have with decisions concerning access rights. This is another advantage of an industry specific regulator that can fall back on thorough rules.

As a consequence, the legislator, when deciding whether to establish an industry specific regulator or not, might also consider whether the national authorities experience many difficulties in applying either the essential facilities doctrine or the general rules of misuse of market power.

¹²³ This includes landmark cases like *Bronner* and *Melway*.

¹²⁴ Such a behaviour can be identified in landmark decisions like *Telecom v Clear*, *QWI*, *Port Nelson* and *Stena Sealink*.

¹²⁵ Telecom did not deny Clear the access to the local loop and the national network completely. It just demanded terms like an access key and wanted to charge prices it would charge any other customer, too. Telecom even came up with an economist model to prove that the charging of monopoly prices would be tolerable because Clear could compete by charging lower prices to its customers. This model is now known as the Baumol-Willig-Rule after its inventors. Through this, it could reduce these opportunity costs over time.

F Enabling Competition

It is a requirement that the granting of an access right enables competition in an up- or downstream market.

As mentioned above, the right to access another ones facility is limited to exceptional circumstances. It is not enough that it is a mere convenience or a competitive advantage for the would-be entrant.¹²⁶ An access right is justifiable only where barriers to entry are almost insurmountable.

[I]t must be extremely difficult not merely for the undertaking demanding access but for any other undertaking to compete. Thus, if the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market.¹²⁷

In other words, the access must be crucial to compete with an overwhelming large incumbent and in spite of barriers to entry such as high capital costs and large economies of scale.¹²⁸

G Unfeasible to share the Facility

The defence of the owner of a facility against the claim of a would-be entrant is that access is unfeasible.

1 Infeasibility

“Infeasibility” is a very ambiguous term. The owner of the facility will set the threshold of unfeasibility lower as this would prevent the other competitor from entering. The owner could secure the investments and could go on making the profits he or she calculated with in the beginning. The would-be entrant will try to set the threshold of

¹²⁶ Opinion of Advocate General Jacobs delivered on 28 May 1998 ([1998] ECR I-7791) para 65.

¹²⁷ Opinion of Advocate General Jacobs delivered on 28 May 1998, above, para 66.

¹²⁸ Daniel Clough “*Economic Duplication and Access to Essential Facilities in Australia*” 28 ABLR 325, 334.

infeasibility as high as possible. It is possible only then to enter the facility under relatively easy terms.

The case of *MCI* regarded the access right under the essential facilities doctrine as unjustified if the access would be impractical for the owner. If this means it is just inconvenient for the owner, the threshold is too low. This would give the owner an advantage that would make the essential facilities doctrine useless. Therefore, unfeasible must be construed as having the meaning of almost impossible. The essential facilities doctrine only works with such a high threshold. If policy reasons make an access right desirable, a low threshold must not cross the whole construction.

As a consequence, it is no argument that the two opponents dislike each other. Arguments that create infeasibility are safety reasons, where the competitor would threaten the lives of people involved. Another argument is that the owner of the facility would not survive economically if he or she had to allow someone to use the facility.

2 *Promotion of a Competitor*

A further question is whether an owner of a facility can argue that the applicant cannot be connected to the network due to technical differences between the two systems or lack of capacities. The owner could be obliged to promote that competitor through the necessary changes instead. Another question is whether the owner of the facility has to provide additional capacity if there is some free capacity but not enough to provide every applicant with the desired space.

Usually, no one is obliged to promote a competitor to its own detriment. However, in the area of the essential facilities doctrine, for the benefit of competition and consumers, the owner cannot retreat to that position. If the interconnection is possible, the facility has to be altered. However, the costs have to be paid for by the new entrant.¹²⁹

¹²⁹ *Telecom Corporation of New Zealand v Clear Communications Ltd* [1995] 1 NZLR 385, 401 (PC), Lord Browne-Wilkinson.

If there is not enough capacity for all competitors, the owner has to make sure that the access is granted on non-discriminatory terms.¹³⁰

3 *Burden of Proof*

Although the claimant has to prove all the criteria of the essential facilities doctrine, he or she does not have to prove that the access is feasible. The burden of proof is with the owner of the facility. This is only just

because the possible reasons for a justification of the denial of an access right are almost all in the sphere of influence of the owner of the essential facility. The claimant has hardly any chance to assess these.¹³¹

As a consequence, where there is doubt about infeasibility of an access right, the access right has to be granted.

H *Change of German approach?*

As illustrated before, the German legislator established § 19 IV Nr.4 GWB as a special case of the misuse of market power that is covered by § 19 I GWB. One could argue that the phrasing of the subsection changed the behavioural approach to a structural one.

The origin of the essential facilities doctrine is the misuse of some market power. This means that the monopoly position itself was not deemed to be punishable. This is different in the US where the Sherman Act of 1890 tries to prevent the maintenance of monopolies although a competitor in a dominant position in a market is allowed to charge whatever price he or she sees fit. In the European systems the charging of monopoly prices is very likely to be regarded as misuse of a dominant position. This illustrates that the dominant competitor has to do something blameworthy to trigger actions of the

¹³⁰ Hilmer Report, ch 11, 256.

¹³¹ Justification of § 19 IV Nr.4 GWB by the German Government, BT-Drs. 13/9720, 73.

competition authorities.¹³² It could be argued that the German legislator changed this approach with the new regulation in § 19 IV Nr. 4 GWB. Under this subsection, the trigger for action could be seen as the market power of the owner of the facility alone without any reference to certain behaviour.¹³³

On the European level the European Commission and the ECJ are in charge of competition law. Both authorities made their point that the doctrine if applied at all within article 82 of the EC Treaty should be used thoughtfully and with care. The implications could be significant if the doctrine is used in an extensive manner. The market power of the dominant competitor alone is not enough to rectify any action.

The ownership of a network or infrastructure and the burden of proof on the side of the owner to establish the infeasibility of access are considered together. This diminishes the effect the behaviour of the dominant competitor has on a decision. The concern relating to that approach is that the general competition authorities could be placed in a position where they are expected to act as fulltime administrators for the access to certain facilities and become like industry specific regulators.¹³⁴ In that scenario the authorities would not be equipped for such a task. However, even after the change of legislation the different agencies still have to assess the refusal to deal or the denial of access in the light of the misuse of a dominant competitor's position. Therefore, the behaviour of a dominant competitor is still the primary focus while its position is just another criteria. The circumstance that the burden of proof is with the owner of the facility is also no argument for a change to a structural approach. The objective of the new legislation would be thwarted if the applicant had to prove that the access is feasible. Only the defendant has the necessary knowledge about his or her facility to prove that the

¹³² The focus of this approach is on the behaviour of the competitor. Therefore, this can be called behavioural approach.

¹³³ As the focus of this approach is on the market power of a certain competitor, which relates to the market structure, this can be named structural approach.

¹³⁴ Meinrad Dreher, "Die Verweigerung des Zugangs zu einer wesentlichen Einrichtung als Missbrauch der Marktbeherrschung" (1999) 16 DB 833, 835.

access is unfeasible.¹³⁵ The statement by the would-be entrant that it is feasible to let him or her access the facility can only be vague and could be rejected easily.

As a result, there is no room for concerns that the cartel authority is not dealing with misuse of a dominant position or behaviour anymore.

VII TELECOMMUNICATION

This part of the paper gives a short overview about the historical background of privatisations taking place in the telecommunications sector of Germany, Europe, Australia and New Zealand.

With the globalisation and the corresponding need for access to information at literally every place in the world, access to telecommunications networks is one of the major concerns of businesses worldwide. These networks illustrate very well the influence of former-state ownership, the importance of access rights, the related problems of defining reasonable terms of access and the advantages as well as disadvantages of industry specific regulators.

A Europe

On the European level several directives¹³⁶ prepared the liberalisation of the telecommunications sector in the Member States. Further, the 1998 Access Notice¹³⁷, as a

¹³⁵ The burden of proof on the side of the owner of the facility in question is only just because the possible reasons for a justification of the denial of an access right are almost all in the sphere of influence of the owner of the essential facility. The claimant has hardly any chance to assess these. Justification of § 19 IV Nr.4 GWB by the German Government, BT-Drs. 13/9720, 73.

¹³⁶ One set of these directives are the liberalisation directives issued under article 90 of the EC Treaty (now article 86 of the EC Treaty). These are the Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment; the Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services; the Commission Directive 94/46/EC of 13 October 1994 amending the Directive 88/301/EEC and the Directive 90/388/EEC in particular with regard to satellite communications; Commission Directive 95/16/EC of 18 October 1995 amending the Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services;

comprehensive document, now defines behaviour that contradicts the required behaviour under articles 81 and 82 of the EC Treaty. This access regime applies to cases with European implications. Nevertheless, the national regulatory authorities have parallel authority.

B Germany

Therefore, Germany is responsible for competition and access to national telecommunications networks.

Liberalisation of Germany's telecommunications sector took place from the early 1990s onward and was finally finished in 1996.¹³⁸ Telecommunications as well as postal

Commission Directive 96/2/EC of 16 January 1996 amending the Directive 90/388/EEC with regard to mobile and personal communications; and Commission Directive 96/19/EC of 13 March 1996 amending the Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets (the "Full Competition Directive").

The other set of these directives are the harmonisation directives issued under article 100 a of the EC Treaty (now article 95 of the EC Treaty). These are the Directive 97/13/EC of the European Parliament and the Council of 10 April 1997 on a common framework of authorisations and individual licences in the field of telecommunications services (the "Licensing Directive"); the Directive 97/33/EC of the European Parliament and the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuing universal service and interoperability through application of the principles of network provision (the "Interconnection Directive"); the Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (the "Framework Directive"); the Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (the "Leased Lines Directive"); the Directive 95/62/EC of the European Parliament and the Council of 13 December 1995 on the application of open network provision to voice telephony, which was replaced by the Directive 98/10/EC of the European Parliament and the Council of 26 February 1998 on the application of open network provision to voice telephony and on universal service for telecommunications in a competitive environment (the "Voice Telephony Directive"); and the Directive 97/66/EC of the European Parliament and the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (the "Data Protection Directive").

¹³⁷ Notice on the application of the competition rules to access agreements in the telecommunications sector – 98/C 265/02.

¹³⁸ Olivier Boylaud and Giuseppe Nicoletti "Regulation, Market Structure and Performance in Telecommunications" Economics Department Working Papers No. 237, OECD, 2000, 30; Claus Zanker

services were formerly state-owned and administered by the same ministry¹³⁹. The privatisation of these services created the *Deutsche Telekom AG* for telecommunications services and the *Deutsche Post AG* for postal services.

Along with these privatisation measures, the German legislator ruled in favour of the creation of an industry specific regulator. The TKG came into force on 1 August 1996 and established the *Regulierungsbehörde für Telekommunikation und Post*. This regulatory authority for telecommunications and postal services took up its work on 1 January 1998. Further, the special statutes of the TKG and the PostG were implemented to regulate these areas and give the regulator the necessary guidelines for its work.

The last step concerning the liberalisation of telecommunications was the deregulation of the voice telephony sector in 1998.¹⁴⁰

The TKG also gives the *Regulierungsbehörde für Telekommunikation und Post* the power to decide about the fees for access to a network. The latest development is the reduction of access fees in the area of local loops¹⁴¹ to reduce prices in this area. This happened after comprehensive market analysis.¹⁴² This analysis was possible because the industry specific regulator has the manpower and knowledge to research the best possible price for competition. A court would not have been able to deliver the same thorough result.

„Privatisation and Liberalisation of the Post and Telecommunication Sector – its Impact on Employees and Trade Unions” <http://www.input-consulting.com/download/berlin-pt-eng.pdf> (Last accessed 2 August 2002) page 5.

¹³⁹ *Postministerium* – Ministry of Postal Services.

¹⁴⁰ Volker Emmerich *Kartellrecht* (9th Edition, C.H. Beck, München, 2001) 333; Thomas Nöllgen “*Kartellrechtliche Probleme bei der Nutzung fremder Netze und Infrastruktureinrichtungen*” <http://www.uni-muenster.de/Jura.deu/Referate-WS-2002/Thema-02-Noellgen.PDF> (Last accessed 2 August 2002).

¹⁴¹ Also called “last mile”. REGTP „*Regulierer senkt Einmalentgelte zur "letzten Meile"*“ <http://www.regtp.de/aktuelles/pm/02530/index.html> (Last accessed 27 May 2002).

¹⁴² REGTP „*Regulierer senkt Einmalentgelte zur "letzten Meile"*“ <http://www.regtp.de/aktuelles/pm/02530/index.html> (Last accessed 27 May 2002).

C Australia

In the area of telecommunications Australia established two industry specific regulators and comprehensive regulation in Part XIC of the Trade Practices Act 1974 to deal with the access to telecommunications networks.

Australia's telecommunications sector was privatised in in the years 1996/97.¹⁴³ Australia set up the Australian Telecommunications Authority (AUSTEL) to monitor this area as an industry specific regulator. On 1 July 1997, the Australian telecommunications industry became subject to a new regulatory framework. In the wake of this, the Australian Communications Authority (ACA) and the ACCC were established as industry specific regulators in this area. The ACA was formed as a result of the merging of the Spectrum Management Agency (SMA) and AUSTEL.¹⁴⁴ The ACA regulates telecommunications consumer and technical matters. The ACCC regulates competition in the telecommunications industry after taking over these responsibilities from AUSTEL on 1 July 1997.¹⁴⁵

D New Zealand

In New Zealand until 1987 the public telecommunication system was a state monopoly conducted by the Post Office. In 1987 Telecom Corporation New Zealand Ltd, then a state-owned enterprise acquired the system. It continued to enjoy a virtual monopoly. On 1 April 1989 all telecommunication markets in New Zealand were deregulated and opened to competition.¹⁴⁶ In September 1990 the government sold all its shares in Telecom, save one (the Kiwi Share) to privately owned interests.

¹⁴³ Olivier Boylaud and Giuseppe Nicoletti "Regulation, Market Structure and Performance in Telecommunications" Economics Department Working Papers No. 237, OECD, 2000, 30; Claus Zanker „Privatisation and Liberalisation of the Post and Telecommunication Sector – its Impact on Employees and Trade Unions" <http://www.input-consulting.com/download/berlin-pt-eng.pdf> (Last accessed 2 August 2002) page 5.

¹⁴⁴ Overview – The Australian Telecommunications Regulatory Environment, <http://www.aca.gov.au/authority/overview.htm> (Last accessed 20 May 2002).

¹⁴⁵ Overview – The Australian Telecommunications Regulatory Environment, above.

¹⁴⁶ New Zealand Law Society Seminar August 2001 *Competition Law Update* 3.

Unlike in Germany and Australia, New Zealand chose "light-handed regulation". The Government issued a policy statement in December 1991:¹⁴⁷

The Government sees competition as the best regulator of telecommunications markets. Accordingly, there will continue to be no statutory or regulatory barriers to competitive entry into telecommunications markets in New Zealand. [...] To maintain the conditions of effective competition, the Government places primary reliance upon the operations of the Commerce Act 1986. In particular, it relies on the enforcement of the statutory prohibitions against anti-competitive practices.

Especially in the telecommunications sector, with several cases involving Telecom Corporation of New Zealand Ltd this attitude changed over the years.

The light-handed regulatory approach introduced in New Zealand in the late 1980s was predicated on the existence of effective competition within markets and, where robust competition does not occur, on the threat of price control and information disclosure to deter firms with market power from abusing their position of dominance. Government members considered that this approach has not prevented some dominant firms from overpricing their goods and services and generally behaving in an anti-competitive manner to the detriment of consumers. In particular, reliance on potential competition ("contestability") as a substitute for actual competition is considered to have been an overly optimistic assumption.

Finally, the Telecommunications Act 2001 established the Telecommunications Commissioner. Apart from other tasks, the Commissioner has to resolve disputes over access to regulated services for the long-term benefit of New Zealand.¹⁴⁸

E Telecom v Clear

A case that illustrates the disadvantages of light-handed regulation in general and the insufficiency in the area of telecommunications in particular is *Telecom v Clear*¹⁴⁹.

¹⁴⁷ New Zealand Law Society Seminar August 2001 *Competition Law Update* 3.

¹⁴⁸ Landmark Telecommunications Act Passed
<http://www.med.govt.nz/pbt/telecom/minister20011218a.html> (Last accessed 13 June 2002).

¹⁴⁹ *Telecom v Clear Communications* [1992] 3 NZLR 247 (HC); *Clear Communications v Telecom* (1993) 5 TCLR 413 (CA); *Telecom Corporation of New Zealand v Clear Communications Ltd* [1995] 1 NZLR 385

First, the different courts that had to decide this case encountered considerable difficulties in gathering and understanding the relevant facts as these facts were all very technical in their nature.

Secondly one of the major disadvantages of a court decision rather than a decision of an industry specific regulator according to certain guidelines is summarised by Lord Browne-Wilkinson in the following way:¹⁵⁰

It is a regrettable fact that the decision of this appeal will only decide whether, in the past, Telecom has abused its dominant market position. It will not decide whether Clear's past stance in negotiations was reasonable, let alone fix the terms for interconnection.

The limited scope of court decisions is also a disadvantage in terms of certainty. Unlike in the situation with an industry specific regulator no statutory guidelines exist. These guidelines not only make decisions for the regulator easier but also for the companies that have to act according to the provisions of the Commerce Act. Uncertainty and lack of predictability create high compliance costs and the threat of penalties. The discussion in *Telecom v Clear* about the right test for a breach of section 36 of the Commerce Act 1986 illustrates the confusion a general rule can create to the detriment of all parties involved.

Different minds can easily reach different views on what is reasonable or justifiable. Yet if a Court subsequently were to disagree with a monopolist's genuine assessment that he was acting reasonably or with justification, the consequence would be that not only would he be liable for substantial damages but he might also have exposed himself (in the case of a corporate monopolist) to a quasi-criminal penalty of up to \$5m under s 80 of the Commerce Act. In Their Lordships' view, s 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful.¹⁵¹

(PC); The Telecom Corporation is a formerly state-owned provider of telecommunication services. Clear Communications wanted to enter the market of local phone calls. To be effective it needed access to the network and the loops of Telecom. Telecom only offered rates and fees that Clear thought were unreasonable and abusive.

¹⁵⁰ *Telecom Corporation of New Zealand v Clear Communications Ltd*, above, 390 (PC), Lord Browne-Wilkinson.

¹⁵¹ *Telecom Corporation of New Zealand v Clear Communications Ltd*, above, 403 (PC), Lord Browne-Wilkinson.

VIII CONCLUSION

The essential facilities doctrine has its roots in US antitrust law. To transfer it to other jurisdictions one has to make some adjustments. The requirements have to be modified to the special needs of the different countries. The US rolemodel and cases can function as guidelines while the historical and legal background of the United States have to be taken into account.

Depending on the size and the importance of a certain facility the readiness of the different jurisdictions to apply the essential facilities doctrine varies. New Zealand is the most sceptical jurisdiction. Apart from the Telecommunications Commissioner acting under the Telecommunications Act 2001 New Zealand relies solely on the general rule of section 36 of the Commerce Act 1986 to cover the refusal to deal and other misuses of a substantial degree of market power. Australia and Germany have very thorough regulation of access to facilities and networks of national importance like the telecommunications industry with even industry specific regulators. These jurisdictions showed their readiness to recognise the doctrine through the implementation of Parts XIC and IIIA of the Trade Practices Act 1974 for Australia and § 19 IV Nr.4 GWB in Germany. Europe recognises the essential facilities doctrine to a certain extend although only within the general rules of articles 81 and 82 of the EC Treaty. However, the EC Commission and the ECJ are both very well aware of the consequences of the application of the doctrine. At least after the landmark decision of *Bronner* this principle is used in a very considerate, thoughtful and restrictive manner.

Nevertheless, as mentioned above, the essential facilities doctrine is just a label or a tool for the competition authorities to use with great care. One could live very well without it. The doctrine is basically a set of requirements for the authorities to check under the general rules of the misuse of a dominant position. The advantage of an instrument like this, be it statutory implemented or not, is the creation of clarity and certainty. In spite of the problems of identifying common features of the doctrine in different jurisdictions, the established criteria help the owners of certain facilities to know in advance if there is a possibility of another competitor entering the facility. The courts also have some guidelines and are not left alone completely with the general rule only.

Within these limitations the essential facilities doctrine is justifiable and helpful.

The establishment of industry specific regulators should be enhanced in areas of high complexity and national or even international importance.

Australian Communications Authority Act 1997 (Australia)

Commerce Act 1986 (New Zealand)

Commerce Amendment Act 2001 (New Zealand)

EC Treaty

Energiewirtschaftsgesetz (Energy Act - EnWG - Germany)

Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition - Germany)

Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition GWB - Germany)

Law No 364 of 10 June 1997 (Denmark)

Postgesetz (Postal Services Act - PostG - Germany)

Radiocommunications Act 1992 (Australia)

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