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When the refusal to deal becomes an
abuse of a dominant position

A study of how article 82 EC Treaty limits
the freedom of action for undertakings in a
dominant position

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Summary

In my paper I have emanated from the question *when* a refusal to deal by an undertaking in a dominant position constitutes an abuse according to article 82 EC Treaty.¹ Under the scope of my paper I have summarised the current legal situation by examining case law. In conclusion I have found that article 82 imposes a special responsibility on undertakings in a dominant position not to allow their conduct to impair competition. The dominant undertaking's refusal to deal constitutes an abuse when it affects the structure of the market and differs from normal competitive behaviour. According to case law, this is the case when the refusal is not objectively justified. The Court does not define the meaning of normal behaviour, but it is clear that article 82 does not hinder dominant undertakings to look after their commercial interests. A dominant undertaking is allowed to make profitable decisions and according to the Court of Justice of the European Communities², so is the case even if these decisions harm competitors. However, case law states that conduct can be considered as an infringement of article 82 if the intention of the dominant undertaking is to eliminate competitors.

Being dominant is not contrary to article 82 and neither is the use of economic power in order to grow on the market where the dominant position is held. However, in case law it has been established that if an undertaking is dominant on one market, it is contrary to article 82 to use the strength on that market to enter another. In these cases the dominant undertaking can be forced to deal in order to let other competitors on the market.

If the dominant undertaking supplies a raw material or controls an essential facility, its actions are more likely to impair competition. The structure of the market and the position of the dominant undertaking are decisive for the effect the conduct amounts to. Therefore, the freedom of action is different depending on in which market the dominant undertaking is acting.

From the case of *Bronner* from 1997³, it follows that the duty to supply a service can be broken down into three criteria to show an abuse:

1. the conduct of the dominant undertaking must be likely to eliminate competition in the market.
2. the refusal cannot be justified objectively, and

¹ Article 82 of The Consolidated version of the Treaty establishing the European Community, signed in Rome 1957, incorporating the changes made by the Treaty of Amsterdam on 2 October 1997, OJ 1997 C340, pp. 173-308, hereafter referred to as "The Treaty".

² Hereafter referred to as "The Court".

³ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, 26 November 1998, [1998] ECR I-7791.

3. the product in question must be indispensable, inasmuch as there is no actual or potential substitute in existence.

These criteria can be useful when determining if a conduct infringes article 82, but are only to be seen as guidelines for the dominant undertaking. When determining if a refusal to deal by a dominant undertaking constitutes an abuse, each case must still be viewed separately.

Abbreviations

EC	European Community
E.C.L.R.	European Competition Law Review
ECR	European Court Reports
C.M.L.Rev.	Common Market Law Review
OJ	Official Journal
UK	United Kingdom
US	United States

1 Introduction

“The successful competitor, having been urged to compete, must not be turned upon when he wins”.⁴

The quotation made above illustrates the fundamental problem in applying article 82 of the Treaty, the prohibition of an abuse of a dominant position. Indeed, Competition law may be viewed as including a fundamental tension. Competition assumes the freedom of economic actors; freedom from constraint is the source of its strength. Still, in order to obtain a functioning competition, laws are required to constrain conduct and reduce this freedom. According to me this tension is what makes competition law interesting. I have always viewed competition law as a tool for controlling the laws of Darwin. EC Competition law promotes the survival of the fittest, but only when this benefits the Community as a whole. The strongest do not always win, if they did it would lead to a monopoly controlled by private and purely economical interests. This would be in contrast to the interests of the EC.⁵

The economists Simon Bishop and Mike Walker claim that

“even a dominant firm should be entitled to keep and use to the maximum any competitive advantage that it has legitimately acquired even if its competitors do not have any similar advantages and may not realistically be able to obtain them”.⁶

However, the line between legitimate competitive behaviour and abuse of a dominant position is not easy to draw. Even if the presumption of freedom to deal seems appropriate to a free market economy, it sometimes must be prevailed by the interest of a functioning competition. Normally an undertaking can choose to deal with whom he pleases and refuse to provide service to a competitor. However, if he is in a dominant position he can easily use the right of freedom to deal in order to force weaker competitors of the market. The behaviour therefore needs to be controlled and competition needs to be protected by rules.

⁴ The statement was made by Judge Learned Hand in *Alcoa, United States v. Aluminium Co. of America*, 148 F. 2d 416, 430 (2d Cir. 1945) and is quoted by Sarah Turnbull in her article *Barriers to Entry, Article 86 EC and the Abuse of a Dominant Position: An Economic Critique of European Community Competition Law*, [1996] 2 E.C.L.R. p. 96.

⁵ The reader is referred to The Commission Notice on Postal Services: *Postal Services, Liberalisation and EC Competition Law – preparing for a new era in postal services*, 12 June 1998, http://europa.eu.int/comm/competition/speeches/text/sp1998_026_en.html, where it says that the “Postal Directive therefore also includes extensive provisions concerning the achievement of service quality through regulation of the postal incumbent, instead of relying on competition to reach this aim”.

⁶ Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, Sweet & Maxwell Limited, London UK, 1999, p. 116.

An undertaking in a dominant position always have to consider EC Competition rules when planning its production and marketing policy. If the Commission of the European Community finds that the practice of a dominant undertaking constitutes a violation of article 82, it may, according to article 3 in Regulation 17/62,⁸ bring that infringement to an end and impose a fine. It is therefore of greatest importance that the application of EC Competition law is clear and comprehensible so that also dominant companies are able chance to predict what will be the consequences of their behaviour.

A rule, prohibiting a certain conduct, per definition limits the freedom of action. My question is to what *extent* article 82 limits the freedom of action to deal for dominant undertakings. Which factors decide if a refusal to deal by a dominant undertaking is contrary to article 82 or instead constitutes a legal way to pursue a commercial interest? And finally, can a dominant undertaking continue to be dominant without abusing its dominant position?

By examining EC case law I hope to find the answers to these questions and define when the refusal to deal by an undertaking in a dominant position constitutes an abuse.

1.1 Method

When searching for information for my paper, I have focused on EC case law. This is due to two reasons. First, although EC Competition law is a well-covered area of EC law, there is not much written concerning my specific subject. The literature has mainly been useful to me in chapters regarding the background of article 82 and regarding established facts about competition rules. I have also made use of the authors' references to relevant case law. The second reason to why I have been moderate in my use of literature is that I consider the subject of this paper to be politically controversial. Even if I have quoted some of the opinions expressed by the authors, I have focused on the decisions and judgements in order to obtain the facts required.

⁷ Hereafter referred to as "The Commission".

⁸ Council Regulation 17/62/EEC of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 13/204 (amended by Regulations 59/62, 118/63/EEC, 2822/71/EEC and 1216/99/EC). The reader is also referred to the Commission Proposal COM (2000) 582 of 27 September 2000, for a Council Regulation on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, http://www.europa.eu.int/comm/competition/antitrust/others/modernisation/comm_2000_582/en.pdf. Article 3 of Reg. 17/62 is equivalent to article 7 in the new regulation.

⁹ Regulation 17/62, *Ibid.*, article 15. In the Commission Proposal COM (2000) 582, *Ibid.*, article 22 deals with the possibility of giving fines.

The European library at the Faculty of Law at the University of Lund has been my primary source of information. In some cases I have had to turn to the University library of Stockholm. However, even with these sources of information, I have failed in my search for some documents that are not available in any Swedish or Danish libraries. In these cases I have not been able to control information that other authors refer to, something that I clearly state in an immediate footnote.

The Treaty of Amsterdam was signed in 2 October 1997 and entered into force on 1 May 1999. This Treaty provides for the renumbering of the articles of both the Treaty on European Union and the Treaty establishing the European Community. Article 82, the essence of this paper, had number 86 before the Treaty of Amsterdam. In this paper I use the new numbering systems. However, when quoting from the content of documents written prior to 1 May 1999, reference is made to the old numeration. To draw the reader's attention to these changes, all quotations using the old numbering appear in italics.

1.2 Limitations

In order for there to be an infringement of article 82 a company has to occupy a dominant position and this position has to be abused in a way, which affects trade between Member States. Article 82 therefore consists of three criteria, which all must be fulfilled in order for a conduct to constitute an abuse. For my paper I will only examine one part of article 82, namely the abuse-concept. In all reasoning I will assume that the two other criteria of article 82 are fulfilled and there will be no reasoning concerning the existence of a dominant position and the trade effect.

The abuse-concept includes many different kinds of conduct. Tying, rebate systems, predatory pricing, excessive pricing and different exclusionary conduct are all different examples of abuse of a dominant position.¹⁰ For this paper I have chosen to focus on different refusals to deal and will only refer to other types of abuse when it is of interest for the questions at issue.

1.3 Disposition of the paper

This paper consists of three parts: one theoretical, one practical and one analysing. Before focusing on the refusal to deal, some background information is required. Therefore, I have chosen to initiate the first part of my paper with some information about article 82. This includes the historical background and a survey

¹⁰ The examples of abuse are taken from Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, 7th edition, Hart Publishing, Portland, Oregon, US, 2000, chapter 3.3.

on EC Competition policy. Thereafter I examine some of the basic features of the abuse-concept, common for different types of conduct. I initiate the practical part of my paper with chapter 4 and a discussion about the essential facilities doctrine. In this part of the paper I focus on EC case law (however, some US case law also appears). Chapters 4.2 up to 4.4 are all constructed according to the same model: an introduction of the case, including the necessary facts and the legal questions, are followed by the decisions and judgements. In the end of each case I make a summary of the outcome and its importance for the questions at issue. The paper ends with a discussion consisting of my own thoughts and opinions as well as those of different authors.

2 Article 82

Article 82 of the Treaty provides:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 82 prohibits the abuse of a dominant position and contains a list of conducts, which, if taken by an undertaking in a dominant position, constitute abuse. However, the conducts listed are not to be seen as exhaustive but only as examples.¹¹ The article itself does not provide us with any definition of the term abuse, and the so-called abuse-concept has often created misunderstandings among foreign observers, particularly from the United States, who find it disturbingly vague.¹² Indeed there is some truth to the critics. As we will see later in this paper, the lack of definition has given the Court a great margin of appreciation and together with the Commission it has been willing to adopt an extensive interpretation of the abuse-concept.¹³ It is also important to observe that article 82 does not provide any possibility for exemptions in cases of abusive of a dominant position.¹⁴

Article 82, and the regulations implementing¹⁵ it must be read in the light of the objectives of the Treaty.¹⁶ Therefore, in order to fully comprehend how article 82

¹¹ This is clear from the wording of article 82 itself and from Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. EC Commission*, 21 February 1973, [1973] ECR 215, para. 26 of the Grounds of Judgment.

¹² Gerber David J.: *Law and Competition in Twentieth Century Europe*, Oxford University Press Inc., New York, US, 1998, p. 174.

¹³ An example is the extension of the definition to cover a merger in Case 6/72, *Continental Can*, cited *supra* note 11. The reader is also referred to Bos Pierre, Stuyck Jules, Wytinck Peter, *Concentration Control in the European Economic Community*, 1st edition, Graham & Trotman Limited, London, UK, Kluwer Academic Publishers Group, Norwell, US. p. 10.

¹⁴ Gerber David J.: *Law and Competition in Twentieth Century Europe*, cited *supra* note 12, p. 345, see also Case T-51/89 *Tetra Pak Rausing SA v. EC Commission*, 10 July 1990, [1990] ECR II-309, para. 25 of the Judgment, where the court stated that an exemption under article 81(3) could not be such as to render inapplicable the prohibition set out in article 82.

¹⁵ Regulation 17/62/EEC, cited *supra* note 8 and Commission Proposal COM (2000) 582, cited *supra* note 8.

is to be applied, we must go back to the Treaty and the historical circumstances due to which it was created.

2.1 Historical background

David J. Gerber¹⁷ describes the story of Competition law in Europe as a success story. However, he adds that the development and strengthening of European Competition law has constantly been opposed by the representatives of big industry who generally consider the competition laws as unwanted constraints on their decision-making rights. The resistance of these strong economical interests is probably the reason to why Competition law's progress typically has been greatest during periods when the political influence of these industrial interests has been temporarily weakened.

The idea of a general law to protect competition started to take shape in the 1890s in Austria. The aim was to protect the competitive process from political and ideological attacks and to look after the so-called public interest. The ideas of competition then moved to Germany, where the first European competition law was enacted, as a response to the post-war inflation course, in 1923. Although this law was to be eliminated during the 1930s, it played an important role in European competition law history, inasmuch it initiated a great debate in Europe on how to regulate competition.

With the industrialisation and the mid-nineteenth century revolution in transportation technology, the competition became increasingly international and more European companies started to compete also in distant markets, such as the American. The industrialisation had dramatically changed the process of competition as the rationalisation of production began to replace quality and dependability as keys to competitive success. Economically strong companies, which because of their strength, could maximise their production and minimise their costs naturally achieved a competitive advantage.

The next big step for European Competition law came after the Second World War. During this time many European governments saw Competition law as a way to encourage the economic revival which was vital to Europe at the time. Many of the Europeans who were involved in economic policy decisions in the 1940s and 1950s had participated in the discussions of competition in the late

¹⁶ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 6.

¹⁷ David J Gerber has been Professor of law and co-director of the International and Comparative Law programme at Chicago-Kent Collage of Law (Illinois Institute of Technology) and is also the author of *Law and Competition in Twentieth Century Europe*, cited *supra* note 12, which has been my source for chapter 2.1. I have primarily used chapters I, II and VI of Gerber's book.

1920s and had often heard claims about the benefits of Competition law as a tool for responding to economic and political problems. By the early 1950s there was a phase of economic and political stability and all over Europe the governments were focusing on maintaining economic growth. At this time many Western European governments introduced competition laws for the first time. The different national competition laws tended to have similar basic characteristics, as they were all based on the concept of administrative control. The conduct norms in an administrative control system tend to be general and vague. They rather focus on the effects of conduct rather than on its characteristics. By controlling the harmful conduct of economically powerful firms, whose effects were against the so-called public interest, the government could protect the process of competition. This model was later to be called the abuse model because it prohibited conduct that led to a certain effect, rather than by prohibiting particular types of conduct.

In post-war Europe there was also an intense pressure from the United States to enact Competition law. According to Gerber, US officials often saw Competition law as a tool for combating the economic concentrations and cartelisation that many considered to have fostered fascism in Germany and Italy and economic and political weakness elsewhere. There was a fear of a resurrection of the German industrial power and by separating German concentrated enterprises, the Allied Nations hoped to avoid this. At a time when many European countries were dependent on the economical aid from the USA, the power of the latter is not to be underestimated.

With the foundation of the European Coal and Steel Community¹⁸ in 1951, the need for a strong Competition law to achieve the broader integrative goals of the community became clear. In order for smaller companies to enter new national markets the advance of the larger companies needed to be restrained. Article 66 of the ECSC treaty¹⁹ contained detailed provisions on merger control and a provision on abuse of economic power. It constitutes the foundation on which article 82 is built. When the Treaty of Rome was drafted, private agreements and economically powerful firms were considered an obstacle for the integration of Europe. Through article 82 the European Community came to maintain a prohibition of abuse. However, in accordance with the post-war system of administrative control, the article was brief and had to be given content in practice.

¹⁸ Hereafter referred to as the ECSC.

¹⁹ The Treaty establishing the European Coal and Steel Community, <http://www.eurofer.org/legislation/index.htm>.

2.2 EC competition policy

According to Valentine Korah²⁰, in the EC

“there is no agreement as to what objectives should be pursued by competition policy”.²¹

However, we obtain a limited guidance from the Treaty where the objectives of the European Union are set out in article²²In article 3 g) it says that for the purposes set out in article 2, the activities of the Community shall include

“a system ensuring that competition in the internal market is not distorted”.²³

According to John Temple Lang, a former legal adviser of the Commission, article 3 g) is the strongest argument that article 82 prohibits all anti-competitive behaviour.²⁴ In the case of *Continental Can* it has been held that abusive behaviour is

“not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure, such as mentioned in article 3 f) of the Treaty”.²⁵

EC case law has confirmed that article 82 must be read in the light of article 3 g).²⁶ Article 3 g) in combination with article 2 shows that Community Competition policy has to take account of the market integration objectives as well as the need for a system of undistorted competition.

On the base of the arguments above we can identify two goals of EC Competition law: the *integration goal* and the *economic goal*. As we will see, there might be a conflict when trying to reach both of these two goals.

Before examining the two goals of EC Competition policy, the interest of the Commission in small and medium sized undertakings needs to be emphasised.

²⁰ Valentine Korah, Ph.D. Professor of Competition Law, University College London, Barrister.

²¹ Korah Valentine: *EEC, Competition Policy – Legal Form or Economic Efficiency* (1986) *Current Legal Problems*, p. 85. Unfortunately I have not been able to find this book. The reader is referred to Furse Mark: *The Role of Competition Policy: A Survey*, [1996] 4 E.C.L.R. p. 255, where the quotation is made.

²² Article 2 is reproduced in supplement A.

²³ Article 3 is reproduced in supplement B.

²⁴ Lang John Temple: *Monopolisation and the definition of “abuse” of a dominant position under article 86 EEC Treaty*, [1979] 16 C.M.L.Rev. p. 351.

²⁵ Case 6/72, *Continental Can*, cited *supra* note 11, para. 26 of the Grounds of Judgment. 3 f) is the old numbering of article 3 g).

²⁶ This follows, *inter alia*, from Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. EC Commission*, 6 March 1974, [1974] ECR 223, para. 32 of the Grounds of Judgment and Case 27/76, *United Brands Company and United Brands Continental BV v. EC Commission*, 14 February 1978, [1978] ECR 207, para. 63 of the Decision.

As we have seen in chapter 2.1 this interest constituted an objective already in post-war Europe, when European governments were trying to encourage the economic revival of Europe. The Commission's opinion is clearly stated in its Report on Competition from 1993²⁷. According to the report the Commission has for many years given preferential treatment to small and medium sized businesses when handling the competition rules. We can read that the Commission

"has decided that it will not normally concern itself with the conduct of smaller businesses".²⁸

The reason to the Commission's interest in small and medium sized undertakings can be explained by the important role these companies play for the industrial and commercial structure of the Community. According to the Commission, small and medium sized undertakings are a major source of innovation and jobs; a source not to be neglected when trying to reach the goals set out in article 2 of the Treaty.²⁹ However, the protection of small and medium sized undertakings is not uncontroversial and, as we will see, it may inflict with the integration and the economic goal.

Liberalisation is also an essential objective of EC Competition policy. According to the Commission, liberalisation

"should be seen as a broad concept, i.e. the creation and safeguarding of fair and unrestricted market access in highly regulated sectors or sectors where special or exclusive rights are granted".³⁰

The Commission considers that it is only through liberalisation that the full positive effects on productivity will be achieved³¹. Liberalisation will create a new environment with competitors different from the old actors on the market. However, this transformation requires that presumptive competitors be given access to the market. In its Report from 1999, the Commission has expressed its concern regarding the effect undertakings in a dominant position will have on liberalisation:

"in recently liberalised markets there is a danger that they (the dominant undertakings) will wipe out the expected benefits in terms of restructuring, innovation or job creation".³²

In "The Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks"³³, the Commission has recognised the need for

²⁷ XXIIIrd Report on Competition Policy (1993), point 22.

²⁸ XXIIIrd Report on Competition Policy (1993), point 159.

²⁹ XIth Report on Competition Policy (1981), points 29-33.

³⁰ XXXth Report on Competition Policy (2000), point 493.

³¹ XXIIIrd Report on Competition Policy (1993), point 21.

³² XXIXth Report on Competition Policy (1999), point 57 (words in parenthesis added). The reader is also referred to XXXth Report on Competition Policy (2000) point 98.

fair and effective competition in the new environment that liberalisation creates. This will, *inter alia*, mean encouraging new competitors to enter the market.

2.2.1 Integration goal

“The first fundamental objective is to keep the common market open and unified”.³⁴

Integration, the goal of a European unified market, was dominating in the process of constructing the competition law system.³⁵ It has later been elevated in competition cases to an aim in itself.³⁶ It is important to keep this objective of the EC in mind since it may explain the Commission’s hostility towards agreements or business practices, which prevent or hinder cross-border trade. The Commission considers the abuse of a dominant position especially harmful since it enables strong companies to exclude competitors from their geographical market.³⁷ The national markets run the risk of becoming closed and the integration of the Member State’s economies will be delayed.

Even if integration is one of the main objectives of the EC, it may cause problems for small and medium sized undertakings that do not possess the ability to compete with larger firms operating from other Member States. Therefore, in accordance with its policy, the Commission has encouraged collaboration between these small and medium sized undertakings, especially where they carry out business in different Member States.³⁸ The intention is to obtain the integration goal. However, it is very likely that reaching the integration goal will be at the expense of the economic goal, since the protection of small and medium sized undertakings does not include any demands for efficiency.

The integration goal is a specific feature of EC Competition policy that cannot be found in the competition policies in other jurisdictions. This must be kept in mind

³³ The Green Paper on Liberalisation of telecommunications infrastructure and cable television, COM (94) 682, <http://europa.eu.int/ISPO/infosoc/legreg/docs/greeninf2.html>. Part 1 of the Green Paper was adopted by the European Commission on 25 October 1994.

³⁴ IXth Report on Competition Policy (1979), p. 9. Unfortunately I have not been able to find this Report. The reader is referred to Furse Mark: *The Role of Competition Policy: A Survey*, cited *supra* note 21, where the quotation is made.

³⁵ Hawk Barry E.: *Antitrust in the EEC – The First Decade*, 41 Fordham L. Rev. 229, 231 (1972). Unfortunately I have not been able to find this document. The reader is referred to Gerber David J.: *Law and Competition in Twentieth Century Europe*, cited *supra* note 12, p. 347 where the reference to Hawk is made.

³⁶ This follows from Joined Cases 56/64 and 58/64, *Établissements Consten S.A.R.L. and Gründig Verkaufs-GmbH v. EC Commission*, 13 July 1966, [1966] ECR 299, where the Court emphasised the objective of a single market between states.

³⁷ XXIXth Report on Competition Policy (1999), point 57.

³⁸ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice* cited *supra* note 10, p. 11, see also XIth Report on Competition Policy (1981), p. 14.

when drawing parallels from other competition systems, such as the US Antitrust law.

2.2.2 Economic goal

Competition is the base of market economy. It is desirable because it tends to lead to cost efficiency, low prices and innovation.³⁹ The application of Competition law cannot properly take place without regard to economic considerations and consequently, economic principles have been playing an increasingly important role in the Commission's decision-making process.⁴⁰ The competition rules of the Treaty are by many believed to have the longer term function of encouraging the expansion of efficient firms and sectors of the economy at the expense of those less good at supplying services and goods that people want to pay for.⁴¹ In its first annual Report on Competition Policy the Commission noted that

“Competition is the best stimulant of economic activity /--/ competition enables enterprises continuously to improve their *efficiency*, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the Community”⁴²

The importance of efficiency has also been emphasised in later Reports on Competition Policy. In the foreword to the Report from 1999, Professor Mario Monti, Member of the Commission with special responsibility for competition policy, said:

“One of the essential roles of competition is to promote innovation and ensure that goods and services are produced as *efficiently* as possible and that these *efficiencies* are benefiting consumers in the form of lower prices or improvements in quality, choice or services”.⁴³

The conclusion is that the competition rules must be interpreted to encourage efficiency.

The economic goal of efficiency may conflict with the Commission's concern with small and medium sized undertakings. These firms might not be able to meet the same efficiency standards that larger firms are capable of and therefore find it hard to compete. Valentine Korah⁴⁴ expresses a fear that the competition rules

³⁹ Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 11.

⁴⁰ Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 2.

⁴¹ Korah Valentine; *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 2.

⁴² The First Report on Competition Policy (1971), p. 11 (emphasis added).

⁴³ XXIXth Report on Competition Policy (1999), (emphasis added).

⁴⁴ *Supra* note 20.

are not being used to enable efficient firms to expand at the expense of the less efficient, but to protect small and medium sized firms at the expense of efficient or larger firms⁴⁵. She is concerned that the interest of consumers, and the economy as a whole, in the encouragement of efficiency by firms of any size, is being subordinated to the interest of smaller traders⁴⁶.

The interests of small and medium sized undertakings are not the only obstacles in reaching the economic goal. According to article 2 of the Treaty, the EC must also pursue objectives based on employment, social protection, protection of the environment etc. In the forewords to the Report on Competition Policy from 1999, the other roles of Competition law are recognised:

“Another role is to ensure that markets are sufficiently competitive in order to keep up with globalisation, and to support employment. For example, State aid control helps to foster structural change and thereby contributes to the development of competitive and innovative industry structures, which safeguard the creation of new jobs. Without competition the driving forces behind growth and employment would be lost. It is therefore of the utmost importance that the competition rules be clear, transparent, and efficiently enforced. But competition rules must also keep up with the pace of economic and technological development in the 21st century”.⁴⁷

The question of how far Competition law is capable of furthering all these goals, without a considerable loss in efficiency becomes unavoidable.⁴⁸

⁴⁵ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 139.

⁴⁶ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 139; Korah Valentine: *Concept of a dominant position within the meaning of article 86*, [1980] 17 C.M.L.Rev., p. 414.

⁴⁷ XXIXth Report on Competition Policy (1999). The quotation is taken from the foreword by Professor Mario Monti, Member of the Commission with special responsibility for competition policy.

⁴⁸ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 12.

3 Abuse of a dominant position

Article 82 does not prohibit a dominant position, but only its abusive exploitation.⁴⁹ The Commission itself has recognised that being big is not a sin,⁵⁰ and in the case of *Continental Can* the Court stated that

“the use of economic power linked with a dominant position can be regarded as an abuse of this position only if it constitutes the means through which the abuse is effected”.⁵¹

The creation of a dominant position can therefore not be condemned under article 82, only its subsequent use can be controlled.

In the case of *United Brands* the Court said:

“It is advisable therefore to ascertain whether the dominant undertaking *has made use of the opportunities arising out of its dominant position* in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently competition”.⁵²

According to John Temple Lang,⁵³ the statement of the Court in *United Brands*, is a quotation from the Commission’s Memorandum on Concentration from 1966.⁵⁴

Even if the use of a dominant position can constitute an abuse, it is not a necessary criterion for an action prohibited by article 82. A conduct that would have been possible even if the undertaking had been small or medium sized may constitute an infringement of article 82 if it is made by a dominant firm. In its decision on *Continental Can*⁵⁶ the Commission held that the acquisition by Continental Can (which had a dominant position over a substantial part of the Common Market in the market for light metal containers and metal caps) of some

⁴⁹ Bellamy & Child: *Common Market Law of Competition*, 4th edition, Sweet & Maxwell, London, UK, 1993, p. 616; Korah Valentine: *An introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 106; Lang John Temple: *Monopolisation and the definition of “abuse” of a dominant position under article 86 EEC Treaty*, cited *supra* note 24, p. 346.

⁵⁰ The Commission, *Competition Policy in the European Community*, Publications Unit, Brussels, 1992, at. 3.

⁵¹ Case 6/72, *Continental Can*, cited *supra* note 11, para. 19 of the Grounds of Judgment.

⁵² Case 27/76, *United Brands*, cited *supra* note 26, para. 249 of the Decision (emphasis added).

⁵³ John Temple Lang has been the Legal adviser of the Commission of the European Community.

⁵⁴ Lang John Temple: *Monopolisation and the definition of “abuse” of a dominant position under article 86 EEC Treaty*, cited *supra* note 24, p. 345.

⁵⁵ This follows from Case 85/76, *Hoffmann-La Roche & Co. AG v. EC Commission*, 13 February 1979, [1979] ECR 461, para. 91 of the Decision.

⁵⁶ Commission Decision No 72/21/EWG of 9 December 1971, IV/26.811 – *Continental Can Company*, OJ 1972 L7/25 (English text is not available).

80% of TDV (a Dutch can packaging company) was an abuse of a dominant position. The decision was later annulled as the Court found that the Commission had not sufficiently shown the facts and the assessments on which it was based.⁵⁷ However, in its judgement, the Court agreed on the finding of the Commission that

“the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty”.⁵⁸

The difference between the conduct of a dominant undertaking and that of a small or medium sized one, is the *effect* that the conduct leads to.

3.1 Effect on the market

In *Continental Can*, which dealt with the question of a merger initiated by a dominant undertaking, the Court held that

“article 86 is not only aimed at practices which may cause damage to consumers directly but also at those which are detrimental to them through their impact on an effective competition structure”.⁵⁹

A merger of a dominant firm with a potential competitor can therefore infringe article 82 if the conduct *affect* the structure of the market. The so called effect-criterion was upheld in *Hoffmann-La Roche*, where the Court formulated a legal test to determine whether a conduct by a dominant undertaking infringes article 82:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the *effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.⁶⁰

The legal test has later been established in many cases, *inter alia* *AKZO*⁶¹ and shows that the abuse concept is an objective concept.

⁵⁷ Case 6/72, *Continental Can*, cited *supra* note 11, para. 37 of the Grounds of Judgment.

⁵⁸ Case 6/72, *Continental Can*, cited *supra* note 11, para. 27 of the Grounds of Judgment.

⁵⁹ Case 6/72, *Continental Can*, cited *supra* note 11, para. 26 of the Grounds of Judgment.

⁶⁰ Case 85/76, *Hoffmann-La Roche*, cited *supra* note 55, para. 91 of the Decision (emphasis added).

⁶¹ Case C-62/86, *AKZO Chemie BV v. EC Commission*, 3 July 1991, [1991] ECR I-3359, para. 69 of the Judgment.

Whether a certain conduct affects the market or not, depends on the structure of the market. In *Tetra Pak I*,⁶² the European Court of First Instance found that Tetra Pak's acquisition of an exclusive license to a new sterilisation technology constituted an abuse of a dominant position. The importance was placed on the fact that the acquisition of the license had the

“effect of preventing, or at least considerably delaying, the entry of a new competitor into a market where very little, if any competition is found”⁶³.

Since Tetra Pak held a considerable part of the relevant market, the Court of First Instance found that the practical effect of its acquisition of the license was the precluding of all competition. From the judgement it is clear that conduct by a dominant undertaking that reduces the competition of the market is considered abusive. In its decision of *AKZO* the Commission observed that firms in a dominant position have a special responsibility.⁶⁴ According to the Commission, dominant undertakings must pay greater attention to the type of methods that they use to compete with other firms and to the effects that some of those methods may have. When looking at the effects, it is not only the immediate operating results that must be taken into consideration, but also the effect on the structure of competition. The structure of the relevant market is therefore decisive for the finding of an abuse. If the relevant market consists of several powerful undertakings with a functioning competition between them, it is harder for a dominant undertaking to impair the structure of the market and thereby abuse its dominant position. Contrary, in *Michelin*, the Court implied that in a market where the structure has already been weakened it is extra important to maintain the competition that is left.⁶⁵

The effect on the relevant market is the important factor when deciding if a conduct constitutes an abuse. However, the responsibility to preserve and foster competition does not extend to all markets where the dominant firm is present, but only to markets where the presence weakens competition.⁶⁶ Also, since the disputed case of *Tetra Pak II*⁶⁷ it has become clear that the effect does not have to appear on the market where the undertaking is dominant, but can also be on a market closely linked to it.⁶⁸

⁶² Case T-51/89, *Tetra Pak I*, cited *supra* note 14.

⁶³ Case T-51/89, *Tetra Pak I*, cited *supra* note 14, para. 23 of the Judgment.

⁶⁴ Commission Decision No 85/609/EEC of 14 December 1985, IV/30.698 – *ECS/AKZO*, OJ 1985 L 374/1, p. 18-23 of the Decision.

⁶⁵ Case 322/81, *NV Nederlandshe Banden-Industrie Michelin v. EC Commission*, 9 November 1983, [1983] ECR 3461, para. 70 of the Decision.

⁶⁶ Levy Nicholas: *Tetra Pak II: Stretching the limits of article 86?*, [1995] 2 E.C.L.R., p. 106.

⁶⁷ Case T-83/91, *Tetra Pak International SA v. EC Commission*, 6 October 1994, [1994] ECR II-755.

⁶⁸ For a discussion about Case T-83/91, *Tetra Pak II*, *Ibid.*, the reader is referred to Levy Nicholas: *Tetra Pak II: Stretching the limits of article 86?*, cited *supra* note 66, pp. 104-109 and XXIVth Report on Competition Policy (1994), point 455.

In general, dominant undertakings have a responsibility for the functioning of competition. This was *inter alia* confirmed in *Commercial Solvents* where the Court stated that a dominant undertaking cannot, just because it changes its policy, act in such a way as to eliminate its competition.⁶⁹ The fact that the effect on the market is decisive for the existence of an abuse, shows that there is a difference between harming the *competitors* and harming *competition*. This distinction, which had also been made in doctrine, is essential when trying to define the responsibility of dominant undertakings.⁷⁰ The economic objective of EC Competition law is to prevent harm to competition. This follows from article 3 g), which protects the competitive system and not the competitors.⁷¹ In the case of *Bronner*, Mr Advocate General Jacobs said:

“the primary purpose of Article 86 is to prevent distortion of competition – and in particular to safeguard the interest of consumers – rather than to protect the position of particular competitors”.⁷²

The, not so comprehensible, conclusion must therefore be that a dominant undertaking is free to harm competitors as long as its behaviour does not affect the structure of the market and weakens the competition.

⁶⁹ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para 25 of the Grounds of Judgment.

⁷⁰ Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 14.

⁷¹ Lang John Temple: *Monopolisation and the definition of “abuse” of a dominant position under article 86 EEC Treaty*, cited *supra* note 24, p. 351.

⁷² Case C-7/97, *Bronner*, cited *supra* note 3, para. 58 of the Opinion of Mr Advocate General Jacobs.

4 The refusal to deal

The statement, that the abuse-concept only covers conduct that harms competition and not conduct that harms competitors, harmonises well with the objectives of the Treaty. Still, since there is uncertainty as regards the substance of the statement, it leaves the Court with a great margin of appreciation and the dominant undertakings in a stage of uncertainty. According to the legal test from *Hoffmann-La Roche* (quoted in chapter 3.1), the conduct prohibited by article 82 is that of an undertaking in a dominant position

“which, through recourse to methods different from those which condition *normal competition* in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”,⁷³

Business conduct can therefore be considered abusive only if it differs from normal competitive behaviour. As the economists Bishop and Walker have observed, this immediately raises the question of what constitutes normal competitive behaviour and when commercial practices can be held to hinder competition.⁷⁴ One could easily presume that exercising the freedom to deal with whom one pleases would constitute normal competitive behaviour. So would looking after economical interests and sanction behaviour which harms the business. However, when this so-called normal conduct is practised by a dominant undertaking it must still be viewed with suspicion. What the dominant undertaking considers to be normal competitive behaviour, might exclude small and medium sized competitors from the market. The Court has not clearly stated what constitutes a normal competitive behaviour and has not distinguished conduct that excludes others through efficiency, from that which is based on artificial means of exclusion and not on efficiency.⁷⁵ The importance of efficiency may also be of secondary importance while, as we have seen in chapter 2.2, the Court has implied that dominant undertakings must take smaller companies into consideration. Naturally it may therefore be difficult to draw the line between normal legitimate competitive behaviour and exclusionary practice that hinders smaller companies from entering the market. Nevertheless, it is a line that must be drawn in order for dominant undertakings to predict what conduct is permitted.

⁷³ Case 85/76, *Hoffmann-La Roche*, cited *supra* note 55, para. 91 of the Decision (emphasis added).

⁷⁴ Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 106.

⁷⁵ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 5.

As we will see, it is not undisputed that it is allowed for a dominant firm to hurt its competitors. Valentine Korah⁷⁶, claims that article 82 is expressed to restrain conduct by a dominant firm that harms those with whom it deals.⁷⁷

In order to find out what conduct is prohibited by article 82 and to reveal what is hidden behind the words “normal competitive behaviour”, we must examine case law and try to identify which factors are decisive for the existence of an abuse.

In my studies of case law I have chosen to sort the refusal to deal into three categories:

1. the refusal to sell
2. the refusal to supply a service and
3. the refusal to licence.

Before examining EC case law, first it is necessary to get familiar with a doctrine closely connected to the question of the refusal to deal, namely the essential facilities doctrine.

4.1 The essential facilities doctrine

“The doctrine of essential facilities in its simplest form suggests that a monopolist can be forced to sell a product or service when another person needs it to do business”.⁷⁸

The definition above is made by Barry Doherty⁷⁹ and is a simplification of a disputed doctrine originating from US antitrust law. The doctrine has been the subject of discussions both in US law and also lately in EC Competition law but its legal status remains unclear. Some critics argue that the doctrine has been created out of the attempts of lower US Courts to make sense of the US Supreme Court precedents for analysing unilateral refusal to deal. The critics claim that even judgements, which explicitly use the term essential facilities, can be explained without referring to the doctrine.⁸⁰

Although there are many critics of the essential facilities doctrine, it may provide us with a useful tool when determining the responsibility of dominant undertakings.

⁷⁶ *Supra* note 20.

⁷⁷ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 81.

⁷⁸ Doherty Barry: *Just what are essential facilities?* [2001] 38 C.M.L.Rev. p. 397.

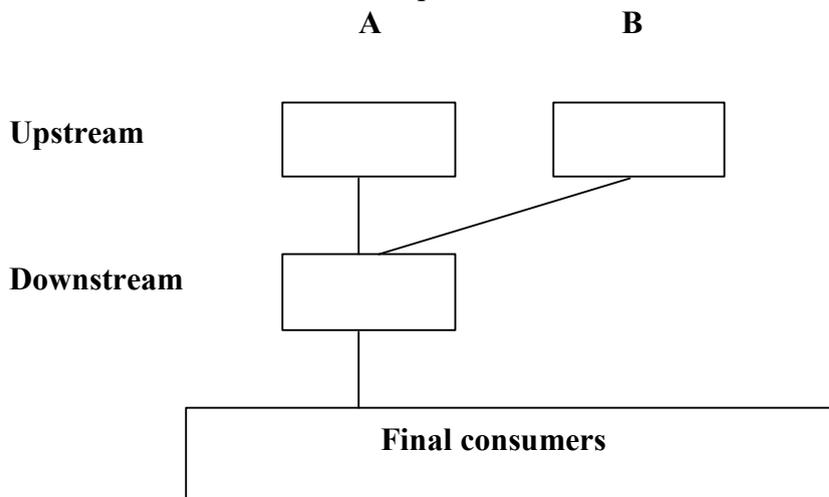
⁷⁹ Barry Doherty is a senior legal adviser at the Office of the Director of Telecommunications Regulation in Dublin. The quotation is taken from an article, which was commenced while Doherty was at the European Commission’s Legal Service.

⁸⁰ Furse Mark: *The “Essential Facilities” Doctrine in Community Law*, [1995] 8 E.C.L.R., p. 470.

⁸¹ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 397.

4.1.1 The economic theories behind the doctrine

In order to fully comprehend the essential facilities doctrine one must first get familiar with some economic terms.⁸² The market situation underlying the essential facilities problem, is involving two related activities known as “upstream” and “downstream” activities. Both these activities form part of the end product. The competition problem arises when one firm is active in both the upstream and the downstream market and refuses to provide access to the “facility” to competitors who provide only “upstream” or “downstream” services. The essential facility then creates a “bottleneck” and the owner can easily block out competition. Bishop and Walker have illustrated the problem:⁸³



The figure shows that in order for B to supply the final customers, he requires access to downstream inputs that are controlled by A. The downstream input therefore constitutes an essential facility for B. However, A has probably put a lot of efforts in acquiring the downstream input, efforts that may consist of investments and that generate efficiency. As we have previously seen efficiency is desired by the EC and an unconditional granting of access to an essential facility would have a chilling effect on investments and development. The solution to the competition problem is therefore not the expropriation of such vital inputs even if it on a short-term basis would have a positive effect on the market. Still, the figure illustrates the dominance of A and such dominance must be regulated in order to have a functioning competition. John Temple Lang⁸⁴ has stated that

⁸² Chapter 4.1.1 is based on the reasoning of Simon Bishop and Mike Walker from their book *The Economics of EC Competition Law*, cited *supra* note 6, pp. 115-120.

⁸³ Bishop Simon and Walker Mike: *The economics of EC Competition Law*, cited *supra* note 6, p. 116, figure 5.2.

⁸⁴ *Supra* note 53.

“in all of these cases, competition law may oblige the dominant owner of the essential facility to co-operate with its downstream competitors, on competition grounds. These cases can only be resolved by reference to basic principles of antitrust economics”.⁸⁵

4.1.2 Background and definition in US Antitrust law

The essential facilities doctrine can be traced back to 1912 and the US Supreme Court’s *Terminal Railroad Association* judgement.⁸⁶ The case involved an essential facility consisting of an important railroad junction. The combination of railroads did not create anything new, but since access to the junction was essential for the competitors’ ability to compete, the owner of the junction could exclude or disadvantage competitors. This was considered “improper” by the Supreme Court, which required the association to open up its membership and abolish certain charges. The next important case, regarding essential facilities, was the case of *Associated Press* from 1945.⁸⁷ The “Associated Press” (AP) was created by 1200 newspapers and granted access to news generated by one member to the others. Members of the association thereby enabled the creation of their own reporting and news-generating staff in areas where they were not previously present. Existing members were allowed to block the admission of competitors, something which was considered a discrimination against competitors. One judge of the Supreme Court used the essential facilities doctrine comparing the AP to a public utility and the Supreme Court required that rival firms be admitted to the AP on terms that were similar to those of the existing members. However, the dissenting judgements noted that, even if AP had created a useful facility, there was no proof that it was essential. According to one of the dissenters, AP was being punished simply because it was big.⁸⁸

During the years, the reasoning in *Terminal Railroad* and *Associated Press* has been followed by many cases where the importance of access to an essential

⁸⁵ The quotation from John Temple Lang is taken from Bishop Simon and Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 119.

⁸⁶ *United States v. Terminal Railroad Association*, 224 US 383 (1912). In my account of the case, I have used the articles by Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, pp. 397-436, Furse Mark: *The “Essential Facilities” Doctrine in Community Law*, cited *supra* note 80, pp. 469-473 and Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust Law: A contribution to the Current Debate*, [1994] 6 E.C.L.R. pp. 306-314. Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, pp. 397-436.

⁸⁷ *Associated Press v. United States*, 326 US 1 (1945). In my account of the case, I have used the articles by Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, pp. 397-436, Furse Mark: *The “Essential Facilities” Doctrine in Community Law*, cited *supra* note 80, pp. 469-473 and Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust Law: A contribution to the Current Debate*, *Ibid.*, pp. 306-314.

⁸⁸ *Associated Press v. United States*, 326 US 1 (1945), p. 56 (Murphy). The reader is referred to Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p 400 where the reference to the dissenters is made.

facility has been discussed.⁸⁹ Most important in the US essential facilities doctrine is the judgement of the Court of Appeal in the case of *MCI Communications Corp. and MCI Telecommunications Corp. v. American Telephone and Telegraph Co* in 1983.⁹⁰ The access to the nation-wide telephone network of AT & T was considered essential for the ability of MCI to compete in the long-distance business. The Court of Appeals held that

“a monopolist’s refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. ././ Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on no-discriminatory terms”⁹¹

The Court of Appeals produced a test for the doctrine where four elements necessary to establish liability under the essential facilities doctrine was identified:²

1. control of the essential facility by a monopolist
2. a competitor’s inability practically or reasonably to duplicate the essential facility
3. the denial of use of the facility to a competitor
4. the feasibility of providing the facility.

The denial of access should never *per se* be unlawful. Legitimate business purposes may justify not sharing a facility.⁹³ As we can see from point 2, the essential facilities doctrine also places a burden on the third party that wishes access to the essential facility. Later in this paper we will find that the conduct and opportunities of a third party is often discussed in cases involving the abuse of a dominant situation. A third party may for example be required to satisfy certain personal requirements such as being in good standing, creditworthy and financially independent.⁹⁴

Before we start looking at how the essential facilities doctrine has been adopted into EC law, we must return to the critics of the doctrine and keep in mind that the

⁸⁹ See *inter alia* *Otter Trail Power & Co. v. United States*, 410 US 366 (1973) (where the cables and technical installations necessary for the local distribution of electricity was considered an essential facility) and *Hecht v. Pro Football Inc*, 436 US 956 (1978) (where the use of a stadium was considered an essential facility).

⁹⁰ *MCI Communications Corp. and MCI Telecommunications Corp. v. American Telephone and Telegraph Co*. 708 F. 2d 1081, 1132 (7th Cir.) 464 US 891 (1983). In my account of the case I have used the articles by Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, pp. 397-436 and Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust: A contribution to the Current Debate*, cited *supra* note 86, pp. 306-314.

⁹¹ *MCI*, *Ibid*.

⁹² *MCI*, cited *supra* note 90, paras. 1132-1133.

⁹³ Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust Law: A contribution to the current debate*, cited *supra* note 86, p. 308.

⁹⁴ Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust Law: A contribution to the current debate*, cited *supra* note 86, p. 314.

US Supreme Court has yet never expressly applied the doctrine⁹⁵ According to Doherty,⁹⁶ the doctrine will, despite the harsh critics, continue to be invoked in the lower courts until there is an authoritative Supreme Court decision.⁹⁷

4.1.3 The essential facilities doctrine in EC law

“The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another market /../ imposing a competitive disadvantage on its competitor, infringes article 86”.⁹⁸

These were the words of the Commission in its decision in the case of *Sea Containers/ Stena Sealink* and demonstrate the connection between the essential facilities doctrine and article 82. According to the same decision, an essential facility is

“a facility or infrastructure, without access to which competitors cannot provide service to their customers”.⁹⁹

4.1.3.1 EC case law

In *Commercial Solvents* the European Court of Justice held that the CSC, which held a dominant position on the Common Market as regarded the production of a raw material, had abused its dominant position as it ceased to supply a manufacture of derivatives.¹⁰⁰ This was the first case brought to the EC Court regarding the use of an essential facility. However, even though the case played an important role concerning the refusal to deal, the essential facilities doctrine was never mentioned in the judgement.

In its decision of *British Midland/Aer Lingus*, the Commission followed the judgement of *Commercial Solvents*.¹⁰¹ Aer Lingus, the dominant undertaking in the market for the London-Dublin air route, had withdrawn its interline facility from the competitor British Midland. The Commission held that

“Refusing to interline is not normal competition on the merits. Interlining has for many years been accepted industry practice, with widely acknowledged benefits for both airlines and passengers”.¹⁰²

⁹⁵ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 398.

⁹⁶ *Supra* note 79.

⁹⁷ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 403.

⁹⁸ Commission Decision No 94/19/EC of 21 December 1993, IV/34.689 - *Sea Containers/ Stena Sealink – Interim measures*, OJ 1994 L15/8, para. 66.

⁹⁹ Decision No 94/19/EC, *Sea Containers/Stena Sealink*, *Ibid.*, para. 66.

¹⁰⁰ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26.

¹⁰¹ Commission Decision No 92/213/EEC of 26 February 1992, IV/33.544 - *British Midland/Aer Lingus*, OJ 1992 L96/34, XXIInd Report on Competition (1992), points 216-218.

¹⁰² Decision No 92/213/EEC, *British Midland/Aer Lingus*, *Ibid.*, para 25 of the Decision.

The Commission stated that companies holding dominant positions should not withhold facilities, which the industry traditionally provides to all other airlines.

“Both a refusal to grant new interline facilities and the withdrawal of existing facilities may, depending on the circumstances, hinder the maintenance or development of competition”.¹⁰³

However, the Commission implied that it was willing to accept such a withdrawal if there were any objective reasons.¹⁰⁴

The first case in which the Commission used the phrase “essential facility” was *B&I/Sealink, Holyhead* from 1992.¹⁰⁵ Sealink was a car ferry operator and the owner of Holyhead Harbour. B&I was another car ferry operator that used the Holyhead Harbour to compete with Sealink on certain ferry services. The traffic in the harbour was constructed in such a way that B&I vessels had to stop their activity whenever a Sealink vessel entered or left the harbour. When Sealink, for the benefit of its consumers, changed its sailing times, B&I had to stop its activity more often and was therefore affected in a negative way. The Commission considered

“that a company which both owns and uses an essential facility, in this case a port, should not grant its competitors access on terms less favourable than those which it gives its own services”

and that Sealink therefore was using its monopoly position in the supply of the essential facility – the harbour –

“to strengthen its position in another related market /../ by granting its competitor access to that related market on less favourable terms than those of its own service”.¹⁰⁶

B&I/Sealink, Holyhead was followed by another Commission decision: *Sea Containers/Stena Sealink*,¹⁰⁷ involving the access to the port of Holyhead. In its decision, the Commission restated the importance for the owner of an essential facility not to use its power to protect or strengthen its position in another related market.¹⁰⁸ The Commission found that by refusing access to the port on reasonable and non-discriminatory terms to a potential competitor, Sealink, as port operator, had abused its dominant position.

¹⁰³ Decision No 92/213/EEC, *British Midland/Aer Lingus*, cited *supra* note 101, para 26 of the Decision.

¹⁰⁴ Decision No 92/213/EEC, *British Midland/Aer Lingus*, cited *supra* note 101, para 26 of the Decision.

¹⁰⁵ Commission Decision of 11 June 1992, *B&I/Sealink, Holyhead*, XXIInd Report on Competition Policy (1992), point 219. The decision has since been appealed by Sealink but the appeal was withdrawn and a settlement was reached between the parties.

¹⁰⁶ Decision *B&I/Sealink, Holyhead*, *Ibid*.

¹⁰⁷ Decision No 94/19/EC, *Sea Containers/Stena Sealink*, cited *supra* note 98.

¹⁰⁸ Decision 94/19/EC, *Sea Containers/Stena Sealink*, cited *supra* note 98, para. 66 of the Decision.

The cases of *Sealink* were important for the development of the essential facilities doctrine in EC law. In contrary to the American case *MCI* and the Commission decision in *British Midland*, the *Sealink* decisions did not put any weight on the *intention* of *Sealink*. In both *MCI* and *British Midland* it was considered significant that the offender had the long-term detriment of a competitor as a primary motivation for its exclusionary practice. In *Sealink* it seemed more as if the long-term detriment of a competitor was just a consequence of *Sealink*'s action. In order to avoid responsibility it was therefore not enough that the offender showed a lack of intention. The Commission suggested that a company like *Sealink* who both owned and used an essential facility, had to separate its management of the essential facility from the use of it in order to avoid infringement of article 82.¹⁰⁹ The duty to provide non-discriminatory access to a facility appears to be the essence of the essential facilities doctrine in EC law and puts a more onerous burden on the controller of the facility than in the American cases.¹¹⁰

*Bronner*¹¹¹ is probably the case where the Court of Justice has come closest to recognising the existence of an essential facilities doctrine in EC law. The case is accounted for below in chapter 4.3.2 regarding the refusal to supply a service. Mr Advocate General Jacobs delivered a detailed opinion that included a thorough examination of the essential facilities doctrine.¹¹² He noted that the Court had yet not applied the doctrine, but referred to the Commission's *Sealink* decisions¹¹³ to make clear that the Commission considers that the refusal of access to an essential facility can of itself be an abuse.¹¹⁴

4.1.3.2 Is there an essential facilities doctrine in EC law?

Just like in the US, there is a debate in the EC regarding the existence of the essential facilities doctrine. However, according to Doherty¹¹⁵ in the European debate the believers are dominating.¹¹⁶ He suggests that this may be because many commentators in Europe take it on faith that there is an essential facilities doctrine in US law. Even if the existence of the doctrine had been undisputed it would not have been enough for an application in EC law. In US Antitrust law the

¹⁰⁹ The reasoning about *Sealink* is taken from the article by Furse Mark: *The Essential Facilities Doctrine in Community Law*, cited *supra* note 80, pp. 469-473,

¹¹⁰ Furse Mark: *The Essential Facilities Doctrine in Community Law*, cited *supra* note 80, p. 473.

¹¹¹ Case C-7/97, *Bronner*, cited *supra* note 3.

¹¹² Case C-7/97, *Bronner*, cited *supra* note 3, paras. 33-53 of the Opinion of Mr Advocate General Jacobs.

¹¹³ Decision *B&I/Sealink, Holyhead*, cited *supra* note 105 and *Sea Containers/Stena Sealink*, cited *supra* note 98.

¹¹⁴ Case C-7/97, *Bronner*, cited *supra* note 3, para. 50 of the Opinion of Mr Advocate General Jacobs.

¹¹⁵ *Supra* note 79.

¹¹⁶ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 404.

essential facilities doctrine deals with a particular type of refusal to deal under the Sherman Act.¹¹⁷ Section 2 of the Sherman Act 1890 aims to protect competition by prohibiting the acquisition or maintenance of monopoly power rather than by regulating the actions of companies in dominant positions.¹¹⁸ It regulates the way that firms *acquire* monopoly power, whereas article 82 controls the *exploitation* of monopoly power.

As we have seen above, the Commission and the Court have dealt with questions concerning the use of an essential facility without referring to the specific doctrine. Like the US Supreme Court, the European Court of Justice has never applied the doctrine.¹¹⁹ This suggests that the essential facilities doctrine is not intended to replace existing principles within the EC competition law, but merely to be viewed as a helpful tool when determining if a conduct by a dominant undertaking infringes article 82. John Temple Lang has said,

“what the Commission now calls essential facilities cases were simply merged with what was regarded as the general class of cases in which dominant companies have a duty to supply”.¹²⁰

The essential facilities doctrine is not a new invention, but merely a question of third party access. It is also a question of increasing interest and importance in EC Competition law and policy.¹²¹ The liberalisation of the European market raises many issues concerning third party access. As the EC market becomes liberated, newcomers must be able to compete; something that can be impossible without access to existing infrastructure. According to the economists Bishop and Walker, the use of the concept of an essential facility has had a significant and growing role in the Commission’s liberalisation programme.¹²² In its Report from 1992, the Commission noted that the decision taken in *British Midland*¹²³ was taken in a period when the European air transport industry was being liberalised. The Commission argued that

¹¹⁷ Glasl Daniel: *Essential facilities Doctrine in EC Anti-trust Law: A contribution to the Current Debate*, cited *supra* note 86, p. 307.

¹¹⁸ Case C-7/97, *Bronner*, cited *supra* note 3, para. 46 of the Opinion of Mr Advocate General Jacobs.

¹¹⁹ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 405.

¹²⁰ Lang John Temple: *Defining legitimate competition: companies’ duties to supply competitors and access to essential facilities*, 18 *Fordham International Law Journal* (1994) p. 446. Unfortunately this issue of *Fordham International Law Journal* is not available at any Swedish library. I therefore refer to Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 404 where the reference to Lang is made.

¹²¹ Glasl Daniel: *Essential Facilities Doctrine in EC Anti-trust Law: A contribution to the current debate*, cited *supra* note 86, p. 306.

¹²² Bishop Simon, Walker Mike: *The Economics of EC Competition Law*, cited *supra* note 6, p. 115.

¹²³ Decision No 92/213/EEC, *British Midland/Aer Lingus*, cited *supra* note 101.

“airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to establish carriers”.¹²⁴

This reasoning must be valid also in other sectors that are characterised by monopolistic structures such as the sectors of telecommunications, transport or energy. Regarding the electronic communications network and services, there are several proposals for directives.¹²⁵ Operators may be subject to different obligations and required to give third parties access to specified network elements and/or facilities.¹²⁶

An essential facility can be a product such as a raw material or a service, including provision or access to infrastructure, such as a harbour or airport or to a distribution system such as a telecommunication service. The relationship between the dominant undertaking and the competitor can be vertical as well as horizontal.¹²⁷ The essential facilities doctrine can therefore be useful in many cases revolving the refusal to supply and the denial of access. However many cases about such abuse of a dominant position does not involve an essential service. Also, the essential facilities doctrine presumes that the owner of the essential facility is active in both the upstream and the downstream market and refuses to provide access to the “facility” to competitors who provide only “upstream” or “downstream” services. As we will see, this scenario is not the only possible in matters regarding the refusal to deal.

The use of the essential facilities doctrine can also constitute a danger of reversing the burden of proof and creating a presumption that the owner is under a duty to deal or else produce an adequate.¹²⁸ Finally, the essential facilities doctrine does not change the fact that in order for there to be an abuse of a dominant position, it is necessary to show a breach of EC law.

Since the importance of the essential facilities doctrine is limited as well as questioned, I will, in my future account of the practice of article 82, not emanate from the doctrine, but only use it as a tool.

¹²⁴ XXIIInd Report on Competition Policy (1992), point 218.

¹²⁵ Commission Proposal COM (2000) 384 of 19 December 2000 for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, OJ C365E p. 215 and Commission Proposal COM (2000) 393 of 19 December 2000 for a Directive on a common regulatory framework for electronic communications networks and services, OJ 2000 C365E p. 198.

¹²⁶ COM (2000) 384, *Ibid.*, article 12; COM (2000) 393, *Ibid.*, article 11.

¹²⁷ Case C-7/97, *Bronner*, cited *supra* note 3, para. 50 of the Opinion of Mr Advocate General Jacobs.

¹²⁸ Hancher L. (Professor of European Law, Tilburg): *Case note on Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, [1999] 36 C.M.L.Rev. p. 1303.

4.2 Refusal to sell

“The refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market”¹²⁹.

The quotation is taken from the judgement of *United Brands* and reveals the competition problem which arises when an undertaking refuses to sell. As previously shown, article 82 imposes a responsibility on dominant undertakings to keep the competition within the Common market working. Of interest is therefore to what extent a dominant enterprise can refuse to sell without infringing article 82. In this chapter, I will examine four cases where dominant undertakings for different reasons have refused to sell to long-standing customers and therefore have been accused of infringing article 82.

4.2.1 Cases 6 & 7 /73: Commercial Solvents¹³⁰

Commercial Solvents is a typical example of a case where a dominant undertaking wanted to enter the downstream market. Although it deals with a specific situation, the Court made some general statements that have been referred to later in numerous practices.

Commercial Solvents Corporation (CSC) was a US company, which in 1962 acquired 51% of the voting stock in the Italian company Istituto. CSC manufactured and sold raw material for the manufacture of ethambutol and ethambutol-based specialities, used as an anti-tuberculosis drug. Until 1970, Istituto had acted as a reseller of the raw material produced by CSC. In 1970 Istituto entered the downstream market as it changed its policy and started the manufacture of its own ethambutol-specialities. CSC claimed that the change of policy was inspired by a legitimate consideration of the advantages of expanding its production to include the manufacture of finished products and not limiting itself to that of raw material¹³¹. CSC then decided to limit, if not completely to cease, the supply of raw material to certain parties in order to facilitate its own access to the market for the derivatives. Hereafter the customers could only obtain such quantities as had already been committed for resale. Since 1966, Zoja had purchased the raw material from Istituto. However, Zoja had chosen to cancel its order in the spring of 1970 since it was able to obtain the product to a lower price elsewhere (due to temporary large supplies of

¹²⁹ Case 27/76, *United Brands*, cited *supra* note 26, para. 183 of the Judgment.

¹³⁰ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26. The reader is also referred to Korah Valentine: *Case note on Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. EC Commission*, [1974] 11 C.M.L.Rev. pp. 248-272.

¹³¹ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para. 23 of the Grounds of Judgment.

aminobutanol by independent distributors). When Zoja had problems purchasing the raw material it needed for its production, it turned to Istituto again and tried to place a new order. CSC informed Istituto that it was impossible to meet the order, as no raw material was available for sale. However, at the same time one of the competitors, Italia Cyanamid, was still getting its supplies. Zoja did not have any success in finding the product elsewhere since the only possible source of supply was CSC.

The entrance by Istituto on the downstream market had meant cutting off supplies to its former customers (and future competitors). The Commission stated in its decision that CSC's refusal to supply a raw material to one of its main users must lead to the elimination of one of the principle producers of ethambutanol in the Common Market.¹³² Since there were only five producers of ethambutanol within the EC, the elimination of one of them seriously affected the competition. Therefore CSC's behaviour constituted an abuse of a dominant position. From its decision it is not clear if the Commission protected Zoja or the final consumers. It would be in line with the EC Competition policy to protect Zoja. Zoja was a small or at least medium sized company that after the entrance of Istituto in the downstream market now would face even harder competition. However, it would not be in line with the notion that EC Competition law shall protect competition and not specific competitors.

The Court upheld the Commission's decision and made it clear that

“an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufactures of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufactures of ethambutol in the Common Market”.¹³³

The abuse by CSC and Istituto of their dominant position consisted in ceasing to supply the raw material to *one* of the principal producers of the product of the down stream market. Mr Advocate General Warner interpreted the formulation of the Commission as implying a finding that there was discrimination against Zoja.¹³⁴ He had no doubt that it constitutes an abuse if an undertaking, which has a dominant position in the market of raw material, refuses to supply a particular customer without reasonable justification. However, he stated that it might be different if the dominant undertaking decides to sell the raw material to no one, but to maximise its profits by supplying all the demand to the end product itself. It is worth noticing that he adds that the raw material then has to exist *only* thanks to

¹³² Commission Decision No 72/457/EWC of 14 December 1972, IV/26.911 – *Zoja/CSC-ICI*, OJ 1972 L299/51 (English text is not available).

¹³³ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para. 25 of the Grounds of the Judgment.

¹³⁴ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, Opinion of Mr Advocate General Warner, p. 268.

the efforts in research and development of the dominant undertaking. According to Valentine Korah,¹³⁵ if this statement by the Advocate General was to be accepted by the Court, it would increase the incentive to invest in the original innovation.¹³⁶

CSC and Istituto had not disputed the statement in the decision of the Commission, saying that

“in view of the production capacity of the CSC plant it can be confirmed that CSC can satisfy Zoja’s needs, since Zoja represents a very small percentage of CSC’s global production of nitroprapane”.¹³⁷

It was therefore undisputed that CSC, even though it changed its policy, still had been capable of supplying Zoja, but had chosen not to. According to Mr Advocate General Warner, it is obvious from the answers from CSC and Istitutio concerning the real reason for the decision in 1970, that there was a discrimination of Zoja. Also, Istitutio continued to supply a competitor to Zoja. This is probably the reason why CSC and Istitutio were found guilty of infringing article 82. There are implications that the outcome would have been different if CSC and Istitutio completely had ceased supplying its customers; the Advocate General and the Court were interested in the commercial and technical reasons underlying the decision of 1970, and the Advocate General even tried to search for information with a view of ascertaining whether all the customers had been treated the same way as Zoja.¹³⁸

The Court did not consider the fact that Zoja itself had informed Istitutio that it was cancelling the purchase of large quantities of aminobutanol. The Court also found it unnecessary to examine whether Zoja had an urgent need for aminobutanol or whether it still had large quantities of this product, which would enable it to reorganise its production in good time.

According to the General Advocate, *Commercial Solvents* was an example of discrimination. Regardless of the discrimination, the case must be considered important since the Court clarified some questions regarding the responsibility of a dominant undertaking to deal. It was stated that a dominant undertaking has a duty to sell in at least some circumstances. An undertaking which is dominant as regards the production of raw material has a certain responsibility towards its customers and may very well have an obligation to meet the requirements of the market. This responsibility does not change the fact that even a dominant

¹³⁵ *Supra* note 20.

¹³⁶ Korah Valentine: *An Introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 114.

¹³⁷ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para. 28 of the Grounds of Judgment.

¹³⁸ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, Opinion of Mr Advocate General Warner, p. 269.

undertaking probably is allowed to make a structural change of its business, even if it affects its competitors, as long as it does not discriminate. However, the Court implied that the dominant undertaking may be forced to show that it is unable to continue the supplying in order not to harm its own business.

4.2.2 Case 27/76: United Brands¹³⁹

In *United Brands* the Court held that there had been three abuses: a prohibition on resale by distributors of unripe bananas, discriminatory prices and a refusal to supply a distributor. For my paper, only the latter is of interest. *United Brands* concerned a pre-existing commercial relationship, but differs from *Commercial Solvents* as there was no change in the production by the dominant undertaking, there was no shortage of the product in question. United Brands refused to sell for pure commercial reasons.

The Danish fruit-dealer Olesen bought from several suppliers, including United Brands. In 1969 Olesen had become the only Danish distributor for a rival brand: Dole. In 1973 Olesen had participated in a campaign for Dole and helped to advertise it. United Brands argued that Olesen was selling fewer and fewer of “their” bananas (hereafter referred to as Chiquita bananas) while pushing Dole bananas and therefore reduced its supplies to Olesen. Olesen continued in the business but could no longer sell as much Chiquita bananas as he desired.

The Commission found that the withdrawal of supplies would discourage Olesen and other distributors from selling competing brands any more, or at least from participating in advertising and sales promotion campaigns.¹⁴⁰ According to the Commission, this behaviour would prevent the competitors to United Brands from having access to the distributors. The distributors constituted an essential facility, which were required in order to sell the bananas. A long-term perspective therefore led to the withdrawal of an essential facility and constituted an abuse of article 82.

There was no disagreement between the parties as to the fact that the supplies by United Brands were discontinued because of Olesen’s participation in the Dole advertising campaign. The question was whether the conduct of United Brands was an abuse of its dominant position or not.

The Court agreed with the applicant that an undertaking in a dominant position must be entitled to protect its own commercial interest if it is attacked and that such an undertaking must be conceded the right to take the reasonable steps as it deems appropriate to protect this interest. However, the Court added that such

¹³⁹ Case 27/76, *United Brands*, cited *supra* note 26.

¹⁴⁰ Commission Decision No 76/353/EEC of 17 December 1975, IV/26.699 – *Chiquita*, OJ 1976 L95/1, p. 16 of the Decision.

behaviour can not be accepted if its actual *purpose* is to strengthen this dominant position and abuse it.¹⁴¹ It was enough to show that United Brands could not have been unaware of the fact that by acting this way it would discourage its other distributors from supporting the advertising of other brand names and that the sanction therefore would strengthen its position on the market.¹⁴² According to me, this last statement of the Court makes the question of the purpose of the dominant undertaking useless. To show an abuse of a dominant position it is enough that there is an effect on the market and that the dominant undertaking could not have been unaware of this effect.

Of much more interest is the statement of the Court that even if the possibility of a counter-attack is acceptable that attack must still be *proportionate* to the threat taking into account the economic strength of the undertakings confronting each other.¹⁴³ According to the Court, the sanction in question was excessive because of the great effects it caused on the market. The Court emphasised the importance of small and medium sized firms being able to keep their independence, which gives them the right to give preference to competitor's goods. The conduct of United Brands was an example of conduct that would seriously interfere with that independence.¹⁴⁴ This statement of the Court is clearly in line with the Commission's goal on creating a friendly environment to the small and medium sized companies in the Common market. The fact that the business of Olesen was never threatened by United Brand's refusal to supply did not make any difference. The Chiquita bananas were not essential to the business as there were alternative brands of bananas available. From this follows that even if a victim of a refusal to sell is able to survive by dealing in other brands it does not prevent the refusal from being an abuse. Total elimination from a market is not necessary for a refusal to sell to constitute an abuse. However, even if Olesen still could buy different brands of bananas, he could not, because of United Brands' prohibition for distributors to sell green bananas, obtain the Chiquita bananas elsewhere. According to Valentine Korah,¹⁴⁵ who has commented the case, this may be a reason to the outcome.¹⁴⁶

Regarding the behaviour of Olesen, the Court stated that Olesen just needed to abide by regular customer and place orders that were not out of the ordinary.¹⁴⁷ United Brands, on the other hand, needed to take a more active part. The Court examined how United Brands had handled the situation and concluded that United Brands had remained passive the last four years. One might say that the Court suggested that if a dominant undertaking is unsatisfied with the work of a

¹⁴¹ Case 27/76, *United Brands*, cited *supra* note 26, para. 189 of the Decision.

¹⁴² Case 27/76, *United Brands*, cited *supra* note 26, para. 192 of the Decision.

¹⁴³ Case 27/76, *United Brands*, cited *supra* note 26, para. 190 of the Decision.

¹⁴⁴ Case 27/76, *United Brands*, cited *supra* note 26, para. 193 of the Decision.

¹⁴⁵ *Supra* note 20.

¹⁴⁶ Korah Valentine: *An introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 116.

¹⁴⁷ Case 27/76, *United Brands*, cited *supra* note 26, para. 182 of the Decision.

distributor it should discuss this with the distributor and register these discussions instead of cancelling the deliverance.

In *United Brands*, the Court put dominant firms under a positive duty to sell to a long-standing customer unless objective reasons justify the decision not to. In this way it confirmed the outcome of *Commercial Solvents*¹⁴⁸. It is obvious that the Court was concerned with the message that the conduct of United Brands sent to other distributors; if they actively supported a competing brand, they might be denied supply of Chiquita bananas. Even if the supply of Chiquita bananas was not essential for the business of Olesen the behaviour of United Brands might lead to weakened competition in a long-term perspective. The judgement does not include any discussions regarding Dole, the competitor of United Brands, and its position. This is a clear example of the right for a dominant undertaking to harm its competitors but not competition.

In conclusion the case tells us that even a dominant undertaking is allowed to look after its commercial interest. The Court allowed sanctions taken by a dominant firm as long as these sanctions were proportionate. The importance of proportion has been upheld, *inter alia*, in the judgement of the European Court of First Instance in *Tetra Pak I*.¹⁴⁹ According to John Temple Lang¹⁵⁰, the case shows that an action by a dominant undertaking which is designed to injure another firm and which goes further than is essential merely to safeguard the legitimate interests of the former is likely to be an abuse¹⁵¹.

4.2.3 Case 77/77: BP¹⁵²

BP dealt with a very specific situation, namely the duties of a supplier when there is a general shortage. Also, in this case the supplier did not completely cease to supply but merely reduced the order because of the shortage.

The Dutch company ABG had obtained petrol from the Dutch group of companies, hereafter referred to as BP, since 1968, but had then switched suppliers in 1972, just some months before a shortage of crude oil developed. The shortage was due to the OPEC boycott of the Netherlands because of the politics the Dutch government pursued in the Middle East. Since the oil crises

¹⁴⁸ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26.

¹⁴⁹ Case T-51/89, *Tetra Pak I*, cited *supra* note 14, *inter alia* para. 68 of the Opinion of Mr Advocate General Kirschner.

¹⁵⁰ *Supra* note 53.

¹⁵¹ Lang John Temple: *Monopolisation and the definition of "abuse" of a dominant position under article 86 EEC Treaty*, cited *supra* note 24, p. 358.

¹⁵² Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV v. EC Commission*, 29 June 1978, [1978] ECR 1513.

occurred, ABG sought supplies from BP but was given much less than it had requested, as BP gave preference to its regular customers.

The Commission adopted a decision saying that BP committed an abuse of its dominant position by reducing its deliveries of motor spirit intended for a customer during a period of shortage, by a percentage significantly greater than that applied to other customers.¹⁵³ However, it was not the different treatment of contractual and non-contractual customers that was contrary to article 82. The Commission noticed that the availability of supplies during a shortage could be influenced by firms, which may be casual, artificial or arbitrary. However, the Commission recognised the right of BP to legitimately discriminate between regular customers and occasional customers. A period of crisis did not change the right for dominant firms to take into consideration particularities or differences, which may exist, in the commercial situation of their customers. However, the Commission added that

“any differences in treatment which may result ought to be objectively based and their choice may not have a discriminatory effect”.¹⁵⁴

The Commission found that BP had treated ABG discriminatory in relation to its other non-contractual customers and BP was therefore found to have infringed article 82.

The Court held that:

“The principle laid down by the contested decision concluding that reductions in supplies ought to have been carried out on the basis of a reference period fixed in the year before the crisis /../ cannot be applied when the supplier ceased during the course of that same period to carry on such relations with its customers /../”.¹⁵⁵

Therefore the Court found that BP had not acted in a discriminatory way and annulled the decision of the Commission.

However, the Court agreed with the Commission that BP, even in a period of shortage, was allowed to treat an occasional customer less favourably than traditional customers. A period of shortage did not put an extra duty on a dominant undertaking.¹⁵⁶ According to the Court, this kind of duty could only flow from measures adopted within the framework of the Treaty or by the national authorities.¹⁵⁷ The Netherlands’ national authorities had in fact, in the absence of Community measures, set up the National Office for Petroleum Products in order to face the difficulties during the crisis. The task of the National

¹⁵³ Commission Decision No 77/327/EEC of 19 April 1977, IV/28.841 – *ABG oil companies operating in the Netherlands*, OJ 1977 L117.

¹⁵⁴ Decision No 77/327/EEC, *ABG oil companies operating in the Netherlands*, Ibid., p. 10 of the Decision.

¹⁵⁵ Case 77/77, *BP*, cited *supra* note 152, para. 30 of the Decision.

¹⁵⁶ Case 77/77, *BP*, cited *supra* note 152, para. 32 of the Decision.

¹⁵⁷ Case 77/77, *BP*, cited *supra* note 152, para. 34 of the Decision.

Office was to control the supply of petroleum products and to support customers or traders who were in difficulty¹⁵⁸.

In the end of its judgement, the Court pointed out that ABG, thanks to the supply opportunities offered by the market apart from supplies coming from BP, was able to find supplies and to overcome the difficulties engendered by the crisis¹⁵⁹. According to me, this paragraph puts the whole judgement in question. The Court does not make it clear if the survival of ABG was decisive for the outcome of the case. Had the conduct of BP constituted an abuse if ABG was put out of business?

BP is a case with very specific circumstances. According to Valentine Korah¹⁶⁰, who has commented the case, the judgement is so specific that it is unlikely to be a precedent in the future. However, the case is of some interest as it shows that a dominant undertaking does probably not have a responsibility to keep other companies on the market. The commercial interests of the dominant undertaking have to be taken into consideration. Laying down criteria for priority in meeting orders in times of shortage would constitute such an interest. From the judgement follows that a crisis period of temporary shortage does not change the responsibility of dominant undertakings unless there is specific legislation regulating the situation.

4.2.4 Case 22/78: Hugin¹⁶¹

The case of *Hugin* dealt with the refusal to sell to a former customer, but the relevant market was much narrower than in *Commercial Solvents*. The question was if Hugin had an obligation to sell spare parts to its cash registers to independent repairers when Hugin normally provided this service itself.

Hugin AB was a major manufacturer of cash registers and Liptons serviced, repaired, sold and rented out cash registers. Since the end of the 50s Liptons had bought spare parts for the cash registers produced by Hugin AB. In 1969, Liptons was appointed as “main agent” to sell Hugin cash registers in United Kingdom, with the right, during the initial period of such agency, to service and repair the new machines delivered under that agreement. In 1970 Liptons entered the business of renting out cash registers, an activity that became the major part of Liptons’ business when the distribution agreement between Hugin AB and Liptons was terminated in 1972. The termination was due to the refusal by Liptons to a new agreement with a newly founded subsidiary of Hugin in the UK (hereafter called Hugin UK). Lipton considered the terms of the new agreement

¹⁵⁸ Case 77/77, *BP*, cited *supra* note 152, paras. 34-37 of the Decision.

¹⁵⁹ Case 77/77, *BP*, cited *supra* note 152, para. 42 of the Decision.

¹⁶⁰ *Supra* note 20.

¹⁶¹ Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v. EC Commission*, 31 May 1979, [1979] ECR 1869.

to be less wide in scope than those of the previous agreement. However, even after the agreement was terminated, Hugin UK continued to supply Liptons with the cash registers and spare parts it required for its rental business. After four months Hugin UK ceased to supply Liptons. Liptons turned to Hugin AB as well as subsidiaries and other distributors but was denied the supply of spare parts.

The Commission found that Hugin's withdrawal of supply of spare parts eliminated Liptons from the market for maintenance of Hugin machines.¹⁶² Since Hugin was dominant in the relevant market and there was no objective reason for the conduct, it was found guilty of infringing article 82. The decision of the Commission was annulled by the Court on the ground that the refusal to supply a firm that operates only locally does not affect trade between Member States. However, from the arguing made by the Court and Mr Advocate General Reischl, it follows that there is no reason to suppose that the decision would have been annulled on the question of abuse.

In its application, Hugin submitted that the existence of Liptons was never threatened, since the refusal of spare parts did not prevent it from hiring out Hugin cash registers. Hugin was still ready to maintain and repair all its cash registers, so the consumers would not have been affected. Hugin based its refusal to supply Liptons on the technical complexity of the Hugin products. From Hugin's point of view, the specialised character of its cash registers constituted an objective justification for Hugin's insistence on having its cash registers serviced only by qualified technicians working in close co-operation with the company.¹⁶³

The Commission did not find the reasons submitted by Hugin as objectively justifiable.¹⁶⁴ It stated that an enterprise in a dominant position could not deny its end customers the freedom of choice. Even if Hugin was able to offer a satisfactory service, Lipton might offer a better one, or Hugin might take advantage of the absence of competition to charge a higher price. This would be at the expense of the customers.¹⁶⁵ In the Commission's opinion Hugin is entitled to try to ensure that its machines are serviced only by qualified technicians, but it is not entitled to insist that those technician must be working in close co-operation with it.¹⁶⁶

Also, the Commission upheld the reasoning in the *United Brands* decision that even if a victim of a refusal to supply is able to survive by dealing in other brands it does not prevent the refusal from being an abuse.¹⁶⁷ Mr Advocate General Reischl agreed with the Commission and said that it is not necessary that a

¹⁶² Commission Decision No 78/68/EEC of 8 December 1977, IV/29.132 – *Hugin/Liptons*, OJ 1978 L22/23, p. 32 of the Decision.

¹⁶³ Case 22/78, *Hugin*, cited *supra* note 161, p. 1886.

¹⁶⁴ Decision No 78/68/EEC, *Hugin/Liptons*, cited *supra* note 162, p. 32 of the Decision.

¹⁶⁵ Decision No 78/68/EEC, *Hugin/Liptons*, cited *supra* note 162, p. 31 of the Decision.

¹⁶⁶ Case 22/78, *Hugin*, cited *supra* note 161, p. 1887.

¹⁶⁷ Case 22/78, *Hugin*, cited *supra* note 161, p. 1884.

competitor is put out of business to constitute an infringement of article 82¹⁶⁸ stated that reference to article 82

“is in principle justified when an undertaking in a dominant position makes use of that dominant position in order to eliminate what is in practice the only important competitor on a secondary market and thus to monopolise the secondary market which is related to the market in which a dominant position is held”.¹⁶⁹

He did not consider the reasons put forward by Hugin to be objectively justified, as the technical characteristics of the Hugin products were characteristic of the cash register as a whole and other producers did not restrict after-sales service to themselves.

The decision of the Commission came as a surprise to British lawyers and businessmen as Liptons could have protected itself by entering into a long-term contract for the supply of spare parts.¹⁷⁰ The possibilities for Liptons to prevent the situation and the remaining options that it had were not really considered by the Commission. Like in *Commercial Solvents*, the dominant undertaking was not the one who terminated the business relation. Also, Liptons could still continue its rental-business and had had the possibility to prevent the shortage of Hugin spare parts. *Hugin* also shows that a refusal to supply because of technical requirements does not seem to be an objectively justifiable reason; at least not when other competitors do not have the same requirements.

4.3 Refusal to supply a service

In the two cases I will examine in this chapter, the dominant undertaking has not refused to sell a certain product, but denied access to a certain service. Some of these cases have already been accounted for in chapter 4.1.3.1 that deals with EC case law on the essential facilities doctrine. However, like the cases regarding refusal to sell, it has not always been decisive for the question of abuse if the service was essential or not. The doctrine is therefore merely an interesting argument.

As we will see, abuse by refusing to supply a service can also include the refusal to supply at certain conditions or at less favourable conditions.

¹⁶⁸ Case 22/78, *Hugin*, cited *supra* note 161, Opinion of Mr Advocate General Reischl, p. 1915.

¹⁶⁹ Case 22/78, *Hugin*, cited *supra* note 161, Opinion of Mr Advocate General Reischl, p. 1912.

¹⁷⁰ Korah Valentine: *An Introductory Guide to EC Competition Law and practice*, cited *supra* note 10, p. 116.

4.3.1 Case 311/84: Télémarketing¹⁷¹

In *Telemarketing* the broadcaster was reserving to itself, without any objective necessity, an ancillary activity that could be carried out by another party. As the broadcaster established himself on the ancillary market he forced out weaker competitors.

Since 1978 Télémarketing had been concerned with telephone marketing. Telephone marketing is an advertising technique whereby an advertiser places, in one of the media (in this case, television), advertisement carrying a telephone number that the person watching the advertisement can call to respond to the advertising campaign. The telemarketing operations had always been carried out using only Télémarketing's phone number.

In 1982 Télémarketing organised the first telemarketing operation aimed at Belgium on the RTL television station, that was run by CLT. The related company IPB was responsible for CLT's advertising and access to RTL advertising was possible only through IPB. IPB granted Télémarketing the exclusive right for one year to carry out telemarketing operations on the RTL station. However, IPB and CLT required that television telemarketing operations should be conducted solely through IPB's technical facilities. They refused to sell television time for telephone-marketing operators using a telephone number other than that of IPB. In its telemarketing operations, Télémarketing had to use the phone number of IPB. The reason was that the public strongly connected the telemarketing campaign with the television station itself. To preserve the viewer's image of RTL it was necessary that telemarketing operations should be connected exclusively through IPB.

Télémarketing was never prevented from carrying out telemarketing operations. The only difference from its former operations was that it had to use the technical facilities of the dominant undertaking, which therefore was able to force its way into a neighbouring market. The case was referred to the Court for a preliminary hearing under article 177 of the Treaty.

The Court referred to *Commercial Solvents* and made it clear that the ruling of that case also applied to the case where an undertaking holds a dominant position on the market in a service that is indispensable for the activities of another undertaking on another market.¹⁷² The service in question consisted in the making available to advertisers the telephone lines and teams of telephonists of the telemarketing undertaking. The condition made by IPB that any other telemarketing company had to use a phone number different from its own,

¹⁷¹ Case 311/84, *Centre belge d'études de marché – Télémarketing (CBEM) SA v. Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA*, 3 October 1985, [1985] ECR 3261.

¹⁷² Case 311/84, *Télémarketing*, *Ibid.*, para. 25 of the Judgment.

therefore constituted a refusal to supply a service. According to the Court this refusal was intended to reserve to IPB any telemarketing operation broadcast by the station and had the possibility of eliminating all competition from other undertakings. Mr Advocate General Lenz argued that while entering the sphere of telemarketing, CLT and IPB had forced Télémarketing out of the market by refusing it an essential service, namely the broadcasting of advertisements over the RTL transmitter.¹⁷³

CLT and IPB argued that the decision to transfer telemarketing operations to IPB was based on reason of expediency.¹⁷⁴ Since IPB was closer connected to CLT it was informed of programme changes made at short notice and was in a position to react accordingly. The decision of CLT was therefore based on economical principles and was not contrary to the interest of the advertisers. The Court did not consider the refusal to be justified by any technical or commercial requirements. It made it clear that for an infringement of article 82 it was sufficient that there was a possibility of eliminating competition. The Court held that:

“an abuse within the meaning of article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking”.¹⁷⁵

The conduct of CLT and IPB therefore amounted to an abuse prohibited by article 82.

Because the judgement was only a preliminary ruling it is formulated very concisely. However, there are some aspect of this case that makes it worth noticing. It is obvious that IPB and CLT wanted to enter a new market and did this with the help of Télémarketing, which had a long experience in this field. The abusive conduct was not aimed at Télémarketing and most likely the conditions laid down by IPB and CLT would have been the same for any potential telemarketing company. Discrimination was therefore not the issue and the reasoning by the Advocate General in *Commercial Solvent*, that the question of discrimination can be essential when a dominant undertaking provides a service, is not applicable to this case. In both *Télémarketing* and *Commercial Solvents* a dominant undertaking wanted to enter a new market. One of the main differences between the two cases is that the latter involved a discontinuance of the supplying of raw material. Istituto had supplied Zoja with the raw material. Istituto's entrance into a new market involved the discontinuance of this supply. CSC and

¹⁷³ Case 311/84, *Télémarketing*, cited *supra* note 171, Opinion of Mr Advocate General Lenz, p. 3268.

¹⁷⁴ Case 311/84, *Télémarketing*, cited *supra* note 171, Opinion of Mr Advocate General Lenz, p. 3264.

¹⁷⁵ Case 311/84, *Télémarketing*, cited *supra* note, para. 27 of the Decision.

Istituto had not denied that they were capable of supplying Z¹⁷⁶As the Advocate General suggested, it must be considered very unlikely that EC Competition law would force the dominant undertaking to continue with its business in general and that Istituto would go free if it had applied the same conduct on all its competitors.¹⁷⁷ In *Télémarketing* the question was not if the dominant undertaking had a duty to supply a service. IPB and CLT were free to enter the new market without any responsibilities. However, if they chose to enter, they had to do this in a way not abusing its dominant position excluding competition from the market.

4.3.2 Case C-7/97: Bronner¹⁷⁸

Bronner, previously referred to in chapter 4.1.3.1, is the case in which the Court of Justice came closest to pronouncing on the existence of an essential facilities doctrine in EC law. Mr Advocate General Jacobs, used the essential facilities doctrine to form his opinion, but also cast doubt on the very basis of the doctrine. The judgement of the Court was much briefer than the opinion of the Advocate General and did not refer to the essential facilities doctrine except in summarising the arguments of the parties.

The Mediaprint group, was a newspaper publisher dominant on the Austrian market for daily newspapers. During the years it had developed a nation-wide early-morning home-delivery service for the distribution of its newspaper. This service guaranteed that subscribers received their newspaper early in the morning. Oscar Bronner (Bronner) was the publisher, manufacturer and distributor of a smaller daily newspaper and did not have access to the home-delivery system. Instead he had to use the ordinary postal delivery, which generally did not take place until late morning. He asked the Mediaprint group to get access to its delivery system for a reasonable fee, but the latter refused. According to Bronner this refusal constituted an abuse of a dominant position. Bronner argued 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 organise his own home-delivery service. Bronner further argued that Mediaprint had discriminated against it by including another independent daily newspaper in its home-delivery scheme.

¹⁷⁶ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para. 28 of the Grounds of Judgment.

¹⁷⁷ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, Opinion of Mr Advocate General Warner, p. 269.

¹⁷⁸ Case C-7/97, *Bronner*, cited *supra* note 3. The reader is also referred to Hancher L: *Case note on Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, cited *supra* note 128, pp. 1289-1307.

Bronner referred to the essential facilities doctrine and considered that Mediaprint was obliged to grant access to its home-delivery system. Mr Advocate General Jacobs accounted for the doctrine and recognised that in certain cases a dominant undertaking must actively promote competition by allowing potential competitors access to the facilities, which it has developed.¹⁷⁹

Although Mr Advocate General Jacobs based a lot of his arguing on the existence of the essential facilities doctrine, he also emphasised that undertakings should have the right to choose their trading partners and dispose their property freely. According to the Advocate General, the freedom of contract was not to be interfered with lightly.¹⁸⁰ Secondly, there should be a presumption in favour of allowing undertakings to retain facilities, which they have developed.¹⁸¹ If access to a distribution facility, such as the one of Mediaprint, was allowed too easily, there would be no incentive for a competitor to develop competing facilities and also the incentives for a dominant undertaking would be reduced. Thirdly, the Advocate General stressed that the primary purpose of article 82 is to prevent distortion of competition and not to protect the position of particular competitors.¹⁸²

The General Advocate stated that in some cases a dominant undertaking can be forced to give access to its facility. However, such interference would only be justifiable where the facility was

“impossible or extremely difficult to duplicate due to physical, geographical or legal constraints”

or such duplication

“is highly undesirable for reasons of public policy”.¹⁸³

The expense of creating a new facility was an obvious obstacle for Bronner. However, the General Advocate stated that cost alone might be a barrier only if the cost were such as to

“deter any prudent undertaking from entering the market”.¹⁸⁴

¹⁷⁹ Case C-7/97, *Bronner*, cited *supra* note 3, para. 34 of the Opinion of Mr Advocate General Jacobs.

¹⁸⁰ Case C-7/97, *Bronner*, cited *supra* note 3, para. 56 of the Opinion of Mr Advocate General Jacobs.

¹⁸¹ Case C-7/97, *Bronner*, cited *supra* note 3, para. 57 of the Opinion of Mr Advocate General Jacobs.

¹⁸² Case C-7/97, *Bronner*, cited *supra* note 3, para. 58 of the Opinion of Mr Advocate General Jacobs.

¹⁸³ Case C-7/97, *Bronner*, cited *supra* note 3, para 65 of the Opinion of Mr Advocate General Jacobs.

¹⁸⁴ Case C-7/97, *Bronner*, cited *supra* note 3, para 66 of the Opinion of Mr Advocate General Jacobs.

It was therefore not enough to show that it would be uneconomical for Bronner, who published a paper with a low circulation, to set up a new delivery system. In order for the costs to constitute a barrier, it would have to be established that the level of investment required to set up a new home-delivery system would be such as to prevent the entrance of a new large daily newspaper. Since the Advocate General found that Bronner had other options and that his business had survived without access to its rival's delivery system he concluded that there was no duty for Mediaprint to share its delivery system.

The Court's reasoning regarding the duty to supply a service can be broken down into three criteria to show an abuse¹⁸⁵:

1. the refusal must be likely to eliminate all competition in the newspaper market on the part of the person requesting the service,
2. the refusal cannot be justified objectively, and
3. the product in question must be indispensable to carrying on the asker's business inasmuch as there is no actual or potential substitute in existence. However, the new entrant could not invoke the difficulties linked to its small circulation.

The Court concluded that it was undisputed between the parties that other methods of distributing daily newspaper, such as by post and through sale in shops and at kiosks, existed; even though these methods might be less advantageous. Also, there was no technical legal or even economic obstacle for any other publisher of daily newspapers to establish its own nation-wide home-delivery system. Regarding the economical difficulties for Bronner to set up a new delivery system, the Court agreed with the Advocate General that Bronner could not invoke any reasons linked to its small circulation. Since the Court concluded that there were substitutes available for Bronner, it did not look at the other criteria and held that Mediaprint's refusal did not constitute an abuse.

The three criteria laid down by the Court were results of the previous practice of the Court and the Commission. It made it clear that a dominant undertaking is not *per se* obliged to share its facilities, since this would refrain companies from investing in new facilities. The Court also put a lot of emphasis on the responsibility on the competitor who wishes access to the facility. A small company can not rely on the dominant undertaking when building up business.

¹⁸⁵ The three criteria follow from Case C-7/97, *Bronner*, cited *supra* note 3, para. 41 of the Judgment.

4.4 Refusal to license

When dealing with a case involving the refusal to grant a license, one has to balance two conflicting issues: the concern to protect industrial and commercial property rights based on national law of the Member States, and the concern of undistorted competition. It can therefore be difficult to assert if a refusal to access constitutes an abuse. The mere existence of a patent, trademark or copyright is not sufficient to establish a dominant position and nor is the exercise of an intellectual property right by a dominant undertaking in itself necessarily abusive.¹⁸⁶ Intellectual property rights are vital for the development of European industry and economics and must be protected. If the denial of access to a facility protected by an intellectual property right always constituted an abuse, there would be no incentives for dominant undertakings to invest in new technical solutions. The efficiency goal would then not be obtained. Also, one could argue that the holder of an intellectual property right already has had to compromise since the right, in most cases, has a limited duration. However, a license may constitute an essential facility for a competitor who wishes to enter a new market and a dominant undertaking can easily eliminate such competition by denying the license. This could also undermine the efficiency goal. Does a dominant company have an obligation in certain situations to grant a licence? It is clear that such an obligation would reduce the value of an intellectual property right.

4.4.1 Case 53/87: Renault¹⁸⁷ and case 238/87: Volvo¹⁸⁸

Both *Renault* and *Volvo* regarded the refusal by a car manufacturer, who held intellectual property rights over car body parts, to licence other manufacturer to make copies. The both car manufacturers refused even though they were offered a reasonable royalty. The cases therefore involved a clear conflict between intellectual property rights and the theory that a monopolist must let new competitors on the market.

The legally independent company Eric Veng Ltd (Veng), imported automobile body panels from Italy and Denmark for sale in the UK. Volvo commenced proceedings against Veng alleging infringement of its Registered Design. In his defence Veng, inter *alia*, relied on article 82 and the question of whether a car manufacturer in a dominant position, which holds registered designs, is abusing its position if it refuses to licence others, was referred to Court for a preliminary ruling.

¹⁸⁶ Bellamy & Child, *Common market law of competition*, cited *supra* note 49, p. 632.

¹⁸⁷ Case 53/87, *Consorzio Italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault*, 5 October 1988, [1988] ECR 6039.

¹⁸⁸ Case 238/87, *AB Volvo v. Erik Veng (UK) Ltd*, 5 October 1988, [1988] ECR 6211.

In the *Renault* case, there had grown up an industry, which copied spare parts. CICRA was a trade association made up of a number of Italian undertakings, which manufactured and marketed motor vehicle bodywork components as spare parts. One of its members produces bodywork components for Renault cars. CICRA brought actions against Renault for the annulment of certain protective rights. The national court expressed doubts regarding, inter *alia*, the compatibility with article 82 and referred the question to the Court for a preliminary ruling. Mr Advocate General Mischo made it clear that the refusal to licence is a subject matter of the intellectual property right and does not *per se* constitute an abuse.¹⁸⁹ If the proprietor of an intellectual right were forced to grant a licence to every person who requested one and offered to pay a reasonable royalty, he would be deprived of the substance of his right.⁹⁰ According to the Advocate General, abuse can therefore only flow from the manner in which the intellectual property rights is exercised.⁹¹

The Court followed the reasoning of the Advocate General holding that

“the right of the proprietor of a protected design to prevent third parties manufacturing and selling or importing, without its consent, products incorporating the design constituted the very subject matter of the exclusive right”.¹⁹²

Therefore, the Court concluded that

“a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position”.¹⁹³

However, the Court agreed with the Advocate General that the exercise of an intellectual property right might constitute an abuse. This would be the case when an undertaking holding a dominant position engaged in abusive conduct such as

“the arbitrary refusal to supply spare parts of independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation”.¹⁹⁴

According to Doherty,¹⁹⁵ this open-ended catalogue of abuses underlines a difference in treatment between intellectual property and other property; the car

¹⁸⁹ Case 238/87, *Volvo*, *Ibid.*, paras 18 and 28 Opinion of Mr Advocate General Misho.

¹⁹⁰ Case 238/87, *Volvo*, cited *supra* note 188, para. 27 Opinion of Mr Advocate General Misho.

¹⁹¹ Case 238/87, *Volvo*, cited *supra* note 188, para. 28 Opinion of Mr Advocate General Misho.

¹⁹² Case 238/87, *Volvo*, cited *supra* note 188, para. 8 of the Judgment.

¹⁹³ Case 238/87, *Volvo*, cited *supra* note 188, para. 8 of the Judgment.

¹⁹⁴ Case 53/87, *Renault*, cited *supra* note 187, para. 18 of the Judgment and Case 238/87, *Volvo*, cited *supra* note 188, para. 9 of the Judgment.

¹⁹⁵ *Supra* note 79.

manufacturer may refuse to licence the design, but may *not* refuse to sell the finished product to independent repairers¹⁹⁶.

4.4.2 Cases C-241 & 242/91: Magill ¹⁹⁷

Magill concerns the duty to make available copyright protected information and may therefore be considered a duty to supply case. The refusal to supply the information would mean the prevention of a new product wanted by the consumers, something prohibited according to article 82¹⁹⁸)The case might be seen as putting an activity duty on dominant undertakings holding an intellectual property right. The Opinion of Mr Advocate General Gulmann is very important; not only because it differs from the judgement of the Court, but also since it seems to represent the view of many academics that have been critical to the outcome of the case.

The three Irish broadcasters ITP, BBC and RTE published weekly listing magazines, giving details of the television and radio programmes that would appear on their own channels the coming week. These were the only source of programme details for more than a few days in advance. Other publications, such as daily newspapers, were licensed to reproduce the listings, but these licences only covered programme details for a day or two in advance. Consequently, there was no comprehensive weekly television guide available on the market in Ireland or Northern Ireland. The publisher Magill TV Guide (Magill) was then established in order to publish a weekly magazine containing information on all the television programmes available to viewers in that area. ITP, BBC and RTE applied to the Irish court, which issued an interim injunction restraining Magill from publishing weekly listings for the three broadcaster's programmes. Magill then lodged a complaint with the Commission claiming that the broadcasters abused their dominant position by refusing to grant licences for the publication of their respective weekly listings.

In its decision¹⁹⁹ the Commission concluded that there was a substantial potential demand for comprehensive TV guides on the market and that the three broadcasters, by using their dominant position to prevent the introduction of a new product, were abusing their dominant position. The Commission rejected the argument that the refusal to grant licences was justified by copyright protection

¹⁹⁶ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, p. 407.

¹⁹⁷ Joined Cases C-241/91 and C-242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. EC Commission*, 6 April 1995, [1995] ECR I-743.

¹⁹⁸ Article 82 b) provides that an abuse is committed if an undertaking in a dominant position limits production or markets to the prejudices of consumers.

¹⁹⁹ Commission Decision No 89/205/EEC of 21 December 1988, IV/31.851 – *Magill TV Guide/ITP, BBC and RTE*, OJ 1989 L78/43.

and stated that in the present case RTE, ITP and BBC were using copyright as an instrument of the abuse,

“in a manner which falls outside the scope of the specific subject-matter of that intellectual property right”.²⁰⁰

Even though national copyright laws protected the TV listings, the Commission made it clear that since the listings were only by-products of the broadcasting activities and required no creative effort they did not deserve a copyright protection.²⁰¹

All of the three broadcasters sought an annulment of the decision. The European Court of First Instance relied considerably on the judgements from the *Volvo* and *Renault* cases and considered that the Broadcaster’s refusal to licence could be compared to the arbitrary refusal to supply spare parts.²⁰² It upheld the decision of the Commission; a judgement that has been widely criticised from academics.²⁰³ RTE and ITP appealed against the judgement.

4.4.2.1 Opinion of the Advocate General²⁰⁴

Mr Advocate General Gulmann opened his opinion in the *Magill* cases by emphasising the fundamental importance of copyright for both the individual owner of the right and for society.²⁰⁵ Since the copyright laws give the copyright owners the exclusive right to exploit their protected work, it is clear that copyright laws per definition give copyright owners the right to restrict competition. This must be considered as generally accepted among the Member States, which have entered into international commitments to give copyright owners sufficient protection in order to ensure an appropriate frame work for their creative efforts. According to the Advocate General it is natural to be cautious when dealing with issues concerning interference with copyright rights on the basis of the Community competition rules. An interference of the right to refuse licenses requires particularly substantial and weighty competition grounds.

²⁰⁰ Decision No 89/205/EEC, *Magill TV Guide/ITP, BBC and RTE*, Ibid., p. 50 of the Decision.

²⁰¹ Subiotto Romano: *The Right to Deal with Whom One Pleases under EEC Competition Law: A Small Contribution to a Necessary Debate*, [1992] 6 E.C.L.R. p. 238.

²⁰² Case T-69/89, *Radio Telefis Eireann v. EC Commission*, 10 July 1991, [1991] ECR II-485, Case T-70/89, *The British Broadcasting Corporation and BBC Enterprises Limited v. EC Commission*, 10 July 1991, [1991] ECR II-535 and Case T-76/89, *Independent Television Publications Limited*, 12 July 1991, [1991] ECR II-575.

²⁰³ Joined Cases 241/91 and 242/91, *Magill*, cited *supra* note 197, para. 26 of the Opinion of Mr Advocate General Gulmann.

²⁰⁴ In chapter 4.4.2.1 I have also used the article by Marleen Van Kerckhove: *The Advocate General Delivers his Opinion on Magill*, [1994] 5 E.C.L.R. pp. 276-279.

²⁰⁵ Cases C-241/91 and C-242/91, *Magill*, cited *supra* note 197, para. 11 of the Opinion of Mr Advocate General Gulmann.

The Advocate General referred to existing case law, where the exercise of intellectual property rights have not been affected by the Treaty. To identify these rights the Court has developed the concept of specific subject matter²⁰⁶. Rights falling within the specific subject matter of an intellectual property right in principle fall outside the scope of the Treaty. According to the Advocate General, it is common ground that the exclusive right to reproduce the protected work forms part of the specific subject matter of copyright²⁰⁷. He referred to the judgement of the Court in *Volvo* where it was stated that the right to refuse licences forms part of the specific subject matter of copyright²⁰⁸. However, the Advocate General also admits that article 82 can affect rights which are in principle within the specific subject matter when exercised in special circumstances.

According to the Advocate General there were no such special circumstances that justified interference with the applicant's copyright on the basis of the Treaty's competition rules. He considered that a comprehensive weekly TV guide would have met the same needs of consumers as the applicants' own guides. In such circumstances the right to refuse licences is necessary in order to guarantee the copyright owner the reward for his creative effort. The applicants were therefore entitled to keep out competition. Also, copyright owners have a right to prevent competitors from using their protected work and it is irrelevant on which market the competitors intend to use the work. Finally, there was no indication of discrimination.

In sum, the Advocate General did not find any particularly substantial and weighty grounds that would motivate the interference in copyright. The Advocate General therefore proposed that the Court set aside the judgements of the European Court of First Instance

4.4.2.2 The Judgement of the Court

The Court did not agree with the Advocate General and upheld the judgement of the European Court of First Instance; stating that Magill must be allowed to use the copyrighted weekly TV programme listings of each of the broadcasters. RTE and ITP had abused their dominant positions by refusing such use.

The Court identified three reasons for finding an abuse²⁰⁹. Firstly, there was a demand for a weekly multi-channel magazine, which the broadcasters did not meet. Instead they forced the viewers to buy three different magazines published by the broadcasters. The Court stated that

²⁰⁶ Cases C-241/91 and C-242/91, *Magill*, cited *supra* note 197, paras. 27-32 of the Opinion of Mr Advocate General Gulmann.

²⁰⁷ Cases C-241/91 and C-242/91, *Magill*, cited *supra* note 197, para. 34 of the Opinion of Mr Advocate General Gulmann.

²⁰⁸ Case 238/87, *Volvo*, cited *supra* note 188, para. 8 of the Judgment.

²⁰⁹ Cases C-241/91 and C-242/91, *Magill*, cited *supra* note 197, paras. 53-57 of the Judgment.

“the appellant’s refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand”.²¹⁰

This in itself was an abuse. Secondly, there was no justification for their refusal. Thirdly, the Court agreed with the Court of First Instance, that the appellants, by denying access to the basic information which is the raw material for the compilation of a weekly television guide, excluded all competition on that market. By doing so they reserved to themselves the secondary market of such guides.

The Court upheld its judgement in the cases of *Volvo* and *Renault* that the refusal by the owner of an intellectual property right to grant a license might, in some circumstances, involve an abuse. It is worth noticing that there was no sign of the broadcasters trying to force their way into an ancillary market. They merely refused on the basis of a conscious policy decision, to make a certain product available to new customers. However, according to the Court, an intellectual property right must not be allowed to stand in the way for the creation of a new product for which there is a substantial potential consumer demand. A holder of an intellectual property right, which is in a monopoly position, might be forced to share it with third parties in order to enable them to create this new product. This would be the case even if the new product might compete with the intellectual property owner’s existing product. In *Volvo* the Court gave examples of situations in which the refusal to grant a licence would constitute an abuse.²¹¹ One of these situations was the decision of a carmaker no longer to supply spare parts for cars, which were still being used on the road. This decision would be at the expense of the consumers. The conduct of RTE and ITP was characterised by a failure to take consumer needs into consideration; a situation that could fall under the same category as the one mentioned in *Volvo* and therefore was considered abusive.

The Court of First Instance went beyond *Magill* in its judgement of *Ladbroke*.²¹² In its judgement in *Ladbroke* the European Court of First Instance added a statement of the essential facilities doctrine to a summary of the *Magill* judgement. The refusal to supply the applicant would constitute an abuse if

“it concerned a product or service which was either *essential for the exercise of the activity in question, in that there was no real or potential substitute*, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers”.²¹³

²¹⁰ Cases C-241/91 and C-242/91, *Magill*, cited *supra* note 197, para. 54 of the Judgment.

²¹¹ Case 238/87, *Volvo*, cited *supra* note 188, para. 9 of the Judgment.

²¹² Case T-504/93, *Tiercé Ladbroke SA v. EC Commission*, 12 June 1997, [1997] ECR II-923.

²¹³ Case T-504/93, *Ladbroke*, *Ibid.*, para. 85 of the Judgment (emphasis added).

The *Magill* judgement might be seen as putting a very long-going responsibility on dominant undertakings. Not only do they have to ensure competition on the market on which they operate, but they may also be required to see to that competition is created and maintained in all markets over which it has an influence.

4.5 When does the refusal to deal constitute an abuse?

When deciding if a refusal to deal constitutes an abuse it is impossible to apply any mechanical criteria. This was *inter alia* established in the Commission's decision in *AKZO*²¹⁴ and is clearly demonstrated in the EC case law previously accounted for in chapter 4. As we can see there are many different factors that need to be taken in account. Unfortunately the factors and, perhaps more important, their different importance is often hidden well in the judgements and decisions. However, in order to clarify the responsibility of the dominant undertakings and to establish to what extent a dominant undertaking is forced to deal with smaller companies, it is important to identify these factors.

In the following I have identified several factors that has been of importance when deciding if a conduct of a dominant undertaking constitutes an abuse. The different factors are not to be seen as exhaustive, but only as the results of my interpretation of the decisions and judgements of the Commission and the Court.

I have chosen to sort the different factors into three categories:

1. factors emanating from the dominant undertaking
2. factors emanating from the smaller undertaking
3. other factors

Even if a factor is found to be emanating from a certain undertaking, this does not necessarily mean that it is under the control of that undertaking. The different categories are merely tools in finding the different factors.

4.5.1 Factors emanating from the dominant undertaking

COMMERCIAL INTEREST

²¹⁴ Commission Decision No 85/609/EEC of 14 December 1985, IV/30.698 - *ECS/AKZO*, OJ 1985 L374/1, para. 77 of the Decision.

When acting on the EC market, a dominant undertaking has to look beyond the present situation. It has to predict the consequences of its behaviour. If the conduct will *affect* the competition of the relevant market, it is clear from *Hoffmann-La-Roche* that the dominant undertaking might be accused of abusing its dominant position. However, even though dominant undertakings have a certain responsibility, the judgements of *United Brands*, *Commercial Solvents* and *BP* clearly show that even undertakings holding dominant positions are allowed to look after their commercial interests and make profitable decisions. In the case of *Tetra Pak I* from 1989, Mr Advocate General Kirschner re-emphasised the right of dominant undertakings to act in their best interest, stating that

“the EEC Treaty does not require the undertaking in a dominant position to act in a way which makes no economic sense and is against its legitimate interest”.²¹⁵

THE POSSESSION OF AN ESSENTIAL FACILITY

As previously shown in chapter 4.1, the possession of an essential facility allows the dominant undertaking to exclude smaller companies from the market. Even if the essential facilities doctrine so far has not been adopted into EC Competition law, arguments based on the doctrine were heard in the Commission’s decisions *B&I/Sealink*, *Holyhead*²¹⁶ and *Chiquita*²¹⁷ and in the Opinion of Mr Advocate General Jacobs in *Bronner*. In *Commercial Solvents* the supply of a raw material was considered essential for the survival of the buyer, even if the essential facility doctrine never was discussed. We have seen that an essential facility can consist of a service, a product or an intellectual property right. Since the refusal to give access to an essential facility may lead to the elimination of competition, the possession of an essential facility is an important factor when determining if a conduct by a dominant undertaking constitutes an abuse. The liberalisation of different areas within the EC will demand the access to essential facilities. However, an unconditional access to essential facilities, owned and controlled by dominant undertakings, is likely to reduce the incentives for dominant undertakings to invest in new projects and innovations.

ENTERING A DOWNSTREAM MARKET

Also a dominant undertaking must be allowed to change its policy, if such a change was to benefit the business. The problem arises when the change of policy entails a dominant undertaking’s entering into a down stream market. In *Télémarketing* and the decision of *Sea Containers/Stena Sealink*²¹⁸ it was made clear that a dominant undertaking is not allowed to use its power to protect

²¹⁵ Case T-51/89, *Tetra Pak I*, cited *supra* note 14, para. 63 of the Opinion of Mr Advocate General Kirschner.

²¹⁶ Decision *B&I/Sealink, Holyhead*, cited *supra* note 105.

²¹⁷ Decision No 76/353/EEC, *Chiquita*, cited *supra* note 140.

²¹⁸ Decision No 94/19/EC, *Sea Containers/Stena Sealink*, cited *supra* note 98.

or strengthen its position in another related market. If a dominant undertaking is the producer of raw material we have an extra delicate situation. If such an undertaking enters the downstream market he becomes a competitor of his former customers and in many cases: a superior one. From the often quoted paragraph 25 of the judgement of *Commercial Solvents*, it is clear that if the dominant undertaking is a producer of a raw material or holds an essential facility, the entering into a downstream market might lead to an abuse.

DISCRIMINATION

In any case, a refusal to deal must never be used in a discriminatory way. The importance of this is underlined by Mr Advocate General Warner in *Commercial Solvents*, where he suggested that the outcome of the case might have been different if all customers of the dominant undertaking had been treated identically. However, from the judgement of *BP* we see that a dominant undertaking is allowed to treat regular customers more favourable than temporary ones. This would be the case even if there were a crisis situation.

EXPENSES AND INVESTMENTS

In his opinion in *Bronner*, Mr Advocate General Jacobs stated that in assessing the conflicting interest of the dominant undertaking and the competing consumer, particular care is required where the services or facilities to which access is demanded represent the fruit of substantial investment²¹⁹. It is therefore likely that the investments and risks taken by the dominant undertaking will be the subject of a more thorough examination. Intellectual property rights are made to guarantee investments and risk taking and their importance for the EC market has been recognised by both the Court and the Commission. As we have seen in *Volvo* and *Renault* they should therefore not be interfered with lightly. The judgement of *Magill*, which stated that a dominant undertaking sometimes may be forced to give access to a facility even if such a facility is protected by a copyright, has been criticised. However, it reveals that not even a legitimately acquired intellectual property right is sacred if it distorts competition.

PROPORTION

From *United Brands* we learned that the commercial interests of the dominant undertaking can justify a refusal to deal. Even sanctions against long standing customers that might lead to a distorted competition are allowed as long as they are proportionate. When deciding if a sanction is proportionate or not the Court has taken different economical factors into consideration. There are not any mechanical criteria to apply. The importance of proportion has later been restated

²¹⁹ Case C-7/79, *Bronner*, cited *supra* note 3, para. 62 of the Opinion of Mr Advocate General Jacobs.

in the first case of *Tetra Pak I*²²⁰ which, in the question of proportion, referred to the judgement of *United Brands*.

INTENTION

The importance of the intention of the dominant undertaking is disputed. In *United Brands* the Court first suggested that the purpose of the dominant undertaking might be taken into consideration when ruling in the abuse question. However, later in the same judgement the Court reduced the importance of intention as it suggested that it was enough that the dominant undertaking could not have been unaware of the fact that its behaviour discouraged other distributors from supporting the advertising of other brand names and that this would lead to the strengthening of United Brand's dominant position. In the decision of *British Midland*²²¹ the importance of the intention of the dominant undertaking was upheld. However, in the decisions of *Sealink*²²² it was not. In the case of *AKZO*²²³ a former buyer, ECS, had started to produce the product it usually bought from AKZO and had started to sell it to end consumers at a cost below that of AKZO. AKZO had then contacted ECS and had threatened with both a general and a selective reduction in prices if ECS did not withdraw from the relevant sector. This kind of behaviour, where a dominant undertaking uses its economical power to lower its prices with the intention to force competitors off the market is called predatory pricing²²⁴. According to Mr Advocate General Lenz, the behaviour (the threats and the setting of the prices) indicated the existence of the anti-competitive object and there was evidence of a policy of elimination²²⁵.

In its decision the Commission concluded that,

“Any unfair commercial practices on the part of a dominant undertaking intended to eliminate, discipline or deter smaller competitors would thus fall within the scope of the prohibition or article 86 if the other conditions for its application were fulfilled”²²⁶.

The Commission did not consider an intention by a dominant firm to prevail over its rivals as unlawful²²⁷. However, the Commission continued its reasoning by recognising the need for a small competitor to be protected against the behaviour of a dominant undertaking designed to exclude the smaller competitor from the

²²⁰ Case T-51/89, *Tetra Pak I*, cited *supra* note 14.

²²¹ Decision No 92/213/EEC, *British Midland/Aer Lingus*, cited *supra* note 101.

²²² Decision *B&I/Sealink, Holyhead*, cited *supra* note 105, Decision No 94/19/EC, *Sea Containers/Stena Sealink*, cited *supra* note 98.

²²³ Case C-62/86, *AKZO*, cited *supra* note 61.

²²⁴ See *inter alia* Korah Valentine: *An introductory Guide to EC Competition Law and Practice*, cited *supra* note 10, p. 74.

²²⁵ Case C-62/86, *AKZO*, cited *supra* note 61, para. 146 of the Opinion of Mr Advocate General Lenz.

²²⁶ Decision No 85/609/EEC, *ECS/AKZO*, cited *supra* note 214, p. 19 of the Decision.

²²⁷ Decision No 85/609/EEC, *ECS/AKZO*, cited *supra* note 214, p. 21 of the Decision.

market not by virtue of greater efficiency or superior performance but by an abuse of market power.

The Commission and the Advocate General found several evidence of the intention of AKZO to eliminate its customer. The Court referred to the judgement of *Hoffmann-La Roche*²²⁸ when stating that the abuse concept is an objective concept relating to the behaviour of the dominant undertaking²²⁹. However, the Court agreed with the Commission and the Advocate General that AKZO had been threatening ECS. The Court concluded that the exclusionary consequences of a price-cutting campaign by a dominant producer might be so self-evident that no evidence of intention to eliminate a competitor is necessary²³⁰. The Court continued its reasoning by saying that on the other hand, where the low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required to prove an infringement.

Although *AKZO* dealt with predatory pricing; a question different from that of when a dominant undertaking has a duty to deal, it shows that the Court has considered the intention of the dominant undertaking when deciding in the abuse question. However, the importance of the intention remains unclear.

ACTIVITY

Finally, as implied in *United Brands* the Court might put a duty on the dominant undertaking to act if it is not content with the behaviour of a reseller.

4.5.2 Factors emanating from the smaller undertaking

RELATION WITH THE DOMINANT UNDERTAKING

The relation between the dominant undertaking and the smaller company may vary. It can be vertical or horizontal and in both cases there might be an abuse. If the dominant undertaking is a competitor to the smaller company it is clear, from *inter alia Commercial Solvents, Bronner* and *Télémarketing*, that the situation becomes more delicate. The effect of the dominant undertaking's refusal to deal might be the elimination of a competitor. However, even if the smaller company is not a competitor, like in *United Brands*, the refusal to deal might have a long-term effect on competition.

If the business relation has been long-termed there are indications in *Commercial Solvents, United Brands, Hugins* and *BP* that the dominant undertaking might

²²⁸ Case 85/76, *Hoffmann-La Roche*, cited *supra* note 55.

²²⁹ Case C-62/86, *AKZO*, cited *supra* note 61, para. 69 of the Judgment (emphasis added).

²³⁰ Case C-62/86, *AKZO*, cited *supra* note 61, para. 65 of the Judgment

have a greater responsibility. In *AKZO* Mr Advocate General Lenz considered the breaking-off of the existing business relationship as being one of the factors contributing to the finding of an abuse.²³¹

SIZE

The Commission has declared that “being big is not a sin”.²³² However, being small might be an advantage when one wishes access to a facility owned and controlled by a dominant undertaking. As previously stated in chapter 2.2, the Commission has recognised the importance of small and medium sized companies. One might therefore predict that small and medium sized companies are going to be compensated for their disadvantage in comparison to dominant undertakings. However, in *Bronner* the Court implied that a smaller company could never unconditionally demand access to the fruits of the investments of the dominant undertaking. Other aspects such as the costs to set up a new facility and the options for the smaller company must be taken into consideration.

THE POSSIBILITY TO SET UP A NEW FACILITY

The existence of technical, legal or economics obstacles, making it impossible for a smaller company to, alone or in co-operation with other undertakings, set up their own facility, could guarantee these companies access to a facility owned and controlled by a dominant undertaking. This was implied in *Bronner*. However, in *Bronner* the Court agreed with Mr Advocate General Jacobs, that in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.²³³ The Court seems to imply that if a smaller company is unable to set up its own facility just because it lacks the economical means, it will not be successful in demanding access to a system created by a dominant undertaking.

OPTIONS

The existence of options for the smaller company is important when asserting if the dominant undertaking has a duty to deal. This was clearly stated in *Bronner* where even less attractive ways to distribute daily newspapers, such as by post

²³¹ Case C-62/86, *AKZO*, cited *supra* note 61, para. 145 of the Opinion of Mr Advocate General Lenz.

²³² The Commission, *Competition Policy in the European Community*, Publications Unit, Brussels, 1992, at. 3.

²³³ Case C-7/97, *Bronner*, cited *supra* note 3, paras. 45-46 of the Judgment.

and through sales in shops, were considered proper alternatives to the facility of the dominant undertaking.

ELIMINATION OF COMPETITION

In both *Commercial Solvents* and *Télémarketing* the refusal of the dominant undertaking to deal, would amount to the elimination of all competition on the part of the smaller company. In the case of *Bronner* the Court noted that the refusal by Mediaprint to grant access to its home delivery system would not prevent Bronner from competing with Mediaprint. Therefore, according to the Court, the responsibility of the dominant undertaking that was set in *Commercial Solvents* could not be applicable in the case of *Bronner*²³⁴. It seems like the abuse question is not dependent on the survival of the smaller undertaking. In *Hugin* and *United Brands* the refusal by the dominant undertaking to sell was considered an abuse although the existence of the smaller company never was at stake. However, in *BP* the survival of the buyer might have played an important role.

THE POSSIBILITY TO MEET TECHNICAL REQUIREMENTS

It must be kept in mind that there is no general duty for a dominant undertaking to share a facility. In order to look after its commercial interest a dominant undertaking must be entitled to refuse to deal with a company, which does not satisfy certain personal requirements such as being in good standing, creditworthy and financially independent. Furthermore, the company that wishes access to a facility must have the professional and technical skills and capacity required for the operation and security of the business. This is clear from, *inter alia*, the Commission's decision in *Hugin*²³⁵. In *Hugin* the Commission accepted the reasoning that a dominant undertaking could be entitled to ensure that only qualified technicians service its machines. However, this reasoning can not be taken too far. The dominant undertaking can not, according to the same decision, insist that these technicians must be working in close co-operation with it.

ACTIVITY

There are no special requirements on the smaller company to prevent a difficult situation from arising. On the contrary, the smaller company may very well have been causing the situation. In both *BP* and *Hugin* it was the smaller companies that terminated the existing co-operation with the dominant undertaking in the first place. These actions by the smaller companies were not given any weight in the judgements. In *Hugin* the Court went even further and did not put any responsibility on the re-seller to take measures to prevent the shortage that amounted when the dominant undertaking ceased to supply.

²³⁴ Case C-7/97, *Bronner*, cited *supra* note 3, para. 38 of the Judgment

²³⁵ Decision No 78/68/EEC, *Hugin/Liptons*, cited *supra* note 162.

4.5.3 Other factors

A CRISIS SITUATION

A crisis situation may increase the power of the dominant undertaking. Consequently the responsibility of that undertaking may also be greater. Still, in *BP* the Court indicated that a crisis situation does not change the application of EC competition law. In a period of shortage, EC Competition law does not seem to put any extra duties on the part of the supplier. According to the Court such a duty could only flow from measures adopted within the framework of the Treaty or by the national authorities²³⁶. However, since the behaviour of BP did not eliminate the smaller company the real importance of a crisis situation must still be considered unclear.

THE STRUCTURE OF THE MARKET

The structure of the relevant market is of importance as it determines the effect that the conduct of the dominant undertaking will amount to. A market with many strong competitors is less likely to be disturbed by the behaviour of one undertaking. As stated in *Commercial Solvents*, the number of actors on the market is therefore of interest. As previously accounted for in chapters 2.2 and 4.1.3.2, the Commission has an outspoken interest in liberalising different markets. This will change the structure of the market and lead to a greater number of competitors. However, in the initial period of a liberalisation the new entrants will undoubtedly be weaker than companies previously present on the market and will therefore require protection against dominant undertakings. As seen in its decision of *British Midland/Air Lingus*²³⁷, the Commission is likely to supply such a protection. Liberalisation could therefore be seen as putting an extra duty on dominant undertakings.

RESPONSIBILITY TOWARDS INVESTORS

A dominant undertaking is an economic unity with commercial interests. It is not, however, an independent unity but has obligations to those who have invested time and money into the company. These investors expect to profit from their investments and their interests must be ensured in order for the company to survive. As we have seen in case law, *inter alia* in *United Brands* and *Commercial Solvents*, the commercial interest of the dominant undertaking might conflict with the interest of the competitors and the Commission. However, it is the primary interest for the investors. In the case of *Tetra Pak*²³⁸ the acquisition of an exclusive license to a new sterilisation technology would undoubtedly have

²³⁶ Case 77/77, *BP*, cited *supra* note 152, para. 43 of the Judgment.

²³⁷ Decision No 92/213/EEC, *British Midland/Aer Lingus*, cited *supra* note 101.

²³⁸ Case T-51/89, *Tetra Pak I*, cited *supra* note 14.

benefited the investors and the shareholders. This was noted by Mr Kirschner, Judge in the European Court of First Instance, who stated that even dominant undertakings such as Tetra Pak are allowed to look after their economical interests. He emphasised that Community law was not meant to conflict with other obligations of the undertaking, for instance,

“the company-law obligation on management organs to use the capital entrusted to them by the shareholders in order to make a profit”.²³⁹

However, even if the responsibility towards the shareholders was recognised, the responsibility not to distort competition prevailed and the conduct of Tetra Pak was considered abusive.

END CONSUMERS

A functioning competition is in the interest of the end consumers who thereby can choose to support the most efficient undertaking. The ability to choose was emphasised in *Hugin* where the Commission rejected the argument that the consumers would not have been affected by the refusal by Hugin to sell to Lipton, since Hugin was still ready to maintain and repair all its cash registers. According to the Commission an enterprise in a dominant position could not deny its end customers the freedom of choice. The importance of the free choice also played an important role in *Magill* where the right of the consumers to a new product prevailed over the intellectual property right held by the broadcasters. However, in the decision of *B&I/Sealink, Holyhead*²⁴⁰ the fact that the car ferry operator Sealink had changed its timetable for the benefit of its customers, did not hinder the Commission from finding an abuse of a dominant position.

In order to reach a functioning competition the Commission and the Court must sometimes help small and medium sized companies. In a short-term period this might be at the expense of efficiency and thereby the consumers. The protection of competition and the protection of consumers might therefore be two conflicting goals. According to Valentine Korah,²⁴¹ it is not always possible to discern whether the Court has been protecting consumers or competition.²⁴²

OTHER GOALS OF THE EC

Competition law does only constitute *one* part of EC law. As discussed previously in this paper the EC has many different goals to take into consideration when pursuing their policies. In *Tetra Pak I*, Mr Kirschner, Judge in the

²³⁹ Case T-51/89, *Tetra Pak I*, cited *supra* note 14, para. 63 of the Opinion of Mr Kirschner, Judge in the Court of First Instance.

²⁴⁰ Decision *B&I/Sealink, Holyhead*, cited *supra* note 105.

²⁴¹ *Supra* note 20.

²⁴² Korah Valentine: *An introductory guide to EC Competition Law and practice*, cited *supra* note 10, p. 137.

European Court of First Instance, recognised the undertaking's responsibility for safeguarding jobs.²⁴³ This would be in line with articles 2 and 3 of the Treaty that, *inter alia*, proscribe that the EC shall pursue a high level of employment.

As stated in chapter 2, article 82 must be read in the light of the Treaty. In order for a dominant undertaking to avoid infringement of article 82, it is therefore necessary to have knowledge about all the different goals and interests of the EC. The preservation of the environment, equality between men and women are just two other examples of goals of the EC that might conflict with a competitive environment and efficiency. The conflict of interest will be further discussed in the following chapter.

²⁴³ Case T-51/89, *Tetra Pak I*, cited *supra* note 14, para. 63 of the Opinion of Mr Kirschner, Judge in the Court of First Instance.

5 Discussion

“Community law does not object to the existence of monopoly or dominant power, so it is compelled to seek a clear rule on behaviour by dominant firms. The search for such a rule will compel Community law to distinguish between legitimate methods of competition which may derive some of their impact from the size and strength of the firm employing them, on the one hand, and unlawful practices which may involve significantly restricting the scope for competitors or taking advantage of market power.”²⁴⁴

According to John Temple Lang, in 1979 these issues had only been directly raised, but not answered, in *National Carbonising*²⁴⁵. In its decision, adopting interim measures, the Commission found that NCB/NSF, which held a dominant position in the UK for both coal and coke, had not been abusing their dominant position by raising their prices of coal and simultaneously introducing a rebate system. The Commission stated that

“the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonable efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term”.²⁴⁶

However, the Commission found that the dominant undertakings, NCB/NSF, while subject to this obligation, appeared not to have acted contrary to it.

The question that John Temple Lang raised in his article in 1979 is still important. The importance of clear guidelines on the behaviour of dominant undertakings can not be emphasised enough. However, according to me, earlier cases such as *Commercial Solvents*, *United Brands* and *BP* have also actualised the distinction between legitimate methods of competition and unlawful practices. In the introduction to this paper I wrote that Competition law supplies rules for the actors on the EC market. However, as we have seen the rules are not so comprehensible as many large companies would desire when making economical profitable strategies. As I have shown in my paper, the interpretation of article 82 requires an examination of many fields.

²⁴⁴ Lang John Temple: *Monopolisation and the definition of “abuse” of a dominant position under article 86 EEC Treaty*, cited *supra* note 24, p. 362.

²⁴⁵ Commission Decision No 76/185/ECSC of 29 October 1975 *adopting interim measures concerning the National Coal Board, National Smokeless Fuels Limited and the National Carbonizing Company Limited*, OJ 1976 L35/6. The case was referred to the Court, in Joined Cases 109/75 and 114/75, *National Carbonizing Company Limited v. EC Commission*, . The applicant then asked to be allowed to withdraw its applications to the Court and the Joined cases were removed from the Court register.

²⁴⁶ Decision No 76/185/ECSC, *National Carbonizing Co. Ltd*, *Ibid.*, p. 7 of the Decision.

5.1 Conflict of interests in theory

The role of dominant undertakings acting on the EC market, is far from clear. Every undertaking is an economic unity with a commercial interest, an interest that has been recognised by both the Commission and the Court. The ambition of the undertaking is simply to generate a profit, a profit which it has to share with shareholders and investors. The confidence from these investors and shareholders is necessary if the undertaking wants to grow.

At the same time, all undertakings operating on the EC market form part of the EC industry. The dominant undertakings are extra important for the EC as their conduct affect the whole European market, having an impact on different areas of the EC. The growth of dominant undertakings may lead to many social, structural and economical changes in Europe. It may amount to a higher degree of employment and encourage investments in important innovations. By controlling the conducts of the dominant undertakings, the EC is given a powerful tool in obtaining the goals set out in the Treaty. As we have seen in this paper, the EC have many objectives that require a certain control of dominant undertakings. The protection of small and medium sized companies is such an objective. The development of such companies is necessary for the EC in a long-term perspective but will require special protection. As we have seen, small and medium sized companies are allowed, and even encouraged, to co-operate, especially over the borders. The protection of small and medium sized companies is therefore closely linked to the objective of integration, an objective which also requires that the power of dominant firms is controlled. Liberalisation is also an objective of the EC that may give smaller, and perhaps less efficient, undertakings access to facilities owned and/or controlled by larger ones. Finally, one needs to consider the social goals of the EC, such as, *inter alia*, the protection of the environment, the promotion of a high level of employment and equality between men and women. Also, since the case of *Stauder* from 1969,²⁴⁷ it has been clear that the EC is bound by the fundamental human rights.²⁴⁸ Today it is clearly stated in the Treaty that,

“the Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950”.²⁴⁹

²⁴⁷ Case 26/69, *Erich Stauder v. City of Ulm*, 12 November 1969, [1969] ECR 419. The German citizen Erich Stauder was due to a decision by the Commission, obliged to state his name in order to get the right to buy butter at a lower price. He considered this obligation to be against the fundamental principles. The case was referred to the EC Court, which clarified the decision of the Commission saying that the identification of those benefiting from the measures does not require the identification, by name.

²⁴⁸ See *inter alia* Pålsson Sten, Quitsow Carl Michael: *EG-rätten – ny rättskälla i Sverige*, 1st edition, Publica C.E. Fritzes AB, Stockholm, Sweden, 1993, p. 122 and Bernitz Ulf, Kjellgren Anders: *Europarättens grunder*, 2nd edition, Norstedts Juridik AB, Stockholm Sweden, 1999, pp. 81-83.

²⁴⁹ Article 6.2 of the Treaty. Article 6 is ex article F.

When pursuing its objectives and forming one European market with functioning competition between the different actors, the EC must also consider its position on the world market. Ever since the industrialisation and the mid-nineteenth century revolution in transportation technology European companies have competed in distant market, such as the American. In order for the EC to be a successful competitor on the world market it must nourish those strong, competitive European companies that have the power to draw necessary investors and consumers to Europe. In this nourishing process the EC must give even the dominant undertakings the freedom to act in the most economically profitable way, although this is likely to amount to the elimination of smaller, less economically strong European companies. In conclusion: the growth of dominant undertakings is desired, and even required, by the EC; as long as it is on the expense of companies outside the EC market. When the growth eliminates competition on the EC market it is called abuse of a dominant position and needs to be controlled.

Besides the conflicts of different objectives of the EC, there are several conflicts between fundamental principles and the desire to keep an undistorted competition. According to the Commission in its ABG decision,

“Undertakings cannot avail themselves of criteria based on the laws of contract in order to prevent the realisation of the objectives of competition law in the Community”.²⁵⁰

5.2 Conflict of interests in EC case law

How has the above-mentioned conflicts been handled by the Court and the Commission? The effect criterion, which was set in *Hoffman-La Roche*,²⁵¹ clearly states that the behaviour of an undertaking in a dominant position, which has the effect of hindering the maintenance of competition, infringes article 82. The importance of the effect-criterion has been upheld in many judgements and it confirms that the abuse concept is an objective concept. However, in *Hoffman-La Roche* it was also held that in addition to a restraint of competition the undertaking in a dominant position must have used methods “different from those governing normal competition in products or services based on traders’ performance”.²⁵² But what constitutes normal behaviour? I have found that praxis is not as clear as one could desire. It has been repeated over and over that dominant undertakings have a certain responsibility to keep the competition working. However, the question what lies within this responsibility and how far it goes remains less clear. When I have studied the decisions of the Commission

²⁵⁰ Decision No 77/327/EEC, *ABG oil companies operating in the Netherlands*, cited *supra* note 153, p. 10 of the Decision.

²⁵¹ Case 85/76, *Hoffmann-La Roche*, cited *supra* note 55.

²⁵² Case 85/76, *Hoffmann-La Roche*, cited *supra* note 55, para. 91 of the Decision.

and the judgements of the Court I have observed how disturbingly vague they are formulated.

First of all, both the Commission and the Court uses expressions without a clear and comprehensible meaning. Phrases like “being big is not a sin” or “a conduct is not an abuse if it constitutes normal behaviour” do not provide the dominant undertakings with any clear guidelines. Besides, some of the expressions are contradicted in praxis. An example would be the statement that dominant firms are allowed to harm competitors but not competition. If this is the case, then why did the Commission pay so much attention to the survival of Zoja in the case of *Commercial Solvents* and why was the intention of the dominant undertaking at all discussed in *United Brands* and *AKZO*?

Second, the decisions and judgements are difficult to interpret inasmuch the determining factors are vaguely formulated. It is clear that both the Commission and the Court has considered different factors to be of importance when deciding if a certain conduct constitutes an abuse. The reasoning may be compared with an equation. In the case of *Commercial Solvents* the different factors that decided the outcome of the case, might be translated into the variables X, Y, Z, A and B. X would represent the fact that CSC and Istituto sold a raw material on which its customers were dependent for their production. Y is the entrance of Istituto on a down-stream market. Z is the fact that CSC and Istituto only ceased to supply *one* customer. The variable A may illustrate the fact that there were only five producers of ethambutanol within the EC and that the elimination of one of them seriously affected the competition. Finally, B may represent the fact that CSC and Istituto still had the production capacity to supply Zoja’s needs, but chose not to. These variables led to the conclusion that CSC and Istituto were acting against article 82. $X + Y + Z + A + B = \text{abuse of a dominant position}$. However, the equation still remains unclear. Were all of the variables necessary for the outcome of the case, or had the judgement been the same without one or two of the variables? Does $X + Y + Z$ also equals an abuse? In conclusion, the decisions and judgements are not formulated clearly enough for dominant undertakings to rely on them.

5.3 The importance of the *Bronner* judgement

The only attempt that has been made to identify the abuse concept was the Court’s reasoning in *Bronner*. As shown in chapter 4.3.2, the Court’s reasoning regarding the duty to supply a service can be broken down into three criteria to show an abuse. If the refusal is likely to eliminate all competition in the market on the part of the person requesting the service, the refusal cannot be justified objectively and the product in question is indispensable inasmuch as there is no actual or potential substitute in existence, the refusal by the dominant undertaking constitutes an abuse of a dominant position. This reasoning is in line with that made by the US Court of Appeals and regards the essential facilities doctrine.

Doherty, who in his article *Just what are essential facilities?*²⁵³ has studied several refusal-to-deal-cases, has applied the *Bronner* criteria retrospectively. The result is that many of the judgements might have been different if they were delivered today, after the *Bronner* judgement. In *Commercial Solvents* the Court chose not to examine whether there were any actual or potential substitutes for producing ethambutol in existence. The use of experimental alternative materials and the alteration of the production methods were not considered as substitutes. Instead the Court settled with concluding that there were no alternative raw materials present on the market which would have been substitutable without difficulty.²⁵⁴ Doherty suggests that the outcome of the case might have been different if the *Bronner* criteria had been applied.

The judgement of *Bronner* came in 1997 and if the Commission and the Court choose to apply the different criteria in the future they might supply the dominant undertakings with some helpful guidelines. However, not even the *Bronner* criteria are clear and easily applicable. Instead they leave a great margin of appreciation for the Court inasmuch as concepts like “eliminate competition”, “objective justification” and “actual or potential substitute” still remain unidentified. *United Brands* is a clear example of how difficult the application of the *Bronner* criteria can be. In *United Brands* there was no immediate threat that the competition would be eliminated. The Court used a long-term perspective and expressed worries concerning the message that this kind of behaviour would send to other distributors. This long-term reasoning is necessary, since the EC has many different interests that must be taken into consideration. However, the long-term effect of disturbing competition did not take place in *Bronner*, where only the elimination of competition was discussed. *Bronner* must therefore not be seen as providing an exhaustive list of criteria that determine when a conduct is abusive.

In *United Brands* the Court also found that the refusal to supply, which in fact was a sanction, was objectively motivated because of the behaviour of Olesen and the commercial interests of United Brands. It was the fact that the sanction was not proportionate that made the conduct of United Brands abusive.

As we can see from the reasoning above, the *Bronner* criteria do not hold all the answers. It is important to keep in mind that they only supply guidelines regarding the permitted conduct of undertakings in a dominant position; not a guarantee. Even after *Bronner* dominant undertakings still need to take different factors into account when trying to predict if a certain behaviour will amount to an abuse of a dominant position.

²⁵³ Doherty Barry: *Just what are essential facilities?*, cited *supra* note 78, pp. 419-422.

²⁵⁴ Joined Cases 6/73 and 7/73, *Commercial Solvents*, cited *supra* note 26, para. 15 of the Grounds of the Judgment.

After concluding that praxis is unclear, one can not refrain from asking why. Already in the 1920s competition law was seen as a way to respond to economic and political problems. Ever since after the Second World War it has been used to encourage economic revival. According to me, the importance of Competition law for the EC could be the reason to the vague decisions and judgements. The world-market is not a consistent market and economical and political changes make it necessary for the EC to be flexible and able to adjust to the current situation. The power to control the behaviour of economically strong companies makes a useful tool in doing so.

5.4 The future development of the abuse concept

It is hard to say in which direction EC competition law will develop. Some of the objectives set by the Commission, such as liberalisation, require a firm control of dominant undertakings. The introduction of the Euro in January 2002 may also influence the development of Competition law. In order for the currency to be successful, the EC needs strong European export-companies, capable of competing on the world market. In order to reach success, these companies may require a greater freedom of action.

In my discussion I have mainly criticised the Commission and the Court. It is important to make clear that my criticism is not directed towards the specific judgements and decisions, but against the fact that both the Commission and the Court have failed in supplying a definition of what duties article 82 puts on dominant undertakings.

It is easy to accept that efficiency and the creation of a wide range of good products desired by the consumers should be the goal of EC competition law. However, 41 years after the signing of the Treaty, the question is still how this goal should be reached. In a market based on free competition the competition might not be long-termed. Dominant undertakings will be free to use their economic strength to enter new markets and monopolies controlled by private interest may be the result. In the end efficiency and new investments might become of secondary interest as the dominant undertakings loose all competition and thereby all incentives to improve. However, competition can not be preserved at any costs. The protection of small and medium sized companies is also a threat to efficiency.

In conclusion, praxis provides us with many factors, which must be taken into consideration when determining if a conduct by a dominant undertaking infringes

article 82. However, so far there is no clear definition of when a refusal to deal constitutes an abuse.

Supplement A

Article 2 (ex Article 2)

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implanting common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Supplement B

Article 3 (ex Article 3)

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
 - (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
 - (b) a common commercial policy;
 - (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
 - (d) measures concerning the entry and movement of persons as provided for in Title IV;
 - (e) a common policy in the sphere of agriculture and fisheries;
 - (f) a common policy in the sphere of transport;
 - (g) a system ensuring that competition in the internal market is not distorted;
 - (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
 - (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
 - (j) a policy in the social sphere comprising a European Social Fund;
 - (k) the strengthening of economic and social cohesion;
 - (l) a policy in the sphere of the environment;
 - (m) the strengthening of the competitiveness of Community industry;
 - (n) the promotion of research and technological development;
 - (o) encouragement for the establishment and development of trans-European networks;
 - (p) a contribution to the attainment of a high level of health protection;
 - (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
 - (r) a policy in the sphere of development cooperation;
 - (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
 - (t) a contribution to the strengthening of consumer protection;
 - (u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

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