COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.12.1996
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DRAFT

COMMUNICATION FROM THE COMMISSION

ON THE APPLICATION OF THE COMPETITION RULES TO ACCESS AGREEMENTS IN THE TELECOMMUNICATIONS SECTOR

Framework, Relevant Markets and Principles

Notice by the Commission concerning a draft Notice on the application of the competition rules to access agreements in the telecommunications sector

The Commission approved a draft Notice on the application of the competition rules to access agreements in the telecommunications sector.

The Commission intends to adopt the Notice after having heard any comments from interested parties.

The Commission invites interested parties to submit their possible observations they may have on the draft Notice published hereunder.

Observations must reach the Commission not later than two months following the date of this publication. Observations may be sent to the Commission by fax (No (32 2) 296 98 19) or by mail to the following address:

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INTRODUCTION

1. The timetable for full liberalization in the telecommunications sector has now been established, and Member States are to remove the last barriers to the provision of telecommunications services in a competitive environment to consumers by 1 January 1998[1]. As a result of this liberalization 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 example of such access. The Commission has stated that it will define the treatment of access agreements under the competition rules[2]. This Notice, therefore, addresses the issue of how competition rules and procedures apply to access agreements in the context of harmonised EU and national regulation in the telecommunications sector.

2. The regulatory framework for the liberalization of telecommunications consists of the liberalization directives issued under Article 90 EC and 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 liberalization and harmonization legislation is the background to any action taken by the Commission in its application of the competition rules. Both the liberalization legislation[3] and the harmonization legislation[4] are aimed at ensuring the attainment of the objectives of the Community

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[1] According to Directive 96/19/EC and 96/2/EC, certain Member States may request a derogation from full liberalisation for certain limited periods. See: Commission Decision 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. 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.

[2] Communication by the Commission 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 May 1995.

[3] Commission Directive 88/301/EEC, on competition in the markets in telecommunications terminal equipment, OJ L131/73 (1988);
Commission Directive 90/388/EEC, on competition in the markets for telecommunications services, OJ L 192/10 (1990);
Commission Directive 94/46/EC, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268/15 (1994);
Commission Directive 95/51/EC, 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 256/49 (1995);
Commission Directive 96/2/EC, amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20/59 (1996);
Commission Directive 96/19/EC, amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets, OJ L 74/13 (1996).

[4] Interconnection agreements are the most significant form of access agreement in the (continued...)

as laid out in Article 3 EC, 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, OJ C 233/2 (1991). The present Notice is intended to build on those Guidelines, which do not deal explicitly with access issues.

4. In the telecommunications sector, liberalization and harmonization 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 ensured 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 achieve its intention of avoiding 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. 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:

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[4](...continued)

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:
Council Directive 90/387/EEC, on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L 192/1 (1990)
Council Directive 92/44/EEC, on the application of open network provision to leased lines, OJ L 165/27 (1992);
European Parliament and Council Directive 95/62/EC, on the application of open network provision to voice telephony, OJ L 321/6 (1995);
Common Position for a European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP), OJ C220/13, 29 July 1996.
Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, Com(95) 543 final, 14.11.1995.

it aims to help telecommunications market participants shape their access agreements by explaining the competition law requirements.

6. The Notice is based on the Commission's experience in several cases,[5] and certain studies into this area carried out on behalf of the Commission[6].

7. 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 First Instance or the European Court of Justice.

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5 In the telecommunications area, notably Commission decision of 18 October 1991, Eirpage, OJ L 306/22 (1991), and Commission decisions of 17 July 1996, Atlas and Phoenix, OJ L 239/23 and 57 (1996). There are also a number of pending cases involving access issues.

6 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.

PART I : FRAMEWORK

1. Competition Rules and Sector Specific Regulation

8. Access problems in the broadest sense of the word (e.g. provision of leased lines, interconnection to networks, access to data concerning subscribers to voice telephone services) 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[7].

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 proceeding (see below, points 13 et seq.).

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[7] In the case of the ONP leased line directive, ONP foresees the first stage 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 a 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 ONP procedures, if matters cannot be resolved at the national level, a second stage is organised at the European level (conciliation procedure). Pursuant to the ONP leased line directive, an agreement between the parties involved must then be reached within two months, with a possible extension of one month if the parties agree.

It should be noted that in the Proposed ONP interconnection directive, as opposed to the leased line directive, a conciliation procedure is foreseen for transfrontier cases only, that is interconnection disputes in which more than one National Regulatory Authority is involved. If the National Regulatory Authorities dealing with an interconnection problem do not reach a solution to the problem, then one of them may notify the Commission thereof and invoke the conciliation procedure (Article 17 of the Proposed directive).

9. The Commission recognises that National Regulatory Authorities[8] have different tasks, and operate in a different legal framework to the Commission. First, the NRAs operate under national law, albeit often implementing European law. Secondly, that law, based as it is on considerations of telecommunications policy has objectives different to, but consistent with, the objectives of Community competition policy. The Commission cooperates as far as possible with the National Regulatory Authorities, and invites the National Regulatory Authorities to cooperate as far as possible between themselves. Under Community law, national authorities, including regulatory authorities and competition authorities, have a duty not to approve a practice or agreement contrary to Community competition law.

10. Community competition rules are not sufficient to remedy 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.[9]

11. It is also important to note that the ONP framework imposes certain obligations on national telecommunications operators that go beyond those that would normally be imposed by Article 86 EC. NRAs may require strict standards relating to transparency, obligations to supply and pricing practices. These obligations can be enforced by the National Regulatory Authorities, which also have jurisdiction to take steps to ensure effective competition[10].

12. This Notice is written, for convenience, in most respects as if the law was conceived with only one telecommunications operator controlling the only nation-wide public switched telecommunications network in each Member States. This will not necessarily be the case: new telecommunications networks offering increasingly wide coverage will develop progressively. These alternative telecommunications networks 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.

13. 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

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8 National Regulatory Authority is a sector specific national telecommunications regulatory created by a Member State in the context of the services directive as amended, and the ONP framework.

9 Article 7 of the services directive (Commission Directive 90/388/EEC, referred to above in footnote 3), and the Commission's Communication 95/C 275/02 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, at p. 9 et seq. See also Case C-91/94, Thierry Tranchant and Telephones Stores SARL, Judgment of the Court of Justice, 9 November 1995, not yet reported.

10 Proposed ONP interconnection Directive cited in footnote 4, Article 9(3).

is therefore obliged, in general, to take all organisational measures necessary for the performance of its task and, in particular, to establish priorities[11].

14. 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[12]. 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[13] so that EC 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.[14]

15. Other national authorities, in particular National Regulatory Authorities 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 National Regulation Authorities must ensure that actions taken by them are consistent with EC competition law[15], this duty requires them to refrain from action that would undermine the effective protection of Community law rights under the competition rules[16]. Therefore, they may not approve arrangements which are contrary to the competition rules[17]. If the national authorities act so as to undermine those rights, the Member

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11 Case T-24/90, Automec v Commission, 1992 ECR II-2223, at paragraph 77; and Case T-114/92, BEMIM v Commission, 1995 ECR II 147.

12 Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 39/6 (1993), at paragraph 14.
Draft Notice on cooperation between national competition authorities and the Commission, OJ C 262/5, 10 September 1996.

13 Case 127/73, BRT v SABAM, 1974 ECR 51.

14 Case 66/86, Ahmed Saeed, 1989 ECR 838.

15 They must not, for example, encourage or reinforce or approve the results of anti-competitive behaviour: Ahmed Saeed, above at footnote 14; Case 153/93, Federal Republic of Germany v Delta Schiffahrts, 1994 ECR-I 2517; Case 267/86, Van Eycke, 1988 ECR 4769.

16 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.*"

17 For further duties of national authorities see Case 103/88, Fratelli Costanzo SpA, 1989 ECR 1839.
See Ahmed Saeed, above at footnote 14: "*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,*
(continued...)

State may itself be liable in damages to those harmed by this action[18]. In addition, National Regulatory Authorities have jurisdiction under the ONP directives to take steps to ensure effective competition.[19]

16. 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[20].

17. Under Regulation 17[21], 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[22], by way of a complaint against a restrictive access agreement or against the behaviour of a dominant company in granting or refusing access[23], by way of a Commission own-initiative procedure into such a grant or refusal, or by way of a sector inquiry[24]. 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[25]. 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.[26]

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[17](...continued)
as the case may be; (ii) precluding the approval by those authorities of tariffs resulting from such agreements"

[18] Joined Cases C-6 and 9/90, Francovich, 1990-I ECR 5357; Joined Cases C-46/93, Brasserie de Pêcheur SA v Germany and Case C-48/93, R v Secretary of State for Transport ex parte Factortame Ltd and others, judgment of 5 March 1996, not yet reported.

[19] For example, recital 18 of the leased line directive referred to in footnote 4 and Article 9(3) of the draft ONP interconnection directive.

[20] Council Regulation No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395/1 (1989).

[21] Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty, OJ 13/204 (1962), as amended.

[22] Articles 2 and 4(1) of Regulation 17.

[23] Article 3 of Regulation 17.

[24] Articles 3 and 12 of Regulation 17.

[25] Case 792/79R, Camera Care v Commission, 1980 ECR 119.
See also Case T-44/90, La Cinq v Commission, 1992 ECR II-1.

[26] See point 16 of the Notice on cooperation between national courts and the Commission cited above in footnote 12.

18. There are a number of areas where agreements will be subject to both the competition rules and national or European sector specific regulation, most notably Internal Market regulation. In the telecommunications sector, the ONP Directives aims 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[27]

19. 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.

20. In applying the competition rules, the Commission will build on the ONP framework, and the National Regulatory Authorities acts within that framework. 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 one or more notifications by way of formal decisions, following appropriate publicity in the Official Journal, 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[28]

21. 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 EC 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[29]. 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

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27 Article 2 or 4(1) of Regulation 17.

28 Article 3(2) of Regulation 17.

29 Camera Care and La Cinq, referred to above at footnote 25.

courts can offer considerable advantages for individuals and companies, such as in particular [30]:

- 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 will 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 harmonized under ONP principles can offer recourse both at the national and if necessary at Community level.

3.1 Use of national and ONP procedures

22. As referred to above[31] 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...*"[32]

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.

23. Article 85(1) and Article 86 EC produce direct effects in relations between individuals which must be safeguarded by national courts[33]. As regards actions before the National Regulatory Authority, the ONP Directive provides that such an authority has power to intervene and order changes in relation to both the existence and content of access agreements. National Regulatory Authorities 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*"[34].

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30 Notice on cooperation between national courts and the Commission cited above in footnote 12, point 16.

31 At paragraph 14.

32 See Automec, footnote 11 above, paragraph 86.

33 BRT v SABAM, footnote 13 above.

34 Articles 9(1) and 9(3) of the Proposed ONP interconnection Directive.

24. The Commission may itself be seized of a dispute either pursuant to the competition rules, or pursuant to an ONP Conciliation Procedure. Multiple simultaneous 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 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 EC Treaty. This is subject, however, to the following points.

3.2 Safeguarding complainant's rights

25. Undertakings are entitled to effective protection of their Community law rights[35]. These 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 would in practice be equivalent to a refusal of access, thus prejudging the proper determination of the case.

26. The Commission therefore takes the view that an access dispute before a National Regulatory Authority 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 or after initiation of ONP procedures, including the conciliation procedures[36]. 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.

3.3 Interim measures

27. As regards any request for interim measures, the existence 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.

28. The availability of and criteria for injunctive relief is an important factor which the Commission must take into account in reaching this prima facie conclusion. If injunctive relief were not available, or if such relief was not likely adequately to take into account the complainant's rights under Community law, the Commission would

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35 Case 14/83, Von Colson, 1984 ECR 1891.

36 Telecommunications: Open network provision (ONP) for leased lines; Conciliation procedure; 94/C 214/04, OJ C 214/4 (1994).

consider that the national proceedings did not remove the risk of harm, and would therefore commence its investigation of the case.

4. Own-Initiative Investigation and Sector Inquiries

29. 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.

5. Fines

30. 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[37]. Where agreements have been notified pursuant to Regulation 17 for an exemption under Article 85(3), no fine may be levied by the Commission in respect of activities described in the notification[38] 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[39].

31. The ONP interconnection Directive has two particular provisions which should be taken into account with respect to the question of fines under the competition rules. First, it provides that interconnection agreements must be communicated to the relevant National Regulatory Authorities and made available to interested third parties, with the exception of those parts which deal with the commercial strategy of the parties[40]. Secondly, it provides that the National Regulatory Authority must have a number of powers which it can use to influence or amend the interconnection agreements[41]. These provisions ensure that appropriate publicity is given to the agreements, and provide the National Regulatory Authority with the opportunity to take steps, where appropriate, to ensure effective competition on the market.

32. Where an agreement has been notified to a National Regulatory Authority, 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:

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37 Article 15(2) of Regulation 17.

38 Article 15(5) of Regulation 17.

39 Article 15(6) of Regulation 17.

40 Article 6(c) of the Proposed ONP interconnection Directive.

41 Inter alia, at Article 9 of the Proposed ONP interconnection Directive.

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

b. the breach of Article 85 is particularly serious.

The size of the fine will depend on the gravity and duration of the infringement.

33. 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[42].

[42] See footnote 18 above.

Part II: Relevant Markets

34. In the course of investigating cases within the framework set out in Part I above, the Commission will base itself on the following approach to the definition of relevant markets in this sector.

35. 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 Articles 85(1) and 86 can be identified.

36. Supply substitutability is generally not used 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.

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

1. Relevant product market

38. 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*".

39. The ending of the legal monopolies in the telecommunications sector, whereby third parties can provide services to end-users, will lead to the emergence of a second type of market, related to the market for provision of services, that of access to facilities which are currently necessary to provide these services. In this sector, 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.

40. It is clear, therefore, that in the telecommunications sector there are at least two types of relevant product 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.

41. 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 5-10%, their collective profits would rise. According to this test, if their profits would rise, the market considered is a separate relevant market.

42. 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 is best done in the light of a detailed examination of an individual case.

1.1. Services market

43. This can be broadly defined as the provision of any telecommunications service to a user. 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

44. 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.

45. 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, as is often the case, for example, with directory information, the facility can only be obtained from the telecommunications operator, similar concerns arise as with physical access issues.

46. In many cases, the Commission will be concerned with physical access issues, where what is necessary is interconnection to the network of the telecommunications operator[43].

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[43] Interconnection is defined in Directive 96/19/EC 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.*"
(continued...)

47. Some incumbent telecommunications operators 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 telecommunications operator itself. This resistance will often manifest itself as 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 operators are not permitted to use their control over access to stifle developments on the services markets.

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

48. 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.*"

49. 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. 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 equivalent 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 [44].

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[43](...continued)
In the full liberalization 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".

[44] Eurotunnel, OJ L 354/66 (1994).

Part III: Principles

50. The Commission will apply the following principles in cases before it.

51. 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.*"[45]

52. 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 harmonization 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.

53. As regards the telecommunications sector, attention should be paid to the cost of universal service obligations. Article 90(2) EC may justify exceptions to the principles of Articles 85 and 86 EC. 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.

54. Articles 85 and 86 EC apply in the normal manner to agreements or practices which have been approved or authorised by a national authority[46], 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.

55. However, if a national regulatory authority 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 Articles 3(g) and 5 EC[47] and therefore subject to challenge by the Commission under Article 169 EC. Additionally,

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45 Guidelines on the application of the competition rules in the telecommunications sector, see point 3 above, at paragraphs 15 and 16.

46 Commission Decision, BNIC/AROW, 82/896/EEC, OJ L 379/1 (1982).

47 See footnote 15 above.

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 infraction[48].

56. National Regulatory Authorities 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 liberalization. When appropriate, legislation such as the ONP framework will be used as an aid in the interpretation of the competition rules[49]. Given the duty resting on National Regulatory Authorities 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 existing and proposed 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)

57. In order for an undertaking to provide services in the telecommunications services market, it will 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 telecommunications operator. As regards access agreements, dominance stemming from control on facilities will be the most relevant to the Commission's appraisal.

58. 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 liberalization Directives, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.

59. In the telecommunications sector, the concept of "essential facilities" will in many cases be of direct relevance in determining the duties of dominant telecommunications operators. The phrase essential facility is used to describe a facility or infrastructure

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[48] Joined Cases C-48 and 66/90, Netherlands and others v Commission, 1992 ECR I-565.

[49] See Ahmed Saeed, footnote 14 above, 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.

which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.[50]

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.

The following facilities could at present be expected to constitute essential facilities in the telecommunications sector: for example, the public telecommunications networks for voice and/or data services, leased circuit or and related network terminating equipment, basic data regarding subscribers to the public voice telephony service, numbering schemes and other customer or technical information.

1.1. Services market

60. One of the factors used to measure the market power of an undertaking are 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[51], taking into consideration the competitive conditions and the structure of supply and demand on the market.

1.2 Access to facilities

61. The concept of "access" as referred to above 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 problem in the strict sense, i.e. interconnecting two telecommunication networks, e.g. mobile and fixed. In relation to access, incumbent operators often occupy a monopoly position, and even in areas where liberalization of the legal framework has begun, it is probable that the incumbent will remain dominant in the future. The incumbent operator, which controls the facilities, is often also the largest service provider, and they have in the past not needed to distinguish between the conveyance of telecommunications services and the provision of these services to end-users. Today, an operator who is also a service provider does not require its downstream operating arm to pay for access, and therefore it is not easy to calculate the revenue to be allocated to the facility. In a

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50 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."

51 Case 6/72 Continental Can, 1973 ECR 215.

case where an operator is providing both access and services it is necessary to separate so far as possible the revenues for the two markets before using revenues as the basis for the calculation of the company's share of whichever market is involved. Article 8(2) of the proposed Interconnection Directive should be helpful in this context as it calls for separate accounting for "activities related to interconnection - covering both interconnection services provided internally and interconnection services provided to others - and other activities".

62. 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 this is possible, also take into account the number of customers who have subscribed to services 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

63. As stated above (see point 37), supply-side substitutability is also relevant to the question of dominance. A market share of over 50%[52] 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

64. 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 be duplicated, either for legal reasons or because it would cost too much.

65. 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

[52] 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.

will take account of any altered market conditions in its assessment of access issues under the competition rules.

1.3 Joint dominance

66. The wording of Article 86 makes it clear that the Article 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 Courts or the practice of the Commission, and the law is still developing.

67. The words of Article 86 ("abuse by one or more undertakings") describe something different from the prohibition on 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[53], nor is there anything to prevent the Commission from taking action only under one of the provisions, when both apply.

68. Two companies, each dominant in a separate national market, are not the same as two jointly dominant companies. National public voice telephony telecommunications operators are not likely to become jointly dominant until after liberalization in the Community. 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.

69. In addition, for two or more companies to be jointly dominant it is necessary, but 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, interconnection or roaming 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[54]. 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 those companies. This having been said, in practice such links will often exist in the telecommunications sector where national telecommunication operators nearly inevitably have links of various kinds with one another.

70. 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

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53 Case 85/76 Hoffmann La Roche, 1979 ECR 461,
Racal Decca, Commission Decision of 21 December 1988, OJ L 43/27 (1989).

54 Nestlé / Perrier, Commission Decision of 22 July 1992, OJ L 356/1 (1992).

telecommunications operator and a cable operator. In order to provide particular services to consumers, access to the local loop of either the telecommunications operator or the cable television operator is necessary. Depending on the circumstances of the case and in particular on the relationship between them, neither operator may hold a dominant position: together, however, they may hold a joint monopoly of access to these facilities.

2. Abuses of Dominance

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

71. 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 telecommunications operators 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*"[55].

A refusal will only be abusive if it affects competition. 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.

72. 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 supply of access from an existing customer.

73. 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.

74. 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

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[55] Case 85/76 Hoffmann La Roche, 1979 ECR 461.

less favourable than those given to other parties, including its own corresponding downstream operations.

75. 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.

76. 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). In the transport field[56], the Commission ruled that a firm controlling an essential facility must give access in certain circumstances[57]. The same principles apply to the telecommunications sector.

77. 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 EU. 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.

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[56] Commission decision, Sea Containers v Stena Sealink, 94/19/EC, OJ L15/8 (1994); Commission decision, Re Access to Facilities of Port Rødby, 94/119/EC, OJ L55/52 (1994)

[57] See also (among others):
Judgments of the Court -
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 242/91P, RTE and ITP Ltd v Commission (Magill), 1995 ECR I-743

Commission Decisions -
76/185/EEC - National Carbonizing Company, OJ L 35/6 (1976);
88/589/EEC - London European - Sabena, OJ L 317/47 (1988);
92/213/EEC - British Midland v. Aer Lingus, OJ L 96/34 (1992);
B& I v. Sealink, (1992) 5 CMLR 255; EC Bulletin, No 6 - 1992, point 1.3.30.

78. 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.

79. 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[58];

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 telecommunications operator'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.

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[58] Community law protects competition and not competitors, and therefore 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.

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.

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.

80. 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.

81. 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.

82. Dominant telecommunications operators have a duty to deal with requests for access efficiently: undue and unexplained 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.

83. 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 questions of capacity restraints, where questions of rationing may arise[59].

84. Excessive pricing for access, as well as being abusive in itself[60], may also amount to an effective refusal to grant access.

85. 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 un ONP Directives to have transparent cost-accounting systems.

86. As to the third of the situations referred to in point 72 above, some previous Commission decisions and the case law of the Court have been concerned with the withdrawal of supply from downstream competitors (the third case, above). 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."*[61]

87. 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

88. 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 abuses which can take place.

Network configuration

89. Network configuration by a dominant network operator which makes access objectively more difficult for service providers[62] could constitute an abuse unless it

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59 As noted above at paragraph 80.

60 See paragraph 91 below.

61 Case 6 and 7/73, Commercial Solvents, 1974 ECR 223.

62 ie to use the network to reach their own customers

were objectively justifiable. One objective justification would be where the network configuration improves the efficiency of the network generally.

Tying

90. This is of particular concern where it involves the tying of services for which the telecommunications operator is dominant with those for which it is exposed to competition[63]. Where the vertically integrated dominant network operator obliges the party requesting access to purchase one or more services[64] without adequate justifications, this may exclude rivals of the dominant access provider from offering these elements of the package independently. This requirement could thus constitute an abuse under Article 86.

63 This is also dealt with under the ONP framework: see Art 7(4) of the Interconnection Directive, Art 12(4) of the voice telephony Directive and Annex II of the ONP Framework Directive.

64 ie including those which are superfluous to the latter, or indeed those which may constitute services the access requester itself would like to provide for its customers

Pricing

91. Pricing problems in connection with access for service providers to a dominant operator's (essential) facilities will often revolve around excessively high prices[65]: 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.

Problem of unfairly low prices could 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 violation of Article 86(a). 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[66].

If a case arises, the ONP rules concerning accounting requirements and transparency will help to ensure the effective application of Article 86 in this context.

92. Where the operator is dominant in the product or services market, the margin between the price charged to all 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 must be large enough 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.[67] If this is not the case, competitors on the downstream market are faced by a "price squeeze" which could force them out of the market.

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65 The Commission Communication 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 the prices charged. See also the reference to the universal service obligation at paragraph 53 above.

66 See AKZO, case C-62/86, [1991] ECR-3359

However, the average variable cost rule cannot be applied in many situations in the telecommunications sector, since the variable costs of providing access to an already existing network are almost zero. Accordingly, the test which the Commission considers should be applied is whether whether a company charges a price for goods and services - other than in the context of a new product or service -which, although above the average variable cost of providing the specific goods or services for which the price in question is paid is so low that the overall revenues for all the goods or services in question would be less than its average total costs of providing them if it sold the same proportion of its output at the same price on a continuing basis, even where no intent to exclude a competitor is proved.

67 Commission Decision, Brown Napier/British Sugar, 88/518/EEC, OJ L 284/41 (1988): 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, footnote 57 above.

Discrimination

93. A dominant access provider may not discriminate between 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[68].

94. With regard to price discrimination, Article 86(c) prohibits discrimination by a dominant firm between customers of that firm[69], including discriminating between customers on the basis of whether or not they agree to deal exclusively with that dominant firm.

95. Discrimination without objective justification as regards any aspects or condition of an access agreement may constitute an abuse. Discrimination may relate to elements such as pricing, delays, technical access, routing[70], 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.

96. 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 (eg wholesale and retail) do not necessarily constitute discrimination.

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

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68 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 utilisation of the infrastructure and 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.

69 Case C-310/93 P, BPB Industries PLC and British Gypsum Ltd v Commission [1995] ECR I-865, 904, applying to discrimination by BPB among customers in the related market for dry plaster

70 ie to a preferred list of correspondent network operators

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 (e.g. 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

98. These 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 dominance

99. In the case of joint dominance (see above, points 65 et seq.) behaviour by one of several jointly dominant companies may be abusive even if others are not behaving in the same way.

100. 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 National Regulatory Authority would resolve the problem by ordering one or more of the companies to offer access, under the terms of the ONP Directive or under national law.

3. Access agreements (Article 85)

101. Restrictions of competition stemming from access agreements may have two distinct effects: to restrict competition between the two parties to the access agreement, or to restrict competition from third parties, for example through exclusivity for one or both of the parties of 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.

102. 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.

103. 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.

104. 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) or market sharing;
(c) have exclusionary effects on third parties[71].
(d) lead to an exchange of commercially sensitive information between the parties.

105. The risk of price coordination is particularly acute in the telecommunications sector since interconnection 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.

106. 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.

107. 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)

[71] Commission Decision, Night Services, OJ L 259/20 (1994); Commission Decision, Eurotunnel, OJ L 354/66 (1994).

108. The Commission has identified certain types of restriction which would potentially infringe Article 85(1) EC and therefore require individual exemption. These clauses will most commonly relate to the commercial framework of the access.

109. In the telecommunications sector, interconnecting parties may wish to exchange, customer and traffic information. This exchange is likely to influence the competitive behaviour of the undertakings concerned, and could easily be used by the parties for collusive practices, such as market sharing[72]. Safeguards will therefore be necessary to ensure that either confidential information is only disclosed to those parts of the companies involved in making the interconnection agreements, or to ensure that the information is not used for anti-competitive purposes.

110. 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 which 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.

111. Access agreement that have been concluded with an anti-competitive object are extremely unlikely to fulfil the criteria for an individual exemption under Article 85(3).

112. 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 co-ordinating end-prices for end-users, which constitutes one of the most serious infringements of Article 85 EC[73].

113. In addition, clauses involving collective 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.

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72 Case T-34/92, Fiatagri UK Ltd and New Holland Ford Ltd v Commission
Case T/35/92, John Deere Ltd v Commission
Both on appeal to the ECJ
Appealing against Commission decision, UK Agricultural Tractor Registration Exchange, OJ L 68/19 (1992).

73 Case 8/72 *Vereniging van Cementhandelaaren v. Commission* [1972] ECR 977;
Case 123/83 *Bureau National Interprofessionnel du Cognac v. Clair* [1985] ECR 391;

4. Effect on trade between Member States

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

115. 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."*[74]

It is not necessary for each of the restrictions of competition within the agreement to be capable of affecting trade[75], provided the agreement as a whole does so.

116. 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.

117. Telecommunications access agreements will normally affect trade between Member States as services provided over a network are traded throughout the EU and access agreements may govern the ability of a service provider or an operator to provide any given service[76]. 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.

118. Cases in this area involving issues under Article 86 will 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.

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74 Case 56/65, STM, 1966 ECR 235 at 249.

75 Case 193/83, Windsurfing International Inc v Commission, 1986 ECR 611.

76 See Telecommunications Guidelines, point 3 above.

Conclusions

119. 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 EU.

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

121. 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.