

Notice on the application of the competition rules to access agreements in the telecommunications sector

FRAMEWORK, RELEVANT MARKETS AND PRINCIPLES

(98/C 265/02)

(Text with EEA relevance)

PREFACE

In the telecommunications industry, access agreements are central in allowing market participants the benefits of liberalisation.

The purpose of this notice is threefold:

- to set out access principles stemming from Community competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors;
- to define and clarify the relationship between competition law and sector specific legislation under the Article 100a framework (in particular this relates to the relationship between competition rules and open network provision legislation);
- to explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context.

INTRODUCTION

procedures apply to access agreements in the context of harmonised EC and national regulation in the telecommunications sector.

1. The timetable for full liberalisation in the telecommunications sector has now been established, and most Member States had to remove the last barriers to the provision of telecommunications networks and services in a competitive environment to consumers by 1 January 1998 ⁽¹⁾. As a result of this liberalisation a second set of related products or services will emerge as well as the need for access to facilities necessary to provide these services. In this sector, interconnection to the public switched telecommunications network is a typical, but not the only, example of such access. The Commission has stated that it will define the treatment of access agreements in the telecommunications sector under the competition rules ⁽²⁾. This notice, therefore, addresses the issue of how competition rules and
2. The regulatory framework for the liberalisation of telecommunications consists of the liberalisation directives issued under Article 90 of the Treaty and the harmonisation Directives under Article 100a, including in particular the open network provision (ONP) framework. The ONP framework provides harmonised rules for access and interconnection to the telecommunications networks and the voice telephony services. The legal framework provided by the liberalisation and harmonisation legislation is the background to any action taken by the Commission in its application of the competition rules. Both the liberalisation legislation (the Article 90 Directives) ⁽³⁾ and the harmonisation legislation

(the ONP Directives) (4) are aimed at ensuring the attainment of the objectives of the Community as laid out in Article 3 of the Treaty, and specifically, the establishment of 'a system ensuring that competition in the internal market is not distorted' and 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.

3. The Commission has published Guidelines on the application of EEC competition rules in the telecommunications sector (5). The present notice is intended to build on those Guidelines, which do not deal explicitly with access issues.
4. In the telecommunications sector, liberalisation and harmonisation legislation permit and simplify the task of Community firms in embarking on new activities in new markets and consequently allow users to benefit from increased competition. These advantages must not be jeopardised by restrictive or abusive practices of undertakings: the Community's competition rules are therefore essential to ensure the completion of this development. New entrants must in the initial stages be guaranteed the right to have access to the networks of incumbent telecommunications operators (TOs). Several authorities, at the regional, national and Community levels, have a role in regulating this sector. If the competition process is to work well in the internal market, effective coordination between these institutions must be ensured.
5. Part I of the notice sets out the legal framework and details how the Commission intends to avoid unnecessary duplication of procedures while safeguarding the rights of undertakings and users under the competition rules. In this context, the Commission's efforts to encourage decentralised application of the competition rules by national courts and national authorities aim at achieving remedies at a national level, unless a significant Community interest is involved in a particular case. In the telecommunications sector, specific procedures in the ONP framework likewise aim at resolving access problems in the first place at a decentralised, national level, with a further possibility for conciliation at Community level in certain circumstances. Part II defines the Commission's approach to market definition in this sector. Part III details the principles that the Commission will follow in the application of the competition rules: it aims to help telecommunications market participants shape their access agreements by explaining the competition law requirements. The principles set out in this Notice apply not only to traditional fixed line telecommunications, but also to all telecommunications, including areas such as satellite communications and mobile communications.
6. The notice is based on the Commission's experience in several cases (6), and certain studies into this area carried out on behalf of the Commission (7). As this notice is based on the generally applicable competition rules, the principles set out in this Notice will, to extent that comparable problems arise, be equally applicable in other areas, such as access issues in digital communications sectors generally. Similarly, several of the principles contained in the Treaty - will be of relevance to any company occupying a dominant position including those in fields other than telecommunications.
7. The present notice is based on issues which have arisen during the initial stages of transition from monopolies to competitive markets. Given the convergence of the telecommunications, broadcasting and information technology sectors (8), and the increased competition on these markets, other issues will emerge. This may make it necessary to adapt the scope and principles set out in this notice to these new sectors.
8. The principles set out in this document will apply to practices outside the Community to the extent that such practices have an effect on competition within the Community and affect trade between Member States. In applying the competition rules, the Commission is obliged to comply with the Community's obligations under the WTO telecommunications agreement (9). The Commission also notes that there are continuing discussions with regard to the international accounting rates system in the context of the ITU. The present notice is without prejudice to the Commission's position in these discussions.
9. This notice does not in any way restrict the rights conferred on individuals or undertakings by Community law, and is without prejudice to any interpretation of the Community competition rules

that may be given by the Court of Justice or the Court of First Instance of the European Communities. This notice does not purport to be a comprehensive analysis of all possible competition problems in this sector: other problems already exist and more are likely to arise in the future.

10. The Commission will consider whether the present notice should be amended or added to in the light of experience gained during the first period of a liberalised telecommunications environment.

PART I — FRAMEWORK

1. Competition rules and sector specific regulation

11. Access problems in the broadest sense of the word can be dealt with at different levels and on the basis of a range of legislative provisions, of both national and Community origin. A service provider faced with an access problem such as a TO's unjustified refusal to supply (or on reasonable terms) a leased line needed by the applicant to provide services to its customers could therefore contemplate a number of routes to seek a remedy. Generally speaking, aggrieved parties will experience a number of benefits, at least in an initial stage, in seeking redress at a national level. At a national level, the applicant has two main choices, namely (1) specific national regulatory procedures now established in accordance with Community law and harmonised under Open Network Provision (see footnote 4), and (2) an action under national and/or Community law before a national court or national competition authority⁽¹⁰⁾.
12. Complaints made to the Commission under the competition rules in the place of or in addition to national courts, national competition authorities and/or to national regulatory authorities under ONP procedures will be dealt with according to the priority which they deserve in view of the urgency, novelty and transnational nature of the problem involved and taking into account the need to avoid duplicate proceedings (see points 23 *et seq.*).
13. The Commission recognises that national regulatory authorities (NRAs)⁽¹¹⁾ have different tasks, and operate in a different legal framework from the Commission when the latter is applying the competition rules. First, the NRAs operate under national law, albeit often implementing European law. Secondly, that law, based as it is on considerations of telecommunications policy, may have objectives different to, but consistent with, the objectives of Community competition policy. The Commission cooperates as far as possible with the NRAs, and NRAs also have to cooperate between themselves in particular when dealing with cross-border issues⁽¹²⁾. Under Community law, national authorities, including regulatory authorities and competition authorities, have a duty not to approve any practice or agreement contrary to Community competition law.
14. Community competition rules are not sufficient to remedy all of the various problems in the telecommunications sector. NRAs therefore have a significantly wider ambit and a significant and far-reaching role in the regulation of the sector. It should also be noted that as a matter of Community law, the NRAs must be independent⁽¹³⁾.
15. It is also important to note that the ONP Directives impose on TOs having significant market power certain obligations of transparency and non-discrimination that go beyond those that would normally be imposed under Article 86 of the Treaty. ONP Directives lay down obligations relating to transparency, obligations to supply and pricing practices. These obligations are enforced by the NRAs, which also have jurisdiction to take steps to ensure effective competition⁽¹⁴⁾.
16. In relation to Article 86, this notice is written, for convenience, in most respects as if there was one telecommunications operator occupying a dominant position. This will not necessarily be the case in all Member States: for example new telecommunications networks offering increasingly wide coverage will develop progressively. These alternative telecommunications networks may, or may ultimately, be large and extensive enough to be partly or even wholly substitutable for the existing national networks, and this should be kept in mind. The existence and the position on the market of competing operators will be relevant in determining whether sole or joint dominant positions exist:

references to the existence of a dominant position in this notice should be read with this in mind.

17. Given the Commission's responsibility for the Community's competition policy, the Commission must serve the Community's general interest. The administrative resources at the Commission's disposal to perform its task are necessarily limited and cannot be used to deal with all the cases brought to its attention. The Commission is therefore obliged, in general, to take all organisational measures necessary for the performance of its task and, in particular, to establish priorities⁽¹⁵⁾.
18. The Commission has therefore indicated that it intends, in using its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings having particular political, economic or legal significance for the Community⁽¹⁶⁾. Where these features are absent in a particular case, notifications will not normally be dealt with by means of a formal decision, but rather a comfort letter (subject to the consent of the parties), and complaints should, as a rule, be handled by national courts or other relevant authorities. In this context, it should be noted that the competition rules are directly effective⁽¹⁷⁾ so that Community competition law is enforceable in the national courts. Even where other Community legislation has been respected, this does not remove the need to comply with the Community competition rules⁽¹⁸⁾.
19. Other national authorities, in particular NRAs acting within the ONP framework, have jurisdiction over certain access agreements (which must be notified to them). However, notification of an agreement to an NRA does not make notification of an agreement to the Commission unnecessary. The NRAs must ensure that actions taken by them are consistent with Community competition law⁽¹⁹⁾. This duty requires them to refrain from action that would undermine the effective protection of Community law rights under the competition rules⁽²⁰⁾. Therefore, they may not approve arrangements which are contrary to the competition rules⁽²¹⁾. If the national authorities act so as to undermine those rights, the Member State may itself be liable for damages to those harmed by this action⁽²²⁾. In addition, NRAs have jurisdiction under the ONP directives to take steps to ensure effective competition⁽²³⁾.
20. Access agreements in principle regulate the provision of certain services between independent undertakings and do not result in the creation of an autonomous entity which would be distinct from the parties to the agreements. Access agreements are thus generally outside the scope of the Merger Regulation⁽²⁴⁾.
21. Under Regulation No 17⁽²⁵⁾, the Commission could be seised of an issue relating to access agreements by way of a notification of an access agreement by one or more of the parties involved⁽²⁶⁾, by way of a complaint against a restrictive access agreement or against the behaviour of a dominant company in granting or refusing access⁽²⁷⁾, by way of a Commission own-initiative procedure into such a grant or refusal, or by way of a sector inquiry⁽²⁸⁾. In addition, a complainant may request that the Commission take interim measures in circumstances where there is an urgent risk of serious and irreparable harm to the complainant or to the public interest⁽²⁹⁾. It should however, be noted in cases of great urgency that procedures before national courts can usually result more quickly in an order to end the infringements than procedures before the Commission⁽³⁰⁾.
22. There are a number of areas where agreements will be subject to both the competition rules and national or European sector specific measures, most notably Internal Market measures. In the telecommunications sector, the ONP Directives aim at establishing a regulatory regime for access agreements. Given the detailed nature of ONP rules and the fact that they may go beyond the requirements of Article 86, undertakings operating in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, and *vice versa*.

2. Commission action in relation to access agreements ⁽³¹⁾

23. Access agreements taken as a whole are of great significance, and it is therefore appropriate for the Commission to spell out as clearly as possible the Community legal framework within which these agreements should be concluded. Access agreements having restrictive clauses will involve issues under Article 85. Agreements which involve dominant, or monopolist, undertakings involve Article 86 issues: concerns arising from the dominance of one or more of the parties will generally be of greater significance in the context of a particular agreement than those under Article 85.

Notifications

24. In applying the competition rules, the Commission will build on the ONP Directives which set a framework for action at the national level by the NRAs. Where agreements fall within Article 85(1), they must be notified to the Commission if they are to benefit from an exemption under Article 85(3). Where agreements are notified, the Commission intends to deal with some notifications by way of formal decisions, following appropriate publicity in the *Official Journal of the European Communities*, and in accordance with the principles set out below. Once the legal principles have been clearly established, the Commission then proposes to deal by way of comfort letter with other notifications raising the same issues.

3. Complaints

25. Natural or legal persons with a legitimate interest may, under certain circumstances, submit a complaint to the Commission, requesting that the Commission by decision require that an infringement of Article 85 or Article 86 of the Treaty be brought to an end. A complainant may additionally request that the Commission take interim measures where there is an urgent risk of serious and irreparable harm ⁽³²⁾. A prospective complainant has other equally or even more effective options, such as an action before a national court. In this context, it should be noted that procedures before the national courts can offer

considerable advantages for individuals and companies, such as in particular ⁽³³⁾:

- national courts can deal with and award a claim for damages resulting from an infringement of the competition rules,
- national courts can usually adopt interim measures and order the termination of an infringement more quickly than the Commission is able to do,
- before national courts, it is possible to combine a claim under Community law with a claim under national law,
- legal costs can be awarded to the successful applicant before a national court.

Furthermore, the specific national regulatory principles as harmonised under ONP Directives can offer recourse both at the national level and, if necessary, at the Community level.

3.1. Use of national and ONP procedures

26. As referred to above ⁽³⁴⁾ the Commission will take into account the Community interest of each case brought to its attention. In evaluating the Community interest, the Commission examines '... the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 are complied with ...' ⁽³⁵⁾.

Another essential element in this evaluation is the extent to which a national judge is in a position to provide an effective remedy for an infringement of Article 85 or 86. This may prove difficult, for example, in cases involving extra-territorial elements.

27. Article 85(1) and Article 86 of the Treaty produce direct effects in relations between individuals which must be safeguarded by national courts⁽³⁶⁾. As regards actions before the NRA, the ONP Interconnection Directive provides that such an authority has power to intervene and order changes in relation to both the existence and content of access agreements. NRAs must take into account 'the need to stimulate a competitive market' and may impose conditions on one or more parties, *inter alia*, 'to ensure effective competition'⁽³⁷⁾.

28. The Commission may itself be seised of a dispute either pursuant to the competition rules, or pursuant to an ONP conciliation procedure. Multiple proceedings might lead to unnecessary duplication of investigative efforts by the Commission and the national authorities. Where complaints are lodged with the Commission under Article 3 of Regulation No 17 while there are related actions before a relevant national or European authority or court, the Directorate-General for Competition will generally not initially pursue any investigation as to the existence of an infringement under Article 85 or 86 of the Treaty. This is subject, however, to the following points.

3.2. Safeguarding complainant's rights

29. Undertakings are entitled to effective protection of their Community law rights⁽³⁸⁾. Those rights would be undermined if national proceedings were allowed to lead to an excessive delay of the Commission's action, without a satisfactory resolution of the matter at a national level. In the telecommunications sector, innovation cycles are relatively short, and any substantial delay in resolving an access dispute might in practice be equivalent to a refusal of access, thus prejudging the proper determination of the case.

30. The Commission therefore takes the view that an access dispute before an NRA should be resolved within a reasonable period of time, normally speaking not extending beyond six months of the matter first being drawn to the attention of that authority. This resolution could take the form of either a final determination of the action or another

form of relief which would safeguard the rights of the complainant. If the matter has not reached such a resolution then, *prima facie*, the rights of the parties are not being effectively protected, and the Commission would in principle, upon request by the complainant, begin its investigations into the case in accordance with its normal procedures, after consultation and in cooperation with the national authority in question. In general, the Commission will not begin such investigations where there is already an ongoing action under ONP conciliation procedures.

31. In addition, the Commission must always look at each case on its merits: it will take action if it feels that in a particular case, there is a substantial Community interest affecting, or likely to affect, competition in a number of Member States.

3.3. Interim measures

32. As regards any request for interim measures, the existence or possibility of national proceedings is relevant to the question of whether there is a risk of serious and irreparable harm. Such proceedings should, *prima facie*, remove the risk of such harm and it would therefore not be appropriate for the Commission to grant interim measures in the absence of evidence that the risk would nevertheless remain.

33. The availability of and criteria for interim injunctive relief is an important factor which the Commission must take into account in reaching this *prima facie* conclusion. If interim injunctive relief were not available, or if such relief was not likely adequately to protect the complainant's rights under Community law, the Commission would consider that the national proceedings did not remove the risk of harm, and could therefore commence its examination of the case.

4. Own-initiative investigation and sector inquiries

34. If it appears necessary, the Commission will open an own-initiative investigation. It can also launch a

sector inquiry, subject to consultation of the Advisory Committee of Member State competition authorities.

(b) the breach of Article 85 is particularly serious.

The Commission has recently published Guidelines on how fines will be calculated ⁽⁴⁴⁾.

5. Fines

35. The Commission may impose fines of up to 10 % of the annual worldwide turnover of undertakings which intentionally or negligently breach Article 85(1) or Article 86 ⁽³⁹⁾. Where agreements have been notified pursuant to Regulation No 17 for an exemption under Article 85(3), no fine may be levied by the Commission in respect of activities described in the notification ⁽⁴⁰⁾ for the period following notification. However, the Commission may withdraw the immunity from fines by informing the undertakings concerned that, after preliminary examination, it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified ⁽⁴¹⁾.

38. Notification to the NRA is not a substitute for a notification to the Commission and does not limit the possibility for interested parties to submit a complaint to the Commission, or for the Commission to begin an own-initiative investigation into access agreements. Nor does such notification limit the rights of a party to seek damages before a national court for harm caused by anti-competitive agreements ⁽⁴⁵⁾.

PART II — RELEVANT MARKETS

36. The ONP Interconnection Directive has two particular provisions which are relevant to fines under the competition rules. First, it provides that interconnection agreements must be communicated to the relevant NRAs and made available to interested third parties, with the exception of those parts which deal with the commercial strategy of the parties ⁽⁴²⁾. Secondly, it provides that the NRA must have a number of powers which it can use to influence or amend the interconnection agreements ⁽⁴³⁾. These provisions ensure that appropriate publicity is given to the agreements, and provide the NRA with the opportunity to take steps, where appropriate, to ensure effective competition on the market.

39. In the course of investigating cases within the framework set out in Part I above, the Commission will base itself on the approach to the definition of relevant markets set out in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law ⁽⁴⁶⁾.

37. Where an agreement has been notified to an NRA, but has not been notified to the Commission, the Commission does not consider it would be generally appropriate as a matter of policy to impose a fine in respect of the agreement, even if the agreement ultimately proves to contain conditions in breach of Article 85. A fine would, however, be appropriate in some cases, for example where:

40. Firms are subject to three main sources of competitive constraints; demand substitutability, supply substitutability and potential competition, with the first constituting the most immediate and effective disciplinary force on the suppliers of a given product or service. Demand substitutability is therefore the main tool used to define the relevant product market on which restrictions of competition for the purposes of Article 85(1) and Article 86 can be identified.

(a) the agreement proves to contain provisions in breach of Article 86; and/or

41. Supply substitutability may in appropriate circumstances be used as a complementary element to define relevant markets. In practice it cannot be clearly distinguished from potential competition. Supply side substitutability and potential competition are used for the purpose of determining whether the undertaking has a dominant position or whether the restriction of competition is significant within the meaning of Article 85, or whether there is elimination of competition.

42. In assessing relevant markets it is necessary to look at developments in the market in the short term.

The following sections set out some basic principles of particular relevance to the telecommunications sector.

1. Relevant product market

43. Section 6 of Form A/B defines the relevant product market as follows:

‘A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use’.

44. Liberalisation of the telecommunications sector will lead to the emergence of a second type of market, that of access to facilities which are currently necessary to provide these liberalised services. Interconnection to the public switched telecommunications network would be a typical example of such access. Without interconnection, it will not be commercially possible for third parties to provide, for example, comprehensive voice telephony services.

45. It is clear, therefore, that in the telecommunications sector there are at least two types of relevant markets to consider — that of a service to be provided to end users and that of access to those facilities necessary to provide that service to end users (information, physical network, etc.). In the context of any particular case, it will be necessary to define the relevant access and services markets, such as interconnection to the public telecommunications network, and provision of public voice telephony services, respectively.

46. When appropriate, the Commission will use the test of a relevant market which is made by asking whether, if all the suppliers of the services in question raised their prices by 5 to 10 %, their collective profits would rise. According to this test, if their profits would rise, the market considered is a separate relevant market.

47. The Commission considers that the principles under competition law governing these markets remain

the same regardless of the particular market in question. Given the pace of technological change in this sector, any attempt to define particular product markets in this notice would run the risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets — for example, the determination of whether call origination and call termination facilities are part of the same facilities market — is best done in the light of a detailed examination of an individual case.

1.1. Services market

48. This can be broadly defined as the provision of any telecommunications service to users. Different telecommunications services will be considered substitutable if they show a sufficient degree of interchangeability for the end-user, which would mean that effective competition can take place between the different providers of these services.

1.2. Access to facilities

49. For a service provider to provide services to end-users it will often require access to one or more (upstream or downstream) facilities. For example, to deliver physically the service to end-users, it needs access to the termination points of the telecommunications network to which these end-users are connected. This access can be achieved at the physical level through dedicated or shared local infrastructure, either self provided or leased from a local infrastructure provider. It can also be achieved either through a service provider who already has these end-users as subscribers, or through an interconnection provider who has access directly or indirectly to the relevant termination points.

50. In addition to physical access, a service provider may need access to other facilities to enable it to market its service to end users: for example, a service provider must be able to make end-users aware of its services. Where one organisation has a dominant position in the supply of services such as directory information, similar concerns arise as with physical access issues.

51. In many cases, the Commission will be concerned with physical access issues, where what is necessary is access to the network facilities of the dominant TO (⁴⁷).
52. Some incumbent TOs may be tempted to resist providing access to third party service providers or other network operators, particularly in areas where the proposed service will be in competition with a service provided by the TO itself. This resistance will often manifest itself as unjustified delay in giving access, a reluctance to allow access or a willingness to allow it only under disadvantageous conditions. It is the role of the competition rules to ensure that these prospective access markets are allowed to develop, and that incumbent TOs are not permitted to use their control over access to stifle developments on the services markets.
53. It should be stressed that in the telecommunications sector, liberalisation can be expected to lead to the development of new, alternative networks which will ultimately have an impact on access market definition involving the incumbent telecommunications operator.

2. Relevant geographic market

54. Relevant geographic markets are defined in Form A/B as follows:

‘The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.’

55. As regards the provision of telecommunication services and access markets, the relevant geographic market will be the area in which the objective conditions of competition applying to service providers are similar, and competitors are able to offer their services. It will therefore be necessary to examine the possibility for these service providers to access an end-user in any part of this area, under similar and economically viable conditions. Regulatory conditions such as the terms of licences, and

any exclusive or special rights owned by competing local access providers are particularly relevant (⁴⁸).

PART III — PRINCIPLES

56. The Commission will apply the following principles in cases before it.
57. The Commission has recognised that ‘Articles 85 and 86 ... constitute law in force and enforceable throughout the Community. Conflicts should not arise with other Community rules because Community law forms a coherent regulatory framework ... it is obvious that Community acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules, so as to ensure the best possible implementation of all aspects of the Community telecommunications policy ... This applies, *inter alia*, to the relationship between competition rules applicable to undertakings and the ONP rules’ (⁴⁹).
58. Thus, competition rules continue to apply in circumstances where other Treaty provisions or secondary legislation are applicable. In the context of access agreements, the internal market and competition provisions of Community law are both important and mutually reinforcing for the proper functioning of the sector. Therefore in making an assessment under the competition rules, the Commission will seek to build as far as possible on the principles established in the harmonisation legislation. It should also be borne in mind that a number of the competition law principles set out below are also covered by specific rules in the context of the ONP framework. Proper application of these rules should often avoid the need for the application of the competition rules.
59. As regards the telecommunications sector, attention should be paid to the cost of universal service obligations. Article 90(2) of the Treaty may justify exceptions to the principles of Articles 85 and 86. The details of universal service obligations are a regulatory matter. The field of application of Article 90(2) has been specified in the Article 90 Directives in the telecommunications sector, and the Commission will apply the competition rules in this context.

60. Articles 85 and 86 of the Treaty apply in the normal manner to agreements or practices which have been approved or authorised by a national authority⁽³⁰⁾, or where the national authority has required the inclusion of terms in an agreement at the request of one or more of the parties involved.

61. However, if a NRA were to require terms which were contrary to the competition rules, the undertakings involved would in practice not be fined, although the Member State itself would be in breach of Article 3(g) and Article 5 of the Treaty⁽³¹⁾ and therefore subject to challenge by the Commission under Article 169. Additionally, if an undertaking having special or exclusive rights within the meaning of Article 90, or a State-owned undertaking, were required or authorised by a national regulator to engage in behaviour constituting an abuse of its dominant position, the Member State would also be in breach of Article 90(1) and the Commission could adopt a decision requiring termination of the infringement⁽³²⁾.

62. NRAs may require strict standards of transparency, obligations to supply and pricing practices on the market, particularly where this is necessary in the early stages of liberalisation. When appropriate, legislation such as the ONP framework will be used as an aid in the interpretation of the competition rules⁽³³⁾. Given the duty resting on NRAs to ensure that effective competition is possible, application of the competition rules is likewise required for an appropriate interpretation of the ONP principles. It should also be noted that many of the issues set out below are also covered by rules under the Full Competition Directive and the ONP Licensing and Data protection Directives: effective enforcement of this regulatory framework should prevent many of the competition issues set out below from arising.

1. Dominance (Article 86)

63. In order for an undertaking to provide services in the telecommunications services market, it may need to obtain access to various facilities. For the provision of telecommunications services, for example, interconnection to the public switched telecommunications network will usually be necessary. Access to this network will almost always be in the hands of a dominant TO. As regards

access agreements, dominance stemming from control of facilities will be the most relevant to the Commission's appraisal.

64. Whether or not a company is dominant does not depend only on the legal rights granted to that company. The mere ending of legal monopolies does not put an end to dominance. Indeed, notwithstanding the liberalisation Directives, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.

65. The judgment of the Court of Justice in *Tetra Pak*⁽³⁴⁾ is also likely to prove important in the telecommunications sector. The Court held that given the extremely close links between the dominated and non-dominated market, and given the extremely high market share on the dominated market, *Tetra Pak* was 'in a situation comparable to that of holding a dominant position on the markets in question as a whole'.

The *Tetra Pak* case concerned closely related horizontal markets: the analysis is equally applicable, however, to closely related vertical markets which will be common in the telecommunications sector. In the telecommunications sector, it is often the case that a particular operator has an extremely strong position on infrastructure markets, and on markets downstream of that infrastructure. Infrastructure costs also typically constitute the single largest cost of the downstream operations. Further, operators will often face the same competitors on both the infrastructure and downstream markets.

66. It is therefore possible to envisage a number of situations where there will be closely related markets, together with an operator having a very high degree of market power on at least one of those markets.

67. If these circumstances are present, it may be appropriate for the Commission to find that the particular operator was in a situation comparable to that of holding a dominant position on the markets in question as a whole.

68. In the telecommunications sector, the concept of 'essential facilities' will in many cases be of relevance in determining the duties of dominant TOs. The expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means⁽⁵⁵⁾.
69. A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 86. Conversely, a company may enjoy a dominant position pursuant to Article 86 without controlling an essential facility.

1.1. Services market

70. One of the factors used to measure the market power of an undertaking is the sales attributable to that undertaking, expressed as a percentage of total sales in the market for substitutable services in the relevant geographic area. As regards the services market, the Commission will assess, *inter alia*, the turnover generated by the sale of substitutable services, excluding the sale or internal usage of interconnection services and the sale or internal usage of local infrastructure⁽⁵⁶⁾, taking into consideration the competitive conditions and the structure of supply and demand on the market.

1.2. Access to facilities

71. The concept of 'access' as referred to in point 45 can relate to a range of situations, including the availability of leased lines enabling a service provider to build up its own network, and interconnection in the strict sense, that is interconnecting two telecommunication networks, for example mobile and fixed. In relation to access it is probable that the incumbent operator will remain dominant for some time after the legal liberalisation has taken place. The incumbent operator, which controls the facilities, is often also the largest service provider, and it has in the past not needed to distinguish

between the conveyance of telecommunications services and the provision of these services to end-users. Traditionally, an operator who is also a service provider has not required its downstream operating arm to pay for access, and therefore it has not been easy to calculate the revenue to be allocated to the facility. In a case where an operator is providing both access and services it is necessary to separate so far as possible the revenues as the basis for the calculation of the company's share of whichever market is involved. Article 8(2) of the Interconnection Directive addresses this issue by introducing a requirement for separate accounting for 'activities related to interconnection — covering both interconnection services provided internally and interconnection services provided to others — and other activities'. The proposed Commission Recommendation on Accounting Separation in the context of Interconnection will also be helpful in this regard.

72. The economic significance of obtaining access also depends on the coverage of the network with which interconnection is sought. Therefore, in addition to using turnover figures, the Commission will, where possible, also take into account the number of customers who have subscribed to services offered by the dominant company comparable with those which the service provider requesting access intends to provide. Accordingly, market power for a given undertaking will be measured partly by the number of subscribers who are connected to termination points of the telecommunications network of that undertaking expressed as a percentage of the total number of subscribers connected to termination points in the relevant geographic area.

Supply-side substitutability

73. As stated in point 41, supply-side substitutability is also relevant to the question of dominance. A market share of over 50%⁽⁵⁷⁾ is usually sufficient to demonstrate dominance although other factors will be examined. For example, the Commission will examine the existence of other network providers, if any, in the relevant geographic area to determine whether such alternative infrastructures are sufficiently dense to provide competition to the incumbent's network and the extent to which it would be possible for new access providers to enter the market.

Other relevant factors

74. In addition to market share data, and supply-side substitutability, in determining whether an operator is dominant the Commission will also examine whether the operator has privileged access to facilities which cannot reasonably be duplicated within an appropriate time frame, either for legal reasons or because it would cost too much.
75. As competing access providers appear and challenge the dominance of the incumbent, the scope of the rights they receive from Member States' authorities, and notably their territorial reach, will play an important part in the determination of market power. The Commission will closely follow market evolution in relation to these issues and will take account of any altered market conditions in its assessment of access issues under the competition rules.
- ### 1.3. Joint dominance
76. The wording of Article 86 makes it clear that the Article also applies when more than one company shares a dominant position. The circumstances in which a joint dominant position exists, and in which it is abused, have not yet been fully clarified by the case law of the Community judicature or the practice of the Commission, and the law is still developing.
77. The words of Article 86 ('abuse by one or more undertakings') describe something different from the prohibition of anti-competitive agreements or concerted practices in Article 85. To hold otherwise would be contrary to the usual principles of interpretation of the Treaty, and would render the words pointless and without practical effect. This does not, however, exclude the parallel application of Articles 85 and 86 to the same agreement or practice, which has been upheld by the Commission and the Court in a number of cases⁽³⁸⁾, nor is there anything to prevent the Commission from taking action only under one of the provisions, when both apply.
78. Two companies, each dominant in a separate national market, are not the same as two jointly dominant companies. For two or more companies to be in a joint dominant position, they must together have substantially the same position *vis-à-vis* their customers and competitors as a single company has if it is in a dominant position. With specific reference to the telecommunications sector, joint dominance could be attained by two telecommunications infrastructure operators covering the same geographic market.
79. In addition, for two or more companies to be jointly dominant it is necessary, though not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that the companies have links such as agreements for cooperation, or interconnection agreements. The Commission does not, however, consider that either economic theory or Community law implies that such links are legally necessary for a joint dominant position to exist⁽³⁹⁾. It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations. There does not seem to be any reason in law or in economic theory to require any other economic link between jointly dominant companies. This having been said, in practice such links will often exist in the telecommunications sector where national TOs nearly inevitably have links of various kinds with one another.
80. To take as an example access to the local loop, in some Member States this could well be controlled in the near future by two operators — the incumbent TO and a cable operator. In order to provide particular services to consumers, access to the local loop of either the TO or the cable television operator is necessary. Depending on the circumstances of the case and in particular on the relationship between them, it is possible that neither operator holds a dominant position: together, however, they may hold a joint monopoly of access to these facilities. In the longer term, technological developments may lead to other local loop access mechanisms being viable, such as energy networks:

the existence of such mechanisms will be taken into account in determining whether dominant positions or joint dominant positions exist.

2. Abuse of dominance

81. Application of Article 86 presupposes the existence of a dominant position and some link between the dominant position and the alleged abusive conduct. It will often be necessary in the telecommunications sector to examine a number of associated markets, one or more of which may be dominated by a particular operator. In these circumstances, there are a number of possible situations where abuses could arise:

- conduct on the dominated market having effects on the dominated market ⁽⁶⁰⁾,
- conduct on the dominated market having effects on markets other than the dominated market ⁽⁶¹⁾,
- conduct on a market other than the dominated market and having effects on the dominated market ⁽⁶²⁾,
- conduct on a market other than the dominated market and having effects on a market other than the dominated market ⁽⁶³⁾.

82. Although the factual and economic circumstances of the telecommunications sector are often novel, in many cases it is possible to apply established competition law principles. When looking at competition problems in this sector, it is important to bear in mind existing case law and Commission decisional practice on, for example, leveraging market power, discrimination and bundling.

2.1. Refusal to grant access to facilities and application of unfavourable terms

83. A refusal to give access may be prohibited under Article 86 if the refusal is made by a company which is dominant because of its control of facilities, as incumbent TOs will usually be for the

foreseeable future. A refusal may have ‘the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’ ⁽⁶⁴⁾.

A refusal will only be abusive if it has exploitative or anti-competitive effects. Service markets in the telecommunications sector will initially have few competitive players and refusals will therefore generally affect competition on those markets. In all cases of refusal, any justification will be closely examined to determine whether it is objective.

84. Broadly there are three relevant scenarios:

- (a) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market;
- (b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;
- (c) a withdrawal of access from an existing customer.

Discrimination

85. As to the first of the above scenarios, it is clear that a refusal to supply a new customer in circumstances where a dominant facilities owner is already supplying one or more customers operating in the same downstream market would constitute discriminatory treatment which, if it would restrict competition on that downstream market, would be an abuse. Where network operators offer the same, or similar, retail services as the party requesting access, they may have both the incentive and the opportunity to restrict competition and abuse their dominant position in this way. There may, of course, be justifications for such refusal — for example, *vis-à-vis* applicants which represent a potential credit risk. In the absence of any objective justifications, a refusal would usually be an abuse of the dominant position on the access market.

86. In general terms, the dominant company's duty is to provide access in such a way that the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

Essential facilities

87. As to the second of the above situations, the question arises as to whether the access provider should be obliged to contract with the service provider in order to allow the service provider to operate on a new service market. Where capacity constraints are not an issue and where the company refusing to provide access to its facility has not provided access to that facility, either to its downstream arm or to any other company operating on that services market, then it is not clear what other objective justification there could be.

88. In the transport field⁽⁶⁵⁾, the Commission has ruled that a firm controlling an essential facility must give access in certain circumstances⁽⁶⁶⁾. The same principles apply to the telecommunications sector. If there were no commercially feasible alternatives to the access being requested, then unless access is granted, the party requesting access would not be able to operate on the service market. Refusal in this case would therefore limit the development of new markets, or new products on those markets, contrary to Article 86(b), or impede the development of competition on existing markets. A refusal having these effects is likely to have abusive effects.

89. The principle obliging dominant companies to contract in certain circumstances will often be relevant in the telecommunications sector. Currently, there are monopolies or virtual monopolies in the provision of network infrastructure for most telecom services in the Community. Even where restrictions have already been, or will soon be, lifted, competition in downstream markets will continue to depend upon the pricing and conditions of access to upstream network services that will only gradually reflect competitive market forces. Given the pace of technological change in the telecommunications sector, it is possible to envisage situations where companies

would seek to offer new products or services which are not in competition with products or services already offered by the dominant access operator, but for which this operator is reluctant to provide access.

90. The Commission must ensure that the control over facilities enjoyed by incumbent operators is not used to hamper the development of a competitive telecommunications environment. A company which is dominant on a market for services and which commits an abuse contrary to Article 86 on that market may be required, in order to put an end to the abuse, to supply access to its facility to one or more competitors on that market. In particular, a company may abuse its dominant position if by its actions it prevents the emergence of a new product or service.

91. The starting point for the Commission's analysis will be the identification of an existing or potential market for which access is being requested. In order to determine whether access should be ordered under the competition rules, account will be taken of a breach by the dominant company of its duty not to discriminate (see below) or of the following elements, taken cumulatively:

- (a) access to the facility in question is generally essential in order for companies to compete on that related market⁽⁶⁷⁾.

The key issue here is therefore what is essential. It will not be sufficient that the position of the company requesting access would be more advantageous if access were granted — but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic.

Although, for example, alternative infrastructure may as from 1 July 1996 be used for liberalised services, it will be some time before this is in many cases a satisfactory alternative to the facilities of the incumbent operator. Such alternative infrastructure does not at present offer the same dense geographic coverage as that of the incumbent TO's network;

(b) there is sufficient capacity available to provide access;

(c) the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;

(d) the company seeking access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions;

(e) there is no objective justification for refusing to provide access.

Relevant justifications in this context could include an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market. However, although any justification will have to be examined carefully on a case-by-case basis, it is particularly important in the telecommunications sector that the benefits to end-users which will arise from a competitive environment are not undermined by the actions of the former State monopolists in preventing competition from emerging and developing.

92. In determining whether an infringement of Article 86 has been committed, account will be taken both of the factual situation in that and other geographic areas, and, where relevant, the relationship between the access requested and the technical configuration of the facility.

93. The question of objective justification will require particularly close analysis in this area. In addition to determining whether difficulties cited in any particular case are serious enough to justify the refusal to grant access, the relevant authorities must also decide whether these difficulties are sufficient to outweigh the damage done to competition if

access is refused or made more difficult and the downstream service markets are thus limited.

94. Three important elements relating to access which could be manipulated by the access provider in order, in effect, to refuse to provide access are timing, technical configuration and price.

95. Dominant TOs have a duty to deal with requests for access efficiently: undue and inexplicable or unjustified delays in responding to a request for access may constitute an abuse. In particular, however, the Commission will seek to compare the response to a request for access with:

(a) the usual time frame and conditions applicable when the responding party grants access to its facilities to its own subsidiary or operating branch;

(b) responses to requests for access to similar facilities in other Member States;

(c) the explanations given for any delay in dealing with requests for access.

96. Issues of technical configuration will similarly be closely examined in order to determine whether they are genuine. In principle, competition rules require that the party requesting access must be granted access at the most suitable point for the requesting party, provided that this point is technically feasible for the access provider. Questions of technical feasibility may be objective justifications for refusing to supply — for example, the traffic for which access is sought must satisfy the relevant technical standards for the infrastructure — or there may be questions of capacity restraints, where questions of rationing may arise⁽⁶⁸⁾.

97. Excessive pricing for access, as well as being abusive in itself⁽⁶⁹⁾, may also amount to an effective refusal to grant access.

98. There are a number of elements of these tests which require careful assessment. Pricing questions in the telecommunications sector will be facilitated by the obligations under ONP Directives to have transparent cost-accounting systems.

Withdrawal of supply

99. As to the third of the situations referred to in point 84, some previous Commission decisions and the case law of the Court have been concerned with the withdrawal of supply from downstream competitors. In *Commercial Solvents*, the Court held that 'an undertaking which has a dominant position on the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86' ⁽⁷⁰⁾

100. Although this case dealt with the withdrawal of a product, there is no difference in principle between this case and the withdrawal of access. The unilateral termination of access agreements raises substantially similar issues to those examined in relation to refusals. Withdrawal of access from an existing customer will usually be abusive. Again, objective reasons may be provided to justify the termination. Any such reasons must be proportionate to the effects on competition of the withdrawal.

2.2. Other forms of abuse

101. Refusals to provide access are only one form of possible abuse in this area. Abuses may also arise in the context of access having been granted. An abuse may occur *inter alia* where the operator is behaving in a discriminatory manner or the operator's actions otherwise limit markets or technical development. The following are non-exhaustive examples of abuse which can take place.

Network configuration

102. Network configuration by a dominant network operator which makes access objectively more difficult for service providers ⁽⁷¹⁾ could constitute an abuse unless it were objectively justifiable. One objective justification would be where the network configuration improves the efficiency of the network generally.

Tying

103. This is of particular concern where it involves the tying of services for which the TO is dominant with those for which it is not ⁽⁷²⁾. Where the vertically integrated dominant network operator obliges the party requesting access to purchase one or more services ⁽⁷³⁾ without adequate justification, this may exclude rivals of the dominant access provider from offering those elements of the package independently. This requirement could thus constitute an abuse under Article 86.

The Court has further held that '... even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article 86 unless they are objectively justified ...' ⁽⁷⁴⁾.

Pricing

104. In determining whether there is a pricing problem under the competition rules, it will be necessary to demonstrate that costs and revenues are allocated in an appropriate way. Improper allocation of costs and interference with transfer pricing could be used as mechanisms for disguising excessive pricing, predatory pricing or a price squeeze.

Excessive Pricing

105. Pricing problems in connection with access for service providers to a dominant operator's facilities will often revolve around excessively high prices ⁽⁷⁵⁾: In the absence of another viable alternative to the facility to which access is being sought

by service providers, the dominant or monopolistic operator may be inclined to charge excessive prices.

106. An excessive price has been defined by the Court of Justice as being 'excessive in relation to the economic value of the service provided' ⁽⁷⁶⁾. In addition the Court has made it clear that one of the ways this could be calculated is as follows:

'This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production' ⁽⁷⁷⁾.

107. It is necessary for the Commission to determine what the actual costs for the relevant product are. Appropriate cost allocation is therefore fundamental to determining whether a price is excessive. For example, where a company is engaged in a number of activities, it will be necessary to allocate relevant costs to the various activities, together with an appropriate contribution towards common costs. It may also be appropriate for the Commission to determine the proper cost allocation methodology where this is a subject of dispute.

108. The Court has also indicated that in determining what constitutes an excessive price, account may be taken of Community legislation setting out pricing principles for the particular sector ⁽⁷⁸⁾.

109. Further, comparison with other geographic areas can also be used as an indicator of an excessive price: the Court has held that if possible a comparison could be made between the prices charged by a dominant company, and those charged on markets which are open to competition ⁽⁷⁹⁾. Such a comparison could provide a basis for assessing whether or not the prices charged by the dominant company were fair ⁽⁸⁰⁾. In certain circumstances, where comparative data are not available, regulatory authorities have sought to determine what would have been the competitive price were a competitive market to exist ⁽⁸¹⁾. In an appropriate case, such an analysis may be taken into account by the Commission in its determination of an excessive price.

Predatory pricing

110. Predatory pricing occurs, *inter alia*, where a dominant firm sells a good or service below cost for a sustained period of time, with the intention of deterring entry, or putting a rival out of business, enabling the dominant firm to further increase its market power and later its accumulated profits. Such unfairly low prices are in breach of Article 86(a). Such a problem could, for example, arise in the context of competition between different telecommunications infrastructure networks, where a dominant operator may tend to charge unfairly low prices for access in order to eliminate competition from other (emerging) infrastructure providers. In general a price is abusive if it is below the dominant company's average variable costs or if it is below average total costs and part of an anti-competitive plan ⁽⁸²⁾. In network industries a simple application of the above rule would not reflect the economic reality of network industries.

111. This rule was established in the AKZO case where the Court of Justice defined average variable costs as 'those which vary depending on the quantities produced' ⁽⁸³⁾ and explained the reasoning behind the rule as follows:

'A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.'

112. In order to trade a service or group of services profitably, an operator must adopt a pricing strategy whereby its total additional costs in providing that service or group of services are covered by the additional revenues earned as a result of the provision of that service or group of services. Where a dominant operator sets a price for a particular product or service which is below its average total costs of providing that service, the operator should justify this price in commercial terms: a dominant operator which would benefit

from such a pricing policy only if one or more of its competitors was weakened would be committing an abuse.

113. As indicated by the Court of Justice in AKZO, the Commission must determine the price below which a company could only make a profit by weakening or eliminating one or more competitors. Cost structures in network industries tend to be quite different to most other industries since the former have much larger common and joint costs.
114. For example, in the case of the provision of telecommunications services, a price which equates to the variable cost of a service may be substantially lower than the price the operator needs in order to cover the cost of providing the service. To apply the AKZO test to prices which are to be applied over time by an operator, and which will form the basis of that operator's decisions to invest, the costs considered should include the total costs which are incremental to the provision of the service. In analysing the situation, consideration will have to be given to the appropriate time frame over which costs should be analysed. In most cases, there is reason to believe that neither the very short nor very long run are appropriate.
115. In these circumstances, the Commission will often need to examine the average incremental costs of providing a service, and may need to examine average incremental costs over a longer period than one year.
116. If a case arises, the ONP rules and Commission recommendations concerning accounting requirements and transparency will help to ensure the effective application of Article 86 in this context.

Price Squeeze

117. Where the operator is dominant in the product or services market, a price squeeze could constitute an abuse. A price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company. A loss-making downstream arm could be hidden if the dominant operator has allocated costs to its access operations which should properly be allocated to the downstream

operations, or has otherwise improperly determined the transfer prices within the organisation. The Commission Recommendation on Accounting Separation in the context of Interconnection addresses this issue by recommending separate accounting for different business areas within a vertically integrated dominant operator. The Commission may, in an appropriate case, require the dominant company to produce audited separated accounts dealing with all necessary aspects of the dominant company's business. However, the existence of separated accounts does not guarantee that no abuse exists: the Commission will, where appropriate, examine the facts on a case-by-case basis.

118. In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)⁽⁸⁴⁾.
119. If either of these scenarios were to arise, competitors on the downstream market would be faced with a price squeeze which could force them out of the market.

Discrimination

120. A dominant access provider may not discriminate between the parties to different access agreements where such discrimination would restrict competition. Any differentiation based on the use which is to be made of the access rather than differences between the transactions for the access provider itself, if the discrimination is sufficiently likely to restrict or distort actual or potential competition, would be contrary to Article 86. This discrimination could take the form of imposing different conditions, including the charging of different prices, or otherwise differentiating between access agreements, except where such discrimination would be objectively justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels. Such discrimination could be likely to restrict

competition in the downstream market on which the company requesting access was seeking to operate, in that it might limit the possibility for that operator to enter the market or expand its operations on that market⁽⁸⁵⁾.

121. Such discrimination could similarly have an effect on competition where the discrimination was between operators on closely related downstream markets. Where two distinct downstream product markets exist, but one product would be regarded as substitutable for another save for the fact that there was a price difference between the two products, discriminating in the price charged to the providers of these two products could decrease existing or potential competition. For example, although fixed and mobile voice telephony services at present probably constitute separate product markets, the markets are likely to converge. Charging higher interconnection prices to mobile operators as compared to fixed operators would tend to hamper this convergence, and would therefore have an effect on competition. Similar effects on competition are likely in other telecommunications markets.

Such discrimination would in any event be difficult to justify given the obligation to set cost-related prices.

122. With regard to price discrimination, Article 86(c) prohibits unfair discrimination by a dominant firm between customers of that firm⁽⁸⁶⁾ including discriminating between customers on the basis of whether or not they agree to deal exclusively with that dominant firm.
123. Article 7 of the Interconnection Directive provides that 'different tariffs, terms and conditions for interconnection may be set for different categories of organisations which are authorised to provide networks and services, where such differences can be objectively justified on the basis of the type of interconnection provided and/or the relevant national licensing conditions ...' (provided that such differences do not result in distortions of competition).
124. A determination of whether such differences result in distortions of competition must be made in the

particular case. It is important to remember that Articles 85 and 86 deal with competition and not regulatory matters. Article 86 cannot require a dominant company to treat different categories of customers differently, except where this is the result of market conditions and the principles of Article 86. On the contrary, Article 86 prohibits dominant companies from discriminating between similar transactions where such a discrimination would have an effect on competition.

125. Discrimination without objective justification as regards any aspects or conditions of an access agreement may constitute an abuse. Discrimination may relate to elements such as pricing, delays, technical access, routing⁽⁸⁷⁾, numbering, restrictions on network use exceeding essential requirements and use of customer network data. However, the existence of discrimination can only be determined on a case-by-case basis. Discrimination is contrary to Article 86 whether or not it results from or is apparent from the terms of a particular access agreement.

126. There is, in this context, a general duty on the network operator to treat independent customers in the same way as its own subsidiary or downstream service arm. The nature of the customer and its demands may play a significant role in determining whether transactions are comparable. Different prices for customers at different levels (for example, wholesale and retail) do not necessarily constitute discrimination.

127. Discrimination issues may arise in respect of the technical configuration of the access, given its importance in the context of access.

The degree of technical sophistication of the access: restrictions on the type or 'level' in the network hierarchy of exchange involved in the access or the technical capabilities of this exchange are of direct competitive significance. These could be the facilities available to support a connection or the type of interface and signalling system used to determine the type of service available to the party requesting access (for example, intelligent network facilities).

The number and/or location of connection points: the requirement to collect and distribute traffic for particular areas at the switch which directly serves that area rather than at a higher level of the network hierarchy may be important. The party requesting access incurs additional expense by either providing links at a greater distance from its own switching centre or being liable to pay higher conveyance charges.

Equal access: the possibility for customers of the party requesting access to obtain the services provided by the access provider using the same number of dialled digits as are used by the customers of the latter is a crucial feature of competitive telecommunications.

Objective justification

128. Justifications could include factors relating to the actual operation of the network owned by the access provider, or licensing restrictions consistent with, for example, the subject matter of intellectual property rights.

2.3. Abuses of joint dominant positions

129. In the case of joint dominance (see points 76 *et seq.*) behaviour by one of several jointly dominant companies may be abusive even if others are not behaving in the same way.

130. In addition to remedies under the competition rules, if no operator was willing to grant access, and if there was no technical or commercial justification for the refusal, one would expect that the NRA would resolve the problem by ordering one or more of the companies to offer access, under the terms of the relevant ONP Directive or under national law.

3. Access agreements (Article 85)

131. Restrictions of competition included in or resulting from access agreements may have two distinct

effects: restriction of competition between the two parties to the access agreement, or restriction of competition from third parties, for example through exclusivity for one or both of the parties to the agreement. In addition, where one party is dominant, conditions of the access agreement may lead to a strengthening of that dominant position, or to an extension of that dominant position to a related market, or may constitute an unlawful exploitation of the dominant position through the imposition of unfair terms.

132. Access agreements where access is in principle unlimited are not likely to be restrictive of competition within the meaning of Article 85(1). Exclusivity obligations in contracts providing access to one company are likely to restrict competition because they limit access to infrastructure for other companies. Since most networks have more capacity than any single user is likely to need, this will normally be the case in the telecommunications sector.

133. Access agreements can have significant pro-competitive effects as they can improve access to the downstream market. Access agreements in the context of interconnection are essential to interoperability of services and infrastructure, thus increasing competition in the downstream market for services, which is likely to involve higher added value than local infrastructure.

134. There is, however, obvious potential for anti-competitive effects of certain access agreements or clauses therein. Access agreements may, for example:

(a) serve as a means of coordinating prices;

(b) serve as a means of market sharing;

(c) have exclusionary effects on third parties⁽⁸⁸⁾;

(d) lead to an exchange of commercially sensitive information between the parties.

135. The risk of price coordination is particularly acute in the telecommunications sector since intercon-

nection charges often amount to 50 % or more of the total cost of the services provided, and where interconnection with a dominant operator will usually be necessary. In these circumstances, the scope for price competition is limited and the risk (and the seriousness) of price coordination correspondingly greater.

136. Furthermore, interconnection agreements between network operators may under certain circumstances be an instrument of market sharing between the network operator providing access and the network operator seeking access, instead of the emergence of network competition between them.
137. In a liberalised telecommunications environment, the above types of restrictions of competition will be monitored by the national authorities and the Commission under the competition rules. The right of parties who suffer from any type of anti-competitive behaviour to complain to the Commission is unaffected by national regulation.

Clauses falling within Article 85(1)

138. The Commission has identified certain types of restriction which would potentially infringe Article 85(1) of the Treaty and therefore require individual exemption. These clauses will most commonly relate to the commercial framework of the access.
139. In the telecommunications sector, it is inherent in interconnection that parties will obtain certain customer and traffic information about their competitors. This information exchange could in certain cases influence the competitive behaviour of the undertakings concerned, and could easily be used by the parties for collusive practices, such as market sharing⁽⁸⁹⁾. The Interconnection Directive requires that information received from an organisation seeking interconnection be used only for the purposes for which it was supplied. In order to comply with the competition rules and the Interconnection Directives, operators will have to introduce safeguards to ensure that confidential information is only disclosed to those parts of the companies involved in making the interconnection

agreements, and to ensure that the information is not used for anti-competitive purposes. Provided that these safeguards are complete and function correctly, there should be no reason in principle why simple interconnection agreements should be caught by Article 85(1).

140. Exclusivity arrangements, for example where traffic would be conveyed exclusively through the telecommunications network of one or both parties rather than to the network of other parties with whom access agreements have been concluded will similarly require analysis under Article 85(3). If no justification is provided for such routing, such clauses will be prohibited. Such exclusivity clauses are not, however, an inherent part of interconnection agreements.
141. Access agreements that have been concluded with an anti-competitive object are extremely unlikely to fulfil the criteria for an individual exemption under Article 85(3).
142. Furthermore, access agreements may have an impact on the competitive structure of the market. Local access charges will often account for a considerable portion of the total cost of the services provided to end-users by the party requesting access, thus leaving limited scope for price competition. Because of the need to safeguard this limited degree of competition, the Commission will therefore pay particular attention to scrutinising access agreements in the context of their likely effects on the relevant markets in order to ensure that such agreements do not serve as a hidden and indirect means for fixing or coordinating end-prices for end-users, which constitutes one of the most serious infringements of Article 85 of the Treaty⁽⁹⁰⁾. This would be of particular concern in oligopolistic markets.
143. In addition, clauses involving discrimination leading to the exclusion of third parties are similarly restrictive of competition. The most important is discrimination with regard to price, quality or other commercially significant aspects of the access to the detriment of the party requesting access, which will generally aim at unfairly favouring the operations of the access provider.

4. Effect on trade between Member States

144. The application of both Article 85 and Article 86 presupposes an effect on trade between Member States.

145. In order for an agreement to have an effect on trade between Member States, it must be possible for the Commission to 'foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States' ⁽⁹¹⁾.

It is not necessary for each of the restrictions of competition within the agreement to be capable of affecting trade ⁽⁹²⁾, provided the agreement as a whole does so.

146. As regards access agreements in the telecommunications sector, the Commission will consider not only the direct effect of restrictions of competition on inter-state trade in access markets, but also the effects on inter-State trade in downstream telecommunications services. The Commission will also consider the potential of these agreements to foreclose a given geographic market which could prevent undertakings already established in other Member States from competing in this geographic market.

147. Telecommunications access agreements will normally affect trade between Member States as services provided over a network are traded

throughout the Community and access agreements may govern the ability of a service provider or an operator to provide any given service. Even where markets are mainly national, as is generally the case at present given the stage of development of liberalisation, abuses of dominance will normally speaking affect market structure, leading to repercussions on trade between Member States.

148. Cases in this area involving issues under Article 86 are likely to relate either to abusive clauses in access agreements, or a refusal to conclude an access agreement on appropriate terms or at all. As such, the criteria listed above for determining whether an access agreement is capable of affecting trade between Member States would be equally relevant here.

CONCLUSIONS

149. The Commission considers that competition rules and sector specific regulation form a coherent set of measures to ensure a liberalised and competitive market environment for telecommunications markets in the Community.

150. In taking action in this sector, the Commission will aim to avoid unnecessary duplication of procedures, in particular competition procedures and national/Community regulatory procedures as set out under the ONP framework.

151. Where competition rules are invoked, the Commission will consider which markets are relevant and will apply Articles 85 and 86 in accordance with the principles set out above.

- (¹) According to Commission Directives 96/19/EC and 96/2/EC (cited in footnote 3), certain Member States may request a derogation from full liberalisation for certain limited periods. This notice is without prejudice to such derogations, and the Commission will take account of the existence of any such derogation when applying the competition rules to access agreements, as described in this notice.
- See:
- Commission Decision 97/114/EC of 27 November 1996 concerning the additional implementation periods requested by Ireland for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets (OJ L 41, 12.2.1997, p. 8);
- Commission Decision 97/310/EC of 12 February 1997 concerning the granting of additional implementation periods to the Portuguese Republic for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets (OJ L 133, 24.5.1997, p. 19);
- Commission Decision 97/568/EC of 14 May 1997 on the granting of additional implementation periods to Luxembourg for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets (OJ L 234, 26.8.1997, p. 7);
- Commission Decision 97/603/EC of 10 June 1997 concerning the granting of additional implementation periods to Spain for the implementation of Commission Directive 90/388/EEC as regards full competition in the telecommunications markets (OJ L 243, 5.9.1997, p. 48).
- Commission Decision 97/607/EC of 18 June 1997 concerning the granting of additional implementation periods to Greece for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets (OJ L 245, 9.9.1997, p. 6).
- (²) Communication by the Commission of 3 May 1995 to the European Parliament and the Council, Consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(95) 158 final.
- (³) Commission Directive 88/301/EEC of 16 May 1988, on competition in the markets in telecommunications terminal equipment (OJ L 131, 27.5.1988, p. 73);
- Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10) (the 'Services Directive');
- Commission Directive 94/46/EC of 13 October 1994, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (OJ L 268, 19.10.1994, p. 15);
- Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (OJ L 256, 26.10.1995, p. 49);
- Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ L 20, 26.1.1996, p. 59);
- Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets (OJ L 74, 22.3.1996, p. 13) (the 'Full Competition Directive').
- (⁴) Interconnection agreements are the most significant form of access agreement in the telecommunications sector. A basic framework for interconnection agreements is set up by the rules on open network provision (ONP), and the application of competition rules must be seen against this background:
- Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for authorisations and individual licences in the field of telecommunications services (OJ L 117, 7.5.1997, p. 15) (the 'Licensing Directive');
- Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ L 199, 26.7.1997, p. 32) (the 'Interconnection Directive');
- Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ L 192, 24.7.1990, p. 1) (the 'Framework Directive');
- Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19.6.1992, p. 27) (the 'Leased Lines Directive');
- Directive 95/62/EEC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision to voice telephony (OJ L 321, 30.12.1995, p. 6) replaced by Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ L 101, 1.4.1998, p. 24) (the 'Voice Telephony Directive');
- Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ L 24, 30.1.1998, p. 1) (the 'Data Protection Directive').
- (⁵) OJ C 233, 6.9.1991, p. 2.
- (⁶) In the telecommunications area, notably:
- Commission Decision 91/562/EEC of 18 October 1991, Eirpage (OJ L 306, 7.11.1991, p. 22);
- Commission Decisions 96/546/EC and 96/547/EC of 17 July 1996, Atlas and Phoenix (OJ L 239, 19.9.1996, p. 23 and p. 57); and
- Commission Decision 97/780/EC of 29 October 1997, Unisource (OJ L 318, 20.11.1997, p. 1).
- There are also a number of pending cases involving access issues.
- (⁷) Competition aspects of interconnection agreements in the telecommunications sector, June 1995;
- Competition aspects of access by service providers to the resources of telecommunications operators, December 1995. See also Competition Aspects of Access Pricing, December 1995.
- (⁸) See the Commission's Green Paper of 3 December 1997 on the Convergence of the Telecommunications, Media and Information Technology sectors and the implications for Regulation — Towards an information society approach (COM(97) 623).

- (9) See Council Decision 97/838/EC of 28 November 1997 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services (OJ L 347, 18.12.1997, p. 45).
- (10) In the case of the ONP Leased Lines Directive, a first stage is foreseen which allows the aggrieved user to appeal to the National Regulatory Authority. This can offer a number of advantages. In the telecommunications areas where experience has shown that companies are often hesitant to be seen as complainants against the TO on which they heavily depend not only with respect to the specific point of conflict but also much broader and far-reaching sense, the procedures foreseen under ONP are an attractive option. ONP procedures furthermore can cover a broader range of access problems than could be approached on the basis of the competition rules. Finally, these procedures can offer users the advantage of proximity and familiarity with national administrative procedures; language is also a factor to be taken into account.
Under the ONP Leased Lines Directive, if a solution cannot be found at the national level, a second stage is organised at the European level (conciliation procedure). An agreement between the parties involved must then be reached within two months, with a possible extension of one month if the parties agree.
- (11) An NRA is a national telecommunications regulatory body created by a Member State in the context of the services directive as amended, and the ONP framework. The list of NRAs is published regularly in the *Official Journal of the European Communities*, and a copy of the latest list can be found at <http://www.ispo.cec.be>.
- (12) Articles 9 and 17 of the Interconnection Directive.
- (13) Article 7 of the Services Directive (see footnote 3), and Article 5a of the ONP Framework Directive (see footnote 4). See also Communication by the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services (OJ C 275, 20.10.1995, p. 2).
See also the judgment of the Court of Justice of the European Communities in Case C-91/94, Thierry Tranchant and Telephones Stores [1995] ECR I-3911.
- (14) The Interconnection Directive cited in footnote 4, Article 9(3).
- (15) Judgments of the Court of First Instance of the European Communities: Case T-24/90, Automec v. Commission [1992] ECR II-2223, at paragraph 77 and Case T-114/92 BEMIM [1995] ECR II-147.
- (16) Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ C 39, 13.2.1993, p. 6, at paragraph 14).
Notice on cooperation between national competition authorities and the Commission (OJ C 313, 15.10.1997, p. 3).
- (17) Case 127/73, BRT v. SABAM [1974] ECR 51.
- (18) Case 66/86, Ahmed Saeed [1989] ECR 838.
- (19) They must not, for example, encourage or reinforce or approve the results of anti-competitive behaviour:
— Ahmed Saeed, see footnote 18;
— Case 153/93, Federal Republic of Germany v. Delta Schiffahrtsges. [1994] ECR I-2517,
— Case 267/86, Van Eycke [1988] ECR 4769.
- (20) Case 13/77, GB-Inno-BM/ATAB [1977] ECR 2115, at paragraph 33:
— ‘while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive the provision of its effectiveness.’
- (21) For further duties of national authorities see:
Case 103/88, Fratelli Costanzo [1989] ECR 1839.
See Ahmed Saeed, cited in footnote 18:
— ‘Articles 5 and 90 of the EEC Treaty must be interpreted as (i) prohibiting the national authorities from encouraging the conclusion of agreements on tariffs contrary to Article 85(1) or Article 86 of the Treaty, as the case may be; (ii) precluding the approval by those authorities of tariffs resulting from such agreements’.
- (22) Joined Cases C-6/90, and C-9/90 Francovich [1991] ECR I-5357;
Joined Cases C-46/93, Brasserie de Pêcheur v. Germany and Case C-48/93, R v. Secretary of State for Transport ex parte Factortame and others [1996] ECR I-1029.
- (23) For example, recital 18 of the Leased Lines Directive and Article 9(3) of the ONP Interconnection Directive, see footnote 4.
- (24) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1); corrected version (OJ L 257, 21.9.1990, p. 13).
- (25) Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13, 21.2.1962, p. 204).
- (26) Articles 2 and 4(1) of Regulation No 17.
- (27) Article 3 of Regulation No 17.
- (28) Articles 3 and 12 of Regulation No 17.
- (29) Case 792/79R, Camera Care v. Commission [1980] ECR 119.
See also Case T-44/90, La Cinq v. Commission [1992] ECR II-1.
- (30) See point 16 of the Notice cited in footnote 16.
- (31) Article 2 or Article 4(1) of Regulation No 17.
- (32) Camera Care and La Cinq, referred to at footnote 29.
- (33) See point 16 of the Notice cited in footnote 16.

- (³⁴) See point 18.
- (³⁵) See *Automec*, cited in footnote 15, at paragraph 86.
- (³⁶) *BRT v. SABAM*, cited in footnote 17.
- (³⁷) Article 9(1) and (3) of the ONP Interconnection Directive.
- (³⁸) Case 14/83, *Von Colson* [1984] ECR 1891.
- (³⁹) Article 15(2) of Regulation No 17.
- (⁴⁰) Article 15(5) of Regulation No 17.
- (⁴¹) Article 15(6) of Regulation No 17.
- (⁴²) Article 6(c) of the ONP Interconnection Directive.
- (⁴³) *Inter alia*, at Article 9 of the ONP Interconnection Directive.
- (⁴⁴) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).
- (⁴⁵) See footnote 22.
- (⁴⁶) OJ C 372, 9.12.1997, p. 5.
- (⁴⁷) Interconnection is defined in the Full Competition Directive as '... the physical and logical linking of the telecommunications facilities of organisations providing telecommunications networks and/or telecommunications services, in order to allow the users of one organisation to communicate with the users of the same or another organisation or to access services provided by third organisations.'
- In the Full Competition Directive and ONP Directives, telecommunications services are defined as 'services, whose provision consists wholly or partly in the transmission and/or routing of signals on a telecommunications network.'
- It therefore includes the transmission of broadcasting signals and CATV networks.
- A telecommunications network is itself defined as '... the transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means'.
- (⁴⁸) Commission Decision 94/894/EC of 13 December 1994, *Eurotunnel* (OJ L 354, 21.12.1994, p. 66).
- (⁴⁹) See Guidelines cited in footnote 5, at paragraphs 15 and 16.
- (⁵⁰) Commission Decision 82/896/EEC of 15 December 1982, *AROW/BNIC* (OJ L 379, 31.12.1982, p. 19).
- (⁵¹) See footnote 18.
- (⁵²) *Joined Cases C-48 and 66/90 Netherlands and others v. Commission*, [1992] ECR I-565.
- (⁵³) See *Ahmed Saeed*, cited in footnote 18, where internal market legislation relating to pricing was used as an aid in determining what level of prices should be regarded as unfair for the purposes of Article 86.
- (⁵⁴) On each market, *Tetra Pak* was faced with the same potential customers and actual competitors. Case C-333/94 P, *Tetra Pak International SA v. Commission* [1996] ECR I-5951.
- (⁵⁵) See also the definition included in the 'Additional commitment on regulatory principles by the European Communities and their Member States' used by the Group on basic telecommunications in the context of the World Trade Organisation (WTO) negotiations:
- 'Essential facilities mean facilities of a public telecommunications transport network and service that:
- (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
- (b) cannot feasibly be economically or technically substituted in order to provide a service.'
- (⁵⁶) Case 6/72 *Continental Can* [1973] ECR 215.
- (⁵⁷) It should be noted in this context that under the ONP framework an organisation may be notified as having significant market power. The determination of whether an organisation does or does not have significant market power depends on a number of factors, but the starting presumption is that an organisation with a market share of more than 25 % will normally be considered to have significant market power. The Commission will take account of whether an undertaking has been notified as having significant market power under the ONP rules in its appraisal under the competition rules. It is clear, however, that the notion of significant market power generally describes a position of economic power on a market less than that of dominance: the fact that an undertaking has significant market power under the ONP rules will generally therefore not lead to a presumption of dominance, although in a particular situation, this may prove to be the case. One important factor to be taken into consideration, however, will be whether the market definition used in the ONP procedures is appropriate for use in applying the competition rules.
- (⁵⁸) Case 85/76 *Hoffmann-La Roche* [1979] ECR 461.
Commission Decision 89/113/EEC of 21 December 1988, *Decca Navigator System* (OJ L 43, 15.2.1989, p. 27).
- (⁵⁹) Commission Decision 92/553/EEC of 22 July 1992, *Nestlé/Perrier* (OJ L 356, 5.12.1992, p. 1).
- (⁶⁰) The most common situation.
- (⁶¹) *Joined Cases 6/73 and 7/73 Commercial Solvents v. Commission* [1974] ECR 223 and Case 311/84 *CBEM v. CLT and IPB* [1985] ECR 3261.
- (⁶²) Case C-62/86, *AKZO v. Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Gypsum v. Commission* [1993] ECR II-389.

- (⁶³) Case C-333/94 P, *Tetra Pak International v. Commission* [1996] ECR I-5951. In this fourth case, application of Article 86 can only be justified by special circumstances (*Tetra Pak*, at paragraphs 29 and 30).
- (⁶⁴) Case 85/76, *Hoffmann-La Roche* [1979] ECR 461.
- (⁶⁵) Commission Decision 94/19/EC of 21 December 1993, *Sea Containers v. Stena Sealink* — Interim measure (OJ L 15, 18.1.1994, p. 8).
Commission Decision 94/119/EEC of 21 December 1993, *Port of Rødby (Denmark)* (OJ L 55, 26.2.1994, p. 52).
- (⁶⁶) See also (among others):
Judgments of the Court of Justice and the Court of First Instance:
Cases 6 and 7/73 *Commercial Solvents v. Commission* [1974] ECR 223;
Case 311/84, *Télémarketing* [1985] ECR 3261;
Case C-18/88 *RTT v. GB-Inno* [1991] ECR I-5941;
Case C-260/89, *Elliniki Radiophonia Teleorassi* [1991] ECR I-2925;
Cases T-69, T-70 and T-76/89, *RTE, BBC and ITP v. Commission* [1991] ECR II-485, 535, 575;
Case C-271/90, *Spain v. Commission* [1992] ECR I-5833;
Cases C-241 and 242/91 P, *RTE and ITP Ltd v. Commission (Magill)*, [1995] ECR I-743.
Commission Decisions:
Commission Decision 76/185/ECSC of 29 October 1975, *National Carbonising Company* (OJ L 35, 10.2.1976, p. 6).
Commission Decision 88/589/EEC of 4 November 1988, *London European/Sabena* (OJ L 317, 24.11.1988, p. 47).
Commission Decision 92/213/EEC of 26 February 1992, *British Midland v. Aer Lingus* (OJ L 96, 10.4.1992, p. 34); *B&I v. Sealink* (1992) 5 CMLR 255; *EC Bulletin*, No 6 — 1992, point 1.3.30.
- (⁶⁷) It would be insufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory.
- (⁶⁸) As noted in point 91.
- (⁶⁹) See point 105.
- (⁷⁰) Cases 6 and 7/73, *Commercial Solvents* [1974] ECR 223.
- (⁷¹) That is to say, to use the network to reach their own customers.
- (⁷²) This is also dealt with under the ONP framework: see Article 7(4) of the *Interconnection Directive*, Article 12(4) of the *Voice telephony Directive* and Annex II to the *ONP Framework Directive*.
- (⁷³) Including those which are superfluous to the party requesting access, or indeed those which may constitute services which that party itself would like to provide for its customers.
- (⁷⁴) *Tetra Pak International*, cited in footnote 63.
- (⁷⁵) The Commission Communication of 27 November 1996 on *Assessment Criteria for National Schemes for the Costing and Financing of Universal Service and Guidelines for the Operation of such Schemes* will be relevant for the determination of the extent to which the universal service obligation can be used to justify additional charges related to the sharing of the net cost in the provision of universal service (COM(96) 608). See also the reference to the universal service obligation in point 59.
- (⁷⁶) Case 26/75, *General Motors Continental v. Commission* [1975] ECR 1367, at paragraph 12.
- (⁷⁷) Case 27/76, *United Brands Company and United Brands Continental BV v. Commission* [1978] ECR 207.
- (⁷⁸) *Ahmed Saeed*, cited in footnote 18, at paragraph 43.
- (⁷⁹) Case 30-87, *Corinne Bodson v. Pompes funèbres des régions libérées* [1988] ECR 2479.
See also:
Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811, at paragraph 25: 'When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.'
- (⁸⁰) See ONP rules and Commission Recommendation on *Interconnection in a liberalised telecommunications market* (OJ L 73, 12.3.1998, p. 42 (Text of Recommendation) and OJ C 84, 19.3.1998, p. 3 (Communication on Recommendation)).
- (⁸¹) For example, in their calculation of interconnection tariffs.
- (⁸²) *AKZO*, cited in footnote 62.
- (⁸³) *AKZO*, paragraph 71.
- (⁸⁴) Commission Decision 88/518/EEC of 18 July 1988, *Napier Brown/British Sugar* (OJ L 284, 19.10.1988, p. 41): the margin between industrial and retail prices was reduced to the point where the wholesale purchaser with packaging operations as efficient as those of the wholesale supplier could not profitably serve the retail market. See also *National Carbonising Company*, cited in footnote 66.
- (⁸⁵) However, when infrastructure capacity is under-utilised, charging a different price for access depending on the demand in the different downstream markets may be justified to the extent that such differentiation permits a better development of certain markets, and where such differentiation does not restrict or distort competition. In such a case, the Commission will analyse the global effects of such price differentiation on all of the downstream markets.

- (⁸⁶) Case C-310/93 P, BPB Industries und British Gypsum v. Commission [1995] ECR I-865, at p. 904, applying to discrimination by BPB among customers in the related market for dry plaster.
- (⁸⁷) That is to say, to a preferred list of correspondent network operators.
- (⁸⁸) Commission Decision 94/663/EC of 21 September 1994, Night Services (OJ L 259, 7.10.1994, p. 20); Commission Decision 94/894/EC, see footnote 48.
- (⁸⁹) Case T-34/92, Fiatagri UK and New Holland Ford v. Commission [1994] ECR II-905;
Case C-8/95 P, New Holland Ford v. Commission, judgment of 28 May 1988, not yet reported;
Case T-35/92, John Deere v. Commission [1994] ECR II-957;
Case C-7/95 P, John Deere v. Commission, judgment of 28 May 1988, not yet reported.
(Cases involving applications brought against Commission Decision 92/157/EEC of 17 February 1992, UK Agricultural Tractor Registration Exchange) (OJ L 68, 13.3.1992, p. 19).
- (⁹⁰) Case 8/72, Vereniging van Cementhandelaaren v. Commission [1972] ECR 977;
Case 123/85, Bureau National Interprofessionnel du Cognac v. Clair [1985] ECR 391.
- (⁹¹) Case 56/65, STM [1966] ECR 235, p. 249.
- (⁹²) Case 193/83, Windsurfing International v. Commission [1986] ECR 611.

Non-opposition to a notified concentration
(Case No IV/M.1182 — * Akzo Nobel/Courtaulds)**

(98/C 265/03)

(Text with EEA relevance)

On 30 June 1998, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EEC) No 4064/89. The full text of the decision is only available in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

- as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),
- in electronic form in the 'CEN' version of the CELEX database, under document number 398M1182. CELEX is the computerised documentation system of European Community law; for more information concerning subscriptions please contact:

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