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*Dirty Dancing:
System and Legal Practices with Regard to Rights of Way (RoWs)
in a Sampling of European Union Member States – A Critical
Study*

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Dirty Dancing: System and Legal Practices with Regard to Rights-of-Way (RoWs) in a Sampling of European Union Member States – A Critical Study

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Abstract: This Policy Paper contains a critical analysis of the system and legal practices relating to the rights of access of telecommunications operators with regard to both the development and application of legal texts in a sampling of eight European Union countries, specifically Germany, Belgium, Denmark, France, Italy, the Netherlands, the United Kingdom and Switzerland. This Policy Paper successively describes the legal context of the rights to access to public or private property (legal texts), it analyses the legal conditions (agreements) and the ensuing practices, it identifies the unfavourable legal and economic consequences which can result from them (liberalisation policies) and it proposes necessary modifications which could limit the scope of these unfavourable consequences within the framework of European Community law.

Table of Contents:

I. Introduction.....	2
II. Overview of the Legal Rights-of-Way System in the European Community.....	4
A. Legal Texts Enshrining The Rights-Of-Way.....	5
1. Diversity Of The Legal Texts.....	5
2. Overlapping Of The Legal Texts	6

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B.	Procedures for Obtaining Access to Rights-Of-Way	8
1.	Access to Rights-of Way on “Public Property”	9
2.	Access to Rights-of Way on “Private Property”	11
C.	Prerogatives Conferred With The Rights-Of-Way	14
1.	Installation Ownership System	14
2.	Installation Protection System	16
III.	Practices of the Agreements Relating To Rights-Of-Way	18
A.	Agreements Relating To Rights-Of-Way	18
1.	With Public Bodies	18
2.	With Private Owners	19
B.	Fees Relating To Rights-of-Way	20
1.	The System of Fees	21
2.	Fee Levels	22
C.	Additional Demands of Rights-of-Way	23
1.	Diversity of the Additional Demands	23
2.	The Legality of the Additional Demands	24
IV.	Should Rights of Way be Considered to be “Essential Facilities” Under European Union Competition Law?	26
V.	Conclusions	28

I. Introduction

As noted in earlier Phoenix Center Policy Papers, if we are truly trying to move from a market characterised by one firm (*i.e.*, monopoly) to a market characterised by many firms (*i.e.*, competition), then the entry of more firms is the *sine qua non* of the entire exercise.¹ As further noted in these Policy Papers, perhaps one of the most significant entry costs faced by new facilities-based entrants – both in terms of deploying broadband infrastructures² which can carry very large volumes of traffic both over long distances and, first and

¹ See, e.g., *eEurope Means Nothing Without eEntry: Regulatory Harmonisation, Subsidiarity and the Realisation of the Information Society*, PHOENIX CENTER POLICY PAPER SERIES NO. 8 (October 2000) (<http://www.phoenix-center.org/pcpp/PCPPP8.pdf>); *Do the FCC Policies Promote or Deter Entry? That is the ONLY Question*, PHOENIX CENTER POLICY PAPER SERIES NO. 6 (October 1999) (<http://www.phoenix-center.org/pcpp/pcpp6.doc>).

² Broadband infrastructures are understood to mean wired infrastructures that can carry very high traffic volumes at very high transmission speeds. For example, the cables used by @Home in the United States now offer carrier speeds of more than 1000 times faster than those available using classical co-axial cables (copper wire twisted pair) and 100 times faster than those through integrated services digital networks. The present study excludes non-wired infrastructures, notably satellite systems, and the rights or protections relating to them (radio-electric easements, for example). For residential broadband networks, see notably Kim Maxwell’s “Residential Broadband”, ADSL Forum, Dataquest, and Intel.

foremost, within the local loop³ – is timely and non-discriminatory access to rights-of-way at cost-based rates. That is, the material and legal ability of installing conducts in the ground and in the basements of public or private facilities is a competitive prerequisite to the development of telecommunications services⁴ in the Information Society.

In all developed countries, the law has granted telecommunications operators access to rights-of-way which includes both the right to use the existing infrastructures (right of user) and the right to install new ones (right of occupation), either for the purposes of directly operating them or in order to rent them to other telecommunications operators. In practice, these rights are generally exercised by the operators in question, within the framework of amicable agreements, on the basis of temporary occupation agreements, easement agreements or agreements for the rights-of-way of telecommunications networks.⁵ And yet, the negotiation of these agreements between those who control these rights-of way and those who seek access to these rights-of-way is the subject of a battle for influence where, on one side, incumbents raise issues of protecting and maintaining private property rights while new entrants raise issues of mandatory access to some form of “essential facilities” at little or no cost to themselves.⁶ These “practices” are all the more common given that in most countries, the rights-of-way system is not satisfactory, at least not in the telecommunications sector.

There is a risk that the deployment of advanced broadband terrestrial networks, though indispensable, might be significantly delayed even though its necessity is not called into question. This is so despite the fact that an insufficient deployment of such infrastructures will undoubtedly hinder the widespread use of the new information technologies. This would significantly penalise the competitiveness of many telecoms markets within the European Community.

³ Let us recall that the alternatives to such infrastructures, notably in the local loop, are still limited: the DSL (Digital Subscriber Line), which would be the most credible, has demonstrable weaknesses which regularly result in complaints from the clients of major telecommunications operators, notably in the United States (for example John Borland, “DSL problems - slow high-speed Net surfers”, Cnet News.com, July 28, 1999), and satellite systems do not yet offer a complete solution despite the significant progress made in the last few months.

⁴ In this context, telecommunications services include all services that carry voice, sound, images or data of any kind to remote destinations by means of telecommunications networks. We also refer to all of their social, economic or commercial applications, notably electronic commerce.

⁵ See II-B-2, p.11 below.

⁶ For all of these points, see IV, p.26 below.

This Policy Paper contains a critical analysis of the system and legal practices relating to the rights of access of telecommunications operators with regard to both the applicable texts in several European Union Member States, specifically Germany, Belgium, Denmark, France, Italy, the Netherlands, the United Kingdom and Switzerland. To accomplish this analysis, this Policy Paper then successively describes (1) the legal context of the rights to access to public or private property (legal texts), (2) analyses legal conditions (agreements) and ensuing practices, (3) identifies the unfavourable legal and economic consequences which can result from both the legal texts and private agreements, and then (4) proposes necessary modifications which could limit the scope of these unfavourable consequences within the framework of European Community law.

II. Overview of the Legal Rights-of-Way System in the European Community

Curiously enough, and despite the often numerous texts which define its conditions in all of the major countries, the legal aspects of rights-of-way are currently characterised by a great deal of uncertainty. In Europe, the system governing rights-of-way is, quite exceptionally, one of the few areas which the European Community bodies have not chosen to look into more deeply: For example, there is no European directive or even doctrine⁷ which coordinates the legal rules. In the European markets studied herein, the rights-of-way system is generally national, though it is sometimes local according to the policies implemented by each local government or community. Rights of access to public or private property are generally granted under the initiative or authority of these communities; the degree of clarity of these conditions is inversely proportional to the increasing number of such local governments and communities that want to become the operators of their own local telecommunications networks.⁸ The nature of the rights granted to authorised operators is very limited, and even calls into question the existence of a genuine *rights-of-way*, notwithstanding the above-cited measures that enshrine this right.

⁷ At the most, the Green Book on the liberalisation of telecommunications and cable communications infrastructures (COM (94), 440, 25-10-94 and 682, 25-01-95), devotes only one paragraph of a few lines to the few general principles that must be applied by the Member-States and their constituent elements. Article 4 quinquies of the 13 March 1996 "Open Competition" Directive, for its part, repeats the obligation which the Member-States have to establish a non-discriminatory rights-of-way system for all operators.

⁸ See II-C-2, p.24 below.

A. *Legal Texts Enshrining The Rights-Of-Way*

A comparative analysis of the legal system surrounding rights of way in the European countries in this study immediately brings to light the great diversity in the statutes, rules and regulations that enshrine it. This diversity is often complicated by the overlapping texts of different natures or origins, which can sometimes prove to be the source of the difficulties involved in interpreting the understanding or the scope of the rights-of-way granted to authorised operators.

1. *Diversity Of The Legal Texts*

The texts that institute rights-of-way are indeed of different natures or origins. Though these rights-of-way and the resulting prerogatives are generally only granted to operators having an authorisation to install telecommunications networks - which are often referred to as "telecommunications operator's licence" - the licence itself sometimes grants its holder the right to install telecommunications cables in or on public or private property. In Great Britain, for example, the obtaining of an operator's licence immediately confers on the interested party the right to make use of the provisions of the Telecommunications Act of 1984; the provisions of Sect.10 (3A)-(3C) notably grant the authority to install infrastructures which are to be shared by two authorised operators. Sometimes, these are particular provisions that have been adopted by lawmakers, in the form of a law or regulatory text, and which define the rights-of-way granted to authorised operators. An example of this approach is the Danish law n°393 of 10 June 1997 which defines the conditions whereby operators holding a licence can run telecommunications cables in or on the ground occupied by public or private property. This law is all the more interesting in that it grants the Danish telecommunications regulatory authority a genuine power for expropriations, under certain conditions. The Italian law n°249/97 states that each public network operator's licence is equivalent to a declaration of the public usefulness of the works for the deployment of the resulting infrastructures.

The most common situation is that of those European Member States wherein the laws which regulate telecommunications activities - which we will refer to as the "*Telecommunications Act*" in imitation of the Anglo-Saxon terminology - provides authorised operators with a rights-of-way and sets the conditions whereby it can be used. Such are the provisions of the German, Belgian, French, Italian, Dutch or Swiss laws. These laws have been completed by application texts which, if we take the French case as an example, consist of a State Council decree (decree n°97-683 of 30 May 1997, OGFR, 1 June 1997, p. 8767) which sets the rights-of-way conditions for the public roadways and for the easements provided for in articles L47 and L48

of the Post and Telecommunications Code, and of the 28 August 1997 interpretive circular (NOR 9800195 C).

Finally, it is not rare for other more general provisions, notwithstanding those fundamental texts mentioned above, to define all or a part of the prerogatives granted to authorised operators. An analysis of the situation in the United Kingdom thus brings to light the fact that, in addition to the 1984 *Telecommunications Act*, one also has to take into account the *New Roads and Street Act* and the *Planning Law*. In France, however, but also in Belgium, Italy or Switzerland, the easement rules to which authorised operators can avail themselves on private property can interfere with the articles of the Civil Code, the provisions of which apply either on top of or against the abovementioned laws.⁹

As a reference, in the United States, the rights-of-way system in the telecommunications results partly from a complex legal construction which combines the State and Federal constitutional provisions, the 1996 *Telecommunications Act* and the special provisions (*statutes*) adopted by each State and even by each local authority (*municipality or county*).

2. *Overlapping Of The Legal Texts*

This diversity of official texts is obviously part of the logic of the legal traditions of each European Member State and of the principles of its organisation. Sometimes, however, this diversity results in a great deal of complexity, which does nothing to facilitate the work of telecommunications operators.

Earlier, we made reference to the situation in the United Kingdom: it is undoubtedly not one of the simplest cases. Just on public property, the rights of an authorised operator vary on the basis of the application of different texts, as mentioned above, depending on whether this operator uses a dependency which is maintained by public funds (full access entitlement), not maintained by public funds (authorisation scheme), protected (restriction

⁹ The French case is quite representative of this latter type of situation, since if the procedure provided for in article L48 of the Post and Telecommunications Code is excluded, authorised operators cannot impose a legal easement since the Civil Code (article 637 and subsequent) only grants a rights-of-way on the property of other people if it is to the benefit of the owner of a landlocked parcel (article 682). In other words, an authorised operator seeking an agreement with a private owner within the framework a rights-of-way or easement agreement, outside of the procedure provided for in article L48, would not be able to take advantage of the legal easement or of its legal effects. He only enjoys the rights ensuing from the provisions of his contracts, which are by their very nature uncertain and subject to cancellation, notably in the event of a change of owners.

scheme), land, maritime, and benefiting or not from the statutory prerogatives granted to authorised operators under certain conditions by the “Telecommunications Code.”

The situation in France also is not, for its part, one of the least “baroque.” A distinction is made according to whether the operator uses the public roadway domain, the public non-roadway domain, the private domain of a local community (assets not assigned for the use of the public or of a public service) and in which we find property assigned to the use of the public, but classed in the private domain of the public municipalities under the law (rural roads, state forests), the private property of an individual, and in this latter case, using the system of the legal (article L48 of the Post and Telecommunications Code) or contractual easement (passage agreement or right of user).

The necessity of application texts has itself resulted in confusing situations which lawmakers have sometimes had to settle. Thus, at the time of the writing of this Paper, Italian operators are waiting for the application provisions for that which law n° 249/97 already provides. Dutch lawmakers were certainly more prudent, having established the power of the local authorities to set the conditions as to how authorised operators can exercise their rights-of-way on public property, though provisions for its adoption also included a model of the application text and a date limit, *i.e.* 1 June 1999.

The overlapping of legal texts of different kinds is not a source of major problems, provided that there are legal mechanisms that can be used to adjust the ones relative to the others. As in the United States, constitutional provisions can establish a subtle system of subsidiarity that asserts the jurisdiction of the local authorities and consequently grants the primacy of their acts over any other text of Federal origins. A hierarchical principle for the rules can be very useful, in France for example, when one must decide between contradictory provisions contained in texts having different legal force: a law and an application regulation. The saying according to which special laws generally provide exceptions to general laws can also lead one to think that a text that deals with the telecommunications sector should supersede a text having a more general scope. It is clear, for example, that article 37§1 of the Swiss law on telecommunications, a special law, establishes an exception to the provisions of the Swiss Civil Code, a general law, with regard to the ownership plan for installations located on or in public or private property. The same is true in Belgium, in application of the provisions of article 97§2 of the 1991 and 1997 Belgian telecommunications regulations laws.

When this has not be provided for in as explicit a manner, however, we sometimes find ourselves with a genuine legal problem resulting from the weakening of the rights of the authorised operator, one which can even call

into question the scope of the rights-of-way granted to the operator. This is the case in the Netherlands and in France. In the Netherlands, article 5:20 of the Civil Code establishes the famous “*accession theory*” which is also found in several other countries (Germany, Belgium, France, Switzerland, for example), whereby the ownership of the ground level prevails over that of the ground below. If we follow this principle, and in the absence of explicitly exemption provisions in the telecommunications law, as have been provided in Switzerland, it is conceivable that installations below the ground of a private property can *ipso facto* be included in the estate of its owner.

In France, the situation of the operator is even more haphazard when one takes into consideration the nature of the support ground. The public domain (domain assigned to the use of all or to the use of a public service) is governed by a long-standing (since 1566) inalienability plan whereby any private occupation is, by its very nature, precarious and subject to revocation. At the very most, French legislators, with the complicity of the Constitutional Council,¹⁰ have admitted the possibility whereby the public domain occupants can, under certain circumstances, enjoy a genuine right over completed installations.¹¹ The result is that in the absence of legislative details or jurisprudential solutions, authors in France are divided between those who feel that a telecommunications installation is a building which *ipso facto* belongs to the owning community due to its incorporation into the support domain, and those who see only a real estate installation, the ownership of which can be claimed by the operator at the end of the term of his authorisation permit.¹²

B. *Procedures for Obtaining Access to Rights-Of-Way*

As a general rule, in the European countries being studied herein, the procedure whereby authorised operators can avail themselves of rights-of-way has been decentralised: it is within the purview of the local authorities, either because they are the owners of the dependencies being used, or because they have received the power to implement the legal provisions pertaining to the rights-of-way of authorised operators. We will nevertheless see that this is not always the case. Indeed, it happens that the special

¹⁰ Constitutional Council, 21 July 1994, n° 94-346 DC, OG 23 July 1994.

¹¹ Laws n° 88-13 of 5 January 1988 (OG 6 January 1988) and n° 94-631 of 25 July 1994 (OG 26 July 1994). Relative to these laws and the real administrative right, see notably our developments in Lamy, *Droit public des affaires*, 1999, n° 3307 and subsequent.

¹² Roadway permissions are, generally, entirely explicit when it comes to the ownership rights of the occupant relative to the infrastructures which he installs beneath public roadways. For more on this question, see notably Sylvie Joubert, *L'installation des réseaux de télécommunications sur le domaine public*, JCP Ed.Générale, n°35, 1 September 1999, p.1509.

competence of other bodies has been recognised, notably that of the national regulatory authority.

1. *Access to Rights-of-Way on "Public Property"*

Public property is understood here to refer to all dependencies included in the assets of public bodies, whatever their purpose. According to this definition, this category of public property will include dependencies, which, in France for example, are considered as part of the private domain of public bodies (dependencies, property of public persons not intended for collective usage).

According to the nature of each dependency, the procedure for accessing the below-ground area of public dependencies differs according to and within each country. This can correspond with the exercising of a genuine access right, which can be statutorily granted to authorised operators without their having to request the slightest authorisation. This is the case of the operators who, in the United Kingdom, can avail themselves of the powers conferred upon them by the 1984 *Telecommunications Act* when intending to install cables in the sub-grade of a highway maintainable at public expense. Under the same conditions, the Belgian telecommunications law also provides an access right to pre-existing public or private works (canal works, for example), subject to municipal access procedures relating to these works.

While still maintaining the need for a prior authorisation, many national legislative systems have loosened up by implementing a procedure that is not unlike a system requiring a simple declaration. Thus, the roadway permission plan, which applies in France for the occupation of the public roadway domain (article L47 of the Post and Telecommunications Code), is based on an implicit authorisation procedure whereby in the absence of any decision by the competent authority within a period of two months after an authorised operator has submitted a request, the silence maintained by this authority must be interpreted as a decision granting authorisation. A similar system has been implemented in Belgium, and to a lesser degree in Germany, where the authorisation plan needed for the deployment of infrastructures in ground beneath public properties is "corrected" by the following mechanism: for public dependencies such as roadways, squares, bridges and viaducts, the systems for the delivery of drinking water or the evacuation of waste water, the owning authority can only refuse an operator wishing to impose a rights-of-way in the event of technical reasons for this refusal.

Most of the time, however, the installation of cables on the property of a public body is based on an authorisation system that is quite in order. This authorisation is either unilateral (case of the Netherlands), or contractual (case of France for the public non-roadway domain and the private domain, of the United Kingdom, Italy and Switzerland). In France, the procedure is

further complicated by the fact that the authorisation to occupy the public domain of a public body does not dispense the authorised operator from having to obtain, from this same public body, another (second) authorisation to begin the works. Many operators are thus very surprised to find that, though provided with the right to occupy the public domain, they must still wait some time before they can have access to the ground below a public property if they do not yet have the authorisation to carry out the works.

Italy's case is special, but not so much because of the general architecture of the system which uses an authorisation procedure such as has just been described, but because the Italian law requires the use of application measures which have not yet been taken. A temporary state has thus been implemented and, for example, it momentarily substitutes, *vis-à-vis* the backbone networks, the Ministry of Communications for the normally competent national regulatory authority, such that the authorisation system currently in place at the time of this study is an exceptional and abnormally cumbersome system requiring a ministerial decree.

The procedures described above can also be affected by various circumstances that modify the system. Occupied dependencies can be subject to special legal protection due to their nature. Such is the case with "*Crown Lands*" in the United Kingdom, particularly when this involves maritime dependencies. A similar example in France are the state forests or the navigable waterways, which are generally managed by a national public establishment such as the Office National des Forêts (ONF) or the Voies Navigables de France (VNF). It is finally up to these national public establishments to define the conditions for the rights-of-way granted to authorised operators. Also in France, the particular nature of the conditions for access to the approved public properties has led legislators to provide for a special system relating to them, one which is based on a mechanism of access agreements (article L47 of the Post and Telecommunications Code).

And yet, this special system does not cover all of the hypotheses that can arise. Over and above the seemingly simple case of the access of an authorised operator to the dependencies of a granted motorway (agreement), there are a certain number of circumstance in which the authorised operator may make a public dependency, of which he is himself the exclusive occupant, available to another operator. This situation is most often encountered, it is true, when it comes to the establishment of radio-electric communications networks. Nevertheless, it is indicative of the difficulty of straightening out the tangle of properties, a difficulty that is often to the benefit of the on-site operators.

To illustrate this point, let us consider a transmitting or re-transmitting station (built-up station or simple pylon), built by a public body or on its public property. This station is fitted with antennas or instruments installed

by authorised operators, but whose means may be made available to other operators. The on-site operators generally have a temporary occupation authorisation. In the absence of a particular authorisation granted to the first operator, which is frequently the case, any signing of an agreement to make available the said means must logically include the owning body. This is indeed a rare event. The result is a total weakening of the rights of the last arrival, who is occupying a dependency in the public domain without the knowledge of the owning body and in a totally precarious legal position,¹³ the result of which is that he can be considered as an unauthorised occupant of the public domain, and thus be subject to the (expeditious) expulsion procedures provided for in this case.¹⁴

2. *Access to Rights-of-Way on "Private Property"*

In this context, and in line with the previous explanation of public property, private property is understood to mean the dependencies belonging to private individuals or legal persons established for a private interest.

The installation of cables in or on private property – subject to the special prerogatives granted by Belgian law to the operators of networks installed on the surface (article 98§1)¹⁵ – generally involves the signing of an agreement with the owner in question. In almost all of the countries in the study, this agreement grants the authorised operators the right to a usage right according to the general terms of the Civil Code or the applicable civil laws. Its negotiation will take place under conditions pertaining to private law, *i.e.* under a system of contractual freedom, including with regard to the determination of access fees.

Operators most often choose this formula that, though subject to a certain degree of variability,¹⁶ obviously has the advantage of being flexible. They nevertheless try to reduce the inherent uncertainty of this formula by means of procedures that, in the French example, make use of two techniques:

¹³ Which is found in the IRU (Indefeasible Right of Use) agreements.

¹⁴ That's why the French Post and Telecommunications Code (article L47) now organises the conditions for the sharing of the installations in the roadway domain and for the use of the pre-existing state infrastructures of other operators on the non-roadway domain.

¹⁵ According to the terms of article 99§1 of the 1991 and 1997 Belgian laws, telecommunications operators in Belgium have the right to freely deploy (*i.e.* without authorisations) aerial networks alongside the facades or sides of pylons. In this capacity, they can cross - without authorisation - the private property of private individuals.

¹⁶ See note 9 *supra*.

- The signing of a simplified form of a private agreement, presented in the form of a pre-established form (one page of a few lines), which has only to be filled out and have signed by the private owners in question; this agreement is then the subject of a notarised document of a more solemn nature, which results in the registration of an “easement” in the register of mortgages; it sets the financial terms for the compensation of the owner, according to the principles adopted in a national accord with the agricultural professions;
- The negotiation of collective agreements with the representatives of the owners in question, which takes in the individual agreements signed with each owner; this negotiation is all the more simplified by the fact that the owners in question are often farmers, and are often very involved with representative organisations, whose authority they recognise.

Despite these accommodations, it appeared necessary to the national legislators that they should implement procedures intended to overcome the opposition of private owners. An examination of these procedures makes it possible to assess the scope of the rights-of-way granted to authorised operators, though they are of very different natures and forms.

The most constraining, and thus the most efficient, is incontestably the Danish procedure. It can be used both against private property and against public property, and it results from the terms of a previously mentioned special law, *i.e.* the law n° 393 of 10 June 1997. This law establishes a special expropriation procedure that can be used by the operators of public networks. This procedure is implemented by the national regulatory authority, which, when called upon by an authorised operator, checks that the running of the cables in question is essential to the deployment of a telecommunications network and, consequently, is in the general interest, and that there is no other legal possibility. The Danish regulatory authority nevertheless does not have the power to carry it out; it submits the file to the competent minister (minister in charge of transport), who in his turn addresses a special commission under whose authority the procedure is actually carried out with all of the customary guarantees given to the private property. Once completed, the expropriation procedure results in a dispossessing of the private (or public) owners in favour of the authorised operator. It is indeed a radical solution, one which can be likened to the procedure implemented by the Swiss law (art. 36§1) which allows the operator of a network, recognised to be of public usefulness, to avail himself of a procedure of a similar nature undertaken under the aegis of the competent federal minister (minister of transport and energy).

Most often, the procedure implemented in the countries in this study is of an administrative nature: it involves an administrative authority that is in charge of providing a solution to the conflict between the authorised operator

(who is claiming a rights-of-way) and the private property owner who is refusing it. This authority, and consequently, this administrative procedure can be centralised, devolved or decentralised.

For example, this authority is centralised in Belgium, where the provisions of article 99§2 of the 1991 and 1997 Belgian laws establish the national regulatory authority as the body that arbitrates between the authorised operator and the private owner in question. The procedure operates as follows: the operator seeking the rights-of-way informs the private owner of his intention, while providing all details as to the layout of the network and its deployment conditions. The private owner has 8 days in which to give his decision. If he decides to refuse the requested rights-of-way, he must then contact the national regulatory authority (IBPT). After the application, all operations to carry out the works are suspended, and the regulatory authority has one month to decide on the private owner's request and to arbitrate the submitted dispute.

Italy uses a more devolved procedure, one that is under the initiative of the "*Prefetto*" (local representative of the central Italian authorities). It relies on the fact that the authorisation provided to each network operator is equal to a declaration of the public interest of its network deployment project. Pursuant to the provisions of decree n°156/1973, the *prefetto*, in the event of any problems, takes a decision resulting in an easement for the authorised operator, thus providing him with the means to bypass any possible opposition by the private owners in question.

The French procedure, pursuant to article L48 of the Post and Telecommunications and the aforementioned decree of 30 May 1997, is decentralised since it involves the mayor, the elected representative of the community in the French administrative organisation, who acts, in this case, as an agent of the State. An authorised operator anticipating opposition from private owners thus contacts the mayor of the community in question, who informs the private owners of the intentions of the authorised operator pursuant to the legal easement provided to the operator by the said article L48. The private owners have three months in which to submit their observations. After this time, the mayor issues a municipal decree for the creation of a legal easement for the authorised operator. Insofar as possible, this decree takes into account any observations provided to the mayor by the private owners in question. He can impose co-tenancy of the infrastructures on the authorised operator. Any subsequent disputes between the authorised operator and the private owners in question as to the determination of their compensation are the responsibility of the expropriation judge, and are thus settled according to the rules of the Expropriation Code.

The decentralisation of this procedure clearly promotes efficiency in that it brings the decision-making level closer to the place of the execution of the

works. This system nevertheless has its limits, in that it provides the mayor with prerogatives that can be considered as exorbitant insofar as he has discretionary authority and can thus block the rights-of-way of an authorised operator. Of course, as he is acting in the name of the State, one can point out that recourse to the Prefect is always possible. It is nevertheless true that it is unhealthy to entrust a single man with duties which involve very different - and even divergent - interests; he will have a very difficult time setting aside his role as an elected official, and will thus not be able to totally overlook the local interests.

The German and British procedures both establish the authority of the common law jurisdictions in order to decide on disputes occurring between authorised operators and private owners. Under the normal procedures, it is thus up to a civil judge to order - or refuse to order - the installation of infrastructures when private property is involved. In the United Kingdom, legislators nevertheless felt it necessary to make a reservation relative to the situation of operators who cannot avail themselves of the powers provided by the 1984 Telecommunications Act. In the event of difficulties, they can apply to a judge in an effort to force the private owner to respect the rights-of-way, though they must also comply with any decision that goes against them. The private owner has the last word and, in the end, obtains satisfaction.

C. Prerogatives Conferred With The Rights-Of-Way

In all of the European countries in the study, the rights conferred with the rights-of-way include the right to access the public or private property, to dig a trench and to install ducts and lines, and to carry out any maintenance operation that is needed in order to maintain the telecommunications network in question in perfect order. Beyond these initial considerations, however, the authenticity of the rights-of-way and the actual range of prerogatives, which it grants to each authorised operator, can be measured primarily with regard to the equipment ownership system that it establishes, and to the protective rules which they enjoy.

1. Installation Ownership System

A comparative analysis of the ownership system for equipment installed in the ground beneath public or private property brings to light a variety of situations.

Without doubt, Denmark has the most radical solution. One consequence of the expropriation procedure described above is that not only can the authorised operators using this procedure claim the ownership of the equipment which they install, they actually become the owners of the land that they occupy. Of all of the countries in the study, these operators have the

strongest and best-established position. To a lesser degree, and when they can avail themselves of similar powers, Swiss operators appear to be protected in the same way.

In truth, even if they weren't, they would nevertheless be covered by the protective system that Swiss law establishes in their favour. This system is based on the Swiss legal provision (art. 37§1) which states that authorised operators own the equipment, which they install in, or on, public or private property. These provisions are exceptions to the general principles of the Swiss Civil Code, and notably to the previously mentioned accession theory.

The Belgian and German legal systems contain similar provisions. In Belgium, article 97 states that lines installed in the public domain (§1) and those installed in the private domain (§2) remain the property of the telecommunications network operator who installed them. In Germany, the formula used by the law of 25 July 1996 is of a different nature, but its consequences are the same: in fact, this law confers the right of ownership on the holder of the rights-of-way. As the latter is generally the operator of the installed telecommunications network, one can thus believe that the solutions available in Belgium and Germany are of a similar nature.

It is nevertheless true that in several of the studied countries, the system for the ownership of telecommunications equipment installed in or on public or private property is not perfectly established. The reason for this has already been mentioned. It results from the civil law principle of the accession of any owner to the ownership of the "underground" as much as of the "over ground" (surface rights), such that any installed element is ipso facto included in that person's property. Though the telecommunications law does not contain any provisions that are as explicit as those which have just been mentioned, there nevertheless remains the question of the ownership of telecommunications infrastructures.

This is the situation in the Netherlands, where article 5:20 of the Dutch Civil Code provides the owner with a legal mechanism for access to the ownership of the "ground", the "underground" and the "over ground", and consequently, to the elements which they support or incorporate, unless provided for otherwise by the law. Though the Dutch telecommunications law may not be very explicit in this matter, the French one is even less so: not only does it say nothing about the ownership rules for equipment installed below the ground of public or private property, the very principles for the organisation of the public domain have as a consequence that no ownership can even be claimed on permanent equipment installed thereupon (inalienability principle). As has been shown, it is thus a matter of deciding if the infrastructures of a telecommunications network are to be considered as movable assets that can be moved (which would seem to confirm the demolition rules usable at the end of the occupation period), or as equivalents

to buildings that the owning community can thus appropriate. Without it being possible to delve further into an analysis of the applicable systems in Italy or the United Kingdom, it would seem that comparable difficulties exist and which will require, in the absence of express legislative provisions, jurisprudential solutions which will not fail to come about.

2. *Installation Protection System*

An examination of the protection system for installations in the countries in the study is as significant as the scope of the rights-of-way granted to the operators of telecommunications networks.

As a general rule, the occupant's rights are protected versus the owner or against third parties. At best, this results from a recognition of the operator's ownership rights over the ground which he occupies (case of Denmark and Switzerland) or over the installed equipment (case of Belgium, Germany or Switzerland), or at worst from the existence of a legal easement or a true contractual right which are or can be granted (case of France, Italy, the Netherlands and the United Kingdom). Nevertheless, these rights are only granted to the authorised operator after a registration procedure that generally involves the signing of a solemn agreement and the fulfilment of the required formalities. These are noted in an official national or local registry, depending on the case. Of particular note is the situation in Switzerland, which dispenses the authorised operator from any formality for the registration of his rights for the duration of the licence as a telecommunications operator, as the latter grants an occupation right.

The question of the transferability of the occupant's rights is even less clear. If we overlook Denmark, where acquiring the ownership of the ground grants the authorised operator all ensuing rights, including notably the right to do with it as he pleases (abuses), an analysis of the legal situation in Belgium or Italy reveals that the rights conferred on the operator are both personal and individual. Thus, they cannot be transferred or ceded without the required authorisations, including that of the owner of the occupied dependency. The transfer of an occupant's rights, subject to the necessary formalities, seems to be possible in Germany (at least, if to another telecommunications operator wishing to use the installations), in France and in the United Kingdom. However, it is difficult to propose general solutions, due to the application of more general rules that can result in nuances in the response elements provided. In Germany's case, for example, a reservation must be made for operators having freely negotiated agreements with the private owners in question, where these agreements do not expressly provide the possibility for them to let other operators access their installations, as the provisions of the German Civil Code (art. 1902) exclude this possibility unless it is expressly agreed with the owners.

An analysis of the situation in Switzerland brings to light an additional difficulty. It involves the question of knowing if the rights of the authorised operator to the equipment installed by him must or must not be distinguished from those resulting from his licence. In Switzerland, let us recall, a considerable number of a telecommunications operator's rights result directly from the fact of having an operator licence. This is notably the case with his recognised ownership rights over the equipment that he installs. However, the relevant provisions in Swiss law remain ambiguous, and can be interpreted in three different ways:

1. In the sense of an unbreakable link of the occupant's rights and the holding of the operator's licence, with the occupant's rights becoming void upon the expiry of the licence;
2. Of their independence, which would explain the fact that upon the expiry of the authorisation term, the occupant's rights continue and must be recorded; or
3. Of temporary links, the consequence of which would be that the licence of the telecommunications operator only grants the holder an initial ownership right.

The continuity of the occupant's rights and the scope of the protection granted to his installations are, in the end, measured according to the circumstances that characterise the end of his occupation. Does the latter then imply the demolition of the installed infrastructures and the returning of the occupied property to its previous condition? A study of the provisions in force in the various countries in question brings to light a variety of situations. In Belgium or Italy, no provision has been made for this, and there still remains the question as to the need to return the occupied property to its former condition at the end of the authorisation. In Germany, the applicable provisions are not very explicit, even if one can imagine that the public or private owner can demand the return of his property to its previous condition by the removal of all of the installed equipment. In France, Denmark and Switzerland, on the other hand, it is clear that the expiry of the occupation right does not grant, unless it is renewed, any right to maintain the installed equipment, thus implying their demolition. These provisions can appear to be all the more prejudicial to the rights of the authorised operator given that the occupation document (permission or agreement) is limited in time according to the duration of the telecommunications operator's licence (in France 15 years). The result is a weakening of the situation of authorised operators, which can be difficult to overcome by means other than contractual tricks.

Under these conditions, we see that it is in the interests of the authorised operators to find contractual arrangements rather than turn to official procedures, and to make use of the private property of public or private

persons, rather than putting installations beneath the ground of public properties. In such cases, they are only more vulnerable to the “practices” which will be identified in the developments that follow.

III. Practices of the Agreements Relating To Rights-Of-Way

In addition to the legal framework that has just been described, the agreements pertaining to rights-of-way, which are by far the most numerous, are at the origin of practices which must be known and which provide a second “source” of legal rules in the countries being studied. We will see that, except in special cases, these agreements are left up to the discretion of the attending parties who negotiate and write them up within the framework of a genuine ratio of forces. The amount of the fees paid by the occupant is, notably, left up to them to decide, in the absence of provisions that unilaterally set them or exclude them. Finally, it is not rare for local authorities to demand that telecommunications operators provide additional services, thus using – and abusing? – their dominant position in this regard.

A. *Agreements Relating To Rights-Of-Way*

The agreements relating to rights-of-way are of very different natures and forms. They primarily deal with the relations between the authorised operators and the private owners, though it is not rare for agreements to be signed with public bodies.

1. *With Public Bodies*

Agreements signed with public bodies are included within the formal framework surrounding the occupation of the public property. This framework is all the more constraining in that public property, when made available, is covered by the very protective system of “state lands.” Indeed, the notion of “state lands” involves respecting principles having a legislative value, such as that of inalienability, which cannot be negotiated by means of an agreement. Indeed, the inalienability principle opposes the creation of contractual easements on the public domain. Similarly, whenever issues of use of state lands arise, the thorny issues of how much the state should be compensated for access to its monopoly to rights-of-way¹⁷ and how fast this

¹⁷ For example, in the United States, politicians love to extract monopoly rents for access to rights-of way (and thereby raise entry costs for new firms), all in the name of maximising consumer welfare. See, e.g., Lyndsey Layton, D.C. to Charge Cable Firms for Street Damage, WASHINGTON POST (22 March 2000) at B01 (reporting that in response to disruptions of the city’s roadways, Washington, D.C. would impose fees ranging from [U.S.] \$ 739 to \$2,059 per mile); Lyndsey Layton, *Hidden Cost of Road Tear-ups*, WASHINGTON POST (16 March 2000) at A1 (Footnote Continued. . . .)

access must occur¹⁸ concurrently arise. Under any scenario, however, this increase in cost and delay in deployment (which also causes firms to incur costs) deter or outright prohibit new entry of competitive broadband networks.

The notion of “state lands” is also incompatible with the existence of an occupant’s genuine right over the occupied public domain. Agreements to occupy the public domain, when they are even signed,¹⁹ are generally public contracts that use the legal and dispute system of such types of contracts within the legal and litigation systems of each of the countries being studied.

In certain Member States, such as France, which allow public bodies to be the owners of a private domain, agreements signed with public persons can also be of another kind, one which is doubtlessly closer to that of agreements signed with private people. Agreements signed for the private domain of public bodies also have the particular feature of involving a managing body, in the form of a national public establishment or a governmental agency. In France, this involves the previously mentioned bodies, *i.e.* the Office National des Forêts or the Voies Navigables de France.

2. *With Private Owners*

Agreements signed with private owners, be they natural or legal persons, are governed by the rules applying to contractual freedom. Nevertheless, insofar as they result in a genuine right being conferred on the occupant, they

(reporting that Prince George’s County Maryland imposed a franchise fee of 5% of a company’s revenue for digging up the street to lay new cable).

¹⁸ An excellent example where structural resolution of access to rights of way can aggressively promote facilities-based competition can be found in New Zealand. Indeed, rather than extort concessions from new entrants to build new advanced broadband networks (such as those found in the United States), in 1989 the New Zealand Government introduced a special provision called “Network Operator Status” to provide new entrants the right to apply for a court order to install telecommunications plant on public and private property. Not only is it not a pre-requisite for conducting business as an end-to-end carrier, but also designation is automatic on application for those that qualify. As a result of this pro-investment climate, numerous foreign firms have entered significantly into the New Zealand market. For example, British Telecom has invested NZ \$160 million and Vodafone has invested NZ \$200 million in advanced technologies. But, perhaps most encouraging of all, Saturn and Telstra (the dominant firm in Australia) have recently announced their investment of more than NZ \$1 billion dollars in a broadband network which will pass over two thirds of all homes in New Zealand. See Mark Naftel and Lawrence J. Spiwak, *THE TELECOMS TRADE WAR: THE UNITED STATES, THE EUROPEAN UNION AND THE WTO*, Hart Publishing (2001).

¹⁹ Certain Member States, such as France, exclude them entirely, in favour of unilateral procedures such as roadway permissions.

must generally take the form of solemn documents that are subject to registration.²⁰

In an effort to make this legal requirement compatible with the twofold necessities of immediately occupying the dependencies in question and the rapid execution of the installation works, authorised operators in France have implemented a two-part procedure. With this procedure, the approval of the private owner, and consequently, the rights-of-way, can be obtained by signing a pre-established form that is filled out in the field, the parties then having to authenticate their agreement through a notarised document at a later time. It also provides the advantage of setting, right from the start, the amount of any compensation paid to the owners. It is the notary who then carries out the formalities to register the document in the register of mortgages. For owners in the agricultural domain, obtaining their approval is made even easier by the fact that both the procedure and the pre-established form have been approved by the professional agricultural union within the framework of a national protocol which sets, notably, the means for calculating the fee and the compensation due to each owner for any prejudice suffered.

These amicable procedures are not incompatible, at least not from a legal point-of-view, with the implementation of procedures designed to bolster the occupant's rights by means of an administrative easement. It is therefore not impossible for the signing of this type of agreement to precede the implementation of the procedures adopted for this purpose (in France, article L48 of the abovementioned Post and Telecommunications Code). In this latter case, however, the agreement ceases being applicable once the administrative easement is declared by the mayor.

B. *Fees Relating To Rights-of-Way*

In general, the occupation of public or private property within the framework of agreements signed with owners involves the payment of fees. However, this payment is only more or less covered by the applicable texts, such that the amount of the fees can be very variable, thus opening the door to discussions between the parties on the basis of their respective positions within the negotiation.

²⁰ See II-C-2, p.11 *supra*.

1. *The System of Fees*

The occupation fee system is undergoing a great many changes within the countries in this study. Firstly, because it includes, in a manner which can be different from State to State, a sum (equivalent to rent) which the owner demands from the occupant in exchange for the rights granted to him, and compensation for any damages of whatever kind which the occupation is causing or may cause to him. Here, there is an initial type of opacity that should be cleared away by clearly distinguishing the two facets of the owner's remuneration: the catchall phrase "compensation" is too often used to conceal a genuine "remuneration." Secondly because the system for these payments is rarely fixed once and for all: the payments can be annual or monthly, when there are no lump-sum payments for the term of the contract; they can be based either on the ducts or on the cables which they contain, and which can have a considerable multiplying effect. And lastly because when clear rules do exist, they are frequently circumvented for reasons which relate to their excessive formalism, whereby by accepting to "pay" for the rights of way granted to them, operators have the feeling that they can find more flexible, and hence more efficient, systems.

A few examples can be given of the inadequacy of the fee system as it currently stands. Belgian law very explicitly establishes the freedom, and consequently, the lack of a cost, for operators to have access not only to dependencies in the public domain of public bodies (art. 98§2), but also to the works and infrastructures which they already contain (art. 98§2). The occupation of the property, however, has a fee in order to take into account the fact that it results from agreements that were freely negotiated with private owners. But the reality of the agreements signed by authorised operators for rights of way shows that, despite these provisions, operators frequently have to pay fees to public bodies, even to occupy the public domain. The official reason given is that the operators in question do not want to have any problems.

An analogous situation is found in Italy; it leads a great many telecommunications operators to prefer sharing infrastructures, and also results in true speculation on the conditions for access to the existing installations. In France, the abovementioned 30 May 1997 decree establishes a calculation method for the fee provided for in article L47 of the Post and Telecommunications Code, while also setting its ceiling. One might think that this account would serve as the legal basis for the calculation of the fees which private owners demand from authorised operators. The reality which we see is very different, however, since the fees charged (without taking into account any possible compensation for damages caused to the occupied dependencies) are sometimes 4 to 5 times greater than the amount provided for in the 30 May 1997 decree, whereas the actual price of the generally occupied agricultural land is in the area of 6 to 8 francs. Observations of a

similar nature can be made for Holland, where there is a comparable mechanism to limit the public fees, or also for Germany, where the law on telecommunications unsuccessfully provides a framework for the conditions for compensating the owner of already installed works on public property, or the owner of occupied dependencies should damage be caused to him.

The expropriation procedure available to authorised operators in Denmark or Switzerland undoubtedly provides them with more efficient protection. However, its effects must not be overestimated: we then have to deal with expropriation compensation, which can be anything up to twice as much, and for which it is almost impossible to set an average value.

2. *Fee Levels*

The very core of the problem is thus the fee levels.²¹ Determining the average price would often involve a meticulous study. It is true that the price of a plot of land can vary from one region to another, or even within a given region, on the basis of its particular characteristics. In Europe, one can obviously not pay the same price in the Friesland region of Holland, the Borinage region of Belgium, Southern Italy, and in very industrialised and highly urbanised major regions. The fees cannot be in the same amounts in the Beauce region of France as they are in the Paris region. Some factors which can have an influence on the fee levels in use can include the ease of construction, its proximity with major communications networks, its servicing conditions, and the presence of a source of water²²

²¹ Here, we are not referring to the fees paid to private owners in exchange for an easement or a right of user that they grant on their property. The fees paid in exchange for roadway permissions on the public domain generally have specific rates. In France, they are set at 0.15 francs per linear metre, per year and per artery.

²² As an illustration, see the table attached to our study published in *Communications & Strategies*, vol.36/1999 p.50). It provides a certain amount of information on the values used during expropriations for purposes of public interest in a few major departments in Northern France. It provides an initial idea of an estimated price for a plot of land according to its location and its parameters. Of course, a distinction must be made between the expropriation compensation and the easement fee, which cannot be of the same amount given that expropriation results in a transfer of property while an easement does not. An easement only imitates - and only in a very limited manner resulting in cable buried under the ground of an agricultural plot of land - the actual usage, which is never more than one of the three attributes of the right of ownership (*usus, fructus and abusus*).

C. *Additional Demands of Rights-of-Way*

The owners in question, notably public bodies, often do not hesitate to force authorised operators to carry out additional operations, some of which have no immediate relationship with the act of burying telecommunications lines. We shall see that these demands are of various kinds, and that the question of their legality arises.

1. *Diversity of the Additional Demands*

Indeed, it is not rare for additional demands to be included in the authorisation granted to a telecommunications operator. Such behaviour is most often, but not exclusively, demonstrated by public bodies.

A community can, first of all, forbid any passage on the public domain for reasons related to its conservation (jurisprudence generally has a very extensive conception of this), in order to force a passage on its private - and generally much more lucrative - domain. Let us recall that in the countries being studied, notably in Belgium, France, Italy and Switzerland, the amount of the fees received by public bodies for the use of their public domain is freely set through a joint agreement between the owner and the occupant.

The public body can demand the realisation of additional installations which correspond with public or private works which the occupant is "invited" to carry out, with or without financial compensation: water disposal canals, various roadways and networks, chambers. These works are separate from the obligations that public bodies generally impose on authorised operators and which involve restoring the roadways or works damaged or displaced due to the burial of telecommunications installations.

A relatively common situation is where a public body obliges the occupant to provide it, generally at no charge, with two or three cables (dark fibres) or telecommunications sleeves which will then be used for its own purposes or those of local public services. In the United States, for example, we come across situations where the no-charge providing of a volume of telecommunications services, in the form of telecommunications service credits, is requested of authorised operators.

Finally, it can happen that the authorisation to occupy the public domain or the private property of a public body will include precise conditions intended to protect a local or metropolitan telecommunications network, or to ensure the satisfying of general interest requirements, for example within the framework of the social policies being promoted by the local authorities. These demands are in addition to the legal obligations, notably those relating to universal service.

2. *The Legality of the Additional Demands*

There is often the question as to the legality of such demands, and also of their compliance with the customs and minimum morals which one can expect from elected representatives or local authorities.

The execution of public works, for example, generally implies a respect for the procedures for the awarding of contracts that, in Europe, are now governed by uniform procedures. It is true, however, that the costs of the requested operations often do not come close to the European thresholds, or even to the national thresholds for the application of national rules. It is nevertheless quite unusual that, while transparency and objectivity are being sought in public procedures, this type of practice is still allowed to develop.

Along these same lines, one cannot fail to be surprised to discover that the additional services provided, notably these works, are governed by very imprecise responsibility rules, in the absence of the application of the formal execution guarantees provided for both by private contract law and by public contract law. In the event of damages to a third party, one might well think that the public body remains wholly and solely responsible for such damages, being the owner of the domain where they were caused. Under these conditions, what then might be its chances of recourse against the telecommunications operator?

Even more interesting, and to a considerable degree, even more worrisome is the situation of public bodies seeking to protect a metropolitan or local network that they helped to build. This is a generalised problem that the French situation currently illustrates in a particularly significant, but by no means exclusive, manner.²³ Legislators recently made an effort to provide an appropriate solution. In France, a growing number of public bodies are currently seeking to build high-speed networks either in order to coordinate isolated local initiatives or to make up for the lacks of the on-site operators. These initiatives are multiplying particularly because, until the recent efforts of legislators, the legal and regulatory context applying to them was relatively unclear.

Given the currently applicable French jurisprudence,²⁴ a local community cannot establish an industrial or commercial activity as a public service unless

²³ Practices of a similar nature would be also found in the United States (notably in California, Arizona, Colorado or New Mexico for example).

²⁴ EC, 30 May 1930, Nevers Chamber of commerce, S.1931, III, p.73, concl. Josse, recently applied to the telecommunications sector, TA Nancy, 18 March 1999, Urban community of Greater Nancy LDPA May and June 1999. For all of these matters, see notably Marie Yvonne Benjamin, *Collectivités locales et telecommunications. Powers and obligations of* (Footnote Continued. . . .)

certain local circumstances require it. The reason for this demand is the effort to protect private initiative. Yet, the telecommunications sector is a regulated sector where access is very controlled, and wherein it has been difficult to invoke the principle of the freedom of commerce and industry. At the same time, national legislators have, it seems, reserved the universal service mission – at least for the time being – to the public operator, France Télécom. However, the French law of 26 July 1996 provided an imperfect synthesis between the traditional notion of a public service and the newer notion – for France – of a universal service.²⁵

Notwithstanding the above, however, these two notions are different and not interchangeable. A universal service (minimum service) is not a public service; it can eventually lead to a taking into account of the emergence of a special local requirement without necessarily considering that there is any threat to the principles of a universal service. On top of this is the fact that the providing of bare non-activated fibres does not require any authorisation pursuant to the provisions in effect throughout France, which were themselves largely inspired by European texts.

The result is that questions surrounding the problem of the legality of the actions of communities in the telecommunications domain, i.e. building or having high-speed infrastructures built without directly operating them, have been asked in France in terms that do not immediately permit definitive solutions to be given. In this context, local communities were actively encouraged to impose the no-charge installation and making available of bare fibres on authorised operators. These fibres were drawn from those that the occupants were authorised to install as a result of the rights-of-way that had been granted to them. They were reserved for the exclusive use of the owning community. As a general rule, authorised operators preferred providing this type of payment in kind for their rights-of-way, rather than have their projects delayed.

It was in this spirit that French legislators wished to provide a framework for the initiatives of local communities in the telecommunications sector. The result was the law of 25 June 1999,²⁶ which added to the General Code of

the communities, DA June 1999, p. 8. *See also* Katia Duhamel, *Les collectivités locales et les télécommunications, Initiatives, droit et contrats*, Editions locales de France and Imprimerie Nationale Editions, Paris, 1999, Preface by Bruno Lasserre.

²⁵ Article 8 of the telecommunications regulatory law (LRT).

²⁶ Orientation law n° 99-533 of 25 June for the fitting out and lasting development of the territory and modifying the orientation law n° 95-115 of 4 February 1995 for the fitting out and development of the territory (OGFR 29 June 1999, p. 9515).

Territorial Communities a new article L1511-6 of the General Code of Territorial Communities,²⁷ It is significant that, in this article, legislators felt it necessary to include the following stipulation: “It (i.e. the making available of high speed telecommunications networks built on the initiative of local communities) must not hinder the rights of way which authorised operators are entitled to obtain.”

IV. Should Rights of Way be Considered to be “Essential Facilities” Under European Union Competition Law?

Given the preceding exegesis, the one remaining question is whether or not rights-of-way should be considered to be “essential facilities” under European Union competition law and therefore subject to additional government remediation? Of American origin, the theory of essential facilities is not, properly speaking, a rule or even a legal concept stemming from competition law, but is rather “a natural extension of the application of the abuse of a dominant position.”²⁸ It has been progressively imported by most European legal systems,²⁹ with both the Commission and the Court of Justice of the European Communities having also made it into an official application in their turn.³⁰ The implementation of the theory of essential facilities, which is becoming an automatic reflex of regulators, is nevertheless subject, within the logical framework of the first jurisprudential decisions

²⁷ “Territorial communities or public establishments for local cooperation having benefited from a transfer of skills for this purpose can, provided that the offer of services or high speed telecommunications networks which they are requesting is not provided at an affordable price by participants in the market or does not meet the technical or quality demands which they are expecting, create infrastructures intended to support telecommunications news as understood by article L32 of the Post and Telecommunications code in order to make them available to the operators of telecommunications networks holding an authorisation provided pursuant to article L33-1 of the Post and Telecommunications Code and making such a request. These communities cannot carry out the activities of an operator as understood by article L32 of the Post and Telecommunications Code. The said availability will be provided by contractual means under objective, transparent and non-discriminatory conditions, and at a cost which ensures the coverage of the costs corresponding with this availability (...).”

²⁸ Mélanie Thill-Tayara and Cyrille Couadou, “Le droit d’accès à l’épreuve de la théorie des installations essentielles” *Contrats, Concurrence et Consommation*, Editions du Jurisclasseur, May 1999, p.4.

²⁹ See notably the Conseil de la concurrence, Dec.n°96-D-51, 3 September 1996, Heli-Inter, BOCCRF, 8 January 1997, p.3 and more recently, CA Paris, 1^{ère} Ch. A, 1 September 1998, SA SFR (Société Française de Radio-téléphone) c/ France Télécom, Dalloz affaires, n°133, 8 October 1998, p.1559.

³⁰ Com. CE Dec. of 21 December 1993 n°IV/34.689, Sea Containers c/Stena Sealink, OGEC L15/8 of 18 January 1994 or more recently, the conclusions of Prosecution Counsel Jacobs in the CJEC decree of 26 November 1998, aff. C-7/97 Oscar Bronner GmbH & Co c/Mediaprint Zeitungs.

which established it in the United States,³¹ to an assessment of the special circumstances in each case. It is in fact necessary to check the conditions under which an operator is refusing access to his infrastructures in order to establish that these conditions are unreasonable, and notably to demonstrate:

- That the operator is in a monopoly situation relative to the operation of his infrastructure;
- That the infrastructure being used cannot be duplicated by his competitors, under reasonable conditions of technical or financial feasibility;
- That it is technically possible for the operator to provide access to his competitors, and is unable to provide objective justification for his refusal to grant access; and
- That the refusal results from an abuse of a dominant position, in that either, due to vertical relations, he intends to reserve access to upstream or downstream activities, or, as a result of horizontal relations, he imposes additional services in the form of auxiliary services which he ties in with the access service.

A case-by-case examination of these conditions clearly involves a precise analysis of the relevant market, which, as we saw above, it is particularly difficult to define. This minimum demand is, in particular, required in order to determine the existence of substitution solutions.

There exists, however, that the risk of too systematic an application of the essential theory, notably in the telecommunications sector and most particularly with networks, could result in a failure to recognise that telecommunications techniques are constantly evolving and, consequently, in an interruption of the movement which we see in favour of the constant innovation of techniques.³² This risk is all the more real given that the information is of private origins and nature. Under these conditions, there is no reason why we should penalise research, development, creativity and, finally, the entrepreneurial spirit. Penalising them would simply be the most certain way of discouraging them forever. One must not give any other

³¹ See notably *MCI Communications Corp. and MCI Telecommunications Corp v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983).

³² On this point, see notably the relevant observations of Béatrice Dumont in reasonable Access to Essential Facilities : an Empty Label of Competition in Information Technologies”, ENCIP, Euro CPR 1999.

understanding to the abovementioned 26 November 1998 decision by the Court of Justice of the European Communities in the previously described affair³³ of *Oscar Bronner vs. Mediaprint*.³⁴

We therefore see the difficulty in attempting to regulate the behaviour of a network operator on the sole basis of competition rules, and the risks that can ensue from the point-of-view of economic reasoning or public policies.

V. Conclusions

It may appear unusual that considerations relating to rights-of-way should lead to the theory of essential facilities. And yet, there is a real – if not immediate – link between the two notions. Access to rights-of-way is the leading condition for the development of competing infrastructures that are adapted to the needs of the information society. However, this development is itself the true guarantee of the respect for the rights-of-way of infrastructures, without which the policies for the liberalisation of telecommunications activities implemented since the mid-1980s lose their primary purpose. Not granting rights-of-way to property thus runs the risk of boxing regulators into a dilemma: that of choosing between innovation and the right of access. This is so even though innovation and the right of access should go hand-in-hand, with innovation guaranteeing the right of access that, in its turn, is the leading condition for the development of innovation. The debate on the theory of essential installations has begun to show how this dilemma presents a vicious circle.

How does one get out of it?

It would be wrong, in my view, to take the applicable texts and attempt to reform them. Despite their insufficiencies, however, they provide a legal basis which one can consider, in general, as being of fairly good quality. Their diversity is inherent to the differing legal traditions in each respective European Union Member State, and it would seem difficult to attempt to circumvent this by striving to find uniform procedures, notably on the Community level. This solution, were it to take the form of a European Community Directive, would, moreover, run up against the provisions of article 295 of the Amsterdam Treaty, which assigns the jurisdiction of the

³³ See note 30 *supra*.

³⁴ For an excellent summary of both the European and US approaches to the “essential facilities” doctrine and the *Bronner* case in particular, see PHOENIX CENTER POLICY PAPER NO. 5: *Does the European Commission’s Telecommunications Access Notice Send the Correct Economic Signals to the Market?* (January 1999) (<http://www.phoenix-center.org/pcpp/PCPP5Final.pdf>).

Member States for anything having to do with the “property rules” applicable in their respective national territories.

At the most, we can note that each of the previously described systems contains a solution which might be transposed to the other, or wherein one might find inspiration in an effort to correct one’s own imperfections. These were mentioned in passing. Furthermore, the problems encountered are often identical from one Member State to the next. Despite that, each one strives to come up with national solutions, whereas a collective reflection would allow for such solutions to be prepared under much better conditions. It is odd that, on this matter, at least, exchanges between the various Member States are very few, with each legislator or regulatory authority seeming to act on the basis of his own national criteria. European Community bodies, or even competent international organisations, could certainly play the role of a forum, by hosing periodic meetings, a conference, committees of experts or workshops on this topic, which, despite its importance, seems to have been much ignored up to the present time. Both the University and research doubtlessly also have a role to play in this area.

On the other hand, it seems indispensable for the previously described procedures and practices to be “moralised,” not so as to limit contractual freedom or ownership rights – both of which must be recognised and given strong protection – but in order to avoid the “wheeling and dealing” which we have identified. Such practices are often at the limits of legality. Can we leave this up to the exclusive authority of ordinary jurisdictions, hoping that they will be brought to litigation?³⁵ It would seem not.

In the absence of precise rules, the partners in place need guidelines that should be adopted with them, and at their initiative if possible, in order to ensure better efficiency of application after a conference that would bring them together. It is thus odd to see that the Commission of the European Communities felt it necessary – and correctly so – to produce a communication on the application of competition rules to access agreements in the telecommunications sector, even though the questions relative to rights of way and rights of access to property have not yet captured its attention. We are surprised to see that the same is true in the United States, for the previously described reasons that limit the jurisdiction of the federal authorities while establishing the jurisdiction of local authorities. It is true that, in that case, the preoccupations are different and that the practices described above do not all relate to competition law. In both cases, however,

³⁵ Litigation that could, also, prove very improbable, as the operators often prefer to pay a heavy price in order to obtain their rights of way.

the same need exists for a framework that will take in these practices. It is not excluded that some of the preceding considerations might justify an updating of the previously mentioned European Commission communication.

These guidelines, relative to the application of national rules to rights-of-way in the telecommunications sector, could notably:

- Provide uniform definitions of rights-of-way (right of user and occupation right) and of its ensuring powers;
- Encourage the various Member States to adopt complete regulations in this domain while distinguishing, insofar as necessary, rights-of-way on public property from rights-of-way on private property;
- Outline principles pertaining to agreements signed either with public owners or with private owners (procedure, fees, compensation);
- Link rights-of-way with the right of access, by listing the minimum necessary protections which the authorised operators should be able to enjoy; and
- Recall that competition rules can be found to apply to agreements involving rights of way.

One can even hope that the preceding proposals might find an echo on the other side of the Atlantic Ocean, where we will be surprised to discover comparable preoccupations and, most likely, a very great degree of shared interest in the question of rights-of-way in the telecommunications sector, and in the conditions for its implementation. The time has thus come to remove rights-of-way from the trenches into which we had thoughtlessly buried it, with an accompanying shovel-full of dirt thrown on top of it together with a prudish veil over the resulting practices.