UNIVERSITY OF ESSEX
SCHOOL OF LAW

LLM in Internet Law

2011 – 2012

Supervisor: Prof. Dr. Christopher Marsden

DISSERTATION

THE APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE TO THE ELECTRONIC COMMUNICATIONS MARKET AND ITS PARTICULAR IMPLICATIONS FOR TURKEY

Name: OZLEM DASDEMIR
Registration Number: 1100369
Number of Words: 19,498
Date Submitted: 12 SEPTEMBER 2012

UP:11/09/2012-10:15:57 WM:11/09/2012-10:16:19 M:LW650-7-FY A:11a1 R:1100369 C:8EB72D5A30C192293AF5F1A9D0A8C53A175DBACB

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Association of Internet Service Providers	TISSAD
Autorité de Régulation des Communications électroniques et des Postes	ARCEP
American Telephone & Telegraph Co.	AT&T
Asymmetric Digital Subscriber Line	ADSL
Bell Operating Companies	BOCs
Court of First Instance	CFI
European Commission	EC
Court of Justice of the European Union	CJEU
European Night Service Ltd	ENS
European Regulators Group	ERG
Federal Trade Commission	FTC
European Union	EU
Deutsche Telecom	DT
Long Run Incremental Cost	LRIC
National Competition Authority	NCA
National Regulatory Authority	NRA
Next Generation Access	NGA
Next Generation Network	NGN
Information and Communications Technologies Authority	ICTA
Internet Protocol	IP
Internet Service Provider	ISP
Open Network Provision	ONP
Régie des télégraphes et des téléphones	RTT
Small But Significant Non-Transitory Increase in Price	SSNIP
Treaty of Functioning of European Union	TFEU
Turk Telekom Anonim Şirketi	TTAS
United States	US

ABSTRACT

In antitrust law, the doctrine of essential facilities covers the circumstances in which a dominant undertaking's duty to share its facilities with actual or potential competitor arises and its legal implications. In EC competition law, the doctrine of essential facilities is seen as a valuable and flexible instrument for overcoming abuse of dominance. One of the growing important issues about the doctrine is the problem of how the doctrine can be used in network industries. In the electronic communications sector in particular, the application of the doctrine of essential facilities represents one of the most interesting points of interaction between antitrust and regulatory provisions. This study will attempt to view the applicability of doctrine to the electronic communications sector. Within the scope of this study, first of all, rationale and origin of the essential facilities doctrine are analysed through the EU and US case law. Besides, the content of doctrine and limitations that apply to the doctrine are elaborated in order to clarify the interplay between sector specific regulation and competition law. In addition, what extent the doctrine of essential facilities is applicable to control bottlenecks of electronic communications sector will be discussed. Finally, the effects of doctrine on the competitive dynamics of Turkish electronic communications sector will be examined.

1. INTRODUCTION

The purpose of this study is to analyse the application of essential facility doctrine to the electronic communications market and its particular implications for Turkey. In this context, this dissertation is comprised of five chapters. Following this introductory chapter, the second chapter will discuss rationale and theoretical background of the doctrine by considering United States (US) and European Union (EU) case law. The third chapter of thesis will give the legal framework of the doctrine in electronic communications sector. Then the respective roles of competition policy and sector-specific regulation in the electronic communications sector will be evaluated by giving characteristics of the two policy regimes. Chapter four will explore the application of the essential facilities doctrine to the electronic communications sector in Turkey. Finally, in the fifth chapter, conclusion with regard to applications of essential facilities doctrine to the electronic communications sector is drawn.

Before liberalisation, the electronic communications sector was characterized by state owned monopolies, and supplying the electronic communications services was seen as a public duty. In the 1980s, most of the European countries began to liberalize their electronic communications market and try to establish competition.[1] Since the mid-nineties, rapid convergence and technological development has led to some major consequences. Firstly, new markets have created new types of service providers and new types of service providers require new types of resources. A growing number of electronic and non-electronic are being delivered over electronic communications networks[2]. Thus, convergence has created new types of bottlenecks. Furthermore, convergence threatens to outpace existing sector-specific regimes. As the technology develops, the complexity of access to bottleneck is bound to grow further and this reveals the need to review existing policies[3].

The access to the incumbent's 'last mile' network or other facilities is essential to establish competition in electronic communications market. Despite the progress which had been achieved during the first years of the liberalization process, access issue has not been solved

[1] Nikolinakos N. Th., 2006, EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors, Kluwer Law International, p.59
[2] Ungerer H, 1998a, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", p. 5,6
[3] Ibid, p.21

in the electronic communications sector. The main reason for this is that a huge amount of investment is required in order to establish a network similar to the incumbent's network. The European Commission (EC) admitted in the 1998 Access Notice that "the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time" and other networks cannot be seen as "satisfactory alternatives to the facilities of incumbent operator"[4].

Furthermore the economic characteristics of the electronic communications sector provide some advantages to the incumbent operators. For instance, economies of scale which reduces average production costs as the output increases, and economies of scope which means that the production of different products in conjunction of each other is more cost effective than their separate production, provide cost advantages for incumbents which cannot be replicated by entrants. Besides, an advantage of productivity may arise due to interconnection of networks (network density)[5] . With network externalities, adding a new customer to a network increases the surplus of other subscribers who are able to call and be called by the new customer, and therefore affects not only customers' demand for the service but also their demand for subscription. Such advantages occur not only from the nature of network industries, but especially from the historical and governmental foundations of incumbent operators. On the other hand network industries are typically characterized by a high level of sunk costs. In order to stay in business profitably, incumbent operators attempt to recoup their fixed costs by selling at high mark-ups[6] .

Besides, there are strong network effects in electronic communications market. Investment in one part of the network leads to potential benefits across the whole network and similarly blockages and deficiencies in one part of the network can cause bottlenecks, increased cost and reduced revenue in other parts of the network[7]. Hence, the characteristics of electronic communications make it difficult to establish similar network for other operators. European Regulators Group in 2004 argued that replication of incumbents' networks might not be

[4] European Commission, 1998, Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, (98/C 265/02), para. 64

[5]Kubasch J.G.,2011, Sector Specific Regulation In Telecommunications Market, VDM Verlag Dr. Müller GmbH & Co. KG p.4,5.

[6]Stoyanova M., 2008, Competition Problems in Liberalized Telecommunications Regulatory Solutions to Promote Effective Competition, Kluwer Law International p.101

[7]Hahn J. H.,2001,"Nonlinear Pricing of Telecommunications with Call and Network Externalities", p.2. http://www.sciencedirect.com/science/article/pii/S0167718703000031

economically or legally feasible 'due to the persistent presence of bottlenecks associated with significant economies of scale or scope or other entry restrictions'[8].

It is therefore clear that the incumbent's network cannot be feasibly and economically substituted. Hence, service providers have to interconnect with the incumbent operator's network. So it is a fact that the incumbent's network is indispensable for all those companies who want to develop economic operations in electronic communications market if they are refused to access they will not able to operate in the market. Incumbent operators could be able to control market developments by closing the market entry and creating barriers for other operators[9]. In order to remove inability of new entrants to compete against incumbent operators, there is a need for strict rules which prevent incumbent operators to use its advantage, grown from de facto monopoly rights, against new competitors. Due to this, the essential facilities concept was created.

On the other hand foundation of liberal economic system depends on the capability of undertakings to make free decisions in the market. In a free market economy, businesses and consumers decide of their own volition what they will purchase and produce. The market economy has many aims such as to attain competitive market structure and thus to provide efficient use of resources, to promote innovation and as prices fall to decrease costs, and increase consumer welfare. The government intervention is at the minimum level in the market economy. But the undertakings sometimes may behave detrimentally to the competitive structure of the market. In this case, government intervention is required in order to re-establish competition in the market. The doctrine of essential facilities in competition law determines the essential elements for building a competitive structure in a market. It is an exception to freedom of making contract which is the one of the principles of liberal economy. With the application of this doctrine, the undertakings controlling such an essential element have an obligation to provide its essential element to other undertakings. At first glance, this doctrine seems contrary to the principles of free-market economy but actually it may play important roles to achieve more competitive structure in the markets[10].

[8]ERG,2004, Common Position on the Approach to Appropriate Remedies in the New Regulatory Framework, ERG(0^) 30 rev1, p.12

[9]Nikolinakos N. Th.,1999, Access Agreements in the Telecommunications Sector-Refusal to Supply and Essential Facilities Doctrine under E.C. Competition Law, European Competition Law Review, p.6

[10]Ölmez H.S., 2003, Rekabet Hukukunda Zorunlu Unsur Doktrini ve Uygulaması, Rekabet Kurumu Uzmanlık Tezi, p.9

The essential facilities doctrine emerged in US Antitrust Law with a road traffic law decision from the year 1912; in the matter of *US v. Terminal Road Association of St. Louis*[11]. This decision was based mainly on the prohibition of a monopoly in accordance with Section 2 of the Sherman Act. The actual term of essential facilities was first used in 1977 in *Hecht*[12] *v. Pro Football Inc*.[13]. This doctrine has been described by US antitrust agency Federal Trade Commission (FTC) Chair Pitofsky as 'a subset of the so-called "refusal to deal" cases which place limitations on a monopolist's ability to exclude actual or potential rivals from competing with it[14].

In the EU, the essential facilities doctrine found its current most explicit formulation in the 1998 Access Notice, which drew the conclusions from a broad range of EC decisions on access to bottlenecks under competition rules, and court rulings in this context. It was the first attempt that provides the EC's interpretation of general EU Competition Law as it applies to access issues. Furthermore it defines the relationship between sector specific regulations under the Open Network Provision (ONP) framework and general Competition Law.

The essential facilities concept was seen as a flexible tool to the situations of convergence in EU. It was believed that market definitions can be adjusted without changing either the regulatory framework or its basic principles by using the doctrine[15]. On the other hand it has received only limited and indirect support by the Court of First Instance (the CFI) and the Court of Justice of the European Union (the CJEU)[16] . It was developed through EC decisions primarily under Article 102[17] (ex-82) of EC Treaty. Article 102 of EC sets out a non-exhaustive list of abusive practices. In many of its decisions the EC expressly refers to the doctrine, while in others – especially in the most recent ones – it follows the doctrine without naming it. Also, there are some sector specific regulations related to the essential facilities doctrine. Within the framework of sector-specific regulation of access, the National Regulatory Authorities (NRAs) can act in a substantial ex-ante manner and mandate in

[11] *U.S. v. Terminal Railroad Association* 224 US 383 (1912).
[12] *Hecht v. Pro Football, Inc*. 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (197).
[13] *Supra* n.5 p.35.
[14] Pitofsky R., 2001, The Essential Facility Doctrine Under United States Antitrust Law, p.2 http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf
[15] *Supra,* n.2, p.27
[16]Hatzopoulos V.,2006 , The EU Essential Facility Doctrine, Research Paper in Law,6, College of Europe, Brugge and Natolin, p.3
[17] Article 82 and Article 81 were renamed Article 102 and Article 101 by the Treaty of Lisbon, which entered into force on 1 December 2009

substantial detail interconnection provisions concerning pricing, accounting, and the technical details of access[18].

The essential facilities doctrine can be deployed when one firm generally in vertically related markets, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first firm in downstream market[19]. In such cases the access liability is imposed by competition authorities to the firms having elements that are identified as an essential facility. The concept of essential facilities is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be replicated by any reasonable means[20] .

As long as a monopolistic bottleneck exists in electronic communications network, essential facilities doctrine has been one of the disputed theoretical conceptions for both competition law enforcers and NRAs. Also the involvement of new and innovative electronic communications markets and technologies has turned the focus to the application of essential facilities doctrine again. In its 2009 Guidance Paper on Article 102 of the Treaty of Functioning of the European Union (the TFEU), the EC established three conditions that must be satisfied before a refusal to deal or margin squeeze may be considered contrary to Article 102 TFEU, based on those established by the CJEU in the Bronner[21] case. The latest European Court of Justice Judgments on margin squeeze such as TeliaSonera[22], Deutsche Telecom[23] and Telefonica[24] made the EC take different views and lead to discussions about essential facilities doctrine. Some commentators claim that application of judgements could give rise to negative consequences in particular by forcing a vertically dominated firm to give access to its infrastructure even when this access is not "essential" within the meaning of the refusal to deal case law of CJEU[25] . This also gives rise to potential conflicts between

[18]Ungerer H., 2000, Access Issues Under EU Regulation and Anti-trust Law- The Case of Telecommunications and Internet Markets, Research Paper WCFIA Fellows Program 1999 / 2000, Weatherhead Centre for International Affairs, Harvard University, p.17
[19] *Supra* n.16, p.2
[20] *Supra* n.4, para. 68
[21] *Oscar Bronner GmbH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag GmbH & Co KG and Others,* Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112.
[22] *Konkurrensverket v.TeliaSonera Sverige AB*, Case C-52/09, 2011
[23] *Deutsche Telekom* v *Commission,* Case T-271/03, 2008, ECR II-477
[24]*Wanadoo España* vs. *Telefónica*, Case COMP/38.784, Commission decision of 4 July 2007
[25]Geradin D., 2010, Refusal to Supply and Margin Squeeze: A Discussion of Why the Telefonica Exceptions Are Wrong, Tilec Discussion Paper, Tilburg University, ISSN 1572-4042, p.1

competition law and sector specific regulations. The question is, whether the access issues should be resolved under Article 102 EC, and in particular the essential facilities doctrine, or whether they should better be dealt with under a sector-specific regime.

2. ESSENTIAL FACILITIES DOCTRINE

In this part, the rationale and the economic foundations of the doctrine will be given. Then the origin of the doctrine will be discussed in the light of US and EU case law. Moreover the objections against the doctrine will be briefly mentioned.

2.1. The Rationale of the Doctrine

Competition law upholds the workings of free market economy by policing the conduct of firms as they compete in the market. There is currently a consensus in economics that competition law systems should be designed to maximize consumer welfare and efficiency. In the past, competition law tried to achieve a more diffuse range of objectives[26]. For example competition law in European Community (EC) seeks to achieve the mission set out in the EC Treaty. Article 3(1)(g) of the Treaty provides that the activities of the Community shall include a system ensuring that competition in the internal market is not distorted[27]. But at present most of the scholars argue that competition law should be directed at the interest of consumers[28]. Providing access to essential facilities can be an instrument available to policy makers to facilitate that objective.

Essential facilities doctrine is one of the controversial concepts in competition law. Because it is an exception to the general rule of competition law. In general, competition law discourages cooperation between competitors. However, if one competitor owns something that is essential to enable other competitors to do business, and if the competitors cannot be expected to provide this facility for themselves, then the competition law obliges the owner of the essential facility to give equal access to its competitors. This obligation is result of a refusal of access on competition. This principle must be implemented carefully, because the law normally allows a company to retain, for its own exclusive use, all advantages that it has

[26] Jones A.& Sufrin B.,2007, EC Competition Law , Oxford University of Press, Third Edition, p. 92
[27] *Ibid*, p. 108
[28] *Ibid,* p. 92

legitimately acquired. Furthermore, companies are normally free to make negotiations for the goods they offer. Hence, the principle that companies in dominant positions have a legal duty to provide access to genuinely essential facilities on a non discriminatory basis is one of great and increasing importance in the electronic communications, transmission of energy, transport, and many other industries[29]. If they are not prevented by law to abuse their dominant position, they may create first mover advantages for themselves which could preserve their dominant power and defeat the purpose of liberalisation.

Another factor that makes the doctrine particularly important is that there is an increase in number of cases related to the essential facilities doctrine. In these cases, a firm with monopoly input abused its dominant position by using the power coming from economies of scope, scale and density as well as strong network externalities. In networked sectors many monopolies have networks that have been subsidised through government expenditures[30]. Following privatization, former monopolies lost their special rights but kept the underlying infrastructure for their business and retained property rights over it. Because former monopolies established their infrastructure by using public resources, it is argued that monopolies could share their state-financed assets with entrants willing to compete in the provision of networks and services to end users. The first results from liberalization process displayed that it is the service based competition to pave the way to infrastructure competition[31]. This argument gives path for application of the doctrine in some respects.

The essential facility doctrine takes account these views. It would be pro-competitive to require monopoly operators to contract with competitors asking for essential facility.

2.2. The Economic Foundations of the Doctrine

Application of the essential facilities doctrine has played an important role in the liberalisation policies of the EC especially for network industries such as electronic communications, gas, energy, and transportation. In addition, when looking at the practices there are some applications of the doctrine in industries that are not natural monopoly.

[29]Temple Lang J.,1994, Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities, Fordham International Law Journal, Volume 18, Issue 2, p.439
[30] Unver M.B., 2004, Essential Facilities Doctrine Under EC Competition Law and Particular Implications of the Doctrine For Telecommunications Sector in EU and Turkey, p.7
http://etd.lib.metu.edu.tr/upload/12605496/index.pdf
[31] *Supra,* n.6,, p.96

The essential facilities doctrine is also known as bottleneck facility doctrine in the literature. The doctrine claims that a firm is using its control of a monopoly input to restrain competition in a vertically related market, either by charging companies requesting access to that resource excessive prices or by denying those companies access to the resource altogether. The input monopolist excludes certain purchasers either by internalizing production, and thereby becoming the sole source of finished goods, or by entering into strategic partnerships with certain purchasers and giving them preferential terms[32]. Hence, it could use monopoly power in one level of production to reduce the competitiveness of vertically related levels of production. Over time, economic theorists began to recognize that this approach is subject to several conceptual limitations. This scholarship has raised questions about monopolist's ability and incentive to attempt to distort competition in a vertically related level of production[33].

Chicago School has had a major influence on antitrust jurisprudence since the 1970s. Chicago School mainly argues for a free market system and avoids the necessity of government intervention through competition law[34]. It argues that the extension of monopoly power from one market into a second market cannot have anticompetitive effects. These scholars claimed that a monopolist in one market cannot increase its profits by extending its monopoly into an adjacent market when they use two products in fixed proportions. Under this theorem, the monopolist can choose to extract the profits from the monopolized market, the competitive market, or both. The amount of profit that can be reaped, however, is fixed and cannot be augmented through the extension of monopoly power. A firm that has monopoly power at one level in a chain of production can at best transmit that monopoly to other levels; it cannot create more monopoly power than it already has[35]. Because monopoly leveraging cannot increase profits, Chicago School theory holds that when monopoly extension does occur, it must be motivated by efficiency considerations. According to Chicago School monopoly leveraging is not a problem, it is actually beneficial when it occurs. On this basis, the essential

[32] Spulber F. D. & Yoo S. C., 2007, Mandating Access to the Telecom and the Internet: The Hidden Side of the Trinko, Colombia Law Review, Vol. 107, p.1833
[33] *Ibid*, p.1834
[34]Tavsanoglu S.,2008, The "Effects-Based" Approach of the Commission to the Application of Article 82 to Exclusionary Abuses: Is the New Approach Really Economics Friendly?, Lund University, p.7 http://www.intertic.org/Policy%20Papers/Tavsanoglu.pdf
[35] Langlois R. N.,1999, Technological Standards, Innovation, and Essential Facilities: Toward a Schumpeterian Post-Chicago Approach, University of Connecticut, Economic Working Papers, p.11

facilities doctrine has been criticized as discouraging efficiency enhancing vertical integration[36].

While the Chicago School argues that the government intervention through the competition law actually hampers the competition in the market and decreases the level of efficiency and consumer welfare, the Post-Chicago School is more supportive for the government intervention[37]. Scholarship from the "Post-Chicago" School has criticized the Chicago School's view of monopoly extension, by saying that the single monopoly profit theorem is possible under only a restrictive set of assumptions that often do not exist in real world markets. For purposes of the essential facilities doctrine, two assumptions often may not be valid. First, it assumes that the products in the two markets are used in fixed proportions Second, it assumes the monopolized state of the non competitive market cannot change. When these assumptions are not satisfied, monopoly leveraging may be used for anticompetitive aims. A vertically integrated owner of an essential facility can deny access to the asset or determine a higher price for access to firms in the dependent competitive market. The vertically integrated firm thus can use its privileged position as the owner of an essential facility to weaken the competitive pressure it faces from other firms in the final product market, allowing the vertically integrated firm to increase its own prices in turn. Econometric analysis reveals that vertical foreclosure by bottleneck railroad lines does have adverse effects on consumer welfare, contrary to Chicago School thinking[38] .Hence, it could be said that the markets cannot achieve competition naturally and regulatory authorities are needed in order to provide competition in the market.

2.3. The Origin of the Doctrine

2.3.1. US Antitrust Law

Although the term "essential facilities doctrine" originated in commentary on US antitrust case law[39], The Supreme Court has never officially recognized the doctrine nor used the term "essential facility". Four rulings from the Court are widely seen as having established the functional foundations for the doctrine. The doctrine's is originating in the Supreme Court's

[36] Vaheesan S., 2010, Reviving an Epithet: A New Way Forward for Essential Facilities Doctrine, Utah Law Review, No.3 p. 915
[37] *Supra,* n.34, p.9
[38] *Supra,* n.36, p. 916-917
[39] OECD, 1996, The Essential Facilities Concept, OCDE/GD(96)113, p.7
http://www.oecd.org/dataoecd/34/20/1920021.pdf

1912 *United States v. Terminal Railroad Association of St. Louis* decision[40]. This decision was based on Section 2 of Sherman Act which provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" (15 U.S.C. § 2).

Although Section 2 of Sherman Act does not contain a specific prohibition or discrimination, it prohibited the monopolisation which means the intention to create a monopoly and to use this position against competitors[41]. In *United States v. Terminal Railroad Association of St. Louis* case, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. This, the court held, constituted both an illegal restraint of trade and an attempt to monopolize[42]. Although the Court did not expressly delineate the railroad facilities as essential, the Court's language indicates it viewed access to the facilities as being indispensable to serving St. Louis[43].

There were a lot of decisions based on the case of *US v. Terminal Railroad Association of St. Louis.* The case *Associated Press v. US*[44] was another important case in this connection. The Supreme Court held that the Associated Press bylaws violated the Sherman Act by limiting membership in the organization and thereby access to its copyrighted news services[45]. The US Supreme Court found that the refusal of non-physical access is a prohibited act in accordance with Section 2 of Sherman Act. As in *United States v. Terminal Railroad Association of St. Louis* decision, a consortium of firms was barred from denying access to an essential facility[46].

Otter Tail Power Co. v. United States[47] was different from *US v. Terminal Railroad Association of St. Louis* and *Associated Press*, in the sense that the Court had to address the propriety of a single firm denying a downstream rival access to an alleged essential facility

[40] *Supra*, n.36, p.918
[41] *Supra*, n.5, p.36
[42] *Supra*, n.14, p.2
[43] *Supra*, n.36 p.918
[44] *Associated Press v. United States* 326 US 1 (1945).
[45] *Supra*, n.14, p.3
[46] *Supra*, n.36, p.919
[47] *The Otter Tail Power Co v. U.S.* 410 US 366 (1973).

instead of multiple firms. Also it was the first decision related to the network infrastructure. The Supreme Court found that the defendant, an electrical utility which sold electricity at both the retail level (directly to consumers) and the wholesale level (to municipalities who sought to resell electricity at retail), had monopolized in violation of the Sherman Act by refusing to supply electricity at wholesale and instead to service customers directly itself[48]. The importance of this decision was that the Supreme Court emphasized for the first time that a criterion for an essential facility can also be a danger of the monopolising of a downstream market[49].

Although principles of the essential facilities doctrine were depended on the *U.S. v. Terminal Railroad Association of St. Louis* decision, the term itself was used firstly in *Hecht v. Pro Football Inc.* decision[50]. In this case, an American Football team demanded access to a stadium which was used by another team. Pro Football Inc refused to access to the stadium for other teams. The court found that the use of a stadium was essential for such teams; that a stadium of that size could not easily be duplicated; and that it was possible for the new team to use it without interfering with the old team. Moreover the criteria for essential facility was developed as follows: "...To be essential, a facility need not be indispensable; it is sufficient if the duplication of the facility would not be economically feasible and if denial of its use inflicts a sever handicap on potential markets..."[51].

One of the landmark cases for the development of the essential facilities doctrine was the *MCI Communication Corp v. American Telephone & Telegraph Co. (AT&T)*[52]. Almost all conditions for the application of essential facilities doctrine in electronic communications sector were determined in this decision[53]. To being able to provide long-distance telephone services, MCI Communication Corp needed access to the networks of the Bell Operating Companies (BOCs), which were controlled by the major long-distance provider AT&T. AT&T refused access and charged high cost for access. Then MCI Communication Corp sued AT&T and claimed that it was an offence against Section 2 of Sherman Act[54]. In the first

[48] *Supra*, n.14, p.3
[49] *Supra,*n.47
[50] Waller S.W., 2008,Areeda, Epithets, and Essential Facilities, Wisconsin Law Review, p.4 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083838
[51] *Supra*, n.12
[52] *MCI Communications v. AT&T*, 708 F.2d 1081, 1132-1133 (7th 1983).
[53] *Supra*, n.5, p.36
[54] *Supra* n.52

instance the 7th Circuit set four elements must be established for applying the essential facilities doctrine:

- Control of essential facilities by a monopolist
- A competitor's inability to practically or reasonably duplicate essential facility
- The denial of the use of the facility to a competitor and
- The feasibility of providing the facility to competitors[55]

While the court did not enumerate a fifth factor within the test, it held that the doctrine also requires that the claimed essential facility be a necessary input in a distinct, vertically related market. This was seen an important limitation on the doctrine for requiring a firm to share its assets with a firm in the same stage of production within an industry that would undermine incentives to invest in the future[56].

While the MCI test was widely adopted in the lower courts, actual winning cases remained rare. The courts rarely imposed liability for either damages or injunctive relief, and when they did so, they rarely used the essential facilities doctrine by name, more often imposing liability under other theories[57].

Opinions of the US courts also suggested that antitrust liability under the essential facilities doctrine is particularly appropriate when denial of access is motivated with a "specific intent" to injure rivals[58].Even if the doctrine can be seen as an elaboration of US courts, it must be remembered that it was an elaboration of lower courts not of the Supreme Court. Furthermore, some scholars like Phillip Areeda thought that the essential facilities doctrine is only a subset of Section 2 of the Sherman Act and not independent legal rule. The *Southern Pacific Communications Co. V. American Telephone and Telegraph*[59] and *Illinois Bell Telephone Co. v. Haines & Co. Inc*[60]. pointed out this opinion.

[55] *Ibid*
[56] *Supra*, n.36, p. 921
[57] *Supra*, n.50, p.5
[58] *Supra*, n.14, p.8
[59] *Southern Pacific Communications Co. v. American Telephone and Telegraph* 740 F.2d 980 http://bulk.resource.org/courts.gov/c/F2/740/740.F2d.980.83-1102.html
[60] *Illinois Bell Telephone Co. v. Haines & Co. Inc* 932 F.2d 610 http://openjurist.org/932/f2d/610/illinois-bell-telephone-company-v-haines-and-company-inc-k-k-haines-and-company-inc

Phillip Areeda stated that ""You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits... . It is less a doctrine than an epithet"[61].

2.3.2. EC Competition Law

Under EC law, the development of the doctrine has been based on Article 102 (ex-82) of the EC Treaty and the case law on abuses of dominant position[62]. The EC refers to the doctrine in many of its decisions, but in others – especially in the most recent ones – it follows the doctrine without naming it. The following will give an overview of the most important decisions in EC Competition Law.

The CJEU first applied Article 102 in a manner similar to the US essential facilities doctrine in its 1974 decision in *Commercial Solvents*[6364]. In its decision the Court found that the company had a dominant position for the production of a raw material used to produce a chemical because the company had a world monopoly. The abuse was the refusal to supply a downstream competitor, which Commercial Solvents had previously tried to acquire, with the raw material which it needed[65]. The Court ruled that the input provided by Commercial Solvents was essential for the maintenance of the degree of competition already existed in the downstream market[66]. The Court also found that under certain circumstances, an undertaking in the dominant position had a duty to deal with another undertaking operating in a downstream market[67].

In the *United Brands*[68] case, The Court held that under certain circumstances an undertaking in dominant position had a duty to supply to competitors in an upstream market. United Brands refused to continue supplying Chiquita bananas to Olesen, one of the United Brands's distributors in Denmark, because Olesen had taken an active part in a sales campaign for a

[61] Areeda P., 1989, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. p.841
[62] Bavasso A.,2003, Communications in EU Antitrust Law Market Power and Public Interest, Kluwer Law International, p.223
[63] Joined Cases 6,7/73, *Commercial Solvents v. Commission* 1974 ECR 223
[64] Cotter T.F., 2008, Essential Facilities Doctrine, Antitrust Law and Economics, Keith N. Hylton, ed., Edward Elgar Publishing, p.6
[65] *Supra*, n.29, p.444
[66] *Supra*, n.6, p.117
[67] Day J., 2004, Essential Facilities in European Union: Bronner and Beyond, Colombia Journal of European Law, Vol.10. p. 2
[68] *United Brands v. Commission*, Case 27/76, 1978,ECR 207

competing brand of bananas[69]. The CJEU decided that the refusal to supply an existing customer who decides to market a competing product leads to abuse of dominant position when the refusal is not objectively justified. It also held that a refusal to supply, in order to be justified, must be proportionate to the threat taking into account the economic strength of the undertakings confronting each other[70].

Commercial Solvents and *United Brands* were the first two important cases on Article 102. After these cases, the principle of a general duty of dominant companies to supply was so well-established that it was not needed later to distinguish essential facility cases from other cases of exclusionary abuse[71].

Unlike previous cases, in *Telemarketing*[72]*,* extension of monopoly power was related to ancillary market. The abuse was the refusal to sell television time for telephone marketing operations when the advertiser wanted to use a telephone number different from the one of the television advertising unit[73]. The essential input to which access was denied was set out by the court as advertising broadcasting medium. Because of the absence of the objective justification, the court ruled that the refusal was restrictive of competition and breach of Article 102. Moreover, it was the first European decision in which a question of where there is a right for access to essential facilities was answered[74].

A similar set of anticompetitive circumstances led to the *Régie des télégraphes et des téléphones (RTT) v GB-INNO* case. RTT was the Belgian electronic communications incumbent which provided electronic communications network and services. Also it had the powers to grant and withhold authorization to connect telephonic equipment. It sold its equipment and it could request proof from the operators for the conformity with the standards. RTT claimed that the equipment sold by GB-INNO was not pre-approved for conformity with the standards set by RTT. This was a case which raised the question of whether RTT owns essential facility and refused to access it. The action against GB-INNO was assessed by the

[69] *Supra,* n.1, p.63
[70] *Supra,* n.68
[71] *Supra*, n.29, p.445
[72] Case 311/84, *Cenbtre belge d'études du marché*, 1985,ECR 3261
[73] *Supra*, n.6, p.118
[74] *Supra,* n.5, p.44

court an objectively unjustified attempt to extend this dominant position in the neighbouring where it had the potential to eliminate or distort competition[75].

One of the most important decisions for the development of essential facilities concept was taken in *Magill*[76] case. ITV, RTE and BBC were broadcaster in Ireland and Northern Ireland. According to Irish and UK law, they held copyright in their program listings. Each broadcaster published its own weekly guide to its own programs. They gave licenses on their daily listings to newspapers and periodicals free of charge. Because there was no comprehensive weekly listing guide, Magill wanted to prepare a television guide including the programs of all broadcasters in 1985. As the violation of the licensing policies, the three broadcasters refused to grant it a licence for the production of weekly television programme listings. Magill made a complaint to the EC and EC decided that the broadcasters had abused their dominant position within the meaning of Article 102[77]. The CFI confirmed the EC's decision and held that the applicants had prevented the emergence of a new product for which there existed a potential consumer demand, for which the three broadcasters' copyrighted programme listings were an indispensable input and which none of the three broadcasters providing it[78]. The CJEU upheld the decision of the CFI. CFI identified three circumstances under which refusal to grant a licence can constitute abuse of dominant position. First, there was a lack of substitutes for weekly television programme listings despite a specific, constant and regular consumer demand. Second, there was no justification for this refusal. Third the broadcasters distorted all competition in the secondary market of weekly television guides by denying access to the basic information which is indispensable for production of a television guide[79].

European Night Services Ltd (ENS)[80] was the last case of essential facilities submitted to the Court before *Bronner.* ENS was a joint venture established by the main railway companies in the United Kingdom, France, Germany, and The Netherlands. The ENS provided and operated overnight passenger rail services through the Channel Tunnel[81]. The railway

[75] *Supra*, n.6, p.119
[76] Joined Cases C-241 & 242/91P, *RTE and ITP v. Commission*, 1995,ECR I-743.
[77] *Supra*, n.1, p.66
[78] *Supra*, n.6, p.121
[79] Supra, n.1, p.67
[80] *European Night Services Ltd (ENS) v. Commission,* Joined Cases T-374/94, T-375/94, T-384/94& T-388/94, 1998 E.C.R. II-3141, [1998] 5 C.M.L.R. 718
[81] Larouche P., 2000, Competition Law and Regulation in European Telecommunications, Hart Publishing, p.189

companies agreed to provide ENS with railway paths through the Channel Tunnel, crew, and locomotives. Since the market share of ENS on the routes it served was between five and eight percent, The EC decided that the agreement violated Article 101 of the EC Treaty[82]. But it granted an exemption for eight years on the condition that the parent companies should provide locomotives, train crews and train paths to any undertaking wishing to provide similar service. The CFI annulled the decision on various grounds. The condition of providing locomotives and train crews was cancelled because the EC had not properly demonstrated that why this requirement was necessary. In this case, CFI expressly referred to essential facilities[83]. In order for a product or a service to be regarded as 'essential', two cumulative conditions must exist according to the European Night Services judgment. First of these conditions is 'non-interchangeability', and the second one is 'unavailability of a viable alternative'[84].

Under the pre-Bronner case law, because of its dominant position, an undertaking could be required to provide access to its facility. These decisions were taken by courts without economic analysis of the conditions prevailing in the market, such as possible alternatives to the facility, market shares in the downstream market of the respective undertakings, or the effect of the refusal on prices. Hence, the application of the essential facilities doctrine was criticised by some of the academics in the sense that it leads to disincentives to invest for the undertakings with a dominant position. So, once an undertaking was a dominant position without being a monopolist, competitors would be able to piggyback on its investments. Hence, there was a need for the Court to intervene and define the conditions under which the essential facilities doctrine should apply. Bronner was the occasion[85].

Two months after the *European Night Services* decision of the CFI, the CJEU ruled on essential facilities doctrine in *Oscar Bronner v Mediaprint*, with a preliminary judgment. The Mediaprint group was a newspaper publisher dominant on the Austrian market for daily newspapers. It had a nation-wide early-morning home-delivery newspaper service which provided that subscribers received newspaper early in the morning. Oscar Bronner was the owner of a smaller daily newspaper and did not have access to the home-delivery system.

---

[82] *Supra*, n.67, p. 14
[83] *Supra*, n.26, p. 546
[84] *Supra*, n.81, p.191
[85] *Supra*, n.67, p. 15

Instead he used the ordinary postal delivery, which delivered the newspaper until late morning. He asked the Mediaprint group to get access to its delivery system for a reasonable fee, but the Mediaprint refused to include Oscar Bronner's newspaper. According to Bronner this refusal was an abuse of a dominant position. He claimed that access to the delivery system was an essential facility since postal delivery did not represent an equivalent alternative to home-delivery and that, because of its small number of subscribers, it would be entirely unprofitable for him to organize his own home-delivery service[86].

The Court found that there was no abuse of dominant position because it did not assess Mediaprint's delivery scheme to be indispensable. The Court stated that there were alternatives to the Mediaprint's delivery system such as retail sale or small scale distribution systems. Hence, the Court argued that an adoption of the essential facilities doctrine is not possible[87]. Accordingly, the CJEU set a criterion which would have to be present before the refusal could be an abuse[88]:

- The refusal would have to be likely eliminate all competition in the downstream market from the person requesting access.
- There is no objective justification for the refusal.
- The access must be indispensable for the other undertaking to carry on its business.
- There must be no actual and potential substitute for it.

These criteria were not fulfilled in *Bronne*r. The Court combined the 'non-substitutability' test which was demonstrated in *European Night Services* decision with indispensability' test[89]. The approach adopted in Oscar Bronner provides an important contribution to addressing question of whether facility is to be considered essential. Moreover the Court pointed out that in order to show that the creation of new facility is not realistic, it is not enough to argue that it is not economically advantageous for a small undertaking which seeks to access. In *Bronner* Case, there were alternatives to the Mediaprint's delivery system such as distributing daily newspapers by post or through shops and kiosks. Also there were not any technical, legal or economic obstacles for Bronner to establish a new delivery system, alone

[86] Šparaš D.& and Kocjančič N., 2005, Essential Facility Doctrine – Access to the Public Postal Network, 13th Conference on Postal and Delivery Economics, p.8
http://www.apek.si/sl/datoteke/File/2007/essential_facilty_doctrine-access_to_public_postal_network.pdf
[87] *Supra*, n.1, p.93-94
[88] *Supra*, n.26, p. 551
[89] *Supra*, n.30, p.56

or in-cooperation with other publishers[90]. This means that it is not easy to prove that a product or service is indispensable in a case, after the above mentioned tests which were brought out by European Night Services and matured by Oscar Bronner.

The *Bronner* decision was a miles step in the European jurisdiction for essential facilities doctrine. In its subsequent decisions, CJEU has referred to the requirements adopted under *Bronner* case.

2.3.3. Guidance on the EC's Enforcement Priorities in Applying Article 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant undertakings

In 2009 The EC published guidance on its enforcement priorities in applying EC Treaty rules on abuse of a dominant market position (Article 102) to abusive exclusionary conduct by dominant undertakings. It identified specific forms of abuse such as exclusive dealing, tying and bundling, predation, refusal to supply and margin squeeze.

According to the Guidance, the concept of refusal to supply covers a broad range of practices such as[91];

- a refusal to supply products to existing or new customers
- refusal to license intellectual property rights or
- refusal to grant **access to an essential facility** or a network

The EC established three conditions that must be satisfied before a "refusal to deal" or "margin squeeze" may be considered contrary to Article 102 TFEU. These conditions mirror those established by the "CJEU" in the Bronner case[92];

- The refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- The refusal is likely to lead to the elimination of effective competition on the downstream market; and
- The refusal is likely to lead to consumer harm.

[90] Nihoul P.&Rodford P.,2004, EU Electronic Communications Law, Competition and Regulation in the European Telecommunications Market, Oxford University Press, p.481

[91] EC,2009, Communication from the Commission- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para.78

[92] *Ibid*, para.81

Thus, the essential facility doctrine is deeply rooted in Community competition law and is increasingly used by the EC in its analysis of refusals to deal by dominant undertakings. This is also reflected in recent case law on margin squeeze[93]. In its Guidance Paper on Article 102 TFEU, the EC analysed refusal to supply and margin squeeze under the same section. It also considered that in order to be prohibited under Article 102 TFEU, the conditions defined by the CJEU in Bronner must be satisfied, including a determination that the refusal in question "relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market"[94].

2.4. Critics of the Doctrine

The development of the essential facilities doctrine over the past few decades has led to a great deal of criticism from commentators. The obligations laid down in the 1998 Access Notice have been considered as an "over-zealous and over-interventionist approach by some scholars. They claimed that extreme caution should be made before the application of the doctrine[95].

One of the most important criticisms of the doctrine has been made by Phillip Areeda. He argued for the need for caution in imposing liability on an essential facility doctrine theory, particularly in the Section 2 of Sherman Act context, and for the need to allow a defence based on legitimate business justifications[96] He argued that case law neither provides a consistent rationale nor explores social costs and benefits of the application of the doctrine. Thus, according to him, essential facilities is less a doctrine than an epithet[97].

Another criticism came from Professor Hovenkamp. According to him the essential facilities doctrine is troublesome, incoherent, and unmanageable. Professor Hovenkamp argued that application of essential facilities doctrine would refine the general refusal to deal doctrine.

---

[93] Renda A., 2010, Competition-Regulation Interface in Telecommunications: What's Left of the Essential Facility Doctrine, Telecommunications Policy, Volume 34 Issue 1-2, p.29

[94] Estella F. D.,2011, Jurisprudence of the EUJC on Margin Squeeze: From Deutsche Telekom to TeliaSonera and Beyond… to Telefonica!,p.16
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851315

[95] Bartosch A., 2002, Essential Facilities: The Access to Telecommunications Infrastructures and Intellectual Property Rights under Article 82, in: Christian K., Bartosch A., Braun J.D. (ed.): EC Competition and Telecommunications Law,2002, Kluwer Law International, p.136

[96] *Supra*, n.50, p.10
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083838

[97] *Supra*, n.61, p.841

Because it leads to include the more troublesome situations that may now fall through the cracks. Hovenkamp believed that its application is unnecessary. According to him, if proper application of the essential facilities doctrine prevents anticompetitive refusals to deal, the general principles of the Sherman Act are all that are needed to remedy the situation. However, if courts do not narrow the application of the doctrine in this manner, the doctrine loses its mooring in § 2 of the Sherman Act. He also claimed that forced sharing requires courts to determine the terms and conditions of access. In contrast to regulatory authorities, regulatory role is not appropriate for the courts are and thus, the court's use of the essential facilities doctrine will not improve consumer welfare[98].

Moreover, some scholars argued that application of the doctrine reduces the incentive for market entrants to develop their own facilities or infrastructure. As they could easily gain access to the facilities of competitors, they may have no incentive to invest in similar and better facilities. This situation may lead to reluctance for the owner of the facilities to continue investing their assets[99].

For example, in Europe the EC and NRAs use the investment ladder model. This model purposes facilitating entry by competitors by offering them favourable access conditions to different network elements at different moments in time, hence they can climb the ladder and eventually get to the real essential facility. Accordingly, NRAs provide much more access than merely essential facilities to new entrants, and have often encouraged entry by competitors that had no intention to invest in their own network[100].

Potential disincentives of application of the doctrine are also dangerous for the market itself. They may discourage innovation and technological change. As companies are reluctant to invest on new technologies, the whole market development –which is based on private investment- will be held back. Therefore, application of the doctrine may delay development of new technologies such as next generations networks in electronic communications market.

[98] Coker J. R., 2005, Saving Otter Tail: The Essential Facilities Doctrine and Electric Power Post Trinko, Florida State University Law Review, Vol. 33, p.243
http://www.law.fsu.edu/journals/lawreview/downloads/331/coker.pdf
[99] Diathesopoulos M. D. ,2010, Competition Law and Sector Specific Rules in European Energy Sector: A Comparison to Trinko, Recent Commission's Antitrust Decisions and a Look to the Future Trinko Case, p.7
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639926
[100] *Supra*, n.93, p.29

As a result, slowdown of technological development may have serious long-term social and economic effects.[101]

Moreover, application of doctrine raises the concerns about collusion on downstream market. Some commentators argue that because of the low risk and standard cost of access to the networks and facilities for operators on the downstream markets, price competition may be limited. Besides, as the firms' dependence to the owner of the essential facility increases, collusion practices could be easier and difficult to end[102].

3. THE LEGAL FRAMEWORK FOR ESSENTIAL FACILITIES DOCTRINE IN ELECTRONIC COMMUNICATIONS SECTOR

Application of the essential facilities doctrine in accordance with Article 102 of the Treaty is important especially for former monopolised network industries such as electronic communications or energy sectors[103].In the context of electronic communications sector, several years following liberalisation, former monopolists throughout the Europe still have a significant market power both in the provision of the electronic communications infrastructure and in the provision of electronic communications services particularly in the local call segments. Although 2002 Regulatory Framework promotes emergence of network competition, provision of services still depends on the use of unbundled network elements and leased lines from incumbent. Hence, in order to deal with situations in which the incumbent refuses provision of access for retail service provision and there is no alternative infrastructure for service providers, the usage of essential facilities doctrine as a remedy to provide competition is discussed[104].

The 2002 framework is based on the concept of dominance as applied under Article 102, thus also based on essential facilities. The essential nature of assets owned by network operators is part of the assessment of need for ex ante regulation. In the three criteria test, barriers to the market entry are evaluated. Recital 9 of the 2007 Recommendation clarifies that "related structural barrier can also exist where the provision of service requires a network component

[101] *Supra*, n.99, p.5
[102] *Ibid,* p.7
[103] *Supra*, n.5, p.51
[104] *Supra*, n.6, p.93

that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors''[105]. In the following part, sector specific regulations related to the essential facilities doctrine will be examined.

3.1. Access Notice of EC

In August 1998, The EC published a notice on the application of the competition rules to access agreements in the electronic communications sector. The EC uses notion of the essential facility both in the context of its explanation of dominance and description of abuse. The dominance is described as relying on the notion of essential facility as follows:

"A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 102. Conversely, a company may enjoy a dominant position pursuant to Article 102 without controlling an essential facility[106]"

Moreover, according to 1998 Access Notice, a refusal will be considered abusive when[107];

- There is a discriminatory treatment of access seekers; or
- There is a refusal to grant access for the purposes of a service where no other operator, has been given access by the access provider to operate on that services market,
- There is a withdrawal of access from an existing customer.

The concept of essential facilities is related with the second case, because the first and third constellations do not reach beyond the traditional concepts of non-discrimination and refusal to deal[108]. According to the EC, a dominant undertaking will infringe Article 102 by refusing access to its essential facilities if[109];

a. Access to the facility in question is generally essential in order for companies to compete on that related market,

[105] European Commission, 2007, Commission Recommendation of 17 December 2007 on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, recital 9.
[106] *Supra*, n.3, para. 69
[107] *Ibid*, para. 84
[108] Garzaniti L.J.H.F., 2005, Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation, Sweet & Maxwell Limited of, Second Edition, p.312
[109] *Supra*, n.3, para. 91

b. There is sufficient capacity available to provide access,
c. The facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market,
d. The company seeking access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions,
e. There is no objective justification for refusing to provide access.

The last condition has been largely criticised because there is a danger of unconstrained use of the objective justification argument by incumbents. In 1998 Access Notice, it is stated that any justification will have to be examined carefully on a case-by-case basis. Examples of objective justification given in the 1998 Access Notice are overriding difficulty of providing access to the requesting company and technical feasibility[110].

There are plans that the EC will revise the Access Notice, but it has not happened yet, the rules set out are still valid[111].

3.2. Access Directive of EC

The current regulatory framework for electronic communications often referred to as the "new regulatory framework" resulted from the review of the ONP 1998 framework. It is embodied in four directives enacted in 2002, one of which is Access Directive[112]. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks. The principle is to allow competition rules to act as an instrument for market regulation. If there is no effective competition on the market, the NRA must act, among other things by imposing obligations on operators which have significant market power. The objective is to establish a framework which will encourage competition by stimulating the development of communications services and networks, and also to ensure

[110] *Ibid*, para. 91
[111] *Supra*, n.5, p.51
[112] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

that any bottlenecks in the market do not constrain the emergence of innovative services that could benefit the users[113].

The Access Directive contains instruments for the NRA to establish competition in the electronic communications market based on the principles from the essential facilities doctrine and Framework Directive. NRA will impose the following obligations on that operator, according to the circumstances[114]:

- obligations of transparency;
- obligations of non-discrimination
- obligations of accounting separation in relation to specified activities concerning interconnection and/or access;
- obligations of access to, and use of, specific network facilities.
- obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems;
- obligations relating to functional separation

The obligation of functional separation was included to the 2002 Regulatory framework with the 2009 Telecom Regulatory Package. The inclusion of functional separation as a remedy in the application of regulatory framework can be considered as the ultimate frontier in the application of essential facilities doctrine in the electronic communications sector. It is the indicator of European attitude towards the imposition of structural remedies to address market failure[115].

The regulation of the communications sector under the regulatory framework addresses most of the issues of access and market entry that have hitherto been addressed using the essential facilities doctrine. The concept of access has been broadened to bring additional facilities within the scope of the access regime[116]. In access obligation obligations operators may be required inter alia[117]:

[113] http://europa.eu/legislation_summaries/information_society/legislative_framework/l24108i_en.htm
[114] *Ibid*
[115] *Supra*, n.93, p.30
[116] *Supra*, n.108, p.312-313
[117] *Supra*, n.113

- to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;
- to negotiate in good faith with undertakings requesting access;
- not to withdraw access to facilities already granted;
- to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;
- to provide co-location or other forms of associated facility sharing;
- to give access to associated services such as those related to identity, location and occupation.

The Access Directive is different from the 1998 Access Notice. The main difference between two legislations is that while the 1998 Access Notice is focused on breaching of Article 102 of Treaty on European Union, the Access Directive set out rules for ensuring access to the facilities or for interconnection. The Access Directive considers content and objectives of the Article 102 in connection with electronic communications sector. Another difference between these legislations is that 1998 Access Notice is not binding to the member states. The content does not have to be implemented into the national law. The Access Notice is a guideline. On the other hand Access Directive sets out binding rules which have to be adopted into the national legislation[118].

In conclusion, in Europe essential facilities doctrine applies both ex ante (under the regulatory framework for electronic communications) and ex post (under Article 102 of the EU Treaty). But new access and interconnection regime includes a wide range of access issues. Hence, it is questionable to what extent general competition law, and in particular the essential facilities doctrine is needed in the regulation of access.

3.3. Sector Specific Regulation versus Competition Law

In the 20th century the electronic communications industry has been viewed as a public utility and public ownership of electronic communications companies or strong controls by the government went with that. Today, after privatization and introduction of competition in the electronic communications markets, the reason for public intervention results from the fact that most incumbents still have significant market power in their markets and enjoy

[118] *Supra*, n.5, p.57

significant advantages even though competition has been officially introduced. Incumbents can control essential facilities, they enjoy the advantages of network industries, they have vertically integrated upstream and downstream production facilities, they have strong control over network standards and their development etc[119]. These problems of market imperfections during the process of liberalisation in electronic communications law led to a threefold regulatory system of sector – specific regulation combined with generic competition law and supervised by an independent regulatory authority[120].

Given the fact that there was no competition in the electronic communications sector, the adoption of competition law alone is not sufficient to provide competition. The competition law regulates competition matters; therefore established competition is required in order to apply competition law. In electronic communications sector, competition is not established all over the sector[121].Despite the positive changes observed after liberalisation, the gap between effective and legal to open up competition is still significant and due to this fact the question is whether regulation or competition policy is the best tool to oversee the liberalization of network industries and to what extent competition policy and regulation are complements or substitutes[122].

3.3.1. Ex ante versus Ex post Approach

In a threefold regulatory system of electronic communications sector, competition is established on the one hand through sector-specific regulation and on the other hand via general competition law rules. Within the European regime; the Directives, Regulations, Recommendations and Notices are the major EU sector-specific measures whereas the EC's decisions under the oversight of the CJEU comprise the core of the EC Competition Law.

Although at first glance they look like similar, there are important differences between two approaches. While the sector specific regulation is a prescriptive approach general

[119] Landgrebe J. The Mobile Telecommunications Market in Germany and Europe: Analysis of the Regulatory Environment Mobile Termination Charges and Access for Mobile Virtual Network Operators, Ludwig-Maximilians-University of Munich,p.4

[120] Broumas A.G., 2009, The Necessity of Sector Specific Regulation in Electronic Communications Law, Journal of International Commercial Law and Technology Vol. 4, Issue 3 p.177

[121] Supra, n.5, p.14

[122] Buigues P.A., 2006, Competition Policy Versus Sector-Specific Regulation in Network Industries – The EU Experience, p.4
http://archive.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf

competition law is a proscriptive approach[123]. In a sector specific approach the regulator imposes certain behaviour and standards on firms prospectively. In contrast to regulatory activity, competition law prohibits certain courses of conduct and leaves firms doing what they like as long as they avoid such practices. It is therefore that competition law is considered to be a less interventionist approach than regulation[124].

Table 1: Competition Policy and Sector Specific Regulation[125]

	Competition Policy– Ex post	Sector Specific Regulation/ SMP regime
General approach	Ex-post, harm based approach	Ex-ante, prescriptive business conduct
Institution design	Horizontal institution Lawyers and economists	Sector-specific institution: sector-specific engineers and economists
Amount and nature of information required	Only information on the allocated abuse	General and detailed information on the sector
Nature of the remedies imposed on undertaking	Structural remedies addressed to specific conduct	Detailed conduct remedies requiring extensive monitoring
Nature of public intervention	Permanent based on general competition policy principles	As competition is more effective, part of sector specific regulation replaced by competition law

One of the main objectives of the Competition law is the maximisation of consumer welfare. This implies that competition law aims at efficiencies (allocative, productive and dynamic) on the market by ensuring the competitive structure is maintained and possibly strengthened. To achieve this goal, an antitrust authority applies ex-post competition law in several steps[126]:

- It begins with defining the relevant market according to the small but Significant Non-Transitory Increase in Price (SSNIP) or the Hypothetical Monopolist Test
- It then determines whether one or several undertakings have significant market power
- Finally, the authority finds out whether the undertakings with market power have committed an anti-competitive behaviour. If so, the authority imposes a fine and/or behavioural remedies (to put an end to the anti-competitive practice) or structural remedies if necessary and proportionate.

[123]Cave, Martin ,2000, How far can deregulation of telecommunication go?, in: Marsden, C. T. (ed.): Regulating the Global Information Society, London (Routledge), 2000, p. 93
[124] Supra, n.119,p.3
[125] *Supra*, n.122, p.11
[126] De Streel A., 2008, The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications p.3
http://www.fundp.ac.be/pdf/publications/65507.pdf

On the other hand, sector regulation has three (possibly contradicting) objectives: promotion of effective competition, the internal market, and the users' interest[127]. To achieve these goals, NRAs follow three stages when imposing obligations on the operators[128];

- It starts by selecting markets where sector regulation would be more efficient than antitrust to solve competition problems. In practice, it uses three cumulative criteria test in order to decide(high permanent and non-strategic entry barriers, no competitive dynamics behind these barriers and inefficiency of antitrust remedies to solve the competitive problems)
- Then, it delineates the boundaries of the selected markets by using antitrust methodologies (the SSNIP test).
- It determines also whether an operator enjoys a single or collective significant market position or could leverage a significant market power from a closely related market. If it is the case, it imposes proportionate regulatory remedies to be chosen from regulatory framework.

In the ex ante approach, regulatory agencies have to take a forward looking view. In order to place restrictions on certain conducts they should observe different business conducts. Thus, enterprises face less uncertainty due to regulation interventions. This approach makes it possible for an operator to foresee the risk of investment. But the competition law approach is basically a harm-based approach. Because there are no ex-ante restrictions on business conduct, enterprises can be penalized if their business conduct leads to an abuse of dominant position or market power[129].

Furthermore the amount and the nature of information needed for these approaches are different. The ex post approach requires less information than ex ante approach. In order to make decision in competition law, the business conduct is assessed after the allegation by using what is known at the time of investigation. On the other hand ex ante approach requires more information to determine in sector specific matters[130].

In network industries, one of the most important issues is the pricing for interconnection among competitors. A new operator needs interconnection on the network of the incumbent in

[127] Article 8 of the European Framework Directive
[128] *Supra*, n.126, p.4
[129] *Supra*, n.122, p.6
[130] *Supra*, n.5, p.15

order to operate. In principle, it is easier to make ex post determination if a price is unfair than to set ex ante a fair price. However, ex-post approach may create uncertainties for new operators. They have to make huge investments without any clear information about the interconnection charge and its future evolution. In other words, ex ante regulation provides competition for network industries and ex post rules ensure that business can operate[131].

Also the characteristics of the authorities are different. The responsibility of competition authorities is to intervene and impose sanctions or penalties for the abuse of dominant market power, cartels or mergers in any industry. It requires a very high standard of expertise from different markets. However, the regulatory authorities have a duty in specific sectors like electronic communications. This approach is known as sector specific approach. In order to make a decision, sector specific knowledge is needed. Another important difference between these authorities is that the decision making power in the regulatory authorities is in the hand of policy maker rather than the courts[132].

3.3.2. Advantages and Disadvantages of the Sector Specific Regulation and the Competition Law

Both ex ante and ex post approach have disadvantages and advantages. The competition law has the following advantages. The competition law prohibits forms of conduct that are specified and shown to be harmful to social good. Hence temporary departures from competition benchmarks are not penalized without investigation[133]. Moreover Competition law interferes to a lesser extent with the proper functioning of the market[134]. But there are also disadvantages. Although Competition law is an essential tool to prevent some serious offences, it has a narrow scope. It is focused on protecting essential conditions without which the market cannot work, leaving the rest to market self-regulation. Moreover the competition law is not suitable for enhancing concurrence in liberalised markets, where no competition existed before. And the competition law is applied on a case-by-case basis, which could create more legal uncertainty than the regulation itself. Competition law is applicable once the behaviour has occurred. It usually requires long procedures, which extend for months or years. [135]

[131] *Supra*, n.122, p.6,7
[132] *Ibid*, p.8
[133] *Supra*, n.5, p.18
[134] Laguna de Paz J. C., 2012, Regulation and Competition Law, European Competition Law Review, p. 3
[135] *Ibid*, p.2,3

Contrary to the ex post regulation, sector specific regulation is a transparent regulation based on general rules. It is widespread in network industries It is adopted in a preventive manner, trying to avoid the illegal conduct. Immediate enforcement is also guaranteed. Regulators act with a forward looking view, trying to anticipate market trends in the short term. On the other hand there are various disadvantages. It imposes a high informational requirement on the regulators. Also in sector specific regulation, short-term goals (lower prices) can take precedence over long-term goals (more investment) which can hinder the development in the market. Due to the excessive regulation, it could crowd out private investment in the sector. And finally asymmetric regulation that favours new entrants could damage the incumbent's property rights[136].

As a result, in order to provide competition both approaches are necessary. The regulatory authorities have to set out the rules and create competition in the market and competition authorities are necessary for the protection of that competition. But the concurrence of two separate sets of rules governing the same conduct entails legal uncertainty, as the recent EU and US case law highlights[137].

Different approaches are accepted in US and EC case law for the concurrence of competition law and sector specific regulation. While the US epitomizes the use of heavy-handed ex ante regulation, which originates from the adoption of the 1996 Telecommunications Act and a large number of implementing provisions[138], the EC decided that competition rules may apply where the sector specific legislation does not prevent undertakings from engaging anticompetitive behaviours[139] . As the competition is established in the market, there should be a transition from sector-specific regulation to general competition law.

[136] *Ibid*, p.3
[137] *Ibid*, p.1
[138] Geradin D. & Sidak J. Gregory,2003, European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications, Handbook of Telecommunications Economics, vol. 2, Technology Evolution and the Internet, p.3
[139] Geradin D.& O'Donoghue R.,2005, The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/05, p.57
http://www.coleurop.be/content/gclc/documents/GCLC%20WP%2004-05.pdf

3.3.3. The Scope for Application of Competition Law Where Sector Specific Remedies Exist

Given that there is an ex ante regulation, the question arises whether there is a need for the application of competition law ex post. This creates difficult issues about the nature and extent of the regulatory objectives and to what extent these two regulatory options converge or diverge. If an operator requires access to an incumbent's network, this could be considered under competition law, in particular under the essential facilities doctrine, or under the access and interconnection regulatory regime[140].

Under EU competition law, recent cases of essential facilities are particularly relevant for this issue. An example is provided by *Deutsche Telecom* (DT) case. The case is about the tariffs that DT charged its competitors for unbundled access to local loops in Germany. Although the NRA had approved the DT's tariffs, the EC applied Article 102 ruling that the competition rules may apply in any case where the sector specific rules do not preclude the undertakings from engaging in anticompetitive behaviours[141]. Because of its territorial reach and economies of scale, The DT's infrastructure was considered to have the properties of an essential facility[142]. The EC found that despite the intervention of NRA, DT retained a commercial discretion, which would have enabled it to change its tariffs further so as to reduce to put an end to the margin squeeze[143]. The CJEU upheld the EC's decision and confirmed that because of the indispensability of wholesale local loop access services, the abusive margin squeeze practice can make market entry more difficult for competitors. Therefore, the conduct of DT hindered competition' in the retail market for the provision of services to end users. The CJEU applied the essential facilities doctrine within the interpretation of the indispensability and lack of alternatives for enabling the viability of competitors in order to compete with DT. In *Deutsche Telecom* case the CJEU clarified that margin squeeze is not a per se abuse. Thus, anti-competitive effect is needed before the pricing practice will amount to an abusive margin squeeze[144].

[140] Frankenberg N. S., 2004, Article 82 EC and Access to Essential Facilities in EC Telecommunications: The Interaction Between Competition Rules and Sector-Specific Regulation. Masters Thesis, Durham University,p.140 http://etheses.dur.ac.uk/3048/
[141] *Supra*, n.99, p.7
[142] Supra, n.6, p.96
[143] *Supra*, n.139, p.56
[144] *Supra*, n.94,p.9

A few years later, in *Telefónica* the EC found that from September 2001 to December 2006 the margin between Telefónica's retail and wholesale prices at national and regional levels were insufficient to cover the costs that an operator as efficient as Telefónica would have to incur. The EC ruled that, by imposing a margin squeeze on its competitors, Telefónica abused its dominant position contrary to Article 102 TFEU[145]. Because in its Guidance Paper on Article 102 TFEU, the EC analysed refusal to supply and margin squeeze under the same section, it appears logical that the conditions that have been set by the CJEU in *Bronner* should be met to establish a margin squeeze infringement.

Telefónica argued that the conditions set by the CJEU in *Bronner* were not satisfied in its case because (i) there were real and/or potential alternatives to the regional and national wholesale access services of Telefónica, (ii) Other operators could replicate the regional and national wholesale access services of Telefónica and (iii) the conduct of the Telefónica was not likely to eliminate all competition on the downstream market[146].

But, in its Telefónica decision the EC rejected the application of the Bronner conditions in the assessment of legality of the incumbent's conduct because of the particular circumstances of this case which fundamentally differ from those in Bronner[147]. First, Telefónica had a duty to supply the upstream inputs under the electronic communications regulation[148] and second, the EC estimated that Telefónica's ex ante incentive to invest in its infrastructure were not in danger in the present case[149].

In Telefónica, the EC could have pointed out that because there is no a serious alternative to Telefónica's DSL network, exceptions merely allowed the EC to take a shortcut in its analysis. But these exceptions criticised by some scholars. They argued that these exceptions could lead to unjustified finding of infringements based on the misguided view that access to a vertically-integrated firm's infrastructure is essential for one or several rivals to compete on a downstream market[150].

[145] *Supra*, n.25, p.3
[146] *Ibid*, p.4
[147] *Supra*, n.94,p.7
[148] Hou L., 2011, Some Aspects of Price Squeeze Within the EU: A Case Law Analysis, European Competition Law Review, p.4
[149] *Supra*, n.25, p.4
[150] *Ibid*, p.5

Moreover Telefónica argued that the EC was not authorised to take action on an issue that had already been settled by the Spanish authorities. The EC pointed out that Spanish industry regulator is not a competition authority and therefore cannot implement TFEU arts 101-102. Also it argued that ex post intervention can be implemented by competition authorities by taking into account the costs actually incurred by the company. Hence, competition authorities can investigate and sanction anti-competitive behaviour in markets subject to sectoral regulation[151].

The latest CJEU judgement on this issue is *Konkurrentensverket v TeliaSonera* case. TeliaSonera is the incumbent telecom operator in Sweden. It provided broadband services to end-users in retail market and offered access to other operators in wholesale market. The National Competition Authority (NCA) found that TeliaSonera abused its dominant position on the wholesale market by applying a margin squeeze between the wholesale price for Asymmetric Digital Subscriber Line (ADSL) products and the retail price for ADSL services it offers to consumers which would not have been sufficient to cover TeliaSonera's incremental costs on the retail market[152].

It is important to note that unlike previous cases (DT and Telefonica), TeliaSonera was not under any regulatory obligation to provide the wholesale product, and the product was arguably not indispensable to competitors. This forced the Stockholm District Court to ask ten questions to the CJEU. One of which it asked, the product supplied by the dominant undertaking on the wholesale market must be "indispensable" to downstream competitors to be an abuse under Article 102 TFEU[153].

Advocate General Mázak submitted its opinion on 2 September 2010. According to him, the margin squeeze and refusal to deal have same rationale and the indispensability of the TeliaSonera needed to be established (it is a critical issue in this case since a some alternative technologies were apparently available to provide broadband services to end-users), except where the dominant undertaking is subject to a regulatory obligation compatible with EU law to supply the wholesale products[154].

[151] *Supra*, n.134, p.5
[152] *Supra*, n.25, p.6
[153] *Supra*, n.94, p.5
[154] *Supra*, n.25, p.6

Moreover The Advocate General considered a margin squeeze to be abusive if there was regulatory obligation for dominant undertaking to supply the input or, if there is no such obligation, the input must be indispensable to enable a competitor to enter into competition with it on the downstream market. This opinion could be interpreted in a way that in German practice the concurrent application of specific regulation is necessary within the general context of essential facilities. On the other hand in EU Competition Law there is no shared-use legal obligation on essential facilities, the practice has created such a duty if that input is indispensable. Therefore, if there is a specific provision of regulation exists, it remains for the competition authority to interpret those provisions and apply them in parallel[155].

AG Mazák considered second Telefónica exception carefully. The NCA and the EC had argued that TeliaSonera's situation was special because its upstream market position was the result of the protection of special or exclusive right or financial contribution by State resources. By saying this, he referenced to AG Jacobs in its opinion in the Bronner case. Because of the recognition in the legal systems and constitution AG Mazák acknowledged the importance of the basic property rights on investments. In addition, AG Mazák noted that it was not clear why a public source of funding for property should lead to a stricter legal standard. Then he concluded that relevance of second exception will depend on the specifics of a given fact[156].

This conclusion is explicitly set in paragraph 29[157]:

"Therefore, if there is no regulatory obligation compatible with EU law on a dominant undertaking to supply the products in question or if those products are not indispensable then that undertaking should in principle not be charged with an abusive margin squeeze simply on the basis of the insufficient spread between wholesale and retail prices."

However, the CJEU roundly rejected this approach. The CJEU disregarded the application of the Bronner standard to an allegedly abusive margin squeeze conduct, and ruled that such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to

[155] Chiriță A.D., 2011, Access to Essential Facilities: A Comparative Competition Law Perspective of Shared Use and Recent Margin Squeeze Cases, Competition Survey: Studies, Researches and Analysis, p.10
[156] *Supra*, n.25, p.6,7
[157] Opinion of Advocate General Mazák in Case C-52/09, Konkurrensverket v. TeliaSonera AB, 2 September 2010
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0052:EN:HTML

supply. And the CJEU concluded that application of the Bronner conditions in every case would unduly reduce the effectiveness of Article 102 TFEU[158].

The ruling of the CJEU has been criticised by some scholars in the sense that after this judgement which dominant companies should rely on the EC's guidance. According to them, the ambiguousness of the answer would increase uncertainty in the area of competition law. Indeed, in its Guidance Paper on Article 102 TFEU, the EC analysed refusal to supply and margin squeeze under the same section. It also recognized that for these practices to be prohibited under Article 102 TFEU, the conditions defined by the CJEU in the Bronner must be met. How then should dominant operators now interpret the EC's Guidance Paper on Article 102 TFEU. Hence it may be said that the CJEU's approach goes beyond the EC's 2009 Guidance[159].

All above lead to the argument that the EC wants to apply competition rules in a regulated electronic communications market. Competition rules remain a valuable reserve for the EC, in case that sector regulation does not achieve competition in specific situations. The judgements of Deutsche Telecom, TeliaSonera and Telefonica cases show that the existence of ex ante regulation does not by any means exclude ex post competition law enforcement.

On the other hand there is a different approach adopted in the recent US case law. In the *Curtis v. Trinko*[160] case (Trinko), the Supreme Court radically limited the substantive and institutional scope for antitrust intervention in network industries, the Court ruled that antitrust rules have a very limited scope of application, if there is sector specific regulation.

In Trinko, Verizon (incumbent local exchange carrier) was required to provide access to its operations support systems in accordance with the 1996 Telecommunications Act. AT&T was using for a fee lines owned by Verizon. Trinko was AT&T customer, who filed a civil action against Verizon. Trinko claimed that Verizon discriminated against AT&T customers, in violation of both Section 2 of Sherman Act of 1890 and 1996 Telecommunications Act. The critical issue in this case was that in order to provide services to their own customers, an effective access to Verizon's systems were required. The case was resulted before the US

[158] *Supra*, n.94,p.15
[159] *Ibid*, p.16
[160] *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, LLP , 540 U.S. 398 (2004)

Supreme Court tried to answer whether a company that does not fulfil its duty under the Telecommunications Act can be sued under the Sherman Act [161].

The Supreme Court judgement in Trinko case led to an interesting guidance on two issues of antitrust law. The first issue was related to the access problems of new entrants on the basis of (i) the case law relating to refusals to deal by monopolists and (ii) the "essential facilities" doctrine. A second issue was to determine whether antitrust rules should be implemented in sectors where sector specific regulation already existed[162].

The Supreme Court rejected the application of essential facilities doctrine to monopolization law for several reasons. The First reason for this was that Supreme Court had never recognised the existence of the doctrine clearly in past cases. Second, if a state or agency or authority has powers to regulate the use of these facilities, the doctrine cannot apply. The Supreme Court noted that in any event, if such a doctrine were recognized, it could only apply where access is unavailable. This is unlikely in sectors where sharing requirements are or can be imposed through regulation[163]. Third, in order to apply the doctrine the access to essential facility must be prevented totally. Fourth, there is no need to apply such a doctrine, when relevant arguments are directly related with Section 2 of Sherman Act. Finally, refusal to deal conduct requires an intention to limit the competition[164].

Moreover the Supreme Court highlighted that the application of the doctrine may reduce incentives for new investment, thus could be harmful for the general objectives of the antitrust law[165]. Thus, the Trinko case led to a major reduction in significance of the "essential facilities" doctrine.

In Trinko case the Supreme Court also assessed the applicability of competition rules where there is sector specific regulation. The US Supreme Court takes a negative attitude towards this approach because of three reasons. First, in the field of electronic communications, Verizon was subject to the detailed authorization requirements and the other sector specific

[161] *Supra*, n.99, p.1
[162] Nicholas P., 2004, Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the Trinko Case, 13 Utilities Law Review,6,p.2 http://local.droit.ulg.ac.be/sa/ieje/fileadmin/IEJE/Pdf/Trinko_case.pdf
[163] *Ibid*,p.4
[164] *Supra*, n.99, p.2
[165] *Ibid*, p.2

provisions. Furthermore, operators are placed under the strict supervision of the Federal Communications Commission which has significant powers to provide competition. Secondly, The Supreme Court assessed the cost/benefit analysis about the enforcement of competition rules when sector specific regulation already existed. It identified that in the field of network industries, practices which have an exclusionary effect may often have nothing to do with the intent to eliminate competitors. Thus, the Supreme Court concluded that where sector specific regulation exists, the role of competition rules in this field has to be subsidiary and these rules should be preferred when no sector specific remedies are available[166].

3.4. The Future Implications of the Doctrine for the Electronic Communications Market

The concept of essential facilities is dynamic, susceptible to change according to the technology evolution and consumer preferences. The traditional view of PSTN telecoms network as essential facilities must now be reconsidered in the electronic communications field. Because the convergence is now blurring the boundaries between fixed and mobile, as well as between telecommunications and information technology (IT) services. The incumbent's wire-line is replicable through wireless technologies, wireless broadband networks and alternative broadband platforms. Thus, whether fixed electronic communications network should be considered as an essential facility is in question[167].

On the other hand migration towards next generation access (NGA) may exacerbate the essentiality of some network elements. Deployment of NGA networks requires huge amount of investment. Cost of digging holes to make space for one or more fibre networks in existing ducts is very high. Hence, countries define passive elements of networks as an essential facility and impose obligations to share them. For example France regulatory authority, Autorité de Régulation des Communications électroniques et des Postes (ARCEP) defines civil engineering infrastructure, including underground infrastructure that hosts the local loop, as an essential facility. On the other hand top European players claimed that new infrastructures should not be considered as an essential facility for providing investment opportunities. Hence, today, NGA debate looks at future essential facilities which for the most part still to be built rather than existing facilities in the network[168].

[166] Supra, n.162,p.2
[167] Supra, n.93, p.31
[168] *Ibid*

Today, passive infrastructure sharing is associated with essential facilities concept. The new EC Recommendation on relevant markets stated that where there is no alternative infrastructure to the today's local loop, access to the ducts or alternative elements must be considered[169]. The ERG also claimed that importance of scale and scope economies will increase with the NGA investments. This will reduce the degree of replicability and lead to a bottleneck. This claim supports the massive application of essential facilities in an NGA environment. Countries that have mandated access or plan to mandate access to passive infrastructure include Belgium, Italy, France, Denmark, and Germany[170].

Moreover it is expected that the essential facilities debate moves to more prospective and less tangible assets. When all-internet protocol (IP) environment is established, internet service provider (ISP) platforms will subject to mandatory access policy. All-IP platforms will be seen essential distribution channels for applications and content[171].

On the other hand the notion of essential facilities will have some difficulties in the regulation process. First, the requirement of huge investment for NGN deployment will make big players reluctant to invest if they know that they will be charged only long run incremental cost (LRIC) –based access prices to new entrants. Secondly, even if they decide to invest, the concomitant regulation of the infrastructure layer (through access policy) and higher layers (through mandatory net neutrality) may impede the profitability of the business[172].

After Trinko, reconsideration of the essential facilities doctrine, at least in the application of antitrust law is expected in US. Whether this will lead to a revival of the doctrine in the US and around the world, especially for the next generation networks, remains to be seen. The researchers claim that NGA deployment and the net neutrality querelle are likely to be affected by the essential facilities doctrine in the years to come[173].

---

[169] EC, 2007, Explanatory Note, Accompanying Document to the Commission Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services Markets.
[170] Supra, n.93, p.32
[171] *Ibid*
[172] *Ibid*, p.33
[173] *Ibid*, p.23

The essential facilities doctrine could also be used for access issues falling outside of the New Regulatory Framework. Because New Regulatory Framework does not include content services, cases concerning access to radio and TV broadcasting content, or web-based content, may still be dealt with under the essential facilities doctrine. As Article 102 EC can be directly used by Member States, third parties want to use Article 102 EC and the essential facilities doctrine to gain access in private litigation and through complaints to EC. This will be especially important whenever Member States have not, or have not fully, implemented sector-specific rules or sector specific regulation is not sufficient to solve competition problems[174].

4. IMPLICATIONS OF ESSENTIAL FACILITIES DOCTRINE FOR TURKISH ELECTRONIC COMMUNICATIONS MARKET

In this part, first of all, the legal framework for the essential facilities doctrine in Turkish Competition Law will be given. Then the most interesting decisions taken by Turkish Competition Board related to the essential facilities doctrine will be discussed. Moreover the future implications of the doctrine for electronic communications market will be considered.

4.1. The Essential Facilities Doctrine under Turkish Competition Law

Turkish economic system is based on free market economy. Article 167 of the Constitution clearly charges the State with preventing monopolization and cartelization in the markets, which may arise de facto or as a result of agreements. In order to ensure implementation of the Article 167, the Law on the Protection of Competition No. 4054[175] (Turkish Competition Act) was enacted in 1994. With this Law, harmonisation of the EC Competition Rules was also achieved.

The main goal of the Turkish Competition Act is the prohibition of cartels and other restrictions on competition, prevention of abuse of dominant position by a firm which has dominance in a certain market and prevention of the creation of new monopolies by monitoring some merger and acquisition transactions.

[174] *Supra*, n.108, p.313
[175] The Act on the Protection of Competition was adopted in 1994.
http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerik&icId=165&Lang=EN

The Turkish Competition Authority[176] (Competition Authority) was established in 1997 as per Article 20 of Turkish Competition Act, in order to ensure the formation and development of markets for goods and services in a free and competitive environment, to observe the implementation of this Act, and to fulfil the duties assigned to it by the Act.

The Turkish Competition Act depends on Articles 101 and 102 of the Treaty. The transactions under the scope of the Act can be listed under three headings:

- Agreements, practices and decisions which can prevent, distort or restrict competition (Article 4),
- Abuse of dominant power by undertakings which hold dominant position in a market (Article 6),
- All legal transactions and behaviour in the nature of mergers and acquisitions which will decrease competition (Article 7).

There is no specific provision on the essential facilities doctrine in the Turkish Competition Act. But there are a number of cases that illustrate the applicability of the essential facilities doctrine. The decisions of the Competition Authority related with the doctrine are based on Article 6/a,d of the Turkish Competition Act[177]. In the following part, some of the most important decisions of the Competition Authority will be discussed.

[176] http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=437&Lang=EN

[177] Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited.
Abusive cases are, in particular, as follows:
a) Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,
b) Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,
c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,
d) Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,
e) Restricting production, marketing or technical development to the prejudice of consumers.

4.2. Essential Facilities Doctrine Decisions under Turkish Competition Law

4.2.1. Biryay Decision[178]

Although the application of the essential facilities doctrine has been very controversial and difficult issue in Europe and US case law, as a new institution, the Competition Authority, had taken an important decision related to the doctrine in 2000.

BBD and YAYSAT who had joint dominant position with 100 % market power in newspaper and magazine distribution market established a joint venture, called BIRYAY, so that they can distribute customer publications. BBD, YAYSAT and their joint venture BIRYAY reached an agreement for determining the distribution conditions, commission fees and other charges to be applied to other distribution companies. Then BBD and YAYSAT made compulsory for their dealers not to sell newspapers and magazines distributed by other distribution companies. They also made some amendments in existing distribution contracts, refused to renew existing contracts with some publication owners. As a result of these activities, Competition Authority decided to open an investigation about BIRYAY to determine whether there existed an infringement of competition in the context of Articles 4 and 6 of Turkish Competition Act[179]

BIRYAY case was an example of both a refusal to deal and a discriminatory act that prevented competition in the market. Hence, the Competition Authority found that there is a prohibition of Article 4/a,b and Article 6/a,d and imposed fines on BBD, YAYSAT and BIRYAY and obliged all municipality kiosks to sell all publications provided by all distribution companies, thus made it available for consumers to find any newspaper and magazine at final sales point[180].

BIRYAY case is similar to the *Oscar Bronner* case in the sense that both cases were related to media sector. But there are important differences between them. Firstly, in BIRYAY, the undertakings were joint dominance whereas in the *Oscar Bronner* Mediaprint was holding a dominant position on itself. Second, in Oscar Bronner the Court found that Mediaprint's delivery scheme was not indispensable because there were alternatives such as distributing daily newspapers by post or through shops and kiosks. Also there were not any technical, legal or economic obstacles for Bronner to establish a new delivery system, alone or in-cooperation with other publishers. On the other hand in BIRYAY, the distribution system was

[178] Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333.
[179] Supra, n.30, p.140,141
[180] *Ibid*, p.141

considered indispensable by Competition Authority because it is not possible to establish such a distribution system. BIRYAY's distribution system used shops and kiosks belonged to municipality. Municipal permission was required in order to use them. Hence there was a legal barrier for other undertakings to use and establish such a distribution system[181].

4.2.2. Turk Telekom A.S. (TTAS) /TISSAD (Association of Internet Service Providers) Decision[182]

It is one of the most important decisions taken by Competition Authority in electronic communications sector. In this decision, not only the essential facilities doctrine used explicitly but also the doctrine used as an evaluation criterion. TTAS was the legal monopoly in carrying out (fixed) voice telephone services as well as establishment and operation of all electronic communications infrastructure. In this case main competitive concern was whether TTAS used its dominance in the wholesale markets to restrict competition in the relevant retail markets[183] .

In its decision the Competition Authority set criteria for the application of the doctrine[184].The *MCI Communication Corp v. AT&T* decision was used by Competition Authority for determining the criteria for the application of the doctrine. These are;

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

The Competition Authority emphasized that the first and second criteria are sufficient for the establishment of essential facility. The latter two criteria are used for the evaluation of the refusal to deal cases when the first two conditions are met[185].

[181] *Supra*, n.10, p.33
[182] Competition Board's Decision dated 02/10/2002 and numbered 02-60/755-305
[183] Gürzumar O.B.,2006, Zorunlu Unsur Doktrinine Dayalı Sözleşme Yapma Yükümlülüğü,Seçkin Yayınevi, p.343
[184] *Ibid*, p.348
[185] *Ibid,* p.349

In this vein, the Competition Authority found that based on these criteria, TTAS infrastructure was an essential facility and TTAS abused its dominant position in the network market for broadband internet access for corporate customers by determining the tariffs for the access to network so high that rivals could not compete in the relevant market while determining the tariffs for the internet access so low[186].

4.2.3. TTAS Decision[187]

TTAS decision is another important decision of Competition Authority regarding the competition in the electronic communications sector. Similar to TTAS /TISSAD decision, in TTAS decision, essential facilities doctrine was used both explicitly, and as an evaluation criterion[188].

In the case, the Competition Board held that TTAS abused its dominant position by imposing excessive prices to ISPs, while applying low prices to its ISP, TTNET. The Competition Board decision stated that TTAS abused its dominant position by making it difficult for the providers and satellite operators to compete with TTAS and applying predatory pricing with the aim of eliminating competitors.

While making its decision The Competition Authority made an assessment related to the economic characteristics of the market and the dominant position of TTAS in the market. In the Board decision, some citations were made to essential facilities doctrine through references to the terms of the usage of the monopoly rights of TTAS in both cable TV network and electronic communications network[189].The Board found that;

- Access to the cable TV, electronic communications networks and leased lines was controlled by TTAS,
- Since these networks have the characteristics of the natural monopoly and there is a legal monopoly in leased lines, it is not possible for other operators to duplicate such networks.

[186]International Cooperative Network, Unilateral Conduct Working Group Questionnaire,p.4 http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/turkey.pdf
[187] Competition Board's Decision dated 06/11/2002 and numbered 02-68/821-333.
[188] *Supra*, n.183, p.343
[189] *Supra*, n.30, p.153

The Competition Authority stated that considering these characteristics of the market, the services that only provided by TTAS (network services) should be considered essential facility for the other operators[190].

4.2.4. Aria (Roaming) Decision[191]

In the Aria case, there were three mobile operators. Turkcell İletişim Hizmetleri A.S (Turkcell) and Telsim Mobil Telekomünikasyon Hizmetleri A.S. (Telsim) were granted GSM 900 licenses in 1998. Some years later in early 2001, Is-Tim started operations in March 2001 under the brand name Aria with a GSM 1800 license. Then Is-Tim made a complaint to the Turkish Competition Authority in December 2001 and claimed that Turkcell and Telsim had abused their dominant position by refusing to provide roaming services. The issue was whether refusal to provide roaming was a violation of Competition Law. The Competition Authority decided to open an investigation. After one and half year, it found that there is a violation of the Competition Law, fined Turkcell USD 15.4 million and Telsim USD 6.1 million[192].

In its decision, first of all the Competition Authority investigated dominant position of Turkcell and Telsim over the GSM infrastructure market and concluded that they have joint dominance. The Competition Authority then argued that Turkcell and Telsim had effectively refused providing roaming services and that this refusal lead to an abuse of dominant position by denying access to an essential facility[193].

In its decision, Competition Authority set criteria which would have to be present for the facility to be essential[194];

- Access to the facility in question is generally essential in order for companies to compete on that related market
- There is sufficient capacity available to provide access

[190] *Supra*, n.183,p.349
[191] Competition Board's Decision dated 09/06/2003 and numbered 03-40/432-186.
[192] Atiyas İ. Doğan P., 2007, When Good Intentions Are Not Enough: Sequential Entry and Competition in the Turkish Mobile Industry, Telecommunications Policy 31, p 519
http://research.sabanciuniv.edu/4797/2/Atiyas_dogan_Tr_mobile.pdf
[193] *Ibid*, p. 519
[194] *Supra*, n.183, p.396

- The facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market
- The company seeking access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions
- There is no objective justification for refusing to provide access

These criteria were taken from Access Notice of the EC. Hence, the existence of the essential facilities doctrine was accepted by Competition Authority by implementation of the Access Notice.

Is-Tim eventually had to duplicate facilities in question by its license condition. Hence the Competition Authority argued that full roll out of the facility would take time and that the passage of time would make it more difficult for Is-Tim to attract subscribers. The Competition Authority considered technical, legal, and economic difficulties that would prevent the installation of infrastructure in a short period of time. According to the Competition Authority delays in attaining full coverage would seriously increase the cost of attracting subscribers, and lead to delay in revenues which would in the end jeopardize the viability of the company and reduce its ability to compete with the incumbents[195].

4.2.5. ÇEAS Decision[196]

ÇEAŞ was an operator in electricity production, transmission, distribution and had concession on transmission and distribution in a region of the country determined by the concession contract. But ÇEAŞ did not conclude the necessary contract for the transport of electricity to be generated by Enerjisa in its autoproducer plant, and did not make the necessary connection for access to the national transmission and distribution line, did not purchase the electricity generated in the autoproducer facilities of Toros in violation of the agreement between the parties and prevented its transport to the partners of Toros[197].

[195] *Supra*, n.192, p 519
[196] Competition Board's Decision dated 10/11/2003 and numbered 03-72/874-373.
[197] *Supra*, n.183, p.424

The Competition Authority evaluated the case on the notion of essential facility. In ÇEAŞ, essential facility is defined as an element owned by a dominant undertaking, which is not possible to be reproduced or duplicated by other undertakings in terms of technical, legal or economic considerations or such a reproduction or duplication is uneconomic and irrational, and which displays a prerequisite for the competitive structure in a related market[198].

In the case, criteria for application of the doctrine were defined as[199]:

- essential element must be controlled by an undertaking which is a monopoly or in a dominant position,
- reconstruction or reproduction of essential element by another undertaking must not be possible under reasonable conditions.

The Competition Authority also stated that the following conditions are sought in order to find an abuse in cases evaluated in the scope of the doctrine. These are[200]:

- the undertaking in a dominant position has refused to let use of essential element or has prevented such a use,
- it is possible to make use of the relevant essential element, in other words; the action of refusal in question is not based on objective grounds.

In the light of above mentioned conditions the Competition Authority decided that ÇEAŞ[201]

- possessed the essential facility and had dominant position in the electricity transmission market in the region determined in the concession agreement,
- prevented the complainants from having access to the infrastructure,
- lacked to set forth any legal and technical justification for the prevention,
- prevented actual and potential competition in the upstream market (electricity production market) by using its dominant position in the downstream market (electricity transmission market) and therefore, abused its dominant position.

In general, in essential facility cases, the dominant operator uses its dominant position in the upstream market to prevent competition in the downstream market. In ÇEAS case, the reverse

[198] *Supra*, n.186, p.11
[199] International Cooperative Network, 2010, Case Annex to ICN Unilateral Conduct Working Group, Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws, p.61
http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf
[200] *Ibid*
[201] *Ibid*, p.62

took effect. ÇEAS was using its dominant position in the downstream market and prevented competition in upstream market[202].

4.2.6. Cable TV Decision[203]

In this case, the Competition Authority evaluated whether TTAS abused its dominant position by not opening cable network to its competitors in a market which is legally open to competition[204].

In the decision, first of all, authorization of the Competition Authority and Information and Communications Technologies Authority (ICTA) related to the subject matter of investigation was discussed. In this context, the Competition Authority stated that existence of a regulatory agency in the electronic communications sector did not undermine the competence of the Competition Authority about competition issues and both agencies should work in a cooperative manner to maximize the consumer surplus[205].

In its decision, the Competition Authority mentioned about essential facilities, but did not refer to the doctrine. The Competition Authority used some kind of "no economic sense test" found that the only rational explanation of TTAS's conduct was to exclude rivals from broadband internet services market. The Competition Authority also examined whether TTAS's behaviour had any technical or objective justification and found that the alleged conduct was neither a result of technical necessities nor had it any reasonable objective justification. Considering these facts, the Competition Authority decided that TTAS abused its dominant position in order to monopolize retail broadband internet services market[206].

In conclusion, The Competition Authority's decisions show that The Competition Authority has been influenced by both US and EU case law. Also it could be argued that the Competition Authority is eager to use the doctrine in its decisions. This is the result of the continued liberalisation process in such sectors in Turkey. Moreover, there are no specific rules and boundaries related to the doctrine in the Competition Authority's decisions. Thus,

[202] *Supra*, n.30, p.143
[203] Competition Board's Decision dated 10/02/2005 and numbered 05-10/81-30
[204] *Supra*, n.183, p.449
[205] Supra, n.199, p.62
[206] *Ibid*

the application of the doctrine looks like the early phases of EC and US case-law, but not the second phase adopted after *Oscar Bronner* judgment.

4.3. Essential Facilities Doctrine under Turkish Electronic Communications Legislation

The term "essential facilities" is not used specifically in Electronic Communications legislation. But this issue is considered under the related Articles of Electronic Communications Law No. 5809 (5809)[207], enacted in 2008, and Ordinance on Access and Interconnection, enacted in 2009[208].

Article 15 of 5809 identifies the scope of access and Article 16 of 5809 defines obligation of access. Article 16(1) and Article 16(5) of 5809 is explicitly related with objectives of the doctrine. Article 16 (1) of the 5809 states that "*When any operator does not allow other operators to have access within provisions of Article 15 of this Law or he sets forth unreasonable period and stipulations for access in a manner to result in not allowing access, and as a result if the Authority decides that such behaviour of the operator will prevent the formation of competition environment and the situation to arise will be against the interests of end users; then the Authority shall be entitled to impose obligation on such operator to accept the access requests of other operators"*. Furthermore, Article 16 (5) of the 5809 states that "*The Authority may impose obligations on operators which are liable for providing access; such as equality, non-discrimination, transparency, clarity, to be based on cost and reasonable profit and to provide access services with fair conditions and with the same quality which they provide for their subsidiaries or partners or partnerships towards meeting reasonable access demands of other operators as per provisions of this Law"*

These Article provides that when access requests are delivered by national authority , it must take into account the competitive environment of the market, in that it has to ensure that the refusal to provide access would not hinder the competition in the market. This seems to be in line with the CJEU's case law on refusal to deal, which requires, that the behaviour in question must have a negative impact on competition in the downstream market.

[207] http://www.btk.gov.tr/mevzuat/kanunlar/dosyalar/elektronik_haberlesme_kanunu.pdf
[208] http://www.btk.gov.tr/mevzuat/yonetmelikler/dosyalar/erisimvearabaglanti.pdf

It should also be noted that the law maker takes account the interests of the end users in the Article 16. This is compatible with the opinion of AG Jacobs in Bronner, where he stated that the primary purpose of the Article 102 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors.

The Ordinance on Access and Interconnection is based on the 5809 and it identifies the details of the access obligation. Article 7 of the Ordinance states that Authority will impose access obligation to the operators with significant market power in the relevant market. It is also compatible with the Article 102 of the Treaty. In EC Law, Article 102 focuses on the unilateral behaviour of undertakings which hold 'dominant position'.

In conclusion, similar to the European electronic communications regime, Turkish electronic communications legislation is based on a dual regime of sector specific regulation and competition law in the regulation of access.

5. CONCLUSION

Despite the full liberalization of the electronic communications sector from January 1998, incumbent operators still have dominant positions in most areas of the sector. This is particularly true for the area of bottleneck facilities. As duplication of bottleneck facilities is not feasible, new entrants into the market depend on access to the incumbents' networks to provide services to end-users. As the incumbents· have no incentive to share their networks with potential competitors, a certain degree of regulation is indispensable to provide competition in the electronic communications market.

In the liberalisation process of electronic communications market, sector specific regulation has intercepted with antitrust rules. One of the antitrust tools that have been used by regulators to provide competition is the essential facilities doctrine. The doctrine states that if a monopoly or a dominant company owns or controls facility which is essential for its competitors to compete on a market, it may be pro-competitive to oblige that company to give access to its facility. The doctrine is originated from United States antitrust case law. In US the doctrine was implicitly used for the first time in *Terminal Railroad* decision in 1912, and

then in cases *Associated Press* (1945) and *Otter Tail* (1973). It was then explicitly used in *Hecht v Pro Football, Inc decision*. The doctrine applied to electronic communications sector in *MCI Communication Corp v. American Telephone & Telgraph Co. (AT&T)* decision. The conditions to be established for applying the essential facilities doctrine were determined in this case. Although, first elaboration related to doctrine was made in US lower courts, The Supreme Court has never officially recognized the doctrine nor used the term essential facility.

The early developments of the doctrine influenced European competition policy. The doctrine was applied in a number of cases, such as *Commercial Solvents, United Brands, Telemarketing.* In these cases, the essential facilities doctrine was incorporated with the doctrine of refusal to deal. Then in *Magill*, for the first time the doctrine is applied to the intellectual property rights. In *European Night Services* judgement, non-interchangeability and unavailability of a viable alternative were identified as two cumulative conditions for a product or a service to be regarded as 'essential'. Later, in *Bronner,* CJEU set criteria which would have to be present before the refusal could be an abuse. This restricted application of the doctrine has been welcomed by most scholars. It emphasizes the importance of sector-specific access regulation and decreases the concerns about incumbent's investments.

Furthermore, the guidance on the Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings also mentioned the essential facilities doctrine as a subset of refusal to deal by dominant undertakings. Thus, the essential facility doctrine is deeply rooted in Community antitrust law and is increasingly used by the EC in its analysis of refusals to deal by dominant undertakings.

But there were some sceptical approaches developed by some leading antitrust scholars such as Phillip Areeda and Hovenkamp for the application of the doctrine. They criticised the doctrine in terms of Section 2 of Sherman Act. Moreover the doctrine is criticised by some scholars in the sense that it may discourage investments, innovation and development and lead collusion on market.

Like antitrust rules, there is a similar trend in sector specific regulation. The essential facilities doctrine can be visible in the open network provision era. The one of the main objectives of sector specific regulation is to eliminate bottlenecks in the networks, which is considered as

an essential facility. 1998 Access Notice provides a test inspired from the US essential facilities doctrine. Essential facility test is used for assessing whether access to a particular network must be granted pursuant to Article 102 of the Treaty. Moreover, the obligation of access and obligation of functional separation in the Access Directive strengthen the application of the doctrine in the electronic communications field. On the other hand new access and interconnection regime includes a wide range of access issues. Hence, it is questionable to what extent general competition law, and in particular the essential facilities doctrine is needed in the regulation of access issues.

As the liberalization process did not coincide with the end of dominant positions, access policies are necessary to provide competition in the market. One of the main issues in electronic communications policy is whether the access issues should be resolved by sector-specific regulation, or whether it is sufficient to apply EC competition rules (particularly Article 102), building on the concept of essential facilities.

Although at first glance they look like similar, there are important differences between two approaches. Sector specific regulation is a prescriptive, forward looking approach in which the regulator imposes certain behaviour and standards on firms prospectively. On the other hand general competition law is a proscriptive, harm based approach that prohibits certain courses of conduct and leaves firms doing what they like as long as they avoid such practices. They have different objectives and they follow different steps in order to achieve these goals. Both ex ante and ex post approach have disadvantages and advantages. Thus, in order to provide competition in the market both approaches are necessary. The regulatory authorities have to set out the rules and create competition in the market and competition authorities are necessary for the protection of that competition. But the concurrence of two separate sets of rules governing the same conduct entails legal uncertainty, as the recent EU and US case law highlights.

In EU the judgements of Deutsche Telecom, TeliaSonera and Telefonica cases show that the existence of sector specific regulation does not by any means exclude competition law rule enforcement. Competition rules remain a valuable reserve for EC, in case that sector regulation does not achieve competition in specific situations. EU antitrust and electronic communications policy stand continue to stand on the essential facility doctrine. On the other hand in US, the Supreme Court radically limited the substantive and institutional scope for

antitrust intervention in network industries in the Trinko decision, the Court ruled that antitrust rules have a very limited scope of application, if there is sector specific regulation. Hence, the Trinko case led to a major reduction in significance of the essential facilities doctrine in US.

The electronic communication sector is dynamic and highly influenced by technological developments. Convergence is another issue that makes the problems in the sector complicated. According to Ungerer[209], convergence is defining the future bottlenecks. In this context, whether a fixed electronic communications network should be considered as an essential facility and whether application of the doctrine discourages the investment in new technologies are highly disputed. On the other hand, convergence may make market definition difficult thus, it threatens to outpace existing sector-specific regimes. In competition law, market definitions can be adjusted without changing either the regulatory framework or its basic principles by using the doctrine. Hence, competition law may have to deal with an increasing number of issues instead of sector specific regulation.

In the electronic communications sector, it hard for regulators to maintain the right balance between incentives to invest in new infrastructure and securing access based competition in the short run. Experiments of US and EU showed very mixed results. In US, the FCC began to use access holidays in order to stimulate investment in new high speed infrastructure. But this approach does not lead to any relaxation of regulatory obligations in the EU and other countries. In EU the NGN Recommendation clarifies that NRAs should open as many access points as possible, possibly encouraging new entrants to gradually invest in their own infrastructure.[210].

But with the technological development, application of the doctrine creates new challenges that regulators have to solve. In the future, although it is hard to evaluate nature of these facilities, the passive elements of the network are expected to be defined as an essential facility. Moreover the essential facility debates moves to new themes such as investment in NGA environment, net neutrality, LRIC pricing, more prospective and less tangible assets and all IP environment.

[209] Ungerer H., 1998b, Beating the Band-width Bottleneck, 14 May Paris http://ec.europa.eu/competition/speeches/text/sp1998_017_en.html
[210] *Supra*, n.93, p.23

There is no specific provision on the essential facilities doctrine in the Turkish Competition Act. But there are a number of decisions that illustrate the applicability of the essential facilities doctrine. The decisions of the Competition Authority related with the doctrine are based on Article 6/a,d of the Turkish Competition Act. Considering the cases mentioned above, it could be argued that The Competition Authority has been influenced by both US and EU case law and it is eager to use the doctrine in its decisions. This is the result of the continued liberalisation process in such sectors in Turkey, particularly in electronic communications sector.

In conclusion, as the access issue remains to be one of the main problems of the electronic communications sector, the essential facility doctrine lies at the core of electronic communications regulation. It stands as a key pillar of liberalisation efforts underway in several countries. Although it has clear deficiencies and the issues with regard to its application are still an issue of debates, given the fact that the doctrine is quite flexible and susceptible to technological development and converging markets, it could be argued that the doctrine is able to cope with bottleneck situations in future electronic communications sector. But, during the application of the doctrine in the electronic communications market, the NRAs have to establish the right balance between the incentives to invest in new infrastructure and securing access based competition. Furthermore, the essential facilities doctrine could also be used for access issues falling outside of the New Regulatory Framework such as Radio and TV broadcasting and Web-based content. As Article 102 EC can be directly used Member States, third parties may use Article 102 EC and the essential facilities doctrine to gain access in private litigation and through complaints to EC. This will be especially important whenever Member States have not, or have not fully, implemented sector-specific rules or sector specific regulation is not sufficient to solve the competition problems.

BIBLIOGRAPHY

I. Books

Bavasso A.,2003, Communications in EU Antitrust Law Market Power and Public Interest, Kluwer Law International, p.223

Cotter T.F., 2008, Essential Facilities Doctrine, Antitrust Law and Economics, Keith N. Hylton, ed., Edward Elgar Publishing, p.6

Garzaniti L.J.H.F., 2005, Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation, Sweet & Maxwell Limited of, Second Edition, p.312,313.

Gürzumar O.B. ,2006, Zorunlu Unsur Doktrinine Dayalı Sözleşme Yapma Yükümlülüğü, Seçkin Yayınevi, p.343,348,349,396,424,449.

Jones A. & Sufrin B.,2007, EC Competition Law , Oxford University of Press, Third Edition, p. 92,108,546,581.

Kubasch J.G.,2011, Sector Specific Regulation In Telecommunications Market, VDM Verlag Dr. Müller GmbH & Co. KG p.4,5,14,15,18,35,36,44,51,57,

Nikolinakos N. Th., 2006, EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors, Kluwer Law International, p.59,63,66,67,93,94

Larouche P., 2000, Competition Law and Regulation in European Telecommunications, Hart Publishing, p.189,191.

Nihoul P.&Rodford P.,2004, EU Electronic Communications La, Competition and Regulation in the European Telecommunications Market, Oxford University Press, p.481

Stoyanova M., 2008, Competition Problems in Liberalized Telecommunications Regulatory Solutions to Promote Effective Competition, Kluwer Law International p.93, 96,101,117,118,19,121

II. Articles

Areeda P., 1989, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. p.841

Bartosch A., 2002, Essential Facilities: The Access to Telecommunications Infrastructures and Intellectual Property Rights under Article 82, in: Christian K., Bartosch A., Braun J.D. (ed.): EC Competition and Telecommunications Law,2002, Kluwer Law International, p.136

Broumas A.G., 2009, The Necessity of Sector Specific Regulation in Electronic Communications Law, Journal of International Commercial Law and Technology Vol. 4, Issue 3 p.177

Cave, Martin ,2000, How Far Can Deregulation of Telecommunication Go?, in: Marsden, C. T. (ed.): Regulating the Global Information Society, London (Routledge), 2000, p. 93

Coker J. R., 2005, Saving Otter Tail: The Essential Facilities Doctrine and Electric Power Post Trinko, Florida State University Law Review, Vol. 33, p.243
http://www.law.fsu.edu/journals/lawreview/downloads/331/coker.pdf

Day J., 2004, Essential Facilities in European Union: Bronner and Beyond, Colombia Journal of European Law, Vol.10. p. 2,14,15.

Diathesopoulos M. D. ,2010, Competition Law and Sector Specific Rules in European Energy Sector: A Comparison to Trinko, Recent Commission's Antitrust Decisions and a Look to the Future Trinko Case, p.1,2,5,7
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639926

Estella F. D.,2011, Jurisprudence of the EUJC on Margin Squeeze: From Deutsche Telekom to TeliaSonera and Beyond… to Telefonica!,p.7,9,15,16
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851315

Geradin D. & Sidak J. Gregory,2003, European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications, Handbook of Telecommunications Economics, vol. 2, Technology Evolution and the Internet, p.3

Geradin D.& O'Donoghue R.,2005, The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/05, p.57,56.
http://www.coleurop.be/content/gclc/documents/GCLC%20WP%2004-05.pdf

Geradin D., 2010, Refusal to Supply and Margin Squeeze: A Discussion of Why the Telefonica Exceptions Are Wrong, Tilec Discussion Paper, Tilburg University, ISSN 1572-4042, p.1,3,4,5,6,7.

Hou L., 2011, Some Aspects of Price Squeeze within the EU: A Case Law Analysis, European Competition Law Review, p.4

Hahn J. H.,2001,"Nonlinear Pricing of Telecommunications with Call and Network Externalities", p.2. http://www.sciencedirect.com/science/article/pii/S0167718703000031

Laguna de Paz J. C., 2012, Regulation and Competition Law, European Competition Law Review, p. 1,2,3.

Langlois R. N.,1999, Technological Standards, Innovation, and Essential Facilities: Toward a Schumpeterian Post-Chicago Approach, University of Connecticut, Economic Working Papers, p.11

Nicholas P., 2004, Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the Trinko Case, 13 Utilities Law Review,6,p.2,4.
http://local.droit.ulg.ac.be/sa/ieje/fileadmin/IEJE/Pdf/Trinko_case.pdf

Renda A., 2010, Competition-Regulation Interface in Telecommunications: What's Left of the Essential Facility Doctrine, Telecommunications Policy, Volume 34 Issue 1-2, p.23,29,30,31,32,33.

Šparaš D.& and Kocjančič N., 2005, Essential Facility Doctrine – Access to the Public Postal Network, 13th Conference on Postal and Delivery Economics, p.8
http://www.apek.si/sl/datoteke/File/2007/essential_facilty_doctrine-access_to_public_postal_network.pdf

Spulber F. D. & Yoo S. C., 2007, Mandating Access to the Telecom and the Internet: The Hidden Side of the Trinko, Colombia Law Review, Vol. 107, p.1833,1834.

Temple Lang J.,1994, Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities, Fordham International Law Journal, Volume 18, Issue 2, p.439,444,445.

Waller S.W., 2008,Areeda, Epithets, and Essential Facilities, Wisconsin Law Review, p.4,5,10.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083838

Vaheesan S., 2010, Reviving an Epithet: A New Way Forward for Essential Facilities Doctrine, Utah Law Review, No.3 p. 915,916,917,918,919,921.

III. Reports

Atiyas İ. Doğan P., 2007, When Good Intentions Are Not Enough: Sequential Entry and Competition in the Turkish Mobile Industry, Telecommunications Policy 31, p 519
http://research.sabanciuniv.edu/4797/2/Atiyas_dogan_Tr_mobile.pdf

Buigues P.A., 2006, Competition Policy Versus Sector-Specific Regulation in Network Industries – The EU Experience, p.4,6,7,8,11.
http://archive.unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf

Chiriță A.D., 2011, Access to Essential Facilities: A Comparative Competition Law Perspective of Shared Use and Recent Margin Squeeze Cases, Competition Survey: Studies, Researches and Analysis, p.10

De Streel A., 2008, The Relationship between Competition Law and Sector Specific Regulation: The Case of Electronic Communications p.3,4
http://www.fundp.ac.be/pdf/publications/65507.pdf

ERG, 2004, Common Position on the Approach to Appropriate Remedies in the New Regulatory Framework, ERG(0^) 30 rev1, p.12

Frankenberg N. S.,2004, Article 82 EC and Access to Essential Facilities in EC Telecommunications: The Interaction Between Competition Rules and Sector-Specific Regulation. Masters Thesis, Durham University,p.140 http://etheses.dur.ac.uk/3048

Hatzopoulos V.,2006 , The EU Essential Facility Doctrine, Research Paper in Law,6, College of Europe, Brugge and Natolin, p.2,3.

International Cooperative Network, 2010, Case Annex to ICN Unilateral Conduct Working Group, Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws, p.61,62
http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf

Landgrebe J. The Mobile Telecommunications Market in Germany and Europe: Analysis of the Regulatory Environment Mobile Termination Charges and Access for Mobile Virtual Network Operators, Ludwig-Maximilians-University of Munich,p.3,4

Nikolinakos N. Th.,1999, Access Agreements in the Telecommunications Sector-Refusal to Supply and Essential Facilities Doctrine under E.C. Competition Law, European Competition Law Review, p.6

OECD, 1996, The Essential Facilities Concept, OCDE/GD(96)113, p.7
http://www.oecd.org/dataoecd/34/20/1920021.pdf

Ölmez H.S., 2003, Rekabet Hukukunda Zorunlu Unsur Doktrini ve Uygulaması, Rekabet Kurumu Uzmanlık Tezi, p.9,33

Pitofsky R., 2001, The Essential Facility Doctrine Under United States Antitrust Law, p.2,3
http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf

Tavsanoglu S.,2008, The "Effects-Based" Approach of the Commission to the Application of Article 82 to Exclusionary Abuses: Is the New Approach Really Economics Friendly?, Lund University, p.7,9. http://www.intertic.org/Policy%20Papers/Tavsanoglu.pdf

Ungerer H, 1998a, Competition Workshop on "Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union", p.5,6,21,27

Ungerer H., 1998b, Beating the Band-width Bottleneck, 14 May Paris,
http://ec.europa.eu/competition/speeches/text/sp1998_017_en.html

Ungerer H., 2000, Access Issues Under EU Regulation and Anti-trust Law- The Case of Telecommunications and Internet Markets, Research Paper WCFIA Fellows Program 1999 / 2000, Weatherhead Centre for International Affairs, Harvard University, p.17

Unver M.B., 2004, Essential Facilities Doctrine Under EC Competition Law and Particular Implications of the Doctrine For Telecommunications Sector in EU and Turkey, p.7,56,140,141,143,153.
http://etd.lib.metu.edu.tr/upload/12605496/index.pdf

IV. Cases

Associated Press v. United States 326 US 1 (1945).
Case 311/84, Cenbtre belge d'études du marché, 1985,ECR 3261
Deutsche Telekom v Commission, Case T-271/03, 2008, ECR II-477
Decision 94/663 of 21 September 1994, European Night Services,1994,OJ L 15/8
European Night Services Ltd (ENS) v. Commission, Joined Cases T-374/94, T-375/94, T-384/94& T-388/94, 1998 E.C.R. II-3141, [1998] 5 C.M.L.R. 718
GmbH & Co KG and Others, Case C-7/97, 1998,ECR I-7791, 1999,4 CMLR 112
*Hecht v. Pro Football, Inc. 570 F.2d 982, 992 (*D.C. Cir. 1977), cert. denied, 436 U.S. 956 (197).
Illinois Bell Telephone Co. v. Haines & Co. Inc 932 F.2d 610
Konkurrensverket v.TeliaSonera Sverige AB, Case C-52/09, 2011
Joined Cases C-241 & 242/91P, RTE and ITP v. Commission, 1995,ECR I-743.
Joined Cases 6,7/73, *Commercial Solvents v. Commission*, 1974,ECR 223
MCI Communications v. AT&T, 708 F.2d 1081, 1132-1133 (7th 1983).
Oscar Bronner GmBH & Co KG and Others v. Mediaprint Zeitungs-und Zeischiftverlag
Opinion of Advocate General Mazák in Case C-52/09, *Konkurrensverket v. TeliaSonera AB*, 2 September 2010
Southern Pacific Communications Co. v. American Telephone and Telegraph 740 F.2d 980
The Otter Tail Power Co v. U.S. 410 US 366 (1973).
United Brands v. Commission, Case 27/76, 1978,ECR 207
U.S. v. Terminal Railroad Association 224 US 383 (1912).
Wanadoo España vs. Telefónica, Case COMP/38.784, Commission decision of 4 July 2007
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0052:EN:HTML
Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP , 540 U.S. 398 (2004)

V. Legislation

European Commission, 1998, Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, (98/C 265/02), para.64,68,69,84,91

EC, 2007, Explanatory Note, Accompanying Document to the Commission Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services Markets.

EC, 2007, Commission Recommendation of 17 December 2007 on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to Ex ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the

Council on a Common Regulatory Framework for Electronic Communications Networks and Services, recital 9.

EC, 2009, Communication from the Commission- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para.78,81.

The Act on the Protection of Competition (No. 4054), 1994
http://www.rekabet.gov.tr/index.php?Sayfa=sayfaicerik&icId=165&Lang=EN

Electronic Communications Law, (No.5809)
http://www.btk.gov.tr/mevzuat/kanunlar/dosyalar/elektronik_haberlesme_kanunu.pdf

Ordinance on Access and Interconnection, 2009
http://www.btk.gov.tr/mevzuat/yonetmelikler/dosyalar/erisimvearabaglanti.pdf

VI. Online Sources

http://europa.eu/legislation_summaries/information_society/legislative_framework/l24108i_en.htm

http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=437&Lang=EN

International Cooperative Network, Unilateral Conduct Working Group Questionnaire,p.4,11.
http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/turkey.pdf