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COUNTDOWN TO 1998: STATUS OF TELECOMMUNICATIONS COMPETITION IN EUROPE AND COMPARISON WITH THE UNITED STATES

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Table of Contents

I. INTRODUCTION

On January 1, 1998, European telecommunications providers and consumers were confronted by a new market—at least on paper. That was the day decreed for the implementation of full

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telecommunications competition in the fifteen Member States[1] of the European Union (EU).[2] Although there has been progress towards limited competition, and there are differing degrees of competition already present in the Member States, notably the United Kingdom, for the most part 1998 will mark a sudden transition from government owned monopoly to a competitive and regulatory environment.

This competition, coupled with anticipated lifting of restrictions on foreign ownership of telephone companies promised by the World Trade Organization (WTO) Telecommunications Treaty,[3] represents new opportunities for entry into the European telecommunications market. Potential entrants should be aware of the legal and regulatory environment they will face. For in Europe, like the United States, full competition carries with it significant regulation, at least for the foreseeable future. Participants entering via mergers and joint ventures might also have to comply with European (or national) merger or agreement notification procedures in addition to the usual licensing and interconnection rules.

Telecommunications competition is generally a mixed blessing, and this is certainly true in Europe where there will be a comparatively sudden transition to the new market. Competition is expected to bring lower prices, but prices for basic telephone service could rise as a reflection of costs—a situation likely to be unpopular with consumers. Labor also remains suspicious of telecommunications competition as workers fear job loss. Although competition should benefit the European economy as a whole by creating new jobs, unions are concerned about the loss of what had been considered a secure employer in the form of a telephone monopoly.

There is still much to be done to prepare for the new regime. Under EU structure, it will be the responsibility of the Member States to enact and implement the required laws and regulations.[4] Each nation must now prepare its national regulatory authority (NRA). This may be difficult because in addition to passing the appropriate

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1. The "lesser-developed Member States" of Greece, Ireland, Portugal, and Spain received the right to delay full competition for an additional five years. Luxembourg, as a "very small state" received the right to delay for an additional two years. *See* Council Resolution 93/1, 1993 O.J. (C 213) 1, 3; Council Resolution 94/3, 1994 O.J. (C 379) 4; Commission Directive 96/19, 1996 O.J. (L 74) 13, 14.

2. For purposes of European law, the process of allowing competition in the telecommunications market is referred to as "liberalization."

3. Agreement on Telecommunications Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Fourth Protocol to General Agreement on Trade in Services, *reprinted in* 33 I.L.M. 1125, 1144 (1994).

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

laws, Member States must establish regulatory procedures, obtain office space and equipment, and hire the regulators themselves. Qualified personnel might be scarce. In addition to the NRAs, there is also a possibility for competitive oversight on the national level through either administrative or court proceedings. There is no European regulatory office that performs the functions of the U.S. Federal Communications Commission (FCC), but EU competition enforcement officials have indicated they will exercise close oversight to ensure competitive conditions develop to their liking.

The soon-to-be-former telephone monopolies are preparing for competition. Some are forming into alliances; Global One composed of France Télécom, Deutsche Telekom, and Sprint is one example. Although all of the global alliances have received approval from EU officials, Global One's approval was in doubt until the French and German governments agreed to support the European Commission's plans to allow some limited competition prior to the January 1998 deadline. Although competition officials would probably not like to see a new oligopolistic structure in the form of new global alliances taking the place of existing monopolies, such alliances may be the only source of the large resources needed to be an effective telecommunications competitor. Alliances certainly seem to be the order of the day in Europe as well as in the United States. Some companies, such as Belgacom, have welcomed foreign investment from U.S. companies like Ameritech. Another European operator, British Telecom, has demonstrated that foreign investment is not a one-way street. All participants in the European telecommunications market will have to comply with the new competitive and regulatory regime.

II. CONSTITUTIONAL FRAMEWORK AND INSTITUTIONS

The EU is a recent creation. Born as the European Economic Communities (EC), and originally popularly known as the Common Market, the EU has its constitutional underpinnings in the Treaty of Rome of 1957.[5] Since this date, the European Community[6] (EC), as it was called until the Maastricht amendments of 1992 introduced the term "European Union,"[7] has grown steadily in terms of the number of participating nations (Member States) and influence over legal and economic affairs of the Member States. The Treaty of Rome ("the

5. *See id.* art. 3.

6. The original treaties established the European Coal and Steel Community, the European Economic Community and Euratom—hence the plural "Communities." Legally, "Community" is still part of the entity's title and "Community law" is still referred to.

7. *See* EC Treaty, *supra* note 4, at 726.

Treaty") established principles of free movement of goods among the Member States (Articles 30-36), freedom to provide services (Article 59), and undistorted competition (Article 3(f)). The competition rules were more specifically set out in Treaty Articles 85 and 86. Article 85 prohibits agreements affecting trade between Member States having "as their object or effect the prevention, restriction or distortion of competition."[8] A list of *per se* violations including price fixing and market sharing follows. Article 85(2) declares agreements contrary to Article 85 automatically void.[9] Article 85 may be considered roughly equivalent to section one of the Sherman Antitrust Act.[10] Article 86 condemns any "[a]buse by one or more undertakings of a dominant position,"[11] followed by a non-exhaustive list of examples. Article 86 may be considered equivalent to section two of the Sherman Antitrust Act.[12] Article 90 of the Treaty allows government monopolies, but states that they are subject to Treaty competition rules to the extent that "the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[13] The European Commission is given authority to oversee this provision concerning government monopolies and "address appropriate directives or decisions to Member States."[14] This authority became vitally important in introducing telecommunications competition.

The EU governing process is complex. At the top is the Council of Ministers, composed of one appropriate minister from each member state, depending on the subject matter before the Council.[15] Administrative decisions are voted upon by either unanimity or under a weighted voting system known as a qualified majority.[16] The European Commission is the administrative institution of the EU, proposing legislation, administering existing EU funds and programs, and investigating violations of Community Law.[17] The Commission considers itself the guardian of the Treaty. The President of the Commission, currently Jacques Santer, holds the closest position

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8. EC TREATY, *supra* note 4, art. 85.

9. *See id.* Under Article 85(3), an agreement normally prohibited by Article 85(1) may receive an exemption, from the European Commission if certain procompetitive effects are found.

10. *See* 15 U.S.C. § 1 (1995).

11. EC TREATY, *supra* note 4, art. 86.

12. *See* 15 U.S.C. § 2 (1995).

13. EC TREATY, *supra* note 4, art. 90(2).

14. *Id.* art. 90(3).

15. *See id.* arts. 145-50.

16. *See id.* art. 100.

17. *See id.* art. 155.

the EU has to a chief executive.[18] The European Parliament, chosen by popular election in the Member States, has very limited powers to propose amendments to contemplated legislation and approve certain budgets.[19] The basic type of European legislation is known as a directive. Member States are required to implement directives, not necessarily by enacting them word for word, but by accomplishing the object of the directive.[20] In general, the Commission proposes directives, the Council adopts them, and Member States implement them.[21] The Commission can take action against Member States for failure to implement directives, and certain directives are considered to have direct effect, even if Member States fail to implement them.[22]

The European Court of Justice (ECJ), composed of fifteen judges, rules on Community law.[23] Its cases are composed mainly of actions brought by the Commission against Member States or questions of Community Law referred by national courts.[24] No evidentiary hearings are conducted.[25] The ECJ's procedure requires that its opinions be signed by all the presiding judges, in effect a requirement of unanimity.[26] The ECJ has held that Community law is supreme over national law.[27] This position has been accepted by Member States' courts. The Commission also has the power to issue quasi-judicial decisions, including levying fines of up to ten percent of a firm's worldwide annual turnover for violations of competition law.[28] However, there is a right of appeal to the ECJ for review of fines.[29] Community law, including competition law, should not be considered criminal in nature.

There are two divisions, or Directorates-General (DGs), of the European Commission that are of particular importance in telecommunications matters. First, DG IV is charged with implementation of European competition law through investigations and enforcement actions (including fines), and has a limited power to issue directives

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18. *See id.* arts. 155-63.
19. *See id.* arts. 137-44.
20. *See id.* art. 5.
21. *See id.* art. 169.
22. *See* Case 152/84, Marshall v. Southampton Area Health Auth., 1986 E.C.R. 723, 728.
23. *See* EC TREATY, *supra* note 4, art. 165.
24. *See id.* art. 173.
25. *See id.* art. 168a.
26. *See* STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 156 (2d ed. 1995).
27. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 588.
28. *See* Council Regulation No. 17/62 implementing Articles 85 and 86 of the EC Treaty, 1962 O.J. (L 13) 204.
29. *See id.* art. 17.

on its own.[30] It also maintains the Merger Task Force, which is responsible for receiving merger notifications. DG IV might be considered equivalent to the Antitrust Division of the U.S. Department of Justice. Second, DG XIII is in charge of European telecommunications regulation, postal services, and research and information services, and might be considered equivalent to the FCC. DG XIII drafted much of the telecommunications regulatory framework now being finalized.

III. FIRST STEPS TOWARDS TELECOMMUNICATIONS COMPETITION

Europe does not have a history of telecommunications regulation similar to the United States. Until recently, the telephone companies (often combined with postal services and collectively known as PTTs) were government-owned monopolies. Prices were charged to end-users based on political decisions rather than rate of return regulation or any rational market concerns. However, changes in the U.S. telephone industry beginning in the mid-1960s were influential in Europe. With the AT&T divestiture, interested DG IV officials began to seek a way to bring the benefits of competition to European telecommunications. The weapon employed was the Commission's Article 90 authority. The first important case involved forwarding telecommunications traffic from third countries to an ultimate destination to avoid steep international settlement rates, a practice that continues today.[31]

A. British Telecom

Due to the structure of international telex charges, it was often cheaper to send messages through third countries, such as the United Kingdom, than to transmit them directly.[32] Recognizing this anomaly, telex forwarding agencies were established in the United Kingdom and took advantage of developing technology to store a number of messages and transmit them in short bursts.[33] The International Telecommunications Union (ITU), composed of representatives of nations and private telephone companies, reacted by passing ITU recommendations and regulations calling on telecommunications administrations to deny service to telex forwarding

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30. *See id.* In its investigations, DG IV can submit written or oral questions, request documents, and, in cooperation with judicial officials of Member States, conduct "dawn raids" on firms to seize documents proving a competition case. *See id.*

31. *See* Case 41/83, Italian Republic v. Commission, 1985 E.C.R. 873 hereinafter [British Telecom].

32. *See id.* at 875.

33. *See id.* at 882-83.

agencies.[34] One of the agencies, when threatened with disconnection by British Telecom (BT), complained to DG IV of the European Commission.[35] The Commission investigated using its Article 90 authority and charged BT with a violation of Article 86 (abuse of a dominant position).[36] The Commission's decision condemned the threatened disconnection,[37] but by that time BT was in the process of privatization, and neither BT nor the U.K. government chose to enforce the ITU regulations in question.[38] As allowed under ECJ procedure, the Italian government and other Member States appealed the Commission's decision to the ECJ.[39] The Court held that Community competition law did apply,[40] but took a narrow view of the ITU regulations, holding that BT could have complied with the regulation without threatening to disconnect the forwarding agencies in violation of Article 86.[41]

Furthermore, the Court held the "modicum of competition" represented by the message forwarding agencies was a benefit to consumers and did not constitute interference with a state monopoly's position that might be legitimately preserved from competition under EC Treaty Article 90(2).[42] Italy argued that a Member State has complete discretion over the reservation of areas for exclusive or special rights and that the application of Article 90(2) should be left to the discretion of the Member State.[43] The ECJ disagreed, however, holding that Article 90(3) entrusted oversight of state monopolies to the Commission, not to the Member States themselves.[44] The ECJ maintained that allowing message forwarding agencies to exist could decrease the absolute nature of the state telecommunications monopoly, but the small decrease in revenue potentially suffered by the

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34. *See id.* at 873-82.

35. *See* Case 82/861, Telespeed Servs. Ltd. v. United Kingdom Post Office, 1 C.M.L.R. 457, 458 (1983).

36. *See* British Telecom, *supra* note 31, at 883.

37. *See id.* at 890.

38. *See id.* at 884.

39. *See id.* at 873.

40. *See id.* at 877-78.

41. *See id.* at 890.

42. *See* British Telecom, 1985 E.C.R. at 887. The Advocate General, an official of the ECJ who drafts recommended opinions for the Court, submitted an opinion in this case noting that the message forwarding agencies relied on "an advanced technology" and price differentials to conduct their business and thus offered the public higher quality service at a lower price. Enforcing the ITU regulations would then have the effect of curbing technological progress and increasing prices. *See id.* at 875-79.

43. *See id.* at 888.

44. *See id.*

state monopoly would not sufficiently jeopardize the performance of the tasks assigned to the state monopoly so as to justify exclusivity.[45]

B. The Green Paper

Closely following the *British Telecom* judgment, the European Commission launched a comprehensive study of the European telecommunications market that was released in 1987, calling for competition in all aspects of telecommunications except basic voice telephony.[46] The Green Paper described the poor state of telecommunications in Europe compared with the United States and Japan.[47] There was a recognized global trend toward promotion of competition and privatization of telecommunications,[48] the cornerstone of which was asserted to be a separation between the regulation and operation of telecommunications administrations.[49] In Europe, not only did the PTTs have a monopoly over telecommunications services and equipment, but the same governmental agency that provided the services typically set prices and granted approval for provision of services and equipment.[50] While the Green Paper concluded that basic voice traffic might be reserved as a monopoly service, this reservation was to be temporary, allowing the PTTs to maintain universal service support while adjusting to meet the challenges of forthcoming competition.[51] New and advanced services and international voice traffic would have to open to competition,[52] while simultaneously combating PTT cross subsidization of new services through accounting separation.[53]

IV. THE EQUIPMENT DIRECTIVE

The Commission wished to eliminate the tie between telecommunications services and the provision of telecommunications equipment.[54] As recently as 1995, the ECJ ruled that France's attempt to criminally prosecute a merchant for advertising "non-

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45. *See id.*

46. Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87)290 final [hereinafter Green Paper].

47. *See id.*

48. *See id.* at 10.

49. *See id.* at 185.

50. *See id.*

51. *See id.* at 177-79.

52. *See id.* at 68.

53. *See id.* at 77-78, 184.

54. *See id.* at 14 (PTTs traditionally provided all telephone sets).

approved" telephone sets was prohibited under European law.[55] In 1988, the Commission issued a Directive under its Article 90 authority calling for competition in telecommunications terminal equipment (POTS sets).[56] In its preamble, the Equipment Directive delineates its goals as technical progress, consumer choice, the elimination of restrictions on imports from other Member States, fair competition, and mutual acceptance of goods legally manufactured and marketed in other Member States.[57] Member States were to withdraw special or exclusive rights to supply telecommunications equipment.[58] The telecommunications authorities could ban equipment not meeting the requirements of any forthcoming European harmonizing directive for telecommunications equipment, or, alternatively, could have their own technical requirements, subject to the obligation that such requirements be nondiscriminatory.[59] To combat the temptation of telecommunications organizations to ban all equipment they did not supply, Member States were required to separate the regulatory and operating functions of their telecommunications administrations.[60] End-users locked into long term service contracts with PTTs were given the right to terminate on one year's notice.[61]

Several Member States filed a challenge to the Equipment Directive, focusing on the power of the European Commission to issue such a directive under EC Treaty Article 90(3).[62] The ECJ opinion declared that state monopolies, although recognized under Article 90, must be considered a departure from the general rules of the EC Treaty and the specific rules of competition.[63] The interests of Member States in using state monopolies as instruments of economic or fiscal policy must be weighed against the policy of the Community, as expressed in the EC Treaty, of preserving fair competition and the unity of the Common Market.[64] The ECJ accepted the stated premise of the Equipment Directive that competition could be allowed in telecommunications terminals without jeopardizing fulfillment of the PTTs' basic mission: the furnishing of a telecommunications network

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55. *See* Case 91/94, France v. Tranchant, 1995 E.C.R. I-3911.

56. *See* Commission Directive 88/301, 1988 O.J. (L 131) 73 [hereinafter Equipment Directive].

57. *See id.* arts. 1-5.

58. *See id.* art. 2.

59. *See id.* art. 3.

60. *See id.* art. 6.

61. *See id.* art. 7.

62. *See* Case 202/88, France v. Commission, 1991 E.C.R. I-1223 [hereinafter Telecommunications Terminals].

63. *See id.* at 1263.

64. *See id.*

and services.[65] As none of the challenging Member States contested this assertion, the ECJ did not need to consider whether competition in telecommunications equipment might interfere with this mission.[66] As Article 90(3) gives the Commission power to enact general rules in directives to specify obligations of Member States under Article 90(1) and (2),[67] the Member States argued that the Commission exceeded its Article 90(3) power by issuing a directive instead of proceeding against individual Member States as allowed by Article 169.[68] The ECJ concluded that the Commission did have the power to act in response to general market conditions in Member States by establishing concrete obligations through directives on Member States.[69] The challenging Member States further alleged that a directive of this scope should have been issued as a harmonizing directive, that is, with the full participation of the Council of Ministers and the European Parliament.[70] Although the ECJ upheld the Commission's authority to issue such a directive on its own, the political difficulties generated by the Commission's solo action did not disappear. Eventually, the Council officially endorsed the Commission's telecommunications liberalization policy and urged that appropriate regulatory directives be issued with full participation from the Council, Parliament, and Commission.[71]

The total effect of the *Telecommunications Terminals* judgment was an endorsement of the Commission's philosophy as expressed in the Green Paper and its exercise of power in the Equipment Directive. The Commission was now emboldened to take further steps to chip away at the power of state telecommunications monopolies. One year later, the ECJ reached a similar result in a challenge to another Article 90 directive, the Telecommunications Services Directive.[72]

V. THE SERVICES DIRECTIVE

In 1990, the Commission issued the Services Directive[73] on the same day that the Council adopted a Directive on Open Network

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65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.* at 1264.
69. *See id.*
70. *See id.* at 1265-66.
71. *See* Council Regulation 93/1, 1993 O.J. (C 213) 1; *see also* Council Resolution 94/3, 1994 O.J. (C 379) 4.
72. *See* Joined Cases 271, 281 & 289/90, Spain, Belgium, Italian Republic v. Commission, 1992 E.C.R. I-5833.
73. *See* Commission Directive 90/388, 1990 O.J. (L 192) 10 [hereinafter Services Directive].

Provision (ONP).[74] ONP was equivalent to the FCC Open Network Architecture requirements and was designed to require incumbent operators to unbundle network elements and make them available as building blocks to potential competitors.[75] The goal of the Services Directive and the ONP Services Directive was to allow the competitive provision of some telecommunications services to become a reality.[76] The Services Directive required telecommunications services to become open to competition, with the temporary exception of basic voice telephone service.[77] The Directive did not originally apply to telex, mobile radiotelephony, paging, and satellite services,[78] but through amendments, again issued under its Article 90 authority, the Commission used the Services Directive as a vehicle to require full telecommunications competition by January 1, 1998.[79] The Services Directive was amended to cover satellite services,[80] the use of cable television networks for already competitive telecommunications services,[81] mobile services,[82] and basic conditions for the competitive telecommunications market.[83]

The Satellite Directive, Cable Directive, and Mobile Directive allowed greater competition by progressively narrowing the definition of services (known as "reserved services") that Member States could keep free from competition.[84] With the adoption of the Full Competition Directive in 1996, only two reserved services remained: basic voice telephony and public telecommunications networks. Basic voice telephony was defined as "the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any

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74. *See* Council Directive 90/387, 1990 O.J. (L 192) 1 [hereinafter ONP Services Directive].

75. *See id.* at 2.

76. *See* Services Directive, *supra* note 73, at 10; ONP Services Directive, *supra* note 74, at 1.

77. *See* Services Directive, *supra* note 73, at 10.

78. *See id.*

79. The Commission eventually received political endorsement of its goals and a timetable for telecommunications competition by a Resolution of the Council of Ministers, Council Resolution of July 22, 1993 on the Review of the Situation in the Telecommunications Sector and the Need for Further Development in that Market, 1993 O.J. (C 213) 1, and a Resolution of the European Parliament, European Parliament Resolution of April 20, 1993 on the Commission's 1992 Review of the Situation in the Telecommunications Sector, 1993 O.J. (C 150) 39.

80. *See* Commission Directive 94/46 amending Directive 88/301 and Directive 90/388, 1994 O.J. (L 268) 15 [hereinafter Satellite Directive].

81. *See* Commission Directive 95/51 amending Directive 90/388, 1995 O.J. (L 256) 49 [hereinafter Cable Directive].

82. *See* Commission Directive 96/2 amending Directive 90/388, 1996 O.J. (L 20) 59 [hereinafter Mobile Directive].

83. *See* Commission Directive 96/19 amending Directive 90/388, 1996 O.J. (L 74) 13 [hereinafter Full Competition Directive].

84. *See* Satellite Directive, *supra* note 80; Cable Directive, *supra* note 81; Mobile Directive, *supra* note 82.

user to use equipment connected to such a network termination point in order to communicate with another termination point."[85] Public networks were defined as "a telecommunications network used *inter alia* for the provision of public telecommunications services."[86]

The Commission urged that new services, such as innovative calling card services, voice mail, or certain call forwarding services should be considered non-reserved.[87] The Member States would have the burden of proof to justify reservation of new services to a dominant telecommunications organization.[88] All of the defined elements of voice telephony had to be present to justify continued reservation.[89] The "public" requirement meant that telephone service, including voice, provided to corporate networks or closed user groups (CUGs) should be considered competitive.[90] "Corporate networks" were defined as "those networks generally established by a single organization encompassing distinct legal entities such as a company and its subsidiaries or its branches."[91] The Commission's difficulty in defining CUGs prompted it to decide that some sort of group activity or link was to exist, but an economic identity, such as a corporation, was not necessary.[92] For example, a professional relationship among entities might qualify a group as a CUG.[93] The internal communications needs of the group were to result from a professional relationship, not a shared desire to obtain telephone service from a discount provider.[94] To clarify the qualifications for CUG status, the Commission gave examples, including "fund transfers for the banking industry, reservation systems for airlines, information transfers between universities involved in a common research project, re-insurance for the insurance industry, inter-library activities, common design projects, and different institutions or services of intergovernmental organizations."[95] The requirement that both ends of a phone conversation be at public switched network termination points meant that if a customer was connected via leased

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85. Services Directive, *supra* note 73, art. 1.

86. Full Competition Directive, *supra* note 83, art. 1(a)(i) (emphasis added).

87. *See* Commission Communication to the European Parliament and the Council on the Status and Implementation of Directive 90/388 on Competition in the Markets for Telecommunications Services, COM(95)113 final at 3-4.

88. *See id.* at 8.

89. *See id.* at 7.

90. *See id.* at 7-8.

91. *Id.* at 8.

92. *See id.*

93. *See id.*

94. *See id.*

95. *Id.*

lines or perhaps through a CUG, then calls could be completed to points on the public network without being considered basic voice service.[96]

One of the more controversial provisions of the Full Competition Directive authorized the use of alternative or self-provided infrastructure for telecommunications services already declared competitive.[97] Several of the larger Member States actively opposed this proposal.[98] France and Germany changed their opposition when DG IV made it clear that France Télécom and Deutsche Telekom would not be allowed to participate in the Global One joint venture unless alternative infrastructure provision was allowed.[99] The Commission has utilized approval of mergers and joint ventures to obtain what are in essence political concessions. The most recent example of this is the pressure the Commission placed on Spain to allow full competition before its derogation date of 2003 in exchange for the Commission's approval of Telefónica's participation in AT&T's Unisource/Uniworld joint venture.[100]

The basic approach of the Full Competition Directive is similar to the U.S. Telecommunications Act of 1996,[101] though not nearly as specific. The Member States must require existing telecommunications organizations to publish the terms and conditions for interconnection by July 1, 1997.[102] Service providers are free to accept those terms or to negotiate their own interconnection agreements.[103] It is envisioned that the parties should first attempt to commercially negotiate terms of interconnection agreements, but if they are unable to reach agreement, the Member States are to adopt a decision setting the individual terms of interconnection.[104] This procedure will be implemented upon the date of full competition and extend for five

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96. *See id.*

97. *See* Full Competition Directive, *supra* note 83, art. 2.

98. *See* Commission Decision Relating to a Proceeding Under Article 85 of the EC Treaty and Article 53 of the EEA Agreement, 1996 O.J. (C 195) 1.

99. *See id.* at 24.

100. *See* Commission Notification of a Joint Venture, 1995 O.J. (C 276) 9. AT&T has led a group of telephone companies, including companies from the Netherlands, Sweden, Switzerland, Spain, and other countries in a joint venture known variously as Unisource/Uniworld or WorldPartners. Spain's Telefónica subsequently dropped out of the venture, which is similar to a franchise, whereby each participant offers a common set of services such as frame relay, private data network service, and virtual private network service. Unlike Global One or Concert, the group will not provide its own infrastructure, but will rely on the individual participants' networks. *See id.*

101. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

102. *See* Full Competition Directive, *supra* note 83, art. 3.

103. *See id.* art. 4(a)(3).

104. *See id.*

years.[105] The Commission may revisit interconnection issues if a harmonizing directive is adopted, and in fact such a directive has now been adopted.[106] Nevertheless, the Services Directive, as amended, might itself have been adequate to set conditions for telecommunications competition in 1998.

VI. OPEN NETWORK PROVISION (ONP) DIRECTIVES

To date, there has not been significant legislation adopted under the EU's overall legislative process (adoption of harmonizing directives) compared to legislation issued directly by DG IV under its Article 90 power. The telecommunications harmonizing directives that have been adopted are mainly under the rubric of ONP directives—legislation designed to force dominant telecommunications operators to unbundle network elements and make them available to potential competitive telecommunications providers.[107] The ONP Services Directive established the general principle that network elements necessary to provide nonreserved telecommunications services should be made available on nondiscriminatory and publicly known terms.[108] However, prices for network elements, primarily leased lines, remained high throughout Europe, and in 1992 the Leased Lines ONP Directive[109] was adopted establishing a common technical standard for leased lines and requiring that leased lines be offered on a cost oriented basis.[110] There has been a great deal of debate over what constitutes cost orientation. The traditional PTTs have experienced some difficulty in accounting for costs as they have typically been run like a government agency instead of a rate of return utility.[111] Determining cost of service will be very important not only in conforming to ONP requirements, but also in negotiating interconnection and in determining the price dominant telecommunications organizations charge themselves for use of the

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105. *See id.* art. 4(a)(5).

106. *See id.*

107. *See, e.g.*, ONP Services Directive, *supra* note 74.

108. *See id.*

109. *See* Council Directive 92/44, 1992 O.J. (L 165) 27 [hereinafter Leased Lines ONP Directive]. British Telecom (BT) challenged the U.K. government's application of the Leased Lines ONP Directive as it claimed that it was not a monopolist as a matter of law and the directive should therefore not apply to it. BT further claimed that there was no demand for the leased lines as technically specified by the directive. The ECJ did not accept either argument and held that the entire Directive could be applied against BT. *See* Case 302/94, The Queen v. Secretary of State for Trade & Indus., 1996 E.C.R. I-6417, 6417-21.

110. *See* Leased Lines ONP Directive, *supra* note 109, art. 10(1).

111. *See* Commission Recommendation on Interconnection in a Liberalized Telecommunications Market, art. 3.5 (visited Apr. 3, 1998) <http://www.ispo.cec.be/infosoc/telecompolicy/en/r3148-en.htm>.

network to provide services.[112] In general, "cost-oriented" and "cost-based" are interpreted to mean cost plus a reasonable profit.[113] Still to be resolved is whether costs should be calculated to include historic costs or if an incremental basis is proper. Many cost decisions may be left to national regulators.

ONP requirements were further specified by the ONP Voice Telephony Directive.[114] This directive has caused some confusion as it draws a distinction between requirements of interconnection and special network access without defining what is meant by "special network access."[115] A consensus appears to be emerging that the term refers to access needed by potential service providers. If a potential service provider, lacking its own network facilities, requests access to elements of the public telecommunications network, then the dominant operator will be under an obligation to provide the facilities in accordance with cost orientation. On the other hand, telecommunications providers having network facilities should be considered as requesting interconnection. Interconnection is to be a matter of commercial negotiation between the parties, subject to possible intervention by national regulatory authorities, and operators are to respect the principle of nondiscrimination.[116]

The Interconnection Directive further fleshes out the rules for European interconnection.[117] Member States are required to remove all restrictions on the ability of service providers to negotiate interconnection agreements, and telecommunications organizations are required to negotiate such agreements, subject to certain limited exceptions.[118] Telecommunications organizations with significant market power, any telecommunications operator with a greater than twenty-five percent market share in a given geographic area, must meet all reasonable requests for interconnection.[119] It is questionable, in competition law terms, whether market power should be assumed with a twenty-five percent market share. Incumbents might welcome this provision because it promises that significant competitors might become subject to the same interconnection

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112. This concept of transfer pricing will be examined in greater detail in the section of this paper on the European law of essential facilities.

113. *See* Council Directive 97/33, art. 7(2), 1997 O.J. (L 199) 32 [hereinafter Interconnection Directive].

114. *See* Council Directive 95/62, 1995 O.J. (L 321) 6 [hereinafter ONP Voice Telephony Directive].

115. *See id.* art. 10, 11.

116. *See id.* art. 11.

117. *See* Interconnection Directive, *supra* note 113.

118. *See id.* art. 3(1).

119. *See id.* art. 4(3).

requirements. In a similar manner to the procedure required by the U.S. Telecommunications Act of 1996,[120] an appeal may be made to the national regulatory authority and an arbitrated agreement imposed if the parties are unable to reach an interconnection agreement.[121] Interconnection agreements may be required to include charges in support of universal service and must be issued on a non-discriminatory basis with equal conditions applied for similar service elements.[122] Proposed changes in interconnection arrangements must be announced six months in advance, and all interconnection agreements should be open for public inspection.[123] Charges for interconnection are to be cost-based, with two allowable elements: one-time costs for network configuration and regular usage charges.[124] Bulk discounts and charges designed to help support universal service are allowed.[125]

Broad conditions are set for Member States' regulatory goals. Network security, network integrity, guaranteed interoperability, and essential requirements such as scarcity of available frequencies could justify Member States limiting certain interconnection requirements.[126] Sharing rights-of-way and collocation are not required but encouraged, and Member States could impose collocation under their dispute resolution authority.[127] Additionally, telephone numbers are to be allocated in a fair manner, but number portability would not be required in major European cities until January 1, 2003.[128] If service providers licensed by different Member States could not agree on the terms of interconnection agreements, either party could refer the matter to the Member States involved and their regulatory authorities would coordinate efforts to resolve the dispute within six months of referral.[129]

A common framework has also been established for the grant of telecommunications service authorizations and individual licenses.[130] The Licensing Directive prefers a maximization of the

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120. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

121. *See* Interconnection Directive, *supra* note 113, art. 9(5).

122. *See id.* art. 5.

123. *See id.* art. 14.

124. *See id.* art. 7(2).

125. *See id.* art. 5(4).

126. *See id.* art. 10.

127. *See id.* art. 9(3).

128. *See id.* art. 12(5). The Commission's Numbering Green Paper recommends this date be moved forward to the year 2000. Green Paper on a Numbering Policy for Telecommunications Services in Europe, COM(96)590 final at 17.

129. *See* Commission Directive 97/13, art. 12(3), 1997 O.J. (L 117) 15 [hereinafter Licensing Directive].

130. *See id.*

number of service providers in order to bring the benefits of competition to the largest number of consumers.[131] Therefore, the Member States are to allow potential service providers to follow a declaration procedure granting general authorization to offer services whenever possible.[132] However, there are areas involving allocation of scarce resources such as radio frequencies that might call for limiting the number of participants in the market.[133] Only essential requirements of access to scarce resources; network security, integrity, or data protection; or environmental concerns could justify restricting the number of licensees for a particular service.[134] As technology develops, perhaps enabling radio spectrum to be shared by more providers, technical justification for restrictions on the number of licensees may further diminish. Consistent with the European single market principle, the Licensing Directive sets forth limited steps to promote a one-stop shop for telecommunications authorizations and licenses.[135] A potential operator who wishes to provide service or infrastructure in more than one Member State must request the national authorities to coordinate authorization grantings.[136] If the operator is not satisfied with the coordination, a notification could be made to a European Union Telecommunications Committee, which would then reach a solution that could be implemented by the involved Member States.[137] If not implemented, the European Commission is to be informed,[138] but it is unclear whether any real enforcement powers exist. Likewise, the proposal for a one-stop shop for licenses is rather vague. The Commission will establish a clearinghouse at one physical location that would forward requests for licenses to the appropriate Member States, which would then decide on the request within six months.[139] This would not be a true one-stop shop because an applicant might still be subject to different substantive and procedural rules within the general framework of the Licensing Directive. Perhaps the Commission only intended to set up the principle of a one-stop shop at this time and make it a reality later.

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131. *See id.* ¶ 25.
132. *See id.* art. 3(3).
133. *See id.* art. 10(1).
134. *See id.* art. 10.
135. *See id.* art. 12.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.* arts. 14-17.

The Competitive Environment Directive is another directive designed to work in a competitive environment.[140] While its accompanying recitals place emphasis on the provision of universal service, defined as a minimum set of specified quality services accessible to all at an affordable price,[141] there are no mechanisms in the amendments to help provide universal service. Rather, the amendments focus on ensuring that dominant telecommunications organizations unbundle network facilities and make leased lines available to potential competitive service providers.[142] There is again the presumption that holders of a telecommunications market share greater than twenty-five percent possess market power that subjects them to ONP requirements.[143] Member States are to strictly observe the independence of the regulator and the provider.[144] Parties affected by a decision of a national regulatory authority are given a right of appeal to an independent body.[145] Regulatory authorities ensure that at least one source of unbundled leased lines is available on a cost-oriented tariffed basis at every geographic point in their Member State.[146] As a part of tariff requirements, technical interfaces are to be published in the *Official Journal*.[147]

VII. PROPOSED DIRECTIVES

There is one telecommunications directive scheduled to be adopted before the date of full competition: the Proposed ONP Voice Telephony and Universal Service Directive.[148] The proposal focuses on keeping basic telephone service affordable to rural and high-cost service provision areas as well as to "vulnerable groups of users such as the elderly, those with disabilities" and those who do not often

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140. *See* Commission Directive 97/51, 1997 O.J. (L 295) 23 [hereinafter Competitive Environment Directive]; *see also* Commission Proposal for a European Parliament and Council Directive amending Council Directives 90/387 and 92/44 for the Purposes of Adaptation to a Competitive Environment in Telecommunications, 1996 O.J. (C 62) 3.

141. *See id.* art. 1, ¶ 2.

142. *See id.* art. 1, ¶ 1.

143. *See id.* art. 2(3)(3). Member State regulatory authorities may overcome this presumption and either grant or remove significant market power after a determination of "the organization's ability to influence the leased-lines market conditions, its turnover relative to the size of the market, its access to financial resources and its experience in providing products and services in the market." *Id.*

144. *See id.* art. 1(5)(5).

145. *See id.* art. 1, ¶ 6.

146. *See id.* art. 2, ¶ 11.

147. *See id.* art. 1, ¶ 5.

148. Commission Proposal for a European Parliament and Council Directive on the Application of Open Network Provision (ONP) to Voice Telephony and on Universal Service for Telecommunications in a Competitive Environment (replacing EP and Council Directive 95/62), COM(96) final 771 [hereinafter Proposed ONP Voice Telephony and Universal Services Directive].

use the telephone.[149] The Interconnection Directive also states that Member States may fund universal service by allowing a surcharge to be placed on interconnection fees or by requiring contributions to a universal service fund based on market share.[150] As a part of minimum service level requirements, Member States would designate a carrier of last resort for every geographic area,[151] ensure that every subscriber has the opportunity to be listed in a directory,[152] require an adequate number of public pay telephones,[153] require fixed network operators to publish tariffs,[154] including service level guarantees,[155] and set specific procedures for disconnection due to a failure to pay.[156] Complaints coming from competitive providers and consumers would be heard by the NRAs and brought to the European ONP Committee if necessary.[157] Tariffs would be required to be cost-oriented and basic universal service, as identified in the proposal, would have to be affordable.[158] Any offered discount schemes would be published in tariffs.[159]

Part of the difficulty in setting cost-oriented prices is that most European providers do not have a tradition of rigorous accounting. Without rate of return regulation, there was no reason to scrupulously determine the cost of network or service provision. That will change soon, because much of the new European regulatory regime requires cost-oriented prices. In fact, the Proposed ONP Voice Telephony and Universal Service Directive calls for strict accounting standards.[160]

In a return to the beginning of telecommunications liberalization, the Commission has also proposed a directive that would harmonize standards for telecommunications equipment and allow compliant equipment to bear a "CE" seal and be sold throughout the EU.[161]

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149. *Id.* art. 3(1). This is unlike the U.S. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), which promotes advanced services for schools, libraries, and medical facilities.

150. *See* Interconnection Directive, *supra* note 113, art. 7.

151. *See* Proposed ONP Voice Telephony and Universal Services Directive, *supra* note 148, art. 4(1).

152. *See id.* art. 12(4).

153. *See id.* art. 7.

154. *See id.* art. 7(3).

155. *See id.*

156. *See id.*

157. *See id.* art. 17.

158. *See id.* art. 7(2); *see also* ONP Services Directive, *supra* note 74, annex II.

159. *See* Proposed ONP Voice Telephony and Universal Services Directive, *supra* note 148, art. 7(3).

160. *See id.* art. 4.

161. *See* Commission Proposal for a European Parliament and Council Directive on Connected Telecommunications Equipment and the Mutual Recognition of the Conformity of Equipment, COM(97)257 final [hereinafter Proposed Conformity Directive].

After publication of applicable standards in the *Official Journal*, as called for in the Competitive Environment Directive,[162] Member States may carry out inspection (through independent conformity assessment bodies) designed to ensure that telecommunications equipment complies with the standards.[163]

After adoption of the Interconnection Directive, which calls for telephone number portability (operator portability) by the year 2003 in major European cities,[164] the Commission proposed that this obligation be extended to include all of Europe and that the date be brought forward to January 1, 2000.[165] The Proposed Number Portability Directive would also impose carrier pre-selection on those with significant market power (again referring to the twenty-five percent market share presumption) so that customers could elect to permanently use another carrier, perhaps for national long distance and international calls.[166] Call-by-call override is also to be made available.[167]

VIII. DG IV'S COMPETITION PRINCIPLES

DG IV has issued two documents setting out its views on application of European competition law to telecommunications markets. First, the Commission's Competition Guidelines were issued contemporaneously with the first wave of liberalization measures in 1991 and embody the principles and recommendations of the Green Paper.[168] The Competition Guidelines call for a continuous review of telecommunications operators, while recognizing that cooperation is necessary among these operators to ensure smooth evolution of consistent standards and interconnectability throughout Europe.[169] This should result in greater efficiency for end-users and more global trade opportunities for service and equipment providers.[170] Common European standards might enable economies of scale for

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162. *See* Competitive Environment Directive, *supra* note 140.

163. *See* Proposed Conformity Directive, *supra* note 161, arts. 9-11.

164. *See* Interconnection Directive, *supra* note 113, art. 12(5).

165. *See* Commission Proposal for a Directive of the European Parliament and the Council amending Directive 97/33 with regard to Operator Number Portability and Carrier Preselection, COM(97) final, art. 1(1) [hereinafter Proposed Number Portability Directive].

166. *See id.* art 1(2).

167. *See id.*

168. *See* Commission Guidelines on the Application of EC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2 [hereinafter Competition Guidelines].

169. *See id.*

170. *See id.*

producers of equipment and services,[171] but standards may be used anticompetitively.[172]

There is an interesting section of the Competition Guidelines in which the Commission recognized the difficulties inherent in defining relevant product markets in an area of rapid technological change such as telecommunications.[173] This section stated that relevant product markets could only be determined on a case-by-case basis after examining factors of substitutability and "the competitive conditions and the structure of supply and demand on the market."[174] In spite of this, the Commission indicated that it would tend to draw narrow product markets "for terrestrial network provision, voice communication, data communication and satellites."[175] Nevertheless, there was recognition that technology was blurring the distinction between services such as mobile communication, paging, and cordless telephones and causing heightened interchangeability from a consumer standpoint.[176] Indeed, mobile service might today be considered an effective substitute for fixed line telephone service. That interchangeability can be observed whenever long waits at pay telephones cause mobile phones to be used.

The European geographic market was considered to currently consist of individual national markets, but the Commission expressed the belief that national markets would begin to break down and a European market would emerge.[177] In 1990, when the Competition Guidelines were released, most European operators held legal monopolies for basic voice service, but the Commission stated that it still intended to vigorously enforce restrictions against price fixing—particularly with regard to international traffic and attempts to foreclose third party traffic on private internationally leased circuits.[178] The Commission determined that agreements concerning international traffic routes through particular countries might fall under Article 85 of the Treaty of Rome, but might qualify for an exemption under Article 85(3) to the extent infrastructure investments in such routes were technically justified.[179] Consistent

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171. *See* Green Paper, *supra* note 46, at 165, 167-68.

172. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head Inc., 486 U.S. 492, 511 (1988) (holding that the practice of stacking a decision-making body with those whose sole economic interest is to restrain competition is unconstitutional in the U.S. system).

173. *See* Competition Guidelines, *supra* note 168, ¶ 25.

174. *Id.* ¶ 26.

175. *Id.* ¶ 27.

176. *See id.* ¶ 30.

177. *See id.* ¶ 32.

178. *See id.* ¶ 46.

179. *See id.* ¶ 48; *see also* EC TREATY, *supra* note 4, art. 85(3).

with the *British Telecom*[180] judgment, the Commission declared that ITU regulations and recommendations incompatible with Community competition law may not be applied in Europe.[181] The Commission's reasoning is noteworthy. First, the Commission asserted that revisions to the ITU Convention or WATTC Regulations effectively created a new treaty, so Member States should be foreclosed from asserting that ITU treaties predate the EC Treaty and therefore have precedence over it by virtue of Article 234 of the EC Treaty.[182] Second, Article 234 only applies to treaties with non-EC countries, therefore it is improper to argue that a pre-existing treaty allows otherwise prohibited intra-EC conduct.[183] Third, all Member States have signed the WATTC Regulations while retaining flexibility in their implementation but asserting they would be applied consistent with the EC Treaty.[184]

As a part of its preparations for full competition, DG IV released a draft Access Notice on December 10, 1996, containing its views on the relationship between access to telecommunications facilities and European competition law.[185] As the Access Notice details DG IV's current thinking, it is worthwhile to examine it in some detail, particularly with regard to the essential facilities doctrine. The Access Notice signals the Commission's intention to continue taking an activist role in supervising telecommunications competition. The year 1998 will bring a regulatory regime mandated by harmonizing directives, but the Commission intends to use its competition enforcement power to supplement national regulation.[186] The Commission viewed the principles included in the Access Notice as complementary to other European legislation, particularly the Proposed Interconnection Directive.[187]

A. Access

Access is defined to include not only interconnection of networks, but also the provision of leased lines, access to customer data or any other data, or facilities that may be necessary for a potential

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180. 1985 E.C.R. 873.

181. *See* Competition Guidelines, *supra* note 168, ¶ ¶ 139-44.

182. *See id.* ¶ 140.

183. *See id.*

184. *See id.* ¶ 141.

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

186. *See id.* ¶ 2.

187. *See* Interconnection Directive, *supra* note 113.

competitor to enter a telecommunications market.[188] If a potential service provider is refused access, there may be a remedy either through the established NRA or through national courts under national or EC competition law.[189] The Access Notice offers another possibility—a complaint to the Commission.[190] Such a complaint would supplement the Commission's conciliatory role, which is limited to transborder providers under the Interconnection Directive.[191] The Access Notice recognizes that NRAs might be better positioned than the Commission to widely regulate the telecommunications sector.[192] This section also states that NRAs must be independent and that giving the Commission final authority in telecommunications matters will not contribute to such independence.[193]

The Commission will "concentrate on notifications, complaints and [its] own-initiative proceedings having particular political, economic or legal significance."[194] The Commission signaled its intention to set principles by taking formal decisions for a few notifications and otherwise acting via comfort letters.[195] Comfort letters or national court proceedings might be preferred for more routine matters. The Commission's assertion that access agreements notified to the NRAs might still need to be notified to the Commission is troubling from the standpoint of certainty and finality.[196] Compliance with NRA regulations will not give immunity from Commission action because no state action is immune from the application of Community competition law.[197] Indeed, the NRAs themselves might be liable under Community law for damages caused by their failure to properly apply Community law.[198] In the event of Commission action, fines will not generally be levied for interconnection agreements notified to a NRA unless the Commission determines that a serious breach of Article 85 or Article 86 has occurred.[199] While the Commission retains the right to overrule NRAs and assert Community competition law, in practice no fines will be levied against

188. *See* Access Notice, *supra* note 185, ¶ 8.
189. *See id.*
190. *See id.* ¶ 17.
191. *See* Interconnection Directive, *supra* note 113, ¶ 18.
192. *See* Access Notice, *supra* note 185, ¶ 10.
193. *See id.*
194. *Id.* ¶ 14. Comfort letters are an informal clearance procedure.
195. *See id.* ¶ 20.
196. *See id.* ¶ 15.
197. *See id.*
198. *See id.*
199. *See id.* ¶ 32; *see also* EC TREATY, *supra* note 4, arts. 85, 86.

undertakings acting as required by NRAs, even if such requirements are contrary to Community competition law.[200]

Access agreements containing restrictive clauses would be considered under Article 85, and access agreements involving a dominant firm, considered by the Access Notice as being of greater significance than Article 85 matters, would fall under Article 86.[201] As is usual with Community law, the Commission must be notified of agreements falling under Article 85(1) to receive an exemption under Article 85(3).[202] Potential complainants are urged by the Commission to consider pleading Community competition law in NRA or national court proceedings.[203] If there are existing proceedings on a national or European level, the Commission has indicated that it might refrain from pursuing an investigation for a period of six months after any proceedings have commenced.[204]

B. Relevant Markets

Consistent with Form A/B,[205] used to notify agreements under Article 85, the Commission focuses on demand substitutability when considering what constitutes a relevant product market.[206] Form A/B generally defines the relevant product market as those products considered to be substitutes by the consumer.[207] The Access Notice discounts supply substitutability as a form of potential competition useful only for determining dominance; however, it retains the test of whether a concerted price rise of five to ten percent is sustainable.[208] This test takes into account supply substitution, as a price rise will attract potential suppliers and prices will decrease as a result of their entry. The Access Notice is written as if only one operator controlled the nationwide public services telecommunications network. However, it is recognized that alternative networks may become substitutable at some point in the future.[209]

The Access Notice found there is a distinct market separate from provision of telecommunications services, a market of access to facilities necessary to provide telecommunications services, and the Commission considers this to be "information, physical network,

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200. *See* Access Notice, *supra* note 185, ¶¶ 54, 55.
201. *See id.* ¶¶ 54, 55; *see also* EC TREATY, *supra* note 4, arts. 85, 86.
202. *See* Access Notice, *supra* note 185, ¶¶ 54, 55.
203. *See id.* ¶ 23.
204. *See id.* ¶ 26.
205. Council Regulation 3385/94, 1994 O.J. (L 377) 1.
206. *See* Access Notice, *supra* note 185, ¶ 38.
207. *See id.*
208. *See id.* ¶¶ 36, 41.
209. *See id.* ¶ 47.

etc."[210] The effect of rapid technological change on product market definition is noted, and while that recognition might be beneficial for alleged dominant suppliers, it might also lead to uncertainty as the Commission reserves the right to determine the relevant product market on a case-by-case basis.[211] The growth of an alternative infrastructure might also be expected to impact access market definition.[212] The importance of the separate access market in the eyes of the Commission should be stressed. Telecommunications competition has not yet effectively developed throughout the EU, and the Commission effectively asserts that telecommunications competition itself, manifested in the form of access to facilities necessary to compete, constitutes a separate market.[213] The access to facilities market is stated to be most dependent on physical interconnection, allowing access to the termination points of end-users.[214] The Commission appeared more rigid in its pronouncement of relevant product markets than in the earlier Competition Guidelines.[215] Again, Form A/B is consulted for a definition of a relevant geographic market: an area in which competition conditions are sufficiently homogenous.[216] The effect of this definition may be national, given the Commission's emphasis on terms of licenses and special and exclusive rights when determining relevant geographic markets.[217]

C. *Dominance*

Part III of the Access Notice speaks to principles, specifically competition law principles considered in the context of telecommunications competition and regulation.[218] The Commission states that it will try to recognize and build on the principles included in the ONP harmonization directives.[219] Universal service is recognized as possibly justifying nonapplication of competition rules under the principles of Article 90(2).[220] Dominance, in the form of controlling access to facilities, will be monitored closely by the Commission, and the fact that competition is legal will not automatically

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210. *Id.* ¶ 40.
211. *See id.* ¶ 34.
212. *See id.* ¶ 47.
213. *See generally id.* ¶¶ 44-47.
214. *See id.* ¶ 44.
215. *See id.* ¶¶ 48-49.
216. *See id.*
217. *See id.*
218. *See id.* ¶¶ 50-118.
219. *See id.* ¶ 52.
220. *See id.* ¶ 53.

mean an entity is no longer dominant.[221] Market share in terms of turnover and comparative numbers of customers will be used to assist the Commission in determining whether a particular undertaking is dominant.[222] A fifty percent or greater market share may demonstrate dominance, but other factors, including the existence of alternative networks, will be considered when determining whether dominance exists.[223]

Even though Member States are required to abolish exclusive and special rights as of 1998, the Commission indicated that the continued existence of "privileged access to facilities which cannot be duplicated, either for legal reasons or because it would cost too much" would also be considered when determining dominance.[224] Is "privileged access" a new category that the Commission has created because exclusive and special rights will soon disappear?[225] The Commission may measure market power by considering the sales of a particular undertaking compared with the total sales of substitutable services in the relevant geographic market.[226] Calculation of these amounts will also require separating the functions of conveyance of telecommunications services and the provision of these services to end-users.[227] Although the Commission indicated that it did not believe it would face a problem of joint dominance in the short run, it indicated that it would monitor the markets closely to ensure that two operators, for example a traditional telecommunications operator and a cable television company, did not conspire to jointly dominate a market.[228]

D. Essential Facilities Doctrine

The Commission will rely heavily on the essential facilities doctrine to determine the duties of a dominant telecommunications firm.[229] Because the concept of essential facilities was imported into

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221. *See id.* ¶¶ 57, 58; *see also* EC TREATY, *supra* note 4, art. 86.
222. *See* Access Notice, *supra* note 185, ¶¶ 62, 63.
223. *See id.* ¶¶ 63, 64.
224. *Id.* ¶ 64.
225. *See* Full Competition Directive, *supra* note 83, art. 1.
226. *See* Access Notice, *supra* note 185, ¶ 62.
227. *See id.*
228. *See id.* ¶ 70.
229. *See id.* ¶ 57. Essential facility is defined as "a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be replicated by any reasonable means." *Id.* ¶ 59. The Commission also quotes from a working WTO definition: Essential facilities mean facilities of a public telecommunications transport network and service that (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service." *See id.*

European competition law from U.S. antitrust law, a short examination of U.S. law is necessary.

1. U.S. Law of Essential Facilities

Under U.S. antitrust law, which originally delineated the concept of essential facilities, the doctrine is an exception to the principle that a business can sell to the customers of its choice.[230] The essential facilities test was summarized in *MCI v. AT&T*, a case instrumental in opening the AT&T monopoly to competition:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[231]

This case examines the essential facilities doctrine, reasoning that control of an essential facility creates market power in one market that can be used to further a monopoly in another market.[232] As to the specifics of MCI's complaint, the Court found:

> AT&T had complete control over the local distribution facilities that MCI required. The interconnections were essential for MCI to offer [its services]. The facilities in question met the criteria of 'essential facilities' in that MCI could not duplicate Bell's local facilities. Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. It would not be economically feasible for MCI to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication . . . .
>
> Finally, the evidence supports the jury's determination that AT&T denied the essential facilities, the interconnections for [the services], when they could have been feasibly provided. No legitimate business or technical reason was shown for AT&T's denial of the requested interconnections . . . MCI was not requesting preferential access to the facilities that would justify a denial . . . Nor was MCI asking that AT&T in any way abandon its facilities . . . [I]t was technically and economically feasible for AT&T to have

230. *See e.g.*, United States v. Colgate & Co., 250 U.S. 300, 307 (1919).
231. MCI Communications v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
232. *See id.* at 1132.

> provided the requested interconnections, and . . . AT&T's refusal to do so constituted an act of monopolization.[233]

It is noteworthy that one of the Court's rationales was that "given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such."[234] Today, local telephone service is not regarded as a natural monopoly from either a technological or regulatory standpoint. Indeed, technological development should be considered carefully when considering application of the essential facilities doctrine. What is essential today will likely be feasible to duplicate tomorrow.

The Commission accepts the basics of the U.S. test, but goes further: if a monopolist possesses an essential facility, it must provide these facilities to competitors at its own "price," not necessarily the usual retail price it charges on the open market.[235] This burden is not imposed under U.S. law. In *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*,[236] the Court accepted, for purposes of its analysis, plaintiff's allegations that the defendant railroad was a monopolist in control of an essential facility, thereby fulfilling the first requirement of the four-part essential facilities test.[237] However, the Court held that plaintiff could not meet the remaining three requirements.[238] Plaintiff "failed to show that it could not reasonably duplicate or pursue a reasonable alternative to the essential facility."[239] The Court found that alternatives might exist, including building other facilities (the Court admitted that this would be economically impractical), or purchasing service at the rates the railroad requested (a

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233. *Id.* at 1133 (citations omitted). A case involving the refusal to supply telephone directory listings to a competitor was Rural Tel. Serv. Co. v. Feist Publications, Inc., 737 F. Supp. 610 (D. Kan. 1990), *rev'd*, 957 F.2d 765 (10th Cir. 1992). The Federal District Court held the defendant liable because it had an intent to create or maintain a monopoly by refusing to supply directory listings to a competitor (the "intent test"). *See* 737 F. Supp. at 620-22. However, the Tenth Circuit reversed, holding that there was no anticompetitive effect and therefore no unlawful refusal to deal. *See* 957 F.2d at 768-69. The case also involved a copyright infringement claim. The copyright aspects of the case were examined by the Supreme Court, which held that the basic information contained in the directory listings could not be protected by copyright. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991); *see also* BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, 933 F.2d 952 (11th Cir. 1991).

234. 708 F.2d at 1133.

235. *See* Access Notice, *supra* note 185, ¶ 92.

236. Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539 (4th Cir. 1991).

237. "Four elements must be proven to establish a violation by denying access to an essential facility: (1) control by a monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility." *Id.* at 544 (citing MCI Communications v. AT&T, 708 F.2d 1081 at 1132-33).

238. *See id.*

239. *Id.*

standard rate that included profit).[240] Plaintiff contended that it could not make a profit at the rate the railroad requested.[241] The plaintiff's desire for a more favorable rate did not mean that the railroad's price was unreasonable.[242] This was true even though plaintiff could not profitably pay the railroad's rate. The Court held that "[t]he reasonable standard of the access factor can not be read to mean the assurance of a profit for" plaintiff.[243] Lastly, the Court interpreted the final requirement (the feasibility of providing the facilities) in terms of the normal business dealings of the railroad.[244] That is, the Court refused to intervene in the normal commercial activities of the alleged monopolist. The legitimate business reasons of the railroad, including existing sales relationships, should be considered and take precedence over a competitor's request, especially when the monopolist does not refuse the request, but only insists that its normal prices be paid.[245]

Certainly there is nothing in the essential facilities doctrine (as interpreted under U.S. law) requiring a supply at cost represented by what a firm might in essence "charge" itself. This would constitute a serious disruption of the normal commercial relations of the supplier, and for the reasons stated below, is unsound from an economic and competitive standpoint. The *Laurel* Court's refusal to guarantee a profit for potential competitors is strikingly different from the European Commission's approach.[246] However, in U.S. law there may be limits on what the holder of an essential facility may charge. In *Delaware & Hudson Railway v. Consolidated Rail Corp.*,[247] the U.S. Court of Appeals held that a railroad's attempt to charge a competitor a price that represented the revenue the monopolist lost by the competitor carrying the traffic for an essential facility, the use of train tracks, could be characterized as a refusal to supply the facility.[248]

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240. *See id.*

241. *See id.*

242. *See id.* at 545.

243. Laurel Sand & Gravel, 945 F.2d at 545.

244. *See id.*

245. *See id; see also* Illinois Bell Tel. Co. v. Haines & Co., 905 F.2d 1081, 1087 (7th Cir. 1990) (reasoning that access to essential facilities must be commercially negotiated and concluding the "court need only consider whether the prices charged . . . provide[] access to those who sought [it].").

246. *Compare* Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 545 *with* Access Notice, *supra* note 185, ¶ 92.

247. 902 F.2d 174 (2d Cir. 1990).

248. *See id.* at 179-80.

2. European Union Law of Essential Facilities

It should first be considered whether, properly speaking, there is a European doctrine of essential facilities. The ECJ has never used the term. However, a Commission official involved in oversight of telecommunications markets has asserted that such a doctrine does in fact exist, and under whatever name, the judgments of the ECJ indicate that some form of the essential facilities doctrine is implemented in the EU.[249]

The leading European case on essential facilities is *ICI v. Commission*,[250] involving a monopolist's decision to withdraw supply of an ingredient necessary to make a downstream product after the monopolist decided to enter this market itself. The argument of the Commission in that case was:

> [T]here is a duty to supply at least when: the dominant company is a monopoly; the refusal affects one of the principal users, a former customer; no objective justification is apparent; and the refusal gravely affects the conditions of competition in the EC. If there is a duty to supply, there is, under Article 86 itself, a duty not to discriminate if the buyers are in competition with one another.[251]

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

> [I]t follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.[252]

Likewise, in *United Brands v. Commission*, a discontinuance of supply to a distributor in retaliation for promoting a competitor's products was condemned as an abuse of a dominant position.[253] In other

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

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

251. Lang, *supra* note 249, at 445 (citing Commercial Solvents, 1974 E.C.R. at 250-51).

252. Commercial Solvents, 1974 E.C.R. at 251.

253. *See* Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 217.

cases, notably *Radio Telefis Eireann v. Commission*, the ECJ has found a duty to license access to intellectual property rights.[254] Commission decisions regarding ports and ferry service are also relevant, particularly given the Commission's reasoning in *B&I Line v. Sealink* that an operator of a port cannot give more favorable terms to its own ferry service than to its competitors.[255] *Sealink* is also an important case as it is the first decision employing the specific term "essential facilities."[256]

The Access Notice gives examples of what might be considered essential facilities, including "the public telecommunications networks of voice and/or data services, leased circuit or and [sic] related network terminating equipment, basic data regarding subscribers to the public voice telephony service, numbering schemes and other customer or technical information."[257] The Commission concludes that the very act of possessing an essential facility makes a company dominant if the facility cannot be reasonably replicated.[258]

3. Market Definition, Essential Facilities, Nondiscrimination and Transfer Pricing

The Commission suggests that the physical structure of a telecommunications network (identified as a monopoly activity) can be separated from services provided by the network, at least for purposes of determining whether an operator should be considered dominant. In essence, the Commission desires telecommunications organizations to split in two (at least on paper), with the operating organization bearing provision costs (that is, the network), and the services organization "paying" the same costs as competitors to access the network. This might be possible from an accounting standpoint (it would probably be very costly and speculative to divide costs in this way), but from a practical standpoint it is fallacious to artificially separate a producer from its means of production. For "products" such as telecommunications services, infrastructure itself might constitute part of the product. Taken to its logical conclusion, this argument would place existing telecommunications organizations at a competitive disadvantage. Its "service arm,"

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254. *See* Joined Cases C-241/91 and C-242/91, Radio Telefis Eireann v. Commission, 1995 E.C.R. I-743.

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

256. *See id.* at 266.

257. Access Notice, *supra* note 185, ¶ 59.

258. *See id.*

presumably including all services including basic voice, residential service, and provision of service to universal customers, would be required to "pay" the same access rates as charged to outside competitors. Under unbundling principles, each element of network infrastructure (given the Commission's broad definition of essential facilities this might include directory services, operator services, billing services, installation, and repair, and perhaps *all* the physical and human resources necessary to run a telephone company that a potential competitor might claim to be too expensive to duplicate) would have to be separated and available for purchase by potential competitors on a provider's own price basis. The telecommunications organization would then have to charge its services arm the same price for each of these elements as it charges competitors.[259] This principle could arguably be consistent with the existing requirement of the ONP Voice Telephony Directive that "[n]ational regulatory authorities shall ensure that telecommunications organizations adhere to the principle of non-discrimination when they make use of the fixed public telephone network for providing services which are or may also be supplied by other service providers."[260] The Commission noted that ECJ Judgments and Commission Decisions in the transport field have followed the principle "that a firm controlling an essential facility must give access in certain circumstances."[261] In order to determine if a telecommunications operator is abusing a dominant position by denying access to an essential facility, the Commission will begin the analysis by identifying the existing or potential relevant market,[262] then it must determine whether access to the requested facility is essential in order to compete.[263] The Commission's footnote is worth examining in its entirety:

> Community law protects competition and not competitors, and therefore, it would be insufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory.[264]

While the statement that competition law "protects competition and not competitors" is a fundamental principle of U.S. antitrust law

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259. *See id.* ¶ 74.
260. ONP Voice Telephony Directive, *supra* note 114, art. 10(6).
261. Access Notice, *supra* note 185, ¶ 76.
262. *See id.* ¶ 79.
263. *See id.* ¶ 79 n. 58.
264. *Id.*

(articulated specifically in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*),[265] this concept is not as well-established in European law. It would be a welcome addition, as emphasis on competition should lead to consistent and coherent economic results. The footnote, however, mischaracterizes the distinction between competition and competitors. The Access Notice implies that "competition" means *a number of competitors*, not one single competitor. A better definition of "competition" would be the maximization of consumer welfare, that is "such things as low prices, innovation, choice among differing products—all things we think of as being good for consumers."[266] The maximization of consumer welfare occurs through the most efficient marketing structure, companies, or company, not by dictating that a certain number of competitors must be present in a market. The goal of competition law should be allocative efficiency. Any other goal will likely result in higher prices and less choice for consumers. Consumer welfare will not be supported by requiring more efficient, but possibly dominant, operators to subsidize less-efficient competitors by providing access to facilities at artificially low prices. It would reduce the efficiency of the dominant provider by reducing its incentive to lower costs, and therefore the price charged to rivals. It would also make competitors dependent on access to the facilities of the dominant provider, reducing incentive to self-provide facilities and thereby paradoxically reducing consumer choice as well as price competition.

Competitors, free to choose which elements are desired, would select the elements that were offered at a price less than it would cost to self-provide or obtain from another source. The telecommunications organization's service arm would then logically be the least efficient competitor on the market because it has the highest prices. The incumbent operators would never be able to effectively compete on the basis of price, as every cost-saving provision of services would have to be offered to competitors at the same price that the organization charges itself. This would decrease incentives to reduce costs, in turn reducing competitive pressures on prices paid by telecommunications consumers, because the dominant provider would lack the ability to price compete. Ironically, the one market participant unable to compete would be the one labeled by the Commission as possessing market power, that is, the ability to independently set prices. If the telecommunications organizations possess the ability to set prices and incentive for them to compete on the basis of price is

265. *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

266. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1993).

removed, prices will be too high. The Commission's anticipated competitive regime would lead to higher prices for consumers and therefore would not be beneficial to consumer welfare and competition.

It might also be considered whether decisions regarding the pricing of telecommunications infrastructure, including essential facilities, would be better left to regulators who have expertise in the market, rather than to a competition law process.[267] Competition law is a blunt instrument, not well suited to deal with what are essentially regulatory questions.[268] The limited resources available to competition law officials might be better deployed elsewhere than in resolving individual costing disputes. Furthermore, the competition law process cannot offer the continuing oversight or speed of resolution that regulation can. Of course, competition law remedies should be available in appropriate cases.

E. Refusal to Grant Access

In its Access Notice, the Commission contended that failure to grant access to essential facilities on favorable terms might constitute an abuse of a dominant position.[269] The Commission further stated that the refusal must affect competition to constitute an abuse.[270] The Commission considered three categories of refusal: (1) operator refusal to grant access to provide a service when it has already given access to another provider (possibly including itself) to provide the service; (2) refusal to grant access when there are no operators who have been given access to provide the service; and (3) withdrawal of access from an existing provider.[271] In the first scenario, if other operators (including the services arm of the dominant operator) are already given access, refusal would be discriminatory if the refusal restricts competition and is done without an objective justification.[272] The operator opens the door to access by providing a service itself. In the second scenario, if the dominant operator refuses access necessary to provide service when there are no providers of the service, this might constitute a restriction on the development of new products or services contrary to Article 86(b).[273] If the potential

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267. *See* Alan Silverstein, *Essential Facilities and Refusals to Deal in Network Industries Facing Rapid Technological Change*, ANTITRUST REP., Sept. 1995, at 5.

268. *See id.*

269. *See* Access Notice, *supra* note 185, ¶ 71.

270. *See id.* ¶ 71.

271. *See id.* ¶ 72.

272. *See id.* ¶ 73.

273. *See id.* ¶¶ 75, 76.

provider could commercially provide the facilities through other sources, or if the dominant operator cannot provide access due to scarce capacity, there might be an objective reason to refuse access.[274] Finally, withdrawal of access from existing providers is even more problematic, and existing case law of the ECJ has condemned withdrawal of necessary supply as abusive.[275]

The Commission did recognize that unbundling requirements should not extend to all facilities necessary to provide a telecommunications service.[276] Rather, there must be a showing by a potential competitor that the requested facility is truly essential; that is, denial of the requested facility "must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic."[277] The availability of alternative infrastructure often times removes the dominant operator's duty to provide access, but the Commission expressed skepticism that sufficient alternative infrastructure would be available, at least at present.[278] However, in countries such as Belgium that have a high cable television penetration rate (over ninety-seven percent) of Belgian households are passed by cable television networks[279], an argument could be made that sufficient alternative infrastructure with dense geographic coverage currently exists. The incumbent could also refuse to provide access on the grounds that sufficient capacity does not exist to satisfy the request or that the requesting party would not pay a "reasonable and non-discriminatory price" or accept "non-discriminatory access terms and conditions."[280] There might be other acceptable and objective justifications for refusing to provide access, such as technical difficulties, but the Commission indicated that its examination of any asserted justifications would occur on a case-by-case basis.[281] The Commission will compare how the incumbent responds to equivalent access requests from its own subsidiaries or operating branch, particularly regarding timing, technical configuration, and price.[282] Again, it could be questioned whether the Commission's separation of telecommunications companies into

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274. *See id.* ¶ 76.

275. *See id.* ¶ 87; *see also* Commercial Solvents, *supra* note 250 at 223.

276. *See* Access Notice, *supra* note 185, ¶ 79.

277. *Id.*

278. *See id.*

279. *See* Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks, Part II, A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union, COM(94) 682 final at 17.

280. Access Notice, *supra* note 185, ¶ 79.

281. *See id.*

282. *See id.* ¶ 81.

network and operating branches is appropriate. It is certainly artificial.

F. Other Abuses

When determining where points of interconnection (POI) should be located, a point of particular interest is the Commission's assertion that "competition rules require that the party requesting access must be granted access at the most suitable point for the requesting party, provided that this point is technically feasible for the access provider."[283] This may be consistent with language in the Interconnection Directive that all telecommunications organizations with "significant market power shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users."[284]

The Access Notice asserts that charging excessive prices for access would be abusive,[285] however there is no guidance given as to what might be excessive. Not only the Access Notice, but also existing and emerging European legislation, require that interconnection and access charges be cost based.[286] Is the Access Notice suggesting that access should be provided at less than cost if cost based charges are excessive? This may not be solely an academic question. Without tariff rebalancing, telecommunications operators may be providing some retail services below cost. The concept of excessive is subjective, and the Access Notice admits that there will be many elements to consider when weighing pricing, among them the ONP costing requirements,[287] as well as principles of universal service financing. Conversely, the Commission recognizes an aversion to traditional predatory pricing principles by declaring that a dominant provider pricing below average variable costs or average total costs would be abusive, stating that pricing too low might prevent the emergence of effective alternative infrastructures.[288] If the dominant provider prices infrastructure access too low, there would be no incentive for other sources to emerge. Potential competitive service providers would always select the low-cost infrastructure offered by the dominant provider. This is a danger represented by the Access Notice's insistence that dominant providers

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283. *Id.* ¶ 83.

284. Interconnection Directive, *supra* note 113, art. 4(2); *see also* ONP Voice Telephony Directive, *supra* note 114, art. 10(1).

285. *See* Access Notice, *supra* note 185, ¶¶ 84, 91.

286. *See id.* ¶ 91.

287. *See id.* ¶ 85.

288. *See id.* ¶ 91.

offer access to infrastructure at the same price it charges itself. Given the dominant operator's economies of scale and historic operations, a start-up operator's costs will probably be more than it would cost a dominant operator to self-provide a network element. This will not cause incentives to build or use alternative sources of infrastructure, resulting in fewer choices for service provision and ultimately higher prices to the consumer due to lessened competition.

G. Price Squeeze

The Access Notice's price squeeze formulation would require the dominant operator to charge competitors (including itself) a price for access to network infrastructure sufficiently below the retail price charged by the service subsidiary of the dominant operator so that competitors can enter the service market and make a profit, presumably by charging a price less than that of the dominant operator's service subsidiary.[289] First, this is not a recipe for fair competition; it is seriously detrimental to undertakings considered dominant. The prices of the dominant provider would always be under-cut. Incumbents would be required to subsidize inefficient entrants at the expense of their remaining customers, stuck with paying higher prices. Second, this formulation unrealistically assumes that infrastructure is the only factor in retail prices. Any time an inefficient operator seeks to enter the market, there will be an assumption that the dominant provider's retail prices are too low. There may be an additional requirement placed on the dominant operator to show that "its downstream market is exceptionally efficient."[290] Rather than be faced with that burden, incumbents will likely keep retail prices high. This result would oppose the interests of consumers and would not promote competition. Third, retail prices for some services, particularly universal services, may be priced below cost.

Price squeeze is another concept imported from U.S. antitrust law.[291] United States courts have recognized that special problems occur when the price squeeze theory is applied to industries where retail or wholesale prices are set by regulation.[292] Like the essential

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289. *See id.* ¶ 92.

290. *Id.*

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

292. *See, e.g.*, Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990).

facilities doctrine, the U.S. law regarding price squeeze has evolved based on efficiency concerns. There is no longer a strict test based on "fair" prices charged by the monopolist. Rather, there is more of a focus on whether the monopolist's prices cover costs, and perhaps whether the wholesale profits were significantly higher than the retail profits ("the comparative rate of return" test).[293]

H. Discrimination and Exclusivity

Discrimination by dominant operators was correctly noted as constituting an abuse in the absence of objective justifications.[294] Pricing discrimination is the most obvious form, particularly if done in exchange for a customer agreeing to exclusivity.[295] However, differences between wholesale and resale prices, presumably including volume discounts, might not be discriminatory. Discrimination could also exist in delays in installation or repairs, "technical access, routing, numbering, restrictions on network use . . . and use of customer network data."[296] The Access Notice indicates that the number and location of POIs with competitors might be considered discriminatory.[297] For example, requiring competitors to place POIs at several locations, remote from a central switch, might increase the costs of the competitor.

While the Commission and European regulatory legislation require operators to enter access and interconnection agreements, the Access Notice perceives a danger that access agreements might be used for anti-competitive purposes contrary to Article 85 of the EC Treaty.[298] Exclusivity appears to be the Commission's main concern, and will be prohibited unless objectively justified. Price coordination, market sharing, exclusion of third parties, and improper information exchanges are also noted as possible anti-competitive techniques.[299] In particular, confidential information should be shared among interconnecting parties only on a need-to-know basis, and then only with appropriate divisions of the companies.[300] Possible group boycotts were also mentioned as a concern.[301] Regarding the requirement of Article 85 that there be an effect on trade between the Member States, the Access Notice stated that

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293. *See* Ray v. Indiana & Mich. Elec. Co., 606 F. Supp 757, 776 (N.D. Ind. 1984).
294. *See* Access Notice, *supra* note 185, ¶ 93.
295. *See id.* ¶ 94.
296. *Id.* ¶ 95.
297. *See id.* ¶ 97.
298. *See id.* ¶ 101.
299. *See id.* ¶ 104.
300. *See id.* ¶ 109.
301. *See id.* ¶ 113.

access agreements will usually be considered as fulfilling this requirement.[302] This includes possibly foreclosing potential competitors from other Member States.[303]

IX. CONCLUSION

Experience in the United States and other emerging competitive markets has proven that telecommunications competition is a mixed blessing. Consumer confidence can drop along with prices. Other prices may rise as prices begin to reflect the costs of production. Without traditional subsidies, some end users may experience less reliable and prompt service. Quality of service may also be affected by the deep work force cuts that seem to invariably accompany telecommunications competition and deregulation. Balanced against these effects are promises of technical advances and lower prices with overall benefits to an economy increasingly service and information oriented. With an increasingly global economy, the WTO Telecommunications Treaty should accelerate opportunities for efficient providers to enter telecommunications markets, whatever their national origin. Although it might be tempting for European government and business leaders to draw back from the promise of telecommunications competition, particularly when Europe is suffering from high and protracted unemployment, a refusal to embrace technological and market change would only deepen long-term problems. On the other hand, overzealous attempts to protect potential new competitors may hurt many consumers. It is to be hoped that Europe will regulate in a proper way, knowing when to step away from regulation and let market forces work.

302. *See id.* ¶ 117.
303. *See id.* ¶ 116.