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Abstract

The article identifies circumstances in which refusal to grant third-party access to energy networks to competitors constitutes an abuse of a dominant position enjoyed by energy utilities. It explores the scope and evident limitations of Article 82 of the EC Treaty in regard to gas and electricity markets in the context of the essential facilities doctrine and refusal to supply cases. It is argued that under certain limited circumstances competition law grants compulsory third-party access. Therefore, even without further sector specific regulation and ownership unbundling, independent energy suppliers can have a legally enforceable right to access energy network facilities owned by dominant energy system operators.

Characteristics of the Energy Market in Europe

The Lisbon strategy recognises that well functioning energy markets that guarantee secure energy supplies at competitive and affordable prices are crucial for achieving growth and consumer welfare in the European Union. To achieve these objectives, the EU decided to open up Europe's gas and electricity markets to competition and to create a single European Internal Energy Market ('IEM'). Despite progress in the liberalisation of the market, the objectives of market opening have not yet been achieved and barriers to free competition remain.

Many legal problems concerning network access result directly from the energy sector structure. Transmission and distribution infrastructure system operators are suspected of favouring their own vertically integrated supply affiliates. Discrimination between integrated affiliates and independent third-party undertakings is a common feature of energy markets. The recent Commission initiatives to further open the market by structural unbundling and ownership separation of network and supply operations of integrated utilities have resulted in fierce opposition from a few Member States and from the industry. In this context, the Commission is considering the possibility of demanding structural remedies in the energy sector on the basis of Article 82 EC and existing competition law, without recourse to new secondary legislation.

The Electricity and Gas Directives ('the IEM Directives') acknowledged the existence of two separate but interconnected markets in which the energy undertakings operate: (a) the primary market of network operation activities, namely transmission and distribution, which involve physical management of the infrastructure and energy inputs to the system, and (b) the secondary market of 'supply' activities such as wholesale trading and sales of energy to customers. In the context of the electricity market, the Commission further distinguishes five different types of operations:

- generation, the production of electricity in power stations;
- transmission, its transport over high tension cables;
- distribution, the transport of the electricity over the low tension local cables;
- supply, the sales and delivery of the electricity to the customer; and
- trading, the purchase and resale of electricity that is not necessarily directed to final consumers.

Each of the first four activities could be regarded as constituting a separate product market, as they require different assets and resources. Relevant geographical markets should be defined on a case-by-case basis, but, in general, they cover the regions or territories of a Member State.

The Concept of Third-party Access

The idea that in certain circumstances economically independent undertakings operating in the energy sector should have a legally enforceable right to access and use various energy network facilities owned by other companies has been described, in the energy market context, as the third-party access ('TPA') right. The concept of this unusual right to access and use infrastructure developed at great expense by another company, even against that company's will and business interest, emerged at European level in the context of Community competition law. The Internal Energy Market Directives envisage the third-party access right as a crucial element of organisation of access to the energy infrastructure system in Europe and as the main instrument for opening the Internal Energy Market to competition.

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4 Recital 8 G-Directive.
7 TXU Europe/EDF-London Investments, Note 5 above, at [29].
8 Notes 2 and 3 above.
The IEM Directives do not provide a clear definition of a TPA right. However, the underlying concept is embodied in the text of the Directives.\(^9\) In the sphere of energy, the third-party access concept refers to the right granted to (a) gas and electricity producers, (b) energy suppliers, and (c) their customers, allowing them to make use of, and have their energy traded and transported through, electricity grids and gas pipelines that are owned or controlled by other companies. The TPA right corresponds with an obligation to contract and a duty to perform on the side of the undertaking in control of the energy transmission system. From the legal point of view, the TPA right is not a stand-alone, autonomous right; it is related to and results from an underlying energy supply contract. The IEM Directives provide that the TPA right is applicable exclusively to supply contracts with ‘eligible customers’, that is, a strictly specified group of customers to whom the IEM Directives guarantee the right to purchase energy from the supplier of their choice.\(^10\)

### Abuse under Article 82 EC

Recently, Community competition law has been more systematically applied to and enforced in the Internal Energy Market, which means that disputes concerning access to energy networks are likely to arise in the context of the dominant position of an incumbent undertaking under Article 82 EC. Access agreements, having as their effects restrictions or distortions of competition in the energy markets, involve issues under Article 81 EC. In assessing the competitive constraints faced by a company under Article 82 EC and what constitutes abusive behaviour, it is necessary to identify the relevant markets in which the energy undertakings operate and may possibly exercise market power. As described in the preceding section, distinct energy markets of generation, transmission, distribution, trading and supply, can be perceived as closely related for the purpose of appraisal of market power and dominance. In the energy sector, control over transmission and an extremely strong position in the infrastructure market can imply a very high degree of market power in formally separate but closely related supply and sales markets. These very close links between the dominated and non-dominated markets may lead to ‘a situation comparable to that of holding a dominant position on the markets in question as a whole’.\(^11\) In fact, special transportation and distribution rights conferred upon the incumbent energy undertakings result in their permanent dominance on the electricity and gas sales markets across all Member States. Competition analyses of a refusal of access under Article 82 EC by an undertaking in control of an energy network require an appraisal of its dominance in the relevant energy market. It should be recalled that ‘dominance’ indicates:

\[\ldots\text{ [a] position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.}\]

The dominant undertaking is able ‘at least to have appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment’.\(^13\)

The dominant position enjoyed by energy utilities may be granted by Member States or may result from private arrangements and from historical market structure. Transmission system operators (TSOs) and distribution system operators (DSOs), which own or control the network, have almost unlimited control of the physical flows of energy to consumers. Energy generation and transmission have been generally regarded as a ‘natural monopoly’, that is, an activity that cannot be replicated for competition purposes in any commercially viable way and needs to be carried out in a particular region by a sole company with necessary, legally protected, exclusive rights required by the public interest.\(^14\) When the law confers a similar series of monopolies within the entire territory of a Member State, as has sometimes been the case with energy utilities, it constitutes a dominant position in a substantial part of the common market.\(^15\) The monopolistic position enjoyed by an energy utility is a clear case of individual dominance in a relevant market.

In the traditional paradigm, energy utilities were protected by monopoly rights granted by states. As a result of liberalisation, the formal exclusive legal rights have been, in most cases, withdrawn. The formal opening of energy networks, however, does not mean that the incumbent undertakings are no longer in a dominant position. In the new paradigm, energy generation and supply are regarded as being capable of competitive restructuring, while network operation activities are still perceived as a natural monopoly.\(^16\)

Occasionally there may be a possibility of competing energy lines being established, but this applies merely to transmission and direct lines to big customers as opposed to a local distribution level comprising ‘the last mile’ infrastructure connecting the system to the consumer. Despite technological progress, environmental damage and prohibitive social costs are likely to prevent a duplication of the energy infrastructure. The question then becomes how to regulate and promote competitive usage of these networks without violating the legitimate business interests of their owners.

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13 Hoffmann La Roche & Co AG v Commission of the European Communities (Case 85/76) [1979] ECR 461, [1979] 3 CMLR 566 at [16].
Collective Dominance

Dominance in the common market according to Article 82 EC can be held ‘by one or more undertakings’. This is relevant to the energy sector where various regional and local utilities operate on different market levels, without having an overtly dominant position in a given Member State. The abundance of formally independent undertakings (for example, in Germany) may give a false impression of an open and competitive market. The ‘narrow’ view of joint dominance held by a number of undertakings is that the market power and behaviour of undertakings within the same corporate group can be so closely related that it is reasonable to consider them as essentially one economic unit.17 Despite the existence of Chinese walls, recently unbundled and legally separate divisions of the former energy monopolies would usually satisfy even this strict test. Actions of formally separate transmission and supply divisions can be aggregated as the actions of what is de facto a single entity and evaluated according to their overall effect. This is particularly the case when legally unbundled transmission, distribution and supply undertakings are linked by common ownership.

The possibility of a ‘collective dominance’ position must be examined, even when there is no single or aggregated entity with significant market power. The existence of a few independent regional or local network operators allows them to claim that the usage of their particular infrastructure is not strictly indispensable for third parties to conclude their contracts, because energy flows could be viably directed through alternative (even if distant) grids. A third-party applicant could in theory use one of a few alternative regional networks to convey its electricity flows or cross-border gas transmissions, but in fact it would be refused access by all economically independent and bilaterally acting operators.

The ECJ has recognised that conduct of oligopoly undertakings may constitute collective dominance in a ‘broader’ sense and be subject to Article 82 EC, even if it does not amount to a concerted practice under Article 81 EC.18 In the context of the electricity market the ECJ stated in Almelo that:

… in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market … It is for the national court to consider whether there exist between the regional electricity distributors … links which are sufficiently strong for there to be a collective dominant position in a substantial part of the common market.19

These links between the dominant undertakings do not have to amount to tacit collusion. In this sense, regional and local energy undertakings can act truly on their own as rational economic actors, without engaging in oligopolistic practices or market foreclosing intentions, and still be guilty of abusing their collectively dominant position. This can often be the case when independent network operators, acting on their own, refuse network access to alternative transmission routes, which they independently control, when access to one (but not to any particular one) of these networks is indispensable to performing a particular energy supply contract.

In Port of Rødby,20 the Commission confirmed that obligations resulting from the ownership of an essential facility may also emerge in a situation of collective dominance. The Commission followed this reasoning in Nestlé/Perrier and stated that:

… for two or more companies to be jointly dominant it is necessary, though not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that the companies have links such as agreements for cooperation, or interconnection agreements … It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations.21

In a later judgment, in Companie Maritime Belge, the ECJ confirmed that:

… the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.22

A position of collective dominance may be held and possibly abused by economically independent entities, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity.23 The court confirmed in Airtours that parallel behaviour that is tacit collusion, even without an agreement or concerted practice, is sufficient for collective dominance.24 In practice, however, in the energy sector, collectively dominant national and regional operators will usually have links of various kinds with one another.25

Refusal of Access as an Abuse

The 2007 Energy Sector Inquiry26 confirms the Commission’s long-held view that strong links with suppliers reduce the economic incentives for network operators to grant access to

19 Municipality of Almelo and others v NV Energiebedrijf Ewals (Case C-393/92) [1994] ECR I-01477 at [42], [43].
22 Companie Maritime Belge Transports v Commission, Note 12 above, at [45].
23 Ibid., at [36].
25 Under the US Sherman Act a conspiracy to monopolise claim is subject to stricter requirements.
third parties. Incumbent operators resist providing access to third-party suppliers or traders, especially in areas where they will be in competition with supplies offered by the TSO itself or by its integrated trading branch or an affiliated company.

Refusal to allow access to an energy network by a requesting third-party supplier or consumer should be classified as a form of refusal to supply or a refusal to deal. Refusal to deal is not an abuse per se under Article 82 EC. In principle, even a dominant company enjoys the freedom to contract, which is a fundamental right for the free market, and must be able to choose for whom and on what conditions to provide a service. The ECJ confirmed in Bayer that ‘under Article [82], refusal to supply, even where it is total, is prohibited only if it constitutes an abuse’.

In the seminal Magill case, concerning access to television programme data, the ECJ affirmed the freedom of contract principle. The court held that a refusal by the owner to allow usage of its property (a refusal to grant a licence):

... even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but ... the exercise of an exclusive right by the proprietor may ‘involve an abuse only’ in exceptional circumstances.

The ‘exclusive’ right to exploit intellectual property in the Magill case is to a degree analogous to an exclusive property right the owner has in relation to a network infrastructure.

The concept of abuse is objective and relates to the behaviour that is ‘such as to influence the structure of the market where, as a result of the very presence of the undertaking in question the degree of competition is weakened’. The refusal will only be exploitative and amount to an abuse if it might have ‘the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’. The form and effects of a refusal should be examined on an individual basis, but the very limited competition between suppliers on the energy markets implies that habitual refusal would affect competition on the market.

A refusal to give access to an energy network can take many forms and is seldom expressed as an explicit denial; it often manifests itself as willingness to allow access only under disadvantageous conditions. The most common forms involve offering unattractive access terms or other unfair trading conditions such as margin squeezes, delaying negotiation tactics or actually dissuasive conditions to use ancillary services such as linepack or electricity balancing. In the context of the telecommunications market, the Commission has distinguished three basic scenarios where refusal is likely to have exploitative or anti-competitive effects and amount to abuse of a dominant position in the access market:

- **Discrimination**: a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate in that services market;
- **Essential facilities**: a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate in that services market;
- **Withdrawal of access**: a withdrawal of access from an existing customer.

**Discrimination**

A refusal to provide access to a new undertaking in circumstances where a dominant network owner is already supplying one or more sales companies operating in the same downstream market would clearly constitute discrimination. Discriminatory treatment, which does not result from objectively justified circumstances, is abusive when it restricts competition in that downstream supply market. This situation is common: a network operator provides exclusive or preferential energy transportation service to its affiliated sales companies or to non-affiliated special partners. This conduct is contrary to Article 82(c) EC in ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’.

The Commission maintains that a dominant undertaking is obliged to provide access in such a way that “the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.” It would be an abuse for a dominant undertaking to treat comparable customers in a discriminatory manner without objective justification. This does not mean that all network suppliers or traders must be offered identical terms. “Traditional customers” may be treated more favourably than occasional customers. However, any prioritising of customers must be objectively justified.

It follows that competition law itself does not require universal uniform tariffs for all network users. In the context of the energy markets the scope for favourable treatment and various rebating practices should be narrow, as significant differentiation is likely to contravene fair competition between economic operators. This is particularly true when traditional customers are likely to be the established affiliates of the incumbent utilities. A uniform tariff, although not required by the current IEM Directives, is being considered and could be introduced under internal market secondary legislation. It would probably have a pro-competitive effect by allowing small newcomers to the market to overcome barriers resulting from the economies of scale and to compete with larger, more established undertakings. Internal market regulation could specify the competition rules and limit the ‘traditional customer’

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28 Bayer AG v Commission (Case T-41/96) [2000] ECR II-3383 at [189].
30 Hoffmann-La Roche, Note 13 above, at [6].
31 Ibid., at [6].
33 The Enron debacle revealed that unsuccessful negotiations to enter the German electricity market took more than a year and entailed expenditure of over US$ 1 million.
34 Commission’s Notice on the application of the competition rules to access agreements in the telecommunication sector OJ 1998 C265/2 at [86].
35 Ibid.
exception. However, it is arguable that a strict identical tariff for all supply undertakings, which does not allow for any differentiation of customers, could contravene the principle of non-discrimination that allows for the favourable treatment of certain customers.

Refusal to Supply and Withdrawal of Access

A withdrawal of access to energy networks could be construed as refusal to supply. An early ECJ case on a refusal to supply/refusal to deal was *Commercial Solvents.* A producer refused to continue supplies of nitropropane, a raw material, to its existing customer, which was, as a result, eliminated from a secondary downstream product market. The ECJ confirmed that it is not a legitimate practice for a dominant undertaking to stop dealing with an existing customer and eliminate substantial competition in order for the dominant company to vertically integrate and itself enter the secondary market. The case suggests that there is a distinction between the termination of an existing contractual relation and a refusal to start dealing with a new customer. In the energy markets this situation may occur when the incumbent system operator initially allows an independent supplier to serve a particular niche of the market (for example, a scarcely populated area or a growing business) but, as the market becomes more profitable, wants to serve this market through its own affiliated company or to reserve the market for its privileged partner and subsequently refuses service to its previous customer. The court later confirmed in *United Brands* that:

… an undertaking in a dominant position … cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary.

Refusal of supply and withdrawal of access intended to eliminate all competition or as a disciplinary measure are considered to be abuses. On the other hand, the Commission justified withdrawal from commercial relations in the *Tabacalera* case, concerning the discontinuation of cigarette filter purchases, because of an increase in the company’s own production, which was motivated by economic concerns. The Commission suggested that vertical integration without an anti-competitive purpose is not abusive even if the effect is that a dominant firm ends a previous course of dealings with an existing customer. In the light of *Commercial Solvents* and extensive case law, straightforward abuse through discriminatory withdrawal of access from an existing customer should not be difficult to identify.

Essential Facilities Doctrine

According to the ‘essential facilities’ doctrine, owners of certain infrastructure or business facilities must allow competing undertakings to use these facilities when the access is indispensable to conducting specified market activity, and when the refusal eliminates competition in the market in question and prevents the introduction of a new product. Despite extensive academic commentary on the doctrine, not much attention has been paid to its application in gas and electricity markets. The doctrine itself is quite ambiguous and adds further complication to access disputes. The courts have not had an opportunity to apply it to energy markets. The essential facilities concept originates from the United States, where it has been applied for over a century. In the context of utility regulation, it has been often cited as a possible and well tested model for European legislators.

Without going into the history of the essential facilities doctrine, the concept is not universally accepted and influential commentators argue for strict limitation of the doctrine or are even completely against its continued application. European scholars, following Advocate-General Jacobs’ opinion in *Brenner,* were very sceptical in their reception of the doctrine and emphasised the negative consequences of an imposed duty to deal. As a consequence of recent cases in the United States, even though not completely rejected, the doctrine is very controversial. The long-standing argument in favour of following the US concept and the resulting ‘common carrier’ practice regarding access to network facilities is no longer so persuasive in the framework of Community law.

In the European context, the ECJ has considered the essential facilities argument in a series of cases. The expression ‘essential facilities’ was first used by the Commission in its decision concerning access to Holyhead harbour. Under Community law, the doctrine does not form a basis for a separate claim but rather aggregates various refusal to supply cases. In other words, under the essential facilities doctrine, an alleged abuse of a dominant position by an energy facilities

39 Ibid., at [250].
40 *United Brands v Commission* (Case 27/76) [1978] ECR 20777.

46 Oscar Brenner v Mediaprint Re Austrian newspaper distribution (Case C-7/ 97) [1998] ECR I-7791.
49 In: *Foreign Communications Law Office of Curtis Vernick LLP 124 SC 872 (2004); (US Supreme Court)* the court stated that it had never recognised the doctrine and in any case is should not be applicable where a regulatory body could mandate and control the terms and conditions of market entrance.
50 D. Geradin, ‘Limiting the Scope of Article 82 EC: What can the EU learn from the US Supreme Court’s judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’ [2004] 41 (6) CMLRev 1519.
owner must still satisfy all the requirements of Article 82 EC.53 A good expression of what constitutes essential facilities under EU law can be found in the definition adopted by the Commission in its Telecommunication Access Notice:

… The expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.54

A facility is essential if denial of access to it results in a disadvantage to a new entrant that can reasonably be expected to make competitors’ activities in the market in question either impossible or permanently, seriously and unavoidably uneconomic.55

In the landmark Bronner case, concerning access to a newspaper distribution system, the ECJ did not expressly refer to the essential facilities doctrine but instead analysed the case as a refusal of supply abuse. The court stated three conditions required to establish an abuse within the meaning of Article 82 EC in essential facilities cases:56

(1) the refusal of the service is likely to eliminate all competition in the relevant market on the part of the person requesting the service
(2) such refusal is incapable of being objectively justified
(3) the service in itself is indispensable to carrying on the requesting party’s business, inasmuch as there is no actual or potential substitute in existence for that service.

Insofar as the first condition is concerned:

… it is important not to lose sight of the fact that the primary purpose of Article [82] is to prevent distortion of competition and in particular to safeguard the interests of consumers rather than to protect the position of particular competitors.57

It might be argued that when a certain market niche is fully served by a dominant utility, and standardised tariffs are imposed by the state, there might be no obvious benefit for consumers in gaining service from a new third-party supplier who would be obliged to charge the same uniform tariff. Although refusal of access would eliminate other competitors, consumers’ positions might not be harmed. In this case, at least in the short term, it may be possible to claim that TPA should not be imposed and any structural remedies imposed on dominant utilities would be excessive.

The meaning of ‘essential’ or, in the court’s words ‘indispensable’, remains ambiguous. According to Advocate-General Jacobs’ opinion in Bronner followed by the court, in order to accept that the product is indispensable, it must be established, at the very least, that creation of alternative products or services is not economically viable on a scale comparable to that of the undertaking which controls the existing product or service.58 It is questionable whether this criterion is sufficient in the context of energy markets. The more recent IMS case59 concerned access to the unique ‘brick structure’ classification of the medicine market universally used by the industry for marketing purposes. The court clarified that:

In order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services.60

Advocate-General Tizzano argued in IMS, with particular relevance to network industries, that to be ‘indispensable’ it is not necessary that the facility cannot be physically replicated. The Advocate-General went even further and suggested that a facility might be essential if, in order to induce potential customers to use the alternative facility, the new entrant would have to offer ‘particularly favourable’ terms and might risk not being able to recover investments.61 The court did not follow this more radical suggestion because offering particularly advantageous terms by new entrants is a normal practice in a competitive market. It follows that a third-party new market entrant, cannot go as far as to demand that the terms of his access ensure profitability of his operations. The court implied that the facility is indispensable when an undertaking ‘would have to make exceptional organisational and financial efforts’ in order to acquire an alternative facility and would be ‘obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of [an] undertaking which controls the protected structure’.62 The requirement of ‘comparable scale’ is hardly satisfactory. Following IMS, network operators or other undertakings in control of a unique facility might argue that the facility is not indispensable as long as the access applicant is not completely eliminated and could run his business on a smaller scale. That would be so even if the applicant is forced to make exceptional efforts, such as arranging his transmissions through distant networks or making very risky and significant infrastructure investments, as long as the business model maintains some economic viability. The answer to this quandary comes only from the factual circumstance that construction of energy networks can only be justified by economies of scale and relatively large-scale operations.

When very attractive, large industrial energy consumers are involved, and environmental or planning issues are not at stake, construction of a ‘direct’ energy line connecting a third-party supplier to its consumer can be a viable alternative to

54 Telecommunication Access Notice, Note 34 above, at [68].
56 Bronner, Note 46 above, at [41].
57 Ibid., AG Opinion at [58].
58 Ibid., [46].
59 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. Re brick structure (Case C-418/01) [2004] ECR I-5039.
60 Ibid., at [28].
61 Ibid., AG opinion at [84].
62 Ibid., at [29].
usage of an existing network. In that case, even if it was more convenient for the potential supplier, imposed network access should not be forced onto the dominant network operator. Nevertheless, taking into account the above-mentioned natural monopoly characteristics of the sector, the analyses of the first and third Bronner requirements in the sphere of energy should not be very problematic. Energy networks in almost all cases are clearly indispensable to operation in energy supply markets, and refusal to allow access to them will result in elimination of all competition from the relevant market.69

The Requirement of Two Markets

US commentators have argued that the ‘essential facility doctrine concerns vertical integration, in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market’.64 In other words, there has to be two different but vertically related markets reflecting two stages of sales or production. This is so in the case of network operations and a fully dependent sales/supply market, which cannot be served without access to network infrastructure. The control of the ‘primary’, ‘bottleneck’ or ‘input’ market results in control of the related ‘secondary’ or ‘foreclosed’ market. Temple Lang believes that ‘in a single-market situation, something that is necessary to compete can only be a competitive advantage’.65 This distinction has relevance in the energy sector.

In the Community context, Magill66 followed the earlier practice in Commercial Solvents67 and found abuse only after identifying two separate product markets. This requirement was accepted by Advocate-General Jacobs in Bronner.68 The two-market requirement was maintained even when the relevant markets were defined very narrowly.69 In IMS the court revisited the essential facilities doctrine and confirmed that:

… it was relevant, in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular business activity was an abuse, to distinguish an upstream market, constituted by the product or service … and a downstream market, on which the product or service in question is used for the production of another product or the supply of another service.70

The requirement of two separate but interrelated vertical markets limits the range of undertakings entitled to claim third-party access to energy facilities under Article 82 EC. In the prevailing situation in energy markets, a third-party supplier active in the secondary sales markets needs access to the primary energy transmission market, which comprises network facilities. Although the Commission identified or invented very narrow product or geographical markets,71 it is unlikely that undertakings operating in different geographical markets will be regarded as being active in vertically different primary and secondary markets.

In effect, local energy undertakings operating in parallel geographical markets may only have a limited recourse to the essential facilities doctrine. In order to enter and compete in neighbouring markets and rely on third-party access rights, the undertakings would have to show that they operate at different stages of vertically related markets. This condition could be satisfied when a gas network operator or electricity generator in one region wants to operate in the supply market in the neighboring geographical market. It is apparently not satisfied when transmission or distribution system operators need to access neighboring networks not for sales but simply in order to convey their exports or imports from distant regions. In other words, they want access not to a vertically connected supply market but to a horizontally parallel transportation market. The refusal does not eliminate all competition in the relevant secondary market and may not therefore be regarded as abusive.

This suggests that TSOs active on horizontally parallel markets, apparently on the same primary level of the energy transportation market, should not rely on the ECJ’s refusal of supply jurisprudence in order to request access to another operator’s networks, even when they need it to perform transportation activities. In this respect, if the requirement of two vertical markets is upheld, the essential facilities doctrine has limits in promoting third-party access in the sphere of energy. The secondary legislation thus found it necessary to supplement competition law and specify that TSOs can access other networks when it is necessary to carry out their network functions including cross-border transmissions.72

The Requirement of a New Product

In the Magill case, in the context of intellectual property rights, the ECJ found that the refusal to deal by a dominant company constituted an abuse in exceptional circumstances when:

- ‘it prevented the appearance of a new product for which there was a potential consumer demand’;
- ‘it was not justified by objective considerations’; and
- ‘it was likely to exclude all competition in the secondary market ….’73

71 Recently reaffirmed in DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, public consultation (2005) at [212].
72 In IMS the court distinguished the primary market of regional ‘brick structure’ classification of the medicine market (being the indispensable facility) and the secondary market for marketing research based on this classification. Narrow markets were found in the Spanish Airports Commission Decision 2000/521 of 2000 L208/56, [2000] 5 CMLR 967.
73 Article 18(2) G-Directive.
74 Magill, Note 29 above, at [54], [55], [56].
The ‘new product’ requirement introduced in Magill and reaffirmed in the subsequent ECJ cases is not a prerequisite for the application of the essential facilities doctrine in US antitrust law. This requirement, if it is universally valid, undermines the application of the essential facilities doctrine in the sphere of energy. In a typical network access situation, the strict Magill ‘new product’ requirement is not satisfied. Taking into account technical standards and the generic character of energy provision, it is hard to find a more homogenised product than electricity or gas. Moreover, the new entrant in the energy market, at least initially, is going to provide exactly the same product not in addition to but instead of the incumbent’s transmissions. The product and the supply service offered to the final consumer will also be the same in economic terms, when the price is identical under the unified tariff. In any case, if a lower price amounted to acceptable innovation, the condition would be rendered meaningless.76

In the IMS judgment, the ECJ stressed the pro-competitive effects of innovation and reaffirmed the ‘new product’ requirement. Advocate-General Tizzano argued that the product offered by a newcomer demanding access to an exclusive right must have a ‘different nature’.77 The court adopted a slightly less stringent test and stated that the refusal by an undertaking in a dominant position to allow access may be regarded as abusive only where the third-party undertaking demanded use of a facility ‘indispensable for operating on a secondary market’, and

... does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner… but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.78

This broader definition of what constitutes product novelty79 attracted strong criticism, as it provokes ‘free-riding’ by undertakings willing to rely on the essential facilities doctrine to provide only a slight variation of the original product or service.80 In the context of energy markets, the second part of the IMS test is not satisfied. Taking into account the emergence of the essential facilities doctrine as a way to conceptualise competition principles in network based industries, it would be a rather astonishing outcome if it had no application in the energy sector, itself the epitome of a natural monopoly.

In the highly controversial Microsoft decision, given just a few days before the IMS judgment, the Commission changed its approach and apparently abandoned the ‘new product’ requirement. The Microsoft decision approved by the ECJ redefines the essential facilities doctrine as applied to energy markets.81 The Commission stressed that Microsoft’s refusal to allow the use of its proprietary exclusive right to ‘server interoperability’ information is abusive, as it ‘limits production, markets or technical development to the prejudice of consumers’.82 It seems that the Commission introduced the following new question to the test: ‘does the refusal to license reduce the incentives to innovate in the whole industry?’83 The difficult balance between the need for open access to energy networks and the need to provide long-term incentives to construct new infrastructure lies also at the core of the Commission’s thinking about mandatory TPA in energy markets.

The possible replacement of the strict Magill ‘new product’ requirement with a more flexible ‘incentive to innovate’ test may help to overcome what would otherwise be the surprising inapplicability of the essential facilities doctrine to gas and energy markets. From a broad perspective, refusal to grant access to energy networks solidifies the incumbents’ position and their conservative utility business models. New energy suppliers will not provide products of a different nature, but may in fact significantly change the industry structure for the benefit of consumers. Indeed, the liberalisation programme is expected to result in a profound transformation of the energy markets and the emergence of new supply practices. It is arguable that new competitive generation and supply practice might satisfy the ‘innovation’ test.

However, it is arguable that the problematic ‘new product’ requirement might not be applicable to energy facilities. The ECJ, restating the case law in IMS, emphasised that the cumulative existence of the three Magill conditions is ‘sufficient’ to find the refusal abusive.84 The court did not rule out a possibility that the refusal may still amount to an abusive market limitation under Article 82(b) EC, even when the new entrant is willing to provide a product that is not ‘new’. In Brouner, the court did not clarify whether the previous set of conditions concerning intellectual property, including the new product requirement in Magill, has general applicability to other more tangible property rights and all essential facilities. Moreover, the court suggests in Brouner that ‘even if the case law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever’, these cases should be distinguished.85

Arguably, the requirement of product novelty stressed in Magill, not explicitly abandoned in Brouner and reaffirmed in IMS, should be more relevant in intellectual property cases and need not be applied to other property rights.86 Most of the landmark essential facilities cases concerned intellectual property and as a result possibly overemphasised the novelty requirement, which is the essence of intangible IP rights.

75 Energy has been recognised as a ‘good’ in Costa v Enel (Case 6/64) [1964] ECLR 584.
77 IMS AG Tizzano opinion, Note 59 above, at [62].
78 Ibid., at [49].
80 D. Geradin, Note 50 above.
82 Bihayd argues that the decision amounted to a new “convenient facilities” doctrine.
83 Article 82(b) EC.
85 IMS, Note 59 above, at [38].
86 Brouner, Note 46 above, at [41].
87 Indeed, the Commission recently considered the issue of product novelty and product cloning in the context of refusal to license intellectual property rights. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, public consultation (2005).
Competition in standardised gas and electricity markets does not rely on innovative new products but depends on access to bricks and mortar networks. This fact, despite not being clearly distinguished by the ECJ, justifies different legal conditions for mandatory access to physical facilities and, on the other hand, to intellectual property or in the other intangible rights. In the context of energy networks, stress should be placed on the first IM condition that access is ‘indispensable for operating in a secondary market’ of energy supply. Rather than rely strictly on the recent essential facilities cases, it is reasonable to consider TPA claims in the energy sector in the light of earlier refusal of supply or refusal to deal cases such as Commercial Solvents, Hugin, and Sealink/Holyhead harbour access decisions where there was no analogous novelty requirement.

In the early Commercial Solvents case, the primary bottleneck market comprised raw materials provided exclusively by the dominant firm, which were indispensable for entering the secondary market on which derivatives were sold. The control of the primary market was analogous to an essential facility insofar as access to it was indispensable to compete in the secondary dependent markets. The derivative chemicals produced by the third party were not different from the raw materials that the dominant undertaking was willing to provide itself. The court mandated access to the primary market and obliged the producer to deal with his existing customer, even though there was no novelty element involved. In Hugin, the Commission distinguished the primary market for producing cash registers and the secondary market for its servicing. Hugin’s refusal to provide spare parts to other service companies with the intention of operating itself on the service market was condemned by the Commission. The conduct was abusive, despite the fact that the spare parts and maintenance services proposed by the competitors were not novel and were equivalent to those offered by Hugin.

The later Holyhead harbour and Sealink decisions concerned access to a more tangible port infrastructure and justified ‘essential facilities’ expression. Sealink both owned and operated the Holyhead port infrastructure and also used it in a secondary market to operate a ferry service: a situation very similar to that of a network operator. The Commission agreed with a third-party complaint and found that the port operator organised the sailing schedules in a way that caused maximum disruption and inconvenience to a competing ferry operator. In this early low-profile decision on interim measures, taken before elaborate juridical examination of the essential facilities doctrine, the Commission did not require product novelty or innovative service in relation to infrastructure access. The Commission concluded that:

... The owner of an essential facility which uses its power in one market in order to strengthen its position on another related market, in particular, by granting imposed access to that related market on less favourable terms than those of its own services, infringes Article [82] where a competitive disadvantage is imposed upon its competitor without objective justification.

Considering these multiple opinions, one should distinguish ‘essential facilities’ cases that relate to physical property rights from the latest cases concerning copyright and intellectual property. In consequence, the novelty requirement should not be applied in gas and electricity markets.

Conclusion

Article 82 of the Treaty is directly applicable to the energy sector and provides a meaningful legal framework to support and complement analyses under sector specific regulations. Application of the primary competition rules and the essential facilities doctrine has limitations and cannot solve all access problems in the energy sector. The requirements of two vertically connected markets and of product novelty provoke particular doubts. Nevertheless, competition law empowers the Commission to enforce third-party access rights and provides a limited but direct remedy to some structural market problems. Under certain circumstances, independent third parties seeking access to network infrastructure controlled by a dominant utility can initiate proceedings based on competition law provisions and seek imposed access to energy facilities.

88 Commercial Solvents, Note 38 above.
89 Hugin, Note 69 above.
91 Commercial Solvents, Note 38 above.
92 Hugin, Note 69 above.
93 Holyhead harbour, Note 51 above.
94 Sealink, Note 90 above.
95 Holyhead harbour, Note 51 above, at [41].