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Does the European Commission's Telecommunications Access Notice Send the Correct Economic Signals to the Market?

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Does the European Commission's Telecommunications Access Notice Send the Correct Economic Signals to the Market?

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I. Introduction and Basic EU Legal Principles

The European Commission's final release of the Telecommunications Access Notice[1] gives an opportunity to examine the policy of the EU competition enforcement officials (DG IV) in markets involving rapid technological change. The Access Notice should be considered as a statement of policy regarding telecommunications competition law in the EU. As the European Commission has a great deal of discretion as to what complaints to accept or what investigations to launch, the practical effect of the Notice is great. Complainants and targets of investigations are likely to quote the Notice in support of positions. EU law practitioners should therefore be familiar with the Notice and the principles behind it. For non-EU practitioners, the Access Notice should be interesting from a comparative basis and as an introduction to EU institutions and legal principles, with a focus on EU competition law policy.

For readers not familiar with EU law and institutions, a brief introduction to may be necessary at this point. The EU government is complex, as are the procedures for legislation and administration. Although strictly speaking, the EU is not a federal organization, it does bear comparison with federal structures. The EU began its life as a customs union, specifically the European Communities, named after the plural treaty-based organizations represented: the European Coal and Steel Community, EURATOM, and the European Economic Community. Although EU law does not cover such important matters as

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1 Notice on the Applications of the Competition Rules to Access Agreements in the Telecommunications Sector, Framework, Relevant Markets and Principles, 31 March 1998, 1998 O.J. (C 265) 2, [hereinafter Access Notice].

criminal law and most taxation issues, in areas it does address, EU law is supreme over national law. At the top of EU institutions is the Council of Ministers, made up of representatives from Member States ministries, depending on the subject matter under consideration. The administration of the EU is entrusted to the European Commission, with a president and twenty divisions, or directorates general (DG), dealing with different subject matters. DG IV is the bureau within the European Commission responsible for enforcement of the EU's competition policy, including approval of mergers. DG IV may be considered roughly comparable to the Antitrust Division of the US Department of Justice.

In a nutshell, the basic EU competition law is found in the Treaty of Rome, Articles 85,[2] roughly equivalent to Section One of the US Sherman Act, and 86,[3] equivalent to Section Two of the Sherman Act. The Treaty of Rome can be considered the constitution of the European Communities, later popularly known as the European Union. Rather than a rule of reason, the European Community adopted a notification procedure whereby agreements that arguably fell within the prohibitions of Article 85 could be notified to the European Commission and receive an exemption under the terms of Article 85(3). Although European Community competition law is not considered criminal in nature, fines up to 10% of firms' worldwide turnover may be imposed by the Commission for violations. Anticompetitive agreements that have been formally notified to the Commission via Form A/B may not be fined. Form C/O is used to notify mergers to the European Commission, with a procedure roughly equivalent to the Hart, Scott, Rodino Act. The usual practice of DG IV is to issue few exemptions in response to formally notified agreements, but rather, when it wishes to approve an agreement, to send a comfort letter indicating that the Commission will not take action against the possibly anticompetitive agreement.

Treaty Article 86 forbids the abuse of a dominant position[4] and contains a non-exhaustive list of actions that would constitute an abuse of a dominant position, including imposing unfair purchase or selling prices, limiting

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2 EC TREATY, *supra* note 2, Article 85.

3 *Id.* Article 86.

4 *See*, Mark Naftel, *How Does One Say 'Dominance' in European?*, ANTITRUST REPORT, (October 1997); <http://www.phoenix-center.org/library/naftel_dom.doc>.

production, markets or technical development to the prejudice of consumers, tying, and discrimination.[5]

In addition to enforcement activities such as investigations and initiating litigation (resulting in Decisions that may be appealed), DG IV will occasionally issue guidelines and notices reflecting its thinking regarding competition matters. The Access Notice falls into this category – not controlling authority, but certainly persuasive, at least as far as DG IV is concerned.

Directives are the basic legislation of the EU, directing Member States to implement laws accomplishing the purpose of the directive. Directives are usually adopted through a complicated process involving the European Commission, the European Council of Ministers, and the European Parliament. The European Commission has the right to unilaterally issue directives under special circumstances such as to correct widespread competition law abuses by national monopolies.[6] European telecommunications competition was promoted by a combination of harmonization (normal) directives and Commission-issued directives.[7] The European Parliament, directly elected in EU Member States, has a role in the legislation process and also has some supervisory authority over the Commission.

There is another EU institution that must be considered – the European Court of Justice ("ECJ"). The ECJ can hear appeals from Commission action such as Commission decisions in competition matters, and also has jurisdiction for other EU matters such as disputes between Member States, cases alleging failure to properly implement EU law, and references from Member State Courts on points of EU law.

II. Introduction to the Access Notice

The Notice considers access as interconnection of networks and the ability to obtain leased lines, access to customer data or any other data, or facilities that

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5 EC Treaty, *supra* note 2, Article 86.

6 *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1992 O.J. (C 224) 1, 1 C.M.L.R. 573 [hereinafter EC TREATY], Article 90(3).

7 For a full discussion of the history of the EU's promotion of telecommunications competition, *see* Mark Naftel, *Countdown to 1998: Status of Telecommunications Competition in Europe and Comparison with United States*, 7 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1997); <http://www.law.fsu.edu/journals/transnational/issues/7-1/naft.html>.

may be necessary for a potential competitor to enter a telecommunications market.[8] If a potential service provider is refused access, there may be a remedy either through the established National Regulatory Authority (NRA), through national courts under national or EC competition law,[9] or by a complaint to the Commission.[10] The tension between Member State regulation, supposed to come from independent[11] regulators, and the centralized European Commission regulation will be interesting to observe.

According to the Notice, the Commission will "concentrate on notifications, complaints and [its] own-initiative proceedings having particular political, economic or legal significance."[12] The Commission signaled its intention to set principles by taking formal decisions for a few notifications and otherwise acting via comfort letters.[13] The Commission's assertion that access agreements notified to the NRAs might still need to be notified to the Commission14 is troubling from the standpoint of certainty and finality. In the event of Commission action, however, fines will not generally be levied for interconnection agreements notified to a NRA unless the Commission determines that a serious breach of Article 85 or Article 86 has occurred,[15] in other words the usual grounds for imposition of fines by the Commission.[16]

If there are existing proceedings on a national or European level, then the Commission has indicated that it might refrain from pursuing an investigation for a period of six months after any proceedings have commenced,[17] as was the

8 Access Notice, *supra* note 1, ¶ 1.

9 *Id.* ¶ 11.

10 *Id.* ¶ 12.

11 *Id.*

12 *Id.* ¶ 18.

13 *Id.*

14 *Id.* ¶¶ 19 and 38.

15 *Id.* ¶ 37.

16 *Id*.

17 *Id.* ¶ 30.

case in the recent fixed / mobile inquiry.[18] Interim measures, such as injunctions, may be taken by NRAs,[19] and if interim measures are not available for a complainant, the Commission may accept an immediate complaint to safeguard competitors' rights.[20]

A. *Relevant Markets*

Product Markets. Consistent with Form A / B[21] used to notify agreements under Article 85, the Commission focuses on demand substitutability when considering what constitutes a relevant product market.[22] Form A / B generally defines the relevant product market as those products considered to be substitutes by the consumer.[23] The Access Notice discounts supply substitutability as a form of potential competition useful only for determining dominance; however, it retains the test of whether a concerted price rise of five to ten percent is sustainable.[24] This test takes into account supply substitution, as a price rise will attract potential suppliers and prices will decrease as a result of their entry.[25]

The Access Notice identified two types of markets: telecommunications services, and a market of access to facilities necessary to provide telecommunications services, considered to be "information, physical network, etc."[26] The access to facilities market is stated to be most dependent on physical interconnection, allowing access to the termination points of end-users.[27] The effect of rapid technological change on product market definition is noted, and while alleged dominant operators might take comfort from this recognition, it might also lead to uncertainty as the Commission reserves the right to determine

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18 European Commission Press Release, "Commission concentrates on nine cases of mobile telephony prices" 27 July 1998, IP / 98 / 707.

19 Access Notice, *supra* note 1, ¶ 32.

20 *Id.* ¶ 33.

21 *Id.* ¶43. For Form A / B, see 1985 O.J. (L 240) 3-12.

22 *Id.* ¶ 40.

23 *Id.* ¶ 43, quoting Form A / B.

24 *Id.* ¶ 46.

25 *Id.* ¶ 41.

26 *Id.* ¶ 45.

27 *Id*.

the relevant product market on a case-by-case basis.[28] The earlier Telecoms Competition Guidelines stressed the difficulty in determining relevant product markets in the telecoms sector.[29] The growth of an alternative infrastructure might also be expected to impact access market definition.[30]

While reasonable people usually take into consideration the factors outlined above, however, the Access Notice at this point takes a rather bizarre twist. The Commission effectively asserts that *telecommunications competition itself* – manifested in the form of access to the facilities necessary to compete – constitutes a separate market.[31] This raises the question of how competition in the "competition" market will be evaluated. By number of competitors? By market shares? By retail price levels and innovative service offerings? Indicators such as falling prices are traditionally seen as evidence of a competitive market. An telecoms incumbent, however, that lowers prices might still find itself accused of predatory conduct or engaging in a price squeeze, adding legal uncertainty to the usual commercial problems in pricing decisions.

Geographic Markets. The Access Notice returned again to Form A/B for a definition of a relevant geographic market: an area in which competition conditions are sufficiently homogenous.[32] The effect of this definition may be national, given the Commission's emphasis on terms of licenses or the existence of exclusive or special rights when determining relevant geographic markets.[33] The reference to exclusive or special rights is puzzling given that the Full Competition Directive required Member States to abolish all such rights for telecoms organizations.[34] Even with Member States abolition of exclusive and special rights, the Commission indicated that the continued existence of "privileged access to facilities which cannot be duplicated, either for legal reasons or because it would cost too much" would also be considered when

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28 *Id.* ¶ 47.

29 Commission Guidelines on the Application of EC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2, ¶¶ 26 – 27.

30 Access Notice, *supra* note 1, ¶ 53.

31 *Id.* ¶ 44.

32 *Id.*¶ 54.

33 *Id.* ¶ 55.

34 Commission Directive 96/19 amending Directive 90/388, 1996 O.J. (L 74) 13, art. 2.

determining dominance.[35] Is "privileged access" a new category that the Commission has created now that exclusive and special rights have disappeared? Apparently this section refers to access to facilities such as rights of way or transmission towers. The emerging European regulatory framework states that NRAs shall encourage sharing of such facilities.[36] This might be better addressed by the NRAs, taking into account national and local conditions such as zoning and pla nning. The emphasis on cast as a factor in determining privilege also goes against the trend in competition policy of discounting capital cost as a barrier to entry.

III. DG IV´s Market Guidelines

Market determination being extremely important to application of competition law, a closer look at the Commission's policies in this area is warranted. DG IV has issued guidelines[37] designed to give some certainty regarding the criteria used by the Commission to determine relevant markets. In effect the Market Guidelines are a summary of existing tests used by the Commission and the European Court of Justice (ECJ). It is stated that the objective of "defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behavior and of preventing them from behaving independently of effective competitive pressure."[38] In actuality, shares in relevant markets are used to determine market power.

Referring to legislative definitions as contained in Forms A/B and C/O, the Market Guidelines define relevant product markets as "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] Using the same sources, the Market Guidelines give the relevant geographic market as "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the

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35 Access Notice, *supra* note 1, ¶ 74.

36 Council Directive 97/33/EC, 1997 O.J. (L 199) 32, art. 11.

37 Commission Notice of 9 December 1997 on the definition of the relevant market for the purposes of Community competition law. 1997 O.J. (C 372) 5, [hereinafter Market Guidelines].

38 *Id.* ¶ 2.

39 *Id.* ¶ 7.

conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas."[40]

By calculating a firm's (or that of group of undertakings involved in a proposed concentration) composite share of the relevant market – the share of the relevant product market in the relevant geographic market – the Commission asserts that a determination of dominance may be determined. On occasion, it may consider other factors as well.

Under the Community's competition policy, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Such a position would usually arise when a firm or group of firms would account for a large share of the supply in any given market, provided that other factors analyzed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.[41]

While the Commission recognized that constraints on a firm's market independence can consist of "demand substitutability, supply substitutability and potential competition"[42], it indicated that demand substitutability is the main factor to consider when determining relevant product markets. "Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers."[43] Demand substitutability is determined by what products or services consumers consider effective substitutes. Effective substitutes are in turn determined by hypothetical price increases, that is "postulating a hypothetical small, non-transitory change in relative prices and evaluating the likely reactions of customers to that increase."[44] In practice, this test proposes a hypothetical price increase of five to ten percent. If in response to this price increase, customers would change to

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40 *Id.* ¶ 8.

41 *Id.* ¶ 10.

42 *Id.* ¶ 13.

43 *Id.*

44 *Id.* ¶ 15.

other products or services such that it was unprofitable for the firm due to lost sales, then those products or services so substituted should be included in the relevant product market. The same is true for the relevant geographic market determination: if customers can substitute products or services from another area, then that area should be included in the relevant geographic market. "[A]dditional products and areas will be included into or excluded from the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term."[45] As an example, the Commission cited the soft drinks market, an example rooted in the reality of the *Perrier*[46] decision.

Although a preference seems to be expressed for demand substitution, the Market Guidelines acknowledge that supply side substitution could also be a factor, at least when price changes can attract entrants to the market in the short-term (short-term is not specifically defined here, but this period is defined as a term of one year under the remarkably similar US Department of Justice Merger Guidelines). As an example of supply side substitution, the Guidelines give the case of paper, where it is relatively easy to switch production between various grades of quality of paper, presumably in response to changes in price of the finished product.

The Commission asserts that potential competition cannot properly be taken into account when evaluating the current state of competition, since that would go beyond the scope of current market definition.[47] If a supply side competition test is conducted adequately, it might capture potential entrants anyway.

Pricing differences and existing market shares in a particular region or area are important in helping the Commission to determine the proper geographic market.[48] Barriers to entry will also be considered.

> This analysis will include an examination of requirements for a local presence in order to sell in that area, the conditions of access to distribution channels, costs associated with setting up a distribution network, and the existence or absence of regulatory

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45 *Id.* ¶ 17.

46 Apollinaris/Schweppes (M.093), 24 June 1991, 1991 O.J. (C 203) 14.

47 Market Guidelines, *supra* note 37, ¶ 24.

48 *Id.* ¶ 28.

> barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorisations, packaging regulations, etc... In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.[49]

Transport costs are also mentioned as a specific item to take into account.[50] Evidence of market integration, that is the success of breaking down of national markets and the development of the single market, is another factor.

When gathering evidence, the Commission may question competitors, customers and upstream suppliers in order to ascertain the proper product and geographic markets.[51] Such evidence should provide information regarding possible substitutes by showing such things as "functional interchangeability or similarity in characteristics"[52] though other factors regarding substitutability may be important. Historic market data may be available to show effective substitution. The Commission considers market research studies of customer preferences to be useful also, but stated that consumer surveys carried out in the course of Commission proceedings (a notification) would be "scrutinized with utmost care."[53] There might be barriers to effective substitution in the form of regulation, cost of capital investment and retooling or the fear of dealing with an unknown supplier. Relevant product markets might be narrowed in the face of a demonstration that a specific category of customers exists.[54] This designation of customer category markets might be useful if a firm allegedly dominant in some markets attempts to meet competition for a certain class of customers, for example large corporate customers for telecoms service.

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49 *Id.* ¶ 30.

50 *Id.* ¶ 31.

51 *Id.* ¶¶ 33-34.

52 *Id.* ¶ 36.

53 *Id.* ¶ 41.

54 *Id.* ¶ 43.

Similar factors are listed to assist in determination of the relevant geographic market. "Past evidence of diversion of orders to other areas"[55] might call for inclusion of those other geographic areas within the designation of the relevant geographic market. There may also be national preferences, language barriers or the need for a local presence that calls for a particular geographic designation.[56] Other possible factors to weigh include the views of customers and competitors, the current geographic pattern of purchases, trade flows, and the existence of any switching barriers such as transport costs.[57] The resultant relevant geographic market can vary from a purely local market to a global one.

Once the relevant product and geographic markets have been determined, it should be easy to determine market shares, but there is still the matter to consider of how shares and the total market itself should be measured. The Guidelines propose that total sales of the relevant products in the relevant geographic market be used to determine shares,[58] with a preference expressed for "value shares" (presumably expressed in monetary terms) over "volume shares".[59] On occasion, the Commission might use other measures such as "capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining."[60]

Finally, The Guidelines stress that there may be special conditions in certain markets that may call for other methods to determine relevant markets. For example, primary and secondary markets involving such items as replacement parts or where compatibility with other products is a consideration.[61] The Commission stated that the evidence it uses to make decisions concerning relevant markets would likely vary from case to case.[62]

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55 *Id.* ¶ 45.

56 *Id.* ¶ 46.

57 *Id.* ¶¶ 47-50.

58 *Id.* ¶ 53.

59 *Id.* ¶ 55.

60 *Id*. ¶ 54.

61 *Id.* ¶¶ 56-58.

62 *Id.* ¶ 25.

IV. EU Concept of Dominance

Part III of the Access Notice speaks to principles, specifically competition law principles considered in the context of telecommunications competition and regulation.[63] The Commission states that it will try to recognize and build on the principles included in the ONP harmonization directives,[64] the EU telecoms regulatory framework. Universal service is recognized as possibly justifying non-application of competition rules under the principles of Article 90(2).[65] The accompanying reference to the telecoms competition directives, effectively abolishing all special and exclusive rights, issued under the Commission's Article 90 authority, makes it difficult to envision an acceptable application of Article 90 monopoly rights in telecommunications.

Dominance, in the form of controlling access to facilities, will be monitored closely by the Commission, and the fact that competition is legal will not automatically mean an entity is no longer dominant.[66] Market share in terms of turnover and comparative numbers of customers will be used to assist the Commission in determining whether a particular undertaking is dominant.[67] A fifty- percent or greater market share may demonstrate dominance, but other factors, including the existence of alternative networks, will be considered when determining whether dominance exists.[68]

The Commission also indicates that it will rely on the rationale of the *Tetra Pak*[69] judgment when determining dominance. *Tetra Pak* declared that the concept of dominance extends to markets where the firm is not dominant by finding "close links between the dominated and non-dominated market."[70] The finding of the ECJ that dominance can extend into a market where a firm is not

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63 Access Notice, *supra* note 1, ¶ 57.

64 *Id.* ¶ 58.

65 *Id.* ¶ 59.

66 *Id.* ¶ 64. *See also* Case C-392/93, The Queen v. H. M. Treasury, ex parte British Telecommunications plc, [1996] E.C.R. I-1631.

67 Access Notice, *supra* note 1, ¶¶ 70 and 72.

68 *Id.* ¶ 73.

69 Case C/333/94 P, Tetra Pak International SA v Commission, 1996 E.C.R. I-5951.

70 Access Notice, *supra* note 1, ¶ 65.

dominant, so as to condemn conduct on the non-dominated market, is very troubling. There was no proof that Tetra Pak was improperly leveraging its dominant position in one market to gain an advantage in another market. If there are anticompetitive effects in associated markets, the usual concepts of tying or anticompetitive leverage might be better applied than this amorphous concept of neighboring markets.

The *Tetra Pak* judgment questions all conduct by firms deemed dominant in a single market designed to exclude or eliminate competitors in any relevant market (at least where it is possible to claim associated links between the market in question and the market where the firm is dominant – in other words, all markets the dominant firm is involved with). Competition law and policy, however, should encourage legitimate exclusionary conduct by competitors. The very nature of competition is to win in the market and thereby eliminate one's competitors.[71] Punishing legitimate competition can only lead to less competition and therefore higher prices for consumers, less technical innovation, and less choice. A more rational competition law policy is clearly in order. It is unfortunate that in its Access Notice the Commission adopted the flawed reasoning of the *Tetra Pak* judgment with regard of finding dominance. Perhaps experience will demonstrate to the Commission the folly of restricting competition by handicapping any competitors considered dominant in associated markets. If it is EU policy to subsidize inefficient firms, it would be more transparent to do so via state aids, than by punishing effective competitors. Under the neighboring markets rationale, it is difficult to imagine traditional telcos ever escaping from the dominant label, no matter how much competition develops in specific markets such as business, international calls, mobile, or Internet provision.

The Commission may measure market power by considering the sales of a particular undertaking compared with the total sales of the party requesting access.[72] This will consistently tilt the legal scales in favor of small providers. Calculation of these amounts will also require separating the functions of conveyance of telecommunications services and the provision of these services to end-users.

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[71] Valentine Korah, *Tetra Pak II – Lack of Reasoning in Court's Judgment*, 2 ECLR 98, 101 (1997).

[72] Access Notice, *supra* note 1, ¶ 72.

While anticompetitive agreements could alone be sanctioned under Article 85, the Notice also asserts that firms acting together, possibly under interconnection agreements,[73] or singly, so that both exercised a monopoly over access to essential facilities, joint dominance would be found. If, for example, a traditional telephone company and a cable TV network provider were to together control the only effective means of accessing end users, they might be considered as jointly dominant.[74]

Because of the current reality of availability of alternative infrastructure and service providers, the assumption of the Access Notice that dominance can be assumed for each geographic market is fundamentally flawed. As dense coverage of alternative infrastructure is currently available in some geographic markets, and will grow in all geographic markets in the future, a more flexible approach is in order. With telecommunications technology continuing its rapid development, the growth of commercially feasible alternatives should also continue, eroding further any credible assertions of dominance – that is the ability to act independently of the market. The Access Notice itself indicated that factors other than market share, including the existence of alternative networks, would be considered when determining whether dominance exists in a telecoms market.[75]

DG IV's proposed Article 90 Directive in the area of joint ownership of telecommunications and cable TV networks[76] gives further concern over Commission use of the terms "exclusive and special rights." With the abolition of all such rights in telecommunications, it would seem a logical conclusion that they do not exist. Nevertheless, DG IV asserts that the historic grant of rights in such areas as mobile telephone frequencies continue to give exclusive and special rights. This position is questionable, particularly since historic mobile license grants to (former) monopoly providers have been required to be equalized by retroactive assessment of fees equal to the license fees paid by new entrants.

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73 *Id.* ¶ 79.

74 *Id.* ¶ 80.

75 *Id.* ¶ 63.

76 Draft Commission Directive amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, 1998 O.J. (C 71) 23.

V. Essential Facilities

A. *The Notice's Concept of the Essential Facilities Doctrine*

The Notice indicated that the Commission will rely heavily on the essential facilities doctrine to determine the duties of a dominant telecommunications firm.[77] The concept of essential facilities was imported into European competition law from US antitrust law[78] and remains a controversial position. It is debatable whether the essential facilities doctrine, named as such, is even a part of EU law.

The Commission's Access Notice accepts the basics of the US law of essential facilities as expressed in the *MCI* case, but goes further: if a monopolist possesses an essential facility, it must provide these facilities to competitors at its own "price," not necessarily the usual retail price it charges on the open market.[79] It

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[77] Access Notice, *supra* note 1, ¶ 68. Essential facility is defined as "a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be replicated by any reasonable means." *Id.* The Commission also quotes from the WTO Telecoms Treaty Reference Paper (included in the European Communities' commitment) definition: "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." *Id.* n. 56.

[78] The US essential facilities test was summarized in *MCI v. AT&T*, a case instrumental in opening the AT&T monopoly to competition, as follows:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. MCI Communications v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[79] Access Notice, *supra* note 1, ¶¶ 86 and 104. This burden is not imposed under US law. In Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539 (4th Cir. 1991), the Court accepted, for purposes of its analysis, plaintiff's allegations that the defendant railroad was a monopolist in control of an essential facility, thereby fulfilling the first requirement of the four-part essential facilities test. *Id.* at 544 (citing MCI Communications v. AT&T, 708 F.2d 1081 at 1132-33). However, the Court held that plaintiff could not meet the remaining three requirements. *Id.* Plaintiff "failed to show that it could not reasonably duplicate or pursue a reasonable alternative to the essential facility. *Id.* The Court found that alternatives might exist, including building other facilities (the Court admitted that this would be economically impractical), or purchasing service at the rates the railroad requested (a standard rate that included profit). *Id.* Plaintiff contended that it could not make a profit at the rate the railroad requested. *Id.* Plaintiff's desire for a more favorable rate did not mean that the railroad's price was unreasonable. *Id.* at 545. This was true even though plaintiff

(Footnote Continued. . . .)

should be stressed that under the US essential facilities doctrine, even a successful claimant wins no more that the right to access the facilities at commercial (retail) prices. US antitrust law does not impose a burden of transfer prices on the alleged dominant supplier as the Commission's Access Notice would do. Certainly there is nothing in the essential facilities doctrine (as interpreted under US law) requiring a supply at cost represented by what a firm might in essence "charge" itself.

B. *EU Law of Essential Facilities*

It should first be considered whether, properly speaking, there is a European doctrine of essential facilities. The ECJ has never used the term. However, a Commission official involved in oversight of telecommunications markets has asserted that such a doctrine does in fact exist, and under whatever name, the judgments of the ECJ indicate that supply by a dominant party can be mandated by EU competition law,[80] perhaps under the general headings of refusals to supply or interruptions in usual supply arrangements.

The leading European case on refusal of supply is *ICI v. Commission*,[81] involving a monopolist's decision to withdraw supply of an ingredient necessary to make a downstream product after the monopolist decided to enter this market itself. The argument of the Commission in that case was:

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could not profitably pay the railroad's rate. The Court held that "[t]he reasonable standard of the access factor can not be read to mean the assurance of a profit for" plaintiff. *Id.* Lastly, the Court interpreted the final requirement (the feasibility of providing the facilities) in terms of the normal business dealings of the railroad. *Id.* That is, the Court refused to intervene in the normal commercial activities of the alleged monopolist. The legitimate business reasons of the railroad, including existing sales relationships, should be considered and take precedence over a competitor's request, especially when the monopolist does not refuse the request, but only insists that its normal prices be paid. *Id.*

80 John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INT'L L.J. 437 (1994). However, as John Temple Lang states, the essential facilities doctrine "must be treated with caution, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has legitimately acquired." *Id.* at 439.

81 Joined Cases 6 and 7/73, ICI & CSC v. Commission, [1974] E.C.R. 223 [hereinafter Commercial Solvents].

> [T]here is a duty to supply at least when: the dominant company is a monopoly; the refusal affects one of the principal users, a former customer; no objective justification is apparent; and the refusal gravely affects the conditions of competition in the EC. If there is a duty to supply, there is, under Article 86 itself, a duty not to discriminate if the buyers are in competition with one another.[82]

Leaving aside the redundancy in the first part of the test ("the dominant company is a monopoly"), this is much the same as the US essential facilities test, except for the gloss as to nondiscrimination. The actual judgment stated that:

> [I]t follows that an undertaking which has a dominant position in 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.[83]

Likewise, in *United Brands v. Commission*,[84] a discontinuance of supply to a distributor in retaliation for promoting a competitor's products was condemned as an abuse of a dominant position. In other cases, notably *Magill*,[85] the ECJ has found a duty to license access to intellectual property rights. Commission decisions regarding ports and ferry service are also relevant, particularly given the Commission's reasoning in *B&I Line v. Sealink* that an operator of a port cannot give more favorable terms to its own ferry service than to its competitors.[86] *Sealink* is also an important case as it is the first decision employing the specific term "essential facilities."[87]

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82 Lang, *supra* note 89, at 445 (citing Commercial Solvents, *id.* at 250-51).

83 Commercial Solvents, *supra* note 81, at 251.

84 Case 27/76, United Brands Co. v. Commission, [1978] E.C.R. 207, 217.

85 Joined Cases C-241/91 and C-242/91, Radio Telefis Eireann v. Commission, [1995] E.C.R. I-743 [hereinafter Magill].

86 See B&I Line v. Sealink, 5 C.M.L.R. 255, 265, 266 (1992). "A company in a dominant position may not discriminate in favour of its own activities in a related market." (quoting Case C-260/89, Elliniki Radiophonia v. Commission (unreported)).

87 *Id.* at 266.

a. The Bronner Case

Bronner v. Mediaprint,[88] dealing with a competition law complaint from the Austrian newspaper market, is a timely and important case in the field of essential facilities. The following is an analysis of the Opinion of the Advocate General in the case. Although the opinions of the Advocate General have only persuasive weight in the judgments of the ECJ, this Opinion is worth a close review. It contains a through analysis of the essential facilities doctrine as applied under US antitrust law and EU Commission decisions. There is also a well-reasoned argument as to proper formulation and application of EU competition law policy. There follows an examination of the *Bronner* judgment itself.

Bronner publishes the Austrian daily newspaper *Der Standard*, with a 3.6% of the Austrian newspaper market.[89] Bronner filed a complaint against Mediaprint, accusing it of abusing its dominant position[90] by refusing to give Bronner access to Mediaprint's daily delivery system.[91] Bronner argued that access to Mediaprint's delivery system was essential for it to compete, and that Mediaprint discriminated against it by giving another competitor access.[92] Mediaprint responded that the delivery system was used for its own benefit, and that even assuming that it "is in a dominant position, it is not obliged to afford assistance to competitors."[93] Mediaprint responded to the allegations of discrimination by noting that it required the competitor to accept other services before delivering its newspapers: conditions that Bronner refused to accept.[94] In essence, Mediaprint admitted tying.

88 Case D-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs – und Zeitschriftenverlag GmbH & Co. KG and Others, Opinion of Advocate General Jacobs delivered on 28 May 1998 [hereinafter Bronner].

89 *Id.* ¶ 2.

90 *Id.* ¶ 3. Mediaprint had 46.8% of total Austrian circulation through its two newspapers.

91 *Id.* ¶ 4.

92 *Id.*

93 *Id.* ¶ 5.

94 *Id*.

Bronner's position was that under the essential facilities doctrine Mediaprint could be forced to give competitors access to delivery system as "it is a prerequisite for effective competition on the market in daily newspapers."[95] The Advocate General summarized the essential facilities doctrine as follows:

> According to that doctrine a company which has a dominant position in the provision of facilities which are essential for the supply of goods or services on another market abuses its dominant position where, without objective justification, it refuses access to those facilities. Thus in certain cases a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities which it has developed.[96]

The Opinion correctly notes that the ECJ itself has never used the words "essential facilities" in its judgments,97 but a number of cases have dealt with refusals to deal or a withdrawal of supply from competitors including *Commercial Solvents,*[98] *United Brands,*[99] *Télémarketing,*[100] and *GB-Inno-BM.*[101] The last two cases have particularly applicability to telecoms markets and were important in the Commission's liberalization of telecoms markets.

In *Télémarketing,*[102] the state television company insisted that all commercials employing a call in number must use the telephone number supplied by the television company. The television company argued that there was no abuse of a dominant position because competition had been removed in the area by law.[103] The ECJ, consistent with the provisions of Treaty Article 90, that even if a Member State removes areas from competition, Article 86 may still be applied so

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[95] *Id.* ¶ 33.

[96] *Id.* ¶ 34.

[97] *Id.* ¶ 35.

[98] Commercial Solvents, *supra* note 81.

[99] Case 27/76 United Brands v. Commission, [1978] E.C.R. 207.

[100] Case 311/84 CBEM v. CLT and IPB [1985] E.C.R. 3261.

[101] Case C-18/88 [1988] E.C.R. 6211.

[102] Case 311/84, Centre Belge d'etudes de marche – Télémarketing (CBEM) SA v. Compagnie Luxembourtgeoise de Télé diffusion SA and Information Publicité Benelux SA, [1985] E.C.R. 3261.

[103] *Id.* 3271-72.

as to sanction anticompetitive conduct. The *Télémarketing* judgment was important in DG IV's drive to liberalize the telecoms markets. The *GB-Inno-BM*[104] case involved an attempt by the Belgian PTT to continue to link the provision of telephone service to sales of telephone sets by withholding approval of sets other than those offered by the Belgian PTT. The ECJ held that the PTT acting as judge and jury of what equipment could be attached to its network amounted to an abuse of a dominant position.[105] Both *Télémarketing* and *GB-Inno-BM* can be considered as tying rather than refusal to deal cases.

The *Bronner* Opinion also considered two intellectual property cases, *Volvo v. Veng*[106] and *Magill*.[107] Community law recognizes a difference between the existence of an intellectual property right that may confer exclusivity – indeed a type of monopoly – and the exercise of that right, which may violate competition law. While the *Volvo* judgment expressed a qualified right of intellectual property right holders to refuse to deal with competitors, *Magill* held that under certain circumstances, copyright holders could be forced to license to competitors. *Magill* proves the truth of the old legal adage that bad facts make bad law. The intellectual property rights in question were no more than the copyright to television listings. When faced with a similar claim of copyright in telephone directory listings, the US Supreme Court decided that such listings were not worthy of copyright protection.[108] Unfortunately, that option was not available to the ECJ in *Magill* because, as a matter of national law, a national court had already determined that the listings were protected by copyright. The ECJ held that the exercise of the copyright had the effect of prohibiting the emergence of a new product on the market – in this case a comprehensive weekly TV guide - as opposed to the available daily listings.[109]

Magill was widely hailed as a landmark judgment, and imaginative lawyers rushed to assert sweeping claims to use competitors' property based on its

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[104] Case C-18/88 Regie des Telegraphes et des Telephones v. GB-INNO-BM S.A. [1991] E.C.R. I-5941.

[105] *Id.* at ¶ 12.

[106] Case 238/87 Volvo v. Veng [1988] E.C.R. 6211.

[107] Magill, *supra* note 85.

[108] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991).

[109] Magill, *supra* note 85, ¶ 54.

reasoning. There are indications, however, that European courts may not be as open to these arguments as the claimants might wish. The *Bronner* Opinion analyzes the recent Court of First Instance holding of *Tiercé Ladbroke*,[110] in which it was held not to be an abuse of a dominant position for the holders of exclusive rights in certain televised horse races to refuse to license the rights in Belgium. The Court noted that televised horse races were already present in Belgium and were used in the market (betting) on which claimants were active. Therefore, the television rights were not essential for competition in the relevant market, nor was the emergence of a new product prevented.[111]

The Opinion traces the essential facilities doctrine from its origins in US antitrust law to the Commission decisions supported the finding of an EU essential facilities doctrine, a position increasingly found in the national law of the Member States as well.[112] Against that line is contrasted the right of private property and contract, recognized throughout the EU and often conferred with constitutional status.[113] Given these competing considerations, the Advocate General was reluctant to interfere with the commercial decision of a firm, even a firm that is dominant in a particular market. It should be stressed that the question before the Advocate General was only a refusal to supply. There were not other factors "such as cut-off of supplies, tying of sales or discrimination between independent customers."[114] *Magill* was distinguished "by the special circumstances of that case," specifically the prevention of the emergence of a new product.[115]

Most striking is the Opinion's statements regarding competition law policy. While not specifically recommending a judgment to the effect that the essential facilities doctrine does not exist in Community Law, the Opinion expresses grave reservations about its wholesale application. First, the Opinion recommends that courts should be extremely careful about interfering with commercial decisions regarding the identity of one's trading partners.[116] Generally, a firm can sell to

[110] Case T-504/93 Tiercé Ladbroke v. Commission, [1997] E.C.R. II-923; appeal pending (Case C-300/97 P).

[111] *Id.* ¶ 131.

[112] Bronner, *supra* note 88, ¶ 53.

[113] *Id.* ¶ 56.

[114] *Id.* ¶ 54.

[115] *Id.* ¶ 63.

[116] *Id.* ¶ 56.

whomever it wishes. Furthermore, the facilities in question may be the result of substantial investment. Habitually compelling competitor access to facilities created only with considerable effort and expense will not create incentives for such efforts in the future.[117] Likewise, the Access Notice notes the importance of maintaining proper incentives for all, including incumbent telcos, to enjoy the fruit of investments as new products or services are introduced.[118]

Second, the effects of forcing a firm to supply its competitors should be considered:

> In the long term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduce in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.[119]

The problem of whether telecommunications competition law and regulatory policy should favor creation of alternative infrastructure or force the allowance of competitor access to facilities such as local telephone loops is a pressing issue in the EU. The EU regulatory framework recognized that apart from interconnection, access to a limited number of telecoms facilities such as the purchase of leased lines, and special network access (generally interpreted to mean enhanced service provision by competitors), regulators in Member States were free to set their own policy as to whether to encourage alternative infrastructure or to mandate local loop unbundling.

Although the basic principle of ONP (open network provision) is unbundling of telecoms network elements, there is now consensus that the

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117 *Id.* ¶ 62.

118 Access Notice, *supra* note 1, ¶ 91.

119 Bronner, *supra* note 88, ¶ 57.

ONP directives do not require unbundling of the local loop. The Commission itself stated that:

> Again, in the telecommunications sector, Community policy does not require a full unbundling of the local loop, or a structural separation of the associated infrastructure, from the provision of services carried over it. This does not exclude appropriate safeguards or requirements being introduced under competition rules. In reality, the issue of unbundling of the local end of transmission networks is complex and must be closely linked to the degree of overall competition in the market concerned; the availability of viable alternative distribution channels and the starting point for competition in the particular market. Some argue that unbundling may act against the consumer interest in the longer term by removing economic incentives for organisations to put their own wired or wireless networks in place.[120]

Several Member States, notably the UK, adopted a policy similar to that espoused in the *Bronner* Opinion: that in the long run competition is best promoted by competitor independence. Currently there is a contrary trend towards the encouragement of immediate competitor entrance as expressed in the Access Notice and with national regulators mandating local loop unbundling. As of September 1998, Austria, Denmark, Finland, Germany and The Netherlands require some form of local loop unbundling.

The third prong of the assessment portion of the *Bronner* Opinion constitutes a ringing declaration that consumer welfare should be the touchstone of proper competition law policy. "[T]he primary purpose of Article 86 is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors."[121] Furthermore, the Opinion reasons that the proper focus should be on the state of competition in the downstream market rather than in the upstream market, where the dominant firm might control access to raw materials. If there is sufficient competition, perhaps through available substitutes, in the downstream

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[120] Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, Towards an Information Society Approach, COM (97) 623, IV.2.3.

[121] Bronner, *supra* note 88, ¶ 58.

market, then it is not an abuse for the dominant firm to refuse to supply the potential downstream competitors. This goes to the heart of what competition law is all about. If consumers are not suffering because there is adequate competition, why should the law care whether the request a particular competitor for access to raw materials is met? The key here may be the assessment of adequate competition. Presumably, if the benefits of competition in the downstream market exist, and an essential facility upstream is alleged, then the facility is not really essential, substitutes are readily available in the downstream market, or the market is relatively easy to enter. Interestingly, the Access Notice itself, while still regrettably failing to distinguish competition and the interests of competitors, at least agrees that the alleged necessity of an individual competitor for access to upstream facilites should not be sufficient to force access.122 The Opinion also stresses that the essential needs of all competitors, rather than one that might not be able to duplicate the facilites in question should be deteminative.[123]

Also of interest is a comparison between the position of the Access Notice and the *Bronner* Opinion regarding division of upstream and downstream markets. The Access Notice considers there is a division of upstream (telecom facilities) and downstream (telecom services) markets.[124] On the other hand, the *Bronner* Opinion (quoting the Opinion of the Advocate General in *Commercial Solvents*), questioned whether consideration of positions on an upstream market is relevant when considering competition in a downstream market. The consumer is only interested in the end product.[125] Likewise, in telecommunications makets, consumers only care about the delivery of dial tone, not whether that dial tone is supplied by a fixed line local loop, co-axial cable, fibre rings, GSM, satellite, Internet telephony, or whatever curent or future means of delivery can be conceived and put in place by competitors.

This is not to say that the *Bronner* Opinion gives a free pass to monoply activity (as the efficiency doctrine is often mischaracterized as doing). The Advocate General stated that refusal of access may constitue an abuse "where

[122] Access Notice, *supra* note 1, ¶ 91a n. 68.

[123] Bronner, *supra* note 88, ¶ 65.

[124] Access Notice, *supra* note 1, ¶ 45.

[125] Bronner, *supra* note 88, ¶ 59.

access to a facility is a precondition for competition on a related market for goods or service for which there is a limited degree of interchangeability."[126] That is, the essential facilities doctrine should be reserved for exceptional cases, as most commentators recognize. The *Bronner* Opinion would put an end to the tendency to promote the essential facilities doctrine from a remedy of last resort to the prevailing policy of competition law.

The Opinion draws a distinction between the exercise of intellectual property rights, which presumably are of a limited duration in time, and monopolies that might be expected to be of such duration as to be considered as permanent.[127] If the cost of duplicating the facilities in question is prohibitive for all potential competitors, then the Opinion asserts that access might be mandated as then there might exist an insurmountable barrier to entry. Whatever the alleged barriers, however, they must grant the dominant firm "a genuine stranglehold on the related market."[128] In markets of rapid technological progress like telecommunications, such strangleholds should be rare.

With these considerations in mind, there is no surprise in the Advocate General's recommendation that the alleged dominant firm, Mediaprint, did not have an obligation to allow Bronner access to its home delivery network.[129] Alternative, "albeit less convenient"[130] means of distribution were available. Nor was the substantial investment needed for nation-wide home delivery seen as dispositive. If Bronner wished to compete on equal terms with Mediaprint, then it might be necessary to make the investments required of a paper with a large circulation. The fact that Bronner was enjoying substantial growth in circulation was also seen as proof that access to Mediaprint's network was not so essential after all.[131] Most importantly, the Advocate General was not willing to put the EU on a path that would lead to detailed regulation of markets throughout Europe, including regulation of prices and conditions of supply.[132] Given the

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[126] *Id* ¶ 59.

[127] *Id* ¶ 64.

[128] *Id* ¶ 65.

[129] *Id* ¶ 66.

[130] *Id* ¶ 67.

[131] *Id*.

[132] *Id* ¶ 69.

Commission's regulatory creep towards total regulation of telecoms markets, such fears are not misplaced.[133]

The *Bronner* Judgment[134] was not as long or comprehensive as the Advocate General's Opinion. It can be viewed as an endorsement of the Advocate General's Opinion, but given the consensus nature of the ECJ's judgments (the language of the judgments must be unanimously agreed upon), it is not surprising that the Judgment is rather terse and cryptic at times.

The Court first considered a jurisdictional question: whether the Austrian Court properly referred the case to the ECJ for resolution of EU legal questions. Mediaprint and the EU Commission both argued that Austrian law alone should have disposed of the legal issues involved in the case and that the dispute did not affect trade among the Member States of the EU as required for Treaty Article 86 to apply. The ECJ replied that it was for the Member State referring court itself to gauge whether a question of European law was involved so as to refer the matter to the ECJ under Treaty Article 177. [135] The question of the potential affect on trade between Member States was considered a factual matter, presumably to be disposed of by the Austrian Court in any subsequent trial.[136]

The Court than moves to consideration of the main question, whether the holder of a large market share for daily newspapers and possessing the only home delivery network violates Article 86 (abuse of a dominant position) by refusing to grant a rival access to this network.[137] For the analysis to proceed, relevant markets must be defined. Bronner argued that separate markets existed for Austrian newspapers themselves and the service of home delivery.[138] According to Bronner, the existence of separate markets was proved by the fact

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133 The Commission's movement towards micromanagement of the telecoms market can be demonstrated by the intervention in such matters as prices for mobile licenses charged by the member States, interconnection pricing, and settlement rates for termination of international traffic

134 Case C-7/97 Oscar Bronner GmbH & Co. KG v Meida Zeitungs – und Zeitschrifenverlag GmbH & Co. KG, [1998] E.C.R. _____, [hereinafter Bronner Judgment].

135 *Id.* ¶ 16.

136 *Id.* ¶ 21.

137 *Id.* ¶ 23.

138 *Id.* ¶ 24.

that delivery was requested and offered separately from the newspaper itself.[139] Certainly Bronner requested delivery separately from the Mediaprint, but I fail to grasp how an end buyer could request delivery without a newspaper to be delivered. However, the Court does not deal fully with the issue of market definition at this point, instead in the same paragraph, the Judgment considers the allegation that the delivery network constitutes an essential facility.[140] The Court places the phrase "essential facilities" within quotation marks, so it is still uncertain whether the ECJ accepts the doctrine as such. Bronner asserted that the doctrine as established under *Magill* first dictated that "the service performed by placing a facility at the disposal of others and that supplied by using that facility in principle constitute separate markets."[141] It then followed that the holder of an essential facility was "obliged to allow access to the scheme by competing products on market conditions and at market prices."[142] Bronner also pled the more classic refusal to supply case, *Commercial Solvents*.[143]

Mediaprint responded that an obligation to supply should only be imposed in exceptional circumstances, being an interference with a firm's freedom and ability to make business decisions, including decisions as to the identity of a firm's customers.[144] *Commercial Solvents* can be distinguished in that refusals to supply are only to be condemned when such refusal has the effect of leading to an elimination of all competition in a downstream market. Mediaprint asserted that was not the case for Austrian newspapers; there are alternatives for distribution other than Mediaprint's home delivery network.[145] Even if the Court found the required "exceptional circumstances," Mediaprint argued that a dominant firm might still deny access to a competitor if such refusal could be objectively justified, for example due to lack of capacity.[146]

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139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* Note that Bronner did not claim the right to access at a price representing Mediaprint's own cost. In contrast, the Access Notice would require incumbent telcos to supply access to essential facilities at their own cost (transfer prices).

143 *Id.* ¶ 25.

144 *Id.* ¶ 26.

145 *Id.* ¶ 27.

146 *Id.* ¶ 28.

From the Judgment, it appears that the position of the Commission was that the Court needed to engage in a three-part test. First, it would need to be determined whether a separate relevant product market existed for home delivery of newspapers. The second question was whether Mediaprint was dominant in that separate market. Third would come the question of whether Mediaprint's refusal constituted an abuse of a dominant position.[147] Assuming the first two conditions were met, the Commission then would have the Court consider whether Mediaprint discriminated against Bronner, discrimination being a listed abuse according to the terms of Article 86(c).[148] As Mediaprint provided delivery services to another newspaper competitor, albeit in conjunction with printing services, the Commission did not consider that a discrimination case was made out.

At this point, rather confusingly, the ECJ returns to the question of defining the relevant market, stating that it is up to the referring national court to determine the relevant markets, and therefore whether a home delivery network constitutes a separate product market, or whether other distribution outlets are sufficiently interchangeable to be included within the relevant product market.[149] At this point, it might be expected that the ECJ would end the case by returning it to the Austrian court, but the Judgment goes on, first to state that if a separate market is found for home delivery the national court could then conclude that Mediaprint was dominant in that relevant product market, and that a geographical product market designation of Austria as a whole would constitute a substantial part of the common market, so as to invoke the terms of the Treaty Article 86.[150] This then sets the stage for a discussion of essential facilities and refusal to deal – that is, is Mediaprint's refusal to deal an abuse under Treaty Article 86.[151]

The Court read *Commercial Solvents* and *CBEM*[152] as condemning refusals to deal only when the supply "is indispensable for the activity of another

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147 *Id.* ¶ 29.

148 *Id.* ¶ 30.

149 *Id.* ¶ 34.

150 *Id.* ¶ 35-36.

151 *Id.* ¶ 37.

152 Case 311/84 CBEM v. CLT [1985] E.C.R. 3261.

undertaking in a different market."[153] *Magill* is likewise narrowly presented as a case where:

> Refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but that he exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse.[154]

The ECJ recalled that in *Magill* exceptional circumstances were found; the refusal of the holder of the intellectual property right in question (copyrighted TV listings) to license the rights prevented the emergence of a new product – weekly TV guides.[155] The Court also hints that it might restrict *Magill* to its facts – that is only to cases involving exercise of intellectual property rights.[156]

Nevertheless, the Court considers when refusal to supply could be constitute an abuse of a dominant position, and proposes a four part test. First, the refusal must "be likely to eliminate all competition"[157] in the upstream market. Second, The refusal must not be objectively justified. Third, The service or product in question must be indispensable. That is, fourth, there must be "no actual or potential substitute in existence" for the requested service or product.[158] The Court concluded that Bronner could not succeed under this criteria, even assuming there was only one home delivery network in Austria.[159] There are other methods of selling newspapers, such as sales in stores, even if these other methods are not as advantageous as home delivery.[160] Furthermore, it is not "impossible, or even unreasonably difficult," for potential competitors to set up their own competing home delivery network.[161] Technical, legal or economic barriers do not exist to the establishment of any such rival delivery system. Very

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153 Bronner Judgment, *supra* note 134, ¶ 38.

154 *Id.* ¶ 39.

155 *Id.* ¶ 40.

156 *Id.* ¶ 41.

157 *Id.*

158 *Id.*

159 *Id.* ¶ 42.

160 *Id.* ¶ 43.

161 *Id.* ¶ 44.

importantly, the Court emphasized that economies of scale alone are not enough for a plea by a smaller rival for access to the dominant providers distribution system.[162] The claimant cannot succeed by merely pointing out that its small size does not justify a nationwide delivery system. In that case, the Court would find that the dominant provider is not required to in effect subsidize the operations of the smaller competitor by allowing it to deliver newspapers through the system established by the larger firm. That is merely a benefit of size that the Court is unwilling to characterize as an abuse. The Court quoted with approval the test suggested by the Advocate General in Paragraph 68 of his opinion, that the claimant would have to demonstrate impossibility of the establishment of a competing network by showing the economic impossibility of such distribution "with a circulation comparable to that of the daily newspapers distributed by the existing scheme."[163] If a competing network is impossible with a small share of the market, but not with a large share, the competitor must then labor to raise its circulation or find other means to efficiently distribute its products. This Court refuses to give it a hand up in the marketplace.

The *Bronner* Judgment does not expressly reject or accept the essential facilities doctrine, but it does clarify the test for determining when a dominant firm's refusal to supply a rival can amount to an abuse of that dominant position. By narrowing the scope of *Magill*, the Judgment does a great service in helping to curtail the more imaginative uses some claimants have tried to bend that case to. The dose of economic reality represented by the recognition that economies of scale do not automatically mean an abuse of a dominant position is also most welcome. Unfortunately, as we shall see below, DG IV's Access Notice is not quite so favorable to economic first principles when considering access to telecommunications networks.

VI. Terms of Access

A. *Incumbent Refusal to Grant Access*

The Access Notice considers three types of refusal:[164]

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[162] *Id.* ¶ 45.

[163] *Id.* ¶ 46.

[164] Access Notice, *supra* note 1, ¶ 84.

1. Where another operator (including the incumbent) already has access to provide the service in question. This is a discrimination problem, in the absence of an objective justification.[165]

2. Where no operator has been given access to provide the service. This is a problem of essential facilities, and where capacity constraint is not a problem, then the ability to give an objective justification for refusal is doubtful.[166] Access to upstream network services may be of key importance.[167]

3. There is a final category of refusal of access. That is where access is withdrawn. This will be analyzed similarly to refusals to supply. "Withdrawal of access from an existing customer will usually be abusive."[168]

The Access Notice statement that "In particular, a company may abuse its dominant position if by its actions it prevents the emergence of a new product or service"[169] is particularly interesting. This means that if an operator does nothing and does not offer a new service itself, thereby preventing the benefits of the new service from reaching the market, the case for mandating access is strengthened. This is entirely consistent with principles of promoting consumer choice and technical progress. Indeed, the Treaty Article 86 lists as a specific abuse of dominant position, "limiting production, markets or technical development to the prejudice of consumers."[170]

To analyze refusals of access, it is necessary to start with identifying relevant markets.[171] The Commission's analysis of what circumstances justify mandating access is worth examining in depth:

1. It must be shown that access is truly essential; that is the service would be either impossible of seriously uneconomic to provide without access.

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165 *Id.* ¶ 85.

166 *Id.* ¶ 87.

167 *Id.* ¶ 89.

168 *Id.* ¶ 100.

169 *Id.* ¶ 90.

170 EC TREATY, *supra* note 2, Article 86(b).

171 Access Notice, *supra* note 1, ¶ 91.

2. There must be sufficient available capacity.

3. "[T]he 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."[172]

4. The requesting party must be willing to pay a reasonable price and abide by non-discriminatory terms.

There is no objective justification for refusing access such as technical difficulties. It is also stated that an acceptable justification for refusal includes "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."[173]

Therefore, a possible return on investment is recognized as a justification for failing to grant access, at least if the incumbent is out competing, rather than trying to deny consumers access to developing technologies.

C. *Other Abuses*

When determining where points of interconnection (POI) should be located, a point of particular interest is the Commission's assertion that "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."[174] This may be consistent with language in the Interconnection Directive that all telecommunications organizations with "significant market power shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users."[175] The reference to "technically feasible" points of interconnection is interesting. This phrase is not found in the EU

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[172] *Id*. ¶ 91.c.

[173] *Id*. ¶ 91.e.

[174] *Id.* ¶ 96.

[175] Council Directive 97/33, 1997 O.J. (L 199) 32, art. 4(2); *see also* Council Directive 95/62, 1995 O.J. (L 321) 6, art. 10(1).

regulatory framework, but it is included in the US Telecommunications Act of 1996[176] as well as the WTO Telecoms Treaty Reference Paper.[177]

1. *Excessive Pricing*

The Access Notice asserts that charging excessive prices for access would be abusive,[178] however there is no guidance given as to what might be excessive. The existing EU regulatory framework requires that interconnection and other charges from telecoms operators with significant market power be cost based. Is the Access Notice suggesting that access should be provided at less than cost if cost based charges are excessive? This may not be solely an academic question. Without complete tariff rebalancing, telecommunications operators may be providing some retail services below cost. The concept of excessive is subjective, and the Access Notice admits that there will be many elements to consider when weighing pricing, but a preference is expressed for an approach comparing or "benchmarking" prices in other geographic areas or from markets considered to be open to competition to determine what is "fair."[179] This approach has been already been used for general (fixed-to fixed) interconnection prices, as well as investigations into fixed-to-mobile prices and international accounting rates. Benchmarking, however, fails to consider either market conditions or unique costs in the relevant geographic market. It is micromanagement of the telecommunications industry and is not consistent with the EU principle of EU subsidiarity – Member States should have authority in appropriate areas.

2. *Predatory Pricing*

The Access Notice declares that a dominant provider pricing below average variable costs or average total costs would be abusive, stating that pricing too low might prevent the emergence of effective alternative infrastructures.[180] A preference is expressed to consider prices in relation to long term average incremental prices.[181] If the dominant provider prices infrastructure access too

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[176] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56, (1996), §251(c)(2).

[177] World Trade Organization, Negotiating Group on Basic Telecommunications, 24 April 1996, Reference Paper, 2.2; <http://www.wto.org/wto/press/refpap-e.htm>.

[178] Access Notice, *supra* note 1, ¶ 105.

[179] *Id.* ¶ 109.

[180] *Id.* ¶ 110.

[181] *Id.* ¶ 115.

low, there would be no incentive for other sources to emerge. Potential competitive service providers would always select the low-cost infrastructure offered by the dominant provider. This is the danger represented by the Access Notice's insistence that dominant providers offer access to infrastructure at the same price it charges itself. A start-up operator's costs will probably be more than it would cost a dominant operator to self-provide a network element. This will not provide incentives to build or use alternative sources of infrastructure, resulting in fewer choices for service provision and ultimately higher prices to the consumer due to lessened competition.

3. *Price Squeeze*

The Access Notice's price squeeze formulation would require the dominant operator to charge competitors (including itself) a price for access to network infrastructure sufficiently below the retail price charged by the service subsidiary of the dominant operator so that competitors can enter the service market and make a profit, presumably by charging a price less than that of the dominant operator's service subsidiary.[182] First, this is not a recipe for competition; it is seriously detrimental to undertakings considered dominant. The prices of the dominant provider would always be under-cut. Incumbents would be required to subsidize inefficient entrants at the expense of their remaining customers, stuck with paying higher prices. Second, this formulation unrealistically assumes that infrastructure is the only factor in retail prices. Any time an inefficient operator seeks to enter the market, there will be an assumption that the dominant provider's retail prices are too low. There may be an additional requirement placed on the dominant operator to show that "its downstream market is exceptionally efficient."[183] Rather than be faced with that burden, incumbents will likely keep retail prices high. This result would oppose the interests of consumers and would not promote competition. Third, retail prices for some services, particularly universal services, may be priced below cost. Full rebalancing of prices, based on market conditions and relevant costs, should be implemented before a price squeeze can be evaluated.

182 *Id.* ¶ 118.

183 *Id.*

Price squeeze is another concept imported from US antitrust law.[184] United States courts have recognized that special problems occur when the price squeeze theory is applied to industries where retail or wholesale prices are set by regulation.[185] Like the essential facilities doctrine, the US law regarding price squeeze has evolved based on efficiency concerns. There is no longer a strict test based on "fair" prices charged by the monopolist. Rather, there is more of a focus on whether the monopolist's prices cover costs, and perhaps whether the wholesale profits were significantly higher than the retail profits ("the comparative rate of return" test).[186]

A US Court, faced with a claim by of a price squeeze by a regulated electric utility, held that its first duty was to the protection of the competitive process, not competitors.[187] Competition law should only intervene when the goals of competition policy, that is "lower prices, better prices, better products and more efficient production methods"[188] are imperiled. Given the regulation in the electricity industry, he Court was reluctant to find that a prices squeeze could succeed in the usual way of driving competitors from the market. Indeed, commentators have questioned whether the price squeeze doctrine should be applied to regulated industries.[189]

4. *Discrimination and Exclusivity*

The Access Notice cited discrimination by dominant operators as an abuse in the absence of objective justifications.[190] Pricing discrimination is the most obvious form, particularly if done in exchange for a customer agreeing to

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184 United States v. Aluminum Co. of America, 148 F.2d 416, 437-38 (2d Cir. 1945). There a four-part test for price squeeze was articulated: (1) a firm has monopoly power with respect to one product, (2) its price for that product is higher than a "fair price," (3) that product is required to compete in a second market where the monopolist itself competes, and (4) the monopolist's price in the second market is so low that competitor's cannot match it and still earn a "living profit."

185 Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990).

186 Ray v. Indiana & Mich. Elec. Co., 606 F. Supp. 757, 776 (N.D. Ind. 1984).

187 Town of Concord, 915 F.2d at 21-22. The First Circuit Opinion was written by Judge, now Supreme Court Justice, Stephen G. Breyer.

188 *Id.*

189 Lawrence J. Spiwak, *Is The Price Squeeze Doctrine Still Viable In Fully-Regulated Energy Markets?,* 14 ENERGY L.J. 75 (1993).

190 Access Notice *supra* note 1, ¶ 120.

exclusivity.[191] Differences between wholesale and resale prices, however, presumably including volume discounts, might not be discriminatory.[192] Discrimination could also exist in delays in installation or repairs, "technical access, routing, numbering, restrictions on network use . . . and use of customer network data."[193]

While the Commission and European regulatory legislation require operators to enter access and interconnection agreements, the Access Notice perceives a danger that access or interconnection agreements might be used for anti-competitive purposes contrary to Article 85 of the EC Treaty.[194] Exclusivity appears to be the Commission's main concern, and will be prohibited unless objectively justified. Price coordination, market sharing, exclusion of third parties, and improper information exchanges are also noted as possible anti-competitive techniques.[195] In particular, confidential information should be shared among interconnecting parties only on a need-to-know basis, and then only with appropriate divisions of the companies.[196] Possible group boycotts were also mentioned as a concern.[197]

5. *Permissible Prices*

A telecommunications provider, deemed to be dominant, can therefore price only within a narrow range without competition law effects. Prices for essential facilities must mirror internal costs and be low enough for competitors to purchase these facilities and make a reasonable profit. Prices cannot be so high to lead as to excessive profits. Prices cannot be so low as to be considered as predatory. And finally, prices cannot be discriminatory – an alleged dominant provider may not price so as to meet the competition for customers. With all of these roadblocks to market pricing, perhaps providers should give up and ask the Commission to set prices. The Commission itself might find it impossible to

[191] *Id.* ¶ 122.

[192] *Id.* ¶ 126.

[193] *Id.* ¶ 125.

[194] *Id.* ¶¶ 131 and 136.

[195] *Id.* ¶ 134.

[196] *Id.* ¶ 139.

[197] *Id.* ¶ 143.

meet all of these requirements, let alone run a business. Short of putting an army of competition lawyers and economists in charge of pricing policy, there is no sure way of pricing within the confines of the Access Notice so as to avoid the possibility of a competitor complaint or Commission action.

VII. Specific Critiques – Market Definition, Essential Facilities, Nondiscrimination, and Transfer Pricing: Recipe for Competition or Inefficiency?

The Commission suggests that the physical structure of a telecommunications network (identified as a monopoly activity) can be separated from services provided by the network, at least for purposes of determining whether an operator should be considered dominant. In essence, the Commission desires telecommunications organizations to split in two (at least on paper), with the operating organization bearing provision costs (that is, the network), and the services organization paying (again at least on paper) the same costs as competitors to access the network. This might be possible from an accounting standpoint (it would probably be very costly and speculative to divide costs in this way), but from a practical standpoint it is fallacious to artificially separate a producer from its means of production. For products such as telecommunications services, infrastructure itself might constitute part of the product. Taken to its logical conclusion, this argument would place existing telecommunications organizations at a competitive disadvantage. Its service arm, presumably including all services including basic voice, residential service, and provision of service to universal customers, would be required to pay the same access rates as charged to outside competitors. Under unbundling principles, each element of network infrastructure (given the Commission's broad definition of essential facilities this might include directory services, operator services, billing services, installation, and repair, and perhaps all the physical and human resources necessary to run a telephone company that a potential competitor might claim to be too expensive to duplicate) would have to be separated and available for purchase by potential competitors on a provider's own price basis. The telecommunications organization would then have to charge its services arm the same price for each of these elements as it charges competitors.[198] This principle could arguably be consistent with the existing requirement of the ONP

[198] Access Notice, *supra* note 1, ¶ 86.

Voice Telephony Directive that "[n]ational regulatory authorities shall ensure that telecommunications organizations adhere to the principle of non-discrimination when they make use of the fixed public telephone network for providing services which are or may also be supplied by other service providers."[199]

The Access Notice noted that ECJ Judgments and Commission Decisions in the transport field have followed the principle "that a firm controlling an essential facility must give access in certain circumstances."[200] In order to determine if a telecommunications operator is abusing a dominant position by denying access to an essential facility, the Commission will begin the analysis by identifying the existing or potential relevant market,[201] then it must determine whether access to the requested facility is essential in order to compete.[202]

The draft Access Notice inserted at footnote at this point that should be examined in its entirety:

> 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.[203]

While the statement that competition law "protects competition and not competitors" is a fundamental principle of US antitrust law (articulated specifically in Brunswick v. Pueblo Bowl-O-Mat, Inc.),[204] this concept is not as well-established in European law. It would be a welcome addition, as emphasis on competition should lead to consistent and coherent economic results. The

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[199] Council Directive 95/62, 1995 O.J. (L 321) 6, art. 10(6).

[200] Access Notice, *supra* note 1, ¶ 88.

[201] *Id.* ¶ 91.

[202] *Id.* ¶ 91a.

[203] Draft Access Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, Framework, Relevant Markets and Principles, COM (96) 649 final, ¶ 79 n. 58.

[204] Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

footnote, however, mischaracterizes the distinction between competition and competitors. The Access Notice implies that "competition" means a number of competitors, not one single competitor. A better definition of "competition" would be the maximization of consumer welfare, that is "such things as low prices, innovation, choice among differing products—all things we think of as being good for consumers."[205] The maximization of consumer welfare occurs through the most efficient marketing structure, companies, or company, not by dictating that a certain number of competitors must be present in a market. The goal of competition law should be allocative efficiency. Any other goal will likely result in higher prices and less choice for consumers. Consumer welfare will not be supported by requiring more efficient, but possibly dominant, operators to subsidize less-efficient competitors by providing access to facilities at artificially low prices. It would reduce the efficiency of the dominant provider by reducing its incentive to lower costs, and therefore the price charged to rivals. It would also make competitors dependent on access to the facilities of the dominant provider, reducing incentive to self-provide facilities and thereby paradoxically reducing consumer choice as well as price competition.

Competitors, free to choose which elements are desired, would select the elements that were offered at a price less than it would cost to self-provide or obtain from another source. The telecommunications organization's service arm would then logically be the least efficient competitor on the market because it has the highest prices. The incumbent operators would never be able to effectively compete on the basis of price, as every cost-saving provision of services would have to be offered to competitors at the same price that the organization charges itself. This would decrease incentives to reduce costs, in turn reducing competitive pressures on prices paid by telecommunications consumers, because the dominant provider would lack the ability to price compete. Ironically, the one market participant unable to compete would be the one labeled by the Commission as possessing market power, that is, the ability to independently set prices. If the telecommunications organizations possess the ability to set prices and incentive for them to compete on the basis of price is removed, prices will be too high. The Commission's proposed competition policy would inevitably lead to higher prices for consumers and therefore would not be beneficial to consumer welfare and competition.

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[205] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1993).

In the final Access Notice, the footnote cited above, which to the Commission's credit, actually contained the phrase that the law protects "competition and not competitors" was altered to read in its entirety as follows:

> 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.[206]

Did the authors of the Access Notice realize the dangers inherent in a statement supporting competition over the interests of competitors? Certainly, if competition does not take a backseat to the interests of competitors, micro-management of the market is not possible. With real competition, competitors would have to actually produce a superior product or find real efficiencies to offer lower prices, rather than relying on the artificial subsidies provided by enforcement officials and regulators, subsidies that must be ultimately paid by consumers.

VIII. Conclusion

It is tempting for regulators and politicians to score points by decrying progress towards a competitive telecoms market. Evidence, however, suggests that markets are functioning well. Prices are declining across service and product markets and throughout geographic markets. Technical innovation and the introduction of new products and services continue. The linking of computers and telecommunications, amply demonstrated by the Internet, is transforming not only telecoms markets, but industry and commerce everywhere. These are not the hallmarks of a stagnating, monopolistic industry. Government officials should not attempt to micromanage and second-guess business people and markets themselves. It would be better to closely observe what is happening, while reserving the right to intervene if necessary. In addition, markets would function better without the added cost of heavy regulation and unnecessary competition law intervention.

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[206] Access Notice, *supra* note 1, ¶91a n. 68.