University of Cape Town

School for Advanced Legal Studies

Minor Dissertation

SECTOR SPECIFIC REGULATION IN THE TELECOMMUNICATION MARKET

THE ADOPTION OF THE 'ESSENTIAL FACILITIES DOCTRINE' AS AN INSTRUMENT TO OPEN UP THE MARKET FOR COMPETITION

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Cape Town, 12 February 2009 _____

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CHAPTER 1 INTRODUCTION

In almost all countries worldwide the telecommunication sector was characterized by state owned monopolies, and supplying telecommunication services was understood as a public duty. In the eighties of the last century, most countries began to liberalize their telecommunication market and try to open it up for competition. The establishment of competition in a former monopolized sector can be only successful by taking specific network related features into account. This thesis deals with the establishment of competition in the telecommunication market taking into account the so-called “essential facilities doctrine”. This doctrine was developed from the U.S. American anti-trust law and is a helpful instrument to ensure access, under specific circumstances, by new competitors to facilities which are controlled by a market-dominating operator.

Chapter 2 will give an overview of the telecommunication network economics that need to be taken into account when establishing competition in this field. The third chapter of this thesis deals with the advantages and disadvantages of sector specific regulation, as an instrument for competition establishment, in comparison with the existing competition rules. The next chapter will give an overview of the European approach to open up the telecommunication sector for competition and the subsequent chapter will show how the “essential facilities doctrine” is implemented in this connection in the European law and as an example in the German law as a member state of the European Union. An overview of the South African approach in the establishment of competition taking into account the “essential facilities doctrine” will be found in chapter 6, and in the final chapter both approaches will be compared in the conclusion.

CHAPTER 2 BASICS OF TELECOMMUNICATION NETWORK ECONOMICS - WHAT NEEDS TO BE OBSERVED TO ESTABLISH COMPETITION IN THIS FIELD?

This chapter will give an overview of the basics of network economics and answer the question under which specific circumstances it might be possible to open up the telecommunication network for competition. This question was fundamentally discussed during recent years based on the historical development of the worldwide telecommunication market. Generally, until the beginning of the eighties of the last century, the telecommunication market and, in conjunction with it the telecommunication network, was characterized worldwide by state-owned telecommunication companies as national monopolies which often ran in conjunction with postal services. Furthermore, most countries understood the provision of telecommunication services as an exclusive national responsibility. This attitude was underlined by some countries, like Germany, by embedding this exclusive national duty in their constitution.[1] Because of the worldwide understanding of the telecommunication market and the supply of telecommunication services as a "natural monopoly" which could only be regulated as a national responsibility, competition in this field was neither possible nor allowed because of the available network, the technical infrastructure and the fact of state controlled regulation. Furthermore, the countries were convinced that only state-owned telecommunication companies, which were structured as monopolies, were able to ensure the access for the whole population of a country to the telecommunication services under the same conditions. During the eighties, most countries worldwide began to liberalise their telecommunication markets. One reason for this liberalisation process was the realisation by governments worldwide that this would become important for the economic growth of each particular country in the future and that telecommunication itself would set the tone for future business growth. The liberalisation process in the

[1]In the German constitution "*Grundgesetz" (GG)* is this exclusive national duty embedding in Art. 73 Nr. 2 GG; Art. 80 section 2 GG; Art. 87 f GG Available at http://www.bundestag.de/parlament/funktion/gesetze/Grundgesetz/index.html [Accessed 04November 2008].

telecommunication sector has not yet been concluded, and it has to be emphasized that it is highly influenced by network specific economic characteristics about which the following will give an overview. The chapter will close with an answer to the question whether it might be possible to open up the telecommunication network for competition and under which conditions.

To understand the network specific economic conditions it is necessary to understand how a "telecommunication network" has to be defined. An easy and popular way to find a definition of this term is to use an internet search engine. By doing this, Wikipedia came up with the result that a "network" has to be generally defined as a method of sharing information between two systems.[2] To complete this definition in connection with the telecommunication sector it is furthermore necessary to define the term "telecommunication" which can be generally described as the transmission of signals over a distance for the purpose of communication.[3] Hence, it is possible to define the telecommunication network in general as a "method for transmitting signals over a (long) distance for the purpose of communication". This general definition is not able to identify the network specific economic characteristics of the telecommunication network and therefore the subject is worthy of academic research. For that reason the term "network" needs to be considered from an economic point of view.

2.1 Network concept influenced by economic aspects (basic overview)

There is also no consistent description of the term "network" from an economic point of view. For the purpose of this discussion, it seems to be useful to define this concept as a wide and complex transport and logistic system for goods, persons and information.[4] Furthermore, this description is so flexible that it captures the physical networks like road system or networks in the water, gas, electricity and

[2] http://en.wiktionary.org/wiki/network [Accessed 31 October 2008].

[3] http://en.wiktionary.org/wiki/telecommunication [Accessed 31 October 2008].

[4] Christian von Weizsäcker ´Wettbewerb in Netzen´ (1997) *WuW*, 572 at 572.

telecommunication sector and also more abstract network structures like in the post or computer network sector.[5]

Specifically in the telecommunication sector the concept of a network comprises of two different components: A network component and a service component. Furthermore, these components can be split into two different markets: The access to the telecommunication network as a basis to render telecommunication service and the consumer service market.[6]

The network component in the telecommunication sector falls undoubtedly into the area of infrastructure. Competition in the infrastructure sector is described as "network competition" which also influences the telecommunication market for the consumer service.[7] Apart from the fact that network structures are characterized differently, there is an essential common factor in specific sectors from an economic point of view: the provision and maintenance of network connections cause costs and benefits. The special characteristics of network structures of the side of cost and benefits define the term "network" and may also be responsible for market failure, depending on the circumstances connected.[8] They will be described briefly hereafter. Subsequently, and in connection with the basics of the network economics, the meaning of competition in the form of network competition will be described.

2.2 Economic particular characteristics of network structures

The following description of economic particular characteristics can be used for any kind of a network and is not restricted to the telecommunication network. Furthermore, it will be just an overview without information in too much detail. Generally, network structures are characterized by a combination of economies of scale and irreversible costs, which can arise from unbreakable natural monopolies.[9] Network operators supply different products by using the network infrastructure. From an economic point of view one must distinguish between different kinds of economies

[5] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 5.

[6] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 5.

[7] Wolfgang Burr *Netzwettbewerb in der Telekommunikation* (1995) .6.

[8] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 5.

[9] Thomas Kiessling *Optimale Marktstrukturierung in der Telekommunikation: Lehren aus den USA und anderen Ländern für die EU* (1998) 64.

of scale[10] for these operators: Firstly, with an analysis of the different products is it possible to investigate the cost structure of each product supplied in their production. In this connection, a cost advantage may arise for the suppliers within a bigger output, which reduces the average production cost with an increase of the production. This economic average is known as product specific economies of scale. As a consequence it may happen that in a network with sufficient capacity the costs of transport increase under-proportionally in comparison with the transported quantity of products. Due to the fact that the definition given above from the theory of "economies of scale" is not in a position to cover network operators which supply different products by using the network infrastructure and that these theory by itself is too simple to describe the conditions of a "naturally modern monopoly", the theory of "economies of scope" was also developed.[11]

The theory of "economies of scope" purports that the production of different products in conjunction with each other is more cost effective than their separate production. Those "economies of scales" can be found in any network structures like the road system, telecommunication network or the wastewater system. In addition to the "economies of scale", there are also cost advantages for the widely interlinked networks in the matter of transportation of huge amounts of products or services over a (long) distance:[12]

- These cost advantages arise out of the so called "two-third rule"[13] which states that the volume of a service, which is determined by the capacity, increases faster than the cost by supplying more service.
- They can also arise from the interlinking of cables from networks, which bundle the transport capacities to so-called network hierarchies. This method ensures a better use of the capacity.[14]

[10] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 6.

[11] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 6.

[12] Christian von Weizsäcker ´Wettbewerb in Netzen´ (1997) *WuW*, 572 at 573.

[13] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 7.

[14] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 7.

- Finally, regarding the fluctuations of demand, which requires availability of reserve capacity in the network, economies of scope may arise from "commingling effect". Due to the "commingling effect" the necessary network capacity per participant decreased with an increase of the numbers of participants. This means that a bigger network needs less reserve capacity as a smaller network.[15]

All these bundling advantages, which arise from a network, can be summarised as "distance cost decrease", which means that the transport cost per kilometre over a longer distance will be decrease sharply.[16]

Furthermore, another general characteristic of network economics is that an advantage of productivity may arise due to interconnection of networks.[17]

All these economic characteristics described above are the cause of subadditivity of the cost function in a network, which is a necessary and adequate condition for the justification of a natural modern monopoly.[18] It means, in particular, that the aggregate demand of a specific product (economies of scale) or of several products (economies of scope) can be offered by an exclusive (monopolistic) supplier cost-effectively and macro-economically with less use of resources than by multiple competing businesses.[19] This situation describes a form of market failure in which competition is only possible based on increased costs and the waste of resources, and it is the (monopolistic) supplier, who is able to produce in the most cost-effective way, who will ultimately be able to survive.[20] Due to this there was in the past an academical justification for the restriction in competition and regulations in natural modern monopolies, which were classified as an area of exception where competition is not possible and desirable, and the telecommunication sector was regarded as such a an area of exception over a long time.[21] Furthermore, the findings from the theory of the natural modern monopoly were also used to legitimise the establishment of public, and mostly state owned, service monopolies in the network-

[15] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 7.

[16] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 7.

[17] Christian von Weizsäcker ´Wettbewerb in Netzen´ (1997) *WuW*, 572 at 573.

[18] http://en.wikipedia.org/wiki/Subadditivity#Economics [Accessed 31 October 2008]

[19] http://en.wikipedia.org/wiki/Subadditivity#Economics [Accessed 31 October 2008]

[20] Rupert Windisch *Privatisierung natürlicher Monopole im Bereich von Bahn, Post und Telekommunikation* (1987) 56.

[21] William G. Shepherd *The Economics of Industrial Organization* 3ed (1990) 212.

structured sectors. Also economic characteristics from the consumer point of view were used to legitimise the fact, that network structured sectors were not opened up for competition. In this connection, natural modern monopolies were characterised as follows: A consumer will get an advantage of using the network services when more, connected consumers are interested in the same service, e.g. a nationwide service can be used or a minimum of consumers necessary for the establishment of a functional network and network standards to make the service cost-effective.[22]

All economic characteristics described above result in the criteria of indivisibility of a network. This means for the market structure that in a network structured market, depending from the subadditivity of the cost function, the numbers of network suppliers will be restricted by a narrow oligopoly or, in an extreme situation, there will be only one supplier – a natural modern monopolist.[23]

2.3 The theory of the contestable markets

A natural modern monopoly itself cannot be used as a competition theory for the market failure of interlinked markets or to legitimise the regulation of market power because the subadditivity of the cost function alone is not able to implement a market power of the network suppliers. In terms of the theory of the contestable markets is it possible to establish a competition in a natural modern monopoly.[24] Due to this theory, the criteria of the "sunk cost" became more accepted.[25] The criterion of the "sunk costs "means that the condition for a potential competitor disciplining a monopolist is the access to the network and the absence of irreversible costs. Accordingly, a market is contestable and there will be the possibility of an efficiency gain through competition if there is an unhindered access to the network and the market exit is free of charge.[26] To reach this goal the following conditions have to be fulfilled:

[22] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 8.

[23] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 9.

[24] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 10.

[25] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 10.

[26] William J. Baumol ´Constable markets: an uprising in the theory of industrie´ (1982) *American Economic Review* 1 at 3.

- For an unhindered access to the network there needs to be a guarantee that a multitude of potential competitors will have unlimited access to the same, cost-effective technology without loss of time.[27]
- The bottom line for the question whether a market is contestable or not is the criterion of the "hit and run entry".[28] The criterion of the "hit and run entry" is characterized by irreversible investment. An investment to a network is irreversible, if the investment is sufficient to get access to the market, but in the event of an exit, the investment cannot be used for another market. These investment costs are so-called "sunk costs".[29] In the telecommunication sector in particular, high investment costs for the construction of a nationwide cable network were necessary because in the past every telecommunication service, e.g. voice service or faxes, needed its own cable network. Furthermore, the dismantling of one of such cable networks and their re-installation in another area would be costly. However, today a wide spectrum of services can be supplied via one single network, especially in the telecommunication sector. Due to this fact the criterion of the "hit and run entry" is loosing its former importance.
- Finally, the precondition for a market being contestable is that it is possible for a potential competitor to access the market before the established supplier is able to bring his prices down.[30]

Summarized, the theory of contestable, stable markets suggests that even if there is only one supplier, the supplier may be forced to act as if there was competition.[31]

2.4 Irreversible cost as justification for regulatory intervention

If the above conditions are fulfilled, the market is contestable; due to this fact a natural modern monopoly will produce cost-effectively and will set out prices which cover the costs. Accordingly, if no network specific market power exists, no need for

[27] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 10.

[28] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 10.

[29] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 11.

[30] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 12.

[31] http://tutor2u.net/economics/content/topics/monopoly/contestable_markets.htm [Accessed 5 November 2008]

regulatory intervention would arise even if only one independent supplier would offer a service based on the subadditivity of the cost function.[32] Beside that, irreversible costs result in an asymmetry between dominant suppliers and potential competitors because the dominant supplier invested in a network and the construction cost do not influence the service prices anymore but a potential competitor has to decide if he will make this investment.[33] If there are such "sunk costs", the theory of the contestability of the markets, which points out that those markets with monopolies or oligopolies act automatically like markets with competition, is no longer supportable. It is not feasible for a supplier with irreversible investment cost to get access to the network is a "hit and run entry", so, as a consequence, the first mover will get market power due to the fact that there is no competition in this field.[34] As a result of this, the first mover has the power of strategic margins on the market because he is able to reduce the prices over a long term. A potential competitor might be deterred by that behaviour and may not be willing to enter the market. Thus, irreversible cost can be a barrier to a market entry or exit, because the only way to avoid this cost will be to not access the market.[35] The access to the market will become unprofitable for potential competitors, and due to this the possibilities for disciplining the market power will be restricted. The situation of a combination of the subadditivity of the costs function and irreversible costs, in which the development of a competition will be not possible, has to be described as an unbreakable natural modern monopoly, the so called "bottleneck resource".[36] In the past, a huge average of sunk cost from the construction of networks was responsible for the assumption that one big supplier is able to ensure a nationwide service better than a few smaller suppliers.[37] Also based on this assumption is the necessity of cross-subsidies to offset the profit in one area against the loss in another. Due to the above mentioned facts and that most of the suppliers of network services are state owned companies, it was assumed that telecommunication sector was an excepted area where the state owned companies were protected from competition.[38]

[32] William J. Baumol ´Constable markets: an uprising in the theory of industrie´ (1982) *American Economic Review* 1 at 3.

[33] Rupert Windisch *Privatisierung natürlicher Monopole im Bereich von Bahn, Post und Telekommunikation* (1987) 61.

[34] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 12.

[35] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 12.

[36] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 13.

[37] Rupert Windisch *Privatisierung natürlicher Monopole im Bereich von Bahn, Post und Telekommunikation* (1987) 61.

[38] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 14.

2.5 Loss of significance of the theory of the natural monopoly in the telecommunication sector

The model described above of the "natural monopoly" has one fundamental weakness: all factors, like the "economies of scale" or the "economies of scope" reflect a "snapshot" (a short moment in time), and they are not able to react to technological changes or a demand for expansion in the network.[39] A dynamic perspective is crucial for the determination of a natural monopoly, especially in a rapidly changing market like the telecommunication market. From this point of view, it will be possible to determine whether changing factors will be partly able to cancel a natural monopoly by cancelling the significant economies of scale and scope in the market.[40] Due to this, the possibility must be taken into consideration that a natural monopoly may disappear. Indicators for this disappearance are the demand for growth and the reduction of costs through technological progress.[41]

Most countries worldwide had state owned telecommunications companies based on the theory of a natural monopoly without any competition in this sector. Due to the possibility that different factors are able to cancel the status of a natural monopoly the discussion whether it will be necessary to open up the telecommunication market for competition arises. The precondition for the telecommunication market to remain a natural monopoly was that competition in this market will not be able to come up with innovations for the supplementation of products or the reduction of costs in this field. Furthermore, one must take into consideration that the economic meaning of network structures has matured immensely in the past years. Also, the competition theoretical consideration changed during recent years based on a high investment potential and the enormous technical progress.[42] Especially new technological developments in the telecommunication market are able to burst the characterising economies of scale and economies of scope in the field of the conventional telephone network. Due to this fact it is arguable whether the telecommunication network can continue to be described as a natural monopoly.

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[39] Rupert Windisch *Privatisierung natürlicher Monopole im Bereich von Bahn, Post und Telekommunikation* (1987) 56.

[40] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 14.

[41] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 15.

[42] Christian von Weizsäcker ´Wettbewerb in Netzen´ (1997) *WuW*, 572 at 575.

A characteristic of the natural monopoly is its temporary character, and for that reason, the continued existence of a monopoly needs to be investigated from time to time. This investigation is for a network which, like the telecommunication network, supplies multiple products, more complex because of their economies of scope than for a network, which supplies only one product.[43] For this dissertation it is sufficient to give an overview of common appraisals of the question whether the telecommunication sector may continue to be described as a natural monopoly.

Clear indicators for the disappearance of natural monopolies are the fundamental technological progress which influenced the economies of scale and scope and the demand for growth.[44] The development in the telecommunication market is characterised by a strong demand for growth and structural changes due to new consumer preferences. The demand for growth in the telecommunication sector is based on the increased real income levels in the industrial states and technological development in this field. Especially the development of the cellular mobile telephony created new market sectors in the telecommunication field.[45] Furthermore, the convergence between telecommunication, computer, radio and television technology resulted in cost reduction and the combination of consumer demands in traditional separated markets.[46] Apart from the development of the cellular mobile telephony, the internet market strongly influenced the telecommunication market. In this field the supplier who supplies networks only will have the smallest margins and the supplier who is able to offer the network, internet access, the content aggregator and the content originator, will have the highest one.[47]

Notwithstanding the huge changes in the field of the technology data transfer, e.g. the change from analogue to digital or from wired to wireless transfer, there are still some economies of scale and scope for the wired network structure.[48] On does not need to explain in more detail that an established network operator just has to replace the old wired network with a more efficient one whilst a new operator has firstly to invest the cost to build up a network. As long as the wired technology dominates the telecommunication market there will be a market power problem due

[43] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 16.

[44] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 17.

[45] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 18.

[46] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 18.

[47] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 18.

[48] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 18.

to the theory of contestable markets.[49] However, these economies of scale and scope for the wired network structure, today, are graded by the development of wireless technologies.

Furthermore one needs to take into consideration that the demand for growth and the technological change can also create new natural monopolies.[50] It might be possible that an ISDN-network supplier will create economies of scale and scope which are factors in favour of the creation of a natural monopoly.[51] The technology changes during the last years, in any event, make it obvious that there are no more economies of scale and scope in the telecommunication market – the former natural monopoly is gone and also the creation of new monopolies as described above was noticed based on the establishment of competition in this field. Furthermore, the demand for expansion and the technological improvements in the telecommunication sector allow the conclusion that the opening of this market for competition will bring more structural change and advantages for consumers of this network. In addition, the telecommunication market is subject to international competition and due to this fact it is necessary to create national competition in this field.

[49] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 19.

[50] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 19.

[51] Rupert Windisch *Privatisierung natürlicher Monopole im Bereich von Bahn, Post und Telekommunikation* (1987) 56.

CHAPTER 3 SECTOR SPECIFIC REGULATION VERSUS COMPETITION LAW -WHAT APPROACH WILL BE THE BEST?

The above mentioned can be summarised as follows: In the past, network industries were national monopolies. In this matter the duty of the national authorities was to guarantee acceptable prices for the benefit of the offering services and to fulfil the public service obligation. Due to these facts, competition issues were completely absent in such networks. In a study for the European Commission in 1999, the Institut d´Economie Industrielle noted: ´…In the previous monopolized environments, the main economics issues were the setting of a proper price structure, the encouragement of cost efficiency, the extraction of monopoly rents and the protection of the company's long term investments against expropriation. Antitrust policy, with its focus on competition, had little to contribute...´.[52]

In the beginning of the eighties of the 20th century a liberalisation process started in the network sectors, especially in the telecommunication sector. The goal of this process was to ensure a change from a natural monopoly in which telecommunication services was exclusively supplied by state owned operators to a market, in which competition will bring more technological improvements and advantages for the customers in the service and cost matters.[53] A reason for this change was the recognition of the so called "spill over - effect", which means that competition in the telecommunication market is affecting the turnover and efficiency in other economic sectors through an improved telecommunication services.[54] Hence, the common economic growth in a country will benefit from a liberalised telecommunication market. The liberalisation process has to observe the economic specifics in the network. Competition is commonly defined by Merriam Webster as ´…the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms…´.[55] The goal of competition is the

[52] European Economy (European Commission Directorate-General for economic and financial affairs) ´Liberalisation of network industries – Economic implications and main policy issues´ (1999) No 4 105. Available at http://ec.europa.eu/economy_finance/publications/publication8093_en.pdf [Accessed 11 November 2008].

[53] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 22.

[54] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 22.

[55] http://en.wikipedia.org/wiki/Competition#Economics_and_business [Accessed 11 November 2008].

development of new products, services and technologies to ensure a greater selection and better products for consumers combined with lower prices.[56] Bearing in mind that there was no competition in the telecommunication sector, the adoption of the competition law alone is not sufficiently appropriate to implement competition in this field. The competition law on its own regulates competition matters and in so far an established competition in different business fields is required. Therefore an adoption of the competition law in a field where no competition is established is not possible. No competition was established in the telecommunication sector and due to this fact the question is whether there was a need for sector specific regulation to ensure the successful transition from a natural monopoly to a competition orientated network.

Despite the positive effects which will arise out of competition, the gap between effective and legal measures to open up a natural monopoly and make way for competition is still significant. Due to this, the question arose, as to whether regulation or competition policy will be the best tool to oversee the liberalisation process of network industries and to what extent competition policies and sector-specific regulation were complements or substitutes.[57] In this matter economists and lawyers with an expertise in network industries hold different views on the necessity of sector specific regulation to establish competition. According to some, special characteristics of a network, e.g. the historically grown telecommunication network, make it necessary to introduce and maintain specific regulatory measures, as for others competition law is sufficient.[58]

3.1 What is the difference between sector-specific regulation and the competition policy approach?

The change from a former natural monopoly to an open sector for competition is significantly influenced by liberalisation measures and technical innovation, and the nature of public intervention has to be redefined in this context. In this context, the

[56] http://en.wikipedia.org/wiki/Competition#Economics_and_business [Accessed 11 November 2008].

[57] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 4. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[58] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 5. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

question is of primary importance as to what extent the removal of sector specific regulations, e.g. ex ante regulations, has created less damage than the former natural monopoly-structured sector. To clarify the situation it is useful to give examples of the differences between sector specific regulation and competition law. At the end an answer to the question can be given whether the sector specific regulation might be of just a temporary character.

3.1.1 Ex ante versus ex post approach

Sector specific regulatory measures, e.g. price regulations, rely on an ex ante prescriptive business conduct. Ex ante regulations are always forward looking and in this context different technology business developments and place restrictions on certain products have to be observed by the regulatory authorities.[59] This approach makes it possible for a supplier to foresee the risk which has to be taken within different investments. The competition approach, on the other hand, is an ex post approach without any restriction for a possible future development. Only the current situation combined with former experiences will be regulated. Here, however, is an unforeseen risk for a supplier to be penalized if the business is found to abuse a dominant market power and needs to observe restrictions after investments were made.[60] Due to the different approaches, the amount and nature of information on which the different measures are based are different. Within an ex post approach the information required is less than within an ex ante approach. To make a decision or a new regulation based on competition law only, it is only necessary to assess the business conduct after the allegation and only in the light of what is known at the time of investigation. By contrast, an ex ante decision or regulation needs more information to get general, detailed and updated information in sector specific matters.[61]

One of the most important issues in network industries is the pricing for interconnection among competitors. A new supplier in network industries needs interconnection to the network to be able to offer their services. Just in the matter of

[59] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 6. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[60] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 6. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[61] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 9. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

the price policy it seems to be better to set out an ex post regulation as to define with an ex ante approach what price policy might become unfair in the future. However, despite the price regulation itself, new entrants need clear information on the interconnection charge and its future evolution. Only with this information they will be able to make huge investments and observe the economic risk. In other words: with ex ante regulation measures network industries can be opened up for competition and ex post competition rules ensure that the business can be operate.[62]
Hence, to establish competition in a formerly monopolistic network, sector specific regulation is needed this can be amended into regular competition rules after the successful implementation of competition in the network.

3.1.2 Structural design of acting authorities

The responsibility of competition authorities on the one hand is to intervene and to impose sanctions or penalties for the abuse of a dominant market power, cartels or mergers in any industry.[63] This approach is a horizontal one and requires a very high standard of expertise and decisions on very different markets with different structures and technologies. On the other hand, the regulatory authorities act only in specific sectors like the telecommunication sector, which is the so-called vertical approach. Here, decisions require sector-specific knowledge. The different structure of the acting authorities requires a different category of employee with different qualifications. Due to the fact that of a required sector-specific knowledge is required within the regulatory authorities, increased numbers of engineers will be employed by them. Furthermore, the employees in regulatory authorities are mostly nominated by government. There will be the risk that this authority will be affected by industrial policy consideration in favour of national economics or social interest.[64] However, especially social interest, like implementing network connection in rural areas or other Universal Service obligations, are also helpful to establish competition in the network sector. By contrast, in the competition authorities the decisional power will be more in the hands of lawyers. However, lawyers will be required for regulatory and

[62] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 7. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].
[63] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 7. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].
[64] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 9. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

competition decision. The main differences between these two authorities is that the decision-making power in the regulatory authority lies in the hand of policy maker rather than courts, and the decision making by the competition authorities has power vested in courts as well as the two different approaches – the vertical (regulatory authorities) and the horizontal (competition authorities).[65]

To break a former monopolised network for competition, both structures are necessary. The regulatory authorities are able to make sector-specific decisions and the competition authorities are necessary to prevent the creation of a new dominant market power. Once again: In the beginning of the liberalisation process the regulatory decisions will be more important and afterwards the decision making by the competition authorities will be become more valuable to guarantee the competition created in this field.

3.1.3 Legal Remedies

Competition law and sector specific regulation also differ in the matter of remedies due to institutional competencies and human and technical resources.[66] Competition law remedies are structural without the requirement of future extensive monitoring and normally addressed at a specific conduct. By contrast, regulatory remedies are detailed conduct remedies which require extensive monitoring, e.g. the conditions to mandate the provisions of certain services.[67] In other words: Regulatory remedies are more specific than the competition law alone. In the context of creating an open market with competition, the sector specific regulation will help to establish the competition. Whilst this goal is in the process of being attained, these regulations have to be replaced by the non-specific competition rules.

[65] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 8. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[66] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 9. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[67] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 10. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

3.2 Advantages and disadvantages of a sector specific regulation and the competition law

An ex ante as well as an ex post regulation has advantages and disadvantages. The sector-specific ex ante regulation has the following advantages: This form of regulation is transparent based on rules clearly set out in advance; thus damage, arising from an anti-competitive behaviour, can be avoided by anticipating and providing for it. Furthermore, a dispute resolution can be achieved easily through a decision of the regulatory authority. On the other hand, there are various disadvantages. A sector specific regulation used to impose a high informational requirement on the regulators and often uses the "perfect competition model" as a benchmark which can lead to unnecessary or excessive intervention. Due to excessive regulation of all effects a sector specific regulation may prevent a specific effect. Also unforeseen distortions can be introduced in the operation of the market and an asymmetric regulation can encourage service providers to focus on exploiting opportunities for arbitrage.[68]

Contrary to an ex post competition law regulation, forms of conduct that are specified in advance are prohibited. Another advantage of this regulation is that the competition law attempts to only stop conduct that is shown to be harmful to the social good, and temporary departures from competition benchmarks (e.g. due to innovation) are not penalized without investigation. Due to the fact that the competition law regulation applies the same rules for all competition sectors without any differences a consistent outcome across all sectors can be achieved. But there are also disadvantages which are arising by using competition law rules. An ex post regulation only ameliorates harm to competition but does not prevent it. Furthermore, it can be difficult and cost intensive to secure the information for enforcing competition law rules and these general rules may be unsuitable for identifying and penalizing anti-competitive conduct specifics to a certain market like the telecommunication market.[69]

[68] http://www.ictregulationtoolkit.org/en/Section.1677.html [Accessed 21 November 2008].

[69] http://www.ictregulationtoolkit.org/en/Section.1677.html [Accessed 21 November 2008].

Seeing that both forms of regulation have advantages and disadvantages the right balance has to be found to successfully open up a former national monopoly like the telecommunication market for competition.

3.3 What is the best approach to open up the telecommunication market for competition?

All the examples above demonstrate that a sector specific regulation have a temporary character. They will be replaced by the existing competition rules as competition becomes more effective in the specific field. The instrument of sector specific regulation has to be kept to a strict minimum and should only be used where a market failure arises. They have to be used for example to discipline companies to be more efficient, to limit the potential of unfair rent or to rebalance the price structure in the specific market.[70] As soon as the former monopolised network industries achieve a competition market outcome which is fair to the rest of the economy, it is necessary to abolish the sector-specific regulatory bodies and hand the supervision over to the competition law only.[71] Especially the telecommunication market is a good example of an ex monopoly moving towards to an open market with competition.

[70] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 10. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[71] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 10. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

CHAPTER 4 THE EUROPEAN APPROACH TO OPEN UP THE ELECOMMUNICATION MARKET FOR COMPETITION

The member states of the European Union opened their telecommunication markets up for competition really effectually through the use of different and efficient liberalisation and harmonisation measures during the last years. Furthermore, each member state of the European Community established the competition in this field under the same legislative conditions established by the European Commission. The European Community itself is not able to set out legislative rules for the member states but its organ (European Commission, European Parliament and the European Council), based on the Treaty of Amsterdam, are authorized to set out different legal rules of different degrees of intensity in exactly defined fields. One of these fields is "competition matters". The most important instruments for setting out legal rules are both the "self executing" rules known as "Regulations", which affect the member states directly, and the "Directives", which have been fulfilled by the member states in their country through their own national legislation in a specific timeframe. Furthermore, the organs of the European Community can decree "Recommendations" which the member states have to observe, but not to adopt. To reach the goal of the creation of an internal European market, most member states of the European Community also transact these "Recommendations" in their national legislative. Finally, the organs of the European Community can act through "Decisions" or "Resolutions" which bind the recipient directly without any transaction into national law.

The liberalisation process of the telecommunication market in the European Community was focused on two broad themes: The liberalisation measures have resulted in new regulation permitting competition in a former national monopoly, while the harmonisation measures have focussed on a design to ensure consistency in the regulatory structure in the telecommunication sector across the member states.[72]

[72] Chris Doyle ´Local Loop unbundling and regulatory risk´ (2000) 1 *Journal of Network Industries* 33 at 33. Available at http://www.cdoyle.com/papers/llurisk.pdf [Accessed 25 November 2008].

In the following the most important measures of the European Community to open the telecommunication market up for competition will be shown in an overview.

4.1 Overview of the "old regulatory framework" measures of the European Community to open up the telecommunication sector for competition

In brief, all liberalisation and harmonisation measures of the European Community have the objective to induce competition in prices, creating incentives to lower production and to increase product innovation.[73] Furthermore, the legal and regulatory framework designed by the European Community will also allow network industries to operate more efficiently by changing market structures as reforms are progressively implemented.

In the early eighties of the last century, the European Community started to liberalise the telecommunication market in the member states. In 1984, the European Commission initiated a first phase with the aim to move policy in the telecommunication sector forward to established common development lines for an internal market in the telecommunication sector. However, this phase was characterized particularly through common research.

The second phase of the European Community politics to open up the telecommunication sector for competition was based on the "Green Paper on the Development of the Common Market for Telecommunications Services and Equipment" (thereafter referred to as "Green Paper") which was published in 1987.[74]

As a guideline, the "Green Paper" pursued the aim of disbanding the state-owned telecommunications companies as a national monopoly step by step. Here, "Green Paper" differentiates between the following 3 fields: terminal equipment, telecommunication services and telecommunication network, which all have to be completely liberalised in the next years. In addition, the "Green Paper" had the aim to implement a higher degree of harmonisation in the European Community through

[73] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 4. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008].

[74] European Communities: Towards a Dynamic European Economy. Green Paper on the Development of the Common Market for Telecommunications Services and Equipment. *COM (87) 290 final, 30 June 1987*. Available at http://aei.pitt.edu/1159/ [Accessed 02 December 2008].

using the opportunities offered by a single internal market in the telecommunication sector. To achieve these aims the European Community decided to set out different legal measures in the following field:

- Liberalisation of the telecommunication market through cancellation of specific or exclusive rights for telecommunication suppliers in the member states;
- Harmonisation of the telecommunication market through attaining similar legal prevailing conditions in accordance with the foundation of a telecommunication network and in accordance with the telecommunication service;
- Safeguard an equal and fair competition through application of the community competition law in the member states; and
- Safeguard a universal service in this matter.

All these measures are summarised under the term of the "the old regulatory framework". They are the first measures which were put into place by the European community to open up the telecommunication sector for competition.

The most important liberalisation measures of the European Community in this phase were, amongst others:

- The "Commission Directive on competition in the markets in telecommunications terminal equipment"[75] which contains the responsibility of the member states to withdraw any special or exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment.
- The "Service Directive"[76] which limited the national telecommunication monopolies to the "voice telephony service" as a commercial provision for the

[75] Commission Directive on 16 May 1988 on competition in the markets in telecommunications equipment *(88/301/EEC)* Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31988L0301&model=guichett&lg=en [Accessed 05 December 2008].

[76] Commission Directive *90/388/EEC* of 28 June 1990 on competition in the markets for telecommunications services Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31990L0388&model=guichett [Accessed 05 December 2008].

public and to the network.[77] The remaining exclusive or specific rights of national monopolies in this matter have to be abolished by the member state within a specific timeframe. Especially the "Service Directive" was amended by a few other Directives in this context. One important Directive which amended the "Service Directive" was the "Mobile Directive".[78] Within this Directive exclusive and special rights in the mobile sector have to be disestablished by the member states.

- The "Cable Directive"[79] permitted as a liberalisation measure multi-media telecommunication services to be tendered over cable television network; in other words: The Directive requires the member states to allow the cable television network to be used for all telecommunication services with the exception of the "voice telephony service".
- The "Full Competition Directive"[80] contained the obligation for the member states to cancel the remaining national monopoly for using a "voice telephony service" and to provide the telecommunication network. Furthermore, the member states had the obligation to set out a range of provisions addressing licensing, universal service, interconnection and numbering until January 1998.

The most important harmonisation measures of the European Community in this phase were, inter alia:

- The harmonisation measures of the European legislature were summed up under the title "1998 Regulatory Package", which included harmonisation

[77] Article 2 Commission Directive *90/388/EEC.*

[78] Commission Directive *96/2/EC* of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0002&model=guichett [Accessed 12 December 2008].

[79] Commission Directive *95/51 EC* of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restriction on the use of cable television networks for the provision of already liberalized telecommunication services Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31995L0051&model=guichett [Accessed 12 December 2008].

[80] Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunication markets Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0019&model=guichett [Accessed 12 December 2008].

measures in the field of open network provisions (ONP), licenses, radio frequencies and the so called "local loop". The most important harmonisation measure in this package, amongst others, is the "Open Network Provisions (ONP) Framework Directive"[81]. With this Directive, a dualistic regulation system was established which included liberalisation measures followed by harmonisation measures. The aim of the "ONP Framework Directive" was to ensure the access to the public telecommunications networks and telecommunication services in the whole community efficiently in accordance with the harmonised conditions.[82]

- Based on the "ONP Framework Directive", the acting organ of the European Community developed the so called "Green Paper on liberalisation of infrastructure part II"[83] in 1995. This paper was the reason for a number of measures to liberalise and harmonise the European telecommunication sector with the aim to fulfil the goals set out. The "Green Paper on liberalisation of infrastructure part II" includes, amongst others, the following aims:
    - Establishment of "National Regulatory Authorities" (thereafter referred as to NRA's) which have to ensure that the historic regulatory functions of a national monopoly are vested in independent bodies and the regulatory function is separate from activities associated with ownership or control. Furthermore, the NRA's have to ensure that the policy of the European Commission on the telecommunication market are adopted in the member states.
    - In the field of licensing, the "Green Paper on liberalisation of infrastructure part II" contains the procedure for the granting of authorizations and licenses of communication services and networks by the member states. To create an internal market, a system of speedy, transparent and effective licensing for communication services and networks is necessary.

[81] Commission Directive *90/387/EC* of 28th June 1990 on the establishment of the Internal Market for telecommunications services through the implementation of Open Network Provision Available at http://ec.europa.eu/archives/ISPO/infosoc/legreg/docs/90387eec.html [Accessed 12 December 2008].

[82] Article 1 Commission Directive *90/387/EC.*

[83] Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation *COM (97) 623* Available at http://rspg.groups.eu.int/doc/documents/legal/conver97.pdf [Accessed 12 December 2008].

- The "Green Paper on liberalisation of infrastructure part II" for the first time pointed out measures in the field of interconnection. An interconnection framework is necessary because new operators have to rely on the networks to deliver transit or terminate traffic from and to their costumers. In the European Community the regulation in this field starts with the premise that interconnection is a matter for commercial negotiation. However, there is a key-policy objective of regulation focusing on an end-to-end interoperability for telecommunication services in the Community. In accordance with this, the interconnection framework ensured generally that operators have a basic right and obligation to bargain interconnection. Furthermore, the policy of the European Commission will achieve that operators with a significant market power are obliged to agree to the interconnection terms and to meet all reasonable requests to access to their network.
- Finally, the "Green Paper on liberalisation of infrastructure part II" contains measures for a European standard in the field of telecommunication, like universal service and being in accordance with the aims set out in the "GATS Fourth Protocol on Basic Telecommunication Services".

4.2 ***Overview of the "new regulatory framework" measures of the European Community to open up the telecommunication sector for competition***

After the aims of the "old regulatory framework" were reached, the European Community developed a "new regulatory framework" based on the "Communications Review"[84] of 1999. This "new regulatory framework" includes measures which ensure

[84] The 1999 Communications Review for electronic communications infrastructure and associated services *Com 1999/539* Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Towards a new framework for Electronic Communications infrastructure and associated services Available at http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/review99/review99en.pdf [Accessed 12 December 2008].

a transition to a free competition with fewer barriers in the European telecommunication sector. Within the "new regulatory framework" the regulatory approach is based on competition law principles, the existence of market power and the possibility of abuse of dominant positions in the telecommunication sector. Furthermore, two fundamental issues are covered by the new framework: Firstly, the framework which identifies the markets to be regulated and, secondly, the operators with a significant market power are identified on which the sector specific regulation obligations are imposed.[85] Finally, after a successful implementation of competition in the telecommunication sector, the sector specific regulation has to be replaced by the European competition law. Due to the fact that the telecommunication market is a large, dynamically developed and unpredictable market, the remaining sector specific regulations must cover all possibilities of an electronic communication infrastructure and associated services in a consistent method.[86] The aims of all liberalisation and harmonisation Directives which were based on the "new regulatory framework" can be summarized as following:

- Simplification of the regulation scope for the telecommunication sector
- Establishment of convergence of the telecommunications, media and information technology sector
- Transfer from an ex ante regulation (sector specific regulation) to an ex-post regulation (competition law) by using the European competition rules
- More harmonisation through application of the European legal scope in the member states

Within the "new regulatory framework" of the European Community there is one liberalisation measure which has to be emphasised. The "Commission Directive on competition in the markets for electronic communication networks and services"[87] has the sole aim to establish the new regulatory concept, which means to ensure the transmission of sector specific regulation to competition law.

[85] Pierre-André Buigues *`Competition policy versus sector-specific regulation in the network industries – The EU experience´* (2006) 12. Available at http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf [Accessed 15 November 2008]

[86] Status Report on European Union Electronic Communication Policy Available at http://europa.eu.int/ISPO/infosoc?telecompolicy/tcatatus.htm [Accessed 15 December 2008].

[87] Commission Directive *2002/77/EC* of September 2002 on competition in the markets for electronic communication networks and services Available at http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_249/l_24920020917en00210026.pdf [Accessed 15 December 2008].

In the field of harmonisation the European Community issued, amongst others, five important Directives within the new regulatory framework:

- The "Directive on a common regulatory framework for electronic communications networks and services", the so called "Framework Directive", has the aim to establish a harmonised framework for the regulation of electronic communication services, electronic communication networks, associated facilities and associated services.[88] This Directive specifically contains rules for the responsibilities of NRA's in the member states and how they have to work.[89] These responsibilities can be summarised as improvement of competition in the telecommunication sector within an establishment of an internal market which observes the interest of the European citizen. Furthermore, the "Framework-Directive" contains specific regulation for parts of the telecommunication sector like licensing, frequencies and numbering.[90] The most important regulations contains Art 14 – 16 of the Framework-Directive. These Articles determine which operators have to be classified as such with a "significant market power" and therefore, as a common principle, they are subject to a specific sector ex ante regulation. An operator has a significant market power if, ´…either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers…´.[91] Furthermore, to prevent an abuse of vertical acting operator, i.e. an operator which is also acting on closely related markets, the "Framework-Directive" pointing out that if this operator ´...has a significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other

[88] Article 1 Directive *2002/21/EC* of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Available at http://www.euroblind.org/fichiersGB/com200221.htm [Accessed 15 December 2008].

[89] Article 8 ff Directive *2002/21/EC.*

[90] Bernd Holznagel and Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 314.

[91] Article 14 subparagraph 2 Directive *2002/21/EC.*

market…´.[92] This definition of a significant market power is closely related to the definition in this connection contained in the European competition law, Article 81 and 82 Treaty on European Union and also the judgments of the European Court of Justice are applicable here.[93] Despite the fact that the term of significant market power is the same within the European sector specific regulation for the telecommunication market and the European competition law, there is one essential difference: the NRA's have to make an ex ante decision about the significant market power and to observe the future market development. By contrast, the decision by the competition law authorities is an ex post one. For the determination of an operator with a significant market power in accordance with the "Framework-Directive" two successive procedures were developed: the market definition procedure and the market analysis procedure which have to be used by the NRA's.[94] The European Commission developed the "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services"[95] (thereafter referred to as "Guideline"). In accordance with this "Guideline" not only the market share is the only criterion to determine an operator as one with a significant market power. Also criteria like a technological advantage or the control over not replaceable infrastructure have to be observed within the procedure. Despite that, if an operator holds a market share of over 50 per cent on a market which has to be sector specific ex ante regulated, he has to be declared as one with a significant market power without any more investigation.[96] Such a sector specific ex ante regulation is only allowed for markets ´…which may be such as to justify the imposition of regulatory obligations set out in specific Directives…´.[97] The determination on which markets a sector specific ex ante regulation can be used is incumbent on the European Commission. In this connection the Commission published the

[92] Article 14 subparagraph 3 Directive *2002/21/EC.*

[93] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 315.

[94] Article 15 and Article 16 Directive *2002/21/EC.*

[95] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services *(2002/C 165/03)* Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF [Accessed 18 December 2008].

[96] Bernd Holznagel and Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 315.

[97] Art 15 subparagraph 1 sentences 2 Directive *2002/21/EC.*

"Commission Recommendation of 11/02/2003 On Relevant Product and Service Markets within the electronic communication sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services"[98] (thereafter referred to as "Recommendation"). This "Recommendation" contains eighteen different markets in two different levels like the access to the public telephone network on the retail level or the access to the public telephone network on the wholesale level.[99] The European Commission will control this "Recommendation" periodically and depends on the development of the market also amended. As mentioned above, a Recommendation does not contain responsibilities for member states but Art. 16 of the "Framework-Directive" states that the NRA's shall to be carrying out these Recommendations.[100] The NRA's have to fulfil the responsibilities contained in the "Framework-Directive" and to determine where a sector specific ex ante regulation will be necessary. The authorities, under observation of the Recommendations und Guidelines and national specials, have to investigate, which markets need to be regulated by a sector specific regulation. Afterwards, the results have to be notified by the European Commission which has the vetoing power over all decisions.[101] In a next step the NRA's have to analyse if effective competitions are established in the particular telecommunication markets.[102] Within a negative definition an effective competition is not established, if on this market one or multiple operators with a significant market power are acting. The NRA's have to find at least one capable ex ante regulation for these operators to establish competition in this market.[103] These regulations may have an intensity which may extend from

[98] *Commission Recommendation of 11/02/2003* On Relevant Product and Service Markets within the electronic communication sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services Available at http://ec.europa.eu/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf [Accessed 15 December 2008].

[99] Annex *Commission Recommendation of 11/02/2003*.

[100] Article 16 subparagraph 1 Directive *2002/21/EC.*

[101] Article 15 Directive *2002/21/EC.*

[102] Article 16 Directive *2002/21/EC.*

[103] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 318.

basic transparent conditions to detailed guidelines for all network related considerations.[104]

- The "Authorisation Directive"[105] aiming to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorization rules and conditions.[106]
- The "Access Directive"[107] , which aims to establish a regulatory framework for the relationship between suppliers of networks and services.[108] Furthermore, this Directive clarifies when an operator, who is a dominant market power, has the obligation to contract with a potential competitor. In this connection the Directive will be discussed later.[109]

[104] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 318.

[105] Directive *2002/20/EC* of the European Parliament and of the Council of 7 March 2002 on the authorization of electric communications network and services (Authorisation Directive) Available at http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00210032.pdf [Accessed 15 December 2008].

[106] Article subparagraph *1 Directive 2002/20/EC.*

[107] Directive *2002/19/EC* of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML [Accessed 15 December 2008].

[108] Article 1 subparagraph *1 Directive 2002/19/EC.*

[109] 58 ff.

- The "Universal Service Directive"[110] which aims to ensure the provision of a defined minimum set of services to all end-users at an affordable price in the member states through an equal and fair competition.
- And finally, the "Directive on privacy and electronic communications"[111] which aims to protect personal data and privacy for users of an electronic network and services of publicly available electronic communication services regardless of the technologies effectively used.

4.3 Current "regulatory framework" of the European Community

Today, the aims of the European Commission policy in the telecommunication market are the same as those which they pointed out in the "new regulatory framework" policy, as mentioned above. To achieve these aims, the European Commission primarily used the so-called "1998 regulatory package" as their basic instruments. In accordance with the enlargement of the European Community in January 2007 by two member states, Bulgaria and Romania, "mid-term" challenges are discernible. Firstly, the correct and timeout implementation of the "new regulatory framework" by all 27 member states. Secondly, establishment of a procedure to handle the member states notice on operators with a "significant market power" and confiscation of uniform regulatory measures in the European Community. Thirdly, development of an European regulatory culture to harmonise application of community rules all over the internal market. And finally, extraction of the achievement of the different aims of the "new regulatory framework", inter alia via well mapped out implementing measures, recommendations and guidelines.[112] Furthermore, in accordance with the enlargement of the European Community, which began in 2004, the new member

[110] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users rights relating to electronic communications networks and services (Universal Service Directive)
Available at
http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00510077.pdf [Accessed 15 December 2008].

[111] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) Available at http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf
[Accessed 15 December 2008].

[112] http://ec.europa.eu/information_society/policy/ecomm/todays_framework/index_en.htm [Accessed 15 December 2008].

states have to achieve the aspiring European standard in the telecommunication sector.

In order to create a functioning and effective internal market in the telecommunication sector, the European Commission will have to achieve the following aims in accordance with an ever changing market in the future:

- Establish an effective market-orientated strategy in Europe's internal market;
- A more effective regulatory body;
- Economisation of the market review procedure to make it faster; and
- Protection of the single market through ensuring that the rules and remedies will be applied in all member states

The European Commission understands that the telecommunication market changed due to their reforms as is apparent from the review proposal of 2007. The next reform steps will be, inter alia, the replacement of the sector specific regulation with common competition law. Regulatory efforts and resources will only be focusing on the sectors where they are most needed; the Commission aims to gain the greatest benefits for consumers, in the shortest possible time.[113]

[113] http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm [Accessed 15 December 2008].

CHAPTER 5 THE "ESSENTIAL FACILITIES DOCTRINE" IN THE EUROPEAN LAW AND ESPECIALLY ITS CONSEQUENCES FOR THE TELECOMMUNICATION SECTOR

All the liberalisation and harmonisation measures mentioned above are not able to ensure that a former monopolist will open up its infrastructure completely for competition. One needs to take into account that a former monopolist in the telecommunication sector still holds the networks to supply telecommunication services. The danger remains that new operators are not allowed to get access to the network or only under complicated circumstances – all this becomes a key-issue in the dualistic system of sector-specific regulation and competition law. The access to the network or other facilities is essential to establish competition in a former monopolist-dominated sector. The European Commission recognised this early and declared different Recommendations under which circumstances the European competition law will be applicable to bottleneck access next to the sector specific regulation in the telecommunication sector. These Recommendations clarify what facts will end up with a contravention against the European competition and anti-trust law. Especially the "Notice on the application of the competition rules to access agreements in the telecommunication sector"[114] (thereafter referred to as "Access-Notice") and the "Access Directive"[115] are important in this connection. Within this Access-Notice the relationship between the sector specific regulation and the competition law is defined in substantial detail. The main European competition rule in this connection is Art. 82 Treaty on European Union. This Article is aimed at preventing undertakings who hold a dominant position in a market from abusing that position. It provides that:

[114] Notice on the application of the competition rules to access agreements in the telecommunication sector FRAMEWORK, RELEVANT MARKETS AND PRINCIPLES *(98/C 265/02)* Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:265:0002:0028:EN:PD [Accessed 20 December 2008].

[115] Above 30 and later 60.

´…(1) 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.

(2) Such abuse may, in particular, consist of:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) Limiting production, markets or technical development to the prejudice of consumers;
(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts…´[116]

Generally, Art 82 Treaty on European Union does not contain a prohibition that an operator with a significant market power or dominant market position, is not allowed to deny the access to their facilities or allow the access in connection with unwarranted high cost without any justification.[117] If there is no economic alternative for the applied access, the aspiring new operator is not able to supply its services in the market. Accordingly, the establishment of competition in this field is not possible. However, the goal of an open competition orientated market cannot be attained at any cost. It must be clarified under which circumstances the former monopolist has to open up his facilities for competition and also some of his interests must be prevented. Thereafter, one needs to investigate under which circumstances an operator controls an essential facility and has to allow the access in the telecommunication sector under the European competition and anti-trust law.

[116] Article 82 of the EC Treaty (ex Article 86) Available at http://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html [Accessed 20 December 2008].

[117] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 165.

5.1 Necessity of special regulation to get access to an essential facility

Due to the European system of economics and property, an operator who does not give assets to another operator – especially a competitive one – is not acting against the law.[118] Accordingly, the assumption that such acting is contravening the European competition law needs a specific justification. An exception from the mentioned general rule exists for such operators who control essential facilities; without an access to it other operators are not able to act. Especially new operators in the telecommunication sector do not own necessary facilities and for their market entrance they need to get access to the facilities from the former monopolist and established operator. Summarized, within the "Access-Notice" the European Commission describes an essential facility as a facility or infrastructure that is essential for reaching costumers and/or enabling competition to carry on their business, and which is unable to be replaced by any reasonable means.[119] Especially physical infrastructures like the cable network are contained in this definition. The criterion of the essentiality can also be used for network termination devices. Services in the telecommunication sector can only be supplied if the operator has access to the termination devices of the telecommunication network on which the consumer is connected. For this connection a so called "local loop" – a local infrastructure – is necessary which can be operated by the supplier or rented out by another supplier. This access can also be ensured with an operator of an interconnection, which has access to the network termination devices. Finally, such an access is also possible through another operator, who supplies the consumer as well. Furthermore, amongst the physical infrastructure, technical or consumer specific information, like the telephone directory or numbers, can be "essential" in terms of the definition mentioned.[120] In this connection, an operator must have access to a public switched telecommunications network for supplying the same services as an established operator which is a main principle in the competition law of the

[118] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 166.

[119] section "essential facilities" *98/C 265/02.*

[120] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 167.

telecommunication sector.[121] For an effective competition and the development of new media-technologies and internet, the access to networks and services is important. If the access to such facilities is controlled by the established operator with the significant market power there is the risk that this operator abused its power. These operators are able to control the newly established competition in the way that they are using the bottlenecks for the network access to obtain an advantage in supplying services adverse to the competitors. To prevent this, there is a need for strict rules, which prevent that a former monopolist is able to use its advantage, grown from old monopoly rights, against new competitors.[122] Due to this, it is possible, in exceptional circumstances, that an operator with an access to an essential facility has to work together with a competitor to establish competition in this specific field. Logically there is a stress ratio between the rights of the owner of an essential facility and protecting the new competitors from abusing of a monopoly related advantage. To resolve this situation, the "essential facilities doctrine" developed from the US American anti-trust law can be used as far as the doctrine is implemented in the European competition law.[123]

5.2 The development of the "essential facilities doctrine" in the US American anti-trust law

Similar to Europe, there is also a stress ratio between the public utility regulation and anti-trust law or competition law in the United States of America which is based on the different requirements of the prohibition of competition restriction and the instruction of the supervision of the economy.[124] Regulations are defined by the market structure and the market behaviour through control of the access to the market, clear definition of prices and obligations to ensure the access for new competitors. Despite this specific regulation, the anti-trust law is still applicable in state-controlled economic sectors to prevent a private competition restriction. The

[121] Section "access to facilities" *98/C 265/02.*

[122] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 168.

[123] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 168.

[124] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 168.

US-American anti-trust law is mentioned in different Acts, namely the Sherman Act[125], the Clayton Act[126] and the Federal Trade Commission Act[127].

The development of the "essential facilities doctrine" began with a road traffic law decision from the year 1912; in the matter of the *U.S. v. Terminal Railroad Association of St. Louis*. This decision was based mainly on the prohibition of a monopoly in accordance with Section 2 of the Sherman Act. This Section declares: ´…Every person, who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...´.

In accordance with the wording, Section 2 of the Sherman Act does not contain a specific prohibition of discrimination or a common rule about an abuse of a significant market power like Art. 82 Treaty on European Union contains. This Section prohibited the "monopolisation" which means the intention to create a monopoly and to use this position against other competitors, in other words: the competition has to result in the prevention of monopolies. Also, this approach does not reflect the content of Art. 82 Treaty on European Union which does not prohibit a significant or dominant market power per se, but prohibits an abuse of this power. In this connection a monopoly or a significant market power is held by that operator who has the intention and the power to control prices or exclude competition. An important criterion for this intention is the size of the enterprise and the power of the monopoly.[128] In accordance with Section 2 of the Sherman Act it is possible to assume the creation of a monopoly if an operator refuses to supply or does predatory pricing. The US Supreme Court decided in *U.S. v. Terminal Railroad Association of St. Louis* that, due to the fact that there were only one rail station and rail bridge in St. Louis, the unification of these railroad terminal systems by the Terminal Railroad Association in a joint operation shows the intention to prevent competition in this field and in so far it has to be declared as a prohibited act in accordance with Section 2 of the Sherman

[125] *Sherman Antitrust Act*, Act of July 2, 1890, Chap. 647, 26 Stat. 209, as amended, 15 U.S.C., Sec. 1-t Available at http://www.stolaf.edu/people/becker/antitrust/statutes/sherman.html [Accessed 20 December 2008].

[126] *The Clayton Antitrust Act*, Act of October 15, 1914 Chap. 323, 38 Stat. 730, 15 U.S.C., Sec. 12-27 Available at http://www.stolaf.edu/people/becker/antitrust/statutes/clayton.html [Accessed 20 December 2008].

[127] *Federal Trade Commission Act*, Act of September 26, 1914, Chap. 311, 38, Stat. 717-721, 15 U.S.C., Sec. 41-58 Available at http://www.ftc.gov/ogc/ftcact.shtm [Accessed 20 December 2008).

[128] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 170.

Act.[129] In this connection the rail station and rail bridge in St. Louis were "essential" because it was the possibility for other competitors to get access to the network system. The Terminal Railroad Association was obliged within this decision to prevent competitors with non-discriminatory access to their facilities. There were a lot of decisions based on the case of the *U.S. v. Terminal Railroad Association of St. Louis*. However, the case *Associated Press v. US*[130] was specifically in this connection. Part of the decision was the question if there is a right for an access to a news agency. The US Supreme Court decided that also the refusal of non-physical access is a prohibited act in accordance with Section 2 of the Sherman Act. This decision is in so far problematic as far as the object was the access to the product "information". An access to "information" means that the competitor can use it. By contrast, an access to a physical infrastructure is connected with an own act by the competitor before competition can be established.[131] The Supreme Court decided that this specific news agency is an essential facility; the question whether other competitors, except for the plaintiff, have a right to get access to this news agency under the same condition was not answered. [132]

The first decision in the matter to get access to a network infrastructure was made in the case of *Otter Tail Power Co. v. US*.[133] Otter Tail is a regional electricity operator, and competitors took legal action to get access to the electricity network to supply consumers in a downstream market. Due to geographical circumstances it was not possible to build a new network. Otter Tail did not allow the access to the network and the Supreme Court decided that acting in this manner is prohibited in terms of Section 2 of the Sherman Act. The highlight of this decision was that the Supreme Court pointed out for the first time that a criterion for an "essential facility" can also be the danger of the monopolising of a downstream market.[134] Due to the fact that only the behaviour of Otter Tail was evaluated, different academical assignments

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[129] *U.S. v. Terminal Railroad Association of St Louis* 224, U.S. 383, 405 (1912) Available at http://supreme.justia.com/us/224/383/case.html [Accessed 20 December 2008].

[130] *Associated Press v. United States* 326 U.S. 1 (1945) Available at http://supreme.justia.com/us/326/1/ [Accessed 20 December 2008].

[131] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 171.

[132] *U.S. v. Terminal Railroad Association of St Louis* 224 U.S. 383, 405 (1912) Available at http://supreme.justia.com/us/224/383/case.html [Accessed 20 December 2008].

[133] *Otter Tail Power Co. v. US* 410 U.S. 366 (1973) Available at http://supreme.justia.com/us/410/366/ [Accessed 20 December 2008]

[134] *Otter Tail Power Co. v. US* 410 U.S. 366 (1973) Available at http://supreme.justia.com/us/410/366/ [Accessed 20 December 2008]

classified this case exactly not as an "essential facilities doctrine" case because a general access obligation to facilities with a monopolistic character was not established.[135]

Despite the fact that the principles of the "essential facilities doctrine" were based on the *U.S. v. Terminal Railroad Association of St. Louis* decision, the term itself was firstly used in the *Hecht v. Pro Football Inc.*[136] decision. Pro Football Inc, supplier of a stadium and head of a Washington football team, refused access to the stadium for other teams. Based on the principles from the *U.S. v. Terminal Railroad Association of St. Louis* decision, the "essential facilities doctrine" was firstly recognised. The Court ruled that it is not possible to duplicate the stadium, and the capacity is sufficient to allow other utilisation as well. Furthermore, the important criteria for an "essential facility" were determined as follows: ´…To be "essential", a facility need not be indispensable; it is sufficient if the duplication of the facility would not be economically feasible and if denial of its use inflicts a severe handicap on potential market entrants…´.[137] In other words: a potential market entrant needs coactive access to the facility to establish the business and a duplication of the facility is factually not possible.

Important for the establishment of the "essential facilities doctrine" was the case *Aspen Skiing Co v. Aspen Highlands Skiing Corp.*[138] Object of the case was the following: Aspen Highlands Skiing Corp, who owns one of the four major mountain facilities for downhill skiing at Aspen, took legal action against Aspen Skiing Co who owns the other three major facilities. Both operators had a long-term agreement to sell "multi-area" ski tickets that gave customers the flexibility to patronize any of the area's ski resorts at a discounted prize. This cooperation was quit by Aspen Skiing Co. The US Supreme Court described these "multi-area" tickets as an "essential facility" to which Aspen Skiing Co denied access, with the intention to monopolise the business by putting Aspen Highlands Skiing Corp ski resort facilities out of business to get an own advantage. The court found no "normal business proposals" to legitimate Aspen Skiing Co actions, and therefore the Court decided that there is an

[135] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 173.

[136] *Hecht v Pro Football Inc.* 444 F. 2d 931 (1971) Available at http://www.altlaw.org/v1/cases/887973 [Accessed 20 December 2008].

[137] *Hecht v Pro Football Inc.* 444 F. 2d 953 (1971) Available at http://www.altlaw.org/v1/cases/887973 [Accessed 20 December 2008].

[138] *Aspen Skiing Co V Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) Available at http://supreme.justia.com/us/472/585/ [Accessed 20 December 2008].

obligation to work together in future.[139] This decision was very controversial due to the fact that the Supreme Court decided, in accordance with Section 2 of the Sherman Act, that operators with a market power have to work together to prevent an intention to monopolise by one of these operators.[140]

Important for the development of the "essential facility doctrine" as an independent legal institution was the case of *MCI Communication Corp. v. American Telephone & Telegraph Co. (AT&T)*.[141] Almost all principles for the application of the "essential facilities doctrine" in the telecommunication sector were developed in this decision. The object of the case was the question whether MCI was allowed to expand its services in the long-distance area by using local network facilities from AT&T.[142] AT&T denied the access to these facilities or rather charged excessively high costs for the access which was in MCI´s opinion an offence against Section 2 of the Sherman Act. In the first instance the 7th Circuit Court followed MCI´s opinion and based the decision also emphatically on the "essential facilities doctrine".[143] In its decision the court defined, for the first time, four concrete constituent facts for the existence of the "essential facilities doctrine" which were based on former decisions like *Otter Tail Power Co. v. US* or *Hecht v Pro Football Inc.* In particular the four constituent facts are:

- Control of the essential facilities by a monopolist;
- A competitor's inability to practically or reasonably duplicate the essential facility;
- The denial of the use of the facility to a competitor; and
- The feasibility of providing the facility to competitors.[144]

[139] *Aspen Skiing Co V Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) Available at http://supreme.justia.com/us/472/585/ [Accessed 20 December 2008].

[140] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 174,175.

[141] *MCI Communication Corp. v. American Telephone & Telegraph Co* 708 F.2d 1081, 1132 ((1993) Available at http://supreme.justia.com/us/512/218/case.html [Accessed 20 December 2008].

[142] *MCI Communication Corp. v. American Telephone & Telegraph Co* 708 F.2d 1081, 1132 (1993) Available at http://supreme.justia.com/us/512/218/case.html [Accessed 20 December 2008].

[143] *MCI Communication Corp. v. American Telephone & Telegraph Co*708 F.2d 1081, 1132 (1993) Available at http://supreme.justia.com/us/512/218/case.html [Accessed 20 December 2008].

[144] Robert Pitofsky ´The essential facilities doctrine under United States antitrust law´ 6 Available at http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf [Accessed 20 December 2008].

Within this test the 7th Circuit Court considered that there was an "essential facilities claim" for MCI due to the fact that, in accordance with the court decision, AT&T holds a monopoly in the local network to which the access was essential for MCI and the provision of the facility for AT&T feasible. However, one needs to take into account also that the court pointed out in the decision that AT&T was not able to give proof of technical or economic justification for the denial of the access to the network. Furthermore, the court emphasised that the evidence of a limited capacity will be able under specific circumstances to justify the access denial. And, a local network has to be classified as a natural monopoly the duplication of which, for economic reasons, is not possible. In the succession instance the US Supreme Court made clear that the prevention of a transfer from a monopolistic market power to a competition market is to be defined as a breach of Section 2 of the Sherman Act:

´…A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolistic control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discrimination terms…´[145]

The case of *MCI Communication Corp. v. American Telephone & Telegraph Co* itself ended up with a consent decree, but with the decision by the 7th Circuit Court and the statement of the U.S. Supreme Court, the establishment of competition in the American telecommunication market began.[146]

[145] *MCI Communication Corp. v. American Telephone & Telegraph Co* 708 F.2d 1081, 1132 (1993) Available at http://supreme.justia.com/us/512/218/case.html [Accessed 20 December 2008].

[146] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 178.

5.3 Consequences for the development of the "essential facilities doctrine"

The above mentioned precedents and other subsequent cases in connection with the "essential facilities doctrine" have the aim to define with contents the monopolisation ban as based on Section 2 of the Sherman Act. Anyway, the development of the "essential facilities doctrine" as an independent legal rule within the American antitrust law has to be critically evaluated. Similar to the decision in the *MCI Communication Corp. v. American Telephone & Telegraph Co.* case, where the requirements of an "essential facilities claim" were developed, in some decision referring to this case the requirements were not fulfilled.[147] In the beginning of the nineties of the last century, these requirements were strictly used again[148] and were expanded to the following: To give proof of a monopolising intention it is necessary that the operator has the monopolising power in one market and tries to get the same power in another market as well. The U.S. jurisdiction does not so often refer emphatically to the "essential facilities doctrine" like in cases such as *Hecht v Pro Football Inc or MCI Communication Corp. v. American Telephone & Telegraph Co.* However, nowadays there are new Supreme Court decisions which refer to the "essential facilities doctrine" as an independent legal rule like in the case of *Alaska Airlines v. United Airlines et. al.*[149] from 1991, where the court pointed out: ´…Stated most generally, the essential facilities doctrine imposed liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first…´[150]

To some extent, academics assume that the "essential facilities doctrine" is only a subset of Section 2 of the Sherman Act and not an independent legal rule. Especially the telecommunication cases of *Southern Pacific Communication Co. v. American*

[147] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 178.

[148] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 178.

[149] *Alaska Airlines v. United Airlines et. al* 948 F.2d 536 (9th Cir. 1991) Available at http://bulk.resource.org/courts.gov/c/F2/948/948.F2d.536.90-55163.90-55162.html [Accessed 20 December 2008].

[150] *Alaska Airlines v. United Airlines et. al* 948 F.2d 536 (9th Cir. 1991) Available at http://bulk.resource.org/courts.gov/c/F2/948/948.F2d.536.90-55163.90-55162.html [Accessed 20 December 2008].

Telephone and Telegraph[151] and *Illinois Bell Telephone Co. v. Haines & Co. Inc.*[152] express this opinion. The court verified in the first case the requirements of an "essential facilities claim" based on the *MCI Communication Corp. v. American Telephone & Telegraph Co*. decision and came up with the result that there is no evidence for an anticompetitive intention of AT&T and a claim of access to the network has to be refused. In this connection the court pointed out that the "essential facilities doctrine" is a subset of Section 2 of the Sherman Act. The second decision confirmed and concretised this opinion: There will be only a claim to get access to a network if the requirements of the "essential facilities doctrine" are fulfilled and, additionally, an anticompetitive intention can be proved. By contrast, in the *Alaska Airlines v. United Airlines et. al.* decision it was pointed out that the proof of a specific intention is not necessary if an operator is able, by its control of an essential facility, to exclude competition in this sector.[153] A further concretisation of the "essential facilities doctrine" requirements is the later conclusion that the criterion of the ability to duplicate a facility will be crucial for the qualification as "essential".[154]

A few of U.S. Supreme Court decisions came up with the result that there will be a claim to get access to a facility, but these decisions were based on a pure breach of the prohibition of monopolising in accordance with Section 2 of the Sherman Act. Hence, the assumption of the establishment from the "essential facilities doctrine" as an independent legal rule has to observe that there is a huge insecurity in the application of it.[155]

By contrast, the existence of the "essential facilities doctrine" has been criticised by a few academics. In their opinion it is sufficient to resolve cases through an efficient examination only with the prohibition of monopolisation based on Section 2 of the Sherman Act as a common antitrust rule. The court decisions only amend the content of Section 2 of the Sherman Act with the element of the abuse control.

A prominent critic of the "essential facilities doctrine" is Phillip Areeda. In this connection he wrote, the "essential facilities doctrine" is

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[151] *Southern Pacific Communication Co. v. American Telephone and Telegraph* 740 F.2d 980 (D.C. 1984) Available at http://cases.justia.com/us-court-of-appeals/F2/740/980/233981/ [Accessed 20 December 2008].

[152] Illinois Bell Telephone Co. v. Haines & Co. Inc 932 F.2d 610 (7th Cir.1990) Available at http://bulk.resource.org/courts.gov/c/F2/932/932.F2d.610.89-2207.html [Accessed 20 December 2008].

[153] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 179.

[154] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 179.

[155] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 179.

´…"so-called" because most Supreme Court cases invoked on support do not speak of it and can be explained without references to it. Indeed the cases support the doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explore the social costs and benefits or administrative cost of requiring the creator of an asset to share it with a rival…´[156]

Areeda does not take into account that a right to get access to a facility has the aim to open up the market structurally and is in so far to be differentiated from the intention of monopolising a market. However, the criticism on the "essential facilities doctrine" has to be accepted in so far as its application is connected to tight requirements, otherwise there will be a danger for the market based on too wide circumferences and too fast assumption of a breach, especially in areas of sector specific regulation.[157]

In conclusion, the declaration of the particular requirements of the "essential facilities doctrine", in practice, is difficult, and the Supreme Court tried to base its decisions on the prohibition of monopolisation in accordance with Section 2 of the Sherman Act. Despite this, this doctrine, in the U.S. American antitrust law to date, is an established legal rule to get access to such a facility.[158]

5.4 Application of the "essential facilities doctrine" in the European antitrust and competition law

The question is, whether the fundamentals mentioned above are able to be adopted in the European antitrust and competition law and which consequences it will have for the telecommunication sector. In this connection it needs to be clarified under which circumstances Art. 82 Treaty on European Union will give the right to get access to a network or for interconnection of networks alternatively if Art 82 Treaty on European Union implements an obligation in this matter. The European jurisdiction developed common fundamentals for the so called "third party access" which where later adopted in the telecommunication sector.

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[156] Philipp Areeda ´Essential Facilities: An Epithet in Need of Limited Principles´ (1990) 58 *Antitrust Law Journal* 841 at 841.

[157] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 180.

[158] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 180.

5.4.1 Development of the European jurisdiction

A number of decisions, in which a refusal for new business due to the termination of existing or the absence of the taking-up of future supply relationships of certain goods or services had to be clarified, may be considered as a starting point of a development in the common competition law, in which the refusal of access to "essential facilities" or products had to be adjudged as constituting abuse of a market dominant position in the sense of Art 82 of the Treaty on European Union. The following will give an overview of the most important decisions in this matter.

5.4.1.1 Commercial Solvents[159]

Commercial Solvents is a case based on Art 82 Treaty on European Union[160] in the chemical industry, in which Commercial Solvents as a manufacturer of a raw product was found to have abused a dominant position by refusing to continue the supply to a downstream competitor. Due to the fact that there was no reason which justified the actions of Commercial Solvents, the Court of Justice of the European Communities (thereafter referred to as ECJ) decided that these actions constitute an abuse in accordance with Art 82 Treaty on European Union. Furthermore, it makes no difference for the application of Art 82 Treaty on European Union whether the manufacturer supplies other operators with his products.

[159] Court of Justice of the European Communities Cases 6/73 and 7/73, *ICI and Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309 Judgement of 6 March 1974 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973J0006:EN:HTML [Accessed 29 December 2008].

[160] At the time of the decision Art 86 Treaty of Rome

5.4.1.2 United Brands[161]

This case related to the abuse of a dominant position by United Brands, a company which imports the Chiquita brand of Latin American bananas. United Brands supplied these bananas unripe in bulk to wholesalers in various European countries, which used their own facilities to distribute them to retailers across their national markets. United Brands refused to deliver the bananas to a specific wholesaler due to the fact that this wholesaler was part of an advertising campaign for a competitor. The ECJ decided that this refusal is not justified and disproportional in comparison with the harassment of the wholesaler's business interests. Furthermore, this action influenced the market structure because of an attempt to bind the wholesaler to a specific supplier. In this connection the decision covers also, amongst other things, issues of market definition and the concept of a dominant position.

5.4.1.3 Télémarketing[162]

Content of this decision was the fact that the respondent controls advertising space on a TV channel, and have a policy of rejecting adverts that encourage viewers to call a number unless the numbers advertised use the respondent's own call centre. Télémarketing as the defendant is seeking access to advertising time that would not include such restrictions. The ECJ decided that it was irrelevant for application of the Article 82 Treaty on European Union prohibition on abuse of a dominant position that the dominant position might have been the result of State action. There was no justification for the respondent's action. Furthermore, it was the first European decision where the question where there is a right for access to an essential facility was answered. In conclusion with the decisions mentioned above a denial of business is a breach with Art 82 Treaty on European Union if there is no objective

[161] Court of Justice of the European Communities Judgment of the Court of 14 February 1978 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. - Chiquita Bananas* Case 27/76 Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61976J0027&lg=en [Accessed 28 December 2008].

[162] Judgment of the Court (Fifth Chamber) of 3 October 1985. - *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB). - Reference for a preliminary ruling: Tribunal de commerce de Bruxelles - Belgium.* - Dominant position - *Telemarketing.* - Case 311/84. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61984J0311:EN:HTML [Accessed 28 December 2008].

justification. An action of an operator is basically justified if it does not prevent an effective competition. Obligations to contract have such operators who established a factual or lawful monopoly and who, due to this, control the access to the market or downstream markets for new competitors.

5.4.1.4 RTT/GB-Inno-BM[163]

Régie des telegraphes et des téléphones (RTT) under the Belgium law hold a monopoly over the establishment and operation of public telegraph and telephone lines. Furthermore, they had the power to grant or withhold authorisation to connect telephonic equipment, they sold their own equipment and they also had the power to request proof whether third party produced equipment confirms to the specifications they set out. GB-Inno-BM tried to sell non-approved telephone equipment in Belgium and a conflict arose. This is a case which lead to the question whether RTT owns an essential facility and refused the access to it. In this connection, the ECJ referred to the *Télémarketing* decision and held that the fact that monopoly in the telecommunication market for establishment and operation of the network, without objective necessary, reserves for itself a separate neighbouring market for importation, marketing and maintenance of equipment of the same network, thereby eliminating all competition from other undertakings, which constitutes an abuse by a dominant market position in accordance with Art. 82 Treaty on European Union.[164] The ECJ confirmed in its decision that an undertaking may not use a dominant position to eliminate competition in a downstream market. In connection with this, this decision is an example for the European justice in the matter of abuse of an essential facility but not for an access to it.

[163] Judgment of the Court (Fifth Chamber) of 13 December 1991. - *Régie des télégraphes et des téléphones v GB-Inno-BM SA*. Reference for a preliminary ruling: Tribunal de commerce de Bruxelles - Belgium. - Free movement of goods - Competition Type-approval of telephone equipment. - Case C-18/88. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988J0018:EN:HTML [Accessed 28 December 2008].

[164] Jonas Day 'Essential facilities in the European Union: *Bronner* and beyond' Available at http://www.jonesday.com/files/Publication/e2d79ea9-8440-49e6-a879-c834f4b0b557/Presentation/PublicationAttachment/9cf89b02-295b-43cf-8a00-3cbea13a85bf/Article%20essential%20facilities.pdf [Accessed 30 December 2008].

5.4.1.5 Port of Rogby[165]

An adoption of the "essential facilities doctrine" or part of it through the European Commission may be recognized in decisions like *Port of Rogby* in which the question whether a third party has to get access to a costly infrastructure that can be duplicated was discussed. The Commission defined in this case an essential facility as ´…a facility or infrastructure without which [the owner's] competitors are unable to offer their services to customers…´[166]

The Danish company DSB owned and operated the port of Rogby and also served the only ferry between Rogby and Puttgarden. Another Danish company intended to serve the same sailing route but DSB refused the access to the port of Rogby on the grounds that doing otherwise would prevent companies already operating in the port from expanding their services. The Danish Government meant to have a right to protect DSB from competition. Furthermore, they did not allow the other company to build a new port. The Commission decided that the refusal was an abuse of a dominant market power and obliged the Danish government to allow the access to the port or the building of a new one. They referred to the *Télémarketing* decision and held that ´…an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a ship owner wishing to operate on the same maritime route access to that facility without infringing article [82]…´[167] Furthermore, the Commission pointed out that ´..even on a saturated market, an improvement in the quality of products or services offered or a reduction in prices as a result of competition is a definite advantage for consumers . . .´[168]

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[165] 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the *port of Rødby* (Denmark) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0119:EN:NOT [Accessed 28 December 2008].

[166] 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the *port of Rødby* (Denmark) paragraph 12 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0119:EN:NOT [Accessed 28 December 2008].

[167] 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the *port of Rødby* (Denmark) paragraph 12 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0119:EN:NOT [Accessed 28 December 2008].

[168] 94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the *port of Rødby* (Denmark) paragraph 12 Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0119:EN:NOT [Accessed 28 December 2008].

5.4.1.6 Magill[169]

One of the most important cases in the European justice development in connection with access to essential facilities is the *Magill* – decision. The ECJ had to decide in this connection if an access to information is equal to an access to an "essential facility". The ECJ opened with this decision the door for an application of the "essential facilities doctrine" into the intellectual property rights and defined the notion of abusive conduct. The decision is based on the following facts: Most homes in the Republic of Ireland and around two-fifths of the homes in Northern Ireland are able to receive television programmes broadcast by the Irish State Broadcaster (RTE), ITV and the BBC. Under the United Kingdom and Irish copyright law, the BBC, ITV (acting through a subsidiary, Independent Television Publications Limited ("ITP")) and RTE own the copyright in their lists of television programmes. These three broadcasters provided their programme schedules free of charge to daily and periodical newspapers but until 1985 there was no comprehensive weekly listing guide. In 1985 Mr. Magill decided to produce an own Irish television guide for all channels and complained to the European Commission when the three broadcasters refused his approach to license him to reproduce their weekly listings. His complaint in April 1986 sought a declaration that the three broadcasters were abusing their dominant market positions by refusing to grant licences for the publication of their weekly listings and the Commission decided that there was a breach of Art. 82 of the Treaty on European Union.[170] The ECJ, under reference to the *Commercial Solvents* decision, upheld both the Commission's and the Court of First Instance's view that the refusal by television companies to permit publication of their listings was a breach of Art. 82 and decided to prevent publication of comprehensive listings for which consumer demand existed. In conclusion, an access refusal can be a breach of Art. 82 Treaty on European Union if there was no competition established in the downstream market and the establishment is protected by an exclusive right.[171]

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[169] Judgment of the Court of 6 April 1995. - *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*. - Competition - Abuse of a dominant position - Copyright. - Joined cases C-241/91 P and C-242/91 P. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0241:EN:HTML [Accessed 28 December 2008].

[170] At the time of the decision Art 86 Treaty of Rome

[171] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 195.

5.4.1.7 SWIFT[172]

The *La Post/SWIFT u. GUF* - decision is a case where the access to a telecommunication network was litigant and the European Commission altercated expressly the "essential facilities doctrine". SWIFT, an association of banks, offered worldwide a data communication and – processing service and, in this connection, holds a dominant market position in Europe. SWIFT refused the approach from other banks to use their network. The European Commission pointed the network out as an "essential facility" and the abuse of the access as a breach with Art. 82 Treaty on European Union.[173]

5.4.1.8 European Night Services Ltd (ENS)[174]

Another important case which contains the requirements of the adoption of the "essential facilities doctrine" in the European competition law was *European Night Services Ltd (ENS)*. The decision was based on Art. 81 Treaty on European Union, but the ECJ resorted to the fundamental principles which were developed under Art. 82 Treaty on European Union in connection with "essential facilities".[175] The decision was based on the following facts: The main railway companies in the United Kingdom, France, Germany and Netherlands had formed a joint venture, ENS, to provide and operate overnight passenger rail services between the United Kingdom and the European continent. After the establishment of the joint venture, their market share was between five and eight per cent. Hence, the European Commission held that the agreement violated Art 81 Treaty on European Union, but granted an exemption for eight years provided that the parties would make the same rail services

[172] XXVII Competition review of the European Commission (1997) 67. Available at ec.europa.eu/competition/publications/broch97_de.pdf [Accessed 28 December 2008].

[173] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 195.

[174] Judgment of the Court of First Instance of 15 September 1998 in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94: *European Night Services Ltd (ENS) and Others v. Commission of the European Communities* Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:340:0015:0015:EN:PDF [Accessed 30 December 2008].

[175] Jonas Day 'Essential facilities in the European Union: *Bronner* and beyond' Available at http://www.jonesday.com/files/Publication/e2d79ea9-8440-49e6-a879-c834f4b0b557/Presentation/PublicationAttachment/9cf89b02-295b-43cf-8a00-3cbea13a85bf/Article%20essential%20facilities.pdf [Accessed 30 December 2008].

available for possible competitors. ENS would not accept this exemption within the conditions. In the decision, the ECJ referred to the *Magill* – decision and the fundamental principles to Art. 82 Treaty on European Union developed in connection with access to an "essential facility" and refused ENS´s point of view. Furthermore, the ECJ held at the first time that a facility is essential if the duplication is connected with high costs as an independent criterion like in the US-American jurisdiction in this connection.[176]

5.4.1.9 Bronner[177]

Despite the fact that the European jurisdiction used the "essential facilities doctrine" or parts thereof, the Bronner/ Mediaprint decision was the first decision with a direct contention of the adoption of the "essential facilities doctrine" in the European law because the claimant stated that this doctrine is directly applicable.[178] The decision was based on the following facts: Mediaprint was the publisher of two newspapers in Austria with a market share of 46, 8 per cent. Furthermore, Mediaprint holds an own distribution system which was able to ensure the delivery of the newspapers to the subscriber in the early morning. The claimant Oscar Bronner GmbH & Co.KG published another newspaper with a market share of 3, 6 per cent and requested the access to Mediaprint´s distribution systems for an equal remuneration which was refused before. The first instance, an Austrian Court, appealed to the ECJ with the question whether it is an infringement of Art. 82 Treaty on European Union when an operator with a dominant market power refused the approach of a competitor to get access to a distribution system for an equal remuneration and for the competitor the establishment of an own distribution system is not appropriate because of the high distribution costs. The ECJ decision in this case was important for the European

[176] Jonas Day 'Essential facilities in the European Union: *Bronner* and beyond' Available at http://www.jonesday.com/files/Publication/e2d79ea9-8440-49e6-a879-c834f4b0b557/Presentation/PublicationAttachment/9cf89b02-295b-43cf-8a00-3cbea13a85bf/Article%20essential%20facilities.pdf [Accessed 30 December 2008].

[177] Judgment of the Court (Sixth Chamber) of 26 November 1998. *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* Reference for a preliminary ruling: Oberlandesgericht Wien - Austria. Case C-7/97 Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997J0007&lg=en [Accessed 30 December 2009].

[178] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 198.

jurisdiction in connection with the "essential facilities doctrine" and its coverage in the European competition law. In his summing up, Attorney general Jacobs made an analysis about the "essential facilities doctrine". He pointed out that there is only an obligation for contracting for an operator with market dominant power if there are no other possibilities to get market access for the competitor. He also makes clear that Bronner can use other possibilities like retail sale or small local distribution systems to expand his market share – in so far the market to which the claimant would like to have access can be duplicated without high costs. Due to these possibilities an adoption of the "essential facilities doctrine" is not possible. In their decision, the ECJ followed the arguments of the attorney general. For the final decision whether Mediaprint abused a dominant market power in accordance with Art. 82 Treaty on European Union, the ECJ summarized the requirements for such an abuse as follows:[179]

- Control of an essential facilities through an operator, which holds a dominant market power
- The refusal of the access must be appropriate to exclude any competition on the downstream market for the asking operator
- The facility must be indispensable for the exertion of the planned action and not able to be duplicated
- There is no objective justification for the actions of the market dominant operator

These requirements are similar to the requirements of the US American "essential facilities doctrine" and they make it clear that an access obligation is the exception and only possible if all requirements are fulfilled. Due to the fact that Bronner had the possibility to use other distribution systems there was no obligation for Mediaprint to allow him access to their system.

[179] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 201.

5.4.2 Conclusion

The *Bronner* decision was a miles step in the European jurisdiction in connection with the "essential facilities doctrine". In a further decision the ECJ just refers to the requirements developed for the adoption of the doctrine. It is undoubtedly a helpful instrument in opening up a market for competition, particularly when the access to a downstream market results from legal monopolies or a facility's owner using its legal monopoly to monopolize the downstream market. Beside that, it has to be shortly investigated whether the "essential facilities doctrine" is implemented in Art 82 Treaty on European Union and therefore focused on an establishment of an internal, pristine and effective European market as formulated in Art 3 lit. g) Treaty on European Union. Such a market is the result of freedom of conduct and freedom of formation of competing operators in a market – an obligation to contract is generally not included. Due to the consequences which will arise out of an obligation to contract, this instrument can just be used under exactly defined requirements (set out in the *Bronner* decision) which are based on competition reasons. All cases in which an obligation to contract can be found are based on a common ground: A potential competitor needs the access to an essential facility to implement its services. This operator is not able to get access to this facility on its own or it is too cost-intensive to duplicate the facility. Owner of the essential facility is the monopolist who will prevents the competition on this or the downstream market A competition is therefore not possible. Through the appliance of the "essential facilities doctrine" this abusive action can be resolved and competition can be established. The ECJ also highlighted this in its decision, but under the additional requirement that the action of the monopolist is an infringement of Art. 82 Treaty on European Union.

5.5 The concept of the "essential facilities doctrine" in the European telecommunication law

Especially in the telecommunication or in the energy market, as former monopolized markets, the systematics of the access to essential facilities and therefore the appliance of the "essential facilities doctrine" in accordance with Art 82 Treaty on

European Union is important. In this connection there are two major possibilities to influence a competition which has to be established: Firstly, the refusal to get access to the essential facilities can be an abuse of the dominant market power to prevent competition and secondly, the refusal to get access to the infrastructure of the market dominant operators can also prevent the development of competition or new markets. In the telecommunication market there are different constellations in connection with the "essential facilities doctrine". E.g. every operator in the telecommunication market needs access to end point of the network infrastructure to offer telecommunication services. There are different possibilities to get this access: Firstly, owning or leasing, as in the so-called "local loop" area, a local infrastructure. Furthermore, the access can be ensured with interconnection. Beside that, an operator in the telecommunication sector needs sector specific information to offer services like that of a telephone directory or directory assistance.

5.5.1 Access Notice of the European Commission[180]

The appliance of Art. 82 Treaty on European Union in the telecommunication sector needs exactly defined requirements under which a telecommunication operator who owns an essential facility for offering telecommunication services is in breach of the above mentioned Article. The European Commission recognized the features in this former monopolized sector and adopted in the "Access-Notice" the "essential facilities doctrine" for this sector. In this connection there are different possibilities which demonstrate an unjustified refusal of an access to an essential facility. In particular these possibilities are:

- Discrimination through refusal of the access for one operator but permission for another operator who also offers services in the same downstream market;
- A complete access refusal for all operators;
- The belated access withdrawal through deprivation of the access for an existing operator.[181]

[180] Above 33.

[181] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 214.

5.5.1.1 Discrimination

A breach of Art. 82 Treaty on European Union will be assumed without any other reason in the matter of discrimination of one operator. Also, the allowance to get access, but with different conditions, is another possibility of discrimination in this connection. Within the common discrimination prohibition it can be summarized that every operator – including the own – must get access to the facilities to same conditions. Furthermore, for an access obligation it is sufficient if there is just a limited competition in the downstream market possible – a complete exclusion is not necessary. In this connection it is also not crucial if the operator will develop a new product in the downstream market or offer services in an existing market.[182]

5.5.1.2 Access refusal

Apart from the main situations mentioned above, the European Commission assumes a breach of Art. 82 Treaty on European Union if the access to an essential facility will be refused to an operator which plans to use the facility to offer new services or products. In connection with the *Magill* decision in such an access, refusal may pre-empt the development of new markets which will be a damage to consumers. For the assumption of this breach the following five requirements must be fulfilled accumulatively:

Essential facilities

The access to a facility needs to be essential for implementation of services in a market. Taking into account the fundamental principles of the "essential facilities doctrine", the European Commission pointed out in the "Access Notice" that the refusal to get access to a facility is responsible for the fact that competition in the downstream market is not possible or ineffective.[183] At the time of developing the "Access Notice", the European Commission was confident that in the near future no alternative network will exist in Europe especially in the local loop sector. This approach was right until the beginning of the 20th century. There are plans that the

[182] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 214.

[183] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 215.

European Commission will revise the "Access Notice", but it this has not happened to date, the rules set out are still applicable. For the application of the "essential facilities doctrine" it has to be evaluated whether there is a bottleneck or whether other possibilities are getting access to a network or alternatives due to the technological development process. In the mobile sector the application of the "essential facilities doctrine" was excluded from beginning due to the comparatively easy installation of the network.[184]

Capacity

The network must have sufficient capacity to ensure the access for other operators.[185]

Consequences for associated markets

An operator, which owns the essential facility, is not able to satisfy the demand of products or services in the established market and anticipate the development of a potential new service or product or affect the competition in an established or potential service and product market.[186]

Access condition

The operator, who applied for access to an essential facility, accepts an adequate and non-discrimination payment as well as all other non-discrimination access conditions.[187]

Objective justification

There is no objective justification for the refusal of the access demand. In connection with the "Access Notice" a possible justification might be exceeding technical difficulties by ensuring access or investments for the establishment of new products or services which take time to condense to investments.[188] The European Commission, within the last reason for justification, clearly pointed out that new investments are worth protecting. Another reason for justification is the fact whether

[184] Section "access to facilities" and "essential facilities" *98/C 265/02*.

[185] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 215.

[186] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 215.

[187] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 216.

[188] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 216.

a potential operator is not able to fulfil the technical or commercial requirements for the use of the essential facility.[189] It is important to the European Commission within all justification reasons that the development of the competition and within that the advantages for the consumers through an access refusal are not affected.[190] Due to this, the fact that the ex-monopolist will ensure the consumer services alone is not a justification reason. Another justification reason is a limited capacity.[191] In this connection there is no obligation to create new capacity but the existent capacity must be used effectively. An appliance of this justification reason for interconnection is not possible due to the fact that there is no direct utilization of the network in this connection.[192] Finally, a justification reason might be that the local loop access can be responsible to anticipate the development of new technologies due to the fact that there is no necessity for the development of alternative technologies in this field.[193] The European Commission did not declare anything in this connection.

The justification reasons contained in the "Access Notice" are equal to those developed in connection with the US American "essential facilities doctrine". If no justification reason is fulfilled, the operator, who owns the facility, has the obligation to contract under non-discrimination conditions.[194] Goal of such an obligation is the establishment of an effective competition in a particular market as Art. 82 Treaty on European Union pointed out. Due to the technical features in the telecommunication sector mentioned in chapter 2[195] an obligation to ensure the access to the network in connection with Art. 82 Treaty on European Union will be assumed for every new operator until the construction of a new telecommunication network is cost-effective.[196] The establishment of competition in the telecommunication market is only possible with such an access obligation for the former monopolist.[197] Most of the time the access will be ensured via interface and the former monopolist has to ensure their adequate numbers; otherwise the access obligations are constricted which is also a breach of Art. 82 Treaty on European Union.[198] Due to this, a network

[189] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 216.

[190] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 218.

[191] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 218.

[192] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 218.

[193] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 218.

[194] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 218.

[195] Above 2.

[196] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

[197] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

[198] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

operator who is able to make available the technical preconditions can then not refuse the access for other operators. In connection with the European jurisdiction an operator is obliged to ensure the best technical standard and therefore it is possible to ensure the market access for new operators mostly.[199] Finally, the network operator is obliged to inform the operator who would like to get access to the network about all technical and system information to ensure a successful access.[200]

5.5.1.3 Belated access withdraw

It is an infringement of Art. 82 Treaty on European Union if an operator belatedly withdraws an access to a network without any objective justification.[201] This is consistent with the European jurisdiction like the *Commercial Solvents* decision.

5.5.1.4 Unbundling

The unbundling of services, service criteria and facilities is a basic requirement to open up the telecommunication market for competition.[202] In connection with this, the European Commission pointed out that the unbundling access to subscriber terminals needs specific regulations. A new operator must be able to use the allocated network without further and prescribed transmission capacity or switchboard services.[203] Questions in this matter can be resolved with the direct application of the above-mentioned discrimination fundamental principles.[204] Furthermore, the European Commission pointed out in this connection that especially the so called "tying", where a dominant operator forces a competitor to demand other services, is without justifications a breach with Art. 82 Treaty on European Union.

[199] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

[200] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

[201] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 219.

[202] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 220.

[203] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 220.

[204] Michael Holzhäuser *Essential Facilities in der Telekommunikation* (2001) 220.

5.5.2 Access-Directive of the European Commission[205]

Based on the "Access Notice" the European Commission developed the "Access Directive" in 2002. The "Access Directive" regulates the interconnection and the access to essential facilities between different telecommunication services providers. In this connection, the NRA's are allowed to ensure the access to essential network facilities. Furthermore, the "Access-Directive" contains some regulation for the digital television service. Provider of such services can be obligated to allow access to different elements like electronic television program services or open interfaces.[206] In addition, the conditional access systems must be fulfilling the requirement contained in the annex of the "Access Directive".

The "Access Directive" contains instruments for the NRA's to establish competition in the telecommunication sector in accordance with the principles from the "essential facilities doctrine" and while taking into account the "Framework Directive". Amongst other such instruments are:

- Transparency, like the publication of technical specification of network characteristics or tariffs (Art 9 Access Directive)
- Obligations of equal treatments (Art. 10 Access Directive)
- Obligation of separate accounting (Art. 11 Access Directive)
- Obligations in connection with specific network facilities like the access to network components, obligation for negotiation, collocation and interconnection; and
- Obligations for price controlling and costs accounting

Within these instruments the "Access Directive" will ensure that the NRA's have different commitment possibilities to dam up the dominant market power of the former monopolists while taking into account the commensurability basic principles.

[205] Directive *2002/19/EC* of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML [Accessed 15 December 2008].

[206] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 319.

Within the “Access Directive” the “Access Notice” is not completely separate. The main differences between these two legislatives is that the “Access Notice” focused on breaching of Art 82 Treaty on European Union and the “Access Directive” set out rules which are similar, but the legal consequences consist of orders to ensure access to the facilities or for interconnection. It seems that Art. 82 Treaty on European Union is not longer observed by the “Access Directive” which is not true. The content and the developed aims of this Article in connection with the telecommunication sector are implemented in the “Access Directive”. Another difference between these two legal instruments is that the “Access Notice” is not binding to the member states. The content does not have to be implemented into the national law. The “Access Notice” is a guideline while the “Access Directive” sets out binding rules which have to be adopted into the national legislation of the member states.

5.5.3 Conclusion

Within the “Access Notice” and the “Access Directive” the European legislator set out sector specific ex ante regulations within the principles of the “essential facilities doctrine” for a successful establishment of competition in the European telecommunication market. Based on the fact that all member states must adopt the “Access Directive” into their national law, the creation of an internal European market is ensured. Apart from the positive outcome of the “Access Directive”, there is one criticism: the “Access Directive” is from 2002 and does not contain provision in connection with the developing of the so-called “new markets”. Due to this, it is highly controversial whether the provisions of the “Access Directive” e.g. the transaction thereof into the national law will be applicable in such markets too. At present a court case is pending in this connection[207] and the European legislator is required to set out new rules for the telecommunication market.

[207] Detailed 64,65.

5.6 Implementation of the Access Directive in the German telecommunications law

Germany as a member state of the European Community has the obligation to implement the specifications of the "Access Directive" into the German law. As mentioned above, the "Access Directive" is based on the "Access Notice" and in so far the rules are in accordance with such from the "essential facilities doctrine" to ensure the establishment of a competition in the European telecommunication sector. The Directive especially contains a regulation in connection with the access to the so-called local loop, the physical circuit connecting the network termination point at the subscriber's premises to the main distribution frame[208], or the interconnection, the physical and logical link between communication networks[209] which are most important for the establishment of competition. The NRA's, which are called Bundesnetzagentur (thereafter referred to as BNetzA) in Germany, are obliged to ensure that new competitors get access to network facilities of the operators with dominant market power – which will be in Germany the former monopolist Deutsche Telekom, by using the elements from the "essential facilities doctrine". In this connection the NRA's can choose which possibility they will use to oblige an operator with dominant market power to ensure the access to the network facilities.

5.7 Access regulation in the German Telecommunication Act (TKG)

The TKG adopted the definition of "access" from the "Access Directive" in connection with which "access" means the making available of facilities and/or services to another provider under defined conditions for the purpose of providing electronic

[208] Directive *2002/19/EC* of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) Article 2(e) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML [Accessed 15 December 2008].

[209] Directive *2002/19/EC* of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) Article 2(b) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML [Accessed 15 December 2008].

communication services.[210] The different possibilities to obligate an operator with dominant market power to ensure access to its facilities for other provider are contained in § 21 TKG. In this connection the access has to be ensured to the network and other physical facilities as well as to the telecommunication services like billing, collection and resale. In accordance with the "Access Directive", the decisions whether an operator with a dominant market power is obliged to ensure the access to its facilities to another provider are so-called "discretion decisions", which means under specific circumstances the operator can be obliged by the BNetzA to contract.[211] In particular such an obligation must be imposed by the authority if the development of a consumer orientated competition market is endangered or the development is against the consumer interest (§ 21 sub 1 TKG).

The TKG defined the "consumer orientated competition market" in the telecommunication sector as a market in which competition will continue after the sector specific regulation will be replaced by the existing competition rules.[212] In addition, the discretion of the BNetzA in connection with the obligation to contract for a market dominant operator is circumscribed by the interest of legal and planning security for the market operators by different leading guidelines in the legislation.[213] In this connection, the TKG distinguishes between obligations of different intensity. Examples for a highly intensive obligation is the choosing of the operator (§ 40 TKG) or the offer of dedicated lines (§ 41 TKG).

The access obligations contained in the "Access Directive" are obligations which have to be fulfilled if specific circumstances are presented. In this connection the discretion of the authority is reduced which means that only in an atypical particular case the operator with a dominant market power is not obliged to ensure the access to its facilities. Obligations in this connection are:

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[210] Directive *2002/19/EC* of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) Article 2(a) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML [Accessed 15 December 2008]. and § 3 Nr. 32 *TKG* Available at http://bundesrecht.juris.de/tkg_2004/index.html [Accessed 03 January 2009].

[211] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 87.

[212] § 3 Nr. 12 *TKG* Available at http://bundesrecht.juris.de/tkg_2004/index.html [Accessed 03 January 2009].

[213] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 87.

- Completed unbundling access to subscriber terminals and common access to it (§ 21 sub 3 Nr. 1 TKG);
- Interconnection of telecommunication networks (§ 21 sub 3 Nr. 2 TKG);
- Open access to technical interfaces, protocols or other technologies which are essential for the interoperability of telecommunication services (§ 21 sub 3 Nr. 3 TKG) and
- Collocation or other possibilities of a common utilization of facilities and access to these facilities (§ 21 sub 3 Nr. 4 TKG).

All other access obligations which are contained in § 21 sub 2 TKG are obligations which may be fulfilled, and the authority has a wide discretion in this connection. One needs to take into account that the enumeration in § 21 sub 2 TKG is not complete and can be amended with related obligations. Access obligations contained in § 21 sub 2 TKG are for example:

- Access to specific network components or facilities (§ 21 sub 2 Nr. 1 TKG);
- Prohibition of belated access withdrawal (§ 21 sub 2 Nr. 2 TKG);
- Enabling of resale (§ 21 sub 2 Nr. 3 TKG);
- Ensuring of interoperability including roaming (§ 21 sub 2 Nr. 4 TKG);
- Access to necessary software programs (§ 21 sub 2 Nr. 5TKG);
- Permitting of utilization possibilities and cooperation of different operators (§ 21 sub 2 Nr. 6 TKG) and
- Billing and collection (§ 21 sub 2 Nr. 7 TKG).

In these cases the BNetzA can oblige a market dominant operator to contract only if there is a justification to ensure the access and the act itself is proportional to the aims of the TKG (§ 21 sub 1 TKG). The commensurability itself is concretised by criterions like capacity, investment and the possibilities of using other networks.
Furthermore, specific access obligations are, of necessity, connected to other obligations like pricing.[214] Such obligations are called accessory obligations. For example, a market dominant operator, who is obliged to ensure access to its facilities to other providers, is also obliged to charge them an adequate fee.

[214] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 89.

The BNetzA can also oblige the market dominant operator to create the access condition objective and under observation of equal opportunities for all providers (§19 sub 1 TKG). Within this regulation the privilege of a company associated with the market dominant operator will be anticipated.

Finally, the TKG contains different regulations in connection with the request for transparency[215], for instance: information for accounting, separation of accounting, technical specifications, network characteristics, terms of use or fee regulation.[216]

For the appliance of the regulation, the BNetzA is obliged to implement a complete consideration in accordance with § 21 sub 1 TKG. A market dominant operator can only refuse such request for access by BNetzA by proving that through the ensuring of access for new providers, the network integrity or the security of the main operation is endangered (§ 21 sub 4 TKG). Is a market dominant operator obliged to ensure the access to its facilities for other providers, the operator has directly but not later than within three months give up an access offer (§ 22 sub 1 TKG). Within this regulation the legislator pointed out the priority of individual negotiations. Due to the fact that the negotiation position for a new operator is mostly unfair, this basic principle is qualified via the possibility of the authority to command the access after invocation of a party within ten weeks if such negotiations are not concluded (§ 25 sub 1 TKG). To simplify and unify of the access conditions for the different facilities, the BNetzA can oblige the market dominant operator to publish standard offers for the different accesses and to contain them in the operators general terms and conditions (§ 23 sub 7 TKG). By contrast to individual negotiations, such a standard offer is binding for the asking operator and it ensures equal market chances.

Fees for an access obligation are subject to approval in accordance with § 30 sub 1 TKG. In this connection the BNetzA is allowed to determine the conditions for an access and the access fee in one step. In case of disputes, it is possible to determine the conditions and fee separately and in this connection each decision is independently judicially revisable. If the parties do not implement the access or interconnection order immediately, the BNetzA is allowed to appoint a coercive enforcement penalty up to one million Euro (§ 25 sub 8 TKG).

[215] Above 59.

[216] Bernd Holznagel, Christoph Enaux and Christian Nienhaus *Telekommunikationsrecht* 2ed (2006) 89.

5.8 Conclusion

The regulations of the “Access Directive” to ensure access to essential telecommunication facilities, in accordance with the European legislation, are completely adopted into the German law. Within the “Access Directive” the European legislator ensured that in all member states legislation elements of the “essential facilities doctrine” are implemented. However, something specific needs to be mentioned. The TKG, in § 9a, makes an exclusion for sector specific regulation for the so called “new markets” like the VDSL network. The European Commission sees in this regulation an abuse against the European law and a risk for the competition in the telecommunication sector due to the fact that mostly the former monopolist will have the power to invest in new networks and due to that a new monopoly might be created. Both parties, the German government and the European Commission were unable to reach agreement about this regulation and due to this, legal proceedings are currently pending at the ECJ.[217] The so called “new markets” are not specific emphasised in the “Access Directive” but the question, if the regulation are also applicable is still discussed. Until today, there is no decision about this question and so the German law, which pointed out that the access in interconnection obligations, are not applicable in this matter, is at the moment valid.

[217] *European Commission v Germany* C 424/97; IP 07/889 , unreported until today.

CHAPTER 6 SOUTH AFRICANS APPROACH IN CONNECTION WITH LIBERALISATION OF THE TELECOMMUNICATION SECTOR UNDER SPECIFIC OBSERVATION OF THE "ESSENTIAL FACILITIES DOCTRINE"

Similar to Europe, the South African telecommunications sector was opened up for competition. In this connection there are different legislations which specifically regulate this field. This chapter will give a short overview about the historical development of the legislation in this connection and especially the regulations in the matter of competition and access to essential facilities.

6.1 South African legislative development in the telecommunication sector – an overview

The point of departure is in Europe and South Africa similar. The South African Government also understood the provision with telecommunication services as a public utility and to ensure the universal access to the telecommunication services they provide it itself within a state owned monopoly – Telkom.[218] By law, Telkom holds the exclusive privilege of constructing, maintaining or using any telecommunication line (Sec 78 of the Post Office Act, Act 44 of 1958). Due to the former apartheid system there was no telecommunication network in whole South Africa. White households in South Africa holds 55 per cent of the telecommunication network connection although they constituted only 13 per cent of South Africans total population. Mostly the urban provinces of Western Cape and Gauteng with a large white population where connected to the telecommunication network whilst the rural areas not.

[218] Lisa Thornton, Yasmin Carrim, Patric Mtshaulana and Pippa Reburn *Telecommunications Law in South Africa* 1ed (2006) 18. Available at http://link.wits.ac.za/papers/TeleLaw-full.pdf [Accessed 04 January 2009].

Influenced by the international trend, South Africa began also in the eighties of the 20 century slowly to liberalize their telecommunication sector. At this time "value added network services" (cellular network) were permitted. The real liberalisation process of the telecommunication sector began in the nineties of the 20 century after the apartheid system was disposed.

After the first free election in South Africa in 1994, a so called technical task team began to work on the "Green Paper on telecommunication policy"[219] (thereafter referred to as "Green Paper"). The "Green Paper" based on two main issues in the telecommunication sector: the need for an increase in penetration rates and limits for cross-subsidies. Furthermore, with the "Green Paper" South Africa recognized the necessity to open up the telecommunication sector for competition.

Based on the "Green Paper" a National Colloquium was created which was response to draft the "White Paper on telecommunication policy" (thereafter referred to as "White Paper") in conjunction with the Minister. The "White Paper" was issued in March, 1996[220] and the South African government articulated the importance of telecommunication for the economic development of the country.[221] Seeing that the history has proven that the protection of government-owned monopolies is may not the best way to ensure an universal access to the telecommunication network, the "White Paper" envisaged that Telkom will continuing have the exclusivity in the public switched telecom network for a limited time until an independent regulatory authority, which have to be established, will be able to implement competition in the telecommunication market. In this connection the "White Paper" set out specific deadlines for the liberalisation process in South Africa. In accordance to the Paper, latest in seven years after the publication, full competition in South African telecommunication sector will be established.

Based on the "White Paper" framework policy, in 1996, the Telecommunications Act[222] came into force. The Act contains provisions for regulation of telecommunication services, except broadcasting, and established and independent

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[219] *Green Paper on electronic commerce for South Africa* Available at http://www.polity.org.za/govdocs/green_papers/telecoms.html [Accessed 05 January 2009].

[220] *White Paper on electronic commerce for South Africa* Available at http://www. polity.org.za/govdocs/white_papers/telewp.html [Accessed 05 January 2009].

[221] Lisa Thornton, Yasmin Carrim, Patric Mtshaulana and Pippa Reburn *Telecommunications Law in South Africa* 1ed (2006) 18. Available at http://link.wits.ac.za/papers/TeleLaw-full.pdf [Accessed 04 January 2009].

[222] *Telecommunications Act*, Act 103 of 1996 Available at http://www.polity.org.za/docs/legislation/1996/act96-103.html [Accessed 05 January 2009].

South African Telecommunication Regulatory Authority (SATRA) and the Universal Service Agency (USA). In this connection, most of telecommunication services, which were pointed out in the Act, are regulated through licensing. In theory, the provision of the Telecommunications Act seems to be able to establish competition in South Africans telecommunication sector. In reality, within the Telecommunications Act Telkom still get exclusive rights to provide telecommunication services. The Act declared, that Telkom have the exclusive right for licences until 07 May 2002 for the national long distance telecommunication service, the international telecommunication service, the local access telecommunication service and the public payphone service. Within the amendment of the Telecommunications Act[223] from 07 May 2002 until 07 May 2005 Telkom and the second national operator (Neotel) have to share the above mentioned licences. Also the establishment of an independent South African Telecommunication Regulatory Authority (SATRA) was not as successful as it seems to be. As an independent authority, SATRA was subject to policy directions of the Minister of Communications which also had the power to set out timetables for the liberalisation process and in connection with Telkom´s "exclusive privileges", the authority was not empowered to grant licences but could recommend that the Minister will do so.[224] In accordance to the Telecommunications Act the USA is response to redistribute funds from Telkom as well as new competitors to support provisions of telecommunication services where it is inadequate or non-existent. Furthermore, USA helps indigent persons to cover their cost for telecommunication services by way of direct subsides.[225]

In 2000, the current South African Regulatory Authority for Telecommunication (Independent Communication Authority of South Africa – ICASA) was created out of the Independent Broadcasting Authority (IBA) and SATRA within the Independent Communication Authority of South Africa Act.[226] Within the ICASA Amendment Act from 2006 the responsibility includes now also the postal sector.[227]

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[223] *Telecommunications Amendment Act*, Act 64 of 2001 Available at www.info.gov.za/view/DownloadFileAction?id=68166 [Accessed 06 January 2009].

[224] Section 5 *Telecommunications Act,* Act 103 of 1996 Available at http://www.polity.org.za/docs/legislation/1996/act96-103.html [Accessed 05 January 2009].

[225] Section 58 *Telecommunications Act*, Act 103 of 1996 Available at http://www.polity.org.za/docs/legislation/1996/act96-103.html [Accessed 05 January 2009].

[226] *ICASA Act*, Act 13 of 2000 Available at http://www.internet.org.za/icasa-act.html [Accessed 06 January 2009].

[227] *ICASA Amendment Act*, Act 3 of 2006 Available at http://www.info.gov.za/gazette/acts/2006/a3-06.pdf [Accessed 06 January 2009].

In 2005, the Telecommunications Act was detached by the Electronic Communications Act[228] which provides the legal framework for convergence in the broadcasting, broadcasting signal distribution and telecommunications sector. The Act contains especially amongst others in the telecommunication sector provisions for licensing[229], radio frequency[230], technical equipment and standards[231], interconnection[232], electronic communication facilities leasing[233] and broadcasting[234]. Furthermore, the Act contains regulations in competition matters.[235]

The former highly discussed question of ICASA´s independence seems to be resolve within the Electronic Communications Amendment Act.[236] The former competence of the Minister of Communication to give policy direction in nearly every kind of the telecommunication field is in so far through the new regulation limited as a direction is nowadays just possible in the matter of initiate and facilitate intervention to ensure strategies in the ICT infrastructure investment and to provide a framework of a public entity by the authority after obtaining the Cabinet.[237] The fact that the South African government, especially the Department of Communication, is involved in the telecommunication industry will might be have not so much influence anymore. For clarification: The South African government owns Sentech, which provides TV/Radio and ISP signals[238], is one of the main shareholder of Telkom (38,9 per cent)[239], due

[228] *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[229] Chapter 3 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[230] Chapter 5 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[231] Chapter 6 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[232] Chapter 7 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[233] Chapter 8 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[234] Chapter 9 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[235] Chapter 10 *Electronic Communications Act*, Act 36, 2005 Available at http://www.icasa.org.za/tabid/168/Default.aspx [Accessed 08 January 2009].

[236] *Electronic Communications Amendment Act*, Act 37 of 2007 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[237] Section 3 (1) *Electronic Communications Amendment Act*, Act 37 of 2007 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[238] *Sentech Act*, Act 63 of 1996 Available at http://www.internet.org.za/sentech-act.html [Accessed 09 January 2009].

[239] https://secure1.telkom.co.za/ir1/share_data/share_page.jsp [Accessed 09 January 2009].

to Telkom´s shareholding of 50 per cent of Vodacom[240] indirectly interest in that company and finally the South African government owns the fibre network INFRACO.[241]

6.2 Sector specific and common competition rules for the South African telecommunication sector – especially in terms of "essential facilities"

Chapter 10 of the Electronic Communications Act contains provisions which give ICASA the right to set out obligations for operators and to take steps to remedy conduct by licenses, which results in undue performance to or undue discrimination against other operators.[242] ICASA can set out pro-competitive terms and conditions[243] if they find that an operator acts anti-competitively in accordance with section 67 (1) Electronic Communications Act by observing the following procedure: According to section 67 (4) ICASA has to define different markets like local loop, call termination or leased lines. Thereafter, an operator acting in one of these markets, has to be found to be one with significant market power or to control an essential facility or to have a vertical relationship which is able to harm the competition in this

[240] https://secure1.telkom.co.za/ir1/about_us/operational_review/operational_review.jsp [Accessed 09 January 2009].

[241] Infraco Act, Act 33 of 2007 Available at http://www.info.gov.za/view/DownloadFileAction?id=72463 [Accessed 09 January 2009].

[242] Section 67 (1) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[243] Section 67 (4) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

field.[244] The definition of significant market power based on the South African Competition Act[245] (section 7) declares that an operator is dominant in the market if

- He controls at least 45 per cent of the market or
- He controls at least 35 per cent of the market but less then 45 per cent unless he can give proof that he has not the market power or
- He controls less then 35 per cent of the market but he has the market power.

If ICASA has made a decision in this connection (i.e. they have found that a licensee has significant market power) they investigate the specific market again with regard to the existing competition. In cases where no or - in ICASA´s opinion based on its investigation - ineffective competition exists due to the fact that one operator has the dominant market power or controls an essential facility in the market, ICASA can set out pro-competitive terms and conditions connected to the license for this operator in order to remedy the market failure. Such terms and conditions will generally relate to obligations to allow access to an essential facility under set terms and to wholesale pricing. ICASA is also required to set out schedules in terms of which a periodic review of the market will taken.[246] This method of competition regulation in the telecommunication sector operated by ICASA seems to be a pure ex post regulation. Only in cases where an anti-competitive acting is observed ICASA has the right to set out rules to correct this acting which is a post regulation. There are no provisions in section 67 of the Electronic Communications Act which allow ICASA to prevent anti-competitive acting. The experience shows, that it may be harder to resolve competitive problems in a sector, which was formerly dominated through a state owned monopoly and the achievement of the aim to establish competition can be in danger. This opinion has been particularly criticised by the South African Competition Commission. They characterise the competition regulation based on the Electronic Communications Act as an ex ante regulation. Due to the previous given definition of ex ante and ex post regulation[247], an ex ante regulation is always forward looking

[244] Section 67 (5) (a) and (b) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[245] *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[246] Section 67 (7) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[247] Above 15.

under observation of different developments like business or products. However, the Electronic Communications Act allows ICASA to set out pro-competitive rules if they define anti-competitive acting. In so far a current situation will be regulated, which is an ex-post view, but within foreseen elements (ex ante). Due to that, there are good arguments to support both meanings.

Beside the specific competition rules, contained in the in the Electronic Communication Act, the South African Competition Act[248] is also applicable for which purpose ICASA is the appropriate authority which is allowed to receive advise from the South African Competition Commission as well as to provide it.[249] The Electronic Communications Act uses the term "essential facility" but do not define it. By contrast, the South African Competition Act defines under section 1 (1) (vi) essential facilities as ´...an infrastructure or resource that cannot reasonable be duplicated, and without access to which competitors cannot reasonable provide goods or services to their customers…´. In accordance with the Competition Act it is an abuse of a dominant position if an operator with a dominant market position refuses to give a competitor access to an essential facility if it is economically fungible.[250] If an operator abused its dominant market power access to an essential facility can be ordered on terms reasonably required.[251] The procedure in connection with the Competition Act is not a court procedure. All legal cases in this matter will be resolved by a Competition Tribunal, which is appointed with one Chairman and at least three other South African citizens.[252] The Competition Tribunal is representative for the board cross-section of the Republic and all members must have a suitable qualification and experience in economics, law, commerce, industry or public affairs.[253] If the Competition recognized an in connection with the Competition Act prohibit action by

[248] *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[249] Section 67 (9) (10) (11) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[250] Section 8 (b) *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[251] Section 60 (1) (a) (vii) *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[252] Section 26, 27 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[253] Section 28 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

an operator[254] the Commission starts to investigate in this manner.[255] After investigation the case will close due to the fact of insufficient proof or it will referred to the Tribunal to continue the procedure[256] with a hearing[257]. After the hearing the Tribunal can order measures which are suitable to reconstitute a condition in accordance with the provisions of the Competition Act. Decisions of the Competition Tribunal can be appealed by the Competition Appeal Court.[258]

As mentioned above, the "essential facilities doctrine", developed within the US American antitrust law, is applicable in different fields – especially in fields which are network connected, like the telecommunication sector. In accordance with the definition of an "essential facility" contained in the Competition Act and the prohibition of access refusal, the principles of the "essential facilities doctrine" seem to be applicable – also for the telecommunication sector. However, the Act also clearly stated in this matter, that the access to an essential facility can be refuse if it not economically fungible. A definition, what the term "economically fungible" means does the Act not contain.

In the telecommunication sector the specific regulation contained in the Electronic Communications Act have to be observed. Although, the Electronic Communications Act contained no more specific exclusive rights for Telkom like the Telecommunications Act did[259] but it has to be observed that Telkom´s position is still market dominant. In this connection, justification for access refusal from Telkom's site like not sufficient network capacity or incompatibility of a competitor's technology with Telkom´s network seems to be acceptable for an access refusal. Furthermore, the argument of the duplication of the network can be acceptable. Summarized, a lot of arguments seem to be possible to justify an access refusal to essential facilities in the telecommunication sector through Telkom. Therefore, the efficient of the provision in the Competition Act in this connection are questionable.

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[254] Section 44 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[255] Section 4 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[256] Section 50 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[257] Section 52 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[258] Section 36, 37 *Competition Act*, Act 89 of 1998 Available at http://www.info.gov.za/gazette/acts/1998/a89-98.pdf [Accessed 08 January 2009].

[259] Above 68.

6.3 Existing provisions in the Electronic Communications Act in connection with "essential facilities"

The Electronic Communications Act defined the term "essential facilities" in section 1 as ´…an electronic communication facility or combination of electronic communication or other facilities that is exclusively or predominantly provide by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substitute or duplicated in order to provide a service in terms of this Act…´. Special provisions in connection with the access to an essential facility does the Act not contain. However, there are provisions applying "interconnection"[260] and "electronic facilities leasing"[261] which might be contain elements from the "essential facilities doctrine". "Interconnection" in accordance with the Electronic Communications Act means ´…physical or logical linking of two or more electronic communication networks, electronic communication services, broadcasting services, services provided pursuant to a licence exemption or any combination thereof…´. [262] By contrast, the provisions for "electronic facilities leasing" applying to all electronic facilities in the matter of leasing. This includes also services like numbering or information. Due to the constitution of the Electronic Communications Act, the provisions in connection with "interconnection" are special provision, which just apply in this matter whilst the provision in connection with "electronic facilities leasing" are common provision, which applies to all electronic facilities with exemption of "interconnection". The provisions in connection with "interconnection" itself do not contain the term "essential facility". However, at it is mentioned above, the "essential facilities doctrine" is in the telecommunication sector applicable in connection with "interconnection". Due to this, it has to be investigating if the South African legislator also adopted the "essential facilities doctrine" are elements thereof in the provisions applying to "interconnection". Section 37 (1) of the

[260] Chapter 7 *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[261] Chapter 8 *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[262] Section (1) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

Electronic Communications Act pointed out, that any request on interconnection must be fulfilled unless the request is unreasonable. If a dispute arising out of the reasonableness of the request ICASA can be notify for resolution. Therefore, the unreasonableness has to be prescribed in at least 14 days.[263] Afterwards ICASA has the power to decide about the reasonableness of the request and can set out orders, including the interconnection regulation.[264] In connection with pricing, ICASA only has the power to set out a framework.[265] These regulations seem to be appropriate to open up the market for competition because a request for interconnection can only be refuse if the request is unreasonable. Furthermore, ICASA has the power to determine in this connection. However, the term "unreasonable" is not defined in the Electronic Communications Act. It sounds like an objective justification for refusals as it can be found in the European legislative – but is it like that? Clarification in this connection is missing and so it is might be possible under the South African law to refuse a request on interconnection with the argument to duplicate the network. Furthermore the fact that ICASA is not allow to set out pricing rules or that there is no provision for a timeframe of ICASA´s decision do not give arguments for the implementation of the "essential facilities doctrine" into the South African law in connection with the "interconnection" provisions. Also, it would be hard for new operators to get the "interconnection", because before they can request the access they need a licence in this connection and the licence procedure in South Africa is complicated and also highly discussed.

The general provision of Chapter 8 Electronic Communications Act is that an electronic communications network operator must lease on request electronic communication facilities to other operators unless the request is unreasonable.[266] In this connection the provisions contains in section 43 (8) the term "essential facilities" where the Act declare that ICASA must prescribe a list of essential facilities required to be leased by an electronic communication service operator. ICASA is currently preparing such a list. In this connection ICASA set out in December 2007 a "Draft on

[263] Section 37 (2) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[264] Section 37 (3), 38 *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[265] Section 41 *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

[266] Section 43 (1) *Electronic Communications Act*, Act 36 of 2005 Available at http://www.info.gov.za/gazette/acts/2007/a37-07.pdf [Accessed 08 January 2009].

regulation prescribing a list of essential facilities" and invited interested person to submit written representations in this matter until February 2008.[267] ICASA`s draft pointed out a list of essential facilities in this connection. In accordance with ICASA´s opinion these facilities are:

- Co-location space;
- Land based fibre optic cables;
- Main distribution frames and (a not limited enumeration)
- Backhaul circuit
- Cable landing stations
- Co-location space
- International gateway
- Land line fibre optic cables
- Main distribution frame and
- Undersea-based fibre optic cables.[268]

In a next step ICASA point out the general condition for the access to these facilities. The operator, which control the access must provide fair and non-discriminatory access on a written request to all operators which are allow to supply electronic communication services. This operator must also ensure the access to the operational support systems or similar software systems. The details of the access contract are negotiable under good faith but they apply to any operators in similar circumstances.[269] If an operator which controls the access to an essential facility received a request from another operator he must confirm the receipt in two days and respond within five days with the content of commencement date for the access, inspection of the facility and associated facilities and matters related thereto. Furthermore, within thirty days from the date of confirmation of the receipt the operator which controls the access must communicate the terms and conditions of the access. At the same time, the operator which requested the access must also send a written request to ICASA in this matter. The operator, in control of the access

[267] Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[268] Point 3.1.Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[269] Point 4 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

must notify ICASA of its response and terms of condition of the access within five day of the expiration of the thirty days answering period mentioned above.[270]

The charge for the access must be based on a forward-looking long term contract within average incremental costs of an efficient co-operation basis. If it is necessary, ICASA can control these cost and determine another calculation basis. In accordance with the COACAM-Regulations, the operator controls the access has to inform ICASA about the access charges.[271]

If there any disputes arising out in connection with the access request the parties have firstly to try to resolve this dispute within negotiations, mediation or arbitration before this dispute will be refer to ICASA within a written notice which will made the scope of dispute and the different positions clear and contains a preferred remedy.[272] ICASA will resolve the dispute within thirty days after the parties submitted all necessary documents which were mentioned above. This dispute resolution can contain obligation and regulation to ensure the access to the essential facility.[273] If an operator acting against the provisions of this regulation or ICASA´s dispute resolution orders a penalty not exceeding ten per cent of the operator's annual turnover can be convicted.[274]

The provisions in ICASA´s draft on a regulation prescribing a list of essential facilities do not contain the fundamentals of the "essential facilities doctrine" directly but the content is accordantly. Within this regulation the access to exact defined facilities will be possible with fair conditions for all parties. The regulation contains the principle of non-discrimination and transparency and also ICASA´s possibilities of acting seem to be efficient to ensure the establishment of competition in South Africans telecommunication sector. Also, the provisions in the draft are more clearly ex-ante provision like the European sector specific regulation in this connection. It is welcome to define the "essential facilities" in this connection clearly to resolve any dispute. Furthermore, the draft does not contained reasons for an access refusal like the Electronic Communications Act do in a wide form (unreasonable request). However, it seems to be that within such a regulation the operator controls the access has no

[270] Point 5 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[271] Point 7 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[272] Point 8 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[273] Point 9 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

[274] Point 11 Notice 1800 of 2007 Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

objective possibilities to refuse access request which will be not necessarily good for the establishment of a fair competition in this field.

Nineteen different operators or associations submitted their presentation based on ICASA´s draft for an essential facility regulation.[275] All presentation criticise ICASA´s draft in one point: the definition of essential facilities. Whist some operators would like to extend the drafted list of these facilities, other find that facilities like cable landing station or undersea based fibre optic cable are not essential facilities in this matter- especially in accordance of the "essential facilities" definition set out in the Electronic Communications Act. Another point which is highly criticized is the fact of no objective justification in connection with a request refusal. These two mean point needs to be new defined by ICASA within their final draft. By contrast, almost all operators or associations which submitted a presentation in this connection welcomed the final adoption of the content of the "essential facilities doctrine" to ensure a successful establishment of a fair competition in South Africans telecommunication sector. Now it has to be waiting on ICASA´s final draft in this connection and how the new legislation will be.

6.4 Conclusion

In South Africans current sector specific telecommunication regulation the fundamentals of the essential facilities doctrine are not adopted. However, the Competition Act contains elements from the doctrine but the application for the telecommunication sector seems to be difficult due to the fact of a high range of possibilities in connection with the objective justification of a refusal and the absent clarification in this matter. Within the new regulation prescribing a list of essential facilities, the fundamentals of the "essential facilities doctrine" will be adopted into the South African legislation.

[275] at&t,Blue IQ Investment Holding, Cell C, Digital Broadcasting International, Fast Com, Gateway, Internet Solutions, The Internet Service Provider Association, 2 x MTN, M Web, Neotel, South Africas Communication Forum, Sentech, Smile Communication Pty, The Association for Progressive Communication, Telecom Namibia, Telkom, Transnet and Vodacom All submission available at Available at http://www.icasa.org.za/ [Accessed 31 August 2008].

CHAPTER 7 COMPARISON OF THE EUROPEAN AND SOUTH AFRICAN LEGISLATIVE IN CONNECTION WITH THE "ESSENTIAL FACILITIES DOCTRINE" AND CONCLUSION

To summarise this dissertation one can say that it shows the difficulties of opening up a former monopolistic sector for competition. There are different economics factors which have to be observed in this connection as well as the different legal instruments such as sector specific regulation and the existing competition law. It is a long process which is not yet complete due ongoing technical developments.

The "essential facilities doctrine", developed from the U.S. American antitrust law, is a useful instrument to liberalized former monopoly dominated markets like the telecommunication market. The fundamentals of the doctrine are able to develop an ex ante sector specific regulation to establish competition in such markets.

In Europe, the fundamentals of the "essential facilities doctrine" are implemented in the sector-specific ex-ante regulation of the "Access Doctrine". Due to the fact of the responsibilities of the member state to adopt this provision into their own legislative an internal European market in the telecommunication sector was created. The example of Germany shows that NRA's are able to control the establishment of competition in former monopolized sectors within the specific regulation. Europe began early to liberalize their telecommunication market and has now to resole new responsibilities like the regulation of the so called "new telecommunication markets". The telecommunication sector will grow rapidly and due to this, legislation has to be created in future which is predictable and able to resolve all problems which will arise out of new developments.

By contrast, the liberalisation process in South African telecommunication sector began relatively late. Within the development of new legislation like the Telecommunications Act, competition in the sector was due to the fact of Telkom´s exclusive rights until 2005 were not really created. Also the fact that ICASA or the forerunner authority SATRA, until the end of 2007, were controlled by the Minister of Communication, did not help to establish competition successfully in the telecommunication sector. The current Electronic Communications Act also does not

contain elements of the "essential facilities doctrine" and the sector specific competition law regulations are ex post regulations. The example of Europe shows that a successful establishment of competition needs firstly ex ante sector specific regulations to ensure new competitors the access to the market. Although the existing South African competition law contains provisions of the "essential facilities doctrine" which can also be used in the telecommunication sector – these provisions, as mentioned, are too wide in connection with an objective justification referring to a refusal of an access request. Only within new drafts, like the draft of prescription of essential facilities in connection with the Electronic Communications Act, South Africa started to implement the fundamentals of the "essential facilities doctrine" in their legislation and created ex ante sector specific regulations. The final provisions in this connection are still outstanding, but it seems likely that South Africa finally learns from the experiences of other states in connection of the adoption of the "essential facilities doctrine" to establish successfully a fair competition in the telecommunication sector.

The conclusion is that South Africa learnt from Europe – or other states – that there are possibilities to establish a competition in former monopolized sectors. At the end of the day, Europe and South Africa are currently at different points: while Europe established successful competition in the telecommunication sector and therefore had the problem of creating new legislation for new developing electronic communication markets, South Africa finally started with sector specific regulation to create (real) competition in the telecommunication sector. However, in this connection there is an advantage for South Africa which is able to incorporate also the new markets from the beginning on in their sector specific regulation. Reforms in this connection are required.

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